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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

NATIVE VILLAGE OF KIVALINA and CITY  
OF KIVALINA,

Plaintiffs,

vs.

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

Defendants.

CASE NO. C 08-01138 SBA

**REPLY IN SUPPORT OF THE  
MOTION OF CERTAIN OIL  
COMPANY DEFENDANTS TO  
DISMISS PLAINTIFFS'  
COMPLAINT PURSUANT TO FED.  
R. CIV. P. 12(b)(6)**

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

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1 **I. INTRODUCTION**

2 Plaintiffs' own brief establishes that Plaintiffs are bringing claims and seeking relief  
3 without precedent in American law. This is no ordinary nuisance action. Plaintiffs have  
4 arbitrarily selected a few companies as liable for all the damages caused by more than two  
5 centuries' worth of greenhouse gas emissions, requesting that this Court apply a joint causation  
6 theory that ignores the innumerable other contributors across the globe, and alleging a hopelessly  
7 attenuated causal chain between Defendants' emissions and Plaintiffs' alleged harm. In addition  
8 to failing to plead actual or legal causation, Plaintiffs have also failed to plead a proper claim  
9 under the federal common law of nuisance, because such a claim applies only to protect a State  
10 from identifiable polluting sources beyond the State's borders. Should the Court reach the merits,  
11 therefore, Plaintiffs' claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup>

12 **II. ARGUMENT**

13 **A. Plaintiffs' Brief Fails To Demonstrate The Legal Sufficiency Of Their**  
14 **Causation Allegations.**

15 Plaintiffs labor to characterize their case as a typical nuisance action, no different from  
16 pollution cases involving multiple polluting sources. Plaintiffs assert that in multiple-source  
17 cases, when emissions combine to contaminate a given area, any one or any subset of the  
18 polluters generally can be sued in nuisance, with each and every polluter deemed a contributing  
19 cause of the overall contamination. Plaintiffs then contend that this case follows the same model,  
20 because the defendants are merely a subset of all the "polluters" whose emissions, over every  
21 continent and for several centuries, have combined to "contaminate" the global atmosphere with  
22 greenhouse gases, thereby forcing an artificial change in the worldwide climate. Under the  
23 causation rule applied in multiple-source pollution cases, Plaintiffs contend, it is fair and proper  
24 to hold a handful of emitters liable for the acts of everyone who contributed to the nuisance.

25 The problems with this legal theory of causation leap out directly from Plaintiffs' own

---

26 <sup>1</sup> As explained in the Oil Companies' opening brief, Plaintiffs' claims for conspiracy and  
27 concert of action must also be dismissed because they are purely derivative of their nuisance  
28 claims, and because the First Amendment prohibits courts from adjudicating the truth or falsity of  
viewpoints expressed in a hotly contested public policy debate, as explained further in Part II of  
the Utility Defendants' reply memorandum in support of their motion to dismiss Count III.



1 brief. If the analogy to typical joint-liability pollution cases applied here, such that Defendants  
2 could be held liable as a subset of all the tortfeasors whose combined emissions caused the  
3 “pollution,” the law also would have to hold liable as a joint “polluter” *every single non-natural*  
4 *greenhouse gas emitter on the planet Earth over at least two centuries*. As Plaintiffs’ own brief  
5 insists, under the joint causation principle they invoke, “*every polluter who contributes to a*  
6 *nuisance is liable jointly and severally for the resulting indivisible injury.*” Pls. Br. 2 (emphasis  
7 added); *see* Pls. Br. 104 (“all emitters contribute to the injury ... which is enough to establish  
8 causation”). And because all homeowners, car drivers, truckers, and farmers concededly emit  
9 non-natural greenhouse gases and thereby “contribute” to the alleged “nuisance,” it necessarily  
10 follows that, under Plaintiffs’ own joint causation principle, every one of these “polluters” is  
11 “liable jointly and severally for the resulting indivisible injury.” Pls. Br. 2. Yet Plaintiffs insist,  
12 with no reasoning or authority, that in this case, joint liability should *not* attach to “the  
13 greenhouse gas emissions of the ordinary citizen who drives a car or owns a home that emits  
14 greenhouse gases.” Pls. Br. 42. In other words, Plaintiffs do *not* want the Court actually to apply  
15 the joint causation principle they invoke to the facts of this case – or at least they do not want the  
16 Court to apply the principle in any previously recognized form.

17 Plaintiffs’ concession that the causation rule they invoke cannot actually be applied here  
18 is, of course, fatal to their action. There is simply no recognized basis in tort for singling out a  
19 few companies as liable for all the damages caused – according to Plaintiffs’ carefully worded  
20 allegations – *not* by those companies’ *own* emissions, but by more than two centuries’ worth of  
21 combined emissions from all non-natural human activities worldwide. *E.g.*, Compl. ¶¶ 125, 161.  
22 Plaintiffs do not even allege that the Oil Companies’ greenhouse gas emissions *made a difference*  
23 in the changing pattern of the global climate. Instead they simply allege that Defendants have  
24 been large emitters in recent decades, tacitly conceding (and nowhere denying) that even absent  
25 those emissions, the combined emissions from *other* man-made industrial, commercial, and  
26 agricultural sources over the centuries and around the globe would have sufficed to increase  
27 greenhouse gas concentrations and cause the same climate change the planet has already  
28 experienced. Because neither global warming itself, nor any measure of global warming, nor any

1 particular consequence of global warming, can be attributed to Defendants' own emissions on the  
2 facts alleged, those facts fail to establish actual or legal causation as a matter of law.

3 1. Plaintiffs' Cause-In-Fact Allegations Do Not Satisfy The "Substantial  
4 Factor" Standard.

5 The Oil Companies' opening brief demonstrated why Plaintiffs' complaint fails to allege  
6 facts sufficient to establish that Defendants' emissions were a "substantial factor" in causing  
7 Plaintiffs' property damages. Oil Co. MTD 6-8. Plaintiffs' response does nothing to rehabilitate  
8 their complaint.

