C.A. No. 09-17490

In the United States Court of Appeals for the Ninth Circuit

NATIVE VILLAGE OF KIVALINA AND CITY OF KIVALINA,
Plaintiffs-Appellants,

v.

EXXON MOBIL CORPORATION; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; CONOCOPHILLIPS COMPANY; SHELL OIL COMPANY; PEABODY ENERGY CORPORATION; THE AES CORPORATION; AMERICAN ELECTRIC POWER COMPANY, INC.; AMERICAN ELECTRIC POWER SERVICES CORPORATION; DTE ENERGY COMPANY; DUKE ENERGY CORPORATION; DYNEGY HOLDINGS, INC.; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; PINNACLE WEST CAPITAL CORPORATION; RELIANT ENERGY, INC.; THE SOUTHERN COMPANY; AND XCEL ENERGY INC.,
Defendants/Appellants,

On Appeal from the United States District Court for the Northern District of California, Case No. C-08-1138-SBA
The Honorable Saundra Brown Armstrong, United States District Judge

ANSWERING BRIEF FOR DEFENDANTS-APPELLEES SHELL OIL COMPANY; EXXON MOBIL CORPORATION; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; AND CONOCOPHILLIPS CORPORATION

Jerome C. Roth
Scott W. Coyle
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

Ronald L. Olson
Daniel P. Collins
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

Attorneys for Defendant-Appellee Shell Oil Company

(Additional Counsel on Inside Cover)

John F. Daum
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071-2899
Telephone: (213) 430-6111
Facsimile: (213) 430-6407

Jonathan D. Hacker
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006-4001
Telephone: (202) 383-5300
Facsimile: (202) 383-5414

Attorneys for Defendant-Appellee
EXXON MOBIL CORPORATION

Robert Meadows
Tracie J. Renfroe
Jonathan L. Marsh
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002-5213
Telephone: (713) 751-3200
Facsimile: (713) 751-3290

Lisa Kobialka
KING & SPALDING LLP
1000 Bridge Parkway, Suite 100
Redwood City, CA 94065
Telephone: (650) 590-0700
Facsimile: (650) 590-1900

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

Andrew B. Clubok
Jeffrey Bossert Clark
Susan E. Engel
Joseph Cascio
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 879-5173
Facsimile: (202) 879-5200

Attorneys for Defendant-Appellee
CONOCOPHILLIPS COMPANY

Matthew Heartney
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
Michael B. Gerrard
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
Telephone: (212) 715-1000
Facsimile: (212) 715-1399

Attorneys for Defendants-Appellees
BP AMERICA INC., and BP
PRODUCTS NORTH AMERICA
INC.

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Shell Oil Company is wholly and indirectly owned by Royal Dutch Shell plc, a publicly traded Dutch company.

Defendant-Appellee Exxon Mobil Corporation is a publicly traded domestic corporation.

Defendant-Appellee Chevron U.S.A. Inc. is wholly and indirectly owned by Defendant-Appellee Chevron Corporation, which is a publicly traded domestic corporation.

Defendant-Appellee ConocoPhillips Company is a wholly owned subsidiary of ConocoPhillips, a publicly traded domestic corporation.

Defendant-Appellee BP Products North America, Inc. is wholly and indirectly owned by Defendant-Appellee BP America Inc., which is wholly and indirectly owned by BP p.l.c., a publicly traded British company.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL RULES

FEDERAL REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page(s)

LEGISLATIVE MATERIALS

TREATISES

TREATIES

MISCELLANEOUS

INTRODUCTION

Plaintiffs' suit is based on the remarkable contention that selected members of certain U.S. industries are responsible, in tort, for all injuries allegedly caused by global warming, including the melting of sea ice and the ensuing storm-caused erosion of land in Kivalina, Alaska. (ER 40-41.)[1] Although Plaintiffs style this as a "textbook" common-law nuisance case (AOB 22), it is not. Like the proverbial new wine poured into old wineskins—which "'bursts the skins,'" *Beason v. United Techs. Corp.*, 337 F.3d 271, 273 (2d Cir. 2003) (quoting *Mark* 2:22)—Plaintiffs' effort to squeeze the enormous "complexity of the initial global warming policy determinations" into the rubric of ordinary tort law stretches the judicial function well past the breaking point. *California v. General Motors Corp.* ("*GMC*"), 2007 WL 2726871 at *6 (N.D. Cal. Sept. 17, 2007), *appeal voluntarily dismissed*, Order, No. 07-16908 (9th Cir. June 24, 2009) (SER 2). The district court correctly held that Plaintiffs' suit founders on two constitutional and jurisdictional objections.

Plaintiffs' Claims Raise Nonjusticiable Political Questions

Plaintiffs assert that Defendants should be held liable for creating a "public nuisance" by virtue of having emitted "large quantities of greenhouse gases." (ER 70, 101-02.) Plaintiffs' theory is that Defendants' emissions, "in combination with

[1] "ER" refers to Appellants' Excerpts of Record; "SER" to the Oil Company Appellees' Supplemental Excerpts of Record; and "AOB" to Appellants' Opening Brief. "CR" refers to the Clerk's Record, followed by the docket number.

emissions and conduct of others" since "the dawn of the industrial revolution in the 18th century," contributed to global warming—which in turn reduced the levels of sea ice in the Chukchi Sea, which in turn led to more erosion from winter storms, which eventually will require the village of Kivalina to be relocated. (ER 70, 84-85, 101-02.) According to the complaint, "by far the most significant greenhouse gas emitted by human activity" is carbon dioxide (ER 70), which is a ubiquitous by-product of every industrial, agricultural, and commercial activity on Earth—indeed, it is a by-product of life itself. As the district court held (ER 11-15), Plaintiffs' theory of nuisance-by-global-warming raises two political questions.

First, to adjudicate Plaintiffs' claims that Defendants tortiously contributed to global warming, the courts would be required to determine—without any guidance from the political branches—what *levels* of worldwide greenhouse gas emissions, for which activities, and by which persons, over the last several decades should now be deemed *unreasonable*. As every district court to have confronted the issue has concluded,[2] there are no "judicially discoverable and manageable standards for resolving" this question, which cannot be decided "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*,

[2] *GMC*, 2007 WL 2726871 at *8; *Comer v. Murphy Oil USA, Inc.*, Order (S.D. Miss. Aug. 30, 2007) (SER 8-22), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *vacated*, 598 F.3d 208 (5th Cir. 2010) (en banc), *appeal dism'd*, ___ F.3d ___, 2010 WL 2136658 (May 28, 2010); *Connecticut v. American Elec. Power* ("*AEP*"), 406 F. Supp. 2d 265, 270-74 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009).

369 U.S. 186, 217 (1962). Given the inherently global nature of global warming, the only way a court could perform this task is to weigh a variety of competing and incommensurate policy considerations that are both national and international in scope and that the courts have "neither the expertise nor the authority" to resolve. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007).

Contrary to what Plaintiffs suggest (AOB 40, 48), the "recasting" of political questions "in tort terms does not provide standards for making or reviewing [such] judgments." *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005). Nuisance principles require the courts to undertake a "weighing process, involving a comparative evaluation of conflicting interests," and to give consideration "not only to the interests of the person harmed, but also for the interests of the actor and to the interests of the community." RESTATEMENT (SECOND) OF TORTS § 826, cmt. *c* (1979) ("REST. 2D"). The balancing that would be required here is categorically different from a conventional nuisance case, in which the court evaluates (for example) emissions of a specific chemical into a "discrete, geographically definable waterway" that cause immediate harm to neighbors. (ER 12-13.) Here, the worldwide scale, and the vastly broader range of nonjudicial policy interests that must be weighed, renders the question nonjusticiable. (ER 10-15.)

Second, Plaintiffs' claims would require the courts to make an inherently political, if not wholly arbitrary, judgment "about *who* should bear the cost of

global warming." (ER 14.) In view of the worldwide nature of global warming, the courts have no principled way to determine which persons who allegedly suffered harm from global warming should receive compensation from whom and for what injuries. *GMC*, 2007 WL 2726871 at *15. A legal theory under which nearly anyone can chose to sue anyone else—who, in turn, can then file a third-party complaint against anyone else—is the antithesis of what *judicial* decision-making requires—namely, standards that are "principled, rational, and based on reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality).

Plaintiffs Lack Article III Standing to Assert Their Claims

The district court correctly dismissed this suit on the alternative ground that Plaintiffs cannot satisfy the requirement of Article III standing that the plaintiff's injury "has to be 'fairly … trace[able] to the challenged action of the defendant.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). (ER 15-22.) Because fair traceability is "an indispensable part of the plaintiff's case," *Lujan*, 504 U.S. at 561, Plaintiffs must plead "enough facts" to establish a theory of standing "that is plausible on its face" and that rises "above the speculative level." *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Plaintiffs' allegations foreclose, in two respects, the required fair traceability.

First, Plaintiffs cannot trace their injuries to any particular wrongful emissions of Defendants. (ER 20.) By Plaintiffs' own account, it is only the

overall accumulation, over centuries, of an undifferentiated mix of greenhouse gases from innumerable sources that allegedly produces global warming (which in turn allegedly contributed to Plaintiffs' injuries). (ER 70, 102.) Plaintiffs argue that any alleged contribution to global warming is sufficient for traceability purposes, but that would effectively give any person allegedly harmed by global warming standing to sue virtually anyone. The whole point of the fair traceability requirement is that Plaintiffs must be able to tie their injuries *distinctively* to Defendants' challenged conduct *as opposed to* the conduct of third parties (or other competing causal factors). *Lujan*, 504 U.S. at 561. Plaintiffs cannot do so.

Second, Plaintiffs' claims rest on a causal chain that is "too attenuated" to satisfy Article III. *Allen v. Wright*, 468 U.S. 737, 752 (1984). Plaintiffs' causal theory rests on a long and complex chain of causation—one that, in the district court's words, is "dependent on a series of events far removed both in space and time from the Defendants' alleged discharge of greenhouse gases." (ER 22.) Where, as here, a causal chain must be followed through multiple steps, over an extended period of time, and on a global scale, any effort to fairly trace the threads of causation devolves into "pure speculation." *Allen*, 468 U.S. at 758.

The Court may also affirm on the alternative grounds that Plaintiffs' federal common law claims fail as a matter of law because federal common law is unavailable here and tort causation is lacking as a matter of law.

STATEMENT OF JURISDICTION

Because this suit raises political questions and Plaintiffs lack standing, there is no Article III jurisdiction. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007); *Lujan*, 504 U.S. at 559-61. Jurisdiction was otherwise proper under 28 U.S.C. §§ 1331 and 1367. The order of dismissal was entered on October 15, 2009, and Plaintiffs filed a timely appeal on November 5, 2009. (ER 1, 25.) *See* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the political question doctrine precludes the courts from making the fundamentally nonjudicial policy judgments necessary to establish, *inter alia*, (a) what level of past greenhouse gas emissions worldwide by certain individual emitters should be deemed unreasonable and tortious, (b) which of the planet's innumerable emitters should be held liable in damages, and (c) for which individual injuries they should be held liable.

2. Whether Plaintiffs have alleged facts necessary to establish standing to pursue their claims, when they do not and cannot allege facts plausibly establishing that their land-erosion injuries are "fairly traceable" to greenhouse gas emissions from the particular Defendants before the Court.

3. Whether the district court judgment may be affirmed on the alternative ground that Plaintiffs' complaint fails to state a claim as a matter of law.

STATEMENT OF THE CASE

I. Nature of the Case

Plaintiffs appeal from the district court's order dismissing their complaint under the political question doctrine and for lack of Article III standing.

II. Course of the Proceedings and Disposition in the Court Below

Plaintiffs Native Village of Kivalina and the City of Kivalina filed this action on February 26, 2008. (ER 37.) Plaintiffs assert claims for public nuisance under federal common law (and, in the alternative, for private and public nuisance under state law) against various electric, coal, and oil companies. (ER 101-104.) Plaintiffs also purport to assert claims for civil conspiracy against certain Defendants, and they allege that all Defendants acted in concert. (ER 104-106.)

On June 30, 2008, the various Defendants filed motions to dismiss on grounds of, *inter alia*, lack of subject matter jurisdiction and failure to state a claim. (CR 134-141.) On October 15, 2009, the district court dismissed the action, holding that Plaintiffs' federal claims presented political questions and that Plaintiffs lacked standing. (ER 1-24.) Plaintiffs' alternatively-pleaded state law claims were dismissed without prejudice to refiling them in state court. (ER 24.)

STATEMENT OF FACTS

I. The Unique Phenomenon of Global Warming

Certain critical features about global warming, as described in Plaintiffs'

complaint and the documents cited in it,[3] frame the legal issues in this case:

- Greenhouse gases are undifferentiated and, once emitted, "rapidly mix in the atmosphere" and "inevitably merge[] with the accumulation of emissions in California and in the world." (ER 42, 102.)

