

**No. 09-17490**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Native Village of Kivalina; City of Kivalina,  
*Plaintiffs-Appellants,*

v.

ExxonMobil Corporation; BP P.L.C.; BP America, Inc.; BP Products  
North America, Inc.; Chevron Corporation; Chevron U.S.A., Inc.; ConocoPhillips  
Corporation; Royal Dutch Shell PLC; Shell Oil Company; Peabody Energy  
Corporation; The AES Corporation; American Electric Power Company, Inc.;  
American Electric Power Service Corporation; Duke Energy Corporation;  
DTE Energy Company; Edison International; MidAmerican Energy Holdings  
Company; Pinnacle West Capital Corporation; The Southern Company;  
Dynergy Holdings, Inc.; Reliant Energy, Inc.; Xcel Energy Inc.,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Northern District of California  
The Honorable Sandra Brown Armstrong, United States District Judge  
Case No. 4:08-cv-01138-SBA

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**BRIEF OF DEFENDANTS-APPELLEES AMERICAN ELECTRIC POWER  
COMPANY, INC.; AMERICAN ELECTRIC POWER SERVICE CORP.;  
DTE ENERGY COMPANY; DUKE ENERGY CORP.; DYNEGY  
HOLDINGS, INC.; EDISON INTERNATIONAL; MIDAMERICAN  
ENERGY HOLDINGS COMPANY; PINNACLE WEST CAPITAL CORP.;  
RELIANT ENERGY, INC.; THE AES CORPORATION;  
THE SOUTHERN COMPANY; XCEL ENERGY INC.**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, Appellees American Electric Power Company, Inc., American Electric Power Service Corporation, DTE Energy Company, Duke Energy Corporation, Dynegy Holdings, Inc., Edison International, MidAmerican Energy Holdings Company, Pinnacle West Capital Corporation, Reliant Energy, Inc., Southern Company, The AES Corporation, and Xcel Energy Inc. file the following statement:

Defendant-Appellee AMERICAN ELECTRIC POWER COMPANY, INC. is a publicly traded company. There is no publicly traded company owning 10% or more of its stock.

Defendant-Appellee AMERICAN ELECTRIC POWER SERVICE CORPORATION is a wholly-owned subsidiary of American Electric Power Company, Inc.

Defendant-Appellee DTE ENERGY COMPANY has no parent corporation and no corporation owns 10% or more of its stock.

Defendant-Appellee DUKE ENERGY CORPORATION is a publicly traded company. There is no publicly traded company owning 10% or more of its stock.

Defendant-Appellee DYNEGY HOLDINGS INC. is a wholly owned subsidiary of Dynegy Inc., a publicly traded company. UBS AG, a publicly traded company (NYSE: UBS), owns approximately 11% of Dynegy Inc.'s stock.

Defendant-Appellee EDISON INTERNATIONAL is a publicly traded corporation that has no parent corporation. The following entity owns more than 10% of Edison International Stock: State Street Global Advisors (US).

Defendant-Appellee MIDAMERICAN ENERGY HOLDINGS COMPANY is a consolidated subsidiary of Berkshire Hathaway Inc., which owns more than 10% of MidAmerican's stock.

Defendant-Appellee PINNACLE WEST CAPITAL CORPORATION has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

Defendant-Appellee RELIANT ENERGY, INC., now known as RRI Energy, Inc., is a publicly held corporation. No publicly held corporation owns 10% or more of its stock.

Defendant-Appellee SOUTHERN COMPANY has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Defendant-Appellee THE AES CORPORATION has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Defendant-Appellee XCEL ENERGY INC. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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June 30, 2010

**TABLE OF CONTENTS**

	<b>Page</b>
CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF AUTHORITIES .....	vi
INTRODUCTION .....	1
JURISDICTION.....	3
STATEMENT OF THE CASE.....	4
A.    Plaintiffs’ Complaint And The District Court’s Decision To Dismiss. ....	4
B.    Executive And Legislative Activity .....	7
SUMMARY OF ARGUMENT .....	9
ARGUMENT .....	11
I.    PLAINTIFFS LACK STANDING BECAUSE THE INJURIES THEY ALLEGE ARE NOT FAIRLY TRACEABLE TO ANY DEFENDANT’S EMISSIONS.....	11
A.    The Alleged Chain Of Causation Between Each Defendant’s Emissions And Plaintiffs’ Injuries Fails As A Matter Of Law .....	13
1.    The Alleged Causation Chain Is Too Attenuated .....	14
2.    The Alleged Causation Chain Impermissibly Depends On Speculation Concerning The Independent Actions Of Third Parties .....	18
B.    Plaintiffs Cannot Establish Causation Under Their Alternative “Contribution” Theory .....	20
C.    The Standing Analysis In <i>Massachusetts v. EPA</i> Does Not Apply .....	27
II.   PLAINTIFFS’ CLAIMS PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS .....	31

III. THE COMPLAINT FAILS TO STATE VALID CLAIMS UNDER FEDERAL COMMON LAW.....	42
A. Federal Common Law Does Not Supply A Climate Change “Nuisance” Cause Of Action.....	42
B. Any Federal Common Law Climate Change “Nuisance” Cause Of Action Has Been Displaced .....	46
C. Plaintiffs Have Failed To Plead Facts Stating A Cause Of Action .....	50
1. Plaintiffs Cannot State Valid Nuisance Claims .....	50
2. Plaintiffs Cannot State Valid Conspiracy And “Concert-Of-Action” Claims .....	53
CONCLUSION .....	56
STATEMENT OF RELATED CASES .....	58
CERTIFICATE OF COMPLIANCE.....	59
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>CASES</b>	
<i>Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov’t</i> , 101 F.3d 1286 (9th Cir. 1996), <i>rev’d on other grounds</i> , 522 U.S. 520 (1998).....	29
<i>Alaska v. Native Vill. of Venetie Tribal Gov’t</i> , 522 U.S. 520 (1998).....	29
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	43, 44, 45
<i>Allen v. Wright</i> , 468 U.S. 737 (1984).....	14, 15, 16, 18, 23
<i>Alperin v. Vatican Bank</i> , 410 F.3d 532 (9th Cir. 2005) .....	32
<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009).....	18, 19
<i>Ass’n of Flight Attendants-CWA, AFL-CIO v. U.S. Dep’t of Transp.</i> , 564 F.3d 462 (D.C. Cir. 2009).....	14
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	3, 10, 31
<i>Barasich v. Columbia Gulf Transmission Co.</i> , 467 F. Supp. 2d 676 (E.D. La. 2006).....	40
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	18, 19
<i>Benefiel v. Exxon Corp.</i> , 959 F.2d 805 (9th Cir. 1992) .....	53
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	12, 19

*Bishop v. Bartlett*,  
575 F.3d 419 (4th Cir. 2009) .....14

*Boim v. Holy Land Found. for Relief & Dev.*,  
549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).....26

*Boone v. Redev. Agency*,  
841 F.2d 886 (9th Cir. 1988) .....54

*California v. Gen. Motors Corp.*,  
No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*,  
No. 07-16908 (9th Cir. June 24, 2009) .....4

*Canyon County v. Syngenta Seeds, Inc.*,  
519 F.3d 969 (9th Cir.), *cert. denied*, 129 S. Ct. 458 (2008).....27

*Chem-Nuclear Sys., Inc. v. Bush*,  
292 F.3d 254 (D.C. Cir. 2002) .....26

*Chi. & S. Air Lines v. Waterman S.S. Corp.*,  
333 U.S. 103 (1948).....32

*Cipollone v. Liggett Group, Inc.*,  
505 U.S. 504 (1992).....36

*City of Chi. v. Commonwealth Edison Co.*,  
321 N.E.2d 412 (Ill. App. Ct. 1974) .....33

*Clegg v. Cult Awareness Network*,  
18 F.3d 752 (9th Cir. 1994) .....19

*Comer v. Murphy Oil USA*,  
No. 05-436 (S.D. Miss. Aug. 30, 2007), *rev'd*,  
585 F.3d 855 (5th Cir. 2009), *vacated on grant of reh'g en banc*,  
598 F.3d 208 (5th Cir. 2010), *appeal dismissed*,  
No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010).....4, 6

*Connecticut v. Am. Elec. Power Co.*,  
406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*,  
582 F.3d 309 (2d Cir. 2009).....*passim*

*Corrie v. Caterpillar, Inc.*,  
503 F.3d 974 (9th Cir. 2007) .....31, 32

*County of Oneida v. Oneida Indian Nation*,  
470 U.S. 226 (1985).....49

*County of Westchester v. Town of Greenwich*,  
76 F.3d 42 (2d Cir. 1996).....33

*Covington v. Jefferson County*,  
358 F.3d 626 (9th Cir. 2004) .....24

*Crest Chevrolet-Oldsmobile-Cadillac, Inc v. Willemsen*,  
384 N.W.2d 692 (Wis. 1986).....38

*Ctr. for Biological Diversity v. Dep’t of Interior*,  
563 F.3d 466 (D.C. Cir. 2009) .....30

*Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*,  
438 U.S. 59 (1978).....22, 26

*Erie R.R. v. Tompkins*,  
304 U.S. 64 (1938).....42

*In re Exxon Valdez*,  
270 F.3d 1215 (9th Cir. 2001) .....49

*Exxon Shipping Co. v. Baker*,  
128 S. Ct. at 2605 (2008) .....49

*Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*,  
95 F.3d 358 (5th Cir. 1996) .....12, 26

*Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,  
204 F.3d 149 (4th Cir. 2000) .....12, 22, 27

*Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*,  
528 U.S. 167 (2000).....27

*Georgia v. Tenn. Copper Co.*,  
206 U.S. 230 (1907).....40

*Glenn K. Jackson Inc. v. Roe*,  
273 F.3d 1192 (9th Cir. 2001) .....52

*Gorran v. Atkins Nutritionals, Inc.*,  
 464 F. Supp. 2d 315 (S.D.N.Y. 2006), *aff'd*,  
 279 F. App'x 40 (2d Cir. 2008) .....55

*In re Harbin*,  
 486 F.3d 510 (9th Cir. 2007) .....42

*Hustler Magazine v. Falwell*,  
 485 U.S. 46 (1988).....55

*Illinois v. City of Milwaukee*,  
 406 U.S. 91 (1972).....32, 45

*Illinois v. City of Milwaukee*,  
 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds*,  
 451 U.S. 304 (1981).....40

*Illinois v. Outboard Marine Corp.*,  
 680 F.2d 473 (7th Cir. 1982) .....48, 49

*INS v. Chadha*,  
 462 U.S. 919 (1983).....31

*Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*,  
 500 U.S. 72 (1991).....12

