No. 09-17490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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; THE AES CORPORATION; AMERICAN ELECTRIC POWER COMPANY, INC.; AMERICAN ELECTRIC POWER SERVICES CORPORATION; DUKE ENERGY CORPORATION; DTE ENERGY COMPANY; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; PINNACLE WEST CAPITAL CORPORATION; THE SOUTHERN COMPANY; DYNEGY HOLDINGS, INC.; RELIANT ENERGY, INC.; XCEL ENERGY, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California
The Honorable Saundra Brown Armstrong
District Court Case No. 08-cv-01138 SBA

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Kivalina invokes the long-recognized federal common law of public nuisance due to the inherently interstate nature of global warming pollution. It seeks to apply the same public nuisance principles that have governed multiple-polluter cases for over a hundred years. The district court erred in dismissing this case under doctrines of political question and standing and should be reversed.

Defendants' greenhouse gas emissions cause harm through the Earth's atmosphere and this global vector for transmitting harm is, to be sure, a new fact for nuisance law. But if it was possible to litigate acid rain in 1907, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), the spread of bacterial disease in the Mississippi River hundreds of miles downstream from Chicago in 1901-06, *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*"), *Missouri v. Illinois*, 200 U.S. 496, 523 (1906) ("*Missouri II*"), and, in 1884, the effect of dumping mining waste on the American River despite the intermingling of defendant's waste with a "vast amount" of waste from previous and concurrent polluters on the river and with "still other material, which is the product of natural erosion," *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1156, 1154 (Cal. 1884), to name just a few examples, then it is certainly possible in 2010 to litigate defendants' contribution to global warming. The decision below should be reversed.

I. THE APPLICATION OF PUBLIC NUISANCE LAW TO GLOBAL WARMING DOES NOT PRESENT A POLITICAL QUESTION.[1]

The political question doctrine is an ill fit with this case seeking monetary damages against private defendants. Kivalina does not seek to force or preclude government action and does not challenge any foreign or domestic policy. Assuming the doctrine has any relevance in this case, defendants' political question arguments are incorrect.

A. No Balancing Is Required.

Defendants base their political question arguments upon the faulty premise that a court adjudicating a public nuisance case must always balance the utility of the defendant's conduct against the harm to the plaintiff. But there are several

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[1] On the very first pages of their briefs defendants twist Kivalina's words to suit their arguments; the record must be corrected. Kivalina stated that "carbon dioxide pollution crosses state lines, and, by contributing to the process of global warming, causes transboundary harm in Alaska" and that such allegations "present a textbook case *for the application of federal common law*." Appellants' Opening Br. ("AOB") 23 (emphasis added). The oil and electric utility defendants take this statement and contend that Kivalina said global warming presents a textbook nuisance case: "Plaintiffs style this as a 'textbook' common-law nuisance case . . . ." Oil Companies' Brief ("OCB") 1; *accord* Electric Utilities' Brief ("UB") 1 ("Contrary to plaintiffs' assertions, this is anything but a 'textbook' nuisance case."). Peabody inserted an extra word into a quote from Kivalina's brief so that Kivalina's incontrovertible statement that "*[p]ollution* is a classic public nuisance," AOB 24 (emphasis added), becomes "plaintiffs insist *this* is a 'classic public nuisance *case*.'" Brief of Peabody Energy Corp. ("PB") 2 (emphases added).

ways of determining unreasonableness that focus on the harm to the plaintiff and do not require examining the utility of defendants' conduct–much less a consideration of the "far-reaching economic, environmental, foreign policy, and national security policy issues," PB 23, that defendants contend must be addressed in order to adjudicate this case. The focus on the harm to the plaintiff is especially sharp in damages cases. These are settled points of law, acknowledged not only in the cases and Restatement, *see* AOB 23-28, 49-54, but in the leading treatises.[2]

For example, there can be no doubt that Kivalina has alleged harm of sufficient severity to put it within the rule of section 829A of the Restatement (Second) of Torts, a rule that states that conduct is unreasonable as a matter of law where the harm to the plaintiff is sufficiently severe. Kivalina has alleged that defendants' conduct has put the village's very physical existence at risk such that it must relocated or be destroyed. *See* AOB 8. This is far greater harm than has been required to trigger the application of section 829A. *See* Restatement (Second) of Torts § 829A illus. 1 (vibrations from a factory that cause the plaster

[2] *See, e.g.*, 2 Dan B. Dobbs, *The Law of Torts* § 465 p. 1329 (2001) ("The more debated question deals with the . . . situation . . . where the defendant's activity causes harm that cannot be eliminated by reasonable care but is also socially useful. Should the utility or social value of the activity relieve the defendant of liability? When the harm is severe, the Restatement says not. An important body of authority supports that view.").

in the plaintiff's home to crack and the ceiling to fall); *see also Jost v. Dairyland Power Coop.*, 172 N.W.2d 647, 651 (Wis. 1969) (sulfur fumes from power plant damaged farmers' crops).

None of the authorities upon which defendants rely establishes that courts or juries must engage in defendants' desired balancing test in cases of severe harm. They cite *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090 (Cal. Ct. App. 1997), a case in which prosecutors obtained a court order curtailing gang-related activity under a state statutory public nuisance charge, for the proposition that the court "must 'compare[] the social utility of an activity against the gravity of the harm it inflicts.'" UB 33 (quoting *Gallo*, 14 Cal. 4th at 1105). But the word "must" is defendants' own, not the *Gallo* court's. Moreover, the *Gallo* court did not engage in any balancing but rather found that gang activity was sufficiently injurious to constitute a public nuisance. 14 Cal. 4th at 1120. In *Florida East Coast Properties, Inc. v. Metropolitan Dade County*, 572 F.2d 1108, 1112 (5th Cir. 1978), OCB 22, the only claim of harm was an alleged decrease in property value from the construction of a detention center near a condominium development, not severe harm; in fact the evidence showed that "most of the residents in this area were unaware of the facility's true nature and found it quite attractive." *Id.*

Defendants claim that, by framing the reasonableness inquiry in terms of whether the plaintiff "should" or "ought" to be compensated, as is done in Restatement (Second) of Torts section 829A and in the Prosser and Keeton treatise, these authorities somehow *sub silentio* mandate a balancing test. UB 37; OCB 26. But these general words, no matter how insistently defendants italicize them, do not mandate a balancing. Indeed, defendants' argument-by-italics ignores the very purpose of specialized nuisance rules found in sections such as 829A, which are designed to dispense with this balancing in appropriate circumstances. *See* Restatement (Second) of Torts § 829A cmt. b (1979). Thus, trial courts have crafted jury instructions based upon these authorities that do not require balancing. *See, e.g.*, *Cook v. Rockwell Int'l Corp.*, 2006 U.S. Dist. LEXIS 89515, at *51-52 (D. Colo. Dec. 7, 2006) (overruling defendant's objection to a public nuisance jury instruction that harm without compensation may be unreasonable and citing Restatement and Prosser and Keeton).