- Several greenhouse gases—including carbon dioxide—are "long-lived," meaning that they persist in the atmosphere for extended periods of time. (SER 57.) Indeed, a "large fraction of carbon dioxide emissions persist in the atmosphere for several centuries." (ER 70.)

- As a result of accumulating worldwide emissions from all sources, the global atmospheric concentration of carbon dioxide has increased "by 35 percent since the dawn of the industrial revolution." (ER 70.)

- Global warming occurs only through this cumulative worldwide aggregation of greenhouse gases and is the "globally averaged net effect of human activities since 1750." (ER 77.)

Thus, in contrast to a conventional pollutant that is released by a discrete number of entities into a local body of water (or the local atmosphere) and that causes relatively immediate harms within a geographically proximate area, greenhouse gases allegedly cause harm only when the emissions of billions of entities accumulate worldwide, over many decades, so as to produce global warming.

[3] Documents cited in a complaint may be judicially noticed against the plaintiff. *Dreiling v. American Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006).

II. The Political Branches' Efforts to Formulate a National Policy on Global Climate Change

The issues in this case must be assessed against the backdrop of the political branches' ongoing efforts to craft policies to address global climate change. These efforts confirm that the issue of global warming presents unique challenges.

A. Early Congressional Activity

Early congressional efforts focused primarily on non-regulatory policy approaches. For example, in 1978, Congress established a "national climate program" to improve understanding of global climate change through research, data collection, assessments, information dissemination, and international cooperation. National Climate Program Act of 1978, 15 U.S.C. §§ 2901 *et seq*. Two years later, Congress directed the Office of Science and Technology Policy to engage the National Academy of Sciences in a study of the "projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion, coal-conversion and related synthetic fuels activities." Energy Security Act, Pub. L. No. 96-294, title VII, § 711, 94 Stat. 611, 774-75 (1980). In 1987, Congress enacted the Global Climate Protection Act, Pub. L. No. 100-204, title XI, 101 Stat. 1407, which ordered the Environmental Protection Agency ("EPA") to propose a "coordinated national policy on global climate change," § 1103(b), and directed the State Department to work "through the channels of multilateral diplomacy" to coordinate efforts addressing global climate change, § 1103(c).

In 1990, Congress enacted legislation establishing a ten-year research program for global climate issues. 15 U.S.C. §§ 2931-2938. Congress also amended the Clean Air Act in 1990, stating that the U.S.'s domestic approach to global climate change is "to develop, evaluate and demonstrate nonregulatory strategies and technologies for air pollution prevention." 42 U.S.C. § 7403(g).

Mindful of the profound impacts of limits on greenhouse gases, Congress in 1992 directed the Energy Department to report on "the feasibility and economic, energy, social, environmental, and competitive implications, including implications for jobs," of stabilizing and reducing greenhouse gas emission levels. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1601, 106 Stat. 2776, 2999.

B. U.S. Participation in International Negotiations and Protocols

In 1992, the Senate ratified the United Nations Framework Convention on Climate Change ("UNFCCC"), a conceptual agreement among 154 nations to reduce atmospheric concentrations of carbon dioxide and other greenhouse gases. S. TREATY DOC. NO. 102-38 (1992). Member nations of the UNFCCC adopted the Kyoto Protocol on December 10, 1997, which called for mandatory limits or reductions in greenhouse gas emissions for developed nations, but *not* for developing countries. *See* 37 I.L.M. 22 (1998).

President Clinton signed the Kyoto Protocol, but did not present it to the Senate for ratification, stating that the U.S. "will not assume binding obligations

unless key developing nations meaningfully participate in this effort." 2 PUB. PAPERS 1408, 1410 (Oct. 22, 1997). By a 95-0 vote, the Senate adopted a resolution objecting to any protocol that would result in serious harm to the U.S. economy or that exempted developing countries. S. RES. 98, 105th Cong. (1997).

During the Bush Administration, official U.S. policy emphasized the need for international cooperation by both developed and developing countries to address global climate change. On December 15, 2007, President Bush agreed to the "Bali Roadmap," which set out an agenda for two years of diplomatic negotiations on a new global agreement to reduce greenhouse gas emissions. *See* <http://unfccc.int/meetings/cop_13/items/4049.php>.

C. Recent Developments

1. U.S. International Efforts

The U.S. remains actively engaged in negotiations to replace the Kyoto Protocol, most of whose provisions expire in 2012. President Obama was one of 120 heads of state and government who traveled to Copenhagen, Demark in December 2009 to attend the 15th Conference of the Parties to the UNFCCC. *See* <http://unfccc.int/meetings/cop_15/items/ 5257.php>. The conference produced a non-binding declaration of intent, signed by more than 130 countries, pledging to address climate change in specified ways. *See* Report of the Conference of the Parties at 5-7, *available at* <http://unfccc.int/resource/docs/2009/cop15/eng/

11a01.pdf>. President Obama reiterated the long-standing U.S. position that "[i]t's not enough just for the developed countries to make changes," and that developing countries such as China, India, and Brazil "are going to have to make some changes as well." President's News Conference in Copenhagen (Dec. 18, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD-200901005.pdf>.

2. Federal Domestic Initiatives

a. Recent Legislative Activity

Congress continues actively to consider whether, and to what extent, the U.S. should undertake efforts to mandate reductions in domestic greenhouse gas emissions in the absence of binding commitments from major developing economies. On June 26, 2009, the House passed a bill (H.R. 2454), which, *inter alia*, would establish an economy-wide "cap-and-trade" system for greenhouse gas emissions in the U.S. A related Senate bill (S. 1733) was favorably reported out of committee on February 2, 2010. *See* S. REP. NO. 111-121. Neither bill would create retroactive liability of the sort Plaintiffs seek here.

b. Recent Administrative Activity

After the Supreme Court held that the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from motor vehicles *if* EPA makes a finding that such emissions "'cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,'" *Massachusetts*, 549 U.S. at

528 (quoting 42 U.S.C. § 7521(a)(1)), EPA issued a formal finding to that effect on December 15, 2009. 74 Fed. Reg. 66946 ("Endangerment Rule").[4] The validity of the Endangerment Rule is currently under review in the D.C. Circuit. *See Coalition for Responsible Regulation v. EPA*, No. 09-1322 (and consolidated cases) (D.C. Cir.). After EPA finalized its Endangerment Rule, the agency issued regulations setting greenhouse gas emissions levels for cars and other light-duty vehicles. *See* 75 Fed. Reg. 25324 (May 7, 2010) ("Auto Rule").

Plaintiffs wrongly assert that "EPA has not indicated how, if at all," the Endangerment Rule "would affect any potential regulation under Title I (stationary sources)." (AOB 13.) EPA recently issued a final decision stating that, because issuance of the Auto Rule brings greenhouse gases within the class of "pollutants" subject to regulation under the Clean Air Act, the permitting provisions of Title I's "Prevention of Significant Deterioration" ("PSD") program, as well as the permitting provisions of Title V, will become applicable to stationary sources that emit greenhouse gases. 75 Fed. Reg. 17004, 17019-17022 (April 2, 2010) ("Triggering Rule"). EPA thereafter issued a final rule addressing how it planned to apply the stationary source permitting requirements of the Act in the context of greenhouse gases. 75 Fed. Reg. 31514 (June 3, 2010) ("Tailoring Rule").

[4] EPA's finding applies to "carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)." 74 Fed. Reg. at 66497.

The Triggering, Auto, and Tailoring Rules are all under review in the D.C. Circuit. *See Coalition for Responsible Regulation v. EPA*, No. 10-1073 (pending consolidation) (Triggering Rule); *Coalition for Responsible Regulation v. EPA*, No. 10-1092 (pending consolidation) (Auto Rule); *Southeastern Legal Foundation v. EPA*, No. 10-1131 (and partially consolidated cases) (Tailoring Rule).

On October 30, 2009, EPA issued a final rule requiring facilities that emit specified quantities of greenhouse gases, as well as suppliers of fossil fuels and others, to monitor and report their emissions of such gases. *See* 74 Fed. Reg. 56260, 56267.

III. Plaintiffs' Complaint

Plaintiffs Native Village of Kivalina and the City of Kivalina are the self-described "governing bodies" of a small Alaskan village of 400 persons located north of the Arctic Circle. (ER 40.) The village sits at the tip of a slender barrier island that is exposed to extreme weather conditions. (SER 26-28, 32-33.)

According to the complaint, Defendants have "for many years" emitted "greenhouse gases," such as carbon dioxide and methane, through activities such as oil exploration, electricity generation, and refining. (ER 40, 78-83.) As a result of these emissions, Defendants have "contribut[ed] to global warming," and thus are "responsible" for the "special injuries" suffered by Plaintiffs, namely, increased erosion to Kivalina's barrier island caused by winter storms that previously would

have been buffered by sea ice (which sea ice, Plaintiffs contend, has been reduced by global warming). (ER 1-2, 4, 40, 78-85.)

The complaint does not allege that Defendants' emissions by themselves caused Plaintiffs any injury, but only that those emissions contributed to global warming "in combination with emissions and conduct of others." (ER 102.) Moreover, Plaintiffs acknowledge that they cannot trace any of the alleged effects of global warming (including their alleged injuries) to any specific emissions of Defendants, because greenhouse gas emissions "rapidly mix in the atmosphere" and "inevitably merge[] with the accumulation of emissions in California and in the world." (ER 42, 102.) Plaintiffs seek damages for "defendants' past and ongoing contributions to global warming," arising from all of Defendants' operations "no matter where such operations are located." (ER 41, 102.)

Based on these allegations, Plaintiffs assert "federal common law" claims for public nuisance, civil conspiracy, and concert of action. (ER 41, 101-106.) Plaintiffs seek damages for injury to property and the costs of relocating the village. (ER 103-04.)

IV. The District Court's Order Dismissing Plaintiffs' Claims

The district court held that Plaintiffs' claims raised two nonjusticiable political questions. First, in the absence of "'an initial policy determination of a kind clearly for nonjudicial discretion,'" the court held that general common-law

standards of "reasonableness" did not provide "sufficient guidance" to enable the court to determine, "in any 'reasoned' manner," whether any alleged interference caused by Defendants' emissions was unreasonable. (ER 13-14.) Unlike a conventional nuisance case involving a "discrete number of 'polluters' that were identified as causing a specific injury to a specific area," this case would require balancing "on a scale unlike any prior environmental pollution case." (ER 12-13.) Second, an initial policy determination by the political branches would be needed to resolve, in a non-arbitrary fashion, the question of "*who* should bear the cost of global warming" from among the innumerable emitters worldwide. (ER 14.)

The court also held that Plaintiffs lack Article III standing. Given Plaintiffs' own allegations "as to the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time," Plaintiffs could not satisfy the requirement that their injuries be fairly traceable to Defendants' conduct. (ER 17, 20.) The court rejected Plaintiffs' reliance upon Clean Water Act cases, noting that their unique standing test rests on a statutorily-defined presumption of causation-of-injury in cases where a defendant's discharges exceed federal limits. (ER 19.) Here, there are no applicable federal standards, no presumption of causation, and no ability "to state which emissions—emitted by whom and at what time in the last several centuries and at what place in the world—'caused' Plaintiffs' alleged global warming related

injuries." (ER 19-20.) In addition, Plaintiffs' alleged causal chain between Defendants' emissions and the harm to Plaintiffs is too attenuated. (ER 22.)

STANDARD OF REVIEW

This Court reviews *de novo* the district court's Rule 12(b) dismissal on standing and political question grounds. *Corrie*, 503 F.3d at 979. To withstand a motion to dismiss, Plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

SUMMARY OF ARGUMENT

1. Plaintiffs' claims raise at least two political questions.

a. To adjudicate Plaintiffs' claim that Defendants should be held liable for global warming's alleged effects in contributing to coastal erosion in Kivalina, a court would have to take upon itself the task of retroactively defining what each Defendant's share of the overall global emissions of carbon dioxide and methane should have been over many decades. But the setting of worldwide emissions levels, and how much of those emissions should be allocated to which sets of industries in which countries, are questions that inescapably involve initial political judgments that the courts "have neither the expertise nor the authority to evaluate." *Massachusetts*, 549 U.S. at 533. Plaintiffs' effort to cloak those issues in tort garb does not make them justiciable. *See* section I(B)(1) *infra*.

b. In view of the worldwide nature of the phenomenon of global

warming, the Court has no principled way to allocate "fault" for *Plaintiffs'* injuries (and other alleged global-warming-caused injuries) to and among each potentially liable contributor. In the absence of a legislatively created framework for defining, allocating, and limiting fault, there are no judicially manageable standards for adjudicating this case. *See* section I(B)(2) *infra*.

2. The suit was also properly dismissed because Plaintiffs' own complaint confirms that they cannot satisfy the "fair traceability" requirement of Article III standing. *Lujan*, 504 U.S. at 560-61. Specifically: (1) Plaintiffs cannot trace their injuries to Defendants' emissions as opposed to those of "'third part[ies] not before the court,'" *id*., and (2) Plaintiffs' claims rest on a causal chain that is "too attenuated," *Allen*, 468 U.S. at 752. *See* section II *infra*.