*Japan Whaling Ass'n v. Am. Cetacean Soc'y*,  
 478 U.S. 221 (1986).....10

*Koohi v. United States*,  
 976 F.2d 1328 (9th Cir. 1992) .....32

*Kottle v. Nw. Kidney Ctrs.*,  
 146 F.3d 1056 (9th Cir. 1998) .....54

*Lane v. Halliburton*,  
 529 F.3d 548 (5th Cir. 2008) .....32

*Lujan v. Defenders of Wildlife*,  
 504 U.S. 555 (1992).....*passim*

*Manistee Town Ctr. v. City of Glendale*,  
 227 F.3d 1090 (9th Cir. 2000) .....54

*Marina Point Dev. Assocs. v. United States*, 54  
 364 F. Supp. 2d 1144 (C.D. Cal. 2005) .....54

*Massachusetts v. EPA*,  
 549 U.S. 497 (2007) .....*passim*

*Mattoon v. City of Pittsfield*,  
 980 F.2d 1 (1st Cir. 1992) .....49

*In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*,  
 438 F. Supp. 2d 291 (S.D.N.Y. 2006) .....40

*Michie v. Great Lakes Steel Div.*,  
 495 F.2d 213 (6th Cir. 1974) .....26

*Middlesex County Sewage Auth. v. Nat’l Sea Clammers Ass’n*,  
 453 U.S. 1 (1981) .....46, 48

*Milwaukee v. Illinois*,  
 451 U.S. 304 (1981) .....46, 47, 48, 50

*Missouri v. Illinois*,  
 200 U.S. 496 (1906) .....40

*Nat’l Audubon Soc’y v. Dep’t of Water*,  
 869 F.2d 1196 (9th Cir. 1988) .....*passim*

*Natural Res. Def. Council v. Sw. Marine, Inc.*,  
 236 F.3d 985 (9th Cir. 2000) .....12, 21, 22, 25

*New Jersey v. City of New York*,  
 283 U.S. 473 (1931) .....40

*Nixon v. United States*,  
 506 U.S. 224 (1993) .....39

*North Dakota v. Minnesota*,  
 263 U.S. 365 (1923) .....45

*Nw. Env’tl. Def. Ctr. v. Owens Corning Corp.*,  
 434 F. Supp. 2d 957 (D. Or. 2006) .....25

*Ohio v. Wyandotte Chems. Corp.*,  
401 U.S. 493 (1971).....32, 40

*Pagán v. Calderón*,  
448 F.3d 16 (1st Cir. 2006).....12, 28

*People ex rel. Gallo v. Acuna*,  
14 Cal. 4th 1090 (1997) .....33

*PIRG v. Powell Duffryn Terminals, Inc.*,  
913 F.2d 64 (3d Cir. 1990).....22, 23, 24

*Pritikin v. Dep’t of Energy*,  
254 F.3d 791 (9th Cir. 2001) .....54

*Schneider v. Kissinger*,  
412 F.3d 190 (D.C. Cir. 2005) .....32

*Sierra Club v. Cedar Point Oil Co.*,  
73 F.3d 546 (5th Cir. 1996) .....21, 23, 25, 26

*Simon v. E. Ky. Welfare Rights Org.*,  
426 U.S. 26 (1976).....12, 13, 18

*Sosa v. Alvarez-Machain*,  
542 U.S. 692 (2004).....46

*Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*,  
410 F.3d 964 (7th Cir. 2005) .....12

*Tex. Indus., Inc. v. Radcliff Materials, Inc.*,  
451 U.S. 630 (1981).....35, 42, 46

*United States v. Students Challenging Regulatory Agency Procedures*,  
412 U.S. 669 (1973).....15, 16, 17, 18

*Vieth v. Jubelirer*,  
541 U.S. 267 (2004).....31, 32, 34

*Warth v. Seldin*,  
422 U.S. 490 (1975).....23

*Whitmore v. Arkansas*,  
495 U.S. 149 (1990).....13, 14, 15, 16, 27

*Woodrum v. Woodward County*,  
866 F.2d 1121 (9th Cir. 1989) .....53

**STATUTES AND REGULATIONS**

Pub. L. No. 88-206, 77 Stat. 392 (1963).....7

Pub. L. No. 91-604, 84 Stat. 1676 (1970).....7

Pub. L. No. 95-95, 91 Stat. 685 (1977).....7

Pub. L. No. 101-549, 104 Stat. 2399 (1990).....7

42 U.S.C. § 7411 .....47

42 U.S.C. § 7521(a)(1).....41

42 U.S.C. § 7607(b)(1).....30

Endangerment and Cause or Contribute Findings for Greenhouse Gases  
Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15,  
2009) .....8

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate  
Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010).....8

Prevention of Significant Deterioration and Title V Greenhouse Gas  
Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010) .....8

**RULES**

Fed. R. Civ. P. 13(h) .....40

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**TREATY**

Cession of the Russian Possessions in North America, U.S. – Russ., Mar. 30,  
1867, 15 Stat. 539 .....29

**LEGISLATIVE HISTORY**

American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. ....8

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2 Dan B. Dobbs, *The Law of Torts* (2001).....53

15 James W. Moore et al., *Moore’s Federal Practice* (3d ed. 2010) .....21

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Warming, and the Political Question Doctrine* (Jan. 2010) .....39, 40

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(2005) .....51

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Times, Jan. 15, 2010 .....9

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Times, Apr. 5, 2010 .....9

## INTRODUCTION

Contrary to plaintiffs' assertions, this is anything but a "textbook" nuisance case. Pl. Br. 22. Of the billions of past and current sources of carbon dioxide and other greenhouse gases, the complaint singles out two dozen companies that it alleges should be held "jointly and severally liable for ... the nuisance of global warming," based on their "contributions," and responsible for all "future monetary expenses and damages as may be incurred by Plaintiffs in connection with ... global warming." Excerpts of Record (E.R.) 67. These alleged damages include the expense of relocating the Village of Kivalina away from the Alaskan coastline—at an estimated cost of up to \$400 million. *Id.* at 40-41 (¶¶ 1, 3-4).

Under plaintiffs' theory of federal common law liability, any of the billions of enterprises on earth could sue any other enterprise for the alleged effects of global warming, because virtually all entities both emit greenhouse gases and can claim to be affected by climate change. Any weather-related event in the world—floods, droughts, hurricanes, tornadoes, excessive heat or cold, or any other climatological or meteorological occurrence—could provide the basis for a lawsuit, because an injured party could allege that greenhouse gas emissions and climate change contributed to that event.

Resolution of these claims would be neither guided nor limited by statute or regulation but would depend, instead, on the individual judge or jury's

determination of what level of emissions by a particular defendant is “reasonable.” To resolve this issue, the court would first need to somehow determine a “reasonable” level of global greenhouse gas emissions, considering both man-made and natural contributions to atmospheric levels, and would then have to weigh myriad competing policy considerations—economic, foreign policy, and environmental, among others—to decide which nations, sectors, and specific companies should have reduced their emissions, and by what amounts and at what costs, in order to have attained that “reasonable” global emissions level.

To try to disguise the intractable standing and justiciability problems presented by their claims, plaintiffs characterize their “nuisance” cause of action as exceedingly straightforward, arguing that they need only allege, and the court need only determine, that the defendant “contributed” to a “severe” harm—without any need to assess the “reasonableness” of any defendant’s conduct or balance relevant interests. Pl. Br. 23-35. The common law of nuisance is not so mechanical, however. “Reasonableness” is the central issue in any nuisance action, as the authorities cited by plaintiffs recognize, and that standard by its nature demands a balancing of interests. *E.g.*, Restatement (Second) of Torts § 821B(1) (1979). In a case such as this, where the relevant considerations literally span the globe and implicate billions of independent actors over the course of centuries, there is simply no way a judge or jury could “trace” the alleged injuries resulting from

climate change to these particular defendants or decide whether their emissions, as opposed to those of others, were “unreasonable.”

At least two constitutional doctrines—standing and political question—compel dismissal of plaintiffs’ claims. The standing doctrine prohibits adjudication of cases in which the alleged injury cannot be fairly traced to the alleged wrongful conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The political question doctrine prohibits the judiciary from using its authority to resolve far-reaching socioeconomic matters that lack judicially manageable standards or require an initial policy determination. *Baker v. Carr*, 369 U.S. 186, 217-19 (1962). Additionally, plaintiffs do not and cannot state a valid claim: in this Circuit, federal common law is available in only very limited circumstances, none of which is presented here. *Nat’l Audubon Soc’y v. Dep’t of Water*, 869 F.2d 1196, 1201 (9th Cir. 1988). Moreover, even if such a cause of action could be implied, plaintiffs cannot plead the facts that would be necessary to establish a right to relief. For these reasons, the district court’s judgment should be affirmed.

### **JURISDICTION**

Whether the district court could exercise jurisdiction over this case under Article III of the Constitution is in dispute. Statutory subject matter jurisdiction was otherwise proper under 28 U.S.C. § 1331 and § 1367. The district court

entered its judgment on October 15, 2009, dismissing all of plaintiffs' claims. Plaintiffs filed a timely notice of appeal on November 5, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

### **STATEMENT OF THE CASE**

This is one of four “climate change” tort suits brought in the federal courts, notwithstanding existing federal legislation and regulation in this field and ongoing legislative and executive branch actions to address issues associated with greenhouse gas emissions and climate change. In each of these cases the district court has dismissed the claims as presenting nonjusticiable political questions, and in some cases for lack of standing as well.<sup>1</sup>

#### **A. Plaintiffs' Complaint And The District Court's Decision To Dismiss.**

The complaint asserts that 24 oil, coal, and utility companies are liable under federal and state common law theories of “nuisance,” “concert of action,” and “conspiracy” for costs associated with the future risks of climate change—in particular, for the costs of relocating the Village of Kivalina away from the coastline in response to risks of melting sea ice and erosion alleged to result from

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<sup>1</sup> E.R. 13-14, 20; *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009); *Comer v. Murphy Oil USA*, No. 05-436 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009).

global warming. E.R. 40-44 (¶¶ 1, 4, 12-17). Plaintiffs claim that these defendants emit “large quantities” of greenhouse gases, which combine in the atmosphere with other emissions released over centuries from billions of sources around the globe, which increase the amount of solar energy trapped in the atmosphere, which contributes to a warming of the Earth’s climate, which then warms ocean waters, which causes sea ice to melt earlier or form later in the year, and which in turn leaves their village more vulnerable to waves, storm surges, and erosion, placing it in “imminent[.]” danger of “permanent destruction.” *Id.* at 40-41, 70-72, 102 (¶¶ 3-4, 124-131, 254). The complaint also alleges that some defendants conspired “to mislead the public about the science of global warming.” *Id.* at 86, 98, 101 (¶¶ 189-190, 240, 248).<sup>2</sup>

The district court dismissed the claims as presenting non-justiciable political questions and for lack of standing. Resolution of plaintiffs’ claims, the district court held, would require it “to make a policy decision about *who* should bear the cost of global warming” among the billions of emitters of greenhouse gases—all of whom are claimed to “contribute” on some level to climate change—without “judicially discoverable [or] manageable standards.” *Id.* at 13-14 (emphasis in original). As to standing, the district court concluded that, “[i]n view of the

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<sup>2</sup> This claim is asserted against only ExxonMobil Corp., American Electric Power Co., BP America, Inc., Chevron Corp., ConocoPhillips Co., Duke Energy Corp., Peabody Energy Corp., and Southern Company. E.R. 86 (¶ 189).