This does not mean, as defendants mistakenly claim, that public nuisance imposes liability "automatically." OCB 23, 25, 28. The fact that a defendant acting reasonably can be held to have caused unreasonable harm "has led to the fallacious notion that nuisance liability is a type of liability without fault. But this is not so since the harm of loss results from an intentional rather than an accidental

invasion." Prosser & Keeton § 88 at 629-30.[3] A court or jury would not have to evaluate the utility of defendants' conduct even if section 829A were not the applicable legal standard. None of the reasonableness factors set forth in Restatement (Second) of Torts section 821B, governing public nuisance, focuses on the utility of the defendants' conduct. And none requires weighing the utility of the defendant's conduct against the harm to the plaintiff. Indeed, the Restatement provides that these factors *do not* represent a mandatory multi-factor balancing test of any kind: "any one [factor] may warrant a holding of unreasonableness." Restatement (Second) of Torts § 821 cmt. e.[4]

Defendants themselves eventually acknowledge, as they must, that in cases of severe harm, unreasonableness may be determined without inquiring into the

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[3] Contrary to defendants' argument, UB 51, Kivalina has made proper allegations of defendants' intent, including that defendants knew or should have known that they were contributing to Kivalina's injuries. Excerpts of Record ("ER") 102; *see also* ER 71, 83-101 (allegations relating to defendants' knowledge of global warming and of harms to Arctic). Kivalina has also pled in the alternative a proper negligent nuisance claim. *See, e.g., Ileto v. Glock Inc.*, 349 F.3d 1191, 1204 (9th Cir. 2003).

[4] Nor, contrary to defendants' argument, do the factors listed in Prosser and Keeton impose a balancing test or suggest that these factors supplant the severe harm standard of 829A. *Compare* OCB 26 *with* Prosser and Keeton § 88 at 630. In its opening brief at pages 25-26 Kivalina notes that its block quote from Prosser and Keeton was incorrectly cited as being from section 52 when it was from section 88.

utility of defendants' conduct. OCB 27 n.10. Defendants' attempt to distinguish such cases based upon the allegedly "critical fact" that past nuisance cases involved "immediate and severe injury to a *nearby parcel*," OCB 27, or "a direct and sole cause of harm to adjoining or nearby property," PB 27, misses the mark. First, Kivalina *is* suffering a "severe" injury *now*. The harm may be the result of cumulative greenhouse gas emissions emitted over a long period of time but that does nothing to help defendants. *See* Restatement (Second) of Torts § 821B(2)(c) (unreasonable harm may be indicated by "*conduct [that] is of a continuing nature* or that has produced a *permanent or long-lasting effect* . . . .") (emphasis added). Defendants identify no authority holding a nuisance is *only* actionable if the plaintiff is "adjoining" or "nearby" the defendants. Unsurprisingly, many nuisance cases do involve plaintiffs who are located physically close to defendants but others do not.

If defendants' "nearby" limitation were the law, then river polluters whose contaminants travel far downstream could not be sued by affected property owners or government officials.[5] Ocean dumpers whose refuse washes ashore a continent

[5] *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*") (plaintiff entitled to bring case regarding long-distance river pollution by disease-causing bacteria); *Missouri v. Illinois*, 200 U.S. 496, 523 (1906) ("*Missouri II*") (reviewing evidence as to whether bacteria could survive 357 mile trip downstream).

away could not be sued by coastal states or property owners.[6] Nuclear plant operators who emit radiation into the atmosphere could not be sued by distant victims who become ill from radiation.[7] Long-distance pollution is not exempt from the nuisance laws or from federal court jurisdiction; rather courts have consistently held that a plaintiff injured by pollution may recover so long as it can establish the elements of a nuisance claim, without importing defendant's proposed proximity requirement.

Finally, even if, *arguendo*, a more detailed balancing of the gravity of the harm against the social utility of the conduct were required here, defendants still are not entitled to a jurisdictional exemption from nuisance law. The factors they wish to emphasize about the alleged social utility of their conduct are, at most, matters to be argued to the factfinder.

B. *Baker* Factors Two and Three Are Not Satisfied.

Because the defendants' argument that a balancing test is mandatory is

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[6] *Cf. New Jersey v. New York City*, 283 U.S. 473, 479 (1931) (affirming report of special master that "garbage deposited in the sea, no matter what the distance from the shore, is liable to wash up on the beaches").

[7] *Cf. Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co.*, 534 F.3d 986 (9th Cir. 2008) (radiation pollution case brought under strict liability tort theory dealing with decades of emissions covering thousands of square miles over three states).

inconsistent with public nuisance law, the foundation for their political question argument crumbles. Defendants thus cannot satisfy *Baker* factors two and three. Their remaining arguments are equally unavailing.

First, defendants erroneously argue that this case seeks "*de facto* emissions caps," OCB 30, which it does not. Kivalina seeks damages for *past* conduct; not an injunction regulating future greenhouse gas emissions.

Second, Defendants' political question argument cannot be squared with the causation principle applicable in public nuisance law, which asks whether the defendant has *contributed* to the harm. AOB 29-35. Liability in this multiple polluter case will thus depend upon demonstrating that each defendant contributes to the overall load of pollution that is harming Kivalina. *See id*. at 31. Contrary to defendants' argument, OCB 2, liability will *not* depend on an analysis of how much greenhouse gas emissions each defendant should have emitted in the past.

Nor, contrary to defendants' argument, do the allocation principles applicable in multiple polluter cases somehow defeat federal court jurisdiction anytime the math becomes complex or the polluters become numerous and widespread. OCB 26-27; UB 35-38. Under the Restatement of Torts and well-developed federal common law principles that the federal courts have developed to fill a gap in the federal Comprehensive Environmental Response Cleanup and

Liability Act ("CERCLA"), joint and several liability applies to an indivisible injury to which multiple polluters have contributed. *See* AOB 31-33; Restatement (Third) of Torts: Apportionment of Liability §§ 12, 26 (2000).

Defendants also err in arguing that either "everyone in the world would be liable for global warming" or the case must be declared non-justiciable. UB 40; OCB 36-37. The Restatement addresses this very issue and embodies the established principle that the courts can distinguish trivial causes (here, the individual citizen) from non-trivial causes (the major industrial emitter defendants): "When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm," then as a matter of proximate cause "the harm is not within the scope of the actor's liability." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 36 (2005); *accord* Restatement (Second) of Torts § 834 cmt d. ("When a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable [in nuisance] for the harm resulting from it."). The scale of the defendants' GHG emissions distinguishes them from trivial or *de minimis* GHG emitters and, as Kivalina has alleged, their knowledge (substantial certainty) that global warming has occurred and is injurious, distinguishes them as well. *See* AOB 30-31.

Third, defendants' attempt to repackage under *Baker* factors two and three their argument–rejected by the district court under *Baker* factor one–that litigation of this case "could impede the Executive Branch's foreign policy efforts," OCB 30, fails. This argument is based upon the same error of assuming this damages case is tantamount to imposing emissions caps and, additionally, upon a misguided attempt to entangle this case with irrelevant concerns regarding U.S. foreign policy.[8]

Defendants rely heavily on the Supreme Court's statement in *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007), that it has "neither the expertise nor the authority to evaluate" the domestic and foreign policy judgments that EPA offered in that case as an excuse for EPA's refusal to decide whether greenhouse gases contribute to global warming; defendants recycle those policy concerns here as

[8] The political question cases dealing with foreign policy cited by defendants are, on their face, inapposite as they deal with suits against the U.S. and its officials for military actions taken overseas. *See Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 837 (D.C. Cir. 2010) (*en banc*). And in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), cited repeatedly by defendants, not even the issue of political gerrymandering could muster a majority in favor of finding a political question. *See id.* at 311 (rejecting "plurality's conclusions as to nonjusticiability") (Kennedy, J., concurring in the judgment); *id.* at 317 ("five Members of the Court are convinced that the plurality's answer" to the question of justiciability "is erroneous.") (Stevens, J., dissenting).

evidence of a supposed political question. OCB 3, 17, 32; UB 41; PB 32. But defendants' partial and out-of-context quotation fails to reveal what the Court actually said, i.e., that this "laundry list" of policy issues is *irrelevant*: "Although we have neither the expertise nor the authority to evaluate these policy judgments, *it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change*." 549 U.S. at 533 (emphasis added). Indeed, the Court in *Massachusetts* directly held that the case was *not* a political question. *See id.* at 516. If a lawsuit against the federal government seeking to force it to take action on global warming is justiciable notwithstanding the very same alleged policy issues advanced here by defendants, then *a fortiori* this tort lawsuit against private parties is justiciable. *Massachusetts* does not support–and in fact undercuts–defendants' political question argument.[9]

With respect to *Baker* factor three, defendants gloss over the central point. To the extent any initial policy decision is necessary, that decision has already been made through numerous legislative and executive pronouncements that U.S.