3. Alternatively, the judgment may be affirmed on the ground that Plaintiffs' federal common law claims fail to state a claim. Specifically, there is no private federal common law for damages; the Clean Air Act precludes judicial application of federal common law to regulate greenhouse gas emissions; and Plaintiffs do not and cannot plead facts establishing that Defendants' emissions were the legal cause of their injuries. *See* section III *infra*.

ARGUMENT

I. Plaintiffs' Global Warming Claims Raise Political Questions

This case is nonjusticiable because adjudication of Plaintiffs' federal

common law claims[5] would require the courts to address fundamental questions of "'national polic[y]'" that are "'not legal in nature'" and that can only be resolved by a political judgment of the political branches. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

A. A Case Presents a Political Question If Any One of the Six Independent Tests Set Forth in *Baker v. Carr* Is Satisfied

The federal judiciary has long acknowledged that certain disputes raise "political questions" that are not the proper domain of the courts. *See Baker*, 369 U.S. at 210-17 (reviewing cases). This doctrine is rooted in several distinct aspects of the Constitution's separation of powers. *Vieth*, 541 U.S. at 277-78 (plurality).

On the one hand, the Constitution's grant of certain discretionary powers to the political branches, rather than to the courts, means that a case whose resolution calls for the "exercise of [such] a discretion" is nonjusticiable. *Baker*, 369 U.S. at 211. Article III's limitation of the "judicial Power" to "Cases" or "Controversies" also means that the courts may not proceed to decide a case where there is a "'lack of satisfactory criteria for a judicial determination.'" *Id*. at 210. In addition, the political question doctrine also rests in part on "'prudential concerns calling for mutual respect among the three branches of Government'"—concerns that, in a

[5] As Plaintiffs requested (CR 155 at 120-21), the district court dismissed their state-law claims without prejudice. (ER 23-24.) Accordingly, only Plaintiffs' asserted federal law claims are before this Court.

specific case, may "assist [the courts] in the difficult task of discerning which cases the Constitution forbids them from hearing." *Corrie*, 503 F.3d at 981.

Reflecting the multiple concerns that animate the political question doctrine, the Supreme Court has distilled that doctrine, not into a single test, but six *alternative* tests. *Baker*, 369 U.S. at 217. Thus, a case is nonjusticiable if there is:

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

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

Determining whether a case involves a nonjusticiable political question requires a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, and an evaluation of "the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211-12.

B. Application of the *Baker* Tests Shows That Plaintiffs' Claims Raise Nonjusticiable Political Questions

The "discriminating inquiry" mandated by *Baker* confirms that Plaintiffs' purported federal common law claims are nonjusticiable. (ER 10-15.)

1. Plaintiffs' Theory That Defendants' Emissions Were at a Level That Tortiously Contributed to Global Warming Raises Inherently Political Questions

Even if federal common law applies, *but see infra* at 56-66, the district court correctly held that whether Defendants' emissions were an "unreasonable" interference with a public right raises a political question. (ER 10-14.)[6]

a. A Public Nuisance Claim Requires a Balancing of Competing Interests and Not Just Consideration of the Harm to Plaintiffs

In the proceedings below, Plaintiffs did *not* contest that *if* this suit would require the district court to determine the reasonableness of Defendants' worldwide emissions, then the action is barred by the political question doctrine. (CR 155 at 44-71; *see also* CR 162 at 3.) Instead, Plaintiffs only disputed the premise of this argument, contending (as they do on appeal) that "no balancing is required," because the focus of the relevant inquiry supposedly is "exclusively on the severity of the interference," *i.e.*, the harm to Kivalina. (AOB 50-51; *see also* CR 155 at

[6] The district court correctly focused its analysis on the nuisance claim. Plaintiffs concede that their conspiracy and "concerted action" claims are simply derivative of that claim. (AOB 36, 38.) *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 992 (9th Cir. 2001); 2 Dobbs, THE LAW OF TORTS 936 (2001).

49.) As the district court recognized (ER 10), this argument is contrary to well-settled nuisance law principles, under which "[t]he unreasonableness of a given interference represents a judgment reached by comparing the social utility of an activity against the gravity of the harm it inflicts, taking into account a handful of relevant factors." *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1105 (1997) (describing standards for a public nuisance); *see also Florida E. Coast Props., Inc. v. Metropolitan Dade County*, 572 F.2d 1108, 1112 (5th Cir. 1978) (in "every case," court "must make a comparative evaluation of the conflicting interests").

The required balancing analysis is elaborated in the Restatement,[7] which states that a defendant's conduct may constitute a "public nuisance" only if (among other requirements) it represents "an *unreasonable* interference with a right common to the general public." REST. 2D § 821B(1) (emphasis added). To determine what is "unreasonable," a court must conduct an analysis that is "substantially similar to that employed for the tort action for *private* nuisance." REST. 2D § 821B, cmt. *e* (emphasis added).[8] That analysis requires, as an initial step, that the defendant's conduct be intentional or "otherwise actionable" under

[7] Defendants do not concede that the Restatement's nuisance principles can be transposed into the global warming context, but merely assume the point *arguendo*.

[8] Plaintiffs are therefore wrong in suggesting (AOB 26-27, 50-51) that the mere existence of one of the circumstances enumerated in § 821B(2) (*e.g.*, that the defendant's conduct violates a statute) is sufficient to establish a public nuisance. Plaintiffs elsewhere appear to concede the point. (AOB 26 n.6.)

principles of liability for negligence, recklessness, or abnormally dangerous activities. *Id*. (citing REST. 2D § 822). Plaintiffs here did not (and could not) allege that emitting carbon dioxide is an "abnormally dangerous activity," and theories of negligence or recklessness liability require the very sort of balancing analysis that Plaintiffs are trying to avoid. *Id*., § 822, cmt. *k* (court must "balanc[e] the gravity of the harm against the utility of the conduct"). The only remaining basis of liability—for intentional conduct—likewise requires a balancing analysis:

> If the interference with the public right is intentional, it must also be unreasonable. (See § 822, and §§ 826-831, *involving the weighing of the gravity of the harm against the utility of the conduct*).

REST. 2D § 821B, cmt. *e* (emphasis added).[9]

Plaintiffs contend, however, that balancing is not required under the Restatement when the alleged harm is "severe." In that situation, say Plaintiffs, §§ 826(b) and 829A of the Restatement impose liability automatically, without regard to the social utility of the Defendants' conduct or the broader social costs of imposing monetary liability for such conduct. (AOB 50-51.) That is wrong.

Sections 826(b) and 829A do not abjure balancing in cases of intentionally-caused severe harm, but instead establish a *special* balancing test that refocuses the

[9] Defendants dispute that their conduct is properly analyzed as "intentional." (CR 162 at 4.) The complaint alleges an "intentional[]" nuisance in conclusory terms (ER 102) and contains no facts giving rise to a plausible inference that, in emitting greenhouse gases, Defendants "act[ed] for the purpose" of harming Kivalina or knew that harm to Kivalina was "substantially certain to result." REST. 2D § 825.

inquiry. These provisions reflect a recognition that the conventional articulation of the "unreasonableness" test—*i.e.*, whether "the gravity of the harm outweighs the utility of the actor's conduct"—"may sometimes be incomplete" in cases seeking damages for severe harms. REST. 2D § 826, cmt. *f*. In such cases, the focus of the balancing inquiry shifts from determining whether the conduct is reasonable "in general" to "determining whether the conduct of causing the harm *without paying for it* is unreasonable." *Id*. (emphasis added). Section 826(b) states that, in such cases, the court must consider both the severity of the harm to the plaintiff *and* whether "the *financial burden* of compensating for this and similar harm to others" would make "the continuation of the conduct not feasible." *Id*., § 826(b). Section 829A—on which Plaintiffs principally rely (AOB 26, 28, 50-51)—frames the test more generally as whether the "harm resulting from the invasion is severe *and greater than the other* ***should*** *be required to bear without compensation*." REST. 2D § 829A (emphasis added).

By framing the inquiry as whether the harm is one that, under the circumstances, the plaintiff "should" be required to bear without compensation, and by directing the courts to consider the economic impact of imposing liability, §§ 826(b) and 829A belie Plaintiffs' assertion that the nuisance inquiry "focuses exclusively" on the severity of the harm and that "no balancing is … required." (AOB 51.) Indeed, the commentary accompanying § 829A confirms that its test is

merely a *variation* on the gravity-v.-utility balancing that typifies nuisances cases:

> Thus, *in determining whether the gravity of the interference with the public right outweighs the utility of the actor's conduct* (see § 826, Comment *a*), the fact that the harm resulting from the interference is severe and greater than the other should be required to bear without compensation will *normally* be sufficient to make the interference unreasonable.

REST. 2D § 829A, cmt. *a* (emphasis added).

The commentary to § 826 likewise confirms that the unreasonableness inquiry always involves a balancing of competing interests. "Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards." REST. 2D § 826, cmt *c*. "Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case." *Id*., cmt. *b*; *see also Walsh v. Stonington Water Pollution Auth.*, 736 A.2d 811, 819-20 (Conn. 1999) (because question whether it is reasonable to continue an activity without providing compensation remains a "weighing process," the jury was properly instructed "to take into consideration and weigh the conflicting interests involved"); *Padilla v. Lawrence*, 685 P.2d 964, 968 (N.M. App. 1984) (under both § 826(a) and § 826(b), unreasonableness is "'problem of relative values'").

Accordingly, §§ 826(b) and 829A do not establish a test in which the court assesses only one factor—the severity of the harm—and then automatically

imposes liability without any regard for the weighing of countervailing considerations. As in all nuisance cases, "[c]onsideration must be given not only to the interests of the person harmed but also for the interests of the actor and to the interests of the community as a whole." REST. 2D § 826, cmt. *c*.

This conclusion is further confirmed by one of the very cases on which Plaintiffs rely, which describes the relevant inquiry as requiring a "'just and right balancing of the competing interests according to the general principles of fairness and common sense.'" *Pendergrast v. Aiken*, 236 S.E.2d 787, 797 (N.C. 1977). And while Plaintiffs reproduce a long block quote from Prosser's treatise (AOB 25), they neglect to mention that, in the very next paragraph, the treatise confirms that the question of whether the cost of the harm should be allocated to the defendant turns on a multi-factor balancing test. The treatise frames the inquiry as whether the loss allegedly "result[ing] from the intentional interference *ought* to be allocated to the defendant" in light of several factors, including the nature of the harm, the plaintiff's use of its property, the "relative capacity" of the parties to avoid or adapt to the circumstances causing the harm, and, notably, "the nature of the defendant's use of his property." PROSSER & KEETON ON TORTS § 88, at pp. 629-30 (5th ed. 1984) ("PROSSER") (emphasis added).

Plaintiffs' contrary argument rests on out-of-context quotations from a handful of cases, all of which involved the direct infliction of harm on an

immediately adjacent neighbor—and none of which holds that the harm to the plaintiff is the exclusive factor to be considered. (AOB 50-51.) These cases merely confirm that (as explained above) there are some situations in which, under all the circumstances, "'the resulting interference with another's use and enjoyment of land is greater than it is reasonable to require the other to bear under the circumstances without compensation.'" *Pendergrast*, 236 S.E.2d at 797.[10]

Moreover, Plaintiffs overlook the critical fact that each of the cases on which they rely involved (unlike this case) an immediate and severe injury to *a nearby parcel*.[11] This common feature is not an accident. The Restatement's commentary

[10] *See also Hall v. Phillips*, 436 N.W.2d 139 (Neb. 1989) (under § 826(b), defendant "may" still be liable even if utility of conduct outweighs harm); *Hughes v. Emerald Mines Corp.*, 450 A.2d 1, 7 (Pa. Super. Ct. 1982) (because "[u]tility of an act must be balanced against the bad effects resulting from that act in determining its reasonableness," court upheld finding that plaintiffs' loss was "'greater than they should be required to bear without compensation'") (quoting REST. 2D § 829A); *Furrer v. Talent Irrigation Dist.*, 466 P.2d 605, 612-13 (Or. 1970) (in negligence action, court rejected view that defendant could escape liability "simply by showing that the defendant's use had a greater social value than the plaintiff's," but affirmed that "[a]ll would agree that the social utility of the defendant's conduct is a factor"); *Jost v. Dairyland Power Coop.*, 172 N.W.2d 647, 651, 653-54 (Wis. 1969) (agreeing with the first Restatement's comment that there are some cases in which "[i]t may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying").