Plaintiffs' allegations as to the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time," it is impossible to "trac[e] any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." *Id.* at 20. It noted that the "presumption" of causation that has sometimes been applied in Clean Water Act cases, when the challenged discharge exceeded limits set by federal statute, could not apply here because "there are no federal standards limiting the discharge of greenhouse gases." *Id.* at 19.

The district court considered and rejected the Second Circuit's reasoning in *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), *petition for writ of cert. due August 2, 2010* (U.S.), the only decision to have approved claims seeking tort relief for the alleged effects of global warming. E.R. 12-13 & n.3.<sup>3</sup> The Second Circuit based its holding on century-old nuisance cases that, the district court explained, were "far different" from this case in that "they [all] involved a discrete number of 'polluters' that were identified as causing a specific injury to a specific area." *Id.* (citing *Missouri v. Illinois*, 180 U.S. 208 (1901); *Missouri v. Illinois*, 200 U.S. 496 (1906)). The claims in this case, by contrast, are

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<sup>3</sup> The Fifth Circuit panel in *Comer* reversed the district court, 585 F.3d 855 (5th Cir. 2009), but that opinion was vacated by the grant of rehearing en banc, *see* 598 F.3d 208, and the appeal was later dismissed for lack of a quorum, leaving the district court's decision (dismissing the lawsuit) to stand, No. 07-60756, 2010 WL 2136658.

“based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere.*” *Id.* (emphasis in original). “[N]either Plaintiffs nor [the Second Circuit in *Connecticut*],” the district court concluded, “[has] offer[ed] any guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims at issue.” *Id.*

### **B. Executive And Legislative Activity.**

Plaintiffs pursue their common law claims against the backdrop of existing and expanding legislation and federal regulation. The Clean Air Act (CAA), passed by Congress in 1963 and amended several times thereafter,<sup>4</sup> created a “comprehensive” federal structure to address air pollution in the United States. *Audubon*, 869 F.2d at 1201. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that greenhouse gases, including carbon dioxide, fit within the broad definition of “air pollutant” under the CAA, *id.* at 528-29 & n.26 (quoting 42 U.S.C. § 7602(g)), and directed EPA to address a rulemaking petition seeking a determination that greenhouse gas emissions should be regulated under the Act, *id.* at 529-35 (citing 42 U.S.C. § 7521(a)(1)).

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<sup>4</sup> Pub. L. No. 88-206, 77 Stat. 392 (1963); Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2399 (1990).

In December 2009, in response to *Massachusetts*, EPA formally found that emissions of carbon dioxide and other greenhouse gases from light-duty motor vehicles should be regulated under the CAA. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009). It then issued emissions standards for motor vehicles, *see* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010), and rules addressing greenhouse gas emissions by “stationary sources,” Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010). These rules establish the contours of a permitting program that will require certain stationary facilities emitting threshold quantities of greenhouse gases, including those in source categories that encompass facilities operated by defendants, to secure a permit from EPA or an approved local regulatory authority and meet defined prerequisites such as emissions limits. *Id.* EPA will consider extending the program to additional sources, with lower emissions levels, in future years. *Id.*

The House of Representatives last year passed comprehensive climate legislation, including an economy-wide cap-and-trade program and separate renewable energy standards for electricity suppliers, *see* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., and similar legislation may be

considered by the Senate, *see* John Harwood, *Drilling Plan May Buoy Efforts on Energy Policy*, N.Y. Times, Apr. 5, 2010, at A10. In addition, the President and other world leaders gathered in Copenhagen last year with the express goal of setting international limits on greenhouse gas emissions, and diplomatic discussions concerning potential limits are continuing. John M. Broder, *U.S. Official Says Talks on Emissions Show Promise*, N.Y. Times, Jan. 15, 2010, at A8.

### **SUMMARY OF ARGUMENT**

Federal courts may exercise jurisdiction consistent with Article III of the Constitution only where the alleged injury is “fairly traceable” to conduct of the defendant. *E.g.*, *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Neither global climate change nor the risks alleged by these plaintiffs can be attributed to any individual defendant or its greenhouse gas emissions; rather, under plaintiffs’ theory, climate change is caused by greenhouse gas emissions from virtually every enterprise on the planet over centuries. *See* E.R. 70-72 (¶¶ 123, 125, 127, 130-132). As such, even accepting plaintiffs’ allegations, it is impossible to determine whether or how the allegedly excessive emissions from any defendant has affected the global climate, much less whether or how they led to coastal erosion in Kivalina. Without this necessary link, plaintiffs lack standing. *Infra* Part I.

Furthermore, plaintiffs' claims are not justiciable because there are no "judicially discoverable and manageable standards" by which a court could adjudicate them and because resolving them would require an "initial policy determination of a kind clearly for non-judicial discretion." *See, e.g., Baker*, 369 U.S. at 217-19. Deciding a reasonable level of such emissions (both worldwide and for each defendant), and determining which, if any, sectors of the U.S. and foreign economies should pay for alleged global warming-related harms is a political judgment that "revolve[s] around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). These are not judgments for courts to make.

Unable to offer a rejoinder to these points, plaintiffs instead argue that, because this is styled as a tort case, traditional tort standards can guide a court's decision-making. Pl. Br. 47-55. But the fact that a complaint sounds claims in tort is irrelevant to whether it is barred by the political question doctrine. The "textbook" tort cases cited by plaintiffs involve discrete harms and causes that a judge or jury could effectively assess and balance without resolving broad issues of societal policy. *See id.* In contrast, the injuries in this case were allegedly caused by the collective actions of billions of entities worldwide over centuries that, according to plaintiffs, contributed to global warming. These claims cannot be

adjudicated without deciding broad socioeconomic policy issues affecting national and international interests. *Infra* Part II.

The claims also fail because plaintiffs cannot state a valid claim for relief. Under the law of this Circuit, federal common law cannot be expanded to support the novel cause of action they assert. *Audubon*, 869 F.2d at 1201. This is particularly so because there already exists comprehensive legislation—the Clean Air Act—that addresses the same subject matter and thus displaces federal common law. To allow these claims would authorize a parallel regime in which courts would improperly attempt to apply general tort principles to issues Congress already has assigned to EPA. And, even if a claim could be recognized under federal common law, plaintiffs do not plead the facts that would be necessary to show a right to relief. *Infra* Part III.

## ARGUMENT

### **I. PLAINTIFFS LACK STANDING BECAUSE THE INJURIES THEY ALLEGE ARE NOT FAIRLY TRACEABLE TO ANY DEFENDANT’S EMISSIONS.**

One element of the “irreducible constitutional minimum of standing” is a “causal connection” between the plaintiff’s injury and the defendant’s conduct. *Lujan*, 504 U.S. at 560-61. The plaintiff must plead, and eventually prove, that his or her injury is “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.”

*Bennett v. Spear*, 520 U.S. 154, 167 (1997); *see also Lujan*, 504 U.S. at 560-61 (citing *Simon*, 426 U.S. at 41-42). In other words, the plaintiff must establish a link—a “genuine nexus”—between his or her injury and the defendant’s conduct. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc); *accord Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 994-95 (9th Cir. 2000); *see also Simon*, 426 U.S. at 42-43; *Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 974 (7th Cir. 2005); *Friends of the Earth, Inc. v. Crown Cent. Petrol. Corp.*, 95 F.3d 358, 361 (5th Cir. 1996).

“The standing inquiry is both plaintiff-specific and claim-specific,” *Pagán v. Calderón*, 448 F.3d 16, 26 (1st Cir. 2006), and must be “gauged by the specific common-law, statutory or constitutional claims that a party presents,” *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Thus, plaintiffs must plead facts that, if true, would be sufficient to show that their alleged damages are causally connected to each defendant’s respective emissions.

That causal connection has not been alleged here. Instead, plaintiffs rest their case on the novel premise that a party has standing to proceed against any defendant that emitted a substance that is alleged to have “contributed” to the asserted harm, regardless of how remote the injury from the defendant’s conduct and notwithstanding the acknowledged influence of other independent factors.

This extraordinary position finds no support in the case law of the Supreme Court or this Court and ignores the baseline requirement of an *actual*—not merely “speculative”—link between the injury and conduct at issue. *Simon*, 426 U.S. at 42-43. It also relies on a theoretical chain of causation that, in terms of its attenuated nature, sheer number of necessary (and speculative) links, and reliance on the independent actions of parties not before the court, extends far beyond that which the Supreme Court has previously defined as “the very outer limit” of the constitutional bounds of standing doctrine. *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990).

**A. The Alleged Chain Of Causation Between Each Defendant’s Emissions And Plaintiffs’ Injuries Fails As A Matter Of Law.**

The district court properly held that plaintiffs’ “theory of causation” is far too “tenuous[]” to support standing, E.R. 22, because the causation chain they posit fails to draw the constitutionally required “causal connection” between defendants’ emissions and plaintiffs’ injuries. The alleged chain includes at least the following links:

1. defendants’ operations emit carbon dioxide and other greenhouse gases;
2. those emissions “mix in the atmosphere” and “merge[] with the accumulation of emissions in California and in the world”;
3. these accumulated emissions—a large portion of which were emitted decades and even centuries ago—persist and trap heat;

4. over some unknown period of time, the pool of trapped heat raised the temperature of the planet's atmosphere;
5. increased atmospheric temperature has raised ocean temperatures and causes land-fast sea ice to form later or melt earlier;
6. the loss of sea ice has left Kivalina's coast more vulnerable to intervening storm surges and erosion; and
7. the resulting damage has created an unacceptable risk of flooding, which renders the island unsafe.

*Id.* at 40-42, 70-72, 84-85, 102 (¶¶ 3, 10, 123-131, 185, 254).