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[9] Defendant Peabody mistakenly contends that the cases rejecting the idea that domestic emissions caps somehow conflict with foreign policy were based on construction of the Energy Policy and Conservation Act; but the relevant portions of these cases do not refer to EPCA at all. *See Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1182-89 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 392-97 (D. Vt. 2007).

greenhouse gas emissions should be reduced. AOB 60-61. Defendants' criticism of that policy as "forward-looking and hortatory," OCB 34 n.13, acknowledges that U.S. *prospective* policies–such as Clean Air Act regulations–are not relevant to the retrospective question of awarding damages, a point that is at odds with defendants' preemption thesis. The policy is, indeed, forward-looking and/or hortatory, which is why: (1) there is no conflict between the political branches' actions and the exercise of judicial authority in this retrospective, monetary damages case; and (2) to the extent any policy judgment is necessary, it has been provided by hortatory expressions that point the way for a federal common law court just as the Supreme Court has indicated is proper. *See Illinois v. Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 102-03 (1972).

Finally, Kivalina's action should not be dismissed because of defendants' hypotheticals about joinder, impleader, and contribution. OCB 35-38; UB 40-41. The only procedural vehicle for dismissing a lawsuit for reasons relating to joinder is Federal Rule of Civil Procedure 19, and it is settled law that a court may not dismiss an action under that rule for a failure to join all joint tortfeasors in a single action. AOB 33 n.8. Defendants offer no authority for the novel proposition that the prospect of issues relating to potential, as-yet-unfiled, joinder or impleader motions or contribution claims should make the lawsuit nonjusticiable on political

question grounds. If, after a remand, defendants file joinder or impleader motions, the trial court can decide them and will have authority to deny the motions or sever claims as necessary for case management. *See, e.g.*, *Oklahoma v. Tyson Foods, Inc.*, 237 F.R.D. 679 (N.D. Okla. 2006) (granting motion to sever third-party claims under Rule 14(a) when defendant polluter attempted to implead more than 160 third-party defendants who allegedly also contributed to the pollution). The mere prospect of such motions does not make Kivalina's lawsuit nonjusticiable.

II. KIVALINA HAS STANDING.

A. Defendants' Contributions to Global Warming and Hence to Kivalina's Total Destruction Satisfy the Causation Element of Standing.

Defendants focus on the causation element of Article III standing, which asks whether there is "a causal connection between the injury and the conduct complained of . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Defendants' argument relies for the most part on a series of cases in which plaintiffs challenged tax exemptions or other government conduct but were unable to demonstrate that the state action at issue played any causal role in their claimed injuries. Defendants seek to read into these cases a causation principle that they claim applies to pollution cases; namely, a duty to untangle molecules of pollution and trace them back to their original sources. OCB 44 ("Plaintiffs could not

possibly carry their tracing burden as to any specified entity or group"); UB 27 ("there is no way to trace emissions from these particular defendants either to or from the greenhouse gas mixture in the atmosphere"); PB 41. But this view is inconsistent with well-established causation principles governing multiple polluter cases, which do not require a plaintiff to trace molecules or demonstrate that a particular defendant's emissions and no one else's caused her injury. AOB 31-33.

Defendants' approach ignores two core and related principles of standing: first, that the requirements of Article III standing must not be raised higher than the requirements for success on the merits, AOB 61-62, and second, that standing "is 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, 76 (1991). There is no one-size-fits-all standing doctrine; rather, standing "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*" *Id.* (internal quotation marks and citation omitted).

Defendants ignore these principles and cite no standing authority that construes standing principles in the context of nuisance actions involving multiple polluters, the most clearly apposite factual context. Instead, they cite cases dealing with injunctive relief against the government in factual contexts far removed from

this case that are distinguishable on their face.[10] These cases, addressing what the Supreme Court has called "indirectness of injury," *Simon*, 426 U.S. at 44, do not suggest that standing is lacking in a case where, as here, defendants and others all have directly and jointly contributed to an indivisible harm to the plaintiff. They deal instead with a problem of which cause, among several possibilities, was the real cause, and with the related problem of whether a third person's conduct constitutes an intervening cause.[11]

Here, the legal principles that govern the underlying claim establish that each defendant may be liable even if the plaintiff cannot establish which particular defendant caused the injury. AOB 31-33; *see, e.g.*, *Natural Resources Defense*

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[10] *See Allen v. Wright*, 468 U.S. 737, 759 (1984) ("[t]he chain of causation . . . . involves numerous third parties . . . *who may not even exist* in respondents' communities and whose *independent decisions may not collectively have a significant effect* on the ability of public school students to receive a desegregated education.") (emphases added); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976) (plaintiffs challenged tax exemptions for hospitals that denied care to the indigent but it was entirely unknowable whether the denial of care "instead result[ed] from decisions made by the hospitals without regard to the tax implications."); *Warth v. Seldin*, 422 U.S. 490, 506 (1975) (allegations that municipal zoning ordinance had reduced availability of affordable housing contradicted by record evidence demonstrating "precisely the contrary -- that [plaintiffs'] inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts").

[11] One of defendants' cases undermines their own (inapposite) point. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997) (traceability rule regarding independent action of third party causing the harm "does not exclude injury produced by determinative or coercive effect upon the action of someone else.").

Council v. Southwest Marine, Inc., 236 F.3d 985, 994-95 (9th Cir. 2000). "[O]therwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury." *Boim v. HolyLand Found. For Relief & Dev.* 549 F.3d 685, 697 (5th Cir. 2008) (*en banc*). Thus, global warming tort cases dealing with multiple polluters have found the causal element of standing satisfied. *Connecticut*, 582 F.3d at 345-47; *Comer v. Murphy Oil USA*, 585 F.3d 855, 864-67 (5th Cir. 2009) ("*Comer I*"), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010) ("*Comer II*"), *appeal dismissed for lack of quorum*, 607 F.3d 1049 (5th Cir. 2010) ("*Comer III*").

Defendants heavily rely upon the statement in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978), examining whether there was "substantial likelihood" that the statute at issue there was the cause of the plaintiffs' claimed harm. OCB 39-40, 44; UB 22, 25-26; *see also* PB 7-8, 37. In *Duke Power*, the plaintiffs challenged a federal insurance program for nuclear power plants and alleged environmental injuries, including thermal pollution of lakes; the Court held standing was proper because the record showed that the two plants at issue would not be built without such insurance. *Duke Power*'s "substantial likelihood" statement (describing a factual finding of the district court, *see* 438 U.S. at 74), takes on a very different meaning in a multiple polluter case where, as here, the

defendant contributes to the overall pollution harming the plaintiff; there is no requirement to trace molecules. *See Pub. Interest Research Group of New Jersey, Inc. v. Powell Duffryn*, 913 F.2d 64, 72 (3d Cir. 1990) ("The requirement that plaintiff's injuries be 'fairly traceable' to the defendants conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs . . . . . plaintiffs need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm") (quoting *Duke Power*, 438 U.S. at 75 n.20).[12]

Defendants also err in their attempt to distinguish the standing analysis in *Massachusetts*. The Court in *Massachusetts* specifically examined and accepted Massachusetts' standing based upon *the physical causal link* between greenhouse gas emissions and the state's harm - apart from its analysis of statutory-procedural

[12] Peabody attacks standing with the further argument that its conduct was not a substantial factor in causing the harm. PB 42-43. But under the substantial factor rule, "no consideration is given to the fact that . . . the actor's conduct has created a situation harmless unless acted upon by other forces for which the actor is not responsible." *Bank of N.Y. v. Fremont Gen. Corp.*, 523 F.3d 902, 910 (9th Cir. 2008) (quotations omitted). Thus, multiple polluter cases have found that the substantial factor rule does not bar liability for each individual polluter. *See, e.g. O'Neil v. Picillo*, 883 F.2d 176, 179 n.4 (1st Cir. 1989); *United States v. Sunoco, Inc.*, 501 F. Supp. 2d 656, 662 (E.D. Pa. 2007); *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1283 & n.25 (D. Del. 1987); *see also Rothberg v. Reichelt*, 742 N.Y.S.2d 150, 152 (N.Y. App. Div. 2002) ("Whether the negligence of a particular party was a substantial factor in causing an injury does not depend on the percentage of fault that may be apportioned to that party.").

standing and *parens patriae* standing. *See* 549 U.S. at 524-26. In fact, after discussing procedural-statutory standing and *parens patriae* standing, the Court prefaced its analysis of physical injury, causation and redressability as follows: "With that in mind, it is clear that petitioners' submissions as they pertain to Massachusetts *have satisfied the most demanding standards of the adversarial process*." *Id*. at 521 (emphasis added)*; see also Nuclear Info. & Res. Serv. v. NRC*, 457 F.3d 941, 949 (9th Cir. 2006) ("analysis of Article III standing is 'not fundamentally changed' by the fact that a petitioner asserts a 'procedural,' rather than a 'substantive' injury") (citation omitted).

The Clean Water Act ("CWA") cases have followed the principle that standing cannot be considered apart from the nature of the claim. *See Powell Duffryn*, 913 F.2d at 71-73. Thus, the first element of the *Powell Duffryn* causation analysis (a permit exceedance) is specific to the CWA context, as a CWA cause of action against a private party can arise only if a permit limit is exceeded. 33 U.S.C. § 1365. It thus has no applicability to unregulated, unpermitted pollution where the cause of action arises not from a statute but from the common law.

Further, defendants misinterpret the presumption that arises from a permit violation in a CWA case. UB 22-25; PB 44. The presumption is that a permit violation "necessarily means" that the protected "uses [of the waterway] may be

harmed," i.e., that *there is an injury*. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157, 161 (4th Cir. 2000) (*en banc*). When *Gaston Copper* addressed causation in a separate section of the opinion, its analysis was devoid of any mention of a "presumption" and in fact emphasized that the causal inquiry does not require "pinpointing the origins of particular molecules." *Id.*

Defendants also are incorrect in their attempt to distinguish the CWA cases on the basis of the distances involved. UB 25-27; OCB 50-51; PB 43-44. It is absurdly simplistic to contend that since an 18 mile distance is too far for certain kinds of pollutants to travel in water it must therefore also be too far for other kinds of pollutants to travel in the atmosphere. UB 26. CWA cases have explicitly eschewed arbitrary line-drawing based on geographic proximity. *See, e.g.*, *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996) ("We do not impose a mileage or tributary limit for plaintiffs proceeding under the citizen suit provision of the CWA."). Here, defendants' emissions affect the concentration of greenhouse gases all over the planet and cause a planetary warming. *Cf. Boim*, 549 F.3d 685 (global financial contributions with global consequences give rise to liability). Kivalina suffers a discrete injury in an area–the Arctic–that is disproportionately heating up from the anthropogenic global warming to which defendants are among the world's largest contributors.

AOB 8; ER 40, 43-44, 83-84. It is no answer to a discretely injured plaintiff's case to point out that defendants have polluted and overheated the entire Earth.

B. The Connection Between Greenhouse Gas Emissions and the Global Warming Harms to Kivalina Are Neither Attenuated Nor Speculative.

Defendants further attack the causal element of standing as involving an attenuated and speculative chain of events, inconsistent (defendants claim) with the pleading standards in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct .1937 (2009). PB 38-39; UB 13-19; OCB 52-53. But Kivalina's causal allegations hardly rest on conclusory statements; two government agencies have issued findings consistent with Kivalina's allegations, AOB 8-9, 13, numerous scientific studies establish a direct correlation between GHG emissions and global warming, *id.* at 5-6, and EPA has now issued findings that further substantiate the causal connection between a subset of world GHG emissions, global warming, and a series of harms to human health and welfare, including the very harm to the Alaskan coastline at issue here. *Id.* at 12-13. Moreover, the courts have accepted the evidence of causal linkages between subsets of world GHG emissions, global warming and harms, including injuries to coastal property. *Massachusetts*, 549 U.S. at 506-10, 525; *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*. 538 F.3d 1172, 1189 n.26 (9th Cir. 2008).

The Utilities' parsing of Kivalina's allegations into seven neatly enumerated causal steps does nothing to advance their argument. UB 13-14. Many pollution cases could be similarly parsed. Consider, for example, a nuisance suit against a defendant that has dumped mine tailings in a river:

1. defendant dumps mine tailings in the river;

2. those tailings mix in the river and merge with the accumulation of mine tailings from numerous other mining operations past and present, as well as soil and gravel from natural erosion, throughout the river;

3. those accumulated mine tailings - a large portion of which were dumped decades ago - persist and raise the bed of the river;

4. over some unknown period of time, the increased level of the riverbed lessens the depth of the river, causing its liability to overflow to be greatly increased;

5. the overflowing of the river causes frequent floods to extend their area, and to be more destructive than they otherwise would have been;

6. the floodwaters cause thousands of acres of land to be covered with mining debris; and

7. as the rivers are at all times carrying in suspension the lighter earthy matter from the mines, and washing down the heavier debris, they are likely to fill more rapidly in the future than in the past, and to cause much further and greater injury in the future to large tracts of land -- probably rendering them, within a few years, unfit for cultivation and inhabitancy.

These steps are taken, largely verbatim, from the facts of *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1153-54, 1156 (Cal. 1884), where the court upheld

a finding of liability.

Defendants also err in contending that this case goes beyond the outer limit of standing in *United States v. SCRAP*, 412 U.S. 669 (1973). To the contrary - this case asks far less of standing law than did *SCRAP*, where the Court based an environmental group's standing to challenge a railroad freight rate surcharge on the group's allegation that increases in railroad rates would cause an increase in the use of nonrecyclable goods, resulting in the increased need for natural resources to produce such goods, and some of these resources might be taken from their local area, resulting in increased refuse that might find its way into area parks, harming the group's members. Those projections of what might happen in the future for various reasons depending upon responses by third parties are far more speculative and attenuated, on their face, than the demonstrable physical impacts of greenhouse gas pollution that Kivalina has alleged.

Finally, defendants' scare tactic that accepting standing here would somehow allow everyone on the planet to sue each other for global warming is not credible. Only plaintiffs who have special injury may sue in public nuisance. *Ileto*, 349 F.3d at 1211; Restatement (Second) of Torts § 821C(1). Global warming has uniquely harmed Kivalina due to the importance of snow, ice and permafrost to Arctic ecology, the Inupiat way of life, and the physical security of

the village. Few potential plaintiffs would be likely to present a case like Kivalina's, i.e., their total destruction from the heating of their environment past a crucial melting point. And the limiting principles noted *supra* relating to triviality and knowledge would provide further checks on the merits of such claims.

C. The Native Village of Kivalina Has *Parens Patriae* Standing.

Under the doctrine of *parens patriae* a governmental entity "has a quasi-sovereign interest in the health and well-being–both physical and economic–of its residents," which may provide an independent basis for standing. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607-08 (1982). *Parens patriae* standing is not limited to states: *Snapp* recognized that the unincorporated territory of Puerto Rico had authority to pursue the interests of its residents. 458 U.S. at 609.

Native tribes have standing to protect sovereign or quasi-sovereign interests. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 469 n.7 (1976); *Dep't of Health & Soc. Servs. v. Native Village of Curyung*, 151 P.3d 388, 393, 400 (Alaska 2006) (Native Alaskan village had standing to sue the state to maintain the "integrity" of its tribe and "the well-being of [its] families and children"). Further, it is entirely appropriate for "governments [to] act in their *parens patriae* capacity as representatives for all citizens in a suit to

recover damages [from third parties] for injury to . . . natural resources within [their] boundaries." *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994); *accord Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1181 (N.D. Okla. 2009) (tribe has *parens patriae* standing to recover natural resource damages from defendant private corporations). The decisions defendants cite are inapposite and pertain to tribal authority to tax or regulate non-members. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 525 (1998); *Montana v. United States*, 450 U.S. 544, 551-59 (1981).

Finally, even accepting defendants' premise that the Alaska Native Claims Settlement Act diminished Kivalina's tribal authority over the lands in which it resides, UB 29, Kivalina has a clear interest in preventing the imminent displacement of its citizens and its own possible extinction. The Native Tribe of Kivalina has *parens patriae* standing.

III. KIVALINA STATES VALID COMMON LAW CLAIMS.

A. Federal Common Law Provides a Public Nuisance Cause of Action.

1. Federal Common Law Applies Due to the Nature of the Claim.

Federal common law applies here due to the nature of the subject matter. *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("federal common law exists" in "interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations"). Defendants' strenuous argument that Kivalina may not avail itself of federal common law because it is not a state is in error. UB 44-46; OCB 56-61.

The Supreme Court has directly recognized the right of Native American tribes to bring federal common law claims. *County of Oneida v. Oneida Indian Nation* 470 U.S. 226, 236 (1985) ("we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law"). Moreover, the Supreme Court, in *Milwaukee I*, expressly held that "*it is not only the character of the parties that requires us to apply federal law*" but rather it is "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." 406 U.S. at 105 n.6 (emphasis added). The Court held that these "demands for applying federal law are present in the pollution of a body of water such as Lake Michigan

bounded, as it is, by four States." *Id*.

The lower courts have thus unanimously allowed non-states to sue under the federal common law of public nuisance applicable in interstate pollution cases. For example, the Second Circuit recently held in a similar global warming case that the City of New York and private party land trusts were proper parties to bring federal common law nuisance claims. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 366 (2d Cir. 2009). In that set of cases, the land trusts had filed a separate case that was separately appealed, and the Court was thus directly addressing a suit by non-state parties. The Seventh Circuit, in *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), also held that a municipality could invoke the federal common law of nuisance. *Accord City of Long Beach v. Township of New York*, 445 F. Supp. 1203, 1213-14 (D.N.J. 1978).

Defendants rely on *Committee for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006 (4th Cir. 1976) (*en banc*), OCB 58, but in that case the court emphasized that "[i]t is *not* essential that one or more states be formal parties if the interests of the state are sufficiently implicated." *Id.* at 1009 n.8 (emphasis added). Here, where eight states have filed a case in which they seek to restrain greenhouse gas emissions from some of these same defendants, *see Connecticut*, it cannot be doubted that the interests of states are sufficiently

implicated.

Defendants' reliance on *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), is misplaced. OCB 59; UB 46. In that case the Court expressly declined to address the issue of whether private parties could assert a claim for damages. *Sea Clammers*, 453 U.S. at 21 ("In these cases, we need not decide whether a cause of action may be brought under federal common law by a private plaintiff, seeking damages."). The decision thus does not establish any rule of law on the issue. Kivalina is not a private party in any event: it brings its case here through its two governing public bodies: a *federally-recognized* Indian tribe and a municipality.

Defendants are incorrect in arguing that *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988), is to the contrary. UB 43-46; OCB 57-60; PB 48-49. The interstate aspect of the dust pollution in that case was trivial and entirely extraneous to the key facts in that case where the defendants, emissions, harm and plaintiffs were all located in a single state. To be sure, the Court observed in *National Audubon* that federal nuisance law had previously been applied by the Supreme Court only in the "limited context" of suits by States. 869 F.2d at 1205. But defendants fail to acknowledge that in the very next paragraph *National Audubon* declared that "true interstate disputes require application of

federal common law" and, "[b]ecause we conclude this is essentially a domestic dispute and therefore not the sort of interstate controversy which makes application of state law inappropriate, reliance on federal common law is unnecessary." *Id.* A key factor in this decision was that the plaintiff was "currently seeking the protection of California nuisance laws in California State court, the [plaintiff] has clearly demonstrated that California nuisance law is both well-suited and applicable to the case at bar." *Id*. as 1204. Here, there is a "true interstate dispute" given the inherently interstate nature of greenhouse gas emissions and the numerous states from which defendants emit greenhouse gases. And in contrast to *National Audubon*, here Kivalina has filed no state-court case and it has pled its state-law claims only in the alternative in order to preserve them from a later defense of claim-splitting. *See* AOB 21 n.4. This case is the exact opposite of a "domestic dispute" appropriate for resolution under the law of a single state – or even under the laws of a series of states.

2. Defendants' Remaining Arguments Lack Merit.

Defendants' remaining arguments against the application of federal common law lack merit. First, the Court should decline defendants' invitation to create a circuit split on the issue of whether damages are available under federal common law. The Seventh Circuit's decision in *Evansville*, 604 F.2d at 1019 & n.32,

refusing to dismiss a federal common law claim seeking damages, is correct. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 171 L.Ed. 2d 570, 573 (2008) ("the Court has rejected similar attempts to sever remedies from their causes of action").

Second, the Utility defendants' arguments about when and whether the federal courts should "create" a new cause of action, UB 45-46, are beside the point. Kivalina does not seek the creation of any new cause of action. Rather, Kivalina seeks to invoke the long-established federal common law of public nuisance applicable to interstate pollution. *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way."). The Utilities' related argument that federal nuisance is restricted only to nuisances of a "simple type," UB 45-46, was properly rejected by the Second Circuit, *Connecticut*, 582 F.3d at 355-56, and has the applicable law exactly backwards. *See Missouri II*, 200 U.S. at 522 ("There is no pretence that there is a nuisance of the simple kind that was known to the older common law.").[13] Federal nuisance applies to the inherently interstate pollution at issue in this case.

[13] While the Court in *Missouri II* denied the claim on the merits in light of the evidence, it adhered to its prior decision in *Missouri I* that the plaintiff had stated a proper claim in that distinctly non-simple nuisance case. *See Missouri II*, 200 U.S. at 518.

B. The Clean Air Act Does Not Preempt Kivalina's Federal Common Law Damages Claims.[14]

Defendants admit that "no federal law currently defines carbon dioxide emissions by these defendants above a certain level as unlawful and harmful." UB 23; *accord* OCB 34-35 ("the political branches are actively considering" what if anything to do about greenhouse gas emissions). But Defendants then turn around and argue that–despite the absence of any regulatory standards–Kivalina's action for damages from past, unregulated GHG emissions is somehow preempted by the Clean Air Act ("CAA"), and specifically by prospective EPA regulation of certain GHG emissions under the CAA. UB 46-49; OCB 61-66; PB 47-52.[15]

Defendants principally rely on *Milwaukee v. Illinois*, 451 U.S. 304 (1981) *"Milwaukee II"* and *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), which held that the Federal Water Pollution Control Act

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[14] The Supreme Court has interchangeably used the terms "preemption" and "displacement" of federal common law. *See Exxon*, 128 S. Ct. at 2616-18.

[15] The Second Circuit has held that the CAA does not preempt federal common law public nuisance claims. *Connecticut*, 582 F.3d at 371-88. Two other circuit court opinions have considered but not decided the issue. *See New England Legal Foundation v. Costle*, 666 F.2d 30, 32 n.2 (2d Cir. 1981) (noting differences between CAA and Clean Water Act (FWPCA) in areas that *Milwaukee II* found "especially significant" but reserving preemption question); *National Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1212-14 (9th Cir. 1989) (Reinhardt, J., dissenting on other grounds) (CAA does not preempt federal common law nuisance actions). The majority in *National Audubon* did not address preemption.

Amendments of 1972 (FWPCA) pre-empted certain common-law claims for nuisance based on water pollution. But the pollution at issue in both *Milwaukee II* and *Sea Clammers* was *already regulated* under the FWPCA, which prohibited "*[e]very* point source discharge" of a pollutant unless it was authorized by a permit. *See Milwaukee II*, 451 U.S. at 318; 33 U.S.C. § 1311(a). Hence, as the Supreme Court recently explained, the remedy plaintiffs sought would have conflicted with the Clean Water Act's remedial scheme. *See Exxon*, 128 S. Ct. 2605, 2619 n.7 (in *Sea Clammers* and *Milwaukee II* "plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the CWA"). Here, by contrast, Kivalina seeks damages for injuries from *unregulated* GHG emissions - the past GHG emissions that have caused Kivalina's injuries. ER 40-41, 44-69, 78-85, 102-03. The federal GHG regulations that defendants cite are purely prospective, beginning in January 2011, and, if upheld against defendants' currently pending legal attacks, will not apply to the past emissions that Kivalina alleges caused its harm.[16] There is thus no similar question

[16] On January 2, 2011, the regulation of certain GHG emissions from light-duty vehicles under the CAA will take effect. *See* 75 Fed. Reg. 25,324 (May 7, 2010) ("Auto Rule"). With respect to stationary sources, EPA has merely indicated that this would trigger sections of the CAA that only apply to certain newly constructed sources (or sources so substantially expanded that they are deemed equivalent to new sources). *See* 75 Fed. Reg. 17004, 17019, 10722-10723 (April 2, 2010); 42 U.S.C. §§ 7475(a); 7479(1). Even then such regulations would not establish any national emissions standards, as defendants correctly state.

of a conflict with a remedial scheme; during the period where defendants' emissions allegedly harmed Kivalina they were subject to no regulation at all.[17]

Defendants further contend that the *absence* of regulation of GHGs under the CAA prior to January, 2011 somehow preempts Kivalina's claims. OCB 49. However, the failure to regulate is rarely entitled to preemptive force. In *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), a case defendants cite for the opposite of its holding, OB at 66, the Supreme Court held that the Coast Guard's failure to adopt a

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Further, any EPA action under Title V, 75 Fed. Reg. at 17023, would not impose any emissions limitations as Title V is merely a process for issuing a single document to a source summarizing emissions limits imposed from other, substantive, CAA provisions. *See Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 742 (9th Cir. 2008). Kivalina notes that the electric utility, coal and oil industries are pursuing legal challenges to every EPA action to regulate GHGs that they are touting here. OCB 14; *Utility Air Regulatory Group v. U.S. EPA*, No. 10-1042 (D.C. Cir.); *Peabody Energy Company v. U.S. EPA*, No. 10-1025 (D.C. Cir.); *Nat'l Ass'n of Mfrs. v. U.S. EPA*, No. 10-1044 (D.C. Cir.) (American Petroleum Institute).

[17] Thus, *North Carolina v. Tennessee Valley Auth.*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010), in which a common law injunction under state law conflicted with permits for non-GHG emissions, is inapposite. Defendants also cite *Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982), OCB 64-65; UB 48-49, a water pollution case addressing the residual effects of discharges pre-dating the amendment of FWPCA. The Seventh Circuit found preemption of claims arising from pollution before 1972 because Congress had "obviously considered" the "problem of pre-1972 discharges, and *specifically the appropriate role in the statutory scheme for remedies against polluters.*" 680 F.2d at 478 (emphasis added). Defendants identify no similar evidence of congressional intent in the CAA to consider the appropriate role in the statutory scheme for remedies against pre-regulated GHG pollution or pollution before the CAA was even enacted.

propeller guard regulation, which had been under consideration for fourteen years, did not "convey an 'authoritative' message of a federal policy against propeller guards" that could preempt a tort lawsuit alleging the absence of a propeller guard rendered the motor defective. *Id.* at 67. Rather, the Coast Guard's conclusion was merely that "available data did not meet the [statute's] 'stringent' criteria for federal regulation." *Id.*; *accord Altria Group, Inc. v. Good*, 129 S. Ct. 538, 549-51 (2008) (FTC inaction regarding cigarette companies' descriptions of cigarettes as "light" did not preempt misrepresentation tort claim because "agency nonenforcement of a federal statute is not the same as a policy of approval"); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995) (rejecting preemption argument that "the absence of regulation itself constitutes regulation" in tort suit alleging failure of truck manufacturer to install anti-lock brake systems).[18]

Defendants point to nothing in the language, history, or structure of the CAA that suggests Congress intended EPA nonregulation of particular pollutants to evince an authoritative federal policy that such pollutants should not be regulated in any way, even by the indirect mechanism of common–law lawsuits. In recent years, EPA has been in the process of compiling evidence and considering whether

[18] The leading cases in this area involve federal preemption of state law rather than federal law, but the same principles should apply to this particular question of preemption-by-inaction because in both kinds of preemption it is federal *law*, rather than federal inaction, that has preemptive effect.

regulation under the CAA was appropriate and, as defendants state, "considering" what, if anything, to do. OCB 35. But regulatory inaction during a process of information–gathering does not have preemptive effect. Thus, in *Freightliner*, there was no preemption where a federal court had suspended former brake standards and the agency had developed new standards but had not yet promulgated final rules because there was no "affirmative decision of agency officials to refrain from regulating air brakes," 514 U.S. at 286, and "a finding of liability against petitioners would undermine no federal objectives or purposes with respect to [anti-lock brake] devices, since none exist." *Id*. at 289-90. Similarly here, defendants identify no affirmative decision by EPA to refrain from regulating GHGs and–with no EPA regulation of past GHGs–there is no federal objective with which Kivalina's lawsuit would conflict.[19]

Preemption by inaction may exist in those rare situations where federal

[19] Defendants cite *Mattoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992), UB 49, where the First Circuit held that the Federal Safe Drinking Water Act (SDWA) pre-empted federal common law nuisance action for illnesses caused by drinking water contaminated by a pathogen that was unregulated at the time of the incident. However, *Mattoon* predated the Supreme Court's decision in *Sprietsma* by nearly a decade and is inconsistent with it. Further, the discussion of federal common law in *Mattoon* was *dictum* because the case involved entirely local pollution (Massachusetts residents complaining about pollution in a local reservoir) and thus there was no basis for applying federal common law in the first instance. The case was eventually re-filed and resolved in state court under state law, as it should have been in the first place. *See Mattoon v. City of Pittsfield*, 775 N.E.2d 770 (Mass. Ct. App. 2002).