[11] *See Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen*, 384 N.W.2d 692, 693 (Wis. 1986) (improvements to defendant's property caused flooding in adjacent parcel); *Hughes*, 450 A.2d at 2-3 (mining company's drilling of holes destroyed wells in adjacent property); *Pendergrast*, 236 S.E.2d at 788-89 (piping

on § 826(b) expressly states that a proximity requirement may be necessary to avoid excessive liability that discourages socially useful conduct. REST. 2D § 826 cmt. *f* (noting than even allowing compensation to all "in the general vicinity" may create too heavy a burden, requiring a limitation "only to those in closer vicinity … whose annoyance is more severe"); *see also Jost*, 172 N.W.2d at 652 (noting that Wisconsin precedent applied stricter standards where it is "'the proximity of such a business to the adjacent occupant which causes the annoyance'"). Nothing in the cited cases, or in the Restatement generally, supports the quite different (and absurd) proposition that where (as here) the plaintiff explicitly seeks compensation without regard to geographic proximity, nuisance law would *automatically* allow worldwide liability for all severe harms (including harms only tenuously linked to the defendants) *irrespective* of any countervailing considerations.

Indeed, such a theory—if not limited in some way—would logically allow nuisance liability to be asserted against virtually *any* emitter in the world, and not only for Plaintiffs' injuries, but for all other serious harms caused by global warming. *See* REST. 2D § 826(b) (requiring consideration of whether logic of theory asserted could require compensation of broad range of similar injuries).

---

for creek on defendant's property caused significant flooding on plaintiff's parcel); *Jost*, 172 N.W.2d at 648-49 (sulfur-dioxide from defendant's coal plant damaged crops in nearby farms); *Furrer*, 466 P.2d at 608-09 (defendant's use of its canals seeped water into plaintiff's nearby parcel); *Hall*, 436 N.W.2d at 140-41 (herbicide from defendant's parcel blew onto adjacent parcel, damaging crops).

Plaintiffs below attempted to avoid the resulting unprincipled and unmanageable theory by making a concession that (from the point of view of the political question doctrine) they could not afford to make, namely that liability should be limited to those persons whose *level of emissions* exceeded a certain (unspecified) "order[] of magnitude." (CR 155 at 42; *see also* AOB 59-60.) That is, of course, an implicit concession that the focus cannot be solely on the harm, but must consider whether the defendants' emissions were in some sense *excessive*. And that "line drawing" (CR 155 at 44) would require the courts to answer the inherently nonjudicial political question of how to balance the competing fundamental policy interests.

b. Plaintiffs' Effort to Impose Nuisance Liability on "Large Quantities" of Greenhouse Gas Emissions Raises Political Questions

The inquiry suggested by nuisance law would thus require the court to determine whether Defendants' emissions had reached such a level that, in light of the value of the emissions-producing activities, the severity of the harms allegedly caused, and the costs and burdens of shifting liability for all such harms to those engaged in such conduct, liability for damages should nonetheless be imposed. But in contrast to a garden-variety nuisance claim, which "involv[es] a discrete number of 'polluters' that were identified as causing a specific injury to a specific area" (ER 12), Plaintiffs seek to "impose damages on a much larger and

unprecedented scale" by attributing responsibility to Defendants for injuries assertedly caused by an inherently global phenomenon that results from "multiple worldwide sources … across myriad industries and multiple countries." *GMC*, 2007 WL 2726871 at *15.

Accordingly, to determine that Defendants' emissions should have been lower in the past and should result in damages liability today, the court would need to make an initial policy determination that attempts to assess the significance of any contribution to global warming from such emissions and then to weigh that against a number of countervailing fundamental national and international policy concerns. These latter concerns include: the importance of Defendants' activities to national energy policy, the overall economy, and national security; the concern that *de facto* emissions caps (established by a determination that emissions were "unreasonable") would have dramatic consequences for multiple sectors of the national economy; the probability that imposing all of the costs of global warming on the U.S. energy sector alone (rather than the agricultural, manufacturing, transportation, or myriad other sectors) would have additional, equally dramatic consequences for energy users; and the harm to the nation's foreign policy that would be caused by unilateral domestic emissions caps, which could impede the Executive Branch's foreign policy efforts, over decades, to obtain *multi-lateral* reduction agreements. (ER 11-14.) *GMC*, 2007 WL 2726871 at *8.

Moreover, this balancing of competing concerns could not be done in isolation. Because Plaintiffs allege that *all* greenhouse gas emissions from *all* sources "rapidly mix in the atmosphere" and that Defendants' emissions could have an impact on global warming only "in combination with emissions and conduct of others" (ER 102), any inquiry into whether Defendants' emissions were "reasonable" would be a *comparative* judgment—in other words, one must consider the emissions of all sectors of the economy, not just the energy sector, and from all regions of the world, not just the U.S.

On top of all this, the Court would have to make judgments *retroactively* as to decades' worth of emissions. Plaintiffs' complaint is explicitly based on the aggregate impact of all of the greenhouse gas emissions that have occurred "since the dawn of the industrial revolution." (ER 70.) Plaintiffs' theory thus would require the courts to decide how much carbon dioxide Defendants "should" have been releasing from a wide variety of activities over a period of several decades or more. And Plaintiffs' complaint is equally explicit that it seeks to impose liability for Defendants' *worldwide* emissions (ER 102), thereby confirming that Plaintiffs seek to task the court with selectively regulating emissions in foreign countries.

These policy questions and numerous others must be answered before a court could even hope to determine whether liability can and should attach to Defendants' actions. Yet Plaintiffs do not even begin to identify what standards a

court could apply to give a clear legal answer. There are none. Courts "have neither the expertise nor the authority to evaluate" the fundamental economic, social, and national security policy issues raised by the regulation of carbon emissions. *Massachusetts*, 549 U.S. at 533.

As a result, the second and third *Baker* tests are easily satisfied here. The necessary balancing of these competing interests requires an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217; *see GMC*, 2007 WL 2726871 at *8.[12] Balancing these competing and incommensurate interests, on an inherently national and international scale, requires a *legislative* judgment—one that the political branches have grappled with for decades. It cannot be done simply by a court asking what is "reasonable." *GMC*, 2007 WL 2726871 at *8. Likewise, nuisance principles leave the courts without judicially manageable standards for "determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with global climate change that

[12] Plaintiffs wrongly suggest that a contrary conclusion is required by *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496 (1971), which held that a garden-variety nuisance claim involving mercury pollution in Lake Erie did not raise a political question. (AOB 43-44.) The fact that nuisance principles may be sufficient to permit adjudication of a discrete, geographically confined, and prototypical pollution problem says nothing about whether Plaintiffs' novel invocation of nuisance principles to create a worldwide global-warming liability scheme is justiciable. *See GMC*, 2007 WL 2726871 at *15.

admittedly result from multiple sources around the globe." *Id*. at *15.

Accordingly, Plaintiffs' reliance upon public nuisance principles does not avoid the political question at the heart of this lawsuit, but merely restates and highlights it. The "recasting" of political questions "in tort terms does not provide standards for making or reviewing [such] judgments." *Schneider*, 412 F.3d at 197; *see also El-Shifa Pharm. Indus. v. United States*, __ F.3d __, 2010 WL 2352183 at *6 (D.C. Cir. 2010) (en banc) (same); *Alperin*, 410 F.3d at 562 (affirming political-question dismissal of wartime slave labor claims, which "present no mere tort suit"). For the same reasons, a two-judge panel of the Second Circuit erred in relying on common-law labels to avoid a political question. *AEP*, 582 F.3d at 326-32.

Plaintiffs suggest that common-law claims for *damages* between private parties can never present political questions. (AOB 40-41, 47.) But the courts have not held that such cases never raise political questions, but only that they are *less likely* to raise justiciability problems. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992). Indeed, since *Koohi* was decided, courts have often found that damages claims raise political questions. *See, e.g.*, *Schneider*, 412 F.3d at 196-98; *Corrie*, 503 F.3d at 983-84; *Alperin*, 410 F.3d at 561. As in those cases, the principal political question here arises, not from the *remedy* requested, but rather from the *theory of liability*. *See supra* at 29-32.

Plaintiffs likewise err in arguing that adjudication of this suit would not effectively require the district court to fix and impose future emission standards upon Defendants and all other entities. (AOB 45.) "[C]ommon-law liability is 'premised on the existence of a legal duty,'" and a tort judgment therefore does more than merely give the plaintiff money; it "establishes that the defendant has violated a [legal] obligation." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008). A judgment that, because of their past emissions, Defendants should pay damages is therefore unavoidably a judgment that Defendants—and all others like them—have violated a common-law *duty*. Any such determination that Defendants' past emissions exceeded a common-law-based standard would require the courts retroactively to fashion such a standard, which runs headlong into the political question doctrine. *See GMC*, 2007 WL 2726871 at *8 (distinction between damages and injunction is "unconvincing" here).[13]

Lastly, the difficulty and impropriety of a court making the initial policy determinations that adjudication of Plaintiffs' suit would require is underscored by the political branches' ongoing policy efforts in this area. The political branches

[13] Plaintiffs assert that "even if, *arguendo*, an initial policy decision from the political branches were necessary," those branches have supplied it by urging that greenhouse gas emissions be reduced. (AOB 58.) But that forward-looking hortatory expression says nothing about what *level* of emissions would be reasonable in the future, or about what they should have been in the past, much less for which activities, and in which time frames.

have thus far declined to implement any fixed standards (much less retroactive ones) for appropriate levels of greenhouse gas emissions for the full range of activities at issue in this case (which also include foreign emissions). *See supra* at 9-14. It would be inappropriate for the courts to attempt to resolve these sorts of questions where, as here, the political branches are actively continuing to consider the political judgments necessary for their resolution, and it would be especially inappropriate for the courts to purport to resolve them in a manner that is inconsistent with the judgments made by the political branches thus far.[14]

2. Plaintiffs' Theory for Attributing Fault Also Raises Inherently Political Questions

In addition to the lack of judicially manageable standards for determining when a particular entity's greenhouse gas emissions become "unreasonable," adjudication of Plaintiffs' claims would present another, distinct political question: as the district court held, courts have no principled way (absent guidance from the political branches) to allocate "fault" for the harms allegedly caused by global

[14] The remaining *Baker* tests are also implicated here for substantially the same reasons. The policy determinations necessary to regulate worldwide carbon emissions are textually committed to the political branches (the first *Baker* test), and any attempt by a court to regulate them through domestic tort liability would demonstrate a profound lack of respect for the political branches' policy decisions and would seriously undermine those decisions already made (fourth and fifth *Baker* tests). *See Corrie*, 503 F.3d at 983-84. It would likewise result in multiple branches of the federal government taking inconsistent stances on the same issue (sixth *Baker* test), even though the questions presented here "uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211.

warming among each potentially liable contributor. (ER 14-15.)

This second justiciability problem arises from the fact that Plaintiffs' theory inescapably rests on the premise that all emissions from all sources mix in the atmosphere over centuries into a worldwide blending of gases that only in the aggregate, and over time, causes particular injury. *See supra* at 7-8. An initial *legislative* judgment would be required to sort out the intractable problem of assigning fault for allegedly contributing (along with literally everyone else in the world) to a *single* aggregate phenomenon that purportedly contributes to particular injuries. In the absence of such a legislatively created framework, Plaintiffs' invocation of nuisance principles provides no principled basis for allocating liability for any *particular* harm of global warming to *this* group of Defendants. As the district court concluded, this aspect of Plaintiffs' claims requires a "policy decision about *who* should bear the cost of global warming." (ER 14.)

Plaintiffs' suggestion that the Court can ignore other emitters (AOB 33 n.8) is simply wrong: Defendants are entitled to assert a third-party complaint against any "nonparty who is or may be liable to it for all or part of the claim against it." Fed. R. Civ. P. 14(a)(1). Plaintiffs' nuisance theory would thus lead to the view that any person allegedly injured by global warming can arbitrarily choose to sue almost anyone else in the world—and that defendant, in turn, can choose to sue almost anyone else for contribution. This capriciousness is the antithesis of

"judicially discoverable and manageable standards" that are "principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 277-78. Only a set of legislatively-created distinctions can sever the Gordian knot of worldwide liability that Plaintiffs proffer by fixing rules for determining "who should bear the costs associated with the global climate change that admittedly result[ed] from multiple sources around the globe." *GMC*, 2007 WL 2726871 at *15.

Plaintiffs contend that Defendants are the proper defendants here because they "are among the largest U.S. contributors to global warming." (AOB 59.) But this carefully worded comparative judgment about individual entities *in the U.S.* cannot obscure the fact that Plaintiffs have identified no principled basis for allocating liability for any *particular* harm of global warming entirely to *this* group of Defendants. Any attempt to assign responsibility for Plaintiffs' injuries to particular emissions must ultimately rest on a policy judgment about who *should* bear liability for what level of contribution to the purported effects of greenhouse gases (whether liability should be assessed on each producer, only certain industries, or the entire world); which victims of alleged global-warming-enhanced injury should receive compensation from whom for what harms; and the relative blameworthiness of Defendants' emissions (as well as the relative utility of Defendants' otherwise lawful activities) as compared to the myriad other factors that also contributed to the injury in question. *GMC*, 2007 WL 2726871 at *15.

Notably, if Plaintiffs were correct in urging a "no balancing" approach to "unreasonableness," *but see supra* at 21-29, that would exacerbate this second political question about how to allocate fault for particular injuries. By vastly increasing both the number of compensable harms and the number of emitters who might conceivably be liable, Plaintiffs' no-balancing standard would magnify exponentially the arbitrariness and unmanageability of the case and thereby confirm the need for an initial political judgment by the elected branches.

II. The District Court Correctly Held That Plaintiffs Lack Standing

As the district court correctly recognized, Plaintiffs' theory that these Defendants (or any of the innumerable others who emitted greenhouse gases) may be held liable for the alleged effects of global warming fails to satisfy the fair traceability requirement[15] of Article III. (ER 15-22.)

A. A Defendant's Mere *Contribution* to a Phenomenon That Allegedly Led to a Plaintiff's Injury Cannot Satisfy the Fair Traceability Requirement

Unlike a conventional nuisance case, in which the defendant releases a

[15] The "irreducible constitutional minimum of standing contains three elements": (1) the plaintiff must have suffered an injury-in-fact; (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly … trace[able] to the challenged actions of the defendant, and not … th[e] result [of] the independent action of some third party not before the court'"; and (3) it must be "likely" that a favorable decision will redress the plaintiff's injury. *Lujan*, 504 U.S. at 560-61 (citation omitted). The element at issue here is fair traceability, which the Supreme Court has defined as "the causation requirement" of standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 n.7 (1998).

noxious substance that travels directly to its neighbor's property and causes immediate injury in a defined area, Plaintiffs allege that their injuries occurred only as the result of a global phenomenon that was the result of an undifferentiated worldwide accumulation of gases from billions of sources over centuries. *See supra* at 7-8. Because Plaintiffs admittedly cannot trace their alleged injury specifically to Defendants,[16] Plaintiffs ask the Court to adopt the novel theory that "fair traceability" does not require actual traceability. But fair traceability means, at a minimum, that the plaintiff must explain why the *defendant* is the traceable source of the injury. Alleging that Defendants "contributed" to a global phenomenon that may have contributed to Plaintiffs' injury is not enough.

1. Plaintiffs' Theory of Standing Is Contrary to the Supreme Court's Interpretation of the Fair Traceability Requirement

Article III standing requires a plaintiff to demonstrate a "substantial likelihood" that the defendant's conduct, *and not something else*, caused its harm.

[16] Plaintiffs' reliance upon cases involving a discrete number of polluters in a limited area (AOB 30-32) is thus unavailing. In such cases, the plaintiffs have traced their injuries to discrete acts of contamination from particular defendants. *See, e.g.*, *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973) (defendants identified as having dumped sewage directly into affected waterway). Moreover, the case on which Plaintiffs most heavily rely—*Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696 (7th Cir. 2008) (en banc)—is not even an emissions case at all: *Boim* involved the statutorily-created cause of action for terrorism victims against those who provide material support to terrorists, and the court merely discussed conventional pollution cases in dicta.

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75 (1978). Just as the "injury-in-fact" element of Article III standing requires that a plaintiff have suffered "particularized" injury, *Lujan*, 504 U.S. at 560, "fair traceability" necessarily requires what amounts to *particularized causation*—that the plaintiff's injury is the result of the specific conduct of the particular defendant(s) being pursued. Where, as here, Plaintiffs point to a global phenomenon to which the named Defendants make (along with innumerable others) at most an undifferentiated contribution, fair traceability is absent.

The point of fair traceability is that a plaintiff must be able *distinctively* to tie its injuries to the defendant's challenged conduct as opposed to the conduct of third parties not before the court (or other competing causal factors). *See Bennett v. Spear*, 520 U.S. 154, 167 (1997). But Plaintiffs' selection of Defendants in this action is an exercise of caprice, a fact underscored by a comparison of this suit to other global warming actions. In each action, plaintiffs have selected, seemingly at random, varying small subsets of U.S. industry to the exclusion of billions of other emitters dating back centuries. *Compare* ER 1 (naming select oil companies and utilities and a single coal company), *with AEP*, 582 F.3d 309 (naming five utilities and Tennessee Valley Authority ("TVA")); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated*, 598 F.3d 208 (5th Cir. 2010) (en banc), *appeal dism'd*, ___ F.3d ___, 2010 WL 2136658 (May 28, 2010) (en banc) (naming select

oil, utility, coal, and chemical companies and TVA); *GMC*, 2007 WL 2726871 (naming six automakers only). Other industries inexplicably have not been targeted; as the district court noted, Plaintiffs "readily acknowledge[d] that the 'transportation sector' is responsible for an 'enormous quantity' of greenhouse gas emissions," yet consciously chose not to sue any participant in that sector. (ER 15 n.4.) When different plaintiffs point to different defendants as legally responsible for the exact same global phenomenon, it is a sure sign that plaintiffs are pursuing a generalized grievance against randomly-selected defendants, not a particularized injury fairly traceable to specific defendants.[17]

Moreover, the random selection of defendants in these cases demonstrates the *infinite* universe of potential defendants (and potential lawsuits) if a "contribution" standard for fair traceability were adopted. Plaintiffs would have the Court accept a standing theory that is far more permissive than theories that the Supreme Court and this Circuit have rejected. *Allen*, 468 U.S. at 751-52 ("standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases"). Plaintiffs have sued Defendants who are no more culpable (if at all) than countless third parties, but the Supreme

[17] Plaintiffs wrongly argue that requiring traceability here would preclude courts from asserting jurisdiction whenever there are many alleged victims. (AOB 73.) "While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way." *Massachusetts*, 549 U.S. at 517.

Court has routinely rejected efforts to sue when a much more discrete set of third parties were necessary contributors to the plaintiff's alleged injury. *See*, *e.g.*, *Allen*, 468 U.S. at 756-59 (no standing to challenge IRS's non-enforcement of policy denying tax-exempt status to racially discriminatory private schools because attendance of plaintiffs' children in integrated schools depended not only on IRS's conduct but on decisions of third parties, such as school officials and parents); *Warth v. Seldin*, 422 U.S. 490, 505-06 (1975) (no standing to challenge zoning ordinance because lack of low-income housing may have been attributable to conduct of third parties, including builders' unwillingness to build low-cost housing and plaintiffs' own financial situations); *Prescott v. County of El Dorado*, 298 F.3d 844, 846 (9th Cir. 2002) (no standing where alleged "causal relationship is too remote" in light of role of independent third parties); *Pritikin v. Department of Energy*, 254 F.3d 791, 797 (9th Cir. 2001) (no standing to challenge Department's failure to make budget requests for medical monitoring program, because any injury to plaintiffs would depend on independent decisions of separate agency). Those cases involved a *finite* number of additional actors, whereas Plaintiffs' claims implicate the conduct of *all* emitters. (ER 42, 70, 72, 74, 102.)[18]

[18] Plaintiffs' conclusory allegation that Defendants are "substantial contributors" to global warming (ER 103), does not create traceability. *Warth* assumed that the defendants' challenged conduct "ha[d] contributed, *perhaps substantially*, to the cost of housing" in the plaintiffs' locality, yet still it concluded that the role of

Plaintiffs attempt to cabin their theory by arguing that the courts can treat certain industrial emitters differently from ordinary citizens. (AOB 34-35.) But courts can make such distinctions only when they apply meaningful tests of "fair traceability" (and when they have available standards for assessing excessiveness, *see supra* at 29-35, and when common law causation can be shown, *see infra* at 67-73). If Plaintiffs' "contribution approach" (AOB 33) prevails, there is no reason why Plaintiffs do not have standing to sue anyone with a carbon footprint. That startling proposition is at odds with precedent and should be rejected.

2. Under the Correct Test for Traceability, Plaintiffs Cannot Fairly Trace Their Injuries to *Defendants'* Emissions, as Opposed to Those of Third Parties

Once Plaintiffs' "contribution approach" is rejected, it is clear that Plaintiffs cannot demonstrate fair traceability. Fair traceability requires Plaintiffs to establish that their alleged injuries are the result of *Defendants' emissions* and not the emissions of others not before the Court. *Lujan*, 504 U.S. at 560; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). But in light of Plaintiffs' repeated concessions that global warming is the result of the undifferentiated worldwide mixing of greenhouse gases over centuries from

---

independent third parties prevented the plaintiffs from establishing a causal nexus between their injury and the defendants' conduct sufficient to satisfy the fair traceability requirement. 422 U.S. at 504 (emphasis added). Plaintiffs do not and could not claim that they have sued all substantial emitters. Nor do they claim that the selected Defendants' emissions alone could have caused their injuries.

billions of sources, *see supra* at 7-8, the district court correctly concluded that Plaintiffs could not possibly carry their tracing burden as to any specified entity or group, including Defendants.

Plaintiffs accuse the district court of "rais[ing] the standing hurdle higher than the necessary showing for success on the merits." (AOB 62, quotation omitted.) To be sure, the "fair traceability" requirement is not necessarily as demanding as traditional tort causation. But that does not excuse Plaintiffs from satisfying the threshold Article III requirement that the plaintiff allege (and later prove) a "substantial likelihood" that the defendant's conduct caused the plaintiff's harm. *Duke Power*, 438 U.S. at 75. Instead, Plaintiffs' insistence that the tort causation standard is more demanding only underscores that Plaintiffs should lose, *a fortiori*, when it comes to tort causation. *See infra* at 67-73.

Plaintiffs also suggest that, at the pleading stage, "'general factual allegations of injury resulting from the defendant's conduct may suffice.'" (AOB 60, quoting *Lujan*, 504 U.S. at 561.) But, as the Supreme Court has been at pains to emphasize, conclusory assertions do not suffice. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Twombly*, 550 U.S. at 556-57, 570; *see also Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Once conclusory labels are set aside, Plaintiffs' Article III problem is that they have pleaded too much, not too little. Plaintiffs concede that they cannot trace greenhouse gas emissions to any

source and that global warming is the result of the overall worldwide accumulation of greenhouse gases. *See supra* at 7-8. Those concessions render Plaintiffs' conclusory assertions of causation both legally insufficient and utterly implausible.

3. Plaintiffs' Reliance on Statutory Cases Is Unavailing

Plaintiffs attempt to analogize their suit to cases that have found standing in the context of *statutory* schemes that specifically regulate the levels of pollutants that may be discharged and that confer defined rights to sue on various injured persons. (AOB 62-66; CR 155 at 97-105.) But these inapposite cases only underscore how radical a departure Plaintiffs seek from ordinary standing rules.

Plaintiffs seek to rely on both the Supreme Court's decision in *Massachusetts* and lower court cases applying the citizen suit provisions of the Clean Water Act ("CWA"). The flaw in Plaintiffs' position is made clear by *Massachusetts* itself, which reaffirmed that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" 549 U.S. at 516. That is not to say that Congress can alter the Article III standing requirements themselves. (AOB 63.) Rather, Congress may allow certain plaintiffs to *satisfy* those requirements by statutorily defining sufficient causal relationships between conduct and injury that will give rise to liability on the part of particular persons—as opposed to all others—for certain specified injuries. This is why the Court held that the existence

of a *statutory* authorization to sue "is of critical importance to the standing inquiry." *Massachusetts*, 549 U.S. at 516.