### **1. The Alleged Causation Chain Is Too Attenuated.**

Courts consistently have dismissed claims premised on a chain of causation that is “too attenuated.” *Whitmore*, 495 U.S. at 159; *see also, e.g., Bishop v. Bartlett*, 575 F.3d 419, 425-26 (4th Cir. 2009); *Ass'n of Flight Attendants-CWA, AFL-CIO v. U.S. Dep't of Transp.*, 564 F.3d 462, 464-69 (D.C. Cir. 2009). For example, in *Allen v. Wright*, 468 U.S. 737 (1984), the Supreme Court held that the parents of minority schoolchildren lacked standing to challenge tax exemptions granted to racially segregated private schools based on the claim that those exemptions encouraged other parents to transfer their children to private schools. *Id.* at 753, 755-56, 759. The Court found no standing because “[t]he links in the [alleged] chain of causation ... are far too weak” to conclude that the exemptions contributed directly to problems in public-school integration and because under

plaintiffs' theory "standing would extend nationwide to all members of the particular racial groups [alleged to have been discriminated] against." *Id.*

The "most attenuated" chain of causation the Supreme Court has ever permitted, and which the Court has since said "surely went to the very outer limit" of standing doctrine, was in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) ("*SCRAP*"). *Whitmore*, 495 U.S. at 158-59; *see also Massachusetts*, 549 U.S. at 548 & n.2 (Roberts, C.J., dissenting) (noting that *SCRAP* "has not been followed" because of the "*attenuated* nature" of its theory) (emphasis in original). The plaintiffs in *SCRAP*, environmental groups that asserted an interest in the use of national parks, claimed that they would be harmed by a proposed rail freight surcharge because that surcharge would "cause increased use of nonrecyclable commodities," which would in turn result in more "resources [to] be taken from [national parks]" and "more refuse [to] be discarded" in the parks. 412 U.S. at 687-89. The Court recognized that this connection was "far more attenuated" than those it had approved previously, *id.*, and found standing only because "the string of occurrences alleged [to result in the asserted harm] would happen *immediately* [following the challenged conduct]," *Whitmore*, 495 U.S. at 159 (emphasis added), and because the causation chain served to "*distinguish*[] the[ plaintiffs] from other citizens" who might otherwise bring

claims against the agency for the surcharge, *SCRAP*, 412 U.S. at 689 (emphasis added).

The causation chain alleged in the present case goes far beyond even the “outer limit” set by *SCRAP*. First, even accepting plaintiffs’ allegations for these purposes, the claimed injury does not by any means occur “immediately” upon defendants’ emissions. *Whitmore*, 495 U.S. at 159 (characterizing *SCRAP*’s holding as dependent upon the plaintiff’s allegation, “even if incorrect,” that the claimed injury would happen “imminently” if the challenged decision went into effect, and finding no standing because the plaintiff in *Whitmore* “[did] not make—and could not responsibly make—a similar claim of immediate harm”). To the contrary, according to the complaint, the chain of events that will lead to plaintiffs’ injury started centuries ago when greenhouse gases emitted by independent actors and natural processes began collecting in the atmosphere.<sup>5</sup>

Equally fundamental, the causation chain in this case, like that in *Allen*, fails to “distinguish” plaintiffs from other potential claimants. 468 U.S. at 755-56; *see*

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<sup>5</sup> In contending that the highly attenuated nature of the temporal link between defendants’ conduct and plaintiffs’ future injuries is irrelevant, plaintiffs rely on an unpublished district court ruling that pre-dated *Whitmore* and was vacated on appeal. Pl. Br. 69 (citing *Illinois v. Milwaukee*, No. 72-1253, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), *aff’d in part and rev’d in part*, 599 F.2d 151 (7th Cir. 1979), *vacated*, 451 U.S. 304 (1981)). That case in any event involved the direct discharge of sewage that caused not only long-term environmental damage but also immediate adverse health effects, and the claim required nothing like the attenuated causal chain alleged here.

*also SCRAP*, 412 U.S. at 689. The complaint asserts that defendants are liable for the alleged risks to Kivalina because those risks are attributable to global climate change; however, the same logic would mean that defendants are liable, at least as contributors, for *any* alleged effects of global climate change. These effects, according to the complaint, encompass nearly *every* climatological and meteorological occurrence on the planet, including (among others) “increased storm damage,” “increase[d] ... frequency of extreme events [such as heat waves and storms],” “retreat of mountain glaciers throughout the world,” “shifts of plant and animal ranges and decline of animal and plant populations,” “disrupt[ion of] transportation ... [and] infrastructure,” and additional “major economic and cultural impacts.” E.R. 40-41, 74-75, 83-84 (¶¶ 4, 150, 182, 184). And, since virtually all enterprises and individuals worldwide both emit carbon dioxide and suffer these alleged effects of climate change, all of them arguably could sue and be sued for injuries on the same theory used by plaintiffs here.

Put differently, taking plaintiffs’ alleged chain of causation to its logical conclusion, *any* entity on the planet could sue *any* other entity on the planet for *any* injury that could be tied to *any* natural force allegedly affected by global climate change. Responsibility for what would traditionally have been called “acts of God” could now be imposed on any entity in the world.

This simply cannot be the rule. A central purpose of standing doctrine is to limit the number of potential plaintiffs and potential defendants for any given claim to those with a distinct interest in the subject matter at issue. *SCRAP*, 412 U.S. at 689; *see also Allen*, 468 U.S. at 755-56. The theory advanced by plaintiffs accomplishes precisely the opposite: it allows suits of each against all, for any injury resulting from virtually any climate-related natural event. This extraordinary result is unsupported by prior standing decisions of this or any Court.

**2. The Alleged Causation Chain Impermissibly Depends On Speculation Concerning The Independent Actions Of Third Parties.**

Allegations in support of standing “must be something more than an ingenious academic exercise in the conceivable.” *SCRAP*, 412 U.S. at 688. Beyond guesswork as to the possible cause-and-effect relationships that led to the plaintiff’s injury, the complaint must provide facts that make it at least “plausible”—*i.e.*, “more likely” than not—that the defendant’s conduct resulted in the alleged harm. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-51 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007); *Simon*, 426 U.S. at 42-43. Allegations that merely state legal conclusions should not be accepted unless supported by *factual* assertions that show that the claims are more than merely “conceivable.” *Iqbal*, 129 S. Ct. at 1949-50 (“Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line

between possibility and plausibility of entitlement to relief.”) (quoting *Twombly*, 550 U.S. at 557).

The complaint here sets forth conclusory allegations concerning global warming, defendants’ emissions, and plaintiffs’ alleged injuries, E.R. 70-85 (¶¶ 123-188), as well as “formulaic recitation[s],” *Twombly*, 550 U.S. at 555, that defendants’ emissions “are a direct and proximate contributing cause” of those injuries, E.R. 102 (¶ 251). But it never asserts *facts* that plausibly could explain how any particular defendant’s emissions, as opposed to other emissions from the billions of independent actors not before the court or natural sources over centuries, caused plaintiffs’ injuries. *See Iqbal*, 129 S. Ct. at 1949-50 (“A claim has facial plausibility when the plaintiff pleads *factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”) (emphasis added); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (bare “legal conclusions” cannot establish this Court’s jurisdiction).

Moreover, the facts that plaintiffs do allege establish that their asserted injuries are not “fairly traceable to the challenged action of the defendant[s],” but are instead “the result of the independent action[s] of ... third part[ies] not before the court.” *Bennett*, 520 U.S. at 167; *see also Lujan*, 504 U.S. at 560-61 (citing *Simon*, 426 U.S. at 41-42). Plaintiffs assert that a “large fraction of carbon dioxide

emissions persist[s] in the atmosphere for several centuries,” that nearly two-thirds of the atmospheric increase in this gas over the past three centuries resulted from emissions dating from “the dawn of the industrial revolution in the 18th century,” and that those emissions have come from billions of sources worldwide. E.R. 70 (¶¶ 124-126). And plaintiffs admit that specific harms cannot be traced to defendants’ emissions, because those emissions “rapidly mix in the atmosphere” and “inevitably merge[] with the accumulation of emissions in California and in the world.” *Id.* at 42, 102 (¶¶ 10, 254). Even construing the complaint’s allegations most favorably to plaintiffs, “it is not plausible 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.” *Id.* at 20.

**B. Plaintiffs Cannot Establish Causation Under Their Alternative “Contribution” Theory.**

Making no real attempt to satisfy the established standards for traceability, plaintiffs instead urge a different standard under which all they need to allege is that each defendant “contributed” to their injury—*i.e.*, that each defendant emitted *some* greenhouse gases, even if the amount of those emissions represents a minute fraction of the total greenhouse gases in the atmosphere and absent any showing of causation. That extraordinarily permissive standard—which would effectively eliminate the traceability requirement—has never been the law.

“Contribution” to a harm may, in appropriate circumstances, support standing under Article III; however, although the defendant’s conduct need not be the *sole* cause of the injury, it must still be *a* cause. 15 James W. Moore et al., *Moore’s Federal Practice* § 101.41[1] (3d ed. 2010). In other words, to demonstrate that a defendant “contributed” to a harm, the plaintiff must show an actual, traceable “nexus” between the defendant’s conduct and the injury, such that the conduct can plausibly be characterized as a cause—at least in part—of the injury. *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 & n.24 (5th Cir. 1996); *see Sw. Marine*, 236 F.3d at 994-95; 15 Moore, *supra*, § 101.41[1].

Plaintiffs do not even address this “nexus” requirement. Pl. Br. 62-64. Instead, they incorrectly argue that *any* discharge of a greenhouse gas by a defendant that is alleged to have combined with similar discharges from others renders that defendant a “contributor” that may be sued for injuries. *Id.*; *see also Connecticut*, 582 F.3d at 345-47. This proposed rule is consistent neither with traditional standing doctrine, which demands a more direct, “traceable” link between the defendant’s conduct and the plaintiff’s injury, 15 Moore, *supra*, § 101.41[1], nor with the alternative “contribution” theory of standing developed in opinions addressing pollution claims under the Clean Water Act, *e.g.*, *Sw. Marine*, 236 F.3d at 995, which defines the outer bounds of standing under Article III,

*Gaston Copper*, 204 F.3d at 152 (noting that the Clean Water Act confers standing “to the full extent allowed by the Constitution”).

To the contrary, those Clean Water Act cases show just how demanding the Article III causation requirement is in the context of an alleged “contributor” to pollution. Article III requires that the plaintiff show a “substantial likelihood” that the defendant’s conduct caused its injury. *Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59, 75 (1978). The Clean Water Act cases, drawing on the opinion in *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), hold that, when an alleged contributor’s discharge exceeds the maximum level permitted pursuant to congressional enactment, a court may presume a “substantial likelihood” that the discharge contributed to a congressionally defined injury that occurs proximate to the discharge. *See Sw. Marine*, 236 F.3d at 995; *see also Gaston Copper*, 204 F.3d at 157. Specifically, those cases establish a threshold three-part test for Article III standing in a “contributor” case, requiring a plaintiff to “show[] that a defendant has (1) discharged some pollutant in concentrations *greater than allowed by its 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) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.” *Powell Duffryn*, 913 F.2d at 72 (emphasis added), *cited with approval in Sw. Marine*, 236 F.3d at 995.

Plaintiffs concede that no federal law currently defines carbon dioxide emissions by these defendants above a certain level as unlawful and harmful. Pl. Br. 64-66; *see Connecticut*, 582 F.3d at 346 (same). Thus, there is no basis, under the first requirement of the *Powell Duffryn* test, to presume that defendants' emissions contributed to any injuries suffered by plaintiffs or to find that plaintiffs have standing to bring their claims.<sup>6</sup> In the absence of that presumption, plaintiffs must plead facts showing a direct link between defendants' emissions and their injuries, which they do not do.