9 To start, Plaintiffs falsely accuse Defendants of invoking only a "but for" causation  
10 standard and of ignoring the "substantial factor" test. In fact, the Oil Companies' brief expressly  
11 invokes the "substantial factor" test and specifically notes that it is, as Plaintiffs say, "a broader  
12 rule of causality than the 'but for' test." Pls. Br. 40; *see* Oil Co. MTD 6. But the difference  
13 between the standards does not help Plaintiffs here. A plaintiff can establish causation under the  
14 "substantial factor" test "by showing either (1) but for the negligence, the harm would not have  
15 occurred, or (2) the negligence was a concurrent independent cause of the harm," that is,  
16 "sufficient in the absence of the other[] [causes] to bring about the harm." *Viner v. Sweet*, 30 Cal.  
17 4th 1232, 1240, 1241 (2003). In other words, as Defendants explained, "a defendant's act must  
18 be either a necessary or sufficient cause of the injury." Oil Co. MTD 6. Although the substantial  
19 factor test thus accommodates cases involving two or more concurrent independent causes, where  
20 either would have been sufficient to cause the injury and thus neither was "necessary" standing  
21 alone, the standard still "generally produces the same results as does the 'but for' rule of  
22 causation." *Bank of N.Y. v. Fremont Gen. Corp.*, 523 F.3d 902, 909 (9th Cir. 2008).<sup>2</sup>

23 Plaintiffs cannot meet the substantial factor standard because they do not allege that  
24 Defendants' emissions were either a necessary ("but for") cause of global warming or were  
25 themselves sufficient to have caused global warming in the absence of the other emissions across  
26

---

27 <sup>2</sup> As Defendants explained in their motion, different jurisdictions may use the vocabulary  
28 of causation in various ways, but they all generally divide the question of causation into the same  
factual and policy prongs. *See* Oil Co. MTD 6.

1 the planet over centuries. To the contrary, Plaintiffs make clear that Defendants' emissions alone  
2 were *not* enough to have caused their injuries: "Defendants' greenhouse gas emissions *combine*  
3 *with each others [sic] and those of others* to trap heat, which causes Kivalina's injuries." Pls. Br.  
4 104 (emphasis added). The legal defect is one of diffusion, not just attenuation (Pls. Br. 40-41,  
5 43) – there are far too many other sources of emissions to identify Defendants' own emissions as  
6 uniquely necessary or sufficient in any way. Plaintiffs thus have not alleged facts establishing  
7 that Defendants' emissions are a substantial factor in causing global warming.<sup>3</sup>

8 Plaintiffs also mischaracterize the factual shortcomings identified by Defendants,  
9 suggesting that Defendants rely simply on the "breathing" of billions to defeat their causation  
10 theory. Pls. Br. 1-2, 36-37. But the principal defect in Plaintiffs' complaint is not the fact of  
11 worldwide respiration, it is that Plaintiffs acknowledge, as they must, that Defendants are *only a*  
12 *few* of the many billions of worldwide emitters of *man-made* greenhouse gases. Plaintiffs allege  
13 that "human-made greenhouse gases" have been on the rise "since the dawn of the industrial  
14 revolution in the 18th century," and that the "human activity that releases greenhouse gases is  
15 causing a change in the earth's climate." Compl. ¶¶ 124, 125, 132. They assert that Defendants  
16 are merely "*among* the nation's largest fossil fuel interests" and merely "contribute to global  
17 warming." Pls. Br. 1 (emphasis added); *see id.* at 37.<sup>4</sup> Even accepting Plaintiffs' submission that

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18 <sup>3</sup> The CERCLA case cited by Plaintiffs is irrelevant, because it, too, simply applies the  
19 rule that either of two independent causes must be sufficient in itself to have caused plaintiff's  
20 injury. *See Artesian Water Co. v. Gov't of New Castle County*, 659 F. Supp. 1269, 1283 (D. Del.  
21 1987) (allowing liability under "substantial factor" test where "two or more causes have  
22 concurred to bring about an event, and any one of them, operating alone, would have been  
23 sufficient to cause the identical result"). Plaintiffs recite a slightly different formulation of the  
24 rule quoted by the *Artesian Water* court: "when the conduct of two or more actors is so related to  
25 an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and  
26 application of the but-for rule to them individually would absolve all of them, the conduct of each  
27 is a cause in fact of the event." *Id.* (quoting Prosser & Keeton on Torts, § 42, at 268). But clearly  
28 the *Artesian Water* court understood that formulation as requiring that each contributing cause at  
least be sufficient in itself. And even to the extent that some pollution cases do allow liability for  
combined conduct where each contributing cause is *not* enough in itself to have caused the  
contamination and injury, that principle has no application here, as explained below, *infra* at 5- 6.

<sup>4</sup> *See also* Pls. Br. 2 (defendants "represent most of the biggest emitters and fossil fuel  
producers in the United States"); Pls. Br. 10 ("defendant ExxonMobil was one of the 100 largest  
electric power producers in the United States in 2002"); Pls. Br. 10-11 ("The Power Companies  
are among the largest emitters of carbon dioxide in the United States"); Pls. Br. 36 (Kivalina is  
suing "most of the biggest greenhouse gas emitters and producers of fuels that contribute to such  
emissions in the U.S."); Pls. Br. 68 (defendants are together responsible for "more of the

1 global warming can be attributed only to *non-natural* human activity, it remains undisputed that  
2 billions of entities and individuals around the world have also “contributed” to global warming,  
3 through all the commercial, industrial, agricultural, transportation, technological and other non-  
4 natural human activities that produce greenhouse gases. Pls. Br. 101, 117. Plaintiffs nowhere  
5 suggest that, absent Defendants’ emissions, global warming would not have happened or would  
6 come to a halt – indeed, Plaintiffs disclaim any need to allege such facts. Pls. Br. 100 (“Kivalina  
7 need not show that without defendants’ emissions their injuries would not have occurred”).

8 Plaintiffs instead contend that they need allege only that Defendants were among the  
9 world’s “contributors” to global warming over the prior centuries, relying on common-law  
10 pollution cases holding that each contributor to a pollution nuisance can be held liable for the  
11 nuisance. Pls. Br. 37-38. But as explained in the Oil Companies’ opening brief, those cases are  
12 critically different from this case – they all involve a discrete set of polluters together causing a  
13 nuisance in a particular location, where it is possible to identify all the polluters and hold them all  
14 liable either directly or through contribution. In *Lockwood Co. v. Lawrence*, 77 Me. 297 (1885),  
15 the nuisance was “the combined result[]” of deposits of waste in a river by several sawmills, all of  
16 whom were parties to the case. *Id.* at 309-10. Similarly, in *Woodyear v. Schaefer*, 57 Md. 1  
17 (1881), the defendant slaughterhouse was one of several slaughterhouses upstream from the  
18 plaintiff; the slaughterhouse’s discharge was “a part of one common whole, and to stop the  
19 mischief of the whole,” the court reasoned, “each part in detail must be arrested and removed.”  
20 *Id.* at 10. In *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884), several mines dumping  
21 debris in a river were together the cause of a nuisance, and “[n]o other mine contribute[d]  
22 annually more detritus to the river than the defendant.” *Id.* at 145, 148.

23 The 20th-century descendants of these cases likewise involved an identifiable set of  
24 polluters causing a discrete nuisance in a specific location. See *Michie v. Great Lakes Steel Div.*  
25 *Nat’l Steel Corp.*, 495 F.2d 213, 218-19 (6th Cir. 1974) (allowing suit by residents near Detroit to  
26 proceed against three companies with seven plants emitting “noxious” pollutants); *City of Tulsa v.*  
27 \_\_\_\_\_  
28 problem” than any other single entity in the nation); accord Compl. ¶ 3 (alleging that Defendants  
are “many of the largest emitters of greenhouse gases in the *United States.*”) (emphasis added).