Plaintiffs therefore are incorrect in suggesting that the *Massachusetts* "Court already has accepted the causal steps of global warming for purposes of standing." (AOB 70.) *Massachusetts* rested critically on two factors not present here: (1) the special solicitude owed a *State* in the standing analysis; and (2) the critical importance of the underlying congressionally created rights in the Clean Air Act—namely, "the right to challenge agency action unlawfully withheld" and the "concomitant procedural right to challenge [EPA's] rejection of [a] rulemaking petition as arbitrary and capricious." 549 U.S. at 517, 520 (citing 42 U.S.C. § 7607(b)(1)). It is one thing to allow a State to invoke a procedural right specifically granted by a statute to review agency action or inaction and quite another to invoke an attenuated causal theory to justify a recovery of substantial damages under the common law. *Cf. Center for Biological Diversity v. National Hwy. Traffic Safety Admin.* ("*NHTSA*"), 538 F.3d 1172, 1213-15 (9th Cir. 2008) (standing existed under *Massachusetts* framework where case was brought—for equitable relief—pursuant to federal statute that created procedural right to sue to challenge regulatory action/inaction by administrative agency); *Natural Resources Def. Council v. EPA*, 542 F.3d 1235, 1248 (9th Cir. 2008) (where Congress has "expressed the need for specific regulations relating to the environment," agency's

failure to promulgate them "supports an inference that there is a causal connection between the lack of those regulations and adverse environmental effects"). To extend *Massachusetts*' standing analysis to a case involving a non-State's common law claims for money damages would be to ignore the key distinctions the Court drew in *Massachusetts* and to adopt an unprecedentedly expansive view of standing. *See Center for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 476 (D.C. Cir. 2009) (rejecting global warming standing argument, noting that *Massachusetts* was based on "unique" fact that plaintiff was "a sovereign State" that "sought to assert its own rights as a state under the Clean Air Act").[19]

Plaintiffs' reliance on CWA case law to define the standard for fair traceability here is equally flawed. (AOB 62-66.) By enacting the CWA, Congress created a number of statutorily-defined duties and rights: the CWA (1) defines, through permitting procedures and regulations, what levels of what substances may be released by a party into a waterway; (2) establishes that discharges in excess of those permitted levels may give rise to liability; and (3) gives private citizens a procedural right to bring suit to enforce the enacted permitting and regulatory schemes. *See* 33 U.S.C. § 1365. This statutory

[19] Plaintiffs' reliance (AOB 65) on *Northwest Envtl. Defense Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Or. 2006), a Clean Air Act case, is misplaced. The court's standing analysis in that case rested on the premise that Congress, through the Clean Air Act, had created "procedural" rights that are subject to "relaxed" Article III standards. *Id*. at 964.

framework directly impacts standing analysis *in the CWA context*. Recognizing that fair traceability requires that a plaintiff show a "substantial likelihood" that the defendant's conduct caused the claimed injury, the courts have held that "[i]n a Clean Water Act case, this [substantial] likelihood may be established by showing that a defendant has 1) discharged some pollutant *in concentrations greater than allowed by permit* 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant ***and*** that 3) this pollutant causes or *contributes* to the kinds of injuries alleged by the plaintiffs." *Public Int. Research Group v. Powell Duffryn Terms., Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) ("*Powell Duffryn*") (emphasis added); *see also Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1151-52 (9th Cir. 2000). The district court correctly recognized that the permissive test for standing adopted in these cases flows directly from the CWA's framework, and is limited to that context. (ER 16-19.)

Powell Duffryn recognizes that in the CWA context courts can look to the actions of coordinate branches in assessing standing, inasmuch as the permit levels established under the CWA are set "at the level necessary to protect the designated uses of the receiving waterways." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157 (4th Cir. 2000) (en banc). Accordingly, in suits to enforce the CWA, it makes sense for courts to conclude that the violation of these permit levels "necessarily means that these uses may be harmed" by the

defendant's excessive discharges. *Id.* *Powell Duffryn* and the cases that have applied its three-prong test for fair traceability thus present a paradigmatic situation in which the Article III standing analysis rests critically on Congress's exercise of its "power to define injuries and articulate chains of causation" so as to "give rise to a case or controversy where none existed before." *Massachusetts*, 549 U.S. at 516 (quotation omitted). This is precisely what the district court recognized in refusing to apply the *Powell Duffryn* test here. (ER 19.)

Even the Second Circuit, which (erroneously) relied on the *Powell Duffryn* line of cases, candidly recognized that the first two prongs of *Powell Duffryn*'s three-prong test cannot be satisfied in a global warming nuisance case, because there is no statute that governs carbon dioxide emissions in the same manner as the CWA regulates effluents. *AEP*, 582 F.3d at 346. Rather than recognizing that the *Powell Duffryn* standard is therefore inapplicable outside the CWA context, the Second Circuit simply excised the first two prongs and adopted an unprecedentedly permissive test for standing. This Court should not follow suit. This Court has already recognized that the *Powell Duffryn* test is limited to the CWA context. *See Ecological Rights Found.*, 230 F.3d at 1151-52 (*Powell Duffryn* test addresses "question of citizen standing under the CWA"). Moreover, *AEP*'s circular reasoning conflicts with the plain language of *Powell Duffryn*, as the district court noted: because "[t]he tripartite test … is stated in the conjunctive, not the

disjunctive, … it is illogical to conclude that the mere contribution of greenhouse gases into the atmosphere is sufficient." (ER 19 n.7.)

4. The District Court Properly Concluded, Alternatively, That Even If the *Powell Duffryn* Test Could Apply Outside the CWA Context, It Has No Application Here

The district court also correctly noted that, even if the *Powell Duffryn* test applied here, it would not assist Plaintiffs.

The district court first recognized that Plaintiffs could not satisfy that test's articulation of the requirement that there be "a *genuine nexus* between a plaintiff's injury and a defendant's alleged illegal conduct." *Gaston Copper*, 204 F.3d at 161 (emphasis added). A "genuine nexus" cannot be said to exist unless the "plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit." *Id*. at 162.

In light of Plaintiffs' own allegations about the undifferentiated nature of greenhouse gases and the worldwide nature of global warming, no "genuine nexus" can possibly exist between Plaintiffs' injury and any Defendant's emissions. Moreover, unlike *Gaston Copper*—a case involving localized pollution of a discrete waterway and where Gaston Copper was the only possible source of the pollutant, 204 F.3d at 161—here, one need look no further than Plaintiffs' complaint to identify innumerable other potential alternative culprits.

The district court also recognized that Plaintiffs could not satisfy *Powell*

Duffryn's requirement that there be *geographic proximity* between the defendant's excessive emissions and the affected waters that give rise to the plaintiff's injury. "[T]o satisfy the 'fairly traceable' causation requirement, there must be a distinction between the plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to that defendant." *Texas Ind. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005) (en banc) (internal quotation omitted); *see also Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996) (eighteen-mile distance from discharge to place of alleged impact on plaintiff was "too large to infer causation" for standing purposes); *Northwest Envtl. Defense Ctr.*, 434 F. Supp. 2d at 965, 969 ("[t]he challenged emissions source is local, not halfway around the globe"). Plaintiffs cannot satisfy this "geographic proximity" requirement, but instead would have the Court declare the entire planet to be the relevant geographically proximate area. (AOB 74; CR 155 at 101.)[20]

[20] Contrary to what Plaintiffs contend, the proximity requirement of the CWA standing cases does not "raise the standing hurdle higher than the bar for success on the merits." (AOB 73.) Plaintiffs rely on the inapposite observation that, where there is a "direct" causal link between the defendant's actions and the plaintiff's harm, proximate causation may exist despite a geographical or temporal separation between the two. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 & n.19 (9th Cir. 2003). But proximity is required for standing in CWA cases precisely because, in the context of pollutants, the fact of geographical separation eliminates any direct link between the discharge and the injury.

B. Plaintiffs Cannot Satisfy Article III's Fair Traceability Requirement for the Additional Reason That Their Alleged Line of Causation From Emission to Injury Is Too Attenuated

Plaintiffs' approach to fair traceability fails for the additional reason that it is utterly at odds with the Supreme Court's holding in *Allen* that the standing doctrine requires "careful judicial examination" of the complaint's allegations to determine, *inter alia*, whether "the line of causation between the illegal conduct and injury is too attenuated." 468 U.S. at 752; *see also Center for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d at 478-79 ("Petitioners rely on too tenuous a causal link between their allegations of climate change and Interior's action"); *In re African American Slave Descends. Litig.*, 471 F.3d 754, 759 (7th Cir. 2006) (no Article III standing where "causal chain is too long and has too many weak links"). In arguing that the "attenuation" inquiry should await the "appropriate stage" (AOB 72), Plaintiffs ignore that the problem here is the implausibility and attenuation of their own proposed causal chain, not matters of proof. Plaintiffs similarly ignore that standing questions are "threshold determinants of the propriety of judicial intervention," *Warth*, 422 U.S. at 518, and thus are often appropriately resolved *early* in the litigation, *see Allen*, 468 U.S. at 752; *Warth*, 422 U.S. at 509 (upholding Rule 12 dismissal where "line of causation" was too indirect).

What Plaintiffs' complaint alleges is a causal theory that epitomizes an impermissibly attenuated and speculative theory of causation: the oil company

Defendants' exploration and production activities release greenhouse gases; those emissions have joined with all of the other emissions of people and entities worldwide over the past several centuries to increase greenhouse gas levels; those increased greenhouse gas levels, together with other factors, contribute to overall global warming; global warming (together with yet other factors) contributes to higher temperatures in the Arctic region; those warmer temperatures have resulted in melting of sea ice that, in the past, has acted as a barrier against the effects of coastal storms that occur in the Chukchi Sea; those storms (again, together with other factors) have subjected the barrier reef on which the Village of Kivalina is located to waves and surges that, over time, have eroded the reef; and the erosion of the reef (again, together with other factors) poses a threat to the integrity of structures that make up the village, allegedly necessitating relocation of Kivalina's residents. (ER 40, 42-44, 70-72, 84-85, 102.)

Every step of Plaintiffs' alleged causal chain is "attenuated at best." *Allen*, 468 U.S. at 757. (ER 22.) Plaintiffs' theory contains too many links and relies on the conduct of too many parties over too long a period of time and dispersed over too wide a geographic area, all of which, as Plaintiffs admit, render each Defendant's emissions, standing alone, insufficient to cause the injury claimed.

C. The District Court Correctly Rejected the Argument That the Native Village of Kivalina Is Entitled to Special Solicitude

Finally, Plaintiffs contend that the Native Village of Kivalina is a sovereign

that "must be accorded the same special solicitude" in the standing analysis "as a state."[21] (AOB 75.) The district court correctly rejected this argument.

The *Massachusetts* Court explained that the "special solicitude" for States is tied uniquely to the *quid pro quo* that arises "[w]hen a State enters the Union": the State "surrenders certain sovereign prerogatives" to the "Federal Government" in exchange for various rights and protections afforded by statehood, and the Federal Government assumes responsibility for exercising those sovereign prerogatives. *Massachusetts*, 549 U.S. at 519. "Special solicitude" therefore is warranted under Article III when, as in *Massachusetts*, a State sues the Federal Government, under a federal statutory scheme, to enforce quasi-sovereign rights that the State otherwise could have protected had it retained its sovereignty. *Id*. This rationale does not apply to the Village, which did not surrender its sovereignty as the price of acceding to the Constitution. *Cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) ("it would be absurd to suggest that the tribes surrendered immunity [from suits by States] in a convention to which they were not even parties").

[21] Plaintiffs contend that the Supreme Court in *Massachusetts* did *not* afford Massachusetts any solicitude at all in the standing analysis, but instead applied ordinary Article III principles. (AOB 74, 75.) This argument is belied by the Court's explicit statement that "[i]t is of considerable relevance that the party seeking review here is a *sovereign State* and not, as it was in *Lujan*, a private individual." *Massachusetts*, 549 U.S. at 518.

Kivalina's theory that its sovereign status allows it to sue as *parens patriae* likewise fails, because it ignores the fact that the Village lacks sovereignty in any sense relevant here. Under the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 *et seq.* ("ANCSA"), all aboriginal titles to land in Alaska have been extinguished and all territorial reservations (with one exception) have been revoked; "ANCSA transferred reservation lands to private, state-chartered Native corporations." *Alaska v. Native Village of Venetie*, 522 U.S. 520, 532 (1998). In the absence of any sovereign territory, any residual "sovereignty" possessed by the Village necessarily is quite narrow and extends, at most, only to purely *internal* matters. *See John v. Baker*, 982 P.2d 738, 753-59 (Alaska 1999). Indeed, the one case Plaintiffs cite for the proposition that Alaska Native Villages can bring suit as *parens patriae* is consistent with that limitation, because it recognizes a right of a village to sue with respect to matters of *child custody*—a subject matter that directly relates to the limited residual sovereignty the Village may possess. *Alaska Dep't of Health & Soc. Servs. v. Native Village of Curyung*, 151 P.3d 388, 402 (Alaska 2006). Because a sovereign's standing to sue as *parens patriae* turns on "whether the injury is one that the [sovereign], if it could, would likely attempt to address through its *sovereign lawmaking powers*," *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (emphasis added), the Village's lack of any territorial sovereignty, and lack of any relevant sovereignty vis-à-vis Defendants,

see Native Village of Venetie, 522 U.S. at 525, 532; *see generally Montana v. United States*, 450 U.S. 544, 565 (1981), means that there is no basis upon which the Village could sue as *parens patriae* here.[22]

III. Plaintiffs' Claims Fail on the Merits as a Matter of Law

Alternatively, Plaintiffs' federal common law claims fail to state a claim, for three overarching reasons: there is no private federal common law; the Clean Air Act precludes judicial application of federal common law to regulate greenhouse gas emissions; and there is no tort causation as a matter of law.

A. Private Plaintiffs Seeking Damages Cannot Invoke Federal Common Law

Plaintiffs describe this as "a textbook case for the application of federal common law." (AOB 22.) The opposite is true: a federal common law nuisance claim cannot seek damages or be asserted by non-sovereigns.

Except where Congress has explicitly empowered courts to create federal common law, courts may recognize a federal common law claim only when (among other requirements) "a federal rule of decision is necessary to protect

[22] Even if the Village were correct that special solicitude is warranted whenever a sovereign can sue as *parens patriae*, its argument would still fail. This Court has held that, for Indian Tribes to sue as *parens patriae*, they must *both* satisfy the requirements for *parens patriae* standing *and* allege that "the citizens they purport to represent as *parens patriae*" have standing. *Table Bluff Reservation v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001). For the same reasons explained above, none of the citizens the Village purports to represent has standing.

uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quotations and citations omitted). In *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988), this Court held that "there is not 'a uniquely federal interest'"—within the meaning of federal common law doctrine—"in protecting the quality of the nation's air." *Id.* at 1203. Rather, the type of "uniquely federal interest" that gives rise to a federal common law claim "exists *only* in such narrow areas as those concerned with [1] the rights and obligations of the United States, [2] interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and [3] admiralty cases." *Id*. at 1202 (emphasis added; quotation omitted).

None of those interests was implicated in *National Audubon*—a private suit alleging that the defendants were polluting the air over California and Nevada—and none is implicated here.[23] Admiralty is plainly irrelevant. So too are "rights and obligations of the United States," which *National Audubon* makes clear are limited to "rights and obligations of the United States *as sovereign*." 869 F.2d at 1203-04. Although the plaintiffs in *National Audubon*, as here, asserted "some unquantified federal interest in protecting the nation's air quality," that interest did

[23] Defendants have never "agreed" that "greenhouse gas pollution … raises uniquely federal interests" within the meaning of federal common law doctrine. (AOB 22.) That "global climate change is predominantly a matter of federal concern," *id.*, has nothing to do with whether private damages claims raise "uniquely federal interests" *of the type that justify applying federal common law*.

not suffice because it "d[id] not necessarily involve the authority and duties of the United States as sovereign." *Id*. at 1204.

Nor does this case implicate the type of "interstate dispute" identified in *National Audubon* as permitting application of federal common law. Such disputes include "only those interstate controversies which involve *a state* suing sources outside of its own territory." 869 F.2d at 1205 (emphasis added). Other courts agree that federal common law claims must "involve the rights and duties of states as discrete political entities." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324-25 (5th Cir. 1985); *see Committee for Considerations of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1010 (4th Cir. 1976); *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1013-14 (E.D. La. 1993).

As these authorities demonstrate, *National Audubon* cannot be brushed aside as a decision involving only "localized dust pollution." (AOB 21-22.) *National Audubon* expressly accepted, for purposes of its analysis, that the pollution at issue was an interstate problem. 869 F.2d at 1204-05. And although the Court described the case as "essentially a domestic dispute," as Plaintiffs emphasize (AOB 21-22, quoting 869 F.2d at 1205), that statement simply referred to the fact that the case involved private plaintiffs asserting their own private, local injuries—just like Plaintiffs here. Plaintiffs ignore *National Audubon*'s statement two sentences earlier: "It appears that the [Supreme] Court considers only those

interstate controversies which involve a *state* suing sources outside of its own territory because they are causing pollution within the state to be … subject to resolution according to federal common law." 869 F.2d at 1205 (emphasis added).

National Audubon's description of the narrow scope of federal common law in this area is fully consistent with Supreme Court precedent. Plaintiffs rely heavily on *Illinois v. Milwaukee*, 406 U.S. 91, 103 (1972) (*Milwaukee I*), where the Supreme Court—in the context of a suit brought by the *State* of Illinois—acknowledged that "federal 'common law'" might "give rise to a claim for *abatement* of a nuisance caused by interstate water pollution," *Milwaukee v. Illinois*, 451 U.S. 304, 307 (1981) (*Milwaukee II*) (emphasis added). The Court subsequently clarified that *Milwaukee I* did not create "a cause of action … brought under federal common law by *a private plaintiff, seeking damages*." *Middlesex Cty. Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981) (emphasis added). Plaintiffs are therefore quite wrong in citing, out of context, *National Audubon*'s observation that "there is federal common law when dealing with air and water in their ambient or interstate aspects," 869 F.2d at 1203 (citing *Milwaukee I*, 406 U.S. at 103). *National Audubon* went on to explain that any such recognition of common law must be understood in the "limited context" of *Milwaukee I* where *the State of Illinois* sought "to abate interstate or navigable water pollution." *Id*. at 1203, 1205.

National Audubon thus refutes Plaintiffs' contention that a private suit involving interstate pollution is subject to federal common law. At most, only suits by sovereigns implicating a sovereign interest in abating interstate pollution give rise to federal common law. *Id.* at 1203-05; *Jackson*, 750 F.2d at 1324-25 ("a dispute … cannot become 'interstate,' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state"). No such sovereign interests are asserted here.[24]

Plaintiffs' status as municipal and Indian tribal government entities does not give them sovereign rights akin to those of States. The Supreme Court has made clear that the basis for States' access to a federal common law remedy of abatement of a nuisance rests on the States' relinquishment, in exchange for entering the Union and receiving statehood, of sovereign warmaking powers that would otherwise be used to redress infringements on their territory. *See, e.g.*

[24] Unlike the instant case, the cases Plaintiffs cite (AOB 18-21) fit comfortably within *National Audubon*'s framework. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), involved a riparian apportionment dispute implicating the conflicting rights of States; *Texas Industries* itself *rejected* the proposition that federal courts enjoyed authority to make interstitial common law wherever matters were of federal interest, 451 U.S. at 640-41; and *Arkansas v. Oklahoma*, 503 U.S. 91, 98-101, 110 (1992), and *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987), ruled that interstate water pollution is primarily a matter of federal law because it is governed by the Clean Water Act. The one exception is *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), which preceded the Supreme Court's decision in *Sea Clammers* and is contrary to *National Audubon*.

Missouri v. Illinois, 200 U.S. 496, 520-21 (1906). As a mere instrumentality of the State, the City of Kivalina is not a sovereign, has no independent right to conduct statecraft, and is not entitled to consideration from the federal government for a bargain it did not make.[25] The Native Village of Kivalina likewise cannot cloak itself in the State's sovereignty. As explained earlier, ANCSA strips Alaska Native Villages of territorial sovereignty. *See supra* at 55-56. Yet territorial sovereignty is the *sine qua non* of access to the federal common law of public nuisance.[26]

B. The Clean Air Act Displaces Any Federal Common Law Claims Potentially Arising From Greenhouse Gas Emissions

Plaintiffs' invocation of federal common law also fails because Congress has enacted a statute (the Clean Air Act or "CAA") that EPA has construed as placing the subject of nationwide greenhouse gas emissions and global warming within its

[25] In *AEP*, 582 F.3d at 364-65, the Second Circuit held that municipalities and private parties with trust responsibilities could bring an action for *abatement* of a federal common law nuisance in a case that *also* featured *state plaintiffs*. *AEP* did not address a suit solely by non-state parties, nor did it address a claim for damages. In any event, the Second Circuit's decision conflicts with *National Audubon*—indeed, that Court relied repeatedly on the *dissenting* opinion in *National Audubon*. *Id*. at 365-66, 375 n.42.

[26] "In its [quasi-sovereign] capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain…. It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas [or] be further destroyed or threatened by the act of persons beyond its control." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907).

regulatory purview—and which thereby displaces the authority of federal courts to fashion their own rules and standards governing the same subject.[27]

As a general matter, "federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law." *Milwaukee II*, 451 U.S. at 319 n.14. Thus a threshold question for any court considering the creation of a federal common law cause of action is whether Congress has already enacted a statute addressing the problem. In answering that question, courts "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 317. Such "separation of powers concerns create a presumption *in favor of* preemption of federal common law whenever it can be said that Congress has legislated on the subject." *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (emphasis added); *see also Milwaukee II*, 451 U.S. at 317 n.9. With this background presumption, the question is simply "whether the legislative scheme 'spoke directly'" to the issue before the court. *Milwaukee II*, 451 U.S. at 315.

[27] Defendants do not concede that EPA's construction of the Clean Air Act is correct. Indeed, numerous challenges to EPA's actions concerning greenhouse gas emissions are pending in the D.C. Circuit (*see supra* at 12-14), which is the only court empowered to hear such cases. Nevertheless, unless and until stayed, remanded, or vacated by the D.C. Circuit, EPA's assertion of authority stands, and has the effect of precluding any invocation of federal common law in this area.

One of the issues before the Court here is when greenhouse gas emissions become unreasonable. *See supra* at 21-35. Congress has indeed spoken to that question in the CAA in the view of the currently operative EPA interpretations on point—thereby committing to EPA (so long as EPA's regulations stand) the question of whether and when greenhouse gas emissions exceed appropriate amounts. The CAA provides "a lengthy, detailed, technical, complex, and comprehensive response to [air pollution]." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 848 (1984); *see also Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981). The Supreme Court has already addressed one key issue concerning EPA's authority, holding in *Massachusetts* that greenhouse gases, including carbon dioxide, fall within the CAA's "capacious" definition of an "air pollutant." *See* 549 U.S. at 500, 528-29 (citing 42 U.S.C. § 7602(g)). The same definition of "air pollutant" applies to CAA provisions addressing emissions from stationary sources. *See* 42 U.S.C. §§ 7408-7411. As EPA currently reads the CAA and *Massachusetts*, the CAA has vested the agency with broad authority to regulate carbon dioxide and other greenhouse gas emissions once applicable statutory criteria are met. 549 U.S. at 533. By exercising that purported authority, EPA's actions have displaced efforts to regulate the same subject through common law.

Plaintiffs contend that the CAA does not displace federal common law

regulation of greenhouse gas emissions because adjudication of Plaintiffs' claims would not require the court to "set any emissions standards that could even theoretically conflict with any standards that EPA might eventually set under the CAA." (AOB 80.) This is wrong in two respects. First, Plaintiffs' claims plainly would require the establishment of emissions standards. *See supra* at 34. Second, and in any event, federal statutes do not displace federal common law only when there is a direct conflict between judicial standards and statutory or regulatory standards. The question is simply whether Congress has spoken to the subject at issue, which Congress did in the CAA, as presently construed by the agency charged with construction of that statute in the first instance.

Plaintiffs also contend that the CAA is not sufficiently "comprehensive" to displace their claims because it does not provide them a damages remedy. (AOB 11.) But *Sea Clammers* makes clear that a federal statute can displace federal common law even when the statute lacks a damages remedy. *See* 453 U.S. at 21-22; *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (holding that despite absence of a "comprehensive maritime code," federal common law remedy was displaced because "[t]he Death on the High Seas Act … announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages"); *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982) (declining to create common law to

supplement a *non-comprehensive* federal congressional scheme, stating that doing so "would be no different from holding that the solution Congress chose is not adequate," which the court "cannot do"). Plaintiffs cite cases rejecting displacement of federal common law concerning admiralty, *see In re Exxon Valdez*, 270 F.3d 1215, 1231 (9th Cir. 2001), *aff'd in relevant part*, 128 S. Ct. 2605 (2008), and the federal government's contractual rights, *see County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1249 (9th Cir. 2009), but those are two areas in which federal common law regulation has long been the dominant tradition of authority. *See National Audubon*, 869 F.2d at 1203-04. The presumption favoring displacement has less force when the statute at issue would "invade … long-established familiar principles" of common law. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quotation omitted); *see In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1002 (9th Cir. 2008). But a nuisance action by non-state parties challenging worldwide carbon dioxide emissions and planetary climate change is neither "long-established" nor "familiar." *Sea Clammers*, 453 U.S. at 10 (federal common law nuisance claim for damages would go "considerably beyond" existing precedent).[28]

[28] For the same reason, Plaintiffs' reliance upon *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), is unavailing. The Court there acknowledged a preexisting federal common law right—the right of tribes to sue for unlawful conveyances of land—that had been firmly settled for more than 175 years and that

Finally, because the test for displacement asks only whether Congress has spoken to the issue, it is irrelevant whether EPA has, in fact, exercised its authority to regulate greenhouse gases or how it has chosen to do so. *Cf. Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002) (agency's decision not to regulate "would have as much [displacement] force as a decision to regulate"). But, in fact, the agency *has* been very actively exercising its asserted authority over greenhouse gases.[29] *See supra* at 12-14.

This Court has already recognized that the Clean Water Act displaces a federal common law nuisance theory because "a nuisance theory would enable a federal district judge to substitute a different balancing of interests from the one made by the agency to which Congress assigned the job in the [Clean Water Act's] NPDES permit system." *Exxon Valdez*, 270 F.3d at 1231. For the same reasons, EPA's recent set of greenhouse gas regulations covering mobile and stationary sources leaves no further room for the judicial development of alternative judicially crafted emissions standards.

Congress had reaffirmed through legislation establishing specific procedures for such suits. *See id.* at 235-36. By contrast, there has *never* been any federal common law private right to seek damages for greenhouse gas emissions.

[29] *AEP* concluded that, because EPA had not yet issued its Endangerment Rule or acted to regulate emissions, federal common law had not been displaced. 582 F.3d at 381. Even if that analysis had been correct when that case was decided, *see id.* at 378-81, EPA has now taken actions that make displacement of federal common law in the field of greenhouse gas emissions unmistakable. *See supra* at 12-14.