Plaintiffs' suggestion that standing may be found under *Powell Duffryn* even absent a violation of congressionally prescribed pollutant limits is, as the district court noted, "circular" and inconsistent with the very Clean Water Act cases on which plaintiffs rely. E.R. 19-20 & n.7. Those opinions found standing only *because* the defendant's alleged discharge exceeded federally mandated limits, *e.g.*, *Cedar Point*, 73 F.3d at 557; *Powell Duffryn*, 913 F.2d at 72, and they explicitly articulated the tripartite *Powell Duffryn* test "in the conjunctive, not the disjunctive," E.R. 19 n.7. Under plaintiffs' theory, though, these opinions would

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<sup>6</sup> Plaintiffs' suggestion that these requirements should be ignored because the Clean Water Act cases arose at the summary judgment stage, Pl. Br. 64 n.17, is meritless. The difference in procedural posture is irrelevant here because plaintiffs' complaint contains no factual allegations that would, if proven, satisfy those requirements. *See Allen*, 468 U.S. at 752-53 (affirming dismissal of complaint for lack of traceability); *Warth v. Seldin*, 422 U.S. 490 (1975) (same).

have found standing even if the discharge had been *below* prescribed levels. *See* Pl. Br. 64-66. To interpret *Powell Duffryn* to support a finding of standing in the absence of an alleged statutory violation—as do plaintiffs, and as did the Second Circuit in *Connecticut*, 582 F.3d at 346-47—ignores the fundamental (indeed, the *sole*) basis for applying the presumption of causation: that Congress has defined certain levels of discharge as harmful, thereby allowing courts to infer a “substantial likelihood” that discharges above that level “cause” harms that are associated with that pollutant and suffered by entities in the relevant geographic area. *Powell Duffryn*, 913 F.2d at 68-72; *accord Massachusetts*, 549 U.S. at 516 (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”); *Covington v. Jefferson County*, 358 F.3d 626, 653-54 (9th Cir. 2004) (Gould, J., concurring) (noting violation of federal standards may permit finding of causation).

The district court properly rejected plaintiffs’ view, stating that “a discharge, standing alone, is insufficient to establish injury” and that “it is illogical to conclude that the mere contribution of greenhouse gases into the atmosphere is sufficient to establish that a plaintiff’s injury is fairly traceable to a defendant’s conduct.” E.R. 19-20 & n.7. Absent a violation of federal discharge or emissions

limits, there is no basis to apply a presumption of causation and no basis to find standing under *Powell Duffryn*.<sup>7</sup>

The district court also properly held that, even ignoring the permit element of *Powell Duffryn*, plaintiffs could not show a nexus between defendants' emissions and the alleged harm—*i.e.*, could not show that defendants' emissions are the “seed” of their injuries or that their injuries occurred within the “zone of the discharge.” *Id.* at 20-22; *accord Cedar Point*, 73 F.3d at 558 n.24 (requiring a “geographic or other causative nexus” between the contributor's discharge and the injury); *Sw. Marine*, 236 F.3d at 995 (requiring the discharge to have affected the “specific geographic area of concern”). This nexus does not, as plaintiffs suggest, require them “to demonstrate which particular molecules emitted by which particular source caused the injury” or to establish that defendants are “the *sole* cause of harm.” Pl. Br. 62, 69 (emphasis in original). Rather, it reflects the well-established principle that proof of discharge alone is insufficient and that, although plaintiffs need not show that the defendant is the sole cause of the injury, they must demonstrate at least a “substantial likelihood” that an actual “causal connection”

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<sup>7</sup> The cases cited by plaintiffs in support of their contrary position, *Massachusetts* and *Northwest Environmental Defense Center v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Or. 2006), do not even address the permit element of *Powell Duffryn*. To the contrary, given that both cases were premised on statutorily created causes of action and alleged statutory violations, *Massachusetts*, 549 U.S. at 516-21; *Nw. Env't'l*, 434 F. Supp. 2d at 962-71, they are fully consistent with the statutory violation requirement of *Powell Duffryn*.

exists between the defendant's discharge and the alleged harm. *Lujan*, 504 U.S. at 560-61; *Duke Power*, 438 U.S. at 75; see *Cedar Point*, 73 F.3d at 558 n.24 (noting that applying the *Powell Duffryn* test without requiring an additional "geographic or other causative nexus" between the challenged conduct and alleged injury could "produce results incongruous with ... Article III standing requirements").<sup>8</sup>

That nexus has not been alleged here. According to the complaint, defendants' emissions rise from ground level into the global atmosphere, where they mix with emissions from billions of other, independent sources that have been accumulating in the global atmosphere for centuries, disperse around the circumference of the planet, and then produce effects around the world, potentially thousands of miles away from the original discharge site. E.R. 70-72, 102 (¶¶ 124-131, 254). Given that a distance of 18 miles between the challenged conduct and alleged injury has been held to preclude a reasonable inference of causation under the *Powell Duffryn* standard, *Crown Cent.*, 95 F.3d at 361, the exponentially

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<sup>8</sup> This rule comports with *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008) (en banc), cert. denied, 130 S. Ct. 458 (2009), and the other "contribution" tort cases cited by plaintiffs. Pl. Br. 30-33; see *Boim*, 549 F.3d at 696 (addressing "material support" provision of federal anti-terrorism law but citing pollutant "contribution" cases, such as *Chem-Nuclear Systems, Inc. v. Bush*, 292 F.3d 254 (D.C. Cir. 2002), in which it was not disputed that injury occurred in the geographic proximity of the discharge); *Michie v. Great Lakes Steel Div.*, 495 F.2d 213, 215 (6th Cir. 1974) (noting that pollution was emitted "immediately across the [river]" from the site of plaintiffs' alleged injuries).

greater distances, time periods, and number of non-party actors involved in this case preclude it here.

Under plaintiffs' erroneous theory that "any contribution suffices," there is no way to differentiate defendants in this case from the billions of other "alternative culprit[s]," or to trace emissions from these particular defendants either to or from the greenhouse gas mixture in the atmosphere. *Gaston Copper*, 204 F.3d at 162. Without an alleged nexus between plaintiffs' injury and any defendant's emissions, the district court properly dismissed the claims for lack of standing.<sup>9</sup>

### **C. The Standing Analysis In *Massachusetts v. EPA* Does Not Apply.**

Plaintiffs also rely on *Massachusetts v. EPA* to support their standing argument. Pl. Br. 70, 74-77; *see also Connecticut*, 582 F.3d at 336-38. In that

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<sup>9</sup> Quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), for the proposition that courts should not "raise the standing hurdle higher than the necessary showing for success on the merits in an action," *id.* at 181, plaintiffs suggest that standing requirements must be relaxed to match the claimed requirements for succeeding on the merits. Pl. Br. 62. But, even accepting plaintiffs' erroneously broad conception of common law nuisance, *see supra* note 8, the "irreducible constitutional minim[a] of standing" are neither dependent upon nor affected by common law tort principles. *Lujan*, 504 U.S. at 560-61; *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir.), *cert. denied*, 129 S. Ct. 458 (2008). The quoted passage in *Laidlaw* merely explained why an allegation that *satisfied* the traditional Article III injury requirement should not be rejected on grounds that it failed an even *higher* standard for success on the merits. *See* 528 U.S. at 181; *see also Whitmore*, 495 U.S. at 155 ("[The] threshold inquiry into standing 'in no way depends on the merits of the [plaintiff's] contention that particular conduct is illegal' ....").

case, the Supreme Court held that a State had standing to sue to compel EPA to reconsider its decision against establishing greenhouse gas emission controls for motor vehicles, pursuant to section 202(a)(1) of the CAA, to address possible risks from climate change. 549 U.S. at 516-21 (citing 42 U.S.C. § 7521(a)(1)). Although *Massachusetts* involved climate change, the plaintiffs and claims in *Massachusetts* differ materially from those in this case, and that decision's standing analysis is inapplicable here. See *Pagán*, 448 F.3d at 26 (“[the] standing inquiry is both plaintiff-specific and claim-specific”).

*Massachusetts*'s holding was based on at least two considerations specific to that case. First, the Supreme Court explained at the start of its opinion that “[i]t is of considerable relevance that the party seeking review here is a sovereign State,” and thus entitled to “special solicitude in [the] standing analysis,” in light of States’ distinctive position in the federal union and their interest in “preserv[ing] [their] sovereign territory.” 549 U.S. at 518-20. The “sovereign prerogatives” that States surrendered when they entered the Union, the Court noted, “are now lodged in the Federal Government, and Congress has ordered the EPA to protect Massachusetts (among others) by prescribing standards applicable to the ‘emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the EPA’s] judgment cause, or contribute to, air pollution.’” *Id.* at 519 (emphasis added) (quoting 42 U.S.C. § 7521(a)(1)). While other non-State petitioners were

also parties to the lawsuit, the Supreme Court expressly limited its standing analysis to Massachusetts, because “[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review.” *Id.* at 518.

In contrast, plaintiffs here are not States, and they are not entitled to the same “special solicitude” by virtue of the Village’s status as a federally recognized tribe. The tribe did not join the Union on the same terms as a State; rather, it came within the jurisdiction of the United States by virtue of the 1867 Treaty of Cession between the United States and Russia (not an agreement between the United States and the tribe). *See* Cession of the Russian Possessions in North America, U.S. – Russ., art. 3, Mar. 30, 1867, 15 Stat. 539, 542 (providing that Alaska Natives “will be subject to such laws and regulations as the United States may, from time to time, adopt”). Nor does the tribe maintain territorial sovereignty, as do States (a fact stressed in *Massachusetts*). *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 524, 532 (1998); *see also Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov’t*, 101 F.3d 1286, 1304 (9th Cir. 1996) (Fernandez, J., concurring) (under the Alaska Native Claims Settlement Act, “the tribes ... no longer have control or sovereign power over the land”), *rev’d on other grounds*, 522 U.S. 520 (1998).

Second, *Massachusetts* emphasized that the claims were brought pursuant to a right of judicial review expressly conferred by Congress in the CAA. 549 U.S. at

516-18; *see* 42 U.S.C. § 7607(b)(1) (authorizing petitions for judicial review of any final action of EPA under the CAA). “That authorization,” the Court stated, “is of *critical* importance to the standing inquiry: ‘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 (emphasis added) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). In particular, “[w]hen a litigant is vested with a procedural right, that litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” *Id.* at 517-18 (emphasis added); *see id.* at 524 (explaining that, because regulation generally proceeds through “incremental step[s],” a party challenging a regulatory decision need only show a possibility of agency reconsideration). Thus, to establish standing, the State had to show only that the risks it allegedly faced from global warming “would be reduced to some extent” if EPA reconsidered its denial of the rulemaking petition and as a result determined to regulate greenhouse gas emissions. *Id.* at 517-18, 526.