legislation or regulation is so exhaustively comprehensive that it amounts to a clear statement from Congress that it intends only the statute and its regulation to exist in the area, supplanting all pre-existing common-law remedies. The Supreme Court rejected the application of this theory in *Sprietsma*, emphasizing that the allegedly preempting statute "does not *require* the Coast Guard to promulgate comprehensive regulations covering every aspect of recreational boat safety and design; nor must the Coast Guard certify the acceptability of every recreational boat subject to its jurisdiction." 537 U.S. at 69 (emphasis in original). That is exactly like the CAA, which does not require EPA to regulate every emission of every air pollutant; rather, the CAA prohibits only some emissions of some pollutants under some circumstances from certain categories of sources – most significantly, emissions from sources that threaten the states' attainment of the National Ambient Air Quality Standards (NAAQS).[20] *Connecticut*, 582 F.3d at 380. There are no existing

[20] The NAAQS are EPA-set national standards that define the acceptable levels of certain pollutants known as "criteria" pollutants. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 469 (2004). Defendants cite prior decisions of this Court describing the CAA as "comprehensive," but these observations were not made in the context of deciding whether the CAA preempts federal common law causes of action. *See Audubon*, 869 F.2d at 1201, 1205 (describing CAA as "comprehensive" but concluding "we need not decide whether or not a [federal common law nuisance action] would be preempted by the Clean Air Act"); *Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981). Peabody's assertion that *Audubon* "holds that the CAA has similarly displaced the federal common law for interstate pollution disputes," PB 48, is demonstrably incorrect as *Audubon* made very clear that it was not deciding that question.

or proposed NAAQS for any GHGs now,[21] much less during the period when the defendants' emissions and actions occurred. The CAA is therefore also very different from the FWPCA that the Supreme Court found preemptive in *Milwaukee II*, which prohibited "*[e]very* point source discharge" of a pollutant unless it was authorized by a FWPCA permit. *See Milwaukee II*, 451 U.S. at 318; 33 U.S.C. § 1311(a). Nor would Kivalina's action be inconsistent with the purpose of the CAA. To the contrary: permitting a federal common law nuisance action to redress the harms caused by defendants' greenhouse gas emissions would be consistent with the purpose of the CAA, which is to "protect and enhance the quality of the Nation's air resources," 42 U.S.C. §§ 7401(b)(1). *See Exxon*, 128 S. Ct. at 2619 ("[W]e find it too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.").[22]

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[21] 75 Fed. Reg. 31520 ("There is no NAAQS for CO2, or any of the other well-mixed GHGs, nor has EPA proposed any such NAAQS . . . .").

[22] Defendants' attempt to distinguish *Exxon* on the basis that it involved maritime law, OCB 49, misses the mark. The Supreme Court held there was no preemption of plaintiffs' punitive damages claim because–unlike the nuisance claims considered in *Milwaukee II*–the cause of action in *Exxon* did not "amount[] to arguments for effluent-discharge standards different from those provided by the CWA." 128 S. Ct. 2605, 2619 n.7. That is precisely the situation here; there is no federal regulatory limit on defendants' GHG emissions under the CAA, much less

Finally, defendants argue that it is not relevant to inquire whether the CAA provides plaintiffs with a remedy for the conduct they allege caused their harm; rather, Congress's silence about the federal common law nuisance remedy implies (defendants argue) a desire to eliminate it by statute. UB 48-49; OCB 64-65; PB 51-52. But the preemption inquiry does not require Congress to expressly state its intention that common law remedies survive; rather, it looks to whether Congress intended to *supplant* the remedies that a party has at common law. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. at 240 (1985); *Exxon*, 128 S. Ct. at 2619. Defendants attempt to distinguish *Oneida* in a footnote by claiming that the only basis for its holding was that Congress "*contemplated* [such] suits" in relevant statutes. 470 U.S. at 239; UB 49 n.17. But courts are to presume that Congress legislates against the backdrop of the common law and Congress thus expects that common-law causes of action will survive legislation unless it indicates to the contrary. *United States v. Texas*, 507 U.S. 529, 534 (1993) ("[T]here is no support in our cases for the proposition that the presumption [favoring retention of existing law] has no application to federal common law."); *County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1249 (9th Cir. 2009) (observing in preemption context

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a remedial scheme for past emissions, and thus no argument that federal common law nuisance claims for damages would frustrate the remedial scheme by imposing emissions standards different than those established under CAA.

that "[w]e presume that Congress legislates with the expectation that the principles of the federal common law will apply except when a statutory purpose to the contrary is evident") (internal quotation marks and citation omitted).[23] Congress's failure to say anything one way or another about preexisting federal common law causes of action in the CAA weighs against preemption rather than in favor of it.

C. Kivalina Has Pled a Proper Claim of Public Nuisance.

Defendants are incorrect in contending that Kivalina has failed to plead a proper public nuisance claim. Defendants primarily attack Kivalina's causation allegations. But Kivalina has properly alleged that defendants "contribute" to the harm, which is precisely what nuisance law requires. AOB 31-33; *see, e.g.*, *Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001) ("nuisance liability at common law has been based on actions which 'contribute' to the creation of a

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[23] The *Milwaukee II* presumption in favor of preemption of federal common that defendants invoke, UB 46-47; OCB 62, does not apply any time Congress passes legislation related to the subject at issue; if it did, *Milwaukee I* would be inexplicable. *See Milwaukee I*, 406 U.S. at 101 ("Congress has enacted numerous laws touching interstate waters."). Rather, the *Milwaukee II* presumption applies only when Congress has enacted a statute as exhaustively comprehensive as the FWPCA. *See In re Oswego Barge Corp.*, 673 F.2d 47, 48 (2d Cir. 1982) ("When Congress legislates on a subject as comprehensively and precisely as it has here, *City of Milwaukee* instructs that a presumption arises that common law within the scope of the subject of the legislation has been preempted."). This presumption is inapplicable here because the CAA is a source-by-source and pollutant-by-pollutant regulatory regime, unlike the across-the-board FWPCA considered in *Milwaukee II*, which occupies the entire field.

nuisance").

Defendants acknowledge, as they must, the long-established rule applicable in multiple-polluter cases that the contribution of any single polluter to the nuisance need not by itself have been sufficient to have caused the harm. OCB 68-69; *see also* Restatement (Third) of Torts § 27 cmt f. Defendants incorrectly contend that this rule of law only applies when there are a discrete number of polluters who are causing harm to just one specific location and it is feasible to hold all of them liable. But defendants cannot point to any such holding or statement to that effect in the case law.

Nor have defendants shown that, in the cases applying the contribution principle, the plaintiff had sued all or even a majority of the polluters contributing to the nuisance, as none of the cases so stated. In fact, in *City of Tulsa v. Tyson Foods, Inc*., 258 F. Supp. 2d 1263, 1271, 1297 (N.D. Okla. 2003), the defendants were, *inter alia*, corporate poultry producers alleged to have contributed to eutrophication of multiple reservoirs "by virtue of the land application of poultry litter *by contract growers located throughout the Watershed with whom the Poultry Defendants have contracted for the raising of poultry*." (emphasis added), *vacated by settlement*, 2003 U.S. Dist. Lexis 23416 (N.D. Okla. July 16, 2003). Each of those numerous contract growers were separate sources of pollution spread over a

415 square mile watershed. *Id*. at 1270. Similarly, in *Illinois v. Milwaukee* itself, there were countless other sources of nutrients all over the watershed contributing to eutrophication of Lake Michigan. *See* AOB 34. In other cases, it defies belief to think that, for example, it was only the seven plants belonging to the three U.S. defendants sued in *Michie v. Great Lakes Steel Div., Nat'l Steel Corp*., 495 F.2d 213, 215-18 (6th Cir. 1974), that contributed to air pollution in the vicinity of LaSalle, Ontario, or that it was only the two defendants sued in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), who, in the midst of the industrial revolution, were contributing to acid rain over Georgia. Nor is there any indication in any of the multiple polluter cases that the pollution was affecting only the plaintiff or resource at issue and not any other place - a fact that defendants have simply made up out of thin air.[24]