C. Plaintiffs Cannot Plead Legally Sufficient Causation

Plaintiffs' claims fail for the further reason that the allegations of the complaint make clear that Plaintiffs cannot show tort causation as a matter of law.

Causation is an "essential element" of any tort, PROSSER, *supra*, § 41, at 263, and the legal requirements of causation reflect the fundamental principle that "legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." *Id.* at 264; *see* REST. 2D § 431 cmt. *a*. Causation involves two components: "[W]hether the defendant's conduct was the 'cause in fact' of the injury; and, if so, whether as a matter of social policy the defendant should be held legally responsible for the injury." *Osborn v. Irwin Mem'l Blood Bank*, 5 Cal. App. 4th 234, 252 (1992); PROSSER, *supra*, § 42, at 272-73. Plaintiffs fail both prongs.

1. Plaintiffs Have Failed to Allege Cause in Fact

To establish cause-in-fact under any traditional formulation, a plaintiff must show either (1) that but for the defendant's conduct, the harm would not have occurred, or (2) where there are multiple causes, that the defendant's conduct was, by itself, sufficient to bring about the harm. *See*, *e.g.*, *Viner v. Sweet*, 30 Cal. 4th 1232, 1240-41 (2003); RESTATEMENT OF TORTS (THIRD) LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 26, 27 (2010) ("REST. 3D"). In other words, a defendant's act must be either a *necessary* or a *sufficient* cause of an injury.

Plaintiffs do not allege that either is true here. Plaintiffs nowhere suggest that, absent Defendants' emissions, global warming would not have happened, would come to a halt, or even would be mitigated. Nor can they allege that Defendants' emissions were themselves *sufficient* to have caused global warming in the absence of the other emissions across the planet over time. They do not even allege that Defendants' emissions were in any sense a *necessary* part of the accumulation of gases that allegedly gave rise to global warming. REST. 3D, § 27, cmt. *f*. To the contrary, Plaintiffs acknowledge that Defendants are only a few of the many billions of worldwide emitters of man-made greenhouse gases, and they allege that *all* greenhouse gas emissions—which includes commercial, industrial, automotive, agricultural, technological, and individual emissions—collectively cause global warming. *See supra* at 7-8. Under the allegations of the complaint, Defendants' emissions did no more than contribute to atmospheric changes in some unquantified, unspecified, and undefined way, and Plaintiffs concede in their brief that "many unnamed entities" apart from Defendants "*also* have contributed to global warming in varying degrees." (AOB 69.) That is not enough to satisfy the legal requirements of causation—a "contribution" to an event is not the same as a legal *cause* of the event under long-settled tort principles.

To escape the basic causation principles that preclude their claim here, Plaintiffs invoke a special common-law causation rule devised to address the

situation where multiple sources of pollution, each small enough to be harmless in itself, combine to cause damage to a stream or lake. (AOB 29-32.) That principle has no application here. In every case in which it was applied at common law, there was a *discrete* set of polluters together causing a specific nuisance in a *particular* location, where it is possible to identify all the polluters and hold them liable either directly or through contribution. *See, e.g.*, *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213, 218-19 (6th Cir. 1974) (allowing suit by residents near Detroit to proceed against three companies with seven plants emitting "noxious" pollutants).[30] In those unique circumstances, each individual contributor "is deemed to have caused the harm," and courts have allowed plaintiffs to "sue any entity that contributed to the commingled product that caused their injury." *In re MTBE Prods. Liab. Litig.*, 447 F. Supp. 2d 289, 301 (S.D.N.Y. 2006). Typically, all the contributors are named as defendants in such cases, but if

[30] *See also City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1270, 1297-98 (N.D. Okla. 2003) (suit by city of Tulsa against neighboring town and nearby poultry operations for causing eutrophication of two lakes from which Tulsa drew its water supply; the "separate acts" of the defendants "combin[ed] to cause" the harm); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 338, 343-44 (Tenn. 1976) (allowing third-party complaint by defendant against five other plants "in the Alton Park area" in action involving localized air pollution); *Landers v. East Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 732 (Tex. 1952) (two defendants each pumped salt water into plaintiff's lake, killing his fish); *Warren v. Parkhurst*, 92 N.Y.S. 725, 727 (N.Y. Sup. Ct. 1904) (twenty-six mill owners upstream from plaintiff discharging sewage into creek, individually causing only nominal damage but combining to cause plaintiff harm).

not, the named defendants still "can implead other responsible parties." *Id.* at 301-02. The fairness and effectiveness of joint liability depend crucially on the expectation that all responsible parties can be identified and subjected to actions for contribution. *See Landers*, 248 S.W.2d at 734.

Unlike the common law multiple polluter cases, this case does not involve a discrete number of identifiable emitters collectively responsible for pollution of a particular location.[31] Instead the responsible parties are, by Plaintiffs' own account, all human beings and entities engaged in man-made greenhouse-gas emitting activity anywhere on the planet over the last two centuries—including car and truck drivers, construction and farming vehicle operators, manufacturing plants, and foreign emitters of every kind. Nor do Plaintiffs cite standards by which some particular subset of those contributors could be identified and held collectively liable through contribution for all the alleged harm. There is only the

[31] The authorities cited by Plaintiffs confirm that joint liability is authorized only where the nuisance is isolated and has identifiable contributors. *See*, *e.g.*, REST. 2D § 840E cmts. *b* & *c* (using, as examples, pollution of a stream, flooding land, or filling the air with "smoke, smells or noise"); *id.* § 881 (similar); PROSSER, *supra*, § 52 at 354 (describing rule as applying "in cases of pollution, flooding of land, diversion of water, obstruction of a highway, or … a noise nuisance") (footnotes omitted). Indeed, the Restatement makes clear that it is concerned with *localized* nuisances, since its rule turns on the "character of the locality" in which the defendants' conduct and plaintiffs' harm occurs. REST. 2D § 840E & cmt. *e* ("the character of the locality is to be considered in determining whether the plaintiff's particular use and enjoyment of his land is well suited to it and the defendant's conduct is not suited to it, so that the interference is an unreasonable one").

set of contributors cherry-picked by Plaintiffs, ignoring all others contributing to the alleged harm—including those that emit much more greenhouse gases.

Plaintiffs' "contribution approach" to causation finds no support in *Massachusetts*. The statute at issue there—the CAA—expressly authorized EPA to regulate emissions that "contribute" to an injury, 549 U.S. at 523, and EPA itself has recognized that the "contribution" standard is *lower* than the traditional tort causation standard, 74 Fed. Reg. at 66506 ("The use of the term 'contribute' [in the CAA] clearly indicates a lower threshold than the sole or major cause.").

Nor does *Illinois v. Milwaukee*, 1973 U.S. Dist. LEXIS 15607, support Plaintiffs' approach. (AOB 32-33, 69.) That case involved pollution of one discrete location, and the defendant was the single "largest point discharger," *id.* at *20-*21; *see id.* at *22-*23 ("the most significant point source on the lake"), such that enjoining the defendant's conduct alone would prevent further degradation, *id.* at *25. Plaintiffs do not and could not allege that holding Defendants liable here would make any difference to global climate change.[32]

The CERCLA cases Plaintiffs cite are equally inapposite. Those cases

[32] Plaintiffs likewise argue that the gradual process of global warming is similar to the mercury pollution in *Wyandotte Chems. Corp.*, 401 U.S. 493, and acid rain in *Tennessee Copper*, 206 U.S. 230. (AOB 69.) But in *Tennessee Copper* the discharges at issue *themselves* caused the acid rain. And in *Wyandotte*, which involved geographically confined pollution, *see* note 12 *supra*, the Court still declined to exercise jurisdiction because of the case's complexities, 401 U.S. at 503-04, in part owing to the challenge of assessing relative culpability, *id.* at 504.

necessarily confine liability to pollution of a discrete area. Multiple parties may be liable for cleanup costs, but liability is premised on a direct relationship with the specific site, and thus involves some finite set of responsible entities, as the common law cases do.

There is, in short, no precedent for labeling every commercial actor on Earth a "contributor" to worldwide climate events, and then applying a "contribution approach" to causation to hold one, two, or three dozen select "contributors" wholly liable for the conduct of all humanity over hundreds of years.

2. Plaintiffs Fail to Allege Proximate Cause

The complaint also does not satisfy the requirements of proximate cause, which exists to screen out precisely the type of hopelessly attenuated, diffuse causal chain that Plaintiffs allege here. Plaintiffs simply cannot show that Defendants' emissions were "so significant and important a cause that [they] should be legally responsible." *Vincent ex rel. Staton v. Fairbanks Memorial Hosp.*, 862 P.2d 847, 851 (1993) (citation omitted); *see* PROSSER, *supra*, § 42, at 273 (because "both significance and importance turn upon conclusions in terms of legal policy," proximate cause "is primarily a problem of law," not fact). Under the rules of proximate cause, "'[i]f the force [the defendant] set in motion[] has become, so to speak, merged in the general forces that surround us … it can be followed no further. Any later combination of circumstances to which it may

contribute in some degree is too remote from the defendant to be chargeable to him.'" *Vincent*, 862 P.2d at 851 n.8 (citation omitted).

Plaintiffs cannot adequately plead proximate cause because, under the facts alleged, Defendants' emissions "merged in the general forces that surround us," making no more than some indeterminate contribution to the "combination of circumstances" that allegedly resulted in Plaintiffs' harm. *Vincent*, 862 P.2d at 851 n.8. Plaintiffs notably do not allege that Defendants' emissions made *any* difference in the changing pattern of the global climate. Instead they simply allege that Defendants have been large emitters in recent decades, tacitly conceding that even absent those emissions, the combined emissions from other man-made industrial, commercial, and agricultural sources over the centuries and around the globe would have sufficed to increase greenhouse gas concentrations and cause the same climate change the planet has already experienced. The attribution of Plaintiffs' injuries to Defendants' conduct could hardly be more capricious; Plaintiffs might just as well have targeted steel mills in Pennsylvania, concrete plants in Georgia, farmers in the San Joaquin Valley, or a defendant class of all U.S. car and truck owners. Because neither global warming itself, nor any measure of global warming, nor any particular consequence of global warming, can be attributed to Defendants' own emissions on the facts alleged, those facts fail to establish proximate causation as a matter of law.

CONCLUSION

The judgment of the district court should be affirmed.

DATE: June 30, 2010

Respectfully submitted,

O'MELVENY & MYERS LLP

By: */s/ Jonathan D. Hacker*
Jonathan D. Hacker
Attorneys for Defendant-Appellee
EXXON MOBIL CORPORATION

MUNGER, TOLLES & OLSON LLP

By: */s/ Daniel P. Collins*
Daniel P. Collins
Attorneys for Defendant-Appellee
SHELL OIL COMPANY*

KING & SPALDING LLP

By: */s/ Tracie J. Renfroe*
Tracie J. Renfroe
Attorneys for Defendants-Appellees
CHEVRON CORPORATION and
CHEVRON U.S.A. INC.

KIRKLAND & ELLIS LLP

By: */s/ Andrew B. Clubok*
Andrew B. Clubok
Attorneys for Defendant-Appellee
CONOCOPHILLIPS COMPANY

ARNOLD & PORTER LLP

By: */s/ Matthew Heartney*
Matthew Heartney
Attorneys for Defendants-Appellees BP
AMERICA INC., and BP PRODUCTS
NORTH AMERICA INC

.

* Pursuant to Ninth Cir. R. 25-5(e), the filing attorney attests that all other parties on whose behalf this brief is submitted concur in the filing's content.

STATEMENT OF RELATED CASES

The Defendants-Appellees listed above are not aware of any related cases that are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 18,406 words.

Dated: June 30, 2010

/s/ Daniel P. Collins
Daniel P. Collins

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2010, I electronically filed the foregoing "Answering Brief for Defendants-Appellees Shell Oil Company; Exxon Mobil Corporation; BP America, Inc.; BP Products North America, Inc.; Chevron Corporation; Chevron U.S.A., Inc.; and ConocoPhillips Corporation" with the Clerk of the Court for the United States Court of Appeals by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have today caused the foregoing document to be sent by Federal Express, to the following non-CM/ECF participants:

Christopher A. Seeger
Stephen A. Weiss
James A. O'Brien III
Seeger Weiss LLP
One William St.
New York, NY 10004

Terrell W. Oxford
Susman Godfrey, L.L.P.
901 Main Street, Ste. 5100
Dallas, TX 75202

Kamran Salour
Greenberg Traurig LLP
2450 Colorado Ave., Ste. 400E
Santa Monica, CA 90404

Paul E. Gutermann
Akin Gump Strauss Haer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Gary E. Mason
The Mason Law Firm
1225 19th St., NW, Ste. 500
Washington, D.C. 20036

Dennis J. Reich
Reich & Binstock
4625 San Felipe, Ste. 1000
Houston, TX 77027

Dated: June 30, 2010

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