*Massachusetts* did not, therefore, approve a general causal theory under which any plaintiff allegedly harmed by global warming may bring a claim for tort liability against any enterprise that emits greenhouse gases. *Cf. Ctr. for Biological Diversity v. Dep’t of Interior*, 563 F.3d 466, 478-79 (D.C. Cir. 2009). Rather, the

Supreme Court explicitly based its decision on the fact that a State-plaintiff was challenging an agency decision pursuant to express congressional authorization. 549 U.S. at 516-19. Because plaintiffs here are not States, and there are no congressionally created chains of causation or statutory rights at issue, the reasoning and holding of *Massachusetts* do not apply by their own terms.

## II. PLAINTIFFS' CLAIMS PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS.

Certain cases, by virtue of their subject matter, are not cognizable in the courts. *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004). The Supreme Court in *Baker* set forth six “formulations” to determine whether a case presents one of these non-justiciable political questions:

Prominent on the surface of any case held to involve a political question is found [i] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [ii] a lack of judicially discoverable and manageable standards for resolving it; or [iii] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [iv] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [v] an unusual need for unquestioning adherence to a political decision already made; or [vi] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. These “formulations,” although interrelated, are “independent tests.” *Vieth*, 541 U.S. at 277; *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007). Accordingly, “a political question may arise when *any one* of the[se] circumstances is present.” *INS v. Chadha*, 462 U.S. 919, 941 (1983) (emphasis

added); *see Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005); *see also Lane v. Halliburton*, 529 F.3d 548, 559-63 & n.4 (5th Cir. 2008); *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).<sup>10</sup>

“One of the most obvious limitations imposed by [Article III] is that judicial action must be governed by *standard*, by *rule*.” *Vieth*, 541 U.S. at 278 (emphasis in original). Those rules must be “principled, rational, and based upon reasoned distinctions,” and not the result of “*ad hoc*” policy judgments. *Id.* In particular, claims that would “cast[ the jury] forth upon a sea of imponderables,” *id.* at 290, or that “involve large elements of prophecy,” *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), are not properly adjudicated in the courts. *See id.*

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<sup>10</sup> Plaintiffs assert that the political question doctrine does not apply to a claim that arises under federal common law. Pl. Br. 42-44. This extraordinary position finds no support in the cases plaintiffs cite—neither of which even addresses this issue, *see Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (“*Milwaukee I*”); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496 (1971)—and sidesteps the very question to be decided, since it presupposes the existence of jurisdiction that the political question doctrine withholds. *See Corrie*, 503 F.3d at 980. Nor does the fact that plaintiffs seek monetary damages, as opposed to injunctive relief, preclude or relax application of the political question doctrine, as plaintiffs suggest. Pl. Br. 47. Although a request for injunctive relief—particularly against a government agency—may raise independent justiciability concerns, *see Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992), the doctrine has been applied consistently to bar claims for monetary relief when adjudication of the claims implicates inherently political judgments of the kind properly reserved for the political branches. *E.g.*, *Corrie*, 503 F.3d at 980; *see E.R. 14* (“Regardless of the relief sought, the resolution of Plaintiffs’ nuisance claim requires balancing the social utility of Defendants’ conduct with the harm it inflicts.”).

Adjudication of the claims in this case would place the jury in precisely this role. Central to any common law “nuisance” claim—whether based on intentional or unintentional conduct—is the allegation that the defendant’s actions constitute “an *unreasonable* interference with a right common to the general public.” Restatement (Second) of Torts § 821B(1) (emphasis added); *see id.* §§ 821B cmt. e, 822. To determine whether an interference is “unreasonable,” a judge or jury must “compar[e] the social utility of an activity against the gravity of the harm it inflicts.” *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1105 (1997) (citing Restatement (Second) of Torts §§ 826-31); *accord* Restatement (Second) of Torts § 826 cmt. c (“Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards.”); *County of Westchester v. Town of Greenwich*, 76 F.3d 42, 45 (2d Cir. 1996) (same); *City of Chi. v. Commonwealth Edison Co.*, 321 N.E.2d 412, 418 (Ill. App. Ct. 1974) (same).

No “principled” or “reasoned” standards would govern this inquiry. To determine a “reasonable” emissions level for a single defendant, a jury would first have to determine the “reasonable” level of *global* emissions in light of the global risks of climate change, and the global costs and benefits of emissions-producing activities and associated reduction measures. This would plunge the jury into pure speculation. The posited risks of climate change, and the costs and benefits of

emissions reductions, are not quantifiable or predictable even under the Intergovernmental Panel on Climate Change (IPCC) reports offered by plaintiffs as “the standard scientific reference[] on global warming.” E.R. 75 (¶ 152); *see, e.g.*, IPCC, *Fourth Assessment Report, Synthesis Report* 47, 59, 68, 72-73 (2007) (“IPCC 2007 Rep.”) (“[u]nderstanding of these processes is limited and there is no consensus on their magnitude”; describing effects of emissions reductions as “uncertain[]”). And, even if a judge or jury could somehow determine a “reasonable” global emissions level, it would need to decide what would have been a “reasonable” emissions level for each nation, each sector, and ultimately each defendant here, weighing the gravity of harm to plaintiffs against the utility of each defendant’s conduct.

With no “principled” or “reasoned” standards to guide its decision, the jury would necessarily rely on “ad hoc” policy judgments to resolve these claims. *See Vieth*, 541 U.S. at 278. For example, a jury that accepts the argument that climate change produced the risks allegedly facing Kivalina could, under plaintiffs’ theory, “trace” that phenomenon to automotive companies’ decisions to offer fuel-intensive sport-utility vehicles, but find that the utilities and oil and coal companies had managed their activities in a way to responsibly limit their emissions over time and therefore were “reasonable.” Or, it might determine that individual car ownership is the nation’s highest value and that other industries “caused” climate

change and should have reduced their emissions. Or, it might trace climate change to the emissions of the U.S. Department of Defense or other government entities and hold that utilities, oil companies, and car companies and drivers were acting reasonably. Whether we should have had more public transportation and fewer cars, more electricity from nuclear power or solar power, or less electricity and slower economic growth are not decisions that any judge or jury can make.

When it comes to a question as complex and momentous as how the country should satisfy its energy needs, only a legislature has the capacity and authority to assess and weigh the cost of one societal harm (the possible risks of climate change and its effects) against the innumerable other societal harms (including increased costs and lost productivity) that would flow from restrictions on emissions of carbon dioxide and other greenhouse gases. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (policy choices must be resolved “within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot”); *see also* IPCC 2007 Rep., *Summary for Policymakers* 18 (decisions concerning the risks of climate change and benefits of emissions reductions implicate “value judgments”); IPCC, *Third Assessment Report, Summary for Policymakers* 2 (2001) (“IPCC 2001 Rep.”) (same; describing these decisions as “value judgments [that must be] determined

through socio-political processes, taking into account considerations such as development, equity, and sustainability, as well as uncertainties and risk”).<sup>11</sup>

Plaintiffs argue that a court need not engage in any “balancing” inquiry to resolve the nuisance claims because “[l]iability in nuisance [may be] predicated upon unreasonable injury rather than upon unreasonable conduct.” Pl. Br. 26 (quoting *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982)). Selectively citing statements from Dean Prosser’s treatise and the Restatement (Second) of Torts, they assert that, because the risk to Kivalina is so great, the injuries alleged are *per se* “unreasonable” and any contributor to those injuries may be held liable “even [if] the defendant’s conduct is reasonable,” without assessing other relevant interests and equities. *Id.* at 24-28 (citing Restatement (Second) of Torts §§ 826, 829A; William Lloyd Prosser et al., *Prosser and Keeton on Torts* §§ 52, 87-88 (5th ed. 1984)).

This argument is meritless and contradicted by the very authorities on which it relies. The Restatement provides that an “unreasonable interference” may be

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<sup>11</sup> Plaintiffs’ argument that a damages award premised on a finding that the defendants’ emissions exceeded “reasonable” levels would not serve as a *de facto* emissions cap is absurd. *E.g.*, Pl. Br. 45. Damages awards are intended not only to compensate for an injury but also to govern future behavior. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality) (“[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.”) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

found in the absence of “unreasonable conduct” only when the fact-finder concludes both that the interference is “severe” *and* “the harm resulting from the invasion is ... greater than the other *should* be required to bear without compensation.” Restatement (Second) of Torts § 829A (emphasis added). This latter standard, which plaintiffs ignore, requires a judge or jury to weigh the same impermissible policy considerations discussed above, to determine whether monetary liability “should” be imposed on these defendants for alleged effects of climate change—*i.e.*, whether it is socially and economically appropriate to require the defendants to provide compensation. *See id.*; *see also id.* § 826 cmt. c (“Consideration 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.”). The same is true for Dean Prosser’s formulation, which states the fundamental question as whether the plaintiff’s loss “*ought* to be allocated to the defendant” in light of relevant normative considerations, 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 “the nature of the defendant’s use of his property.” Prosser, *supra*, § 88, at 629-30 (emphasis added). Thus, under either the Restatement’s or Dean Prosser’s approach, the court would

be required to engage in the balancing of policy factors that the political question doctrine forbids.<sup>12</sup>

Moreover, by characterizing their global warming “nuisance” claim as essentially a strict liability tort, plaintiffs simply highlight the political question inherent in this case. To hold that any “contributor” of greenhouse gas emissions—that is, virtually any enterprise anywhere in the world—should pay the societal costs of climate change would reflect a *policy* choice concerning the proper manner to assign responsibility and address the alleged risks of global warming. And, as plaintiffs themselves acknowledge, that holding would beg the fundamental question of how to *allocate* those costs among nations, sectors, industries, and consumers worldwide. *See* Pl. Br. 49 (“the central question in a nuisance action for damages is ... one of allocation: a court asks which party should bear the cost of the harm that an interference has caused”). To address that question, the court would have to determine the percentage of plaintiffs’ injuries that should be attributed to every emitter in the world, going back hundreds of years. Allocating liability in this case would be more than “difficult”; it would be

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<sup>12</sup> The cases cited by plaintiffs as suggesting that a balancing test is not required, Pl. Br. 52-53, are clearly inapposite in that all involve localized property damage for which a known defendant was individually responsible. *E.g.*, *Crest Chevrolet-Oldsmobile-Cadillac, Inc v. Willemsen*, 384 N.W.2d 692, 693-96 (Wis. 1986). That approach is particularly inappropriate here in light of the extraordinarily attenuated link between defendants’ emissions and plaintiffs’ alleged injury.

impossible, and would not be helped by plaintiffs' conclusory assertion that "tort law is capable of separating major industrial [greenhouse gas] emitters from ordinary citizens." Pl. Br. 34; *see also Nixon v. United States*, 506 U.S. 224, 236 (1993) (citing "difficulty in fashioning relief" as indicative of political question).

Plaintiffs offer no reasoned or principled basis by which a court could distinguish between a "major" and "minor" emitter—nor could they. The decision of whether an entity is a "major" emitter that should have to compensate those who claim injury from climate-change impacts is a profound policy determination and cannot be left to jurors to make on an *ad hoc* basis. As the district court noted, "[t]he seemingly arbitrary selection of Defendants, coupled with the gravity and extent of the harm alleged in this case, underscores the conclusion that the allocation of responsibility for global warming is best left to the executive or legislative branch." E.R. 15 n.4.

Neither the "textbook" tort claim, to which plaintiffs attempt to analogize this case, Pl. Br. 22, nor the "ordinary tort suit," which the Second Circuit cited in *Connecticut*, 582 F.3d at 326-29, provides standards for adjudicating plaintiffs' cause of action.<sup>13</sup> Prior common law pollution claims—including state

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<sup>13</sup> *See* Laurence H. Tribe et al., Wash. Legal Found., Critical Legal Issues Series No. 169, *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-14 (Jan. 2010) ("[T]he Second Circuit—essentially confusing a label with an argument—concluded that it was an 'ordinary

transboundary pollution claims—involved a discrete number of emitters, a clear chain of causation, and a specific injury resulting from the discharged substance itself in a localized area, even when crossing state lines. E.R. 12 & n.3.<sup>14</sup> In contrast, the emissions here are not inherently harmful, are produced by virtually all enterprises on the planet, and according to plaintiffs combined in the atmosphere with undifferentiated emissions from billions of sources around the planet over centuries to trap heat in the Earth’s atmosphere, altering the *global* environment and, in turn, influencing by undefined increments the impact of naturally occurring processes that already affect the planet. Indeed, because under plaintiffs’ theory liability for climate change could be traced to *any* emitter of greenhouse gases, *all* emitters would presumably be subject to joinder as defendants in this lawsuit, to the extent they are still in existence. *See* Fed. R. Civ. P. 13(h), 20(a)(2); *see also* Tribe, *supra*, at 15 (“Unlike traditional pollution cases, where discrete lines of causation can be drawn from individual polluters to their individual victims, climate change results only from the non-linear, collective

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tort suit’ and therefore justiciable. . . . [T]he political question doctrine is about more than wordplay.”).

<sup>14</sup> *See Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971); *New Jersey v. City of New York*, 283 U.S. 473 (1931); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906); *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds*, 451 U.S. 304 (1981); *see also In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 438 F. Supp. 2d 291 (S.D.N.Y. 2006); *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006).

impact of millions of fungible, climactically indistinguishable, and geographically dispersed emitters.”). Far from a “textbook” tort suit, this case could become the largest and most complex litigation in the history of jurisprudence.

The decision in *Massachusetts*, rather than establishing the justiciability of these claims, as plaintiffs assert, Pl. Br. 57, confirms that the claims are non-justiciable. The claim in *Massachusetts* was justiciable only *because* Congress had established a statutory standard governing the agency’s conduct. 549 U.S. at 516, 532-35; *see* 42 U.S.C. § 7521(a)(1) (requiring EPA to set “standards applicable to the emission of any air pollutant” which in its “judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare”). The Court could adjudicate EPA’s compliance with that statutory standard without substituting its judgment as to the policy considerations the agency was required to address by the statute. 549 U.S. at 516, 532-35. Indeed, with respect to the policy considerations identified by EPA as counseling against regulation—the very sorts of issues that courts would have to address if the claims in this case were adjudicated—the Supreme Court acknowledged that it had “neither the expertise nor the authority to evaluate these policy judgments.” *Id.* at 533-34.<sup>15</sup>

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<sup>15</sup> Further highlighting the “political” nature of the questions presented in this case is the fact that the legislative and executive branches have issued, and are

### **III. THE COMPLAINT FAILS TO STATE VALID CLAIMS UNDER FEDERAL COMMON LAW.**

Dismissal also is warranted because plaintiffs cannot state valid claims under federal common law. This is so because (i) no global warming “nuisance” claim can be implied under federal common law; (ii) a common law claim, even if it could properly be recognized, has been displaced by the CAA; and (iii) plaintiffs do not and cannot plead facts to support a right to relief. Although the district court did not address these issues in light of its jurisdictional rulings, they were presented and pressed below, *see* E.R. 4, and this Court “may affirm the district court on any ground supported by the record, even if it differs from the reasoning of the district court.” *In re Harbin*, 486 F.3d 510, 520 (9th Cir. 2007) (quoting *Padilla v. Terhune*, 309 F.3d 614, 618 (9th Cir. 2002)).

#### **A. Federal Common Law Does Not Supply A Climate Change “Nuisance” Cause Of Action.**

“There is no federal general common law.” *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). Since its decision in *Erie* in 1938, the Supreme Court has foreclosed the creation of common law rules and causes of action, or expansion of existing ones, in all but the most limited circumstances. *Tex. Indus.*, 451 U.S. at 640. These limited circumstances include: (1) cases “in which Congress has given the courts the power to develop substantive law,” and (2) cases “in which a federal

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considering additional, standards governing greenhouse gas emissions. *See supra* pp. 7-9.

rule of decision is necessary to protect uniquely federal interests.” *Id.* (internal quotation marks omitted). “Raising up causes of action where a statute has not created them,” the Supreme Court recently admonished, “may be a proper function for common-law courts, but not for federal tribunals.” *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Thus, as this Court has explained, “[f]ederal courts ... are not general common law courts and do not possess a general power to develop and apply their own rules of decision.” *Audubon*, 869 F.2d at 1201 (quoting *Milwaukee II*, 451 U.S. at 312).

Neither of the limited “exceptions” to the presumption against federal common law applies here. “Congress has not authorized the courts to develop a substantive law of air pollution ...” *Id.* at 1202. Although the CAA allows for citizen enforcement actions in some circumstances, “[n]othing in the [Act] suggests Congress intended to rely for [its] enforcement ... upon a federal common law remedy.” *Id.* at 1201-02.

Nor, under the law of this Circuit, does this case implicate “uniquely federal interests,” such that a federal rule of decision might be appropriate. A “uniquely federal interest,” this Court has explained, exists “only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases.” *Id.* at 1202 (quoting *Tex. Indus.*, 451

U.S. at 641). This case obviously does not involve “admiralty.” Nor does it concern the “rights and obligations of the United States.” *See id.* at 1202-05 (cases involving the “rights and obligations of the United States” implicate “the authority and duties of the United States as sovereign” and normally relate to its own contractual rights and commercial paper obligations). And, although this case involves alleged transboundary pollution and effects, it is not an “*interstate ... dispute[]* implicating the conflicting rights of *states.*” *Id.* at 1202, 1204-05 (emphasis added). Under the law of this Circuit, those disputes include “only those interstate controversies which involve a *state* suing sources outside of its own territory.” *Id.* at 1205 (emphasis added).<sup>16</sup>

In *Audubon*, this Court flatly rejected the argument that the mere fact of transboundary air pollution establishes a “uniquely federal interest” to support application of federal common law. *Id.* Yet, this is precisely the argument plaintiffs press here: “federal common law governs because Kivalina has alleged that carbon dioxide pollution crosses state lines.” Pl. Br. 22. They mischaracterize *Audubon* as involving only an intrastate controversy based in California. *Id.* at 21-22. To the contrary, this Court noted at the start of its discussion that it

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<sup>16</sup> The presence of a State plaintiff does not, however, necessarily support a common law claim, particularly under recent Supreme Court precedent which restricts the circumstances in which federal common law may be invoked to create a cause of action. *See infra* pp. 45-46; *cf. Alexander*, 532 U.S. at 287

“assum[ed]” that the “air pollution [from California] reaches into Nevada.” 869 F.2d at 1204. Nevertheless, because the case did not implicate “the conflicting rights of states,” it could not be deemed to involve “uniquely federal interests” or warrant application of federal common law. *Id.* at 1204-05. There is likewise no basis for implying a federal common law cause of action here.

*Milwaukee I*, 406 U.S. 91 (1972), was the last time the Supreme Court re-affirmed an interstate federal common law cause of action for transboundary pollution, *id.*, before it “swor[e] off the habit” of creating causes of action, *Alexander*, 532 U.S. at 287. Assuming that *Milwaukee I* remains good law, it offers no support for plaintiffs’ claims.

That case, and others before it, involved *State* plaintiffs suing for *injunctive* relief based on “a public nuisance of *simple* type,” concerning immediately noxious or harmful substances that caused severe, localized harms directly traceable to an out-of-state source. *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) (emphasis added). This case does not involve a State plaintiff; the claims demand monetary damages; and the alleged “nuisance” concerns a non-noxious substance that is emitted by virtually all enterprises on the planet and that, according to plaintiffs, indirectly contributes to a nearly infinite array of harms around the world. The narrowly circumscribed common law “nuisance” claim recognized in *Milwaukee I* is wholly unlike the instant case, and allowing

plaintiffs' claims to proceed would conflict with the Supreme Court's more recent jurisprudence stressing the "limited" and "restricted" nature of federal common law. *Tex. Indus.*, 451 U.S. at 640; *see Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 10, 21-22 (1981) (recognizing a federal common law claim by a private party for monetary damages caused by an alleged "nuisance" would go "considerably beyond [*Milwaukee I*], which involved purely prospective relief sought by a state plaintiff").

The Supreme Court has never upheld a federal common law nuisance action (1) brought by non-States, (2) for damages, or (3) based on a "nuisance" allegedly caused by countless non-parties around the globe. *See Audubon*, 869 F.2d at 1205. There is no basis to do so here. *See id.*; *see also, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[A] decision to create a private right of action is one better left to legislative judgment ....").

**B. Any Federal Common Law Climate Change "Nuisance" Cause Of Action Has Been Displaced.**

Any federal common law cause of action that could have encompassed plaintiffs' nuisance claim, even if it could otherwise be properly recognized, has been displaced by the CAA. A common law claim is displaced when "the field has been made the subject of comprehensive legislation." *Milwaukee v. Illinois*, 451 U.S. 304, 314, 325 (1981) ("*Milwaukee II*"). In addressing displacement, as opposed to "preemption" (the term plaintiffs insist on using in discussing

displacement, Pl. Br. 77-80), 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.” 451 U.S. at 316-17 (internal quotation marks omitted).

The Supreme Court, for example, held in *Milwaukee II* that amendments to the Clean Water Act, passed after the decision in *Milwaukee I*, displaced the previously recognized common law nuisance claim because Congress had now “occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.” *Id.* “[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.” *Id.* at 314.

The same is true here. This Court has described the CAA as a “comprehensive ... scheme to control air pollution in the United States.” *Audubon*, 869 F.2d at 1201. Carbon dioxide has been determined to be an “air pollutant” within the meaning of the Act, *Massachusetts*, 549 U.S. at 528-29 & n.26 (quoting 42 U.S.C. § 7602(g)), and the Act authorizes EPA to regulate carbon dioxide emissions if it finds those emissions “endanger public health or welfare,” *id.* at 532-33 (quoting 42 U.S.C. § 7521(a)(1)); *see also* 42 U.S.C. § 7411. Accordingly, through the CAA, Congress established a “comprehensive” legislative scheme that “speaks directly” to the subject of the complaint, rendering

resort to federal common law unnecessary and improper. *See Milwaukee II*, 451 U.S. at 314-15; *see also id.* at 325 (“The invocation of federal common law ... in the face of congressional legislation ... is peculiarly inappropriate in areas as complex as water pollution control,” the problems of which are “particularly unsuited to the [*ad hoc* adjudicative] approach inevitable under a regime of federal common law.”).