Defendants propose a rule of law that would go well beyond global warming

[24] Defendants make a cursory attempt to repackage their causation arguments under proximate cause. OCB 72-73; UB 52-53; PB 52-53. These arguments fail for the reasons set forth in Kivalina's opening brief. *See* AOB 75. Additionally, Kivalina notes that "[w]hether an act is the proximate cause of injury is generally a question of fact" and thus inappropriate for resolution on a motion to dismiss. *Ileto*, 349 F.3d at 1206. Peabody's proximate cause argument based upon foreseeability must be rejected in light of Kivalina's extensive and detailed allegations that Peabody and other defendants not only knew of the harm they were inflicting but went to great lengths to distort the truth about global warming. ER 86-101; *see also Ileto*, 349 F.3d at 1202-05 (rejecting, under state law, approach to "foreseeability that requires identifying whether an individual plaintiff's injury was foreseeable in light of a particular defendant's conduct").

cases. It is simply inherent in nearly any kind of pollution problem that the sources are widespread and that the harm occurs over a large area. The electric utility defendants' plants are spread out over thousands of miles and contribute to acid rain, smog and mercury pollution all over the Northeastern United States. Defendants' new rule of law would defeat numerous, valid claims targeting such traditional pollutants.[25]

And it would not just be pollution cases that would suffer under defendants' regime: as the Seventh Circuit recently held, the indivisible injury principle of multiple polluter law applies with equal force to impose tort liability upon financial contributors to organizations that finance terrorism. *See Boim*, 549 F.3d at 696-97. Like pollution, financial contributions to terrorist organizations may number in the millions, be insufficient each in isolation to cause the harm and be spread all over the globe. *Boim* is an apt demonstration of how defendants' approach would set back tort law across a variety of contexts.

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[25] Defendants point out that "the discharges themselves" cause pollution problems like acid rain in contrast to the heat-trapping effect of greenhouse gases. OCB 71 n.32. But if that were significant, then ordinary smog would be immune from nuisance law since smokestacks merely emit smog precursor compounds, which must then be transformed in the presence of sunlight (and in combination with volatile organic compounds) in order to become smog. *See Sherwin-Williams Co. v. Crotty*, 334 F. Supp. 2d 187, 190 (N.D.N.Y. 2004).

D. Kivalina Has Pled Proper Civil Conspiracy and Concert-of-Action Claims.

1. Causation Is Established From the Underlying Tort.

The Utilities argue that, to state a claim for conspiracy and concert-of-action, Kivalina must show that the Conspiracy Defendants convinced Congress and the public that greenhouse gases are beneficial. UB 53-54. However, to state a claim for conspiracy and concert-of-action, Kivalina must only allege that the Conspiracy Defendants engaged in a conspiracy, intended to continue their nuisance, and that *the nuisance* harms Kivalina. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999) (*en banc*) (holding that civil conspiracy is a "combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage."); *see also In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 632 (S.D.N.Y. 2001) (holding that concert of action "permits a defendant to be held jointly and severally liable if it commits a tortious act in concert with another or pursuant to a common design, or a defendant gives substantial assistance to another knowing that the other's conduct constitutes a breach of duty"). Kivalina has properly pled detailed factual averments in support of the elements of conspiracy and concert-of-action. *See* AOB 37-39.

The Utilities' reliance on *Pritikin v. Department of Energy*, 254 F.3d 791,

793, 797-801 (9th Cir. 2001), is misplaced. *Pritikin* merely held that the plaintiff in a CERCLA citizen suit failed to establish Article III standing when independent third parties not before the Court caused her injury. *Id.* at 797-801. *Pritikin* is thus inapposite. Kivalina properly alleges a conspiracy and that the underlying tort caused it harm.[26]

2. The First Amendment Does Not Bar the Conspiracy and Concert-of-Action Claims.

a. The *Noerr-Pennington* Doctrine Does Not Shield Defendants' Conduct.

The Utilities err in portraying the Complaint as alleging that the Conspiracy Defendants' activities targeted the government. UB 54-55. Kivalina alleges that the conspirators targeted the public and victims of global warming, not policymakers. *See, e.g.*, ER 86. The Petition Clause of the First Amendment only protects one's right "to petition the Government." U.S. Const. amend. I. The *Noerr-Pennington* doctrine does not expand this protection beyond petitioning the government: "To the extent that Supreme Court precedent can be read to extend *Noerr-Pennington* outside of the antitrust context, it does so solely on the basis of

[26] Peabody frivolously contends that Kivalina's conspiracy claim allegations lack sufficient specificity. PB 55-56. But Kivalina has pled the conspiracy in extraordinary detail. ER 86-95. Kivalina defined the "Conspiracy Defendants" to include Peabody, ER 86, and thus all subsequent references to "Conspiracy Defendants" in the Complaint include by definition Peabody, *see* ER 86, 89, 92.

the right to petition." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir. 2000).

The *Noerr-Pennington* doctrine is not "clearly implicated" by two paragraphs of the Complaint that the Utilities selectively and misleadingly quote. UB 54. First, the Utilities carelessly attribute to Kivalina a quote that was actually the words of a climate critic employed by defendants Exxon Mobil and Shell Oil who criticized members of the IPCC for, in his opinion, having "deceived policymakers and the public" *by exaggerating the magnitude of global warming*. UB 54 (quoting Complaint ¶ 218). Second, Kivalina does not allege that defendants "lobb[ied] members of Congress to thwart any corrective action," UB 54 (quoting Complaint ¶ 242), but merely alleges that a newspaper reported that Exxon Mobil funded various activities, including lobbying. And whether the Conspiracy Defendants intended the campaign to influence the public or the government is an issue of fact that cannot be resolved on a motion to dismiss. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 674 F.2d 1252, 1264 (9th Cir. 1982).

b. The Free Speech Clause Does Not Shield Defendants' Conduct.

The Utilities and Peabody incorrectly contend that the Free Speech Clause bars Kivalina's conspiracy and concert-of-action claims. UB 55; PB 55. While the First Amendment protects scientific debate regarding issues of public interest,

Defendants offer no authority that such speech receives blanket immunity. "[W]hat the First Amendment and our case law emphatically do not require . . . is a blanket exemption from fraud liability for a [defendant] who intentionally misleads [its audience]." *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 621 (2003). Free speech protection does not apply to a deliberately false statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

Nor are Defendants entitled to the "breathing space" defense, which provides "that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks omitted). The Utilities mistakenly rely on *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988), to contend that breathing space "encompasses allegedly false statements of fact as well as opinion." UB 55. In *Hustler*, the Court held that breathing space precluded public figures from recovering damages for intentional infliction of emotional distress without a showing that the allegedly false statement

was made with actual malice. *Hustler*, 485 U.S. at 56. The Court did not apply that standard to *all* knowingly false statements. Further, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003), PB 55-56, does not hold that a *deceptive* advertising campaign is protected speech. *Vess* dismissed a defectively pled false advertising claim; the sole remaining question was whether an advertising campaign was free speech for the purposes of the anti-SLAPP statute. *Id.* at 1110. The Constitution does not protect a deliberately misleading public campaign.

3. Kivalina States a Claim for Concert-of-Action.

Peabody also errs in contending that Kivalina's concert of action allegations are deficient. Kivalina's concert-of-action claim incorporates all of the detailed conspiracy and nuisance factual allegations and contends that Peabody acted in concert with the other Defendants to create, contribute, and maintain a public nuisance. ER 105. Kivalina thus pleaded detailed facts that easily satisfy the notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."

CONCLUSION

Plaintiffs respectfully request the Court reverse the district court's judgment of dismissal and remand for further proceedings.

Dated: September 15, 2010

Respectfully submitted,

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PROOF OF SERVICE

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