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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NATIVE VILLAGE OF KIVALINA and CITY OF KIVALINA, Plaintiffs, v. EXXONMOBIL CORPORATION, et al., Defendants	CASE NO. C 08-cv-01138 SBA **PLAINTIFFS' CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)** Date: December 9, 2008, 1:00 p.m. Place: Courtroom 3 Judge: Hon. Saundra B. Armstrong

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INTRODUCTION

The Native Village of Kivalina and the City of Kivalina (collectively "Kivalina"), bring this case to obtain the funds they desperately need to move their village out of harm's way. Global warming threatens the village with imminent destruction. The sea ice that formerly protected the village from fall and winter storms is in serious decline due to global warming, thus exposing this Arctic village of Inupiat Eskimos, perched on a small barrier island on the Chukchi Sea, to the battering ram of fall and winter storms. Today the village balances on the precipice, just one big storm away from annihilation.

Kivalina brings this case by and through its governing bodies – a federally-recognized Indian tribe and a municipality. Defendants are among the nation's largest fossil fuel interests: electric utilities, oil companies and the nation's largest coal company. They all contribute to global warming through their own emissions of massive quantities of greenhouse gases and the production of fossil fuels. They all know they contribute to global warming and they have known it for a very long time. Some of them have been covering up the harmful nature of their conduct for years. The purpose of this suit is to recover the cost of relocation made necessary by defendants' years of conduct as major contributors to global warming.

Kivalina brings its suit here in California because most of the defendants do no business at all in Alaska but all of them are engaged in substantial business in California. Three of the defendants – Chevron Corporation, Chevron U.S.A., Inc., and Edison International – have their principal places of business in California. California is thus the place where a large number of the corporations responsible for a majority of the greenhouse gas emissions and fossil fuel production in the United States may be sued in one court. There likely is no other state in the nation where so many of the responsible corporations may be sued.

It is a common misconception that "everyone causes global warming." It is a misconception defendants have fueled over the years with a deceptive public relations campaign using industry-funded scientific mouthpieces and front groups bearing innocuous-sounding names resembling think tanks and scientific bodies. It is a misconception they push right into

this Court with their legal briefs claiming that global warming is caused by people and animals "breathing" – a fact they know to be untrue and that directly contradicts the allegations of the complaint. As alleged in the complaint, it is the massive emissions of greenhouse gases from fossil fuels that has knocked the natural carbon cycle of plants and animals out of balance and caused the Earth to heat up.

It is true that there are many sources of greenhouse gas emissions from the burning of fossil fuels throughout the nation and the world. But there is a surprising degree of concentration of these emissions in the hands of a relatively small number of large corporations that dominate their industries. The defendants here represent a significant number of those corporations – they represent most of the biggest emitters and fossil fuel producers in the United States. And, as alleged in the complaint, the United States is by far the biggest historical source of greenhouse gas emissions in the world. Defendants' scare tactic that everyone in the world would be liable under Kivalina's theory is incorrect and ignores both the extraordinary size of defendants' contributions, their knowledge of the harms to which they have been contributing, and the conduct of a core group of the defendants in covering it up.

Defendants' conduct as described in the complaint is a classic public nuisance. A public nuisance is an unreasonable interference with rights common to the general public. Environmental cases are quintessential public nuisances. Under blackletter law, every polluter who contributes to a nuisance is liable jointly and severally for the resulting indivisible injury to property and natural resources – even when there are a large number of polluters and even where each defendant's conduct standing alone would not have created the nuisance. Neither causation nor standing requires the tracing of molecules in a multiple-polluter case. In Superfund cases, federal courts apply this principle all the time as a matter of federal common law that fills a gap in the statute; Superfund cases, like this one, typically involve a very large number of polluters. And while environmental cases often involve complex scientific issues, there is nothing about the science of global warming that takes it beyond judicial ken. *See, e.g., Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 310-25, 339-41 (D. Vt. 2007)

(bench trial opinion resolving extensive global warming science issues).

Kivalina brings this case under the well-established ***federal*** common law of public nuisance. Under *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"), and *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 n.14 (1981) ("*Milwaukee II*"), pollution that is both interstate in nature and unregulated by the federal political branches is governed by the federal common law of public nuisance and presents a federal question under 28 U.S.C. §1331. Defendants agree that greenhouse gas emissions are inherently interstate in nature. Defendants also agree, and even emphasize, the lack of any regulation of greenhouse gases and of any statutory or administrative mechanism under which Kivalina could seek compensation for its global warming injuries. Moreover, global warming is a matter of uniquely federal interest, a point that runs throughout the defendants' briefs and that is a touchstone of federal common law. Defendants thus concede the conditions that require application of the federal common law of public nuisance here. Indeed, given the inherently interstate nature of all greenhouse gas emissions, if this case does not validly invoke federal public nuisance, no case ever could.

Kivalina also has pled state-law nuisance claims in the alternative in order to preserve them. The Supreme Court has held that federal public nuisance and state-law public nuisance are mutually exclusive doctrines. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). Thus, state law can only come into play if federal common law becomes preempted. For example, if Congress at some point were to amend the Clean Air Act by establishing a provision under which Kivalina could seek compensation for its harms, then at that point Kivalina's federal common law claim here likely would be preempted and Kivalina would be forced to litigate its public nuisance claims, if it needed to, under the state common law of each of the states where the greenhouse gas emissions occur. *Id.* at 497 (when federal nuisance preempted, public nuisance claim for interstate pollution may proceed under state common law as long as it is the law of the source state). Here, that would likely require applying the laws of twenty or thirty (or more) different states' laws. But, there is no such preemptive federal statute here and thus federal common law, not state common law, applies to Kivalina's public nuisance claim. Since the

state-law claims are within the Court's supplemental jurisdiction, Kivalina nonetheless was required to plead them in order to avoid the possibility of a *res judicata* effect on any subsequent state court proceedings that might occur in the event a new federal statute is enacted that preempts the federal claim here.

Kivalina recognizes, of course, that previous global warming tort cases sounding in public nuisance have been dismissed under the political question doctrine. *California v. General Motors Corp.,* 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) ("*GM*"), *appeal pending*, No. 07-1698 (9th Cir.); *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), ("*AEP*"), *appeals pending*, Nos. 05-5104-cv; 05-5119-cv (2d Cir.); *see also Comer v. Murphy Oil USA Inc.*, No. 1:05-CV-00436 (S.D. Miss. Aug. 30, 2007) (oral ruling from bench), *appeal pending*, No. 07-60756 (5th Cir.). But this case differs from those cases in keys respects. Unlike *AEP*, this case pleads a conspiracy supported by detailed factual allegations. Unlike *AEP*, this case seeks monetary damages and thus would not require the Court to set any kind of emissions standard, something the *AEP* court viewed as a non-judicial task. The Ninth Circuit has held that the fact that a case seeks *damages* is a "key" factor demonstrating that a case does not present a political question. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992). Further, unlike *GM*, this case does not name product manufacturers as defendants but rather goes directly after the greenhouse gas emitters and fossil fuel producers who are chiefly responsible for the problem. And the *Comer* complaint was always hard to take seriously, relying as it did on "the Magna Carta, [and] the 5th, 7th, 9th, and 14th amendments to the United States Constitution." *Comer* Third Amended Class Action Complaint ¶ 19.

Moreover, with all due respect for the courts that decided *AEP*, *GM*, and *Comer*, the reasoning of those decisions cannot withstand scrutiny. They are like the initial round of district court decisions dismissing Holocaust era claims as political questions that the appellate courts have now reversed and rejected. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 389 (3d Cir. 2006) (reversing district court decision that had dismissed Holocaust claims under political question doctrine); *Alperin v. Vatican Bank*, 410 F.3d 532, 546 (9th Cir. 2005)

(reversing decision that had dismissed as political questions plaintiffs' property claims against Vatican Bank and other defendants for conversion of Nazi-era property); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir. 2004) ("The district court found that this case implicates American foreign relations and, thus, is a political question, non-justiciable in domestic courts. We disagree.").

With a fresh look, this Court will see the errors in *AEP, GM* and *Comer*. The *AEP* court misread the law of political question and U.S. global warming policy, perhaps in part because it was a *sua sponte* decision made without the benefit of full briefing. Indeed, defendants in *AEP* – several of whom are also defendants here – expressly disavowed the political question doctrine as "wholly irrelevant" in their *AEP* district court brief, but apparently now have embraced it as a legal tactic. *See infra* at Section II.A. To be fair to the *AEP* court, it was badly misled by a 2003 EPA ruling that the *AEP* court found compelling. That 2003 EPA ruling has now been invalidated by the Supreme Court in *Massachusetts v. EPA,* 127 S. Ct. 1438 (2007). Undaunted, defendants invoke that EPA ruling endlessly here and in particular its misstatement of U.S. foreign policy that *Massachusetts* expressly dismissed as outside the EPA's statutory charge. The *GM* decision and the *Comer* oral ruling from the bench both adopted the *AEP* reasoning with its errors and added their own, including a continued reliance upon the invalidated EPA ruling even in the face of the *Massachusetts* decision. This was clear error. *See Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1181 (E.D. Cal. 2007) ("the decision in *Massachusetts* teaches that when the court seeks to determine what United States foreign policy is, it must look to sources other than EPA."); *Green Mountain*, 508 F. Supp. 2d at 396 ("In *Massachusetts v. EPA*, the Supreme Court dismissed EPA's contention that regulating greenhouse gases domestically might impair the President's ability to negotiate with developing nations to reduce emissions."), *appeals pending,* Nos. 07-4342, 07-4360 (2d Cir.).

If there is any U.S. foreign or domestic policy on global warming relevant to this damages case, then, as demonstrated by *Central Valley* and *Green Mountain*, defendants have badly distorted them. The *Green Mountain* court extensively reviewed U.S. foreign and domestic

policies on global warming and concluded that they are properly understood as the "***nation's emission reduction policies***." 508 F. Supp. 2d at 395 (emphasis added). The court held:

> Although the United States has consistently called for international consensus and a comprehensive approach to global warming, ***it has never disapproved of domestic regulation of domestic GHG emissions***. To the contrary. . . . That the United States did not ratify the Kyoto Protocol may be evidence that the United States disapproved of international solutions that exempted developing countries, and was concerned that such a plan would unfairly tax the United States economy; ***it is not evidence of an express policy against domestic regulation of greenhouse gases***.

Id. at 396 (emphases added). Similarly, in *Central Valley*, after extensively reviewing the question, the court found "absolutely nothing" to "support the contention that it is United States foreign policy to limits its own efforts" to control greenhouse gas emissions. 529 F. Supp. 2d at 1187. Thus, *AEP*, *GM* and *Comer* have misread U.S. policy and these sweeping decisions would invalidate every state law in the country regulating greenhouse gas emissions.

In any event, Kivalina here does not seek to regulate greenhouse gas emissions but rather seeks monetary damages for the harms from past emissions. There is no international agreement that could provide compensation to Kivalina with which this case could interfere. Nor does this tort case conflict in any way with any federal statute or administrative regime. Defendants themselves emphasize the absence of any such action by the political branches. To accept the defendants' political question and preemption arguments that this case somehow conflicts with a vacuum, i.e., with the *absence* of a regulatory regime that could compensate Kivalina, would turn the applicable law on its head.

This case sounding in tort law by domestic plaintiffs seeking monetary damages against domestic defendants that are corporations – not foreign nations – is a far cry from the kinds of cases that the Ninth Circuit and Supreme Court have found to interfere with foreign relations or other matters assigned exclusively to Congress or the President. ExxonMobil may be bigger than many foreign nations, but it is still a corporation, not a nation.

Kivalina has properly invoked the Court's federal question jurisdiction and has stated a claim under the federal common law of public nuisance.

A Note on Briefing

This Consolidated Opposition responds to five different 12(b)(1)/12(b)(6) motions: one filed by the Utility Defendants[1] addressing counts 1, 2, and 4 (Docket 139, hereafter referred to as "Utilities MTD"); one by "Certain Utility Defendants"[2] addressing count 3 (Docket 140, "Utilities MTD Conspiracy"); one by the Oil Company Defendants[3] under Rule 12(b)(1) (Docket 135, "Oil MTD 12(b)(1)"); and a second filed by the same defendants under Rule 12(b)(6) (Docket 134, "Oil MTD 12(b)(6)"); and one filed by Peabody Energy Corporation (Docket 137, "Peabody MTD"). Because of the considerable overlap of argument and defense, Plaintiffs have chosen the option of filing a consolidated opposition brief addressing all of the arguments under the Court's Order at Docket 126. (Per the Court's Order at Docket 126, Plaintiffs do not respond here to the Utility or Peabody 12(b)(2) motions, Dockets 141 and 138 respectively.). For the ease of the Court and the parties, Plaintiffs have created the table below detailing where the various arguments across the briefs are found, and where they are responded to in this brief.

[1] For the purposes of this brief, the "Utility Defendants" are the AES Corporation, American Electric Power Company, Inc., American Electric Power Service Corporation, DTE Energy Company, Duke Energy Corporation, Dynegy Holdings, Inc., Edison International, MidAmerican Energy Holdings Company, Pinnacle West Capital Corporation, Reliant Energy, Inc., Southern Company, and Xcel Energy Inc. *See* Docket 126 at n.1.

[2] American Electric Power Company, Inc., Duke Energy Corporation and Southern Company.

[3] ExxonMobil Corporation, Shell Oil Company, Chevron Corporation, Chevron U.S.A. Inc., ConocoPhillips Company, BP America Inc., and BP Products North America Inc. Oil 12(b)(6) at 1.

Topic	Defendants' Briefing					Plaintiffs' Opposition
	Utilities MTD Docket 139	**Utilities MTD Cons-piracy** Docket 140	**Oil MTD 12(b)(1)** Docket 135	**Oil MTD 12(b)(6)** Docket 134	**Peabody MTD** Docket 137	***this brief***
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FACTUAL BACKGROUND

The Native Village of Kivalina and the City of Kivalina are the governing bodies of an Inupiat Eskimo village of approximately 400 people. Complaint ("Compl.") ¶¶ 1, 15. "Inupiat" means "the people" and is the term used by the Natives of northern Alaska to describe themselves and their culture. *Id.* ¶ 15. Kivalina is located on the tip of a six-mile barrier reef located between the Chukchi Sea and the Kivalina and Wulik Rivers on the Northwest coast of Alaska within the Arctic Circle. *Id.* ¶¶ 1,15. Plaintiff Native Village of Kivalina is a self-governing, federally recognized Tribe established under the provisions of the Indian Reorganization Act of 1934. *Id.* ¶ 13. Plaintiff City of Kivalina is a unified municipality that was incorporated in 1969 under Alaska state law. *Id.* ¶ 14. The Native Village of Kivalina, the City of Kivalina, and many of the citizens and residents of Kivalina own property and structures in Kivalina. *Id.* ¶¶ 13-14.

A. Global Warming Is Occurring.

There is an overwhelming scientific consensus that anthropogenic emissions of greenhouse gases ("GHGs"), primarily carbon dioxide from fossil fuel combustion and methane releases from fossil fuel harvesting, are causing a change in the Earth's climate. *Id.* ¶¶ 132-134. Carbon dioxide is by far the most significant greenhouse gas emitted by human activity. *Id.* ¶ 124. The combustion of fossil fuels adds large quantities of carbon dioxide to the atmosphere that otherwise would have remained sequestered deep in the Earth. *Id.* ¶ 126. Processes on land and in the oceans that remove carbon dioxide from the atmosphere are unable to keep pace with these emissions. *Id.* As a result, the natural carbon cycle is out of balance and carbon dioxide levels in the atmosphere are increasing every year. *Id.* The current level of carbon dioxide in the atmosphere is higher than at any time in the last 650,000 years, and is likely higher than at any time in the last 20 million years. *Id.* ¶ 125.

The eight warmest years in the instrumental record of global surface temperature dating back to the mid-Nineteenth Century all have occurred since 1998, and the 14 warmest years all have occurred since 1990. *Id.* ¶¶ 128, 181. The Arctic is warming at a rate approximately twice the global average. *Id.* ¶ 129. The Arctic Climate Impact Assessment ("ACIA"), a

comprehensive evaluation of arctic climate change and its impacts, found that the Arctic climate is now heating rapidly and projected much larger changes. *Id.* ¶ 184. The ACIA found that many coastal communities and facilities face increasing exposure to storms and thawing ground will disrupt transportation, buildings, and other infrastructure. *Id.*

B. Defendants' Emissions of Greenhouse Gases.

All defendants and their predecessors in interest have directly emitted large quantities of GHGs from the combustion of fossil fuels and have done so for many years. *Id.* ¶¶ 3, 180. During most of this time, most of the defendants did little or nothing to control their GHG emissions, but instead greatly increased their emissions. *Id.* ¶ 162. Because the planet's natural systems take hundreds of years to absorb carbon dioxide, defendants' past GHG emissions remain in the atmosphere. *Id.* ¶ 180.

Defendants BP p.l.c., BP America, Inc., BP Products North America, Inc., Chevron Corporation, Chevron U.S.A. Inc., ConocoPhillips Company, ExxonMobil Corporation, Royal Dutch Shell plc and Shell Oil Company (hereinafter "Oil Companies") have directly emitted large quantities of GHGs through such activities as exploration, production and refining of petroleum and manufacturing of chemicals. *Id.* ¶¶ 163, 164. Additionally, many Oil Companies engage in coal mining, power generation, transmission of natural gas, and metals production, all of which directly emit carbon dioxide and other GHGs. *Id.* ¶ 165. For example, defendant ExxonMobil was one of the 100 largest electric power producers in the United States as of 2002. *Id.* ¶ 168.

Defendants The AES Corporation, American Electric Power Company, Inc., American Electric Power Service Corporation, DTE Energy Company, Duke Energy Corporation, Dynegy Holdings, Inc., Edison International, MidAmerican Energy Holdings Company, Pinnacle West Capital Corporation, Reliant Energy, Inc., The Southern Company, and Xcel Energy, Inc. (hereinafter "Power Companies") are electric power corporations that emit millions of tons of carbon dioxide each year from the combustion of fossil fuels and have been doing so for many years. *Id.* ¶ 170. The Power Companies are among the largest emitters of carbon dioxide in the

United States. *Id*. Electric power plants that burn fossil fuels are the largest source of carbon dioxide emissions in the United States and emit approximately 2.6 billion tons of carbon dioxide each year. *Id*. ¶ 172. Electric generation and emissions of carbon dioxide have been heavily concentrated in the U.S. in the largest power producers – in 2004, just 19 companies accounted for 50 percent of industry emissions. *Id*. ¶ 171.

Defendant Peabody Energy Corporation ("Peabody"), a coal company, directly emits large quantities of GHGs, principally methane, from its mining operations. *Id*. ¶ 177. In addition, Peabody has produced billions of tons of coal for combustion that has resulted in the emissions of billions of tons of GHGs. *Id*. ¶ 178.

C. Global Warming Impacts on Kivalina.

Global warming has reduced the Arctic sea ice commonly present in the fall, winter and spring at Kivalina. *Id*. ¶¶ 4, 16. The sea ice – particularly land-fast sea ice – acts as a protective barrier to the coastal storms that batter the coast of the Chukchi Sea. *Id*. ¶ 16. Rising temperatures caused by global warming have affected the thickness, extent, and duration of sea ice that forms along Kivalina's coast. *Id*. ¶ 185. Due to global warming, the sea ice forms later in the year, attaches to the coast later, breaks up earlier, and is less extensive and thinner, thus subjecting Kivalina to coastal storm waves and surges and increased erosion. *Id*. ¶¶ 16, 185. These storms and waves are destroying the land upon which Kivalina is located. *Id*. ¶¶ 4, 16. Houses and buildings are in imminent danger of falling into the sea. *Id*. ¶ 4. Critical infrastructure is imminently threatened with permanent destruction. *Id*. Kivalina must be relocated soon or be abandoned and cease to exist. *Id*. ¶¶ 1, 4, 17, 185.

The U.S. Army Corps of Engineers and the U.S. Government Accountability Office ("GAO") both have concluded that Kivalina must be relocated due to global warming, and have estimated the cost to be from $95 million to $400 million. *Id*. ¶ 1. The U.S. Army Corps of Engineers, in an April, 2006 report on erosion suffered by Alaska Native Villages, concluded that global warming has affected the extent of sea ice adjacent to Kivalina. *Id*. ¶ 185. The GAO, in a December, 2003 report ("GAO Report") also addressing erosion in Alaska Native Villages,

reached similar conclusions regarding Kivalina: "[I]t is believed that the right combination of storm events could flood the entire village at any time." *Id.* ¶ 185. The GAO concluded that "[r]emaining on the island . . . is no longer a viable option for the community." *Id.* The GAO Report did not address in any fashion the causes of global warming.

D. The Conspiracy Defendants' Actions Regarding Global Warming.

There has been a long campaign by power, coal, and oil companies, including defendants ExxonMobil Corporation, American Electric Power Company, Inc., BP America Inc., Chevron Corporation, ConocoPhillips Company, Duke Energy Corporation, Peabody and The Southern Company ("Conspiracy Defendants"), to mislead the public about the science of global warming. *Id.* ¶ 189. Defendant ExxonMobil in particular has been heavily involved in this campaign. *Id.* ¶ 231. ExxonMobil has channeled $16 million over the 1998 to 2005 period to 42 organizations that promote disinformation on global warming. *Id.* ¶ 231. Initially, this deceptive campaign attempted to show that global warming was not occurring. *Id.* ¶ 189. Later, and continuing to the present, it has attempted to demonstrate that global warming is good for the planet and its inhabitants or that even if there may be ill effects, there is not enough scientific certainty to warrant action. *Id.* The purpose of this campaign has been to convince the public at-large and the victims of global warming that the process is not man-made. *Id.* The campaign has been conducted directly by the Conspiracy Defendants, and through trade associations such as the Edison Electric Institute ("EEI") (which represents the electric power industry), the National Mining Association (which represents the coal industry), and the Western Fuels Association (which represents coal-burning utilities that own Wyoming coal fields). *Id.* ¶ 190.

For example, the Conspiracy Defendants were at relevant times members of the Global Climate Coalition ("GCC"). *Id.* ¶ 198. The GCC provided public relations services for "global warming skeptics" and attacked credible and preeminent expert scientists. *Id.* ¶¶ 191, 215-221. In December, 1995, the GCC, via its Science and Technology Advisory Committee ("GCC-STAC"), drafted a primer on the science of global warming for GCC members that concluded in part: "The contrarian theories raise interesting questions about our total

understanding of climate processes, but they do not offer convincing arguments against the conventional model of greenhouse gas emission-induced climate change." *Id.* ¶ 205. Subsequently, the GCC and its members continued to publicize the contrarian theories about global warming despite knowing that they were false. *Id.* ¶ 205. At a GCC meeting in February, 1996, for instance, EEI made a powerpoint presentation regarding the science of global warming which stated in part that some of the impacts of global warming would be "potentially irreversible" and include "significant loss of life." *Id.* ¶ 207.

Despite their knowledge that global warming was real and presented extraordinary threats to the planet and humanity, the Conspiracy Defendants continued to mislead the public regarding global warming through their hired front groups and trade associations. For example, in September, 1997, the GCC launched a national television, print and radio advertising campaign falsely claiming that there was an open issue as to whether man-made greenhouse gases caused global warming. *Id.* ¶ 222.

Industry formed a task force in the 1990s called the Global Climate Science Communications Team ("GCSCT"). *Id.* ¶ 223. GCSCT members included some of the defendants, including ExxonMobil, Chevron Corporation, and The Southern Company, and trade associations including the American Petroleum Institute, which represents the interest of all of the U.S. oil company defendants. *Id.* A 1998 GCSCT task force memo outlined an explicit strategy to invest millions of dollars to manufacture uncertainty on the issue of global warming and stated as its goal: "*Victory will be achieved when average citizens understand (recognize) uncertainties in climate science*" and when public "*recognition of uncertainty becomes part of the 'conventional wisdom*.'" *Id.*

E. Federal Global Warming Policy.

As the Supreme Court recently held, EPA has statutory authority under the Clean Air Act ("CAA") to regulate greenhouse gas emissions, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). In the wake of that decision in 2007, EPA has not taken action to regulate greenhouse gas emissions from motor vehicles or from any other source. On July 30, 2008, the EPA published

its response to *Massachusetts v. EPA* in the Federal Register in an Advance Notice of Proposed Rulemaking. *See* 73 Fed. Reg. 44354 (July 30, 2008). The EPA sought comment on "analyses and policy alternatives regarding greenhouse gas (GHG) effects and regulation under the Clean Air Act." *Id.* at 44354. The EPA Administrator states in the preface to this proposed rulemaking:

> I believe the [Advance Notice of Proposed Rulemaking] demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time-consuming, and, likely, convoluted set of regulations.

Id. at 44355. The EPA Administrator is the designated official under the CAA responsible for deciding whether a particular pollutant endangers health or welfare – the prerequisite for EPA to regulate a pollutant under the CAA. *See* 42 U.S.C. § 7521(a)(1). Thus, the EPA Administrator has made clear his intent not to make the finding necessary for EPA to issue ambient air quality standards for greenhouse gases under the CAA.

Even if the EPA and its Administrator were to reverse course, make an endangerment finding, and establish ambient air quality standards for greenhouse gases, however, there is no provision in the CAA or other laws for victims of air pollution generally or global warming specifically to seek compensation.

Likewise, there are no limitations on defendants' domestic emissions under any treaty. The United States is a party to the United Nations Framework Convention on Climate Change ("Framework Convention" or "UNFCCC"), May 9, 1992, 1771 U.N.T.S. 107. The Framework Convention requires the United States and other developed nations to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases." UNFCCC at art. IV § (2)(a). "These policies and measures will demonstrate that developed countries are ***taking the lead*** in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention." *Id.* (emphasis added). The treaty expressly recognizes that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per

capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs." *Id*. at preamble. The treaty does not impose binding emissions limits but instead establishes the general "aim of [the parties of] returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases." *Id.* at art. IV § (2)(b).

A subsequent treaty, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998), imposes nation-by-nation binding emissions limits on the developed nations of the world but the United States has not ratified the Protocol and thus is not a party to it. *Flores v. Southern Peru Copper Corp*., 414 F.3d 233, 256 (2d Cir. 2003) ("A State only becomes bound by – that is, becomes a party to – a treaty when it ratifies the treaty.").

Apart from the Clean Air Act, Congress has enacted statutes requiring research on global warming and interagency collaboration. These statutes recognize that global warming will have severe adverse impacts in the United States and expressed a clear national policy in favor of reducing such emissions. For example, the Global Climate Protection Act of 1987 provides:

> United States policy should seek to . . . limit mankind's adverse effect on the global climate by–(A) slowing the rate of increase of concentrations of greenhouse gases in the atmosphere in the near term; and (B) stabilizing or reducing atmospheric concentrations of greenhouse gases over the long term . . . .

P.L. 100-204, Title XI, § 1103(a) (uncodified), *reprinted in* 15 U.S.C. § 2901-note. And the Global Change Research Act of 1990, 15 U.S.C. § 2931(a)(2), recognizes that "human-induced changes, in conjunction with natural fluctuations, may lead to significant global warming and thus alter world climate patterns and increase global sea levels" with adverse effects on "agricultural and marine production, coastal habitability, biological diversity, human health, and global economic and social well-being."

Congress has required research into technologies to reduce global warming pollution and mandates that electric utilities report their carbon dioxide emissions levels to EPA. *See* 42 U.S.C. § 7403(g)(1) (section of CAA requiring research into "technologies for preventing or

reducing multiple air pollutants, including . . . carbon dioxide, from stationary sources, including fossil fuel power plants"); P.L. 101-549, Title VIII, § 821, 104 Stat. 2699 (Nov. 15, 1990) (uncodified), *reprinted in* 42 U.S.C. § 7651k-note ("Information Gathering on Greenhouse Gases Contributing to Global Climate Change.").

For their understanding of U.S. global warming policy, defendants rely upon: an EPA ruling that the Supreme Court invalidated in *Massachusetts*, Utilities MTD at 12, 14, 16, 18, 34; Oil MTD 12(b)(6) at 5, 7, 8, 23; Peabody MTD at 4; a fuel economy rule that was invalidated by the Ninth Circuit, Utilities MTD at 6; and a wide variety of miscellaneous materials, such as a press release, letters from the President to a group of Senators and a non binding sense of the Senate resolution, *see* Oil MTD 12(b)(1) at 7-9; Utilities MTD at 6-7; Peabody MTD at 5. As set forth below, these items are not official U.S. policy and cannot be relied upon here. *See infra* Section II.B.

In sum, official U.S. policy as set forth in the UNFCCC and federal statutes is to mitigate global warming by limiting greenhouse gas emissions and reducing the atmospheric concentration of such gases. There is no binding emissions limit on U.S. emissions in any treaty to which the U.S. is a party. The EPA is required to conduct technology research and utilities are required to report their carbon dioxide emissions levels. EPA is authorized to regulate greenhouse gases but has not issued any ambient air quality standards for greenhouse gases. There is no statutory or administrative regime under which Kivalina could seek compensation.

STANDARD OF REVIEW

When a court considers a 12(b)(6) motion to dismiss a complaint, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff." *Williams v. Gerber Prods. Co.*, 523 F.3d 934, 937 (9th Cir. 2008) (quotation omitted). All reasonable inferences must be drawn in favor of the plaintiffs. *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). The complaint simply must "'plead enough facts to state a claim to relief that is plausible on its face.'" *Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)).