Plaintiffs acknowledge that the CAA authorizes EPA to regulate carbon dioxide emissions, but nevertheless argue that the Act does not displace their federal common law claims because it does not provide them with a damages remedy. Pl. Br. 77-80. This argument ignores the Supreme Court’s decision in *Middlesex County Sewage Authority v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981), which held that the analysis of *Milwaukee II*—holding that water pollution claims seeking injunctive relief are displaced by the Clean Water Act—applied equally to claims seeking monetary relief, even though that Act provided no equivalent right to monetary damages. *Id.* at 21-22. Once Congress legislates on a subject, related federal common law claims are displaced regardless of whether the statute expressly addresses the precise situation or claim raised by the plaintiffs, or affords them relief. *See Milwaukee II*, 451 U.S. at 314-15, 325; *see also Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 477-78 (7th Cir. 1982) (federal common law is displaced if Congress has “considered the problem ... and enacted some

solution,” even if “it has not done so by means of remedies against the polluters themselves”).

The displacement effect of legislation also is unrelated to whether and how regulatory agencies exercise their delegated authority. “The comprehensiveness of the legislative grant is not diminished, nor is the congressional intent to occupy the field rendered unclear, merely by reason of the regulatory agency’s discretionary decision to exercise less than the total spectrum of regulatory power with which it was invested.” *Mattoon v. City of Pittsfield*, 980 F.2d 1, 5 (1st Cir. 1992). To hold, as plaintiffs suggest, that courts may craft causes of action to supplement the regulatory scheme established by Congress is “no different from holding that the solution Congress chose is not adequate. This [a court] cannot do.” *Outboard Marine*, 680 F.2d at 478.<sup>17</sup>

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<sup>17</sup> Neither of the cases cited by plaintiffs, *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), involves the CAA or in any way suggests that the Act does not displace plaintiffs’ federal common law claims. *Exxon Valdez* involved demands for punitive damages based upon a recognized cause of action under federal *maritime* law, 270 F.3d at 1229-31, which the Supreme Court explicitly distinguished from “nuisance” claims similar to those in this case, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 & n.7 (2008) (rejecting comparison to *Milwaukee II* and *Sea Clammers*); moreover, it was conceded in that case that the Clean Water Act did not displace claims by private parties for compensatory damages, *id.* And in *Oneida* the Supreme Court upheld federal common law claims for unlawful conveyance brought by federal tribes only because Congress “contemplated [such] suits” in relevant statutes. 470 U.S. at 239. In contrast, the Supreme Court has recognized that the “citizen suit” provision of the CAA, and comparable provisions in the Clean Water Act and other environmental statutes, *do not* “evinced[] an intent

**C. Plaintiffs Have Failed To Plead Facts Stating A Cause Of Action.**

Even assuming that a federal common law cause of action exists that might encompass plaintiffs' claims, their allegations are insufficient to state a claim for relief under the authorities on which they rely.

**1. Plaintiffs Cannot State Valid Nuisance Claims.**

Plaintiffs suggest that, to establish an actionable nuisance, they need only show a "severe" harm—a test satisfied, according to plaintiffs, by allegations of the possible destruction of Kivalina—and some form of "contribution" to that harm by the defendant. Pl. Br. 23-35. This is an extraordinary recasting of settled nuisance doctrine. As explained in the Restatement and countless other authorities, an invasion of or interference with property constitutes a "nuisance" only if it is "unreasonable" in light of the court's weighing of relevant normative considerations. Restatement (Second) of Torts § 829A; Prosser, *supra*, § 88, at 629-30; *see supra* pp. 36-38. Plaintiffs do not even attempt to address that balancing process because, as the district court recognized, it is simply impossible

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to preserve the federal common law of nuisance" and *cannot* "be read to mean that the Act as a whole does not supplant formerly available federal common-law actions." *Milwaukee II*, 451 U.S. at 328-29 & n.21 (citing 33 U.S.C. § 1365(e); 42 U.S.C. § 7604(e)). Displacement of plaintiffs' claims is thus fully consistent with both *Exxon Valdez* and *Oneida*. *See Audubon*, 869 F.2d at 1201-02 ("Nothing in the [CAA] suggests Congress intended to rely for [its] enforcement ... upon a federal common law remedy.").

to resolve in the context of this case, where the relevant interests span the globe and implicate billions of persons. E.R. 10-13.

Beyond this fundamental defect, the claims also fail because plaintiffs cannot satisfy other elements of a traditional nuisance action. Nuisance liability requires proof of either an intentional invasion or negligent breach of a legal duty, as well as proximate causation. Restatement (Second) of Torts § 822; *see id.* § 821B, cmt. e. Plaintiffs fail to plead facts supporting any of these elements.

An intentional nuisance occurs when the actor “acts for the purpose of causing [the interference],” or “knows that [the interference] is resulting or substantially certain to result from his conduct.” *Id.* § 825(a)-(b). It cannot plausibly be alleged that these defendants “acted for the purpose” of causing harm to Kivalina, or that they could have been “substantially certain” that Kivalina would face destruction as a “result” of their greenhouse gas emissions. Plaintiffs allege that defendants “knew ... that their conduct was likely to contribute to *global warming*,” Pl. Br. 28 (emphasis added), but this is a far cry from suggesting that defendants knew their conduct was likely to cause the particular alleged damage to Kivalina. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 1, cmt. e (2005) (“[T]he substantial-certainty test ... [requires] that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area.”).

Nor can plaintiffs establish a “legal duty” to support a negligent nuisance claim. Whether to impose a duty of care in a particular context depends on numerous factors, including (among others) the foreseeability of the harm, the connection between the defendant’s conduct and the injury suffered, and the moral blame attached to the defendant’s conduct. *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1197 (9th Cir. 2001). Even cursory consideration of these factors confirms that no duty can be recognized in this case. The alleged risks to Kivalina could hardly be more remote (both geographically and temporally) from the challenged emissions; these defendants could not plausibly have “foreseen” that their emissions would result in the destruction of an Alaskan village; and, far from being morally blameworthy, the defendants’ operations have not violated any existing greenhouse gas regulations and have provided valuable and essential services to the public.

Finally, plaintiffs cannot establish proximate causation. They allege a chain of causation that explicitly depends on the actions of others—the billions of other individuals and enterprises that emitted carbon dioxide and other greenhouse gases over the course of centuries—and rests in large part on speculation, including as to climatological forces beyond anyone’s control. *See supra* pp. 19-20. The link the complaint purports to draw between defendants and plaintiffs, from ground-based greenhouse gas emissions to atmospheric dispersal and aggregation to global

warming and climatological effects, can hardly be deemed “direct” and is far more attenuated than any causation string that has ever been found adequate by courts. *See, e.g., Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992) (requiring a direct relationship between the injury and the alleged wrongdoing). Because the complaint does not and could not set forth facts to support a finding of an intentional invasion, a legal duty, or proximate causation, the nuisance claims must be dismissed.

**2. Plaintiffs Cannot State Valid Conspiracy And “Concert-Of-Action” Claims.<sup>18</sup>**

Plaintiffs’ conspiracy and concert-of-action claims fare no better. *First*, those claims are dependent on the underlying substantive tort, as plaintiffs concede, Pl. Br. 35-38, and thus cannot survive when the flawed nuisance claim is dismissed. *E.g., Woodrum v. Woodward County*, 866 F.2d 1121, 1126-27 (9th Cir. 1989); 2 Dan B. Dobbs, *The Law of Torts* § 340 (2001).

*Second*, the conspiracy and concert-of-action claims rest on impermissible speculation that, absent the alleged publicity campaign, either the political branches would have effected unspecified regulation or consumers would have

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<sup>18</sup> The conspiracy and concert-of-action claims, although pled in the complaint as separate causes of action against different (overlapping) groups of defendants, both rely on the same underlying tort—nuisance—and similar allegations of “concerted action.” Pl. Br. 37-38. Insofar as this section addresses the conspiracy count of the complaint, it is joined only by the undersigned defendants that are named in that count. *See supra* note 2.

engaged in an unprecedented boycott of fossil-fuel-based energy. It is well-established that causation cannot be found when the plaintiff's causal chain presupposes the outcome of a decision by independent parties not before the court. *Pritikin v. Dep't of Energy*, 254 F.3d 791, 793, 797-801 (9th Cir. 2001).

*Third*, the claims are barred by the *Noerr-Pennington* doctrine, which precludes claims premising liability on “publicity campaign[s] directed at the general public and seeking government action.” *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000). The doctrine is clearly implicated here, given the allegations that defendants “deceived policymakers and the public” and “lobb[ied] members of Congress to thwart any corrective action,” E.R. 93, 99 (¶¶ 218-219, 242), and therefore these claims are barred. *See Manistee*, 227 F.3d at 1092.

Plaintiffs' characterization of the alleged acts as “deceptive,” Pl. Br. 37, does not salvage their claim. “[M]isrepresentations will only transform otherwise immune petitioning into unprotected ‘sham’ petitioning if the petitioning were directed at an ‘adjudicatory’ process, rather than a ‘political’ process.” *Marina Point Dev. Assocs. v. United States*, 364 F. Supp. 2d 1144, 1147 (C.D. Cal. 2005) (citing *Manistee*, 227 F.3d at 1094); *see also Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1061 (9th Cir. 1998); *Boone v. Redev. Agency*, 841 F.2d 886, 894 (9th Cir. 1988). Moreover, plaintiffs' characterization of the alleged conduct as “deceptive”

is contradicted by the complaint's references to a decades-long evolution toward a "prevailing view" concerning climate change that involved "*mounting* scientific evidence of the changing climate," and a "*growing* scientific and public consensus," in the "global warming *debate*." E.R. 87-88, 91, 94 (¶¶ 193, 197, 209, 223-224) (emphases added).

*Fourth*, and finally, plaintiffs' claims are barred by the First Amendment, which "protects public debate on matters of public discourse, including scientific matters." *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 326 (S.D.N.Y. 2006), *aff'd*, 279 F. App'x 40 (2d Cir. 2008); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (First Amendment "breathing space" encompasses allegedly false statements of fact as well as opinion). The claims in this case, seeking to impose tort liability for public statements and opinions concerning matters of national and worldwide public discourse, are contrary to this principle and must be dismissed.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court dismissing plaintiffs' claims.

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**STATEMENT OF RELATED CASES**

I hereby certify, pursuant to 9th Cir. R. 28-2.6, that there are no related cases pending in this Court.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 29(d) and Ninth Cir. R. 32-1, the attached brief is double spaced, uses a proportionately spaced typeface of 14 points or more, and contains a total of 13,553 words, based on the word count program in Microsoft Word.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on June 30, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit 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.

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