1 *Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1270, 1297-98 (N.D. Okla. 2003) (suit by city of Tulsa  
 2 against neighboring town and nearby poultry operations for causing eutrophication of two lakes  
 3 from which Tulsa drew its water supply; the “separate acts” of the defendants “combin[ed] to  
 4 cause” the harm); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 338, 343-44 (Tenn. 1976)  
 5 (allowing third-party complaint by defendant against other five other plants “in the Alton Park  
 6 area” in action involving localized air pollution); *Landers v. E. Tex. Salt Water Disposal Co.*, 248  
 7 S.W.2d 731, 734 (Tex. 1952) (two defendants each pumped salt water into plaintiff’s lake, killing  
 8 his fish). In *Illinois v. Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), entities other  
 9 than Milwaukee may have contributed to the eutrophication of Lake Michigan, but the court  
 10 emphasized that the city was “the largest point discharger,” *id.* at \*20-\*21; *see id.* at \*22-\*23  
 11 (“the most significant point source on the lake”), and that further degradation of the lake was “a  
 12 certainty unless [Milwaukee’s] conduct is enjoined,” *id.* at \*25. Milwaukee thus was not one of  
 13 an unknown number of otherwise innocent dischargers – Milwaukee’s own emissions were  
 14 causing significant harm to the lake. Finally, the CERCLA cases cited by Plaintiffs *necessarily*  
 15 confine liability to pollution of a discrete area – that is the point of the statute. *See United States*  
 16 *v. Burlington N. & Santa Fe Ry.*, 502 F.3d 781, 793 (9th Cir. 2008). Multiple parties may be  
 17 liable for cleanup costs, but liability is premised on a direct relationship with the specific site, and  
 18 thus involves some finite set of responsible entities. *See id.* at 799.<sup>5</sup>

19 None of those cases remotely suggests that a plaintiff could have proceeded against a few  
 20 defendants for a global problem caused by billions of global sources over hundreds of years.  
 21 Plaintiffs dispute that their causation principle is limited to localized pollution, *see* Pls. Br. 42, but  
 22 they do not cite a single precedent applying the principle to anything other than localized  
 23 pollution. That is no surprise: the cases cited above permit joint liability only because the  
 24 defendants can be situated within an identifiable set of entities whose joint conduct can be

25 \_\_\_\_\_  
 26 <sup>5</sup> The leading secondary authorities likewise contemplate joint liability only where the  
 27 nuisance is isolated and has identifiable contributors. *See, e.g.*, Restatement (Second) of Torts §  
 28 881 (using, as illustrations, three mines each polluting one stream and three smelter plants  
 emitting fumes that destroy grass on nearby land); W. Page Keeton et al., *Prosser & Keeton on*  
*Torts* § 52, at 354 (5th ed. 1984) (describing rule as applying “in cases of pollution, flooding of  
 land, diversion of water, obstruction of a highway, or ... a noise nuisance” (footnotes omitted)).

1 understood to have caused the nuisance. The fairness and effectiveness of joint liability depend  
 2 crucially on the expectation that all responsible parties can be identified and subjected to actions  
 3 for contribution. *See, e.g., Landers*, 248 S.W.2d at 734 (“If fewer than the whole number of  
 4 wrongdoers are joined as defendants to plaintiff’s suit, those joined may by proper cross action  
 5 under the governing rules bring in those omitted.”); *Woodyear*, 57 Md. at 12 (allowing injunction  
 6 to issue, and noting that plaintiff would “be entitled to the same relief against all the parties  
 7 contributing to the injury”); *In re MTBE Prods. Liab. Litig.*, 447 F. Supp. 2d 289, 301-02  
 8 (S.D.N.Y. 2006) (“Plaintiffs need not name all potential tortfeasors, or even a substantial share of  
 9 all tortfeasors, because defendants can implead other responsible parties”)<sup>6</sup>; *cf. In re Agent*  
 10 *Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 823 (E.D.N.Y. 1984) (observing that fairness of  
 11 enterprise liability often turns on whether “all possible claimants and all possible defendants are  
 12 joined together in a single suit”).<sup>7</sup> Plaintiffs therefore err in asserting that if their principle were  
 13 applied here, Defendants would not be allowed to implead all other greenhouse gas emitters. Pls.  
 14 Br. 68. Where joint causation is allowed, it is essential that the named defendants be allowed to  
 15 pursue actions against all other contributing parties – otherwise, contributing parties not named  
 16 by the plaintiffs, including (as here) parties making equivalent contributions to the alleged  
 17 nuisance, would never internalize the costs of their activities and would continue to contaminate  
 18 the water or land or air at issue.<sup>8</sup>

19 \_\_\_\_\_  
 20 <sup>6</sup> Plaintiffs suggest that Defendants’ reliance on *MTBE* for the proposition that concurrent  
 21 wrongdoing typically involves “a small number of tortfeasors” is misplaced because the *MTBE*  
 22 court ultimately allowed the plaintiffs to proceed against “a large number of oil companies.” Pls.  
 23 Br. 39 n.11. Plaintiffs miss the point: the “large number of oil companies” in *MTBE* was still a  
 24 *discrete, identifiable* set of parties that allegedly contaminated a specific area. *See* 447 F. Supp.  
 2d at 293. The point is not that the court proceeded against numerous defendants, it is that *only*  
 that set of defendants was conceivably liable. And, in any event, that set was a decidedly *small*  
 number when compared to the billions of individuals and entities that have emitted non-natural  
 greenhouse gases into the atmosphere over the last several hundred years.

25 <sup>7</sup> Plaintiffs rely on *Agent Orange* for a statement of their nuisance principle. Pls. Br. 39.  
 26 But the *Agent Orange* court was addressing the distinct problem of connecting seven  
 27 manufacturers of Agent Orange with each plaintiff’s injuries. It was not a case of joint causation  
 at all, and in any event reflects another example of an identifiable set of entities potentially  
 responsible for specific injuries. *See* 697 F. Supp. at 822. Nothing about *Agent Orange* would  
 allow a court to assign liability to a cherry-picked handful of parties out of millions collectively  
 responsible for plaintiffs’ injuries.

28 <sup>8</sup> Plaintiffs overlook the connection to place that typifies the ordinary nuisance or

1 In some instances, disproportionately large emissions by a given defendant or defendants  
2 are enough to establish liability because enjoining that contributor's emissions alone will  
3 substantially mitigate or eliminate the nuisance. *See, e.g., Gold Run Ditch*, 66 Cal. at 148; *Illinois*  
4 *v. Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at \*22-\*23. Here, the issue is not just that each  
5 Defendant "standing alone" did not cause global warming, Pls. Br. 2, it is that even the  
6 Defendants *standing together* are not alleged to have done so. In all of the above cases liability  
7 rested on some "common whole," *Woodyear*, 57 Md. at 10, but here there is no "whole" that is  
8 "common" either to Defendants or to any plausibly identifiable set of entities that could be haled  
9 before this Court. There is simply a vast diffusion of non-natural greenhouse-gas emitters across  
10 the planet and over the centuries, all of whom have "contributed" to a long-developing,  
11 worldwide atmospheric and environmental phenomenon.

12 Plaintiffs ultimately recognize that the rule they invoke – that all "contributors" to the  
13 "nuisance" of global warming are tortfeasors subject to joint liability – cannot actually apply to  
14 this context. Rather than apply the rule faithfully, they try to change it, insisting that the Court  
15 need not allow the joinder of billions of other contributing entities and individuals because  
16 liability ought not attach to "the greenhouse gas emissions of the ordinary citizen who drives a car  
17 or owns a home that emits greenhouse gases." Pls. Br. 42. But they cite no precedent or  
18 authority that would explain *why* a court adjudicating liability on a joint causation theory can  
19 ignore other contributing entities in this context, when in any other pollution case *all* contributors  
20 would be deemed joint tortfeasors, as Plaintiffs themselves expressly state. Pls. Br. 2 ("every  
21 polluter who contributes to a nuisance is liable jointly and severally for the resulting indivisible  
22 injury"); Pls. Br. 44 ("as recognized by the multiple-polluter caselaw, each polluter who  
23 contributes to a nuisance is liable therefore"); Pls. Br. 104 ("all emitters contribute to the injury  
24 which is enough to establish causation"). Plaintiffs suggest that the quality and quantity of

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25 pollution case. Water and eutrophication-causing nutrients may generally be innocuous  
26 substances, *see* Pls. Br. 32, but when they are concentrated in or diverted from a particular  
27 location, they become a nuisance. *See Illinois v. Milwaukee*, 1973 U.S. Dist. LEXIS 15607;  
28 *Hillman v. Newington*, 57 Cal. 56, 64 (1880). Here, the relevant "place" for greenhouse-gas-  
induced global warming would be the entire planet, *see* Pls. Br. 101, and to carry the analogy to  
nuisance through, one must accept that everyone on the planet contributes to it.

1 Defendants' emissions are enough to distinguish Defendants for damages liability purposes from  
2 the rest of the world's greenhouse-gas emitters, Pls. Br. 42, but that suggestion has absolutely no  
3 basis in the nuisance cases on which Plaintiffs rely – not one holds that other contributors to a  
4 nuisance can be absolved of liability merely so long as some large emitters are already  
5 defendants. And as already noted, such an approach would make no sense – if other emitters can  
6 escape liability, the nuisance *will not be abated* and the damage will continue.

7 Plaintiffs complain that Defendants “ask, in essence, why us?” (Pls. Br. 68), as if the  
8 question were surprising. But *of course* Defendants ask “why us?” – they ask because they are  
9 aware of no existing principle of law that would allow them to be singled out from among all the  
10 non-natural greenhouse gas emitters in the world as the sole entities responsible for compensating  
11 Plaintiffs for their weather-related damages. The question is obviously difficult for Plaintiffs as  
12 well, for nowhere in their brief do they give a legal answer. Instead they simply assert that  
13 Defendants should be made to pay because, evidently, *someone* should pay, and Defendants are  
14 the largest emitters (apparently ignoring all car and truck drivers) in the largest “historical”  
15 (notably, not current) emitting nation. Pls. Br. 68. But whatever costs one believes the United  
16 States alone should bear for its role in this global phenomenon, and however one thinks those  
17 costs should be allocated among the many different U.S. sources of greenhouse gases, *none of*  
18 *this has anything to do with private tort law*. If standard principles of tort law could be applied  
19 here, then *every* emitter of non-natural greenhouse gases on the planet would be “a polluter who  
20 contributes to [the] nuisance [and be] liable therefor.” Pls. Br. 44. But Plaintiffs' own analysis  
21 concedes that standard tort principles cannot apply here, effectively confirming that global  
22 warming is not a private tort law issue at all, but a *worldwide public policy* issue, which can be  
23 addressed fairly and effectively only by policymaking bodies properly equipped to address the  
24 global causes and effects of global warming, as well as the economic and social consequences of  
25 the many different regulatory solutions that might be invoked as a remedy.

26 2. Plaintiffs Fail To Demonstrate The Adequacy Of Their Proximate Cause  
27 Allegations.

28 Plaintiffs do little more to argue proximate cause than to cite back to their “substantial



1 factor” cause-in-fact arguments. Pls. Br. 42-43. They assert, however, that proximate cause  
2 “cannot be resolved on a motion to dismiss.” Pls. Br. 43. Not so. As Plaintiffs acknowledge  
3 elsewhere in their brief, “proximate cause ... is a question of law where the facts are  
4 uncontroverted and only one deduction or inference may reasonably be drawn from those facts.”  
5 Pls. Br. 83 (quoting *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003)). Although  
6 Defendants very much dispute the factual allegations in Plaintiffs’ complaint, they need not do so  
7 to prevail on this motion – the problem here is the *legal inadequacy* of the alleged facts. *See, e.g.*,  
8 *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir. 2008) (dismissing complaint  
9 at pleading stage: “The County’s claims against the defendant companies fail for lack of  
10 proximate causation. The asserted link between the companies’ hiring practices and increased  
11 demand for County services is far too attenuated.”); *Ass’n of Wash. Pub. Hosp. Dists., Inc. v.*  
12 *Philip Morris, Inc.*, 241 F.3d 696, 701-07 (9th Cir. 2001) (dismissing complaint at pleading stage  
13 for failure to plead proximate cause where alleged injury was “too remote” from defendant’s  
14 conduct). That is, even assuming the alleged facts to be true, Plaintiffs fail to establish proximate  
15 cause as a matter of law, because the alleged facts do not show a plausible connection between  
16 Defendants’ greenhouse gas emissions and Plaintiffs’ property damage. *See Bell Atlantic Corp.*  
17 *v. Twombly*, 127 S. Ct. 1955, 1960 (2007) (allegations must establish “plausible” claim to relief).

18 Plaintiffs suggest that proximate cause allegations need not satisfy a remoteness inquiry to  
19 survive a motion to dismiss, citing as an example a district court case from Missouri holding that  
20 remoteness did not require dismissal of a case seeking “to recoup healthcare costs against tobacco  
21 companies.” Pls. Br. 43 (citing *St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008, 1014 (E.D.  
22 Mo. 1999)). Plaintiffs’ reliance on that example is remarkable – the Ninth Circuit has flatly  
23 rejected Plaintiffs’ theory, twice holding that federal statutory and state common law claims  
24 against tobacco companies seeking to recoup healthcare costs do *not* satisfy proximate cause  
25 requirements because the alleged injuries are too remote, thus requiring dismissal at the pleading  
26 stage. *See Wash. Pub. Hosp. Dists.*, 241 F.3d at 701; *Or. Laborers-Employers Health & Welfare*  
27 *Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 964-66, 968 (9th Cir. 1999). The same result is  
28 required here. The legal flaw in the complaint is not simply that Defendants’ emissions are

1 remote in “time or distance” from Plaintiffs’ property erosion. Pls. Br. 43. It is that the two are  
2 separated by multiple wholly conjectural steps – including *particular climatic events*, from ice  
3 formation to storms, and their impact on a shoreline. Compl. ¶ 185; *see also* Oil Co. MTD 9. It  
4 is unprecedented to hold a defendant liable for weather-related harms on the theory that the  
5 defendant is responsible for the weather event itself. Finally, even beyond the endless conjectural  
6 links in Plaintiffs’ hypothesized chain of causation, Plaintiffs ultimately cannot escape their own  
7 allegation that global warming is actually the product of *all* man-made emissions across the  
8 planet for more than two centuries. In other words, even accepting Plaintiffs’ chain of linear  
9 causation, what that chain traces back to is *not* Defendants’ own emissions, but an  
10 undifferentiated, wholly diffused mass of greenhouse gases in the atmosphere produced by all  
11 humanity’s non-natural emissions since the dawn of the Industrial Revolution. Once Defendants’  
12 emissions have become “merged in the general forces that surround us,” they “can be followed no  
13 further.” Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 112 (1911).

14 **B. Plaintiffs Fail To State A Federal Nuisance Claim.**

15  
16 Putting aside the substantial flaws in their causation allegations, Plaintiffs argue that they  
17 have otherwise stated a proper claim under the federal common law of nuisance. In Plaintiffs’  
18 view, the federal common law of nuisance applies to any claim for interstate pollution that is  
19 unregulated by the EPA, regardless of whether a State brings the claim or even whether the rights  
20 of States are implicated. But Plaintiffs’ contention that their nuisance claim is a “well-recognized  
21 species of ‘federal specialized common law’” is wildly off the mark. Pls. Br. 21. Although the  
22 existence of a federal common law of nuisance is indeed “well recognized,” it is equally well  
23 recognized that such federal common law exists only to protect the “rights of *a State* from  
24 improper impairment by sources outside its domain.” *Illinois v. City of Milwaukee*, 406 U.S. 91,  
25 107 n.9 (1972) (*Milwaukee I*) (quoting *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971)  
26 (emphasis added)); *see also Nat’l Audubon Soc. v. Dep’t of Water*, 869 F.2d 1196, 1205 (9th Cir.  
27 1988) (“[T]he Court considers only those interstate controversies which involve *a state* suing  
28 sources outside of its own territory because they are causing pollution within the state to be

1 inappropriate for state law to control, and therefore subject to resolution according to federal  
2 common law.”) (emphasis added). Plaintiffs are not States, nor do they genuinely contend that  
3 their claims implicate the rights of the State of Alaska. Instead, Plaintiffs ask this Court to limit  
4 the Ninth Circuit’s decision in *National Audubon* to its facts. *National Audubon* could not have  
5 spoken more clearly, however, and requires dismissal of Plaintiffs’ federal nuisance claim.

6 In *National Audubon*, the Ninth Circuit set forth the well-established framework for  
7 determining when a federal common law claim is appropriate, and applied it to pollution cases.  
8 *National Audubon* explains that federal common law applies “in a ‘few and restricted’ instances  
9 ...: those in which a federal rule of decision is ‘necessary to protect uniquely federal interests,’  
10 and those in which Congress has given the courts the power to develop substantive law.” *Id.* at  
11 1201 (citations omitted). Plaintiffs do not argue that Congress gave courts the power to develop  
12 nuisance law, but contend instead that this case falls into the “uniquely federal interests”  
13 category. As the Oil Companies explained in their opening brief, *National Audubon* makes clear  
14 that this category of cases is not as broad as Plaintiffs suggest. “[A] ‘uniquely federal interest’  
15 exists ‘only in such narrow areas as those concerned with the rights and obligations of the United  
16 States, interstate and international disputes implicating the conflicting rights of states or our  
17 relations with foreign nations, and admiralty cases.’” *Id.* at 1202 (citing *Texas Indus., Inc. v.*  
18 *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)). Plaintiffs cannot fit their claim within any of  
19 the *Texas Industries* categories of “uniquely federal interests,” as they must, and there is no basis  
20 for this Court to create a fourth category for Plaintiffs’ global warming claim.

21 Plaintiffs first attempt to expand the cases involving “uniquely federal interests” to all  
22 interstate pollution cases. According to Plaintiffs, *National Audubon* “plainly recognized that  
23 under *Milwaukee I*, ‘there is a federal common law when dealing with air and water in their  
24 ambient or interstate aspects.’” Pls. Br. 22 (quoting *Nat’l Audubon*, 869 F.2d at 1203). But  
25 *National Audubon* squarely rejects the claim that there is always a “‘uniquely federal interest’ in  
26 protecting the quality of the nation’s air.” 869 F.2d at 1203 (“primary responsibility for  
27 maintaining the air quality rests on the states”). Nor does *Milwaukee I* “hold[] that interstate  
28 pollution is [always] a matter of federal common law.” Pls. Br. 23. *Milwaukee I* permitted the

1 State of Illinois to seek “a federal common law remedy to abate interstate or navigable water  
2 pollution.” *Nat’l Audubon*, 869 F.2d at 1203. As *National Audubon* makes clear, *Milwaukee I*’s  
3 nuisance claim must be read in this “context.” 869 F.2d at 1203. Neither case, therefore,  
4 supports Plaintiffs’ novel claim that a non-State plaintiff can bring a federal global warming  
5 cause of action – for damages<sup>9</sup> – that has never been recognized by any court or by Congress.

6 Plaintiffs next seek to expand the cases involving “uniquely federal interests” not just to  
7 interstate disputes implicating “the conflicting rights of states,” but to all interstate disputes,  
8 regardless of whether a State is a plaintiff. Again, *National Audubon* squarely rejects this  
9 argument. A federal nuisance claim applies only in the “limited context” in which there is an  
10 “interstate controvers[y] involv[ing] a State suing sources outside of its own territory.” *Id.* at  
11 1205; see also *Milwaukee I*, 406 U.S. at 107 (“Federal common law and not the varying common  
12 law of the individual States is, we think, entitled and necessary to be recognized as a basis for  
13 dealing in uniform standard with the environmental rights of a State against improper impairment  
14 by sources outside its domain.”). Indeed, Plaintiffs concede on page 21 of their brief that the  
15 federal common law remedy they invoke applies to “interstate ... disputes implicating the  
16 conflicting rights of States,” but then they immediately ignore this qualifying language.

17 Plaintiffs attempt to distinguish *National Audubon* as a localized pollution case,  
18 suggesting that this case, in contrast, is a true “interstate dispute” that warrants creation of a  
19 federal common law remedy, despite the character of its plaintiffs. *National Audubon* cannot be  
20 so readily distinguished. The Ninth Circuit “[a]ssum[ed]” that the pollution was interstate but  
21 nonetheless held that no federal common law remedy was available because “a state [was not]  
22 suing sources outside of its own territory.” *Nat’l Audubon*, 869 F.2d at 1204-1205 (discussing

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23  
24 <sup>9</sup> Plaintiffs also attempt to read *Milwaukee I* as authorizing their *damages* suit. As  
25 *National Audubon* explained, *Milwaukee I* authorizes only an abatement suit brought by a State.  
26 The Supreme Court has never authorized a federal nuisance claim for damages; to the contrary,  
27 the Supreme Court has expressly grounded a federal nuisance claim in federal courts’ *equitable*  
28 powers. See, e.g., *Missouri v. Illinois*, 180 U.S. 208, 244 (1901) (*Missouri I*). The cases upon  
which Plaintiffs rely – *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019  
(7th Cir. 1979), and two district court maritime cases – were decided before the Supreme Court  
made clear that the *Milwaukee* line of cases does not establish a right to recover damages in a  
nuisance claim. See *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1,  
10 (1981).

1 *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), and *Milwaukee I*).

2 Plaintiffs also attempt to ignore *National Audubon* altogether, pointing to several out-of-  
 3 circuit cases for the proposition that a non-State plaintiff can bring a federal nuisance claim. Pls.  
 4 Br. 25-27.<sup>10</sup> But Plaintiffs plainly cannot ignore controlling precedent. As Plaintiffs concede, the  
 5 Supreme Court has declined to address whether a private plaintiff can bring a federal nuisance  
 6 claim for damages. See *Middlesex County Sewerage Auth.*, 453 U.S. at 22. *National Audubon* is  
 7 therefore binding in this circuit. In contrast to Plaintiffs' stray cases, moreover, *National*  
 8 *Audubon* is consistent with Supreme Court doctrine, which as explained in the Oil Companies'  
 9 opening brief, permits a State to bring a nuisance claim in order to vindicate the State's sovereign  
 10 interest in protecting its territory from polluters beyond its borders. See *Tennessee Copper*, 206  
 11 U.S. at 237-38 ("In [its quasi-sovereign] capacity the state has an interest independent of and  
 12 behind the titles of its citizens, in all the earth and air within its domain .... It is a fair and  
 13 reasonable demand on the part of a sovereign that the air over its territory should not be polluted  
 14 on a great scale by sulphurous acid gas, that the forests on its mountains ... should not be further  
 15 destroyed or threatened by the act of persons beyond its control").<sup>11</sup>

16 Recognizing the weakness of their arguments in light of *National Audubon* and Supreme  
 17 Court precedent, Plaintiffs ultimately suggest that "[i]t is not essential that one or more states be  
 18 formal parties if the interests of the state are sufficiently implicated." Pls. Br. 27 (quoting  
 19 *Committee for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1009

20 <sup>10</sup> Plaintiffs argue that non-State plaintiffs should be permitted to bring federal nuisance  
 21 claims because 28 U.S.C. § 1331(a) does not distinguish between private and State plaintiffs. Pls.  
 22 Br. 26. Defendants' instant motion, however, is based not on failure of jurisdiction under  
 § 1331(a) but on Federal Rule of Civil Procedure 12(b)(6).

23 <sup>11</sup> Plaintiffs suggest that this reasoning cannot be the true reason why the Supreme Court  
 24 created a federal common law nuisance remedy, because the *United States* can likewise bring  
 25 federal nuisance claims, and the United States is not "driven by the *quid pro quo* for the exchange  
 26 of sovereign rights." Pls. Br. 26. This argument misses the mark. The Supreme Court has  
 27 explained why it is appropriate to create federal common law when a State brings a claim for  
 28 abatement of a simple type of nuisance. The Supreme Court has never expanded the nuisance  
 cause of action to claims by the United States. Assuming that other courts properly decided to do  
 so, their decisions are distinguishable, because it is *also* appropriate to create federal common law  
 where "the rights and obligations of the United States" are concerned." *Nat'l Audubon*, 869 F.2d  
 at 1202. Plaintiffs, however, have not shown –and cannot show under *National Audubon* – that  
 this lawsuit concerns "the rights and obligations of the United States."

1 (4th Cir. 1976) (en banc)).<sup>12</sup> They also suggest that a non-State can bring a claim because  
2 *Milwaukee I* stated in a footnote that in addition to “the character of the parties,” “the pollution of  
3 a body of water ... bounded ... by four States” also “requires us to apply federal law.” Pls. Br.  
4 25. But even if it were sufficient that a case implicate the conflicting rights of States, this case is  
5 hardly analogous. Plaintiffs allege damage to an isolated barrier island that borders no State but  
6 Alaska. There is no basis for assuming that the interests of the State of Alaska are in conflict with  
7 the interests of any other State, or even with those of Defendants in this case. Plaintiffs cannot  
8 evade this problem by pointing to lawsuits filed by other States alleging harm in other States: if  
9 the theoretical possibility that a State could file a lawsuit under federal common law were  
10 sufficient to allow other parties to do so, then the Ninth Circuit in *National Audubon* would have  
11 applied federal common law on the ground that California could have sued dust polluters in  
12 Nevada for abatement under *Milwaukee I*. Instead, the Ninth Circuit stated, “[a]lthough we  
13 recognize that this case could develop into a dispute involving conflicting rights of States, that is  
14 not the case before this court, and we do not decide legal questions based on contingencies,  
15 speculation or potential conflicts.” *Nat’l Audubon*, 869 F.2d at 1205.

16 Finally, Plaintiffs suggest that even if their case does not fit within the established case  
17 law, an “additional, alternative, basis for applying federal common law here is the unique federal  
18 interest in global warming.” Pls. Br. 23. But *National Audubon* held that “there is not ‘a  
19 uniquely federal interest’ in protecting the quality of the nation’s air.” 869 F.2d at 1203.  
20 Plaintiffs suggest that *National Audubon* does not apply because the “inherently interstate” nature  
21 of greenhouse gas emissions warrants the creation of federal common law. Pls. Br. 22. But  
22 *National Audubon*’s “uniquely federal interest” finding did not turn on the localized nature of the

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23 <sup>12</sup> Plaintiffs also suggest that the absence of a State plaintiff is irrelevant because the  
24 “sovereign rights” of the Native Village of Kivalina “significantly heighten[] the federal nature of  
25 this controversy.” Pls. Br. 28. In contrast to the State of Alaska, however, the Native Village of  
26 Kivalina lacks *territorial* sovereignty, a point which Plaintiffs ignore. While the Village is a  
27 “sovereign entit[y] for some purposes,” it is a “sovereign[] without territorial reach.” *Alaska ex.*  
28 *rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov.*, 101 F.3d 1286, 1303 (9th  
Cir. 1996) (Fernandez J. concurring), *rev’d on grounds stated in Judge Fernandez’s concurrence*,  
*Alaska v. Native Village of Venetie Tribal Gov.*, 522 U.S. 520, 523-24 (1998). Accordingly,  
neither the Village nor its members possess the requisite sovereign interest in a *territory* to  
warrant application of the federal common law of public nuisance. See *Tennessee Copper*, 206  
U.S. at 238.

1 dust pollution. Rather, in determining whether the “unique rights and obligations of the United  
2 States” were at issue, the court looked at the structure of the Clean Air Act and recognized that  
3 ““air pollution”” is a responsibility shared between federal, state, and local governments, *Nat’l*  
4 *Audubon*, 869 F.2d at 1203 (quoting 42 U.S.C. § 7401(a)(3)), and therefore is not “a uniquely  
5 federal interest,” *id.* at 1203-1204.

6 Plaintiffs claim this case is different from the air pollutants at issue in *National Audubon*  
7 because greenhouse gas emissions affect the “climate” of every State, rather than air “quality.”  
8 Pls. Br. 23. But this hardly helps Plaintiffs. If Plaintiffs’ climate claim is so different from a  
9 typical pollution claim, then Plaintiffs can hardly argue that it falls within the “recognized enclave  
10 of federal common law” of “interstate pollution.” Pls. Br. 21. Nor have they provided any  
11 justification for creating a new global warming claim in this case, where neither a State nor the  
12 United States is a party.<sup>13</sup>

13 Certainly the global warming claim that Plaintiffs are attempting to shoehorn into  
14 established case law is dramatically different from the “simple nuisances” the Supreme Court has  
15 recognized as cognizable causes of action under the federal common law. Plaintiffs dispute  
16 whether the federal common law is so limited, arguing that *Missouri v. Illinois*, 200 U.S. 496  
17 (1906) (*Missouri II*), *North Dakota v. Minnesota*, 263 U.S. 365 (1923), and *Milwaukee I* were  
18 “highly complex,” fact-intensive cases, and therefore not “simple” nuisances. But while these  
19 cases may have involved “a battle of the experts,” and the pollutants in *Missouri II* and  
20 *Milwaukee I* may have been “odorless,” Defendants have never suggested that such facts  
21 foreclose a federal nuisance claim. Rather, in each case in which the Supreme Court has allowed  
22 a federal nuisance claim to proceed, the State alleged an immediate, localized harm directly  
23 traceable to a harmful substance from an out-of-State source. *See Missouri II*, 200 U.S. at 522-23  
24 (suit by one State to enjoin another State from discharging sewage into interstate stream  
25 containing noxious typhoid germs dangerous to health of inhabitants of plaintiff State); *North*

26 <sup>13</sup> The cases Plaintiffs cite in support of their allegation that “as a matter of policy” they  
27 should be allowed to bring their claim, all fall comfortably within the *Texas Industries*  
28 framework. *In re Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997), was an admiralty case, and  
*Hinderlinder v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), was an  
apportionment dispute implicating the conflicting rights of States.

1 *Dakota*, 263 U.S. at 374 (suit by one State to enjoin another State from draining water from  
2 within its lands that increased flow of interstate stream and flooded farm lands of inhabitants of  
3 plaintiff State); and *Milwaukee I*, 406 U.S. at 93 (suit by one State to enjoin another State’s  
4 municipalities from discharging sewage into interstate body of water). These cases may have  
5 involved contentious factual issues, but they provide no basis for Plaintiffs’ claim, which alleges  
6 that Defendants are among millions of sources of emissions, both within and outside the State of  
7 Alaska, that mix indiscriminately in the global atmosphere and contribute in some indeterminate  
8 degree to global warming, which allegedly contributes to the erosion of Plaintiffs’ land.

9 Plaintiffs would have this Court ignore the Supreme Court’s unequivocal assertion that  
10 “[i]t is the creation of a public nuisance of simple type for which a State may properly ask an  
11 injunction.” *North Dakota*, 263 U.S. at 374. But this assertion is not mere dicta or loose  
12 language, as Plaintiffs suggest. It is a description of the *only* nuisance claims the Supreme Court  
13 has allowed to proceed under federal common law. This is for good reason. *See Milwaukee v.*  
14 *Illinois & Michigan*, 451 U.S. 304, 317, 325 (1981) (*Milwaukee II*) (expressing concern that  
15 federal courts applying “vague and indeterminate nuisance concepts and maxims of equity  
16 jurisprudence” are ill-equipped to balance the requisite factors in addressing large-scale interstate  
17 pollution”). The Court should decline Plaintiffs’ invitation to dramatically expand the federal  
18 common law nuisance cause of action.<sup>14</sup>

19  
20  
21 <sup>14</sup> Plaintiffs suggest that, if the federal common law claim is dismissed, their state law  
22 claims should be dismissed without prejudice to refile in state court. It is premature to  
23 determine whether the Court must or should retain jurisdiction of any state law claims under the  
24 unique circumstances Plaintiffs posit. Defendants have presented multiple grounds for dismissing  
25 all claims with prejudice, and the Court would need to decide on retaining jurisdiction over the  
26 state law claims *only* if it were to reject all of Defendants’ arguments *except* the argument that  
27 federal common law is unavailable. In such circumstances, the matter of how to proceed can and  
28 should be briefed at that time. In any event, Plaintiffs overlook the fact that, at a minimum,  
“when a court grants a motion to dismiss for failure to state a federal claim,” it retains discretion  
to exercise supplemental jurisdiction over pendant state-law claims. *Arbaugh v. Y&H Corp.*, 546  
U.S. 500, 514 (2006). Given the “efforts already expended” by the Court and counsel, dismissal  
without prejudice without resolving the dispositive questions raised by the pending motions  
would be a “waste of judicial resources.” *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995); *see*  
*also Schneider v. TRW, Inc.*, 938 F.2d 986, 994 (9th Cir. 1991).



1           **C. Any Federal Common Law Of Nuisance That Would Govern Greenhouse**  
 2           **Gas Emissions Has Been Displaced.**

3           Assuming there is a federal common law nuisance claim, Plaintiffs next contend that the  
 4 Clean Air Act does not “preempt” their federal nuisance claim, because there is no “conflict”  
 5 between the two and because their lawsuit does not “frustrate the purpose of the [Clean Air Act].”  
 6 Pls. Br. 72. But the existence of a conflict or frustration of purpose is irrelevant to displacement.  
 7 “Contrary to the suggestions of [Plaintiffs], the appropriate analysis in determining if federal  
 8 statutory law governs a question previously the subject of federal common law is not the same as  
 9 that employed in deciding if federal law pre-empts state law.” *Milwaukee II*, 451 U.S. at 316.  
 10 Whereas a preemption analysis starts with a presumption against preemption, a displacement  
 11 analysis “start[s] with the assumption that it is for Congress, not federal courts, to articulate the  
 12 appropriate standards to be applied as a matter of federal law.” *Id.* at 317 (internal quotations  
 13 omitted). Thus, there is a presumption *in favor of* displacement. In addition, while the fact that  
 14 federal and state laws address the same subject is insufficient to establish preemption, *see Jones v.*  
 15 *Rath Packing Co.*, 430 U.S. 519, 525 (1977),<sup>15</sup> that is precisely the test for displacement: “[t]he  
 16 question [is] whether the legislative scheme ‘spoke directly to a question’ ... not whether  
 17 Congress ha[s] affirmatively proscribed the use of federal common law.” *Milwaukee II*, 451 U.S.  
 18 at 315; *see also Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008) (“‘In order to  
 19 abrogate a common-law principle, the statute must speak directly to the question addressed by the  
 20 common law.’”) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

21           Plaintiffs’ entire “preemption” argument, including their claim that there must be “a

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 23           <sup>15</sup> The fact that Defendants cited *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), which  
 24 addresses federal preemption of state law, does not help Plaintiffs. If a federal statute preempts a  
 25 state law – because either the federal and state law conflict, or the federal law occupies the field –  
 26 then the federal statute likely also displaces federal common law that addresses the same  
 27 question. *Milwaukee II*, 451 U.S. at 317 n.9 (“[T]he very concerns about displacing state law  
 28 which counsel against finding pre-emption of *state* law in the absence of clear intent actually  
 suggest a willingness to find congressional displacement of *federal* law.”). But the converse is  
 not true. If a federal law does *not* preempt a state law – because there is no conflict or no  
 occupation of the field – that same federal law may still directly speak to the same question  
 addressed by federal common law for purposes of displacement.

1 conflict between the pollution standard set by EPA and the federal common law standard,” Pls.  
2 Br. 74, is thus irrelevant to the displacement question here. Indeed, Plaintiffs not only confuse  
3 the two inquiries but also suggest that the displacement test is “demanding” and that *Milwaukee*  
4 *II*’s “presumption in favor of preemption of federal common law applies only where Congress has  
5 provided a comprehensive remedial scheme.” Pls. Br. 76-77. *Milwaukee II* says nothing of the  
6 sort. As the Oil Companies’ opening brief explained, the presumption in favor of displacement  
7 may have less force when the statute would “‘invade ... long-established and familiar principles”  
8 of common law, Oil Co. MTD 17 n.7 (quoting *Texas*, 507 U.S. at 534, and citing cases), but  
9 Plaintiffs’ cause of action is hardly “long-established” or “familiar.”

10 It is true that legislation on an issue that is merely related to an area long governed by  
11 federal common law does not in all cases displace the common law. Thus, in *County of Oneida*  
12 *New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236-40 (1985), the Supreme  
13 Court held that a federal statute, which included among its provisions two affecting Indian land  
14 relations, did not include a framework for dealing directly with violations of Indian property  
15 rights, and therefore did not displace a federal common law action to enforce well-established  
16 aboriginal land rights. The Court held that nothing in the federal statute addresses “directly the  
17 problem of restoring unlawfully conveyed land to the Indians,” which was the subject of the  
18 federal common law claims at issue. *Id.* at 239. Indeed, the Court noted that in the two centuries  
19 following enactment of the purportedly displacing statute, Congress had enacted other legislation  
20 addressing Indian property rights that provided for specific procedures to adjudicate aboriginal  
21 property disputes — thus assuming the availability of a federal common law claim. *Id.*

22 *County of Oneida* is hardly “dispositive” of this case. In contrast to the federal law there,  
23 the Clean Air Act now occupies the field, and nothing in that Act “suggests Congress intended to  
24 rely for enforcement of this Act upon a federal common law remedy.” *Nat’l Audubon*, 869 F.2d  
25 at 1202. Critically, Plaintiffs cannot dispute that, under *Massachusetts v. EPA*, 549 U.S. 497  
26 (2007), the Clean Air Act speaks directly to the emission of greenhouse gases, which is precisely  
27 the subject of Plaintiffs’ claims. That should be the end of the analysis. It is irrelevant to  
28 displacement that the EPA is only now in the process of considering appropriate regulations to

1 implement Congress’s direction. The displacement test does not ask whether an agency has  
 2 directly addressed the problem; it asks whether Congress has addressed the problem. Where  
 3 Congress has done so, the federal statute, not federal common law, is the source of federal law.

4 Plaintiffs repeatedly claim that this lawsuit is different, because it seeks a remedy –  
 5 damages – that is not provided for in the Clean Air Act. But this is just an attempt to argue that  
 6 the Clean Air Act does not comprehensively regulate the subject. And the Ninth Circuit has  
 7 already described the Clean Air Act precisely otherwise. *See Bunker Hill Co. Lead & Zinc*  
 8 *Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981); *see also Chevron U.S.A. Inc. v. NRDC*, 467  
 9 U.S. 837, 848 (1984). Plaintiffs do not really dispute this; they argue instead that they are entitled  
 10 to bring a federal common law claim that provides “a different remedy” from that provided in the  
 11 Clean Air Act. Pls. Br. 73. But where a federal law addresses a problem, there is no basis for a  
 12 federal court to impose a more stringent, or “different,” solution to the problem. *Exxon Shipping*,  
 13 128 S. Ct. at 2619 n.7; *Milwaukee II*, 451 U.S. at 320.

14 **III. CONCLUSION**

15 For the foregoing reasons, Plaintiffs’ claims should be dismissed with prejudice.

16 Dated: November 18, 2008

Respectfully Submitted,

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**DECLARATION PURSUANT TO GENERAL ORDER 45, SECTION X**

I, Casey M. Nokes, declare and attest, pursuant to this Court’s General Order 45, section X, subparagraph B, that I am an ECF User and the filer of this document and that concurrence in the filing of this document has been obtained from each of the other signatories (in addition to myself) shown on page 20 of this document. I further declare and attest, pursuant to that same subparagraph of General Order 45, that I will maintain records to support this concurrence for subsequent production for the Court if so ordered or for inspection upon request by a party until one year after final resolution of the action (including appeal, if any).

I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Dated November 18, 2008

\_\_\_\_\_  
/s/ Casey M. Nokes  
Casey M. Nokes