When subject matter jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), the plaintiff must demonstrate the "existence of whatever is essential to federal jurisdiction." *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

ARGUMENT

I. KIVALINA HAS STATED A PROPER CLAIM OF PUBLIC NUISANCE UNDER FEDERAL COMMON LAW.

Kivalina has properly invoked the federal common law of public nuisance applicable to unregulated, interstate pollution. Its Complaint properly alleges the elements of federal nuisance and is grounded in a long line of multiple polluter cases.

A. Federal Common Law Applies to Greenhouse Gas Emissions.

1. Kivalina's Public Nuisance Claim Is Governed by Federal Common Law Under the Milwaukee-Ouellette Trilogy of Interstate Pollution Law.

Defendants wrongly contend that federal common law does not apply to this case. In fact, Kivalina brings its claims under a well-established framework of interstate pollution law. This framework was set forth in three Supreme Court cases that provide the starting point for any interstate pollution case: *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"), *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 n.14 (1981) ("*Milwaukee II*"), and *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Under this framework, a plaintiff injured by ***interstate*** pollution that is ***unregulated*** by the federal EPA may bring a claim under the federal common law of public nuisance.

In *Milwaukee I*, Illinois filed a case under the Supreme Court's original jurisdiction against polluters from out of state. The defendants were Wisconsin municipalities discharging inadequately-treated sewage into Lake Michigan, which contributed to bacterial contamination along the Illinois shoreline. In a unanimous decision, the Supreme Court held that the federal common law of public nuisance governs such a claim: "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I* at 103; *see also id.* at 107 (discussing federal "public nuisance"). The Court drew heavily upon the historic decision in *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907), an air pollution case in which the

Court, in an opinion by Justice Holmes, allowed an interstate nuisance claim for what is now recognized as acid rain. *See also Georgia v. Tennessee Cooper,* 237 U.S. 474 (1915) (setting emissions limits on remaining defendant).

The Court observed in *Milwaukee I* that there were important federal interests at stake in light of federal clean water statutes and that those federal interests called for application of federal law. 406 U.S. at 101-02 (noting "a complex of laws recently enacted" relating to water pollution). It held that "[w]hile the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning [federal common law] rules of decision." *Id*. at 103 n.5. The Court observed that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance" but "until that comes to pass, federal courts will be empowered" to hear interstate pollution cases. *Id*. at 107. *Milwaukee I* also held that a claim under the federal common law gives rise to proper federal question jurisdiction. *Id*. at 100. The Court thus declined to exercise its original jurisdiction and held that Illinois could re-file the case in federal district court. *Id*. at 108.

Illinois thus proceeded to re-file its case in federal district court in Illinois under the federal common law of public nuisance, joined now by Michigan as a co-plaintiff. Although Michigan's shoreline was too far from Wisconsin to be affected by the pathogens from Wisconsin-borne sewage, Michigan alleged that the sewage pollution was the largest source of nutrients that were contributing to eutrophication of the entire lake.[4] The plaintiffs prevailed after a bench trial, *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), and the Seventh Circuit affirmed most of the relief ordered by the district court, *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979).

The Supreme Court granted *certiorari* to determine whether new federal legislation enacted after its decision in *Milwaukee I*, i.e. – the Clean Water Act – had now preempted the

[4] Eutrophication is the process of overloading a freshwater body with nutrients, causing algal blooms that deplete the water of oxygen and lead to a dead lake.

federal common law claim. The Court re-affirmed that federal common law applies when the courts are "compelled to consider federal questions which cannot be answered from federal statutes alone." *Milwaukee II*, 451 U.S. at 314 (quotation omitted); *see also id*. at 319 n.14 (federal common law applies where "problems requiring federal answers are not addressed by federal statutory law."). The Court held the plaintiffs' federal common law nuisance claim to be preempted, however, because the new statute regulated the very sewage discharges at issue, imposed numerical limits on them and provided the plaintiffs with a remedy. *Id*. at 320. The Court thus vacated the lower court decision. *Id*. at 332. *Milwaukee II* did not reverse *Milwaukee I* and the Supreme Court and lower courts have continued to rely upon *Milwaukee I* as good law. *See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 n.13 (1981); *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) ("we have long recognized that interstate water pollution is controlled by federal law."); *Nat'l Audubon Soc'y v. California*, 869 F.2d 1196, 1203 (9th Cir. 1988).

The third chapter in the trilogy, *Ouellette*, arose when Vermont citizens invoked *state* common law in a suit against a New York paper pulp mill that was polluting the air and water of Vermont. The Supreme Court, reviewing only the water claim, re-affirmed that "the control of interstate pollution is primarily a matter of federal law." *Ouellette*, 479 U.S. at 492. It held, however, that while the federal common law was unavailable to the plaintiffs under *Milwaukee II*, they could sue under the state public nuisance law of the source state (there, New York), because the savings clauses of the Clean Water Act expressly preserve "common law" claims even where federal common law is preempted. *Id*. at 497 ("nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State"). It further held that the statute preempts application of more than one state's common law and thus the law of the state where the harm occurs may not be applied. On remand, the district court reached the same conclusion with respect to the interstate air pollution claim. *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58, 62 (D. Vt. 1987) (public nuisance law of source state preserved; savings clauses of Clean Air Act virtually identical to those of Clean Water Act).

This trilogy of cases establishes a straightforward framework involving vertical and horizontal choices of law for an interstate air pollution case like Kivalina's. Where such pollution is unregulated by the federal EPA, the federal common law of public nuisance applies. This federal common law is mutually exclusive with state common law. *Ouellette*, 479 U.S. at 488 ("the implicit corollary of [*Milwaukee I*] was that state common law was preempted"); *Milwaukee II*, 451 U.S. at 314 n.7 ("If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."). If EPA commences regulating the pollutant, then under *Milwaukee II* federal common law becomes preempted but state common law applies (vertical choice of law rule). The state law applied must be the law of the source state rather than the affected state (horizontal choice of law rule). Thus, as required by this framework, Kivalina has pled its public nuisance claim here under federal common law and pled its state-law nuisance claims only in the alternative, *see* Compl. ¶¶ 2, 263, as required.

Kivalina's public nuisance claim falls squarely within the *Milwaukee I* category: a public nuisance claim for interstate pollution that is unregulated by EPA:

- **It is interstate pollution**. Carbon dioxide emissions are inherently interstate in nature. *See* Compl. ¶ 254; *see also* Utilities MTD at 32:13-14, 33:11-12.
- **It is unregulated.** EPA has not issued any ambient air quality standard for greenhouse gases and certainly there is no federal liability regime under which Kivalina could seek compensatory damages, as defendants readily concede. *See* Oil MTD 12(b)(1) at 5 ("Notably, the political branches thus far have declined to adopt emission caps or standards . . ."); *id.* at 36 ("Here, of course, there is a complete absence of any statutory scheme that would define the relevant wrongful emissions of greenhouse gases . . . ."); Utilities MTD at 28:1 ("Congress has not provided remedies for plaintiffs"); *id.* at 14:13-15 ("the political branches declined to adopt

> the Kyoto Protocol, which sought to impose emissions caps on developed nations"). Although the EPA is authorized to regulate greenhouse gases under the CAA, *Massachusetts*, 127 S. Ct at 1459, the EPA Administrator has recently stated his intention not to issue such regulations. *See supra* at Factual Background Section E. And even if the EPA were to issue new greenhouse gas regulations in the future, there would still be no remedial scheme for past emissions.

Federal common law applies.

2. Because Interstate Pollution Is A Recognized Enclave of Federal Common Law, There Is No New Law to Create.

Defendants contend that the Court here would have to "create" a federal common law cause of action as a new exception to *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). *See* Oil MTD 12(b)(6) at 9; Utilities MTD at 24-26. But the federal common law of public nuisance already exists by virtue of *Milwaukee I* and the earlier cases on which it is based; there is nothing new to create.

The federal common law of public nuisance is a well-recognized species of "federal specialized common law." The Supreme Court recognized federal specialized common law in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), dealing with apportionment of water in an interstate stream, the same day that it repudiated "federal *general* common law" in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added). *Milwaukee I* relied upon the simultaneous decisions in *Hinderlider* and *Erie* in recognizing interstate pollution as a special enclave of federal law. 406 U.S. at 105 & n.7. As stated in one of defendants' lead cases, federal specialized common law applies to "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). That is exactly the kind of interstate dispute that arises in interstate pollution. *Texas Industries* recognized as much by citing to *Milwaukee I* as an example of such an interstate dispute where federal common law properly applies. *See id*. at 641 n.13. Federal common law governs this case because carbon

dioxide pollution crosses state lines, and, by contributing to the process of global warming, causes transboundary harm in Alaska, where Kivalina is located.

Defendants rely heavily upon *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1998). *See* Oil MTD 12(b)(6) at 10-12. But *Audubon* plainly recognized that under *Milwaukee I*, "there is a federal common law when dealing with air and water in their ambient or interstate aspects." 869 F.2d at 1203. While *Audubon* found, on the facts of that case, no interstate dispute sufficient to trigger federal common law, it is easily distinguished. *Audubon* involved localized *dust pollution* and thus the matter was appropriately resolved under California law, where both the defendant and the harm were located and where the pollution occurred. As the court noted, the plaintiff in *Audubon* had even filed a concurrent lawsuit under state law in state court, thus demonstrating "that California nuisance law is both well-suited and applicable to the case at bar." *Id*. at 1204. Although the court was willing to assume that some of the dust reached into Nevada, it held that "[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*. at 1204; *see also id.* at 1205 ("we conclude that Audubon cannot properly assert a federal common law nuisance action based on air pollution *on these facts*.") (emphasis added). The localized dust pollution at issue in *Audubon* could hardly be more different from the inherently interstate greenhouse gas emissions at issue here.

Defendants also rely upon *Jackson v. Johns-Mansville Sales Corp*., 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc), which stated that federal common law is not triggered "merely because the conflict is not confined within the boundaries of a single state." *See* Oil MTD 12(b)(6) at 12. *Jackson* did not address interstate pollution, however. In that case, the parties had litigated an asbestos case under state law and, after a jury verdict was appealed, the Fifth Circuit requested briefing on whether federal common law should apply to asbestos tort cases. It held that the national nature of the asbestos industry and the fact that many affected victims live in different states was not enough to trigger federal common law. *Id*. at 1324-25. The case is further

evidence that *Milwaukee I* retains its vitality after *Milwaukee II*. *See id*. at 1324 (treating *Milwaukee I* as good law). Moreover, *Jackson* does not purport to cast doubt on *Milwaukee I*'s holding that interstate pollution is a matter of federal common law and especially so for a case like this where the pollution is inherently interstate and even international due to its rapid dispersal in the atmosphere.

An additional, alternative, basis for applying federal common law here is the uniquely federal interest in global warming. *See Audubon*, 869 F.2d at 1203-04. It is true, as defendants point out, that *Audubon* found there is "not a uniquely federal interest in protecting the *quality* of the nation's air." *Id*. at 1203 (emphasis added). But that holding cannot be exported, as defendants attempt to do, from the context of localized dust pollution, which affects air *quality*, to this case dealing with a kind of global air pollution that affects the *climate* of every state. In fact, as the Utilities frankly concede, "global climate change is predominantly a matter of federal concern," Utilities MTD at 32; they also emphasize the "uniquely federal nature of any response to global warming," *id.* at 33. If global warming does not raise a uniquely federal interest, no pollution case ever could. As one commentator has observed;

> Since the time Justice Holmes sat on the Court, federal common law for public nuisance has served as a meaningful cause of action for states and individuals to stop harmful activities and recover the costs of transboundary pollution. So too it can with climate change. Indeed, the legal challenges of climate change seem a particularly cozy fit for federal common law. It is transboundary. Legislative enactments allowing for injunctive relief or money damages do not exist. A patchwork of state common law responses is untenable. So one is left to wonder for what federal common law can exist if not for climate change. And if current circumstances concerning climate change do not warrant its use, then when possibly could it be so.

James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 58 Denver U. L. Rev. 919, 921 (2008).

Because this case falls squarely within *Milwaukee I*, the Court may decline defendants' invitation to travel down side trails having nothing to do with interstate pollution. Cases addressing whether to "create" a new federal common law claim dealing with human rights or whether to supplement an *existing statutory remedy* under Title VII or under the Clayton Act with a common law right of contribution, *see* Utilities MTD at 24-26, are inapposite on their

face. There is no existing statutory remedy for greenhouse gas emissions. There is no compensatory scheme for the damages alleged here. There is no "high policy" choice to be made here, *see* Utilities MTD at 24:13, 25:18-20, that was not already made in *Milwaukee I*. There is no separation of powers concern about whether creating some *new* species of federal common law would intrude on the political branches. The Supreme Court crossed those bridges long ago when it recognized interstate pollution as a proper enclave, however narrow, of federal common law.[5]

Defendants barely disguise their wish that the Supreme Court would simply reverse *Milwaukee I* and the earlier precedents upon which it is based. *See* Utilities MTD at 25 ("even if *Milwaukee I* is good law"); *id*. at 21 ("outmoded theories of federal common law"); *id*. at 25 ("constitutionally suspect interstate nuisance action"). But the Supreme Court has never reversed *Milwaukee I* and indeed has continued to embrace it. So did the Ninth Circuit in *Audubon*. There is thus no occasion to create a new federal common law doctrine. This case invokes the well-established enclave of federal common law applicable to interstate pollution.

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[5] Defendants' argument against creating new federal common law is not only inapposite but weak even on its own terms. For example, in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), relied upon by defendants, *see* Peabody MTD at 15:26 - 16:2; Utilities MTD at 24:15-19, 25:9-11, the Court plainly held that "*Erie* ***did not*** in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way." *Id.* at 729 (emphasis added); *see also Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1099-1100 (N.D. Cal. 2008) ("*Sosa* held, in spite of the *Erie* presumption against federal common law, that 'post-Erie understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.'") (quoting *Sosa*, 542 U.S. at 729). Further, defendants' repeated argument that the use of federal common law violates separation of powers by expanding judicial power at the expense of the political branches misses the primary thrust of the separation of powers doctrine. *See Miller v. French*, 530 U.S. 327, 350 (2000) ("separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design").

B. Defendants' Proposed Restrictions on the Federal Common Law of Public Nuisance Are Unavailing.

Defendants attempt to wriggle free of the straightforward legal framework requiring application of federal common law to unregulated, interstate air pollution, but their arguments badly miss the mark. Indeed, many of their arguments contending Kivalina has not stated a claim under the federal common law of public nuisance are demonstrably incorrect.

The plaintiffs here are proper plaintiffs under federal common law, which recognizes damages actions and is not limited to "simple" nuisances.

1. The Native Village of Kivalina and City of Kivalina Are Proper Federal Plaintiffs.

The Native Village of Kivalina, a federally-recognized Indian tribe, and the City of Kivalina, a municipal subdivision of a state, are proper federal plaintiffs. Defendants' argument that federal nuisance is restricted exclusively to State plaintiffs is directly contradicted by the case law.

Milwaukee I held that "it is not only the character of the parties that requires us to apply federal law" but rather "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. Relying on this key language, the Seventh Circuit held in *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1017-19 (7th Cir. 1979), that federal nuisance is not restricted to suits by States and thus the court permitted a federal nuisance suit for damages by a municipality. As *Evansville* observed, in *Tennessee Copper* the Supreme Court had "implicitly assum[ed] that even a private party might file suit to enjoin interstate air pollution." *Id*. at 1018 n.30 (citing *Tennessee Copper*, 206 U.S. at 238). In *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1214 (D.N.J. 1978), the court held that it could "see no reason why the township should not be entitled to bring an action based on the federal common law of nuisance."

Second, defendants' contention that the federal common law of public nuisance is rooted exclusively in the rights of States, *see* Oil MTD 12(b)(1) at 11:26 - 13:3; Utilities MTD at 23:7-11, overlooks the jurisdictional holding of *Milwaukee I*. The Article III grant of original

jurisdiction over controversies "in which a State shall be a party," U.S. Const. art. III § 2, is no longer the jurisdictional basis for interstate nuisance as it was in the time of *Tennessee Copper*. Under *Milwaukee I*, interstate nuisances now "arise under" federal law. The nature of the subject matter, not statehood, is the key. *Township of Long Beach,* 445 F. Supp. at 1214 ("No statement was made [in *Milwaukee I*] that the interest of the State itself precipitated the development of such common law."). This Court has jurisdiction over this case because it presents a federal question, not because it involves controversies between States and citizens of other States. "There is nothing in the jurisdictional statute, 28 U.S.C. § 1331(a), on which the Supreme Court based its opinion in [*Milwaukee I*], to suggest that suits by citizens should be treated differently from suits by states." John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L. Q. 241, 280-81 (1972); *see also Byram River v. Vill. of Port Chester*, 394 F. Supp. 618, 629 (S.D.N.Y. 1975) (permitting federal nuisance action by private parties).

Indeed, States are entitled to pursue federal nuisance actions in federal district court under federal question jurisdiction not *because* they are States but *notwithstanding* that they are States who may invoke the Supreme Court's original jurisdiction. *See Texas v. Pankey*, 441 F.2d 236, 242 (10th Cir. 1971) ("we hold that the State of Texas was not precluded on its character as a party from bringing a federal-rights suit in the district court under § 1331(a)"), *cited in Milwaukee I*, 406 U.S. at 99-100, 103, 108 n.9. And defendants' theory of federal nuisance as driven by the *quid pro quo* for the exchange of sovereign rights, Oil MTD 12(b)(6) at 14:22-28, Utilities MTD 23:13-15, also cannot explain why interstate pollution cases filed by the United States against private polluters arise under federal law. *See Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036, 1040 n.9 (7th Cir. 1975) (Stevens, J.) (argument that federal nuisance "depends on the existence of a conflict between sovereigns" at odds with cases permitting United States to sue in federal nuisance). It is the "broad language" of *Milwaukee I*

focusing on the subject matter that is the touchstone, *id*. at 1040, not the identity of the parties.[6]

The defendants rely upon *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976) (en banc), but there the court plainly stated that "[i]t is not essential that one or more states be formal parties if the interests of the state are sufficiently implicated." Here the interests of States are clearly implicated by global warming given the similar global warming suits filed by eight States for injunctive relief and damages under federal common law. *See AEP, GM, supra.*

The defendants also rely upon *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), but there the plaintiffs were private parties, unlike Kivalina. Moreover, defendants fail to acknowledge that the Court was careful in that case not to address the question of whether non-States may sue. *See id*. at 11 n.17 ("We therefore need not discuss the question whether the federal common law of nuisance could ever be the basis of a suit for damages *by a private party*.") (emphasis added). And the circuit court in that case had allowed non-State plaintiffs to sue under federal nuisance law. *See Nat'l Sea Clammers Ass'n v. New York City*, 616 F.2d 1222, 1233 (3d Cir. 1980) ("We hold that the common law nuisance remedy recognized in *Illinois v. City of Milwaukee* is available in suits by private parties."), *rev'd on other grounds*, 453 U.S. 1 (1981). In fact, the Third Circuit concluded that "private parties should be permitted, and indeed encouraged," to participate in federal nuisance cases. *Id*. at 1234.

The Kivalina plaintiffs are not private parties. One of them is a subdivision of a state. The other is a federally-recognized Indian Tribe with sovereign rights. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic depending nations' that exercise inherent sovereign authority over their members

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[6] The defendants' argument would even disqualify the States from pursuing their proprietary claims where state-owned property is harmed by unregulated, interstate pollution. *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 601-02 (1982) ("As a proprietor, [a State] is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court.").

and territories."); *see also infra* p. 107-09 (regarding status of Alaskan tribes). That status significantly heightens the federal nature of this controversy. Indeed, if *arguendo* federal nuisance is based, as defendants contend, upon the idea that U.S. states voluntarily gave up their rights to curtail interstate harm by force as a condition of joining the Union, then, *a fortiori*, the nation's Indian Tribes, who *involuntarily* gave up such rights and received the federal government's protection in exchange, must be entitled to the same right of action. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234-36 & n.3 (1985) (recognizing tribal right to pursue federal common law cause of action where Tribes lost full rights as sovereigns but gained protection of federal government). Thus, Tribes share with U.S. states the right to bring *parens patriae* action on behalf of their citizens or tribal members. *See, e.g., Dep't of Health & Soc. Servs. v. Native Vill. of Curyung*, 151 P.3d 388 (Alaska 2006) (Alaskan tribes may sue *parens patriae*).[7] And the *parens patriae* doctrine itself has been relied upon in federal nuisance law. *See*, *e.g., Maine v. M/V Tamano*, 357 F. Supp. 1097, 1099 (D. Me. 1973) (collecting cases).

Finally, as a matter of policy, barring all non-State parties from suing in federal nuisance would render federal nuisance law inconsistent with all of its closest cousins. Non-state parties, including private parties, may sue not only under state nuisance law when they have special injury, but also:

- under federal maritime nuisance law when they have special injury, *In re Exxon Valdez*, 104 F.3d 1196, 1197-98 (9th Cir. 1997);
- under federal common law to resolve title to land dependent upon a boundary between States, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 111 & n.13 (1938) (citing cases); and

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[7] *See also Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514 (9th Cir. 2005) ("The Tribe here is not suing as an aggrieved purchaser, or in any other capacity resembling a private person[]."); *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502, 1503 (D.S.D. 1989) ("The plaintiffs are federally recognized Indian tribes who sue as sovereign governmental entities and as parens patriae on behalf of tribal members."), *vacated on other grounds*, 900 F.2d 1164 (8th Cir. 1990). A few courts have rejected *parens patriae* standing for Tribes where the Tribe was found not to be acting for all its members. *See* Cami Fraser, Note: Protecting Native Americans: The Tribe as *Parens Patriae*, 5 Mich. J. Race & L. 665 (2000) (reviewing cases and arguing that "all members" rule contradicts *parens patriae* law). Here, because the entire village must be relocated, the Tribe represents all its members.

- under federal common law to resolve disputes to water in interstate streams, *Id*. at 110; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (under *Hinderlider* "no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties."); *see also Milwaukee I*, 406 U.S. at 105 & n.7 (relying upon *Hinderlider*).

The Native Village of Kivalina and City of Kivalina are proper federal plaintiffs.

2. The Federal Common Law of Public Nuisance Permits the Recovery of Damages.

Defendants argue that damages are unavailable under federal common law, *see* Oil MTD 12(b)(6) at 9:25-28, 14:4-20; Utilities MTD at 23:7-15, but they again are incorrect. In *Evansville*, for example, the court held that "a request for damages does not preclude the exercise of jurisdiction of a claim arising under the federal common law of interstate water pollution." 604 F.2d at 1019. As the court held in that case:

> The sewer district seems to assert that the Supreme Court's decision in *Illinois v. Milwaukee* establishes a request for equitable relief as a "criterion" for maintaining a claim under the federal common law of interstate water pollution. We disagree. Plaintiffs in that case sought equitable relief because of the nature of the claimed injury. *See Illinois v. Milwaukee*, supra, 599 F.2d at 165. The Supreme Court's discussion of Illinois' right to maintain the action, therefore, focused on that type of claim. We find nothing in the opinion that supports the conclusion that equitable relief is exclusive or that a request for such relief is essential.

Id. at 1019 n.32; *see also Maine v. M/V Tamano*, 357 F. Supp. 1097, 1102 (D. Me. 1973) ("there is no apparent reason why the present action to recover such damages cannot be maintained."); *California v. S.S. Bournemouth*, 307 F. Supp. 922, 929 (C.D. Cal. 1969) (same). Just recently, the Court has rejected an attempt "to sever remedies from their causes of action." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008).

Evansville is a correct statement of the law. Kivalina's cause of action arises under federal law under *Milwaukee I* due to the inherently interstate nature of greenhouse gas emissions and the uniquely federal interests in global warming. These factors are entirely independent of the nature of the relief Kivalina seeks. Indeed, injunctive relief curtailing emissions would not make sense here, where Kivalina needs to move the village to avert further harm to which defendants contributed by their past conduct.

3. Federal Nuisance is Not Restricted to "Simple Type" Nuisances.

The defendants incorrectly argue that federal nuisances must only be of a "simple type." *See* Oil MTD 12(b)(6) at 13:4-14; Utilities MTD at 23:16-27. However, there is no such limitation. Very few federal nuisance cases have used the term "simple" in connection with "nuisance." One of them contradicts the defendants' argument and the others do not support it.

The first case is *Missouri v. Illinois*, 200 U.S. 496 (1906) ("*Missouri II*"), dealing with sewage pollution alleged to have caused an increase in typhoid fever in a downstream state. Far from tying federal nuisance to those nuisances of a "simple type," the Court *distinguished* the properly pled interstate nuisance action before it – dealing with invisible and odorless pathogens in sewage – from the typical "simple" nuisance actions between neighbors:

> We have studied the plaintiff's statement of the facts in detail . . . . There is no pretence that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses – no visible increase of filth, no new smell. . . . The plaintiff's case depends upon an inference of the unseen.

Id. at 522. The Court did not decide that such a non-simple nuisance was not actionable. To the contrary, the Court expressly reaffirmed its prior decision, *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*"), in which it held that Missouri was entitled to pursue its (non-simple) federal nuisance case. *Missouri II*, 200 U.S. at 518, 520. In reaffirming its prior decision in the case, "the actual facts [of which] have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science," *id.* at 518, the Court could hardly have been clearer that federal nuisance would *not* be limited to old-fashioned notions of filthiness, odors, and other immediate and direct affronts to the senses that had characterized typical nuisances between neighbors under the "older common law." Rather, this new doctrine of federal nuisance would also recognize subtle and unseen threats as revealed by the ingenuities of science.[8]

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[8] Notably, the Court in *Missouri II* denied relief only following a full evidentiary proceeding on the merits because the plaintiff had failed to demonstrate that the pathogens could survive the 357-mile trip downstream. Moreover, the defendant had demonstrated that its

The next federal nuisance case to use "simple" in connection with "nuisance" was *North Dakota v. Minnesota*, 263 U.S. 365 (1923), dealing with flooding of land. The Court reviewed state and federal nuisance cases and concluded:

> It needs no argument, in the light of these authorities, to reach the conclusion that, where one State, by a change in its method of draining water from lands within its border, increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another State, the latter State has such an interest as quasi-sovereign in the comfort, health and prosperity of its farm owners that resort may be had to this Court for relief. It is the creation of a public nuisance of simple type for which a State may properly ask an injunction.

Id. at 374. Thus, in context, the Court merely recognized that flooding of land is easily cognizable as a nuisance. The Court nowhere said that "only" nuisances of a simple type are cognizable in federal nuisance. And as it turned out, the evidence in *North Dakota* was highly complex, involved a battle of experts, and required a lengthy and detailed factual analysis by the Court. *Id.* at 376-88.

The only other time "simple" appears in a federal nuisance case in connection with the word "nuisance" is in *Milwaukee I*, which merely reproduced much of the above block quote from *North Dakota*, *without comment*, in a footnote. *Milwaukee I*, 406 U.S. at 106 n.8. The footnote follows the statement that "[w]hen it comes to water pollution this Court has spoken in terms of 'a public nuisance.'" *Id.* at 106. The Court then cites three other cases that use the term "nuisance" or "public nuisance" (but not "simple" nuisance). Thus, in context, the Court's footnote was part and parcel of its point that "nuisance" is the proper term and legal doctrine to employ in an interstate pollution case. The Court never stated that "simple" should be taken as a limiting principle on federal nuisance.

In fact, *Illinois v. Milwaukee* was itself, like *Missouri v. Illinois*, predicated upon an alleged increase in illness caused by invisible and odorless pathogens in sewage. *See Milwaukee II*, 451 U.S. at 309. This non-simple claim was cognizable, as was the even

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conduct (i.e., flushing large quantities of fresh water from Lake Michigan into the river along with Chicago's sewage) actually improved the water quality. 200 U.S. at 522-23. That Missouri ultimately failed in her proof is of no moment here. This global warming case is at the *Missouri I* stage, not the *Missouri II* stage.

less simple claim that defendants were contributing to eutrophication of an entire Great Lake by way of the nutrient pollution contained in the sewage. *Id.* at 309 & n.3. The bench trial in that non-simple nuisance case "took four months." *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at *3 (N.D. Ill. 1973), *aff'd in relevant part and rev'd in part*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds, Milwaukee II.* There is no "simple" limitation on federal nuisance.

4. "Noxious" Means "Harmful."

The Utilities further contend that federal nuisance is limited to "noxious" pollutants and that carbon dioxide is not noxious. *See* Utilities MTD at 3:8-15, 22:13-14 & n.10, 23:16-17. But even if *arguendo* there were a case announcing such a limit (and there is not), "noxious" just means "harmful or destructive to man or to other organisms." Webster's Third New International Dictionary 1547 (1986); *accord* Black's Law Dictionary 960 (5th ed. 1979) ("hurtful"; "[t]hat which tends to cause injury, especially to health or morals."); *Massachusetts v. Goldenberg*, 155 N.E.2d 187, 192 (Mass. 1959) ("the word 'noxious' means 'hurtful, harmful, injurious, destructive, unwholesome'"). It does not mean "toxic" or "poisonous." *Dodd v. Independence Stove & Furnace Co.*, 51 S.W.2d 114, 118 (Mo. 1932) ("the word 'noxious'" includes dusts "which are not in their nature inherently harmful that is, of a poisonous nature"). As the primary cause of global warming, carbon dioxide causes injuries of exceptional and extraordinary severity and is thus "harmful."

Moreover, the Utilities' version of "noxious" is inconsistent with case law. Water is not inherently harmful, yet too much water causes flooding and gives rise to a federal nuisance claim. *North Dakota, supra*. Nor were the nutrients causing eutrophication in *Illinois v. Milwaukee* inherently harmful. In short, any arguable limit on federal nuisances to those that are "noxious" does not preclude this global warming case.

In a related argument derived from injunctive relief cases, the Utilities contend that an interstate pollutant must cause its harm "immediately" in order to give rise to a federal

nuisance. *See* Utilities MTD at 3:8-15, 22:13-14, 23:16-17. But the lag time between defendants' ongoing conduct and the manifestation of injury has never been held to defeat a federal (or other) nuisance claim. The pathogens in *Missouri I and II* traveled hundreds of miles downriver before causing injury. In *Illinois v. Milwaukee,* the district court held that "[e]utrophication is a gradual process in which the changes from year to year are imperceptible. One must measure in terms of decades if not longer intervals to see the difference." 1973 U.S. Dist. LEXIS 15607, at *13. Here, the defendants' emissions "rapidly" disperse into the atmosphere and defendants continue their conduct that contributes to global warming. Global warming, like eutrophication, does not occur overnight but is nonetheless a cognizable federal nuisance.

5. The "Exacting Standards" of Proof on the Merits Are Inapplicable Here.

The Utilities point to the "exacting standards of judicial intervention" set forth in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951), in an attempt to set the bar high on this motion to dismiss. *See* Utilities MTD at 22:17-19, 24:3. But the Court in that case was referring to standards of *proof on the merits applicable in cases against sovereign defendants* because of the "delicacy of interstate relationships." *Id.*; *accord Missouri II*, 200 U.S. at 521 ("the case should be of serious magnitude, clearly and fully *proved*"). Not only is this case not at the proof stage, the defendants here are not sovereigns and thus the "sovereign state rationale recognized in the earlier cases is inapplicable" to them. *Milwaukee, supra*, 599 F.2d at 167. The Utilities also call attention to the Court's statement in *Tennessee Copper* counseling "caution" in a federal nuisance case against private parties, but the Court was, again, addressing the standard for deciding whether "the grounds alleged are proved," not whether a claim had been stated. *Tennessee Copper*, 206 U.S. at 237. Further, the higher standard allows the Supreme Court to "cope with original actions" and does not apply in district court. *Milwaukee, supra*, 599 F.2d at 166. The Court's statements regarding "exacting standards" and "caution" are irrelevant here and should be treated with more caution and more exacting standards than the

Utilities have accorded them.

C. Kivalina Has Properly Pled the Elements of a Federal Public Nuisance Claim.

Kivalina has properly pled the elements of federal nuisance, i.e., an unreasonable interference with rights common to the general public. Kivalina's allegations also meet the causation requirements applicable in multiple-polluter cases.

1. Kivalina Has Properly Pled an Unreasonable Interference With Rights Common to the General Public.

Kivalina has properly pled a public nuisance under federal common law. Pollution is a classic public nuisance. In *Washington v. General Motors Corp.*, 406 U.S. 109, 114 (1972), decided the same day as *Milwaukee I*, the Court declared that "[a]ir pollution is, of course, one of the most notorious types of public nuisance in modern experience." As the Fifth Circuit has observed:

> The theory of nuisance lends itself naturally to combating the harms created by environmental problems. . . . The deepest doctrinal roots of modern environmental law are found in principles of nuisance. . . . Nuisance actions have challenged virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation.

Cox v. City of Dallas, 256 F.3d 281, 291 (5th Cir. 2001) (quotation omitted).

A public nuisance is an "unreasonable interference with rights common to the general public." *In re Oswego Barge Corp.*, 664 F.2d 327, 332 n.5 (2d Cir. 1981) ("*Oswego Barge I*") (federal common law); *accord* Restatement (Second) of Torts § 821B(1) (1979). Intent is not required under federal nuisance law. *See Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) ("The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant."), *vacated on other grounds*, *Milwaukee II*; *United States v. Ira S. Bushey & Sons*, 363 F. Supp. 110, 120 (D. Vt. 1973) ("*Bushey II*") ("there need be no intent"), *aff'd*

without opinion, 487 F.2d 1393 (2d Cir. 1973).[9]

Under any kind of public nuisance law – state or federal - "unreasonable" refers primarily to the interference, not the defendant's conduct. *See Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) ("liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct"); William L. Prosser and W. Page Keeton, The Law of Torts § 52 (5th ed. 1984) (the "interference . . . can be unreasonable even when the defendant's conduct is reasonable."). Unreasonableness is a question of fact. *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 150 (D. Vt. 1972) ("*Bushey I*") (applying federal common law). It is often judged by a series of factors, including "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," or "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." Restatement (Second) of Torts § 821B(2); *accord Bushey II*, 363 F. Supp. at 120-21; *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1353 n.30 (Fed. Cir. 2001) (where "so many others are affected" the "conduct is unreasonable") (quotation omitted).

Kivalina's injuries are classic harms to "public rights." *Rich v. City of Benicia*, 98 Cal. App. 3d 428, 435 (1979) ("Unquestionably environmental concerns in general . . . involve preeminently important public rights."); *cf. Bushey I*, 346 F. Supp. at 150 (plaintiff stated proper claim because "rights to the use and enjoyment of water not polluted by petroleum" are public rights under federal common law), *aff'd without opinion*, 487 F.2d

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[9] Where intent has been required in nuisance, such as in state law, it is satisfied where "the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests are occurring or are substantially certain to follow." Prosser & Keeton, *supra*, § 87. For example, "a defendant who continues to spray chemicals into the air after he is notified that they are blown onto the plaintiff's land is to be regarded as intending that result." *Id.* Kivalina has made proper allegations of intentional nuisance (and negligent nuisance) in the alternative to its strict liability nuisance allegations. Compl. ¶ 252.

1393 (2d Cir. 1973).

The harm alleged here, destruction of the entire village, is, on its face, clearly unreasonable. Kivalina has properly pled an unreasonable interference with public rights.

2. Kivalina Has Properly Pled Causation.

Kivalina has properly pled causation under the federal common law of public nuisance. Defendants mischaracterize Kivalina's complaint and misstate the applicable law.

Defendants' causation argument commences by twisting the words of the Complaint beyond recognition. In paragraph 132, Kivalina alleges that global warming is caused by anthropogenic emissions rather than by natural causes: "Despite the attempts by certain defendants to make the cause of climate change controversial in the popular media, there has been for many years an overwhelming scientific consensus that human activity that releases greenhouse gases is causing a change in the Earth's climate." Here is what the defendants claim Kivalina meant by paragraph 132: "According to plaintiffs themselves, the true cause of global warming, and thus of their injuries, is not defendants' emissions, but all greenhouse-gas emitting 'human activity' worldwide since the dawn of the Industrial Revolution." Oil MTD 12(b)(6) at 4; *see also id.* at 3. Defendants have simply taken Kivalina's allegation that global-warming is non-natural and added their own meaning, i.e., that all humans have caused global warming, in order to seek footing for an attack on causation.

Plainly read, Kivalina alleges it has filed its case against most of the biggest greenhouse gas emitters and producers of fuels that contribute to such emissions in the U.S., the nation that itself is the single largest source of such emissions. Compl. ¶¶ 3, 170-172. While anthropogenic greenhouse gases have been emitted for a long time, the rate of such emissions has increased massively in recent decades. *Id.* ¶¶ 125, 173. Defendants are among the largest sources of the problem anywhere in the world. *Id.* ¶¶ 3, 170-172. Contrary to defendants' statements, global warming is not caused by billions of people

"breathing" and there is no allegation in the complaint supporting such a statement – that is simply more of the fossil fuel industry's disinformation. *See* Utilities MTD at 10; Oil MTD 12(b)(6) at 2; Oil MTD 12(b)(1) at 4. Rather, as the complaint alleges, "[t]he combustion of fossil fuels adds large quantities of carbon (in the form of carbon dioxide) to the atmosphere that otherwise would have remained sequestered deep in the Earth" and as a result "***the natural carbon cycle is out of balance*** and carbon dioxide levels in the atmosphere are increasing every year." Compl. ¶ 126 (emphasis added).

a. Kivalina Has Properly Pled Causation-in-Fact.

Kivalina has properly pled causation in fact. In a multiple polluter case sounding in public nuisance, it is not necessary to trace molecules. Rather, each polluter who contributes to the nuisance is liable.

Public nuisance liability attaches to any defendant who "contributes" to the interference with a public right. *See, e.g., Cox*, 256 F.3d at 292 n.19 ("nuisance liability at common law has been based on actions which 'contribute' to the creation of a nuisance"). And "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution." Restatement (Second) of Torts § 840E; *see also* Prosser & Keeton, § 52 ("Pollution of a stream to even a slight extent becomes unreasonable when similar pollution by others makes the condition of the stream approach the danger point."). The fact that a polluter knows her emissions are combining with those of others to cause harm increases the justification for applying this principle where there are a large number of polluters. *See* Restatement (Second) of Torts § 881 cmt. d ("It is also immaterial that the act of one of them by itself would not constitute a tort if the actor knows or should know of the contributing acts of the others.").

Three seminal state-law cases from the Nineteenth Century are illustrative of this principle. In *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884), California brought a public nuisance action against a mining company that was dumping mine tailings in a river. The defendant's pollution alone would not have caused injury

given the "vast amount" of mining previously undertaken on the river and the large number of mines still operating. *Id.* at 1156. The court nonetheless affirmed liability because defendants were liable "jointly or severally." *Id.* at 1157.

In *Woodyear v. Schaefer*, 57 Md. 1 (Md. 1881), a nuisance action against a water polluter by a downstream landowner, the court held:

> It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained. The extent to which the appellee has contributed to the nuisance, may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing alone, might amount to little or nothing. But it is when all are united together, and contribute to a common result, that they become important as factors, in producing the mischief complained of.

Id. at 9-10 (citations omitted). The court found the defendant liable.

In the third case, *The Lockwood Co. v. Lawrence*, 77 Me. 297 (Me. 1885), a downstream landowner sought an injunction against sawmill operators dumping waste into the stream. The court held:

> In the case at bar, it may be that the act of any one respondent alone might not be sufficient cause for any well grounded action on the part of the complainants; but when the individual acts of the several respondents, through the combined results of these individual acts, produce appreciable and serious injury, it is a single result, not traceable perhaps to any particular one of these respondents, but a result for which they may be liable in equity as contributing to the common nuisance . . .

Id. at 309-10.[10]

This approach to nuisance in Nineteenth Century equity cases has given rise to the modern doctrine of joint and several liability in multiple-polluter cases, which now is the accepted rule in damages cases. *See, e.g.*, *Michie v. Great Lakes Steel Div. Nat'l Steel Corp*., 495 F.2d 213, 215-18 (6th Cir. 1974); *City of Tulsa v. Tyson Foods, Inc*., 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003) ("where there are multiple tortfeasors and the separate and independent acts of codefendants 'concurred, commingled and combined' to

[10] These three cases have been relied upon in federal common law. *See United States v. Luce*, 141 F. 385, 412-13 (C.C.D. Del. 1905).

produce a single indivisible injury for which damages are sought, each defendant may be liable even though his/her acts alone might not have been a sufficient cause of the injury."), *vacated by settlement, City of Tulsa v. Tyson Foods, Inc*., 2003 U.S. Dist. LEXIS 23416 (N.D. Okla. July 16, 2003); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976); *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952); *see also In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 823 (E.D.N.Y. 1984) ("In the pollution and multiple crash cases, the degree to which the individual defendant's actions contributed to an individual plaintiff's injuries is unknown and generally unascertainable" yet "all defendants have been held liable").[11]

This principle is also the rule under federal common law. For example, in *Illinois v. Milwaukee*, defendants' discharges of the nutrients nitrogen and phosphorus were contributing to eutrophication of the lake – as were thousands of other non-point sources all over the watershed (e.g., runoff from farms that used fertilizers; dishwasher and washing machine detergents from home septic systems). Defendants argued that the vast number of contributors defeated liability but the district court disagreed:

> Defendants argue that on this state of the record there is no satisfactory proof of a causal relationship between their conduct and the problem of eutrophication of the lake. . . . In this connection, they point out that, whatever controls are imposed upon point sources, there will still be large inputs of nutrients from non-point sources which are not subject to control. If defendants' argument were to be adopted, it would be impossible to impose liability on any polluter.

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[11] Defendants rely upon a products liability decision, *In re MTBE Products Liability Litigation*, 379 F. Supp. 2d 348, 372 (S.D.N.Y. 2005), which suggested that cases applying ""the rule of concurrent wrongdoing typically involve a small number of tortfeasors." *See* Oil MTD 12(b)(6) at 8. But defendants fail to disclose that the *MTBE* court recently revised its opinion on this question and allowed that case to go to trial on a product liability theory of concurrent wrongdoing against a large number of oil companies that had contributed to water pollution. *See In re MTBE Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 38792, at *16-17, *40 (S.D.N.Y. May 13, 2008) (acknowledging "confusion" had arisen "due to prior rulings in this case that were made without a fully developed evidentiary record" and holding that a "reasonable jury could conclude that each defendant's gasoline was present within the well's capture zone even if the jury concludes that it cannot identify the source of the spill that caused the well's contamination").

Illinois v. City of Milwaukee, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), at *20-21, *aff'd in relevant part and rev'd in part on other grounds*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds, Milwaukee II.* The court enjoined untreated discharges from 239 overflow points on the defendants' sewage systems under the federal common law of public nuisance and the Seventh Circuit affirmed this aspect of the injunction. 599 F.2d at 177.

Federal courts regularly apply this principle of joint and several liability as a matter of federal common law gap-filling under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601-75 ("CERCLA"). Congress ***did not*** legislatively establish joint and several liability in CERCLA; rather, federal courts have applied joint and several liability in such cases ***as a matter of federal common law***. *See, e.g., United States v. Burlington N. & Santa Fe Ry. Co.*, 502 F.3d 781, 793-94 (9th Cir. 2007) (adopting rule of *United States v. Chem-Dyne Corp*., 572 F. Supp. 802, 808 (S.D. Ohio 1983), that federal courts fashion federal common law rule of joint and several liability under CERCLA), *as modified*, 520 F.3d 918 (9th Cir. 2008)). And CERCLA cases typically involve very large numbers of contributors to a hazardous waste site. *See id.* at 796 ("[t]ypically . . . there will be numerous hazardous substance generators or transporters who have disposed of wastes at a particular site") (quotation omitted).

Defendants argue that they cannot be liable because their conduct was not a "substantial factor" in causing the harm. *See* Oil MTD 12(b)(6) at 6. Their version of the substantial factor test would render it indistinguishable from but-for causation. *See* Oil MTD 12(b)(6) at 6. But "the substantial factor test is a broader rule of causality than the 'but for' test." *Bank of N.Y. v. Fremont Gen. Corp.*, 523 F.3d 902, 909 (9th Cir. 2008). Under the correct formulation of the rule, "no consideration is given to the fact that after the event it appears highly extraordinary that it should have brought about such harm or that the actor's conduct has created a situation harmless unless acted upon by other forces

for which the actor is not responsible." *Id.* (quotations omitted).[12]

In *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1283 & n.25 (D. Del. 1987), a CERCLA case, the court set forth the "substantial factor rule of causation as a matter of federal common law" and held:

> "when the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event."

Id. at 1283 (quoting Prosser & Keeton § 41, at 268). In other words, a defendant "may not escape liability merely because other causes . . . have contributed to the result." *Id.; accord Burlington Northern*, 502 F.3d at 796 ("most of the leading cases on joint and several liability under CERCLA have addressed divisibility under [Restatement] § 433A(1)(b) and thereby incorporated a modified concept of causation"). This federal common law approach applies here. The substantial factor rule is not a talisman that defeats the well-established rule that each polluter who contributes to a public nuisance is liable jointly and severally.[13]

For their cramped view of substantial factor, defendants rely almost entirely upon a single personal injury case decided under Alaska law, *Vincent v. Fairbanks Memorial Hospital*, 862 P.2d 847 (Alaska 1993), which they contend is *more* appropriate authority

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[12] *Accord Collins v. Olin Corp.*, 248 F.R.D. 95, 104 (D. Conn. 2008) ("In fact, if Olin's conduct is found to be a substantial factor in the contamination of the properties, Olin's conduct can still be the legal cause even if other sources of contamination exist."); *United States v. Sunoco, Inc.*, 501 F. Supp. 2d 656, 662 (E.D. Pa. 2007) (where "the plaintiff has alleged that one tract of land was polluted by numerous polluters who cumulatively added to a common, indivisible physical injury" the fact "that the violations occurred sequentially rather than simultaneously does not bar joint tortfeasor status where the acts combined as substantial factors to form one physical injury").

[13] The substantial factor test has an important qualitative element. *See, e.g., 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."); *O'Connor v. Raymark Indus.*, 518 N.E.2d 510, 513 (Mass. 1988) ("The substantial factor formulation is one concerning legal significance rather than factual quantum.").

for this multiple-polluter case than other multiple-polluter cases. *See* Oil MTD 12(b)(6) at 6-7. But to the extent that Alaska personal injury law conflates substantial factor and but-for causation by requiring each defendant's conduct *alone* to be a sufficient cause of the harm even under the substantial factor test, it is incorrect and cannot be relied upon under federal common law.

Defendants also cite no authority for their argument that the causation rule of multiple-polluter cases must be tied to defendants that are operating in a "particular location." Oil MTD 12(b)(6) at 7. Here, defendants operate in far flung locations where they emit global pollution that causes particularized harm to particular plaintiffs in particular locations. Nothing in the law allows polluters to absolve themselves of the usual causation rules by spreading out and devising a new means of transmitting harm globally to their victims.

The complaint in this case alleges that each defendant emits massive quantities of greenhouse gases, engages in other conduct contributing to global warming, and has operated for a long time as a sophisticated company with knowledge that its actions were contributing to global warming. Compl. ¶¶ 3, 162, 170-172, 180. Defendants' actions thus quantitatively dwarf by many orders of magnitude the greenhouse gas emissions of the ordinary citizen who drives a car or owns a home that emits greenhouse gases and, given defendants' knowledge, their actions differ qualitatively as well. Defendants are thus incorrect in contending that everyone would be liable for global warming. The Complaint properly alleges defendants have contributed to global warming under the federal common law of public nuisance.

b. Kivalina Has Properly Pled Legal Causation.

Kivalina properly has alleged legal, or proximate, cause. Compl. ¶¶ 3-5, 163-180, 251. The multiple-polluter cases set forth above amply demonstrate that the proximate cause may be established in a case in which the polluter contributes to the nuisance that harms the plaintiff. The substantial factor rule that defendants have argued under the

rubric of cause-in-fact, also is relevant to the legal or proximate cause analysis. *See, e.g., Ileto v. Glock Inc*., 349 F.3d 1191, 1206 (9th Cir. 2003) ("Proximate cause limits the defendant's liability to those foreseeable consequences that the defendant's negligence was a substantial factor in producing.") (quotations omitted); *Vincent*, 862 P.2d at 851 ("an actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm") (quotation omitted) (cited by defendants). Thus, the above analysis of multiple polluter cases and the substantial factor rule applies here as well and demonstrates that the allegations of the complaint adequately plead proximate cause.

Moreover, defendants misconstrue proximate cause law generally. First, the issue is not primarily one of law, as they contend, but rather primarily one of fact. *See Ileto*, 349 F.3d at 1206 ("Whether an act is the proximate cause of injury is generally a question of fact"). It thus cannot be resolved on a motion to dismiss. Further, "proximity in point of time or space is no part of the definition of proximate cause." *Id.* at 1206 n.19. A leading treatise on torts states:

> Courts sometimes use short phrases to express ideas about proximate cause. They may say or imply that a cause of harm is not proximate if it is insignificant, remote, or logically unrelated to the harm that follows. These phrases point in the right direction, but they are incomplete. The word proximate means near or next or most immediate, and taken literally it suggests that only the most immediate trigger of harm can be the proximate cause. That simply is not the law. Several tortfeasors may all be proximate causes of a single harm; the first tortfeasor in a sequence of events as well as the last is often a proximate and responsible cause. ***And the defendant's misconduct is not too remote for liability merely because time or distance separates the defendant's act from the plaintiff's harm.***

1 Dan B. Dobbs, The Law of Torts (2001) § 181, at 445 (emphasis added); *see also City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1147-48 (Ohio 2002) (denying motion to dismiss public nuisance case on remoteness grounds); *City of St. Louis v. American Tobacco Co.*, 70 F. Supp. 2d 1008, 1014 (E.D. Mo. 1999) (remoteness does not bar city from pursuing case to recoup health care costs against tobacco companies).

Defendants point out that the "'event without millions of causes is simply

inconceivable."' *Fairbanks N. Star Borough v. Rogers & Babler*, 747 P.2d 528, 532 (Alaska 1987) (quoting Prosser & Keeton on the Law of Torts, § 41, at 266 (5th ed. 1984), *quoted in* Oil MTD 12(b)(6) at 4:28 - 5:1. But that general proposition just means that *every tort case* calls for some line drawing on who may be liable. Wherever such a line might be drawn here, the defendants are in the innermost circle as the largest contributors in the nation that is the largest historical source of greenhouse gas emissions and given their knowledge of the harm (and the conduct of a core group of them in conspiring and covering it up). In any event, as recognized by the multiple-polluter case law, each polluter who contributes to a nuisance is liable therefor.

II. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR THIS CASE.

This case does not remotely require the Court to engage in legislative or executive functions. Rather, this is a case that asks the Court to perform its core Article III role to resolve a current and real controversy between the parties, apply common law and, if warranted, determine an appropriate damages award. The essence of Kivalina's claim is not, as defendants frame it, whether defendants' conduct was reasonable, but whether the harm and damage to Kivalina is unreasonable. As set forth below, there is no political question here because this case can be resolved "through legal and factual analysis" and does not require the court to "make a policy judgment of a legislative nature." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005).

Kivalina emphasizes at the outset that there is a fundamental difference between a nonjusticiable political question and a political issue. *Baker*, 369 U.S. at 217 ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'"). The defendants invite the Court to blur, if not erase, this important distinction. Moreover, simply because global warming is an important political issue that even has been debated in presidential campaigns does not mean it is a political question. *See United States Dep't of Commerce v. Montana*, 503 U.S. 442, 445, 458 (1992) (no political question notwithstanding that issue of apportioning House seats "has motivated partisan and

sectional debate during important portions of our history" and was of "significance in [that] year's congressional and Presidential elections"); *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371, 1375 (9th Cir. 1997) (no political question presented in dispute between the Navajos and the Hopis regarding land ownership even though the dispute was "part of the long running and emotion scarring controversy between the Navajo Nation and the Hopi Tribe, in which the legislative, executive and judicial branches of the United States have all figured prominently."). This case is justiciable.

A. An Interstate Pollution Case That Properly Invokes Federal Question Jurisdiction Under *Milwaukee I* Does Not Present a Political Question.

Under the long-established federal common law of public nuisance, the federal judiciary has proper federal question jurisdiction over interstate pollution cases. *Milwaukee I*, at 100. That such jurisdiction is proper is beyond doubt and is wholly independent from the question of whether the plaintiff has stated a proper claim under federal law. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 96 (1998) ("the nonexistence of a cause of action [is] no proper basis for a jurisdictional dismissal."); *Bell v. Hood*, 327 U.S. 678, 682 (1946). Further, there is a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

A proper invocation of *Milwaukee I* federal question jurisdiction in an interstate pollution case does not present a political question. This proposition is evident from *Milwaukee I* itself. At the time the case was argued and decided, the Senate and House already had passed bills that would overhaul the nation's water pollution laws and require sewage facilities such as those at issue in the case to adhere to strict permit limitations. *See* Cong. Q. Inc., Congress and the Nation, Vol. III 1969-1972, at 779-80 (1973). Like global warming, water pollution was a hotly contested political issue – President Nixon had immediately announced his opposition to the Senate bill. *Id.* at 794. Six months after the Court's decision, a final bill was sent to the President, who vetoed (and denounced) it in October, 1972. *Id.* at 796. Within twenty-four hours, Congress overrode the veto. *Id.*

at 792. Pollution of the Great Lakes was a matter that also touched upon foreign relations: as the Court was hearing *Milwaukee I*, the United States and Canada were negotiating a treaty specifically addressing water pollution from municipal sewage and other sources. The treaty was signed and entered into force only nine days before the Court rendered its decision in *Milwaukee I*. *See* Agreement on Great Lakes Water Quality, Apr. 15, 1972, U.S.-Canada, art. V, 23 U.S.T. 301. Despite all this intense activity in the political branches on the subject at issue, the Court exercised its jurisdiction in *Milwaukee I*.

Further, in *Ohio v. Wyandotte Chemicals Corp*., 401 U.S. 493 (1971), involving international and interstate pollution of Lake Erie with mercury, the Court specifically distinguished interstate pollution cases from "political questions" and held that under *Tennessee Copper* and other interstate pollution cases, the judiciary is "empowered to resolve this dispute in the first instance." *Id.* at 496.

Here, defendants argue that the mere existence of international discussions and consideration of federal legislation renders this case nonjusticiable. In defendants' own words, the political branches are "grappling" with the issue, Utilities MTD at 8, Oil MTD 12(b)(1) at 19, are engaged in "efforts" regarding global warming, Peabody at 15, and Congress "continues to actively debate whether" to do anything, Oil MTD 12(b)(1) at 9. They argue that the absence of any action at all by the political branches makes this case nonjusticiable. *See* Oil MTD 12(b)(1) at 22 ("the political branches have refused to adopt emissions caps"). They even call attention to the *absence* of a liability regime for victims of global warming in bills that *failed to gain passage*. *See* Oil 12(b)(1) at 9:17-19. But if the thin reeds of merely debating a public policy issue or simply failing to take action could turn a case into a political question, then virtually every lawsuit that touched on any aspect of public policy would be a nonjusticiable political question. Yet the law is clear that the courts "will not find a political question 'merely because [a] decision may have significant political overtones'" or because it "'touches foreign relations.'" *Corrie v. Caterpillar*, *Inc.* 503 F.3d 974, 982 (9th Cir. 2007) (quoting *Japan Whaling Ass'n v. Am.*

Cetacean Soc'y, 478 U.S. 221, 230 (1986), and *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

If defendants' thin reeds could support the political question doctrine, moreover, *Milwaukee* I would be inexplicable. Although the Court did not address the political question doctrine in *Milwaukee I*, "[n]onetheless, that the Court allowed the case to proceed underscores that courts have a place in deciding [such] claims." *Alperin v. Vatican Bank*, 410 F.3d 532, 551 (9th Cir. 2005).

Importing the political question doctrine into the federal common law of public nuisance is particularly objectionable because *Milwaukee II* establishes a specialized separation of powers doctrine for resolving the very kind of objections that defendants have raised here. That doctrine is preemption (or "displacement") of federal common law. Both doctrines – preemption of federal common law and political question – are species of the separation of powers, *Milwaukee II*, 451 U.S. at 315; *Baker v. Carr*, 369 U.S. 186, 217 (1962), and thus should be read in harmony. The preemption of federal common law doctrine demands a federal statute that speaks "'*directly* to [the] question' otherwise answered by federal common law" *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985) (quoting *Milwaukee II*, 451 U.S. at 315). The Supreme Court has left no doubt that the "question" in this preemption analysis is defined narrowly. *See Oneida,* 470 U.S. at 236-37 (federal common law continues to apply "when Congress has not 'spoken to a particular issue.'") (quoting *Milwaukee II*, 451 U.S. at 313); *see generally infra* Section III.

By asking the courts to import the political question doctrine into federal nuisance law, defendants seek to turn the relevant separation of powers test of preemption on its head: *inaction* on an interstate pollution issue rather than action renders the case a political question in defendants' upside down world. This "heads I win under preemption, tails you lose under political question" approach is nonsensical and simply cannot be squared with the Court's careful separation of powers approach of *Milwaukee I*, *Milwaukee II* and *Oneida Indian Nation*. These decisions require action and a remedy by the political

branches in order to stop the judiciary from exercising its traditional role, not inaction or cogitation. By accepting defendants' invitation to analyze the question in a backwards manner, the decisions in *AEP*, *GM* and *Comer* simply failed to grapple with the essence of these controlling Supreme Court decisions about what kinds of congressional and presidential actions may override federal common law.

To be fair to five of the defendants here who also are defendants in the *AEP* case (American Electric Power Co., Inc., American Electric Power Service Corp., Duke Energy Corp., The Southern Company and Xcel Energy, Inc.), they in fact did not invite the district court in that case to apply the political question doctrine. They recognized its inapplicability and to their credit said so directly to the district court: "The *Baker v. Carr* test for determining when the political question doctrine bars adjudication of a recognized cause of action is thus ***wholly irrelevant***." *See* Brief of Appellants, *Open Space Institute, et al. v. American Electric Power Co., et al.*, No. 05-5119-cv (2d Cir.) at 5 (quoting defendants' district court brief) (emphasis added).[14] Yet they are now urging the Second Circuit to repeat the district court's error in *AEP* and they seek to replicate it here. They were right the first time; the political question doctrine is wholly irrelevant.

This interstate pollution case is within the Court's federal question jurisdiction and, like prior interstate pollution cases, is justiciable.

B. This Case Does Not Contradict Any U.S. Foreign or Domestic Policy.

At their core, defendants ' political question arguments come down a contention that this case would contradict some alleged decisions by the political branches in which they allegedly "refused to adopt emissions caps," either in treaty negotiations or as a matter of domestic policy. *See* Oil MTD 12(b)(1) at 22; Utilities MTD at 14. This argument, which cuts across defendants' various theories under the various political question tests of *Baker v. Carr*, badly misses the mark because it commits three

[14]Available at http://www.pawalaw.com/assets/docs/Second%20Circuit%20Brief%20Final%20OSI.pdf

fundamental errors. The *Baker* factors are addressed below but first Kivalina demonstrates the fallacies of this argument.

First, ***Kivalina does not seek to impose any emissions limits of any kind but rather seeks monetary damages, a factor deemed "key" by the Ninth Circuit in the political question analysis***. *See Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("A key element in our conclusion that the plaintiffs' action is justiciable is the fact that the plaintiffs seek only damages for their injuries. Damage actions are particularly judicially manageable."). Defendants' repeated argument that Kivalina's tort suit seeking damages would constitute a decision about future emissions caps or a decision that plants should have been "shut down" years ago, *see* Utilities MTD at 11: 15-16, 20-21, 25, is based upon a basic misunderstanding of public nuisance law:

> Confusion has resulted from the fact that the intentional interference . . . can be unreasonable even when the defendant's conduct is reasonable. . . . Thus, an industrial enterpriser who properly locates a cement plant or a coal-burning electric generator, who exercises utmost care in the utilization of known scientific techniques for minimizing the harm from the emission of noxious smoke, dust and gas and who is serving society well by engaging in the activity may yet be required to pay for the inevitable harm caused to neighbors. This is simply a decision that the harm thus intentionally inflicted should be regarded as a cost of doing the kind of business in which the defendant is engaged.

Prosser & Keeton at § 88 at 629 (5th ed. 1984). ***The "unreasonable" element of public nuisance is focused entirely upon the harm, not upon the defendant's conduct***. *See also supra* at Section I.C.1. This monetary damages case does not seek any cap nor any judgment that plants should have been shut down in the past.

Second, assuming *arguendo* that U.S. foreign policy is what defendants say - - i.e., a refusal to enter a treaty with binding emissions limits without a like commitment from developing nations - - Kivalina has not here sued the United States to try to force it to join a treaty of any kind, with or without developing nations.

Third, there is nothing in defendants' description of foreign policy, or in any U.S. law, that would prohibit domestic emissions limits in the United States. In fact, two courts have expressly rejected the argument that U.S. foreign policy conflicts with domestic legal

limits on greenhouse gas emissions. In *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), and *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), automobile companies sued states seeking to invalidate their laws limiting motor vehicle greenhouse gas emissions. *Green Mountain* resoundingly rejected the very argument made here:

> Although the United States has consistently called for international consensus and a comprehensive approach to global warming, it has never disapproved of domestic regulation of domestic GHG emissions. To the contrary. The United States has praised such efforts to the international community. That the United States also encourages voluntary efforts to reduce GHG emissions is not evidence that domestic regulatory programs are antithetical to the country's foreign policy. That the United States did not ratify the Kyoto Protocol may be evidence that the United States disapproved of international solutions that exempted developing countries, and was concerned that such a plan would unfairly tax the United States economy; it is not evidence of an express policy against domestic regulation of greenhouse gases.
>
> In *Massachusetts v. EPA*, the Supreme Court dismissed EPA's contention that regulating greenhouse gases domestically might impair the President's ability to negotiate with developing nations to reduce emissions, noting that Congress authorized the State Department, not EPA, to coordinate the formulation of United States foreign policy concerning global climate change.

508 F. Supp. 2d at 396. So did *Central Valley*, 529 F. Supp. 2d at 1187 ("there is absolutely nothing in any of the exhibits submitted to support the contention that it is United States foreign policy to limit its own current efforts or the efforts of individual states in controlling greenhouse gas emissions in order to leverage agreements with foreign countries"). Defendants' wildly overbroad argument here would invalidate all state laws regulating greenhouse gases – a result they no doubt desire, but that is at odds with actual U.S. policy.

Defendants heavily rely upon the policy positions articulated in a 2003 EPA ruling in which EPA declared that it lacked legal authority under the CAA to regulate greenhouse gas emissions. *See* EPA, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003), *cited in* Utilities MTD at 12, 14, 16, 18, 34; Oil MTD 12(b)(6) at 5, 7, 8, 23; Peabody MTD at 4. However, this is the EPA ruling that the Supreme Court struck down in *Massachusetts*. *See* 127 S. Ct. at 1462-63. Of particular

note, in dismissing EPA's concerns about the supposed foreign policy implications of limiting domestic greenhouse gas emissions, concerns that defendants repeat endlessly here, the Court held that it is the State Department that is statutorily designated with formulating U.S. foreign policy on global warming, not EPA. *Id*. at 1463. The 2003 EPA ruling cannot be relied upon for U.S. policy. *Central Valley*, 529 F. Supp. 2d at, 1181 ("the decision in *Massachusetts* teaches that when the court seeks to determine what United States foreign policy is, it must look to sources other than EPA because EPA's pronouncements of what is United States foreign policy, and what constitutes interference with that policy, are not authoritative.").[15]

Defendants also rely upon a final rule issued by the National Highway Traffic Safety Administration ("NHTSA") that attempted to establish fuel economy standards for light trucks, and upon fuel economy laws generally. *See Average Fuel Economy Standards for Light Trucks Model Years 2008-2011*, 71 Fed Reg. 17566 (Apr. 6, 2006), *cited* in Utilities MTD at 6; Oil MTD 12(b)(1) at 8 (discussing fuel economy law). According to the Utility Defendants, this rule shows that a federal agency is taking action on global warming. But this rulemaking, too, has been judicially invalidated. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 508 F.3d 508 (9th Cir. 2007). And the courts in *Green Mountain* and *Central Valley* both rejected the argument that the federal fuel economy laws and the regulation of greenhouse gases are functionally equivalent. *Central Valley*, 529 F. Supp. 2d at 1173-74 (state regulation of greenhouse gas emissions from motor vehicles is not a de facto fuel economy law); *Green Mountain*, 508 F. Supp. 2d at 398 (same). Federal fuel economy laws do not constitute global warming policy.

Defendants further attempt to cobble together their "policy" from a slew of

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[15] The Utilities similarly rely upon a legal memo from the former general counsel of the EPA that provided the rationale for EPA's ill-fated 2003 ruling. *See* Utilities MTD at 12 (citing memo by R. Fabricant). The Supreme Court decision in *Massachusetts* renders this legal memo – and the list of policy reasons in it – dead letter.

miscellaneous materials. These include remarks by a former President in a speech to the National Geographic Society, a letter to four Senators from the outgoing President, a letter from the EPA Administrator to two Senators, two press releases from the outgoing administration, bills in Congress that are pending or that failed to gain passage, a newspaper article, and a non-binding sense of the Senate resolution. *See* Oil MTD 12(b)(1) at 7-9; Utilities MTD at 6-7; Peabody MTD at 5.[16] These documents do not have the force of law, are not legitimate sources of official U.S. policy, and should be disregarded. *See, e.g., Barclays Bank PLC v. Franchise Tax Bd. of Cal*., 512 U.S. 298, 329-30 (1994) ("The Executive Branch actions – press releases, letters, and *amicus* briefs – on which Colgate here relies are merely precatory" and "lack the force of law"); ("This Court generally is reluctant to draw inferences from Congress' failure to act."); *Chong Yia Yang v. California Dep't of Social Servs.*, 183 F.3d 953, 958 n.3 (9th Cir. 1999) ("sense of Congress resolutions do not have the force of law.").[17]

Indeed, in *Massachusetts* the Court rejected the same "failure to legislate" argument offered here. *See* 127 S. Ct. at 1460 ("EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants. That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant when it amended § 202(a)(1) in 1970 and 1977."). Just as the failure to legislate did not create a

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[16] The Utilities call one of the press releases a "transcript," *see* Utilities MTD at 7, but it is still, by its own terms, just a press release.

[17] If the 1995 sense of the Senate resolution ("Byrd-Hagel Resolution") relied upon by defendants were to be considered, then so should a later one that says the U.S. should adopt binding domestic emissions limits without awaiting action by other nations. *See* 151 Cong. Rec. §6980, §7033, §7037 (daily ed. June 22, 2005) (Senate resolution approved calling for legally binding limits "on emission of greenhouse gases that slow, stop, and reverse the growth of such emissions" and that "will encourage comparable action by other nations"); *see also* 151 Cong. Rec. § 7267, §7282 (daily ed. June 23, 2005) ("almost from the day of that vote [on the Byrd-Hagel Resolution] those on both sides of the issue have misrepresented and misconstrued its intent. What was meant as a guide for action has instead been invoked, time and again, as an excuse for inaction.") (statement of Sen. Byrd, discussing Byrd-Hagel Resolution).

policy prohibiting EPA from taking action under the Clean Air Act, the failure to legislate here does not create a policy in derogation of the judiciary's federal common law power.

The best source of official U.S. foreign policy on global warming is the Framework Convention, which is the only global warming treaty or international agreement of any kind to which the U.S. is a party. The Framework Convention expressly requires each of the developed nation parties such as the United States to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases," UNFCCC at art. 4(2)(a). This provision does not apply to the developing nation parties and the treaty could hardly be clearer that action in the developed nations is not to await action in the developing nations: "These policies and measures will demonstrate that developed countries are *taking the lead* in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention." UNFCCC at Art. IV § 2(9). (emphasis added). That objective is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." *Id.* at Art. 2. And U.S. domestic law as expressed in federal statutes is also clear in establishing a policy that greenhouse gas emissions should be reduced. *See supra* Factual Background Section E. (quoting Global Climate Protection Act). Based upon these official sources of U.S. policy, the court in *Green Mountain* rejected the argument that a domestic emissions reduction measure constitutes an "intrusion into the 'field' of foreign affairs entrusted exclusively to the national government," and held that such a measure "fits squarely within the ***nations emission reduction policies***." 508 F. Supp. 2d at 395 (emphasis added).

In a last ditch effort to concoct a foreign policy that would conflict with any domestic emissions reduction measure, the Utilities argue that mandatory domestic emissions reductions measures are "bargaining chips" for the U.S. in international negotiations. Utilities MTD at 16. The only evidence for this theory that the Utilities offer is the rationale in the 2003 EPA ruling that the Court dismissed in *Massachusetts*.

As Judge Ishii held in *Central Valley*, the bizarre bargaining chip theory does not accurately reflect or constitute U.S. policy and is not even logical:

> Plaintiffs offer no evidentiary basis for the proposition that the United States would get farther in its efforts to negotiate agreements with other nations by withholding efforts to limit greenhouse gas emissions than by leading the way by example. In essence, Plaintiffs' "bargaining chip" theory of interference only makes logical sense if it would be a rational negotiating strategy to refuse to stop pouring poison into the well from which all must drink unless your bargaining partner agrees to do likewise. The court declines to make any presumptions to that effect.

529 F. Supp. 2d at 1187.

In short, Kivalina seeks damages, not an emissions cap. A public nuisance case seeking damages does not require a decision as to whether plants should have ever been shut down but rather focuses on the unreasonableness of the harm. In any event the entire premise of defendants' argument is incorrect: there is no U.S. foreign or domestic policy prohibiting domestic emissions reductions. In fact U.S. policy is clear that greenhouse gas emissions should be reduced. Thus, crux of defendants political question argument positing a conflict between this case and U.S. policy, fails.

C. None of the Six *Baker v. Carr* Tests of a Political Question Are Satisfied.

Even if the political question doctrine had any applicability here, this case presents no political question. In its landmark decision in *Baker v. Carr*, 369 U.S. 186 (1962), the Court rejected a political question argument in a case challenging apportionment of state legislative districts. *Baker* identified six factors that may indicate a nonjusticiable political question:

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

369 U.S. at 217 (numbering added). "Unless one of these formulations is *inextricable* from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." (emphasis added). *Id.* The factors are listed in descending order of importance and there is a "disproportionate emphasis" on the first two. *Alperin,* 410 F.3d at 545. Factors four through six are prudential factors. *Corrie v. Caterpillar*, 503 F.3d 974, 981 (9th Cir. 2007).

The six *Baker* factors have been grouped into three general categories or "inquiries":

> (I) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?

Wang v. Masaitis, 416 F.3d 992, 995 (9th Cir. 2005) (quoting *Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (Powell, J., concurring)). Under this tripartite approach, the first inquiry covers *Baker* factor one, the second inquiry covers *Baker* factors two and three, and the third inquiry cover *Baker* factors four through six. *Id.* at 995-96. None of the *Baker* factors is "inextricable" from the case at bar.

1. The Constitution Does Not Textually Commit To The Political Branches the Issue of Compensating Victims of Global Warming (*Baker* Factor One).

There is no textually demonstrable constitutional commitment of global warming questions to the executive or legislative branches. Defendants wrongly contend that resolution of this case runs afoul of the Constitution's commitment of foreign affairs to the political branches; Peabody and the Utilities also rely upon Congress' power to regulate foreign and domestic commerce. *See* Oil MTD 12(b)(1) at 22-23; Peabody MTD at 11-12; Utilities MTD at 17.

The argument based upon Congress' power to regulate commerce is never really explained but just mentioned in passing by Peabody and the Utilities. It vaguely contends that this case threatens a takeover of the nation's energy policy. *See* Peabody MTD at

12:1-5. A district court recently rejected a similar political question argument by a group of oil companies in a case seeking to hold them responsible for damages associated with Hurricane Katrina. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 682 n.3 (E.D. La. 2006). In *Barasich* the defendants contended that the case could force them to cease oil exploration and production off the coast of Louisiana and thus threaten the nation's energy supply but the court rejected this alarmist contention.

The *GM* court accepted the breathtakingly broad proposition that matters of interstate commerce are political questions anytime Congress fails to regulate a matter, *see GM*, 2007 WL 2726871, at *14, a notion that would wipe away most of the federal courts' dockets. The *GM* court's error was to rely upon Supremacy Clause cases that prohibit states from regulating interstate commerce through use of ***state*** tort law. *See id.* (discussing *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Edgar v. Mite Corp.*, 457 U.S. 24 (1982); and *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996)). That line of cases is irrelevant where, as here, a plaintiff invokes ***federal law*** and the power of the ***federal*** sovereign through a ***federal*** court precisely because, as the Utilities admit, global warming is a matter of uniquely federal concern. *See*, *e.g.,* Utilities MTD at 32:13-14 ("global climate change is predominately a matter of federal concern"); *id.* at 33:19-20 ("the uniquely federal nature of any response to global warming."). Where federal common law applies, state law is not at issue. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (interstate pollution "is controlled by *federal* law"); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) ("the implicit corollary of [*Milwaukee I*] was that state common law was preempted"). Congress' commerce power, which constrains the application of state law, is irrelevant here. The Oil Companies are right to ignore it.

Nor is there any textual commitment in the Constitution of global warming matters to the political branches by virtue of their role in formulating foreign policy. The *AEP* court found no such constitutional commitment. *See generally* 406 F. Supp. 2d 265. While the *GM* court did, *see* 2007 WL 2726871, at *13-14, this too was clear error. It is

blackletter law that the generalized commitment of foreign policy to the political branches does not mean that all cases touching on foreign relations are political questions. *Alperin v. Vatican Bank*, 410 F.3d 532, 549 (9th Cir. 2005) ("'it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'") (quoting *Baker*, 369 U.S. at 211). On the contrary, even plenary power may be insufficient to establish a constitutional commitment to warrant application of the political question doctrine. *See, e.g., Oneida*, 470 U.S. at 249 ("Congress' plenary power in Indian affairs under Art. 1, § 8, cl. 3, does not mean that litigation involving such matters necessarily entails nonjusticiable political questions."). In *Oneida*, the Court held that *constitutional* commitment was not established in a federal common law case alleging unlawful possession of Indian lands *even though Congress had prohibited the transfer of Indian lands without a federal treaty and authorized the President to eject unlawful settlers*. *See id.* at 238 & n.11; *see also id.* at 249 n.24 ("Congress' delegation to the President is not a 'textually demonstrable *constitutional* commitment.'") (quoting *Baker*, 369 U.S. at 217). If such legislation does not suffice as constitutional commitment, then the much more modest global warming legislation, which is devoid of any remedies at all for Kivalina, cannot.

The case law is rife with examples of cases rejecting the political question argument where the alleged threat to foreign affairs was far more credible than in this global warming case by domestic plaintiffs against domestic corporations. For example, in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), wildlife conservation groups sought a writ of mandamus to compel the Secretary of Commerce to certify that Japan was violating a whaling treaty. The case was brought just days before consummation of an executive agreement between the United States and Japan to resolve the dispute and, when the district court issued the writ, Japan informed the United States that it would adhere to the agreement only upon reversal of the writ. The Court held that while it was "cognizant" of the foreign relations implications and of "the premier role

which both Congress and the Executive play in this field," nonetheless there was no political question because "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. The issue in that case was "a matter of intense worldwide concern." *Id.* at 242 (Marshall, J., dissenting on other grounds).

In *Alperin*, the Ninth Circuit allowed common law claims to proceed for conversion, unjust enrichment, restitution, and an accounting against the Vatican Bank with respect to property lost and looted during the Nazi era. 410 F.3d at 551 ("Reparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution."). Similarly, in *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992), the Ninth Circuit held that a tort suit for damages from the shooting of an Iranian airliner by a United States warship is not a political question: "federal courts are competent to determine both the merits of the plaintiffs' suit and the extent of the relief to which plaintiffs would be entitled." In *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008), the court rejected the political question argument and allowed the plaintiffs' false advertising claims to proceed against their employers – private military contractors supporting U.S. troops in the Iraq War who allegedly misrepresented the level of safety the plaintiffs could expect under the terms of their employment. The Second Circuit allowed plaintiffs to bring a wrongful death claim against the Palestine Liberation Organization for its role in the hijacking of an Italian ship in the high seas. *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49-50 (2d Cir. 1991). In *Kadic v. Karadzic,* 70 F.3d 232, 249 (2d Cir. 1995), the Second Circuit held that Bosnian victims of atrocities could, without running afoul of the political question doctrine, sue the leader of the Serbian insurgency for actions committed on foreign soil.[18] Viewed against these cases, this case against domestic

[18] *Accord Ungar v. PLO*, 402 F.3d 274, 276 (1st Cir. 2005) (wrongful death claim on behalf of Americans gunned down by Hamas group in Israel); *Boim v. Quranic Literacy Inst.*, 291 F.3d 542 (7th Cir. 2002) (same); *Fisher v. Great Socialist People's Libyan Arab Jamahiriya,*

defendants by domestic plaintiffs for injuries arising from pollution cannot possibly be considered an intrusion on foreign policy.

Defendants' argument comes down to an alleged conflict with U.S. foreign policy that does not exist. *See supra* Section II.B. There are no constitutional provisions expressly committing to the political branches exclusive authority to redress injuries caused by global warming. Thus, under the first *Baker* factor this Court clearly retains its authority to decide Kivalina's common law tort claims.

2. This Case Does Not Require the Court to Move Beyond Judicial Expertise (*Baker* Factors Two and Three).

The second *Goldwater* inquiry "lumps together the second and third *Baker* inquiries -- whether there is 'a lack of judicially discoverable and manageable standards' and whether a decision is impossible 'without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Wang v. Masaitis*, 416 F.3d 992, 996 (9th Cir. 2005). In other words, does the adjudication of Kivalina's claims require the court to "make a policy judgment of a legislative [or executive] nature, rather than resolving the dispute through legal and factual analysis." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005).

Here, the answer is no. The Court is not being asked to determine what policy this country should follow regarding global warming. The issue in dispute is whether the conduct of the defendants has contributed to a public nuisance injurious to Kivalina and for which it should receive compensation. The Court is not being asked and need not determine what the appropriate levels of carbon dioxide emissions are. Rather, the inquiry is simply whether the emissions and related conduct that has occurred has contributed to a public nuisance under federal common law, and, if so, what measure of damages should be awarded. These questions clearly fall within the court's expertise and authority.

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541 F. Supp. 2d 46 (D.D.C. 2008) (siblings of American killed in an airplane bombing in Scotland stated a cause of action against Libya under the state-sponsored terrorism exception to the foreign state immunity statute).

a. There Is No Absence of Judicially Discoverable and Manageable Standards (*Baker* Factor Two).

The Oil Companies and Utilities wrongly contend that this case will force the Court to make judgments about which past greenhouse gas emissions were reasonable and which were not, and that there are no judicially-discoverable and manageable standards for doing so. *See* Oil MTD 12(b)(1) at 21 (invoking second and third *Baker* factors); Utilities MTD at 10. But no such judgments will be necessary. Public nuisance law asks whether the harm is unreasonable, not whether defendants' conduct is unreasonable. *See supra* Section I.C.1. Here, Kivalina seeks damages, not injunctive relief. Under public nuisance law, a defendant may be required to pay for the harm to which she contributes even if the activity in question is perfectly reasonable because the plaintiff is not required to suffer unreasonable harm. Prosser & Keeton, The Law of Torts § 52 (5th ed. 1984).

The Utilities contend that one of their greenhouse gas, carbon dioxide, is naturally occurring and ubiquitous and thus cannot contribute to a nuisance. *See* Utilities MTD at 10:7-10. But this is just an attempt to confuse. The complaint alleges that fossil fuel emissions of carbon dioxide have knocked the natural carbon cycle out of balance. Compl. ¶ 126. Global warming is not caused by breathing no matter how much the defendants' have spent on a PR campaign to create this impression. Defendants' emissions are not naturally occurring. Moreover, even if they were naturally occurring, that would not insulate defendants. Naturally occurring and ubiquitous substances like water and nutrients can give rise to a nuisance when they cause harm to property, such as by flooding, or when industrial emissions so distort natural levels that they cause ecological disruption. *See, e.g., North Dakota v. Minnesota*, 263 U.S. 365 (1923) (interstate nuisance of flooding); *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at *24-25 (N.D. Ill. 1973) (enjoining nutrient pollution under federal common law), *aff'd in relevant part and rev'd in part on other grounds*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds*, *Milwaukee II.*

The Oil Companies' argument that Congress and the Executive Branch have "been

struggling for years to develop appropriate legal standards," *see* Oil MTD 12(b)(1) at 21, runs right into a wall of case law. The Ninth Circuit *rejects* the notion that years of struggle to devise even a *judicially* manageable standard renders a case nonjusticiable. *See Alperin*, 410 F.3d at 552-53 & n.13 (controlling law is reflected in the "refusal of five Justices in *Vieth* to hold that no manageable standards existed despite what the plurality termed 'eighteen years of essentially pointless litigation'" and courts must continue to seek legal standards) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality) (political gerrymandering case)). If years of struggle by the judicial branch to devise a standard in cases that directly attack the political process does not satisfy *Baker* factor two, then *a fortiori* the alleged years of struggle by the political branches to devise a non-judicial pollution standard applicable to private conduct certainly cannot satisfy it.

To be sure, the *GM* court found a lack of judicially manageable standards. But each of its three reasons is demonstrably incorrect. First, it held that the long line of interstate pollution cases stretching back over a hundred years are "distinguishable because the remedies sought therein were equitable remedies to enjoin or abate the nuisance, rather than the legal remedy of monetary damages sought in the current case." GM, 2007 WL 2726871, at *15. That holding directly contradicts Ninth Circuit law that seeking damages is a key indicator that the case is not a political question, *Koohi*, 976 F.2d at 1332, and thus the *GM* court has the law exactly backwards.

Second, *GM* held there is no "convincing legal authority" that "the legal framework for assessing global warming nuisance damages is well-established." *GM*, 2007 WL 2726871, at *15. But that reasoning apparently means that any new kind of harm, no matter how much it resembles a classic nuisance harm to public rights, cannot be litigated under nuisance law unless some prior case already provided a standard by resolving a nuisance case on the same topic. Yet nuisance law applies where the nature of the harm is cognizable as a nuisance, not where the defendant's conduct already has been litigated as a nuisance. Otherwise, the doctrine could not have moved beyond butchers

dumping blood in rivers, *Woodyear v. Schaefer*, 57 Md. 1 (Md. 1881), and other Nineteenth Century kinds of conduct. Alternatively, the *GM* court may have meant that Congress or EPA must provide a "well-established" remedy; but if so it is both a bootstrap and it contradicts clear law that it is the very absence of such a statutory or administrative standard that *justifies* application of federal common law. *Milwaukee II*, 451 U.S. at 319, n.14 (federal common law applies where "problems requiring federal answers are not addressed by federal statutory law.").

Third, the *GM* court found the long line of interstate nuisance cases cited by the plaintiff factually distinguishable because they involved "issues of local concern." *GM*, 2007 WL 2726871, at *15. This holding also has the law exactly backwards. Federal common law applies to "air and water in their ambient or interstate aspects," *Milwaukee I*, 406 US at 103, as well as to matters in involving a "uniquely federal interest," *Audubon*, 869 F.2d at 1203-04. *See also Ileto*, 349 F.3d at 1206 n.19 ("proximity in point of time or space is no part of the definition of proximate cause.") (quotation omitted). As alleged in the complaint, carbon dioxide emissions are inherently interstate due to their rapid dispersal in the atmosphere. Compl. ¶ 254. And as the Utilities correctly observe, "global climate change is predominantly a matter of federal concern," Utilities MTD at 32, and the "nature of any response to global warming," must be "uniquely federal," *id.* at 33. Federal common law applies where the pollution is ***not*** local.

Relatedly, *GM* distinguished prior interstate nuisance cases on the ground that they involved pollution from a localized "source-certain." *GM*, 2007 WL 2726871, at *15. But pollution-as-nuisance law is not limited to localized sources or individual polluters. In fact, cases against water polluters have often involved far distant sources and subsets of very large numbers of polluters; the courts in such cases have been fully cognizant, even in injunctive cases, that each polluter's conduct alone would not create the nuisance. *See supra* Section I.C.2.a. The same is true in Superfund cases, which typically involve large numbers of polluters and which employ federal common law to resolve issues of causation

and joint and several liability. *See id.* In *Milwaukee I*, there were countless sources of nutrients spread all over the watershed feeding into Lake Michigan that were contributing to eutrophication of the lake but that case was appropriate for resolution under federal nuisance law unless and until the enactment of a preemptive federal statute that provided an alternative federal remedy. *Id.*; *see also supra* Section III.

Under *Alperin*, the courts are to take "an exhaustive search for applicable standards." 410 F.3d at 552. The judicially discoverable and manageable standards here are the same as they are in all nuisance cases. The Court must determine whether defendants have contributed to an unreasonable interference with public rights. As set forth above in Section I.C.1, unreasonableness is a question of fact judged by a series of factors, including "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," or "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." Restatement (Second) of Torts § 821B(2); *accord* *Bushey II*, 363 F. Supp. at 120; *see also* May, *supra*, 58 Denver U. L. Rev. at 943 (*GM* decision "seems to ignore that two centuries of common law amply supply judicial standards for deciding whether there is a an 'unreasonable interference . . . with a right common to the general public.'"). Defendants will be free to argue that their emissions are not a substantial contributing factor to the nuisance despite the enormous size of their emissions, their knowledge, and their conduct over the years in covering up the consequences of their actions. And, again, as a damages case, there is no call here for setting prospective standards or deciding whether any plant should have been shut down years ago.

Finally, Defendant Peabody argues that the courts are not equipped to resolve the scientific issues of global warming. *See* Peabody MTD at 12. But that proposition has been disproved. *See Green Mountain*, 508 F. Supp. 2d at 310-25, 339-41 (resolving

extensive global warming science issues under *Daubert)*.[19]

The second *Baker* factor -- which even the *AEP* court did not rely upon in that injunctive case -- is not satisfied here.

b. This Case Does Not Require a Nonjudicial Policy Decision (*Baker* Factor Three).

Defendants wrongly contend that this case calls for a non-judicial policy decision. *See* Oil MTD 12(b)(1) at 16-20; Utilities MTD at 11-13. This argument is based almost entirely upon their incorrect assumption that this Court would have to set a pollution standard in order to resolve this monetary damages case. It would not and the decision in *AEP* -- to the extent it has any validity after the Supreme Court's decision invalidating the EPA ruling on which it was largely based -- is thus distinguishable as an injunctive relief case. The courts are far better equipped than the political branches of government to determine liability and assign damages and thus the political question doctrine is rarely applied to damages claims. *Koohi*, 976 F.2d at 1331-1332; *see also Barasich*, 467 F. Supp. 2d at 685 (collecting cases). And again, the unreasonableness element of nuisance is focused on the harm.

The third *Baker* factor requires more than a subject matter that touches on foreign relations. There must be a demonstration that the Court's decision would displace the political branches in carrying out their respective roles. *Gross v. German Found. Industrial Initiative*, 456 F.3d 363, 390 (3d Cir. 2006). That is impossible here, where

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[19] *See also Radio Corp. of America v. United States*, 341 U.S. 412, 426 (1951) ("[T]his Court is not without experience in understanding the nature of such complicated issues. We have had occasion before to consider complex scientific matters."); *Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 293 (1st Cir. 2006) ("[F]ederal courts have proven, over time, that they are equipped to adjudicate individual cases, regardless of the complexity of the issues involved."); *TechSearch L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1377 (Fed. Cir. 2002) (the appointment of a technical advisor may be "helpful in assisting the court in understanding the scientific and technical evidence it must consider."); *see also Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1083 (2d Cir. 1982) (although a legislative solution to the Native American land claims may be preferable, the "claims are justiciable notwithstanding the complexity of the issues involved").

Kivalina does not seek to force the United States to enter a treaty or to make international commitments or even to make emissions reductions of any kind -- indeed, it does not seek to force the United States Government to take any action at all.

The *GM* court improperly concluded that it would have to make an initial policy decision of a nonjudicial kind in order to resolve a damages case, but again its decision is demonstrably incorrect. It held that it would have "to create a quotient or standard" of carbon dioxide emissions. GM, 2007 WL 2726871, at *8. This is just not the law in a nuisance case seeking damages. *See supra* Section II.B at 49 (quoting Prosser & Keeton). If a factory is polluting a river along with hundreds of other factories, it may be required to pay for the harm to downstream landowners even if its conduct was reasonable and useful. The court is not asked to decide if some lower amount of pollution would have been more reasonable but rather, whether the defendant has contributed to plaintiff's unreasonable harm.

The *GM* court heavily relied upon the 2003 EPA ruling that the Supreme Court invalidated in *Massachusetts* for its conclusions regarding U.S. policy. The *GM* court, like defendants here, placed especial reliance upon the EPA ruling's discussion of foreign policy even though in *Massachusetts* the Supreme Court expressly dismissed this discussion as outside the agency's statutory charge. This was clear error. *Central Valley*, 529 F. Supp. 2d at 1181 ("the decision in *Massachusetts* teaches that when the court seeks to determine what United States foreign policy is, it must look to sources other than EPA."); *Green Mountain*, 508 F. Supp. 2d at 396 (same). The EPA ruling must be disregarded. As set forth above, even accepting *arguendo* the fallacy that a damages case is an emissions regulation, U.S. foreign policy does not prohibit domestic emissions reductions.

Indeed, the official U.S. policy is that such emissions should be reduced. *See supra* Section II.B. Thus, even if an initial policy decision from the political branches were necessary, it has been made. *See Milwaukee I* (relying upon general policies in

environmental statutes); *See also* May, *supra*, 58 Denver U. L. Rev. at 951 (*AEP* and *GM* were "patently wrong to conclude that the elected branches have yet to make an initial policy determination . . . . [because] the United States has clearly adopted and currently adheres to a 'general principle' to reduce emissions of [greenhouse gases]").

Both *AEP* and *GM* also misread *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 847, (1984), for the proposition that air pollution cases require the courts to strike a balance between the social costs of pollution versus the economic interests that would be impeded by pollution reduction measures. *AEP*, 406 F. Supp. 2d at 272; *GM*, 2007 WL2726871, at *7. Their partial quotes of *Chevron* failed to capture what the Court actually said, which had nothing to do with judicial balancing but was referring only to the *legislative task* of formulating a comprehensive policy to reduce air pollution. *See Chevron*, 467 U.S. at 847 ("As always in this area, the *legislative struggle* was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs.") (emphasis added). *Chevron* is irrelevant to the judicial task as it has nothing to say on the topic.[20]

Defendants are also wrong that the "nature" and "scale" of the global warming problem takes it out of judicial cognizance. *See* Oil MTD 12(b)(1) at 17. The courts have rejected just such arguments. For example, in *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070 (2d Cir. 1982), the plaintiffs sought vindication of American Indian title to over five million acres of New York land stretching from Pennsylvania to

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[20] Defendants rely on *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), and *Antolok v. United States*, 873 F.2d. 369 (D.C. Cir. 1989), but the portion of the controlling opinion by Judge Sentelle in *Antolok* on which defendants rely was not joined by the other judges on the panel. Equally persuasive is the opinion of Judge Wald, who could not "fathom how any one of [the plaintiffs' arguments] could be deemed unfit for judicial resolution." 873 F.2d. at 391, Wald, J. (concurring in judgment). *Schneider* on its face is far different from this case: it was a wrongful death claim against a former secretary of state and former CIA director for their alleged role in covert CIA action to prevent the elected leader of the Chilean leftist collation from assuming power.

the Canadian border:

> The defendants point to the scale of the wrong alleged and the size of the remedy sought as rendering the claims nonjusticiable. . . . Yet we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed. . . . However preferable a legislative solution might be, in its absence the Oneidas' claims are justiciable notwithstanding the complexity of the issues involved and the magnitude of the relief requested.

Id. at 1083 (internal quotation marks and citation omitted). Many other courts have rejected claims of inherent nonjusticiability based the upon the scale or the nature of an issue.[21]

Finally, the Oil Companies have raised an amorphous set of objections under *Baker* factors two and three to applying tort law and principles of joint and several liability at all to global warming. *See* Oil MTD 12(b)(1) at 24-28. This argument largely repackages their causation arguments, to which Kivalina will not respond further. It also contends in alarmist fashion that this damages case would "set national (if not worldwide) energy policy." *Id*. at 26-27. The Oil Companies are wrong because imposing damages does not set policy.

The crux of the Oil Companies' argument about applying tort law to global warming seems to be that since their pollution is global, they should get off the hook. But simply because industry has found a way to cause harm to particular plaintiffs in particular places through a form of global pollution does not mean that long-standing principles of nuisance law do not apply. Sulfur dioxide pollution causes acid rain, which crosses international boundaries. Is acid rain off limits to nuisance law? Mercury pollution travels around the globe. Is mercury pollution off limits to nuisance? As far back as 1901, the bacterial pollution that traveled hundreds of miles downriver at issue in *Missouri I*

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[21] *See, e.g., Gordan v. Texas*, 153 F.3d 190, 195 (5th Cir. 1998); *Masayesva ex. rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371 (9th Cir. 1997) (case addressing control and use of nearly 2 million acres of commonly held reservation land held to be a justiciable claim); *Barasich*, 467 F. Supp. 2d at 685 ("that the plaintiffs' suit arises from one of the costliest and deadliest natural disasters in this nation's history should not obscure the allegations in tort at the heart of plaintiffs' claims.").

was, like global warming, something that had gone from unknown to scientifically known, yet the Court held that the plaintiff had stated a claim for a harm that was invisible, odorless and had not been previously litigated as a nuisance. *See supra* Section I.B.3 (discussing *Missouri v. Illinois*, 180 U.S. 208 (1901)).

The Oil Companies ask, in essence, why us? Why should we be the ones to bear the brunt of paying for Kivalina's move? *See* Oil MTD 12(b)(1) at 24. The answer is that they and their codefendants are responsible for more of the problem than anyone else in the nation that is the biggest historical emitter of greenhouse gases. And a core group of them have spent years distorting the truth about global warming. The Oil Companies will have their day in court in which they can try to defeat joint and several liability by showing either that they did not conspire or by trying to establish a basis for allocating liability according to their respective shares of emissions and other culpable conduct. *See* Restatement (Second) of Torts § 433B. They are wrong, however, in arguing that they can add to this litigation all other emitters of greenhouse gases. *See* Oil MTD 12(b)(1) at 27: 4-9. A joint tortfeasor is not a necessary party, much less an indispensable one. *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.").[22]

Finally, the Oil Companies' argument that there is an intractable problem about what states' laws should apply, *see* Oil MTD 12(b)(1) at 27:17 - 28:13, misses the entire

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[22] *Accord, Samaha v. Presbyterian Hospital*, 757 F.2d 529, 531 (2d Cir. 1985) ("it is settled federal law that joint tortfeasors are not indispensable parties"); *Woods v. Asset Res.*, 2006 U.S. Dist. LEXIS 94325, at *37 (E.D. Cal. Dec. 21, 2006) ("A joint tortfeasor is not a necessary party because the liability of tortfeasors is joint and several; thus, complete relief may be afforded by joining only one."); *New York v. Shore Realty Corp.*, 1984 U.S. Dist. LEXIS 16183, at *4 (E.D.N.Y. 1984) ("It is well settled law that one tortfeasor may not compel the joinder of other alleged joint tortfeasors under Rule 19.") (nuisance case). *American Motorcycle Ass'n v. Superior Court of Los Angeles County*, 578 P.2d 899 (Cal. 1978), on which defendants rely, Oil MTD 12(b)(1) at 27, merely recognizes the principle of equitable indemnity, whereby defendants may obtain contribution from other responsible parties. *See Countrywide Home Loans v. Superior Court*, 69 Cal. App. 4th 785, 797 (Cal. App. 2d Dist. 1999) (discussing *American Motorcycle*).

thrust of this case. State law should not apply here, rather, federal common law should apply. The very potential for inconsistency in state laws identified by the Oil Companies and the fact that defendants' emissions are emitted in scores of states whose laws would apply under *Ouellette* is one more compelling reason why global warming tort cases must be decided under one uniform federal standard. The oil companies accuse Kivalina of obscuring the basis for its state law claims. *See* Oil MTD 12(b)(1) at 27. But its state law claims are pled only in the alternative since they are the flip side of federal common law under *Milwaukee I* and *II* and *Ouellette*. The defendants' accusation, moreover, is hypocritical since the Oil Companies simultaneously say in their other brief that they "take no position on the resolution of the choice-of-law question at this time." Oil MTD 12(b)(6) at 5 n.1. Kivalina has taken the position required by the Supreme Court in the *Milwaukee-Ouellette* trilogy: federal common law applies unless and until there is preemption and then the laws of the source states must apply.

This case requires no initial policy decision of a nonjudicial kind that has not already been made.

c. Prosecution of this Case Will Not Interfere with Important Governmental Interests (*Baker* Factors Four Through Six).

The remaining *Baker* factors are prudential considerations. They are "relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic v. Karadzic*, 70 F.3d 232, 249-250 (2d Cir. 1995). Neither *AEP* nor *GM* addressed them. The Oil Companies do not argue these factors, conceding their inapplicability. The Utilities mention them only in passing, *see* Utilities MTD at 16:28 – 17:1, in an argument based primarily upon factors one and three and to which Kivalina already has responded, *see supra* Section II.B (addressing alleged contradiction of U.S. policy). Peabody devotes a single sentence to factor four, contending that resolving this case would be tantamount to this Court announcing the country's energy

policy." Peabody MTD at 12, and does not address factor five and sit.

The prudential *Baker* factors are not satisfied here as the case law makes amply clear. For example, in *Japan Whaling*, *supra*, the Court rejected defendants' argument that the sixth *Baker* factor would be violated by any decision "to command the Secretary of Commerce, an Executive Branch official, to dishonor and repudiate an international agreement." *Id.* at 229. In rejecting this argument, the Supreme Court reasoned that it could not "shirk this responsibility merely because [its] decision may have significant political overtones." *Id.* at 230.

Here there are no treaties and no executive agreements that would resolve Kivalina's claims. This lawsuit can be resolved therefore without implicating a prior government decision. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 71 (E.D.N.Y. 2005) (the existing "agreements between the present Vietnam government and the United States . . . do not address any issue raised in this case" and "the instant case [therefore] does not require the refashioning of agreements by coordinate branches of government."). In fact, given the absence of any statutory or administrative claims process for victims of global warming, this lawsuit is Plaintiffs' *only* recourse. *See Alperin*, 410 F.3d at 558 ("In the landscape before us, this lawsuit is the only game in town with respect to claimed looting and profiteering by the Vatican Bank."); *cf. Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 387 (3d Cir. 2006) ("The mere existence of the Executive's power to extinguish claims made to the Judiciary for redress from foreign entities and to resolve certain issues raised in those claims, *without an exercise of that power*, does not render those claims nonjusticiable by virtue of being committed to a co-equal branch.") (emphasis added); *Beaty v. Iraq*, 480 F. Supp. 2d 60, 74 (D.D.C. 2007) ("So long as the diplomatic solution hinted at by Iraq and the United States remains more fantasy than reality, there is no direct conflict with American foreign policy and adjudication of the particular claims at issue here.").

Here, there is no treaty or international agreement providing claims process for

global warming victims. The prudential *Baker* factors are not satisfied. As not one of the six *Baker* factors are met here, the political question doctrine is not applicable and defendants' motions on this ground must fail.

III. KIVALINA'S FEDERAL NUISANCE CLAIM IS NOT PREEMPTED.

Kivalina's claim under the federal common law of public nuisance is not preempted. Defendants fail to cite a single statutory or regulatory provision of the Clean Air Act that could possibly preempt the federal common law of nuisance here. Although the Supreme Court recently held that in *Massachusetts v. EPA* that the agency has authority to regulate greenhouse gases under the Clean Air Act ("CAA"), EPA has yet to adopt greenhouse gas regulations in the wake of this decision. And any such regulations would be purely prospective. Kivalina seeks compensation, not civil penalties for violating some future standard EPA might promulgate. Nor do the hodgepodge of statutes and executive actions relating to global warming preempt Kivalina's claim. They merely require research, study of the problem, the development of technology, and authorize treaty discussions. No court has ever held that a hodgepodge of governmental actions touching on the same general subject as a damages lawsuit preempts that lawsuit; that argument runs directly afoul of *Milwaukee I*.

A. The Clean Air Act Does Not Preempt Kivalina's Federal Common Law Nuisance Claim.

The Supreme Court held in *Massachusetts* that EPA has the authority to regulate greenhouse gases. 127 S. Ct. at 1462. The Court did not, however, order EPA to regulate. *See id*. at 1463 ("We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding."). Under the CAA, the EPA Administrator must make an endangerment finding before it may issue an ambient air quality standard. *See* 42 U.S.C. § 7521(a)(1); *see also Motor & Equipment Manufacturers Ass'n. v. Nichols*, 142 F.3d 449, 452 (D.C. Cir. 1998) (CAA regulates air pollution "by establishing air quality standards for *certain* pollutants and controlling the emissions of approximately 189

hazardous pollutants.") (emphasis added). Defendants fail to cite to *any* statute or regulation that would support their federal preemption arguments; the mere prospect that EPA may take action in the future has no preemptive force.

On July 30, 2008, the EPA published its response to *Massachusetts v. EPA* in the Federal Register in an Advance Notice of Proposed Rulemaking. *See* 73 Fed. Reg. 44354-44520 (July 30, 2008). The EPA sought comment on "analyses and policy alternatives regarding greenhouse gas (GHG) effects and regulation under the Clean Air Act." 73 Fed. Reg. 44354 (July 30, 2008). The EPA Administrator makes clear in the preface to this proposed rulemaking. *See id.* at 73 Fed. Reg. 44355 (July 30, 2008) ("the Clean Air Act is "an outdated law originally enacted to control regional pollutants that cause direct health effects, [and] is ill-suited for the task of regulating global greenhouse gases.") (statement of EPA Administrator); *see also supra* Section Factual Background Section E.

EPA's inaction does not preempt Kivalina's damages claim. There is no preemption where there is no conflict. Here there is no conflict between Kivalina's common law nuisance action and the CAA for two reasons: (1) the CAA's ambient air standards are issued on a pollutant-by-pollutant basis that requires action by EPA in order to regulate a particular kind of pollutant; there currently is no regulation of greenhouse gases under this regime and thus nothing with which a global warming nuisance action could conflict; and (2) such nuisance actions do not frustrate the purpose of the CAA.

1. The CAA Does Not Preempt Federal Common Law Claims With Respect to Pollutants For Which EPA Has Not Issued a Standard.

EPA's inaction is insufficient to preempt federal common law. For Congress to preempt a federal common law cause of action, it must "speak directly to the question addressed by the common law." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008). This is a demanding test:

> In determining whether a federal statute pre-empts common-law causes of action, the relevant inquiry is whether the statute "[speaks] *directly* to [the] question" otherwise answered by federal common law. *Milwaukee II*,

> *supra*, at 315. (emphasis added). As we stated in *Milwaukee II*, federal common law is used as a "necessary expedient" when Congress has not "spoken to a *particular* issue."

County of Oneida, New York v. Oneida Indian Nation of New York State, 470 U.S. 226, 237 (1985) (emphases in original). In *Oneida*, the Court held that a federal common law claim for damages arising from illegal occupation of Native American lands was not preempted by a statute that generally addressed the issue by prohibiting divestiture of such lands absent a U.S. treaty. The legislation even authorized the President to remove, forcibly, illegal occupants of aboriginal lands and thus provided for the Executive Branch to provide some limited remedy. But it did not "address directly the problem of restoring unlawfully conveyed lands to the Indians, *in contrast to the specific remedial provisions* contained in [the water pollution statute at issue in *Milwaukee II]*." *Id.* at 238 (emphasis added). The Court also held that a treaty requiring the Tribe to lodge complaints with the President did not preempt federal common law. *Id*. at 249 n.24. *Oneida* is dispositive here: legislation authorizing the Executive Branch to take action and providing limited redress do not preempt a federal common law action that provides a different remedy. The Supreme Court recently held that even the CWA, which it ruled in *Milwaukee II* was sufficiently comprehensive to preempt a federal common law public nuisance suit to abate the nuisance, did not preempt all federal lawsuits for compensatory damages caused by water pollution: "[W]e see no clear indication of congressional intent to occupy the entire field of pollution remedies." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008). Similarly here, there is no indication that Congress intended the CAA to serve as a comprehensive remedial scheme for injuries caused by greenhouse gases.

In *Milwaukee II*, the Court found preemption where the statute regulated the very pollutant at issue and EPA had issued permits setting numerical limits on the discharges.

> There is thus no question that the problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress. This being so there is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime by reference to federal common law . . . .

451 U.S. at 320; *accord, Arkansas v. Oklahoma*, 503 U.S. 91, 99 (1992) (*Milwaukee II*

found preemption because Congress had provided a federal remedy). Thus, preemption of federal common law requires, at a minimum, a conflict between the pollution standard set by EPA and the federal common law standard. That cannot happen here as the EPA does not regulate greenhouse gas emissions.

In *In re Exxon Valdez*, 270 F.3d 1215, 1230 (9th Cir. 2001), *aff'd in rel. part, Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), the Ninth Circuit rejected a preemption argument under the CWA because the defendant "does not argue that the plaintiffs seek any remedies that might conflict with the decision of an administrative agency charged with enforcement responsibility." According to the court:

> Where a private remedy does not interfere with administrative judgments (as it would have in *Milwaukee*) and does not conflict with the statutory scheme (as it would have in *Sea Clammers*), a statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy. It is reasonable to infer that had Congress meant to limit the remedies for private damage to private interests, it would have said so.

Id. at 1231. Again, there is no conflict here because the administrative remedy is non-existent.

Here, moreover, there is a fundamental difference between the CAA and the Federal Water Pollution Control Act as amended in 1972 that makes preemption far less appropriate in the case of the CAA:

> [T]he Clean Air Act differs substantially from the Water Pollution Control Act in areas which the majority of the Court in *City of Milwaukee* found were especially significant but which bear no relation to the facts herein. For example, Justice Rehnquist, writing for the majority in City of Milwaukee, found it especially significant that under the Water Pollution Control Act the EPA regulated "*every* point source" of water pollution. 451 U.S. at 318 (emphasis in original). Under the Clean Air Act, in contrast, the states and the EPA are not required to control effluents from every source, but only from those sources which are found by the states and the agency to threaten national ambient air quality standards.

New England Legal Foundation v. Costle, 666 F.2d 30, 32 n.2 (1981). Although *Costle* ultimately did not decide the issue, its reasoning was right on point. The CAA stands in sharp contrast to the Clean Water Act, which prohibits *all* discharges to navigable waters from *all* point sources without a permit. *Milwaukee II*, 451 U.S. at 318; *Middlesex County*

Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981).[23]

Judge Reinhardt came to the same conclusion in his dissent in *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988). In *Audubon*, the majority did not consider the preemptive force of the CAA because it concluded that the localized dust pollution at issue was not "the sort of interstate controversy which makes application of state law inappropriate[.]" *Id.* at 1205. In dissent, however, Judge Reinhardt concluded that the plaintiffs had stated a proper federal common law nuisance claim, which brought the preemption question to the fore. In his opinion, which is the only opinion in the case to address preemption, he concluded that "the structure of the Clean Air Act is closer to that of the pre-1972 Federal Water Pollution Control Act (FWPCA) – which the Supreme Court held in *Milwaukee I* did not preempt federal common law," in that it relies primarily on national standards implemented by state plans rather than regulating all discharges of pollutants, as the CWA does. *Id.* at 1212-14 (Reinhardt, Judge dissenting). He thus would have held the CAA not to have preemptive force.[24]

Cases addressing preemption of state law resoundingly reject the argument defendants make here. For example, in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), which defendants themselves rely upon as relevant to the federal common law preemption analysis, *see* Oil MTD 12(b)(6) at 19:26-27, the Court held that a wrongful death claim against a boat manufacturer arising from the failure to use a propeller guard was not preempted by the Coast Guard's prior decision against a regulation that would have required such devices on boats. The reason was that "the Coast Guard did not take the

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[23] Other courts have observed other differences between the CAA and the CWA. *See*, *e.g.*, *United States v. Tennessee Air Pollution Control Board*, 185 F.3d 529, 534 (6th Cir. 1999) (declining to follow CWA approach to waiver of sovereign immunity because of "significant differences between the Clean Water Act and the Clean Air Act").

[24] Two district courts have found that the CAA preempts federal common law causes of action for local, intrastate pollution that is regulated by EPA but those cases did not involve interstate or unregulated pollution. *See Reeger v. Mill Serv., Inc.*, 593 F. Supp. 360, 363 (W.D. Pa. 1984) (local emissions from a hazardous waste facility); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) (local air pollution from a landfill).

further step of deciding that, as a matter of policy, the States and their political subdivisions should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as unsafe." *Id*. at 67. The same is true here. *Green Mountain*, 508 F. Supp. 2d at 396 ("Although the United States has consistently called for international consensus and a comprehensive approach to global warming, it has never disapproved of domestic regulation of domestic GHG emissions").

Similarly, in *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237 (3rd Cir. 2008), the court, applying *Sprietsma*, rejected a preemption claim based upon a variety of actions by the FDA in relation to mercury pollution in fish, including an informal letter, a consumer advisory, and a provision in its internal compliance guide recommending that the agency initiate action if mercury concentrations exceeded a certain level. Such agency actions did not "constitute[] a federal legal standard or binding regulatory action on the subject which could give rise to a conflict, and indeed neither expresses a policy or viewpoint or approach inherently inconsistent with [the] lawsuit." *Id.* at 256. "State law is not preempted whenever an agency has merely 'studied' or 'considered' an issue; state law is preempted when federal *law* conflicts with state law." *Id.* at 254 (emphasis original). These state-law preemption decisions demonstrate the fallacy of defendants' approach to discerning congressional intent.

The Utilities contend that there is a presumption in favor of preemption of federal common law but they misstate the rule. *See* Utilities MTD at 27:5-7. In fact, there is a presumption *against* preemption of federal common law. *United States v. Texas*, 507 U.S. 529, 534 (1993) ("Texas argues that this presumption favoring retention of existing law is appropriate only with respect to state common law or federal maritime law" but "there is no support in our cases for the proposition that the presumption has no application to federal common law"); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 10 (1st Cir. 2005) ("To show displacement of the [federal] common law causes of action . . . [defendant] must overcome this presumption"). The contrary *Milwaukee II* presumption in favor of preemption of federal common law applies *only* where Congress has provided a

comprehensive remedial scheme:

> Section 1321(f) establishes a *comprehensive remedial scheme* providing for both strict liability up to specified limits and recovery of full costs upon proof of willful negligence or willful misconduct within the privity and knowledge of the owner. We must *therefore* start with a presumption that non-FWPCA maritime liabilities and remedies for oil spill cleanup costs of the United States have been preempted.

In re Oswego Barge Corp., 664 F.2d 327, 339-40 (2d Cir. 1981) ("*Oswego Barge I*"), (emphasis added); *accord In re Oswego Barge*, 673 F.2d 47, 48 (2d Cir. 1982) ("*Oswego Barge II*"), 673 F.2d at 48 ("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.") (emphasis added). There is no comprehensive or precise remedial scheme for the claims at issue here because there are no air quality standards for greenhouse gases, much less any regime for compensating global warming victims. Thus, the Utilities cannot avail themselves of the *Milwaukee II* presumption but rather must themselves rebut the presumption against preemption.[25]

The Utilities also rely upon *Illinois v. Outboard Marine Corp.,* 680 F.2d 473 (7th Cir. 1982), *see* Utilities MTD at 27: 9-14, 28 n.13, but that case is quite different. In *Outboard Marine*, a water pollution case addressing the residual effects of discharges pre-dating amendment of the water pollution control statute at issue in *Milwaukee II*, the court

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[25] Kivalina acknowledges that *Mattoon v. Pittsfield*, 980 F.2d 1 (1992), may be viewed as contrary authority. In *Mattoon* the court held that the Federal Safe Drinking Water Act (SDWA) preempted a federal common law nuisance action for illnesses caused by drinking water contaminated by the *Giardia lamblia* pathogen even though the EPA did not regulate *Giardia lamblia* at the time of the incident. However, the Court should view *Mattoon* with great caution for several reasons. First, *Mattoon*'s federal common law analysis was entirely *dictum* as there was no interstate pollution at issue in the case and thus no basis for invoking the federal common law of public nuisance. Indeed, the common law nuisance claim was later re-filed and resolved in state court under state law, as it should have been to begin with. *See Mattoon v. City of Pittsfield*, 775 N.E.2d 770 (Mass. Ct. App. 2002). Second, *Mattoon* failed even to cite the Supreme Court's controlling decision in *Oneida* even though *Oneida* was decided some seven years prior to *Mattoon*. Third, *Mattoon* predated the Supreme Court's decision in *Sprietsma* by nearly a decade.

found preemption because Congress had "obviously considered" the "problem of pre-1972 discharges, and *specifically the appropriate role in the statutory scheme for remedies against polluters*." *Id*. at 478 (emphasis added). No such legislation exists here.

2. Permitting This Claim Would Not Frustrate the Purpose of the CAA.

Third, permitting a federal common law nuisance action to redress the harms caused by defendants' greenhouse gas emissions would not frustrate 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). The Supreme Court counsels against finding preemption where citizens can retain their common law rights without interfering with the accomplishment of the legislative objective. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008) ("[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."). Kivalina's common law nuisance action to recover damages is not inconsistent with the protection and enhancement of this country's air resources and in no way frustrates accomplishment of that goal.

B. The Hodgepodge of Other Federal Statutes, Executive Orders, and Foreign Policy Concerns Defendants Cite Do Not Preempt Kivalina's Federal Common Law Nuisance Claim.

Defendants also argue preemption based upon a hodgepodge of statutes and miscellaneous governmental actions dealing with global warming. They cite, among other things, motor vehicle fuel economy laws, the funding of development programs for alternative energy technologies, statutes requiring scientific studies and research, etc. *See* Utilities MTD at 27, Peabody MTD at 16. They also rely on the existence of treaty negotiations.

Defendants can cite no case holding that a smattering of laws and regulations touching on a subject matter somehow preempts a federal common law claim. Indeed, if this were the law, *Milwaukee I* would be inexplicable. *See Milwaukee I*, 406 U.S. at

101-02 ("Congress has enacted numerous laws touching interstate waters," including the Rivers and Harbors Act of 1899, the Federal Water Pollution Control Act, the National Environmental Policy Act of 1969, the Fish and Wildlife Act of 1956, and the Fish and Wildlife Coordination Act); *id*. at 103 n.5 ("While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning [federal common law] rules of decision.").

In *Massachusetts*, the Court rejected the same argument defendants make here. The EPA, supported by *amici* representing the oil and utility industries, pointed to these same miscellaneous statutes touching on global warming as allegedly establishing a congressional policy against any domestic limitations on greenhouse gases. The Court rejected the argument, however, because "[c]ollaboration and research do not conflict with any thoughtful regulatory effort; they complement it." *Massachusetts*, 127 S. Ct. at 1461.

So too the Court dismissed the same foreign policy argument that defendants make here. *Id*. at 1463. Defendants repeatedly cite to the 2003 EPA ruling for their understanding of U.S. foreign policy, but the Court invalidated that ruling in *Massachusetts* and expressly chastised EPA for wandering off its turf into foreign affairs. Moreover, defendants are incorrect in alleging that there is any U.S. policy against mandatory emissions reductions. *Green Mountain*, 508 F. Supp. 2d at 395, 396 (U.S. global warming policies are "emission reduction policies" and U.S. foreign policy stance "is not evidence of an express policy against domestic regulation of greenhouse gases"); *Central Valley*, 529 F. Supp. 2d at 1187 (finding "absolutely nothing" to "support the contention that it is United States foreign policy to limits its own efforts" to control greenhouse gas emissions."). Defendants also rely on a host of documents that are not official U.S. policy and that therefore must be disregarded. *See supra* Section II.B.

Kivalina's federal common law nuisance claim is ***not*** preempted.

IV. KIVALINA'S CLAIMS OF CONSPIRACY AND CONCERT OF ACTION ARE PROPER.

Defendants' contentions that Kivalina's conspiracy claim is not properly pled and that it runs afoul of the First Amendment and the *Noerr-Pennington* doctrine miss the mark. Kivalina has properly pled its conspiracy claim, with the requisite specificity, and neither the *Noerr-Pennington* doctrine for the Free Speech Clause protects deceptive conduct or deliberately false statements.[26]

A. Kivalina Has Properly Pled a Conspiracy.

A 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." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999) (en banc) (quotation omitted). The conspiring parties must have "reached a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *Id.* (quotation omitted). Each participant in the conspiracy does not need to know the exact details of the plan. *Id.* Conspiracy "imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 457 (Cal. 1994); *Kassa v. BP W. Coast Prods., LLC*, 2008 U.S. Dist. LEXIS 61668, at *23 (N.D. Cal. Aug. 12, 2008) ("a civil conspiracy is not an independent wrong; but a mechanism for imposing joint and several liability on the tortfeasors that agreed to inflict the wrong on the plaintiff."); *see generally* Restatement (Second) of Torts, § 879.

Federal law applies to the conspiracy claim. A conspiracy claim arises under federal law where there is an underlying federal claim. For example, under the federal Civil Rights Act, 42 U.S.C. § 1983, a federal conspiracy claim may be pled as a separate

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[26] Defendants also challenge Kivalina's standing to raise the conspiracy claim. Utilities MTD Conspiracy at 4-15. Because the conspiracy and concert of action claim are merely theories of liability and not independent torts, Kivalina's standing to bring the underlying public nuisance is addressed *infra* Section V.

section 1983 claim even though the text of the statute is silent with respect to conspiracy. *See, e.g., Gilbrook*, 177 F.3d at 856-57*; Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999); *Burdett v. Reynoso*, No. C-06-00720, 2007 U.S. Dist. LEXIS 64871, at *89 (N.D. Cal. Aug. 23, 2007); *see also Caterina v. Int'l Brotherhood of Painters & Allied Trades*, No. CV 477-233, 1978 U.S. Dist. LEXIS 16351, at *9 n.6 (S.D. Ga. July 26, 1978) (holding in Landrum-Griffin Act case that because the "action arises out of a federal statute," the "[f]ederal common law may therefore control as to conspiracy."). In an interstate pollution case where the federal common law of public nuisance applies, Plaintiffs' conspiracy claim must also be a matter of federal law. In any event, the elements of a conspiracy are essentially the same under federal and state law and Kivalina has properly pled conspiracy under federal and state law.

Nuisance is a proper underlying tort that will support a civil conspiracy. *See, e.g., Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268, 1284 (M.D. Ala. 1999) (plaintiffs "have sufficiently stated causes of actions for the claims underlying the conspiracy claims, to wit, trespass, nuisance, and fraudulent concealment."); *Chappell v. SCA Servs., Inc.*, 540 F. Supp. 1087, 1091 (C.D. Ill. 1982) ("the allegations of this complaint sufficiently allege an actionable conspiracy, since creation of a nuisance is itself an actionable wrong."); *see also In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398, 404 (C.D. Cal. 1970) (automakers' conduct at issue in antitrust case by States "is in effect a conspiracy to maintain a public nuisance–smog."). As discussed in detail *supra* Section I, Kivalina has stated a proper claim of public nuisance under federal common law. Thus, defendants' initial contention that because Kivalina's underlying nuisance claim fails so too does its conspiracy claim is meritless. Utilities MTD Conspiracy at 23-24.

Kivalina has properly pled detailed factual averments in support of the elements of conspiracy. *See* Compl. ¶¶ 189-248, 268-77. Specifically, Kivalina alleges that defendants were aware of the devastating effects of their emissions but rather than addressing the problem responsibly instead engaged in a deceptive media campaign to manufacture doubt about the dangers and causes of global warming so that they could

continue their harmful emissions without pause. *Id.*, ¶¶ 189-248. Further, defendants, repeatedly and over a period of years, attacked directly and through front groups the objectivity and reasonableness of the mainstream scientific community, which had formed a broad general consensus about the dangers of global warming and its human-created root cause. *Id.*, ¶¶ 130-54, ¶¶ 191-248. Defendants also encouraged and assisted each other's injurious conduct. *Id.* ¶¶ 194, 205-08. Defendants' common plan or course of conduct to create public doubt allowed them to continue their injurious pollution unabated. *Id.*, ¶ 189. Kivalina thus has properly pled "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." *Gilbrook,* 177 F.3d at 856.

1. Kivalina Has Sufficiently Alleged That Defendants Proximately Caused Its Injuries Pursuant to the Conspiracy.

The Utilities challenge the complaint's allegations as insufficient to establish proximate causation. *See* Utilities MTD Conspiracy at 24-25. However, they demand a separate injury from the conspiracy that is not required. Kivalina is injured by the defendants' public nuisance. The complaint alleges that the Conspiracy Defendants conspired to commit this nuisance. Therefore, as alleged in the complaint, there is a causal nexus between the conspiracy and the harm.

The Utilities focus upon the further allegations of the complaint that their conspiracy altered public behavior in a way that enhanced their ability to commit the nuisance. *See* Utilities MTD Conspiracy at 25:18-20. But causation can be established even without such a public response just as in any other conspiracy in which the underlying tort caused an injury. *See*, *e.g.*, Restatement (Second) of Torts, § 879 cmt. d, illus. 5 ("A, a policeman, advises other policemen to use illegal methods of coercion upon B. A is subject to liability to B for batteries committed in accordance with the advice."). The extent to which each Conspiracy Defendant may have cooperated or aided and abetted the conspiracy is not a determination that needs to be made at this stage. Likewise, whether Kivalina's allegations are factually accurate (and whether the alternative theory of

a change in public behavior is factually accurate) is not the issue to be resolved on a motion to dismiss: "[w]hether an act is the proximate cause of injury is generally a question of fact; it is a question of law where the facts are uncontroverted and only one deduction or inference may reasonably be drawn from those facts." *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003) (reversing dismissal of public nuisance and other claims against gun manufacturers).

In any event, according to Kivalina's allegations, emissions caused Kivalina's injury by contributing to global warming and they cooperated in and/or provided encouragement to a common plan and took steps to carry out their plan. These allegations reveal "a direct relationship between the injury and the alleged wrongdoing," *Ass'n of Wash. Pub. Hosp. Districts v. Phillip Morris Inc.*, 241 F.3d 696, 701 (9th Cir. 2001), sufficient to satisfy the pleading requirement of causation in civil conspiracy. *See Estate of Heiser v. Islamic Republic of Iran* 466 F. Supp. 2d 229, 266-67 (D.D.C. 2006) (holding the elements of civil conspiracy satisfied where defendants provided material support to facilitate an unlawful terrorist attack), cited in Utilities MTD Conspiracy at 25.

Defendants' conspiracy cases are inapposite. Both *Association of Washington Public Hospital Districts,* and *Oregon Laborers-Employers Health & Welfare Trust Fund v. Phillip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), are cases where – unlike here – the plaintiff's injuries were entirely derivative of those of the true victim, who was not party to the case. In *Association of Washington Public Hospital Districts,* public hospital districts and their association sued tobacco companies and industry organizations to recover their increased costs for treating their patients' tobacco-related illnesses allegedly caused by the tobacco companies' unlawful antitrust, RICO and state common law violations. 241 F.3d at 700. The court affirmed dismissal holding that the hospital districts' "claimed damages were not proximately caused by the Tobacco Firms' unlawful conduct, but were instead derivative of the personal injuries of smokers afflicted by tobacco-related illnesses." *Id*. at 701. For similar reasons, the *Oregon Laborers-Employers* court affirmed dismissal of the suit by employee health benefit trust funds against tobacco companies and their public

relations firms to recover the costs incurred treating their participants' smoking-related illnesses. Here, by contrast, the true victim is before the court: Kivalina is directly injured by defendants' unlawful conduct; its injury is not derivative of some third party.

Kivalina has properly pled a conspiracy claim.

2. Kivalina Meets the Rule 9(b) Specificity Requirements.

Peabody wrongly contends that the conspiracy claim allegations lack sufficient specificity. *See* Peabody MTD at 23. Only a subset of Kivalina's conspiracy claim allegations – those regarding fraudulent conduct – must be pled with particularity. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). Kivalina's conspiracy claim allegations regarding Peabody's intent or knowledge may be pleaded generally. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994), *superseded by statute on other grounds*. Finally, even for those allegations regarding Peabody's fraudulent conduct, the court "relax[es] pleading requirements where the relevant facts are known only to the defendant." *Concha v. London*, 62 F.3d 1493,1503 (9th Cir. 1995). The purpose of the Rule 9 particularity requirement is to "ensure that defendants accused of the conduct specified have adequate notice of what they are alleged to have done, so that they may defend against the accusations." *Concha*, 62 F.3d at 1502.

Plaintiffs' allegations with respect to fraudulent acts relating to Peabody's participation in the conspiracy meet the pleading standard of Fed. R. Civ. P. 9(b). Kivalina alleges that Peabody conspired to maintain a public nuisance by engaging in a false media campaign to distort public understanding of the dangers of global warming. Compl., ¶¶ 189-230.[27] The Complaint provides Peabody with the approximate time, place and nature of the alleged fraudulent activities, *i.e.,* the use of numerous front organizations

[27] Peabody incorrectly states that it is "not even mentioned in the conspiracy allegations." Peabody MTD at 24. The "Conspiracy Defendants" were defined to include Peabody in paragraph 189 of the Complaint and so all subsequent references to "Conspiracy Defendants" in the Complaint include by definition Peabody. Peabody is mentioned in this way in paragraphs 189, 190, 198 and 213 of the complaint.

to discredit mainstream, peer-reviewed scientific investigations and mislead the public about the dangers of GHG emissions and global warming. *Id.* For example, Kivalina alleges that Peabody was a member of the Global Climate Coalition ("GCC"). *Id.* ¶ 198. The purpose of the GCC was to create a public perception of scientific uncertainty regarding the need to reduce greenhouse gas emissions. *Id.* ¶¶ 190, 197-203. In December, 1995, the GCC's Science and Technology Advisory Committee advised GCC members that the contrarian views they touted about the science of global warming were not convincing arguments against the overwhelming body of scientific evidence at the time that GHG emissions had caused global warming. *Id.* ¶¶ 205, 207. By at least February, 1996, GCC members were aware of the results of a U.S. government study that found that "the chance of changes since 1976 being purely natural is 1-20%" and information contained within a powerpoint presentation by the Edison Electric Institute to GCC members that stated that global agricultural productivity could be maintained relative to current levels only up to the double the CO2 level, that some of the impacts of global warming would be "potentially irreversible" and include "significant loss of life." *Id.* ¶ 207. Nonetheless, on September 9, 1997, the GCC launched a national television, radio and print campaign, falsely claiming that there was an issue as to whether man-made GHG emissions caused global warming. *Id.* ¶ 222. Furthermore, the GCC provided a video to hundreds of journalists claiming that increased levels of carbon dioxide would increase crop production and help to fight world hunger. *Id.* ¶ 204.

Thus, Kivalina's allegations regarding Peabody's fraudulent conduct contain sufficient detail to put Peabody on notice of the allegations against it, especially where further relevant facts about fraudulent actions involving Peabody are exclusively within Peabody's knowledge. The allegations regarding fraudulent acts relating to Peabody's participation in the conspiracy meet the pleading requirements of Fed. R. Civ. P. 9(b). Peabody's motion to dismiss the conspiracy claim against it on this basis should be denied.

B. Kivalina's Conspiracy Claim Is Not Barred By the First Amendment.

Defendants' contention that they are entitled to absolute, blanket immunity for all the conduct and knowingly false statements that comprised their deceptive public relations campaign about the dangers posed by their GHG emissions finds no support in the law. *See* Utilities MTD Conspiracy at 15-23; Oil MTD 12(b)(1) at 21; and Peabody MTD at 24-25. The Petition Clause of the First Amendment protects only one's right "to petition the Government," U.S. Const. amend. I, not intentional efforts to mislead the public. Of particular significance, whether the campaign is intended to influence the public or to influence the government is an issue of fact that cannot be resolved on a motion to dismiss. Moreover, even assuming without conceding that defendants engaged in genuine petitioning, the *Noerr-Pennington* doctrine does not protect defendants' calculated falsehoods, deceptive conduct and statements outside the antitrust context. Finally, defendants' deliberately false statements are not protected by the Free Speech Clause of the First Amendment.

1. The First Amendment Right to Petition the Government Does Not Apply to Media Campaigns Whose Primary Purpose Is to Mislead the Public.

Defendants' assertion that the *Noerr-Pennington* doctrine protects their deceptive and misleading public relations campaign is wrong. "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 the right to petition." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir. 2000); *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) ("Noerr-Pennington is a label for a form of First Amendment protection; to say that one does not have Noerr-Pennington immunity is to conclude that one's petitioning activity is unprotected by the First Amendment."); *accord Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 956 (S.D. Cal. 1996) (relied on by defendants) ("However, as to other federal claims, and in applying the immunity to state law claims, courts may not go beyond the constitutional basis [i.e., the Petition Clause] for the immunity."). In turn, the protection afforded by the Petition Clause does not extend beyond genuine petitioning

activity: "The plain language of the First Amendment protects only those petitions which are made to 'the Government.'" *Cardtoons*, 208 F.3d at 892; *see id.* at 893 (holding "that when the basis for immunity is the right to petition, purely private threats of litigation are not protected because there is no petition addressed to the government."). Significantly here, whether the campaign is intended to influence the public or to influence the government is an issue of fact that cannot be resolved on a motion to dismiss. *Clipper Exxpress v. Rocky Mountain Motor Tariff*, 674 F.2d 1252, 1264 (9th Cir. 1982); *United States v. Philip Morris USA, Inc.*, 337 F. Supp. 2d 15, 24 (D.D.C. 2004).

Here, Kivalina alleges, *inter alia*, that defendants' media campaign was not directed at public officials, but conducted to convince consumers that global warming was unrelated to their GHG emissions so as to encourage them to maintain (or increase) personal consumption of defendants' products and not to reduce consumption or seek less harmful, alternative products. Compl., ¶¶ 189-248, *see supra* Factual Background Section D. Thus, in *United States v. Philip Morris USA, Inc.*, when tobacco companies raised the *Noerr-Pennington* doctrine as a defense to RICO liability for their media campaign to downplay the dangers associated with smoking, the court rejected the defense, ruling that "the *Noerr-Pennington* doctrine does not automatically characterize (and therefore immunize) every public relations campaign as 'petitioning' of the government." 337 F. Supp. 2d 15, 26 (D.D.C. 2004). At a subsequent hearing, the court explained "if that were the case, the *Noerr-Pennington* doctrine would extend to virtually all activities." *United States v. Philip Morris USA, Inc.,* 449 F. Supp. 2d 1, 887 (D.D.C. 2006). The court ruled that only those statements the tobacco manufacturers "made directly to legislative bodies merit *Noerr-Pennington* immunity." 449 F. Supp. 2d at 886. However, "the vast majority of Defendants' statements . . . made with the primary purpose of influencing smokers, potential smokers, and the general public" were "not protected by the *Noerr-Pennington* doctrine." *Id.*; *accord Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 2006 U.S. Dist. LEXIS 73196, at *1834 (E.D.N.Y. 2006), *rev'd on other grounds by McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008).

The tobacco cases are particularly illuminating because defendants here used the same deceptive strategy as the tobacco companies: manufacturing uncertainty by raising doubts about even the most indisputable scientific evidence; using front groups to publicly further their desired message; promoting scientific spokespersons to persuade the media that there is still serious debate among scientists when, in fact, there is widespread consensus in the scientific community that defendants' position is irresponsible and shifting the focus away from meaningful action to a misleading charge about the need for "sound science." Compl., ¶¶ 223, 231, 247. In fact, some of the same public relations firms and individuals involved in the tobacco campaign were also involved in defendants' campaign to discredit scientific evidence about global warming. *Id*. ¶ 192. Because Kivalina's allegations regarding defendants' media campaign do not target direct communications with the government, the right to petition the government does not apply.

2. The Right to Petition the Government Does Not Extend to Knowingly False Statements or Statements Made with Reckless Disregard for the Truth.

The First Amendment does not immunize deceptive conduct. While it may be true that the *Noerr Pennington* doctrine in the antitrust context protects deceptive conduct *as a matter of Sherman Act statutory construction*, there is no such immunity for deceptive acts outside that context. Rather, *Noerr Pennington* immunity here is a matter of pure First Amendment law, which does not protect deceptive conduct:

> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572. Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U. S. 64, 75 (1964). Thus, even if defendants' campaign here could be characterized as an exercise of their right to petition the government – a point

which Kivalina does not concede – defendants are still subject to liability for harm arising from calculated falsehoods.

In *McDonald v. Smith*, 472 U.S. 479 (1985), the Supreme Court held that known falsehoods communicated in a letter to the president were subject to defamation liability, even if the letter was never made available to the public. Further, *McDonald* holds that "[t]here is no sound basis for granting greater constitutional protection to statements made in a petition to the [government] than other First Amendment expressions." *Id*. at 485. Thus, the "First Amendment right to petition the government for a redress of grievances . . . is generally subject to the same constitutional analysis as the right to free speech." *Canatella v. Stovitz*, 365 F. Supp. 2d 1064, 1077 (N.D. Cal. 2005) (citing *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985)); *Curry v. Hall*, 839 F. Supp. 1437, 1440 (D. Or. 1993) ("Speech contained in petitions to the government is not entitled to any greater protection than utterances in any other context."). And calculated falsehoods, "*do not enjoy constitutional protection*." *McDonald*, 472 U.S. at 487 (Brennan, J., concurring) (quoting *Garrison*, 379 U.S. at 75) (emphasis added); *accord Time, Inc. v. Hill*, 385 U.S. 374, 393-94 (1967).

By way of further example, in *Curry v. Hall*, 839 F. Supp. 1437 (D. Or. 1993), the plaintiff inmate was cited for a violation of a prison regulation when he filed a grievance against prison officials, which allegedly contained false information. The court rejected the plaintiff's contention that the regulation violated his right to petition the government:

> The fact that a false statement is included in a grievance does not give the false statement a special First Amendment status, transforming the statement into protected speech. No constitutional right is implicated . . . because false statements are not generally protected by the First Amendment.

Id. at 1441.

These cases illustrate that whether defendants' statements were primarily intended to influence the public or public officials is immaterial if they were known to be false. The First Amendment petitioning right does not immunize false statements or deceptive conduct.

3. The Free Speech Clause Does Not Protect Deliberately False Statements.

Defendants also contend that even if their activities are not legitimate petitioning of the government, they are still protected under the Free Speech Clause of the First Amendment. Utilities MTD Conspiracy at 20-23; Oil MTD 12(b)(6) at 21; Peabody MTD at 24-25. They argue that they have an "absolute right under the First Amendment."[28] Not so. "[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. 600-62 (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) ("*Sullivan*"). "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). First Amendment law distinguishes between mere errors and knowing deceptions:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S., at 270. They belong to that category of utterances which "are no essential part of any exposition of ideas,

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[28] Peabody MTD at 24. Utility defendants further argue that the First Amendment bars government restrictions on expression because of its message, its ideas, its subject matter, or its content. *Id.* at 20-21 (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)). This argument applies to governmental regulations on speech, which is not at issue in this case.

> and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); *see also Clipper Exxpress v. Rocky Mtn. Motor Tariff Bur., Inc.*, 674 F.2d 1252, 1272 (9th Cir. 1982) (refusing to extend First Amendment protection to deliberate falsity; "While we recognize that under certain circumstances allowing the imposition of liability for statements can hamper debate [citing *Sullivan*], this possibility does not require that all such [false] statements be immunized from liability."). Kivalina has alleged that defendants have engaged in knowing deception, which is afforded no constitutional protection.

Defendants' reliance on selected quotations from inapposite cases, taken out of context, is misleading. For example, they cite *Sullivan* for the proposition that the Court should not consider the truth of matters discussed in public debate. But the issue in *Sullivan* was whether a journalist could be held liable for defamation based on a critique of a public official. The Court concluded liability could attach where there was evidence of actual malice, *i.e.,* knowing falsehood or reckless disregard of the truth. 376 U.S. at 280. While the "half-truths" discussed by *Sullivan* may be tolerated of members of the press reporting on public officials in their official capacity, *id*. at 273, it does not follow that knowing distortions of the truth intended to deceive members of the public about the dangers of GHG emissions are immune from conspiracy liability.

Defendants fare no better with *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), which they cite for the proposition that courts should not inquire into the truth of the subject allegations. *Keefe* held that there is a strong presumption against imposing *prior restraints* on free speech and assembly and the injunction preventing the defendant organization from passing out pamphlets and peacefully picketing plaintiff's business was unconstitutional. *Id*. at 419. Thus, in cases involving *prior restraints*, which have no bearing in this case, "the courts do not concern themselves with the truth or validity of the publication" at issue. *Id*. at 418. Similarly, defendants' reliance on *Consolidated Edison*

Co. v. Public Service Commission, 447 U.S. 530 (1980), striking down a commission order to prevent a public utility from including along with its utility bills an insert promoting nuclear energy is misplaced; that plaintiffs are not seeking a prior restraint on speech.[29]

Nor does *Demuth Development Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977), support Defendants' assertion that the First Amendment prohibits courts from ever entering "disputes over the truth or falsity of statements made in scientific debate." Utilities MTD Conspiracy at 21-22. The sole issue in *Demuth* was whether the publisher of a drug and chemical encyclopedia that had erroneously, but not willfully, misrepresented for 14 years the toxicity of a chemical used in plaintiff's product could be liable for damages. The quote that defendants improperly rely on is part of the court's conclusion that *extending liability to such an innocent circumstance* "would serve neither justice nor the public interest because of its manifestly chilling effect upon the right to disseminate knowledge." *Id*. at 994.

Further, contrary to Peabody's representation, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003), 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 (page cited by Peabody MTD at 24).

Finally, defendants' quotation regarding the appropriateness of a court inquiry into the validity of a scientific theory misrepresents *Oxycal Laboratories, Inc. v. Jeffers*, 909 F. Supp. 719 (S.D. Cal. 1995).[30] In *Oxycal* the issue was whether allegations that the

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[29] As evident from the quotation deployed by Peabody, MTD at 25, the statement from *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940) also involves a prior restraint. Similarly, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), cited by Utilities MTD Conspiracy at 21, holds that regulations placing subject matter restrictions on speech are prohibited under the First Amendment, and, as such, is inapposite.

[30] Only *McMillan v. Togus Regional Office, Department of Veteran Affairs,* 294 F. Supp. 2d 305 (E.D.N.Y. 2003), appears to be properly represented as a case holding that the First

plaintiff's products contained a carcinogen in a book about the dangers of cancer was commercial speech and thus subject to plaintiff's Lanham Act claim. Defendants' selective quotation arises in context of the court's determination that the allegations were not commercial speech. As such, the statements were not subject to the Lanham Act and thus the court did not need to consider the validity of the defendant's theories:

> The Court finds that the main purpose of Clark's book is not to propose a commercial transaction, and Clark's writing is not solely related to the economic interests of the speaker and its audience. Clark has written a book setting out a comprehensive plan for the elimination of the causes of cancer from peoples' lives. The Court cannot inquir[e] into the validity of her scientific theories, nor should it.

Id. at 724. As the full quote illustrates, there is no inherent impropriety of court evaluation of evaluate scientific theories, a process that is routinely carried out when experts are involved in litigation.

Defendants' deceptive public relations campaign and knowingly false statements are not immunized by the *Noerr-Pennington* doctrine nor protected by the Petition or Free Speech Clauses of the First Amendment.

C. Kivalina Has Stated A Proper Claim of Concert of Action.

A concert of action claim "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." *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 632 (S.D.N.Y. 2001); *see also Sindell v. Abbott Labs.*, 607 P.2d 924, 932 (Cal. 1980) (identifying elements of concert of action based on Restatement (Second) of Torts § 876). Only a "tacit understanding" among defendants is required and not an "express agreement." *Sindell*, 607 P.2d at 932. Defendants wrongly contend that a concert of

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Amendment protects scientific debate. But that case turned on the lack of proof that the National Academy of Sciences had failed to adhere to established standards "in reviewing scientific evidence and offering recommendations for further study" regarding the connection between Agent Orange exposure and illnesses among Vietnam veterans. *Id.* at 321. Here, defendants are not scientists but rather have intentionally distorted the prevailing scientific views.

action claim only is viable when there is a limited group of participants over a brief and discrete period of time. *See* Peabody MTD at 25-26; Utilities MTD at 41-43. The caselaw holds otherwise. *See In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d at 599 n.1, 601-02, 635 (denying motion to dismiss concert of action claim against 20 defendants involving conduct over a period of at least 10 years); *see also Roney v. Gencorp*, 431 F. Supp. 2d 622, 634 (S.D. W. Va. 2006) (denying motion to dismiss plaintiff's claim based on concert of action regarding the tortious conduct of over a dozen defendants during plaintiff's 17-year employment).

The Utilities argue that Kivalina has not alleged that defendants had a "tacit understanding" or a "common plan" to accomplish a tortious result. Utilities MTD at 41-43. As discussed above, Kivalina has sufficiently alleged that defendants engaged in a concert of action to commit a tortious act, *i.e.*, a public nuisance, through the use of front organizations, financed and promoted by defendants, to distort public understanding of global warming in order to encourage energy consumption and maintain a global warming nuisance. Compl. ¶¶ 189-248. For example, Kivalina has alleged that the "purpose of [the long campaign by power, coal, and oil companies to mislead the public about the science of global warming] has been to enable the electric power, coal, oil and other industries to continue their conduct contributing to the public nuisance of global warming by convincing the public at-large and the victims of global warming that the process is not man-made when in fact it is." *Id*. ¶ 189. The complaint alleges that certain defendants were members of the Global Climate Coalition ("GCC"). *Id*. ¶ 198. The GCC was founded in 1989 by 46 corporations and trade associations representing all of the major elements of U.S. industry and was one of the most outspoken industry groups in the United States battling reductions in greenhouse gas emissions. *Id*. ¶ 196. Plaintiffs' allegations are legally sufficient at the motion to dismiss stage of the litigation. *See In re MTBE*, 175 F. Supp. 2d at 634-35 (denying motion to dismiss civil conspiracy and concert of action claims based upon similar allegations); *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1159 (N.D. Cal. 1982) (denying motion to dismiss concert of action claim);

see also City of New York v. Lead Indus. Ass'n, Inc., 597 N.Y.S.2d 698, 700-01 (N.Y. App. Div. 1993) (affirming denial of motion to dismiss concert of action claim where "manufacturing defendants allegedly coordinated their efforts to conceal the hazard, to mislead the public and the government as to that hazard, and to market and promote the use of the product despite their knowledge of the hazard."). Notably, the *In re MTBE* court rejected a motion to dismiss a concert of action claim involving allegations similar to those here:

> [P]laintiffs allege defendants formed joint task-forces and committees such as the MTBE Committee and the OFA for the specific purpose of suppressing or minimizing information regarding MTBE hazards. Defendants also engaged in joint activity to deceive the government as well as the public regarding these same dangers. Plaintiffs further allege that defendants' conspiracy and the acts taken in furtherance of the conspiracy are a direct and proximate cause of the MTBE contamination of their wells. Plaintiffs are not required to allege the specific facts surrounding the conspiracy at this stage of the litigation where the necessary information [may be] within the knowledge and control of the defendant[s] . . . . Thus, plaintiffs' allegations of an agreement or tacit understanding are sufficient to support their conspiracy claims and concerted action theory of liability.

In re MTBE, 175 F. Supp. 2d at 634-35 (citations and quotations omitted). Defendants' motions to dismiss the concert of action claim should be denied.

V. KIVALINA HAS STANDING.

Kivalina has standing to pursue its claims. The standing inquiry is fact-intensive and thus, at the pleading stage, only requires general allegations. *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003) ("[A]t the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury.").

"The standing inquiry ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 153 (4th Cir. 2000); *see also Baker v. Carr*, 369 U.S. 186, 204 (1962). The Kivalina Plaintiffs unquestionably have a significant personal stake in this dispute: their longstanding home and livelihood are threatened by defendants' actions, and their survival hinges on their ability to relocate the village to safer ground.

To establish standing under Article III of the Constitution, plaintiffs must show they have suffered an actual or imminent injury-in-fact, that the injury is fairly traceable to the challenged action of the defendants, and that it is likely that the injury will be redressed by this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Kivalina presently is suffering an injury—the destruction of its village—which has been caused in part by the defendants' contributions to global warming, and that injury is redressable through the damages this suit seeks.

In reviewing defendants' motions under Rules 12(b)(1) and 12(b)(6), this Court must take all factual assertions alleged in the Complaint as true and must draw all reasonable inferences in favor of plaintiffs. *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). Kivalina has pled sufficient facts that, when taken as true, establish it has standing to bring the present suit. Defendants demand more specificity, but a 12(b)(1) or 12(b)(6) motion to dismiss is not the proper vehicle to articulate such demands. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.15 (1973) ("*SCRAP*") (if defendants thought plaintiffs allegations were "wholly barren of specifics," they could have moved for a more definite statement pursuant to Rule 12(e), moved for summary judgment, or utilized tools of civil discovery to ascertain specifics, instead of filing a motion to dismiss). Furthermore, specifics as to which particular emissions caused Kivalina's injury and at what point in time, *see* Oil MTD 12(b)(1) at 34, are not required in a multiple-polluter case even on the merits because liability does not depend upon tracing molecules. *See supra* Section I.C.2; *see also Gaston Copper*, 204 F.3d at 161 (plaintiff need not connect harm to "particular molecules" emitted by defendants). And the standing requirements may not be used to "raise the standing hurdle higher than the necessary showing for success on the merits in an action." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Plaintiffs' alleged harm is sufficiently concrete to withstand defendants' Motions to Dismiss. Kivalina has alleged facts about the science of global warming, Compl. ¶¶

123-34, defendants' emissions and contributions to global warming, *id.* ¶¶ 163-80, and the harmful effects of such contributions on Kivalina's property. *Id.* ¶ 185. Such detail cannot be characterized as a "formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs have met the pleading requirements laid out in *Bell Atlantic Corp.*, "providing not only 'fair notice' of the nature of [each] claim, but also 'grounds' on which the claim rests." *Id*. at 1965, n.3.

A. Kivalina Meets All of the Requirements of the Traditional Standing Analysis.

As the defendants concede, Kivalina has suffered an actual and concrete injury-in-fact. Plaintiffs have also shown that defendants' emissions contribute to this injury, satisfying the causation prong of the Article III inquiry. Lastly, a favorable ruling awarding damages to Kivalina would redress its injuries.

1. Kivalina Has Suffered an Actual and Concrete Injury.

Rising temperatures in the Arctic have led to a loss of sea ice along Kivalina's coast. Compl. ¶ 185. As a result, the village has become more vulnerable to waves, storm surges, and coastal erosion, causing significant property damage on the island. *Id.* The U.S. Army Corps of Engineers and the U.S. Government Accountability Office agree that because of global warming, plaintiffs must relocate their homes and businesses; remaining on the island is no longer a viable option. *Id.*

Defendants concede that Kivalina has suffered an actual and concrete injury. Not one of the defendants' 12(b) motions contests that plaintiffs have satisfied the "injury" element of the standing analysis. Indeed, defendants accept the Army Corps of Engineers' findings that the island is vulnerable to "extreme Arctic weather conditions," Oil MTD 12(b)(1) at 10, and that "'the village would have to be moved.'" Peabody MTD at 26.

2. Kivalina's Injury Is Directly Traceable to Defendants' Actions.

In an environmental nuisance suit, plaintiffs can meet the requirements of Article III causation by showing that defendants contribute to their injuries. *Northwest Envtl. Defense Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 967 (D. Or. 2006). The

Supreme Court recently applied this principle of contribution to the global warming context in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1457 (2007) (plaintiff had standing because EPA's refusal to regulate greenhouse gas emissions contributed to its injuries). The Court found that the domestic transportation sector emitted 1.7 billion metric tons of carbon dioxide into the atmosphere in 1999 alone, or 6 percent of all worldwide emissions. The Court declined to establish a precise amount of emissions that would be unreasonable, finding instead that "judged by any standard" this "enormous quantity" of emissions amounted to a "meaningful contribution to greenhouse gas concentrations."[31] *Massachusetts*, 127 S. Ct. at 1457-8. Likewise, here, defendants' emissions alleged in the Complaint totaled more than 1.3 billion tons annually. *See* Compl. ¶¶ 21, 23, 29, 34, 39, 46, 68, 72, 80, 86, 90, 93, 99, 103, 104, 111, 117, 122. This Court does not need to establish any standard or benchmark to deem this a "meaningful contribution."

Additionally, "plaintiffs need not show that a particular defendant is the only cause of their injury, and that, therefore, absent the defendant's activities, the plaintiffs would enjoy undisturbed use of a resource." *Nat'l Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992). In other words, plaintiffs need not show tort-like "but-for" causation to establish standing. *Pub. Interest Research Group of New Jersey v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) ("*Powell Duffryn*").

Defendants prematurely disregard *Powell Duffryn* and its progeny because the cases involve citizen suits under the Clean Water Act ("CWA"). Yet there is no reason to assume that the presence of a statutory scheme in those cases limits the rule that plaintiffs need only show contribution in CWA actions alone. Much to the contrary, *Powell Duffryn* explicitly states that "tort-like causation is not required *by Article III*." *Powell Duffryn*, 913 F.2d at 73 n.10 (emphasis added). Moreover, defendants' repeated attempts to

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[31] It is important to note that in *Massachusetts*, the fact-intensive standing inquiry ultimately turned on declarations. 127 S. Ct. at 1455-57 (reviewing facts found in five declarations). The standing question here is similarly fact-specific and fact-intensive, and should not be resolved at the motion to dismiss stage.

distinguish air and water pollution cases fall flat. Interstate pollution suits most directly inform the present action and cannot be summarily dismissed merely because they often involve statutory violations.

Still, defendants try to draw an artificial and invalid distinction between common law and statutory actions, arguing that the absence of a statutory scheme here is "fatal to Plaintiffs' effort to establish traceability." Oil MTD 12(b)(1) at 36. But congressional statutes cannot lessen the standing burden below what is required by Article III, nor can they establish standing for plaintiffs who would otherwise not have it. *See, e.g., Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing"); *Lujan II*, 504 U.S. at 560 (Article III is an "irreducible constitutional minimum"); *Gaston Copper*, 204 F.3d at 155 (in addition to meeting the constitutional minimum requirements for standing, an individual must also satisfy statutory requirements beyond what is required by Article III).

Though Congress cannot "dispense with the dictates of Article III," it can define new legal rights for purposes of the injury-in-fact element of the standing analysis. *Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 147 (2d Cir. 1992). That Congressional power is irrelevant here: Kivalina has demonstrated—undisputed by the defendants—an "actual and concrete injury" under the common law of nuisance, and no statutory scheme is required to establish that element. Defendants also point to the Supreme Court's discussion in *Massachusetts* about Congress' power to define injuries and articulate chains of causation, glossing over the qualification that such power is only exercised to "'give rise to a case or controversy *where none existed before*.'" *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan II*, 504 U.S. at 580) (emphasis added). Contrary to defendants' assertions, this does not amount to a wholesale relaxation of standing requirements in statutory cases. It only expresses the well-established principle that Congress can create new private rights of action where none previously existed. But public nuisance actions have a longstanding tradition and history in the common law,

predating the current pollution-related statutes. *See, e.g., Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Montana Co. v. Gehring*, 75 F. 384 (9th Cir. 1896); *Robinson v. Baugh*, 31 Mich. 290 (Mich. 1875).

It is true that some statutes relax the standing burden for plaintiffs who have been accorded new rights under the statutory scheme. For instance, the Clean Water Act grants new procedural rights to members of the public, and plaintiffs asserting those rights may do so "without meeting all the normal standards." *Lujan II*, 504 U.S. at 572 n.7. But Kivalina's right to sue for the *substantive* injury to its property under nuisance law is not new nor does it need congressional authorization. Furthermore, citizen suits for substantive injuries under the CWA face the exact same Article III standing test as those brought under the common law. *See, e.g., Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (CWA "extends standing to the outer boundaries" of Article III); *Gaston Copper*, 204 F.3d at 155. *Powell Duffryn*, and other cases that require plaintiffs merely to demonstrate defendants' contributions to their injuries, thus directly apply to the case at bar, and defendants have no footing to suggest otherwise.

Defendants next speculate that Kivalina's injuries might have occurred without their emissions. Oil MTD 12(b)(1) at 34. This "inertia" argument has no legal foundation, and such conjecture has no place in the standing analysis. "Whatever the ultimate accuracy of this speculation, it is not responsive to the simple proposition" that defendants "now do in fact" emit greenhouse gases that contribute to global warming. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 77 (1978). Kivalina need not show that without defendants' emissions, their injuries would not have occurred. "A party seeking to invoke federal jurisdiction" does not need to "negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief." *Id.* at 78. It must only allege that the defendants have caused some part of the actual injury. Even assuming *arguendo* that the inertia theory had legal foundation, that fact-intensive defense is not appropriately deployed in a motion to

dismiss.

a. Defendants' Greenhouse Gas Emissions Harm Kivalina.

Kivalina has alleged facts demonstrating that defendants' emissions contribute to global warming, which in turn causes its injury. Compl. ¶¶ 163-80. Defendants object that the alleged injury cannot be traced to any one of their emissions, "as opposed to the emissions of the many other emitters on the planet." Oil MTD 12(b)(1) at 30. Yet such scientific certainty is not required to establish standing. Kivalina does not have to demonstrate that defendants' emissions, and defendants' emissions alone, caused the precise harm suffered. *Powell Duffryn*, 913 F.2d at 72. Rather, they "'must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged' in the specific geographic area of concern." *Gaston Copper*, 204 F.3d at 161 (quoting *Watkins*, 954 F.2d at 980). Here, the "geographic area of concern" is the entire world, given the inherently global nature of global warming, as emphasized by the defendants themselves. Oil MTD 12(b)(1) at 32.

The defendants contribute to global warming by emitting greenhouse gases that mix in the atmosphere with the emissions of others. But the mere fact that others also contribute to Kivalina's injury does not insulate the defendants in the present action from liability for their own contributions. Restatement (Second) of Torts, § 840E. A plaintiff can establish standing even if polluters other than the defendant contribute to its injury. *See, e.g., Watkins*, 954 F.2d at 980 (although "highly probable" that polluters other than defendant substantially contributed to the polluted state of river, plaintiffs had standing to sue defendant for its contribution).

Defendants further contend that Kivalina's injuries can be attributed to any number of emitters in the world and granting such "undifferentiated standing to sue almost anyone and everyone in the whole world is the very antithesis of 'fair traceability.'" Oil MTD 12(b)(1) at 35. Defendants' position, however, is even more puzzling. Extending their argument would mean that plaintiffs are less likely to obtain judicial relief from the most threatening and widespread environmental injuries. This leads to the wholly "illogical

proposition" that "the greater the threatened harm, the less power the courts would have to intercede." *Owens Corning Corp.*, 434 F. Supp. 2d at 966. It is equally illogical that Kivalina be denied any and all relief for its injuries merely because, worldwide, there is a potentially large number of responsible parties who contribute to global warming. Nonetheless, defendants maintain that Kivalina lacks standing because its injuries are attributable not only to the defendants but also to a larger group of emitters not before this Court. To make this point, they rely heavily on the holding in *Comer*, *see* Utilities MTD at 18-19, Peabody MTD at 10, but an unpublished Mississippi district court decision has no precedential value in this Court and does not provide persuasive guidance here.[32]

[32] Defendants also point to the Seventh Circuit decision in *Texas Independent Producers and Royalty Owners Assoc. v. E.P.A.*, 410 F.3d 964 (7th Cir. 2005), for the proposition that "failure to account for pollution attributable to others precluded traceability to one industry's discharges," Utilities MTD at 19. Defendants fail to note, however, that the Seventh Circuit in fact conceded that a plaintiff need only show that a defendant contributed to its injury. *Texas Independent*, 410 F.3d at 974. The court eventually found that plaintiffs lacked standing but only because they failed to show the defendants contributed *at all* to the polluted waterway. *Id*. Kivalina, by contrast, has alleged facts sufficient to show that the defendants' emissions have contributed to global warming and its related effects on Kivalina's property.

Texas Independent also falls into a subset of cases where the plaintiffs' burden in establishing standing is higher than the burden faced by Kivalina in the instant case. In *Texas Independent*, the Seventh Circuit laid out the traditional elements of the standing analysis, but added that "when, as here, 'a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.'" *Id.* at 971 (quoting *Lujan II*, 504 U.S. at 562 (emphasis in original)). Here, Kivalina's injury does not stem from defendants' responses to unlawful government action or inaction, but rather from defendants' own independent choices and activities. Accordingly, Kivalina does not face the heightened standing burden described in *Texas Independent* and *Lujan II*.

b. The Causal Chain Between Defendants' Actions and Plaintiffs' Injuries Is Short, Direct and Straightforward.

The line of causation between defendants' emissions and Kivalina's injuries is short and direct. Defendants' characterization of the causal link manipulates a straightforward process into an overly-complex chain. They insert multiple superfluous steps in an effort to make the chain appear "highly attenuated." Utilities MTD at 20-21. In reality, there are only three steps:

(1) Defendants emit greenhouse gases. Compl. ¶¶ 163-80.

(2) Defendants' emissions, combined with others in the atmosphere, trap heat and raise the temperature of the Earth's atmosphere. *Id.* ¶ 123.

(3) The trapped heat leads to a loss of Arctic sea ice, leaving Kivalina vulnerable to storm surges and coastal erosion such that residents must relocate or face extermination. *Id.* ¶ 185.

This straight line between defendants' actions and plaintiffs' injury is the essence of traceability. *Saunders v. Farmers Ins. Exch.*, 440 F.3d 940, 943 (8th Cir. 2006) (injury must directly result from challenged conduct). Kivalina has clearly met the requirements of the second prong of the standing test.

Yet, even the defendants' overly-fragmented description of the process does not necessarily preempt a finding of traceability. First, the Supreme Court has rejected the "attenuated line of causation" argument at the pleading stage. *SCRAP*, 412 U.S. at 688-89. A chain with too many links is only an obstacle to establishing standing when the intervening steps require a high degree of speculation. *See, e.g., Allen v. Wright*, 468 U.S. 737, 758 (1984) (Court emphasized the "entirely speculative" nature of several of the links in plaintiffs' chain of causation); *Pony v. County of Los Angeles*, 433 F.3d 1138, 1145-6 (9th Cir. 2006). The underlying principle—and indeed, the very core of the standing inquiry—is to avoid hypothetical or conjectural jumps in showing causation. *Ecological Rights Found.*, 230 F.3d at 1152 ("the causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties but need not be so airtight at this stage of the litigation"). Here, not one of the links of the chain, even as described by the defendants, requires any speculative jumps: they are

merely factual assertions that map the science and effects of global warming. The truth of such assertions can be ascertained through discovery and trial but must be assumed at this point in the litigation. *Buckey*, 968 F.2d at 794.

Defendants also focus too narrowly on the number of links in the chain, though the case law they rely on underscores that the true concern in a standing analysis is not the number of links but the *level of speculation* required to move from one link to the next. For instance, in *In re African-American Slave Descendants Litigation* the fatal flaw in plaintiffs' alleged chain of causation was not the sheer number of links; rather, critical links in the chain required excessive speculation. 471 F.3d 754, 759 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 92 (2007) (plaintiffs' argument depended too heavily on the possibility that making slavery less profitable "might" have reduced the amount of it). Furthermore, the plaintiffs in that case were seeking redress for wrongs done to their ancestors. The Seventh Circuit accordingly decided the linkage between the wrong committed and the plaintiffs themselves was too temporally remote. That, of course, is not the situation here, as Kivalina is *presently* suffering injuries resulting from defendants' emissions. In *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corporation* 273 F.3d 536 (3d Cir. 2001), plaintiffs lacked standing not because their chain of causation had seven links, but rather because the conduct of intervening criminal actors insulated the more removed gun manufacturers from liability. Defendants here similarly argue that the emissions of third-parties, over whom they have no control, muddle the chain of causation. But in *Beretta*, the relevant third-parties were individuals who could be held criminally liable for their unlawful use of guns. With global warming there are not third parties acting criminally nor other intervening causes. Defendants' greenhouse gas emissions combine with each others and those of others to trap heat, which causes Kivalina's injuries. Here, all emitters contribute to the injury – in fact, some, like defendants, more than others – which is enough to establish causation. *See supra* discussion Sections I.C.2.a, I.C.2.b.

c. Geographic Proximity Is Not Necessary with a Global Problem.

Geographic proximity can weigh into the causation inquiry but not in the formulaic fashion defendants propose. The Fifth Circuit, for instance, considered proximity in a citizen suit under the CWA but was careful to qualify its discussion of distance. *Friends of the Earth Inc. v. Crown Cent. Petroleum Corp.,* 95 F.3d 358, 362 (5th Cir. 1996) ("We do not impose a mileage or tributary limit for plaintiffs"). The court noted that "plaintiffs who use 'waterways' far downstream from the source of unlawful pollution may satisfy the 'fairly traceable' element." *Id.* The propriety of measuring the geographic distance between a defendant's activities and a plaintiff's resulting injury depends on the particular nature and circumstances of each case. While in some water pollution disputes, it may be feasible and desirable to require plaintiffs to show a defendant's effluent traveled downstream to their portion of the river, *see, e.g., id.*, a similar evidentiary requirement in the global warming context would be prohibitive. It would be impossible to trace the pathway of any particular greenhouse gas emission, as each combines in the atmosphere with other emissions, to create the effects described in plaintiffs' Complaint. Compl. ¶¶ 181-185. These "elevated evidentiary hurdles are in no way mandated by Article III." *Gaston Copper*, 204 F.3d at 163. The CWA's polluted waterways provisions are entirely different: they govern the discharge and effect of specific toxins in localized bodies of water. By contrast, greenhouse gases are common pollutants that are mixed together in the atmosphere and cannot be similarly geographically circumscribed. This Court must keep pace with evolving developments in scientific and environmental understanding and provide relief for novel injuries accordingly.

3. A Decision by this Court Awarding Damages Will Redress Kivalina's Injury.

Kivalina has standing "because a favorable decision by the district court will redress [its] injuries." *Gaston Copper*, 204 F.3d at 162. The redressability prong of the standing analysis is meant to ensure that a plaintiff will personally "benefit in a tangible way from the court's intervention." *Id.* Here, Kivalina will undoubtedly benefit – they

will be awarded damages – and "injuries compensable in monetary damages can always be redressed by a court judgment." *Wernsing v. Thompson*, 423 F.3d 732, 745 (7th Cir. 2005). Kivalina's injury can and would be redressed by damages for relocation. Indeed, the Oil and Utility defendants concede this point.

Only Defendant Peabody Coal asserts a further standing problem under the redressability prong, *see* Peabody MTD at 9, but its argument centers on the misguided notion that this Court would need to establish a national policy on climate change or set benchmarks on the reasonableness of greenhouse gas emissions in order to provide Kivalina its requested relief. This premise is entirely without foundation. Peabody cites no authority for its assertion; indeed, the case law suggests just the opposite. In the public nuisance context, federal courts have, for more than a century, provided plaintiffs with judicial relief without formulating national policy. *See, e.g., Tenn. Copper Co.*, 206 U.S. at 238-239 (injunction issued "[w]ithout any attempt to go into details immaterial to the suit" and without setting national benchmarks on transboundary air pollution). Federal courts are best suited to provide relief in matters like the present action, where uniform national standards and provisions for legislative or administrative relief are absent. *See Milwaukee I*, 406 U.S. at 108 (citing *State of Tex. v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971) ("Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.")).

B. The Native Village of Kivalina Is Entitled to Any Special Solicitude Applicable to Sovereigns.

Defendants recognize the incongruence between their arguments on standing and the recent holding in *Massachusetts*, where the Supreme Court affirmed standing in a global warming case. 127 S. Ct. at 1458. Accordingly, defendants struggle to circumscribe that decision by suggesting that the Court applied relaxed standing standards that do not govern in the present case. Utilities MTD at 19. Though the Court did comment on Massachusetts' status as a state, *Massachusetts*, 127 S. Ct. at 1454, nothing in

the majority opinion indicates that without "special solicitude," plaintiffs could not have established standing.[33] Indeed, after the Court's discussion of State standing and the relaxed standing requirements for plaintiffs asserting *new* rights accorded by the Clean Air Act, it proceeded to evaluate Massachusetts' standing under the traditional three-pronged test laid out in *Lujan II*. *Id.* at 1455-59. The State did not need, nor was it actually given, any special solicitude by the Court. The central standing inquiry that the Court applied to uphold standing in *Massachusetts* is thus no different than that which applies here. Just as Massachusetts was able to establish it had standing by showing it had suffered an injury caused by defendants' contributions to global warming that could be redressed by court intervention, Kivalina has standing under this traditional analysis as demonstrated above.

If this Court decides sovereign entities are entitled to special solicitude in the analysis of standing, however, the Native Village of Kivalina must be considered under those relaxed standards. It is well established that States have standing to bring suit on behalf of their citizens in matters of public concern under the *parens patriae* doctrine. *See, e.g.*, *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945); *Tenn. Copper Co.* 206 U.S. at 237; *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). The interests that a sovereign may protect through *parens patriae* actions are quasi-sovereign interests "that the State has in the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982). Thus, while only sovereigns may bring *parens patriae* claims, the injury the sovereign seeks to remedy is not to its sovereignty, but rather to its larger population.

As a sovereign, Kivalina, like a State, has a "quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general." *Alfred L. Snapp & Son,* 458 U.S. at 607 (state can bring suit as quasi-sovereign entity on behalf of its residents); *see also Sisseton-Wahpeton Sioux Tribes v. United States*, 90 F.3d 351 (9th Cir.1996). And, like a State, the Native Village has a "stake in protecting [these] quasi-

[33] For their proposition that the Court provided "special solicitude" to Massachusetts, defendants' only authority is Chief Justice Roberts' *dissenting* opinion. Utilities MTD at 19.

sovereign interests." *Massachusetts*, 127 S. Ct. at 1454. Indeed, the Alaska Supreme Court recently upheld the right of Alaska Native Villages to bring suit as *parens patriae* on behalf of their members. *Dep't of Health & Soc. Servs. v. Native Vill. of Curyung*, 151 P.3d 388, 399-400 (Alaska 2006).[34]

The "special solicitude" discussion in *Massachusetts* centers on the unique relationship between States, as quasi-sovereigns, and the federal government. Like States, Tribes – including the Native Village of Kivalina – also possess a special relationship with the federal government.[35] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (Apr. 4, 2008). This special relationship flows from the fact that the pre-existing sovereignty possessed by Tribes was limited, but not abolished, by their inclusion within the territorial bounds of the United States. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (defining the nature of the federal tribal protectorate relationship as "*domestic dependent nations*" whose "*relation to the United States resembles that of a ward to his guardian*.") (emphasis added). The protectorate relationship did not extinguish tribal sovereignty because it was a "settled doctrine of the law of nations . . . that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger, and taking its

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[34] The Ninth Circuit applies the traditional *parens patriae* standing test from *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. at 607, to Tribes. *See Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001). Numerous other Ninth Circuit decisions, without analysis, have implicitly approved Tribes litigating under the doctrine of *parens patriae*. *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514 (9th Cir. 2005) ("The Tribe here is not suing as an aggrieved purchaser, or in any other capacity resembling a private person[].") (quotations omitted), *cert. denied*, 546 U.S. 1090 (2006); *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351 (9th Cir. 1996), *cert. denied*, 519 U.S. 1011 (1996); *In re: Blue Lake Forest Prods., Inc.*, 30 F.3d 1138 (9th Cir. 1994), *cert. denied*, 513 U.S. 1059 (1994).

[35] Defendants attempt to differentiate Alaskan Native villages such as Kivalina from Tribes in the lower 48 states to make the case that Kivalina lacks sovereign tribal status. Utilities MTD at 19-20 n. 8. This is specious: Kivalina is a federally-recognized Tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (Apr. 4, 2008).

protection." *Worcester v. Georgia*, 31 U.S. 515, 560-561 (1832). Because Tribes necessarily gave up certain rights – like the States – they too must be able to protect their sovereign interests in federal court.

The Utility Defendants ignore these obvious similarities and instead narrowly focus on the Native Village's lack of territorial reach as a reason for why it should not be granted special solicitude.[36] Utilities MTD at 20 n.8. But a sovereign's territoriality, though discussed, is not the primary concern in *Massachusetts*; it is merely used as a proxy to ascertain whether plaintiff Massachusetts had a stake in the outcome of the suit. *Massachusetts*, 127 S. Ct. at 1454 ("That Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete."). There is no need for such a proxy here: it is plainly apparent that the Native Village has a sufficient stake in ensuring the Tribe's survival and relocating Kivalina to safer land. Having territorial reach is wholly irrelevant to the standing analysis so long as the plaintiffs' "stake in the outcome" is demonstrably concrete, as it is here. *Id.*

Kivalina has properly pled factual averments that, if true, amply support its standing.

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[36] Defendants narrowly focus on the Native Village of Kivalina's lack of territorial reach, emphasizing that the Alaska Native Claims Settlement Act (ANSCA) revoked all existing tribal reservations in the State. But the existence of tribal lands or a reservation is not a prerequisite to the existence of sovereign tribal power. *John v. Baker*, 982 P.2d 738, 752, 755, 759 (Alaska 1999). Nothing in the ANSCA suggests Congress intended to "force Alaska Natives to abandon their sovereignty." *Id.* at 753. Nor does it affect the Native Village of Kivalina's ability to sue under the *parens patriae* doctrine. *Dep't of Health & Soc. Servs. v. Native Vill. of Curyung*, 151 P. 3d 388, 399-400 (Alaska 2006).

VI. DEFENDANTS' REMAINING ARGUMENTS ARE WITHOUT MERIT.

Defendants make a series of other arguments, some in only one paragraph, and none of which are persuasive.

A. Kivalina's Damages Are Not Speculative.

Only Defendant Peabody Energy Corporation argues that the Federal government's ongoing efforts to assist Kivalina with its environmental problems render Plaintiffs' damages speculative. This argument is without merit. In determining whether damages are speculative, the Ninth Circuit has "distinguished uncertain damage, which prevent[s] recovery, from an uncertain *extent* of damage, which d[oes] not prevent recovery; that is, the failure to establish an injury, from the not uncommon impression with regard to its scope." *Allen v. United Food & Commercial Workers Int'l Union, AFL-CIO*, 43 F.3d 424, 427-28 (9th Cir. 1994) (emphasis in original). Thus, as it is indisputable that Kivalina here has suffered current injuries, Peabody's challenge must be rejected. "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery." *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 73 (9th Cir. 1979) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565-66 (1931)). Kivalina's damages are certain, not speculative.

B. Peabody's Methane Emissions Are Not Expressly Authorized By Statute.

Peabody asserts the unique, but flawed, argument that it is not liable under tort law because the methane emissions emanating from its mining operations are expressly authorized by the Federal Mine Safety and Health Act of 1977 ("FMSHA"). Peabody MTD at 21. This simply is not so.

In making this argument, Peabody relies upon Cal. Civ. Code § 3482, which provides that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." While seemingly broad, this provision's exculpatory effect has long been circumscribed by the California courts. *Varjabedian v. City of Los Angeles*,

20 Cal. 3d 285, 291 (1977); *see also Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1101 (N.D. Cal. 2007) ("Section 3482 has been narrowly construed"); *Suzuki v. City of Los Angeles*, 44 Cal. App. 4th 263, 279 (1996) (noting that "decisions of [the California] Supreme Court have interpreted [Section 3482] very narrowly"); *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 100 (1979) (The Supreme Court of California has "consistently applied a narrow construction to section 3482 and to the principle therein embodied"). Section 3482, therefore, does not automatically prohibit all claims for nuisance that are premised on acts which are addressed by a statute. Rather, it is well-established that a:

> statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are by the express terms of the statute under which the justification is made, *or by the plainest and most necessary implication* from the powers expressly conferred, *so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury*.

Friends of H St. v. City of Sacramento, 20 Cal. App. 4th 152, 160 (1993) (emphasis in original) (quoting *Hassell v. San Francisco*, 11 Cal. 2d 168, 171 (1938)); *see also Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 938 (1972) (same). Applying this standard, it is clear that Peabody cannot utilize Section 3482's protection here.

The FMSHA neither expressly nor impliedly authorizes Peabody to emit methane into the environment in a manner that causes a nuisance. Consistent with its goal of ensuring the health and safety of miners, the FMSHA requires excessive methane to be ventilated in order to protect miners. 30 C.F.R. 75.323(b)(1). This requirement, which is the basis of Peabody's express authorization argument, mandates only that "changes or adjustments shall be made at once to the ventilation system" if the methane concentration exceeds 1.0 percent in a working place or an intake air course. 30 C.F.R. 75.323(b)(1). By no means does that requirement, or any other contained within the FMSHA, expressly authorize unfettered atmospheric methane emissions.[37] Even more, there is no indication

[37] Notably, Peabody does not attempt to argue that its emissions were necessary to maintain acceptable workplace concentrations of methane.

that when enacting the FMSHA, Congress intended to authorize Peabody's emissions and preempt Kivalina's nuisance claims. Surely, in seeking to protect the health and safety of miners, Congress did not intend to authorize methane-related harm to Kivalina or the environment. *See, e.g., Varjabedian*, 20 Cal. 3d at 285 (§ 3482 did not bar property owners' action for nuisance related to emissions of noxious odors from nearby municipal sewage treatment plan as the general authorization of municipal construction of the sewage plant did not "expressly" sanction the production of any particular levels of odors and such odors were not authorized by the "plainest and most necessary implication" from general powers conferred; it could not be fairly said "that the Legislature contemplated, to any extent, the creation of a malodorous nuisance when it authorized sewage plant construction."); *Suzuki*, 44 Cal. App. 4th at 279 (use that is expressly allowed by a valid use permit is subject to a nuisance action if the business operates in a manner that is injurious to persons living and working in the area); *Venuto v. Owens- Corning Fiberglas Corp.*, 22 Cal. App. 3d 116, 129 (1971) ("although the District was authorized to permit defendant to emit pollutants within the standard of permissible limits set by the District, we find nothing in the statue delineating the authority of the District which give it the express authority to permit commercial enterprises to engage in activities which the law pronounces to be a nuisance").[38] As such, Peabody's contention that its methane emissions are excused by the FMSHA must be rejected.

Peabody cites two cases in which the courts found that Section 3482 barred nuisance claims. As both cases involved unique and distinguishable circumstances, neither is relevant here. In particular, the decision to bar plaintiffs' nuisance claim in *Farmers Insurance Exchange v. State*, 175 Cal. App. 3d 494 (1985) was based on the fact that the act alleged to be a nuisance (i.e., the release of chemically destructive spray into the atmosphere) was precisely the act that was authorized by the express terms of the

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[38] *See also Farmy v. College Hous., Inc.*, 48 Cal. App. 3d 166 (1975) (exercise of a right legislatively granted, even though the conditions of the exercise thereof are complied with in all respects, will not immunize one from a nuisance claim).

statute in question. Conversely, here, the only conduct that is expressly authorized by the FMSHA is the ventilation of methane in highly concentrated areas so as to prevent injury to mine workers. Also, in *Friends of H. Street v. City of Sacramento*, the court barred plaintiffs' nuisance claims because "California courts have consistently held alleged nuisances arising from the construction, operation and maintenance of streets and highways to be within the protection of section 3482." 20 Cal. App. 4th at 152, 161 (1993). Such reasoning plainly does not apply here.

C. Kivalina's Claims Are Not Time-Barred.

This case is not time-barred under any possible statute of limitations. The court thus need not determine which statute of limitations applies. If California law applies as the Utilities contend, the case was timely filed and any argument to the contrary raises fact-intensive questions regarding continuing versus permanent nuisance and regarding the discovery rule that cannot be resolved on a Rule 12 motion. If state law were to be applied, it must be the Alaska limitations period applicable to public nuisance actions, under which this case also was timely filed. If federal law applies, this case is timely under the applicable federal statute of limitations or, at most, presents fact-intensive questions under the discovery rule. The Utilities' statute of limitations argument, which their co-defendants tellingly do not join, must be rejected.

1. The California Statute of Limitations Does Not Bar This Case.

If California law applies, there is no time bar for three reasons. First, Kivalina's public nuisance claim is statutorily exempted from the statute of limitations. Cal. Civ. Proc. Code § 3490 ("No lapse of time can legalize a public nuisance amounting to an actual obstruction of a public right."). This statute exempts municipalities and other public entities from the application of the statute of limitations. *See, e.g., California v. Kinder Morgan Energy Partners, L.P.*, 2008 U.S. Dist. LEXIS 15640, at *21 (S.D. Cal. Feb. 29, 2008) (public nuisance action by city seeking damages and other relief for groundwater pollution exempted from statute of limitations by section 3490); *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884) ("Nor can [a public nuisance] be

legalized by lapse of time."); *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal. App. 4th 1160, 1216 (1996); *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1144 (1991); *Turlock v. Bristow*, 103 Cal. App. 750, 755 (1930) ("Neither prescriptive rights, laches nor the statute of limitations is a defense against the maintenance of a public nuisance."); *see also Zack's, Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163, 1191 (2008) (exempting private party's public nuisance claim from statute of limitations). The Native Village of Kivalina and the City of Kivalina are indisputably public entities and thus are not subject to a limitations defense in prosecuting a public nuisance.

Second, the Utilities recognize the need to determine whether, under California law, the nuisance is a permanent or continuing one in order to resolve their statute of limitations argument. *See* Utilities MTD at 30 n.16. A continuing nuisance is never time-barred. But that issue is far too fact-intensive to be resolved on a motion to dismiss. *See, e.g., Beck Dev. Co.*, 44 Cal. App. 4th at 1222 ("[T]here is no single overriding test for determination whether a nuisance is permanent or continuing. The determination must be made on the facts and circumstances of each case with guidance from the various tests that have been set forth."). The tests include the abatability of the nuisance, whether the impact will "vary over time," *id.* at 1218, and whether the nuisance is "an ongoing or repeated disturbance," *Bartleson v. United States*, 96 F.3d 1270, 1275 (9th Cir.1996) (quotation omitted); *accord Arcade Water Dist. v. United States*, 940 F.2d 1265, 1268 (9th Cir. 1991) ("In determining under California law whether the nuisance is continuing, the most salient allegation is that contamination continues to leach into Arcade's Well 31.").

Many nuisances have characteristics of both continuing and permanent nuisances and the issue thus requires full factual development. *See, e.g., Bartleson*, 96 F.3d at 1275 (nuisance at issue has "the appearance of a continuing nuisance" but also "has aspects of a permanent nuisance"); *Arcade Water*, 940 F.2d at 1268-69 (dismissal of nuisance case was improper where nuisance might be continuing); *see also Kinder Morgan*, 2008 U.S. Dist. LEXIS at *24 n.4 (improper to limit damages to three year period preceding filing of complaint on motion to dismiss on theory of continuing nuisance). Here, although the

GAO Report was issued in December 2003, the complaint also alleges that the erosion problem is worsening over time and Kivalina has not yet been forced to evacuate the island. Compl. ¶¶ 4, 17, 185.

Third, assuming *arguendo* the Utilities are correct that the nuisance here would prove to be permanent, there still would be numerous factual questions under the California discovery rule. The rule still requires that Kivalina have had knowledge more than three years prior to filing the complaint that it had a ***claim*** in order to commence the running of the limitations period. *See O'Connor v. Boeing N. Am.*, 311 F.3d 1139, 1147 (9th Cir. 2002) (under California law "the discovery rule provides that a limitations period does not commence until a plaintiff discovers, or reasonably could have discovered, his claim"); *see also Bartleson*, 96 F.3d at 1277 (affirming district court holding that statute of limitations for permanent nuisance had not accrued given the proof at trial regarding plaintiffs' knowledge as to permanency of nuisance). The GAO Report merely identifies global warming as a cause of harm to numerous Alaskan villages but is silent as to the causes of global warming. It says nothing about whether global warming is natural or anthropogenic. Much less does it identify specific industries or corporations as responsible for the problem. Nor have defendants shown that Kivalina reviewed the report or was aware of the portions of it mentioning global warming. Indeed, Kivalina is a remote Arctic subsistence hunting and fishing village where most homes lack running water, not a think tank where government reports are parsed and debated. The GAO Report thus could not have made Kivalina "suspect," *O'Connor*, 311 F.3d at 1147-48, that global warming was not a natural phenomenon, much less that defendants had caused its injuries. Nor is there any evidence of Kivalina being contemporaneously aware of the report and its passing mention of global warming. The Utilities statute of limitations argument thus fails on numerous grounds. The GAO Report is woefully insufficient to commence the running of the statute of limitations under the discovery rule.

2. If a State Statute of Limitations Applies, It Must Be Alaska's.

The California statute of limitations almost certainly does not apply:

> Although the general rule is that a federal court sitting in diversity applies the conflict-of-law rules of the state in which it sits, jurisdiction in this case is based on [the Foreign Sovereign Immunities Act], not diversity. Therefore, federal common law applies to the choice of law rule determination.

Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 782 (9th Cir. 1991) (quotation and citations omitted). In a non-diversity case such as this, "there is a presumption that the law of the place where the injury occurred applies." *Id.* at 783.

Thus, for example, in *Marshall v. Kleppe*, 637 F.2d 1217, 1222 (9th Cir. 1980), a *Bivens* action under federal common law in which federal question was the sole basis of subject matter jurisdiction, the court held that it would apply the statute of limitation of the state "in which the federal cause of action arises." It is blackletter law that a cause of action arises in the place where the injury occurs. *Id.* at 1223 ("Marshall suffered his injury in California"); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004) ("[t]he courts unanimously hold that a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred; *i.e.*, the jurisdiction in which injury was received.") (quotation omitted).

Here, the injury occurred in Alaska, which has a six-year limitation period for suits involving waste and trespass to real property. Alaska Stat. § 09.10.050 (2008). In *Fernandes v. Portwine*, the Alaska Supreme Court expanded the six-year limitation period for waste and trespass to real property to include nuisance claims even where there was no direct trespassory invasion. 56 P.3d 1 (Alaska 2002). Trespass has been given both a narrow and broad meaning. *See State Farm Fire & Cas. Co. v. White-Rodgers Corp.*, 77 P.3d 729, 731 (Alaska 2003). The narrow meaning refers to an unlawful entry upon the land of another. *Id.* The broad meaning encompasses, in a statute of limitations context, any unlawful interference with one's person, property or rights. *Id.* Thus, defendants' argument based upon an alleged December, 2003 commencement of the running of the statute cannot bar this case under the applicable Alaska statute of limitations.

3. Kivalina's Case Is Timely Under the Applicable Federal Statute of Limitations.

Where a federal cause of action that contains no statute of limitations arises from a matter of uniquely federal concern and the realities of litigating the federal claim call for a nationally uniform statute of limitations, federal courts will borrow the closest federal limitations period. *See, e.g., Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002) (uniform federal statute of limitations required where international humans rights is a matter of federal concern as evidenced by treaties and where "reality of litigating" claims necessitates uniform approach); *Prostar v. Massachi*, 239 F.3d 669, 676-77 (5th Cir. 2001); *Int'l Ass'n of Machinists & Aerospace Workers v. TVA*, 108 F.3d 658 (6th Cir. 1997) (federal common law case); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1099-1100 (N.D. Cal. 2008) (federal common law case). Indeed, the Ninth Circuit has held that "a state statute of limitations should only be applied in the absence of a relevant federal statute of limitations." *Sierra Club v. Chevron USA, Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987); *see also Idaho Conservation League v. Boer*, 362 F. Supp. 2d 1211 (D. Idaho 2004) (relying on *Sierra Club* in Clean Air Act case).

Here, the case for application of a uniform federal statute of limitations is strong. First, as defendants concede, there is a uniquely federal interest in the subject of global warming. *See* Utilities MTD at 32-33. Indeed, the United States is party to a treaty that calls for stabilizing atmospheric greenhouse gases at levels that will avoid dangerous interference with the climate and has enacted statutory law calling for emissions reductions. *See* supra Section II.B. Second, the "realities of litigating" a global warming tort case are starkly interstate: the defendants here operate in numerous different states where they emit greenhouse gases, their greenhouse gas emissions are inherently interstate and international in nature due to the rapid dispersal of this form of pollution throughout the atmosphere, and the climatological reaction to this pollution is also inherently interstate and international in nature. Third, the Native Village of Kivalina is not an

ordinary plaintiff but a federally-recognized Tribe with federal sovereign rights.[39]

By contrast, California has no interest in the application of its statute of limitations here. California is simply the state where some of the defendants are headquartered and where all defendants engage in business. In fact, most of the defendants dispute the allegation that they do sufficient business in California to subject them to personal jurisdiction here. If *arguendo* those personal jurisdiction objections have any merit, then the cases against those defendants would have to be re-filed in their home states and, under the Utilities' argument here that the law of the state where the case is filed applies, the statute of limitations of each of those states would apply. This balkanized approach makes no sense. Rather, this is exactly the kind of interstate scenario that calls for a uniform federal rule. *See, e.g., TVA*, 108 F.3d at 666 ("an action against the TVA such as the one at issue here may well implicate its relations with its employees in many or all of the seven states in which it operates"); *Prostar*, 239 F.3d at 676 ("The application of state conversion law in each of the fifty states would result in widely varying limitations periods . . . [because] cable companies engage in multistate activities"). Indeed, application of a patchwork of state statutes of limitation would frustrate the very national global warming policies that defendants point to throughout their briefs. *See Sierra Club*, 834 F.2d at 1522 (national environmental policies frustrated by state statutes of limitations).[40]

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[39] In *Alaska v. Native Village of Venetie Tribal Government* 522 U.S. 520 (1998), the Court held that Alaskan tribal lands are not "Indian country" under 18 U.S.C. 1151 but was careful to observe that its decision dealt only with the land question – not the status of the Tribe itself. *See id.* at 531 n.5 ("it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government" in order to be considered federally-protected "Indian country") (emphasis added).

[40] Defendants cite *North Star Steel Company v. Thomas*, 515 U.S. 29 (1995), in which the Supreme Court applied a state statute of limitations to a claim under the Worker Adjustment and Retraining Notification Act ("WARN"). But as the Eleventh Circuit observed, "an action under WARN almost always will involve an incident at a single plant in a single state" and thus *North Star* does not control in an inherently multi-state case such as this. *TVA*, 108 F.3d at 666. Defendants also cite *Barajas v. Bermudez*, 43 F.3d 1251 (9th Cir. 1994), but in that case the plaintiffs never identified a federal cause of action as a closer analog than state law, *see id.* at 1256, whereas Kivalina does so here.

The relevant federal statute of limitations here is found at 28 U.S.C. § 2415(b), which provides for a six year statute of limitations for trespass actions. Trespass and nuisance are close cousins in environmental cases. *See, e.g., Reynolds Metals Co. v. Martin*, 337 F.2d 780, 783-84 (9th Cir. 1964) (holding that trespass and nuisance "overlap" and the "conduct complained of is both a trespass and a nuisance"). Federal common law trespass is a particularly broad doctrine. *See United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1550 n.8 (9th Cir. 1994) ("The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass, including actions for ejectment, accounting of profits, and damages."). Alternatively, the three-year statute of limitations of section 2415(b) for an "action for money damages . . . founded upon a tort" would apply if the court were for some reason to reject the trespass limitations period. Although this limitations period is the same length as the California limitation period urged by the Utilities, it is subject to a different discovery rule. *See O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1148 (9th Cir. 2001) (distinguishing California law because "we reject an interpretation of the federal discovery rule that would commence limitations periods upon mere suspicion of the elements of the claim"). Section 2415(b) would apply in a federal common law public nuisance case brought by the United States, which is a closer analogy to this federal public nuisance case than state-law public nuisance.[41]

Here, the Utilities argument, predicated on the December 2003 GAO Report, fails under the applicable six-year statute of limitations. And even if the three-year federal

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[41] The Clean Air Act and the Clean Water Act are federal codifications of public nuisance but they contain no statutes of limitation. Section 2415 applies to these statutes. *See United States v. Dae Rim Fishery Co.*, 794 F.2d 1392, 1394-95 (9th Cir. 1986) (finding six year period of section 2415(a), governing federal contract actions, applicable in Clean Water Act case due to quasi-contractual nature of action for recovery of cleanup costs and resolving issue under three-year general tort provision of section 2415(b) in the alternative); *see also Sierra Club*, 834 F.2d at 1521-22 (citizen suit for civil penalties payable to government under Clean Water Act governed by five year limitations period of 28 U.S.C. § 2462 applicable to actions by government for civil penalties).

limitations period of section 2415(b) applicable to tort actions generally were to apply, the fact-intensive issue of the discovery rule cannot be resolved on a motion to dismiss. *See O'Connor*, 311 F.3d at 1150 ("Courts routinely recognize the 'fact-intensive nature' of the determination of when a plaintiff is on notice of a claim."). As set forth *supra* Factual Background Section C, the factual basis for the Utilities' limitations argument – the GAO Report – merely mentions global warming as a cause of harm to numerous Alaskan villages but is silent as to the cause of global warming. This is insufficient under the federal discovery rule. *O'Connor*, 311 F.3d at 1150 (denying summary judgment where defendants failed to establish that plaintiff knew or should have known that the defendant's "contamination was the cause of their diseases").

This case is not time-barred under any applicable limitations period.

D. The Court Should Not Address State-Law Issues.

Because federal common law applies to this interstate pollution case, state common law does not, and cannot, apply. *Ouellette*, 479 U.S. at 488 ("the implicit corollary of [*Milwaukee I*] was that state common law was preempted"); *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1204 (9th Cir. 1988) ("If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.") (quoting *Milwaukee II*, 451 U.S. at 313 n.7). Kivalina has pled its state-law claims as a protective measure only in order to prevent the application of *res judicata* in a subsequent state court case under state law in the event of a dismissal of the federal claim here.[42] Kivalina does not wish to litigate its state-law claims in federal court

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[42] *See, e.g., Kale v. Combined Ins. Co.*, 924 F.2d 1161, 1165 (1st Cir. 1991) ("[w]hen a plaintiff pleads a claim in federal court, he must, to avoid the onus of claim-splitting, bring all related state claims in the same lawsuit so long as any suitable basis for subject matter jurisdiction exists."); *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1368 (7th Cir. 1988) (same); *San Antonio Indep. School Dist. v. McKinney*, 936 S.W.2d 279, 284 (Tex. 1996) ("Because the federal court had jurisdiction to consider McKinney's omitted state law claims against the school district and its board of trustees, res judicata precludes subsequent litigation of those claims in state court."); *ElGabri v. Lekas*, 681 A.2d 271, 280 (R.I. 1996) ("once [the plaintiff's] federal action was fully litigated in the United States District Court, he was thereafter

because federal common law governs Kivalina's cause of action.

If the court should disagree and dismiss the federal claims, it should dismiss the state-law claims without prejudice so Kivalina may re-file them in state court, the proper forum. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991); *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) (district courts should decline jurisdiction over pendent claims when the federal claims are dismissed before trial); *Dean v. City of Fresno*, 546 F. Supp. 2d 798, 821 (E.D. Cal. 2008) ("The general rule is 'when federal claims are dismissed before trial . . . pendent state claims should also be dismissed'") (citing cases). Such a dismissal is without prejudice. *See Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (9th Cir. 1999) ("[d]ismissals for lack of jurisdiction should be . . . without prejudice so that a plaintiff may reassert his claims in a competent court.") (citation and internal quotation marks omitted); *People of State of California v. Gen. Motors Corp.*, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) (state-law global warming claims dismissed without prejudice where court dismissed federal claim). In fact, as the Utility defendants concede, this is the *only* proper result if the Court dismisses the federal claims on subject matter jurisdiction grounds. *See* Utilities MTD at 31 (citing *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991)). The Court should thus decline to address defendants' arguments of state law.

E. Congress Has Not Preempted Kivalina's State Common Law Nuisance Claim.

If the Court decides to address issues of state law on the merits, it should permit Kivalina's state law nuisance claim to proceed because defendants have no plausible argument that it is preempted. There are several ways in which Congress can preempt

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foreclosed in his state action from going forward with any cause of action that could have been joined in his previously litigated federal action."); *McLearn v. Cowen & Co.*, 455 N.E.2d 1256, 1257 (N.Y. 1983) (plaintiff permitted to litigate state-law claim following dismissal of federal case arising from same facts only because plaintiff obtained amended order of dismissal from federal court stating that dismissal was "without prejudice to any claim which plaintiff may have under state law.").

state action: (1) express preemption, where Congress explicitly preempts state law; (2) conflict preemption, where state law conflicts with federal law; and (3) field preemption, where Congress legislates either so comprehensively that it leaves no room for state regulation or where the field is one of dominant federal interest. *Hillsborough County, Florida v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985). None of these exist here.

1. There Is No Express Preemption Because There Is No Explicit Preemption Clause In Any Statute Indicating That Congress Expressly Preempted Kivalina's Cause of Action.

Defendants do not identify any preemption clause in a federal statute that would expressly preempt Kivalina's cause of action. (The relevant statute is to the contrary; the Clean Air Act includes a saving clause which suggests that it was not meant to supersede preexisting state laws. 42 U.S.C. § 7604(e)). There can be no express preemption without an explicit preemption clause.

2. There Is No Conflict Preemption Because There Is No Conflict Between Kivalina's Cause of Action and Any Federal Statute.

Defendants sometimes appear to be suggesting a form of conflict preemption: As the Utility defendants put it, state law is preempted "if there is an actual conflict between federal and state law, or where compliance with both is impossible," *see* Utilities MTD at 32, or, as Peabody claims, the appropriate test is "where a state tort action would have a regulatory effect that conflicts with federal law, the tort action is preempted by that federal law" Peabody MTD at 17. However, conflict preemption only exists where there is a specific federal statute that creates a clear conflict with a state tort-law action. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), for example, a case on which defendants rely, the Supreme Court held that the National Traffic and Motor Vehicles Safety Act's standards for phasing airbag technology and other passive-restraints into newly manufactured cars preempted state tort liability by car companies for failure to install airbags. A state-law action imposing liability for a failure to install airbags would "stand as an obstacle to the accomplishment and execution" of the regulation, which

mandated a phased deployment of airbags and other equivalent safety devices. *Id.* at 883, 886.

Here, however, defendants can point to no specific, identifiable conflict with a federal statute. In fact, it is clear that no such conflict exists. Peabody argues that allowing tort liability for greenhouse gas emissions would be inconsistent with "Congress's authorization of EPA to regulate greenhouse gas emissions under the Clean Air Act, but only after that agency has made a determination that a particular greenhouse gas endangers human health." Peabody MTD at 17. However, as explained in Section III, the EPA has *not yet decided* whether to make an endangerment finding with respect to greenhouse gases under the Clean Air Act. There cannot possibly be preemption in that situation. "State law is not preempted whenever an agency has merely 'studied' or 'considered' an issue; state law is preempted when federal *law* conflicts with state law." *Fellner*, 539 F.3d at 254. There is no preemption even where the agency affirmatively decides not to regulate because such a decision simply means that the conduct did not satisfy the criteria for regulation in the statute, *see Sprietsma v. Mercury Marine*, 537 U.S. 51, 60-62, 66-68 (2002); there can be even less of a preemption issue where the agency has not yet made a decision either way.

Similarly, the Utility defendants argue that "any state-law damages award would necessarily be premised on a finding that a defendant had exceeded some 'acceptable' or 'reasonable' cap on emissions." Utilities MTD at 32. However, that is simply not the case. Kivalina's action does not seek to impose injunctive relief; it only seeks compensation for the damage it has suffered. The jury will not have to make a determination whether defendants' emissions are reasonable in some broad public policy sense; rather, they will determine whether the emissions resulted in an unreasonable interference with Kivalina's use of its property.

3. There Is No Field Preemption Because The Federal Government Has Not Comprehensively Occupied the Field of State-Law Nuisance Actions.

At times, defendants appear to be arguing on a theory of field preemption. For example, the Utility defendants argue that Congress has a "coordinated, comprehensive national scheme." Utilities MTD at 33. But this scheme is nothing more than the hodgepodge of regulations and executive orders discussed in Section II.B. Generally, in order for federal field preemption to occur, the field must already be occupied by a federal statute "so pervasive" that it leaves "no room for the States to supplement it" or the federal interest in the subject must be "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Of course, in order for this to occur, there must be a "pervasive" federal statute or "federal system" in place. The defendants have not identified any such statute or system which meets this criteria. The CAA does not meet this criteria for the reasons identified in Section II.B, and several courts have expressly held that the CAA does not preempt state common-law claims for pollution damages. *See, e.g., Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332, 342-44 (6th Cir. 1989); *Technical Rubber Co. v. Buckeye Egg Farm, L.P.*, No. 2:99-CV-1413, 2000 U.S. Dist. LEXIS 8602, at *16 (S.D. Ohio June 16, 2000); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1285 (W.D. Tex. 1992). The CAA explicitly foresees a role for state action: It was Congress express purpose to "encourage or otherwise promote reasonable Federal, *State, and local* governmental actions, consistent with the provisions of this act for pollution prevention." 42 U.S.C. § 7401(c) (emphasis added). *See Nat'l Audubon Soc'y v. Dept. of Water*, 869 F.2d 1196, 1213 (9th Cir. 1988) (Reinhardt, J., dissenting) (citing 42 U.S.C. §§ 7409, 7410 (1982)) (noting that the Clean Air Act "continues to rely primarily on national air quality standards *that are implemented through state plans*.") (emphasis added). Although it only expressly applies to the citizen-suit provision, the saving clause, which states that "[n]othing in this section shall

restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation *or to seek any other relief* (including relief against the Administrator or a State agency)," 42 U.S.C. § 7604(e) (emphasis added), provides further support that Congress did not intend to preempt state common law actions.[43]

4. There Is No Conflict Between Kivalina's State-Law Nuisance Action and the President's Foreign Affairs Power.

Finally, defendants argue that a state common law cause of action will somehow interfere with foreign affairs. Utilities MTD at 34, Peabody MTD at 17-18. However, it is hard to see how this could be the case – Kivalina's action will not set an emissions limit, so there could be no express conflict with any emissions limits the President may eventually agree to, nor is it clear how compensating Kivalina for its injuries will somehow affect the President's power to negotiate whatever treaties he or she will negotiate related to global warming. Defendants' authorities on this issue each involve an express federal policy that clearly conflicts with a state policy: executive agreements with European nations that clearly conflicted with a California statute regarding insurance policies for Holocaust victims, *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003); federal standards for escape hatch regulations that clearly conflicted with the negligence-based standards that would have been imposed in a state lawsuit, *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); an attempt by the state of Massachusetts to impose sanctions on Burma that differed from the federal sanctions regime, *Crosby v.*

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[43] In fact, even if the CAA were as comprehensive as the CWA Kivalina's action would still be saved. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), for example, the Supreme Court held that the CWA – which the Court declared to have occupied the field of water pollution in *Milwaukee II* – did not pre-empt all state law nuisance actions but only those that could lead to inconsistent pollution standards. The Court held that Vermont could not sue under Vermont nuisance law (among other reasons, because it could result in multiple conflicting discharge standards), but Vermont could sue under New York nuisance law because the Clean Water Act explicitly permitted states to impose stricter standards on sources located within their states. *Id.* at 497-98.

National Foreign Trade Council, 530 U.S. 363 (2000); or an Oregon statute governing probate procedures in Oregon for foreign residents that effectively required determinations by Oregon courts of the policies of foreign countries, *Zschernig v. Miller*, 389 U.S. 429 (1968). Here, however, there is no express executive agreement or treaty with a foreign nation that conflicts with Kivalina's lawsuit. Once more, "there is no federal preemption *in vacuo*," *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988), and defendants have not identified any specific action of the executive or legislative branch, whether in foreign affairs or any other field, that could create a conflict with Kivalina's cause of action.

F. Kivalina Has Stated Proper State Law Claims.

The Utilities challenge Kivalina's state law public nuisance claims. They regurgitate their causation arguments to which Kivalina already has responded. *See* Section I.C.2. They further challenge Kivalina's ability to establish a duty. However, this case sounds primarily in intentional nuisance, not negligent nuisance. Intent is established in nuisance where "the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests are occurring or are substantially certain to follow." Prosser & Keeton, *supra*, § 87. *See supra* I.C.1.

The Utilities also challenge the element of "special injury" that controls whether a private plaintiff may sue in public nuisance. *See* Utilities MTD at 39 (contesting "unique injury").[44] Assuming *arguendo* that Plaintiffs are considered private plaintiffs, which they are not, Plaintiffs satisfy the traditional public nuisance rule limiting the private right of action to those with special injury. Special injury generally is defined as injury different in kind from that suffered by the general public. *See* Restatement (Second) of Torts § 821C.[45] Physical harm to property or interference with use and enjoyment of property

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[44] Defendants have not argued that there is any "unique injury" requirement under Kivalina's federal common law of public nuisance claim.

[45] The Utilities distort the meaning of "general public" by narrowly defining it as a subset of the public that is similarly situated to Kivalina, i.e., other Alaskan villages. *See* Utilities MTD

constitutes injury different in kind. *See, e.g., Ariz. Copper Co. v. Gillespie*, 230 U.S. 46, 57 (1913) ("appellee alleged a special grievance to himself affecting the enjoyment and value of his property rights as a riparian owner"); *City of Portland v. Boeing Co.*, 179 F. Supp. 2d 1190, 1195–96 (D. Or. 2001) ("When a public nuisance interferes with an individual's right to use and enjoy his real property, the individual suffers special injury and may bring an action against the perpetrator of the nuisance.") (quotation omitted); *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 712 P.2d 914, 918 (Ariz. 1985) ("[A]n injury to plaintiff's interest in land is sufficient to distinguish plaintiff's injuries from those experienced by the general public and to give the plaintiff-landowner standing to bring the action.") (citations omitted). The reason for this rule is that "every plot of land [is] traditionally unique in the eyes of the law." William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1018 (1966). The Plaintiffs have alleged that they own real property that is being destroyed to such an extent that the village must relocate or face extermination. Compl. ¶¶ 185-188.[46] Moreover, the members of the Native Village of Kivalina are injured in their real property and those interests are properly represented here by the Tribe under the *parens patriae* doctrine. *See supra* Section I.B.1.

Degree also is relevant to the different-in-kind analysis. Restatement (Second) of Torts § 821C cmt. c ("[I]n determining whether there is a difference in the kind of harm, the degree of interference may be a factor of importance that must be considered."). Plaintiffs have alleged that their village is threatened with destruction such that they must

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at 39 n.23. This is incorrect. For example, in *In re Exxon Valdez*, 1994 WL 182856 (D. Alaska Mar. 23, 1994), *aff'd* 104 F.3d 1196 (9th Cir. 1997), cited by the Utilities, the court applied the special injury rule by comparing the plaintiffs' injury to that of all people who "reside in the Lower 48 states." *Id.* at *2.

[46] Contrary to the Utilities' assertion, Kivalina has not alleged that its injuries are "common to native Alaskan coastal villages." *See* Utilities MTD at 39. Rather, Kivalina has alleged that the impact of global warming is "more certain and severe" on it than on others in the general population. Compl. ¶ 188.

relocate or face extermination, *see* Compl. ¶ 185, and thus have injury that is greater in degree than the average member of the general public.

Defendants' special injury argument improperly relies on cases addressing indirect economic harm, rather than harm to real property, and thus these cases are not on point. *See 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 293–94 (N.Y. 2001) (plaintiff suffered pecuniary losses from reduced business related to street closures due to a building collapse); *Koll-Irvine Ctr. Prop. Owners Ass'n v. County of Orange*, 24 Cal. App. 4th 1036, 1040 (1994) (plaintiffs suffered "mental anguish, risk of higher insurance premiums, diminished property values and reduced usefulness of its premises"). Similarly, cases not involving harm to the plaintiff's real property are factually distinguishable and unavailing. *See In re Exxon Valdez*, 1994 WL 182856, at *2 (D. Alaska Mar. 23, 1994) (no special injury in maritime nuisance case where injury was to natural resources and "[a]ll Alaskans have the right to lead subsistence lifestyles, not just Alaska Natives"), *aff'd* 104 F.3d 1196 (9th Cir. 1997). Plaintiffs have alleged injury different in kind from that of the general public.

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss should be denied.

Dated: September 18, 2008

Respectfully submitted,

LAW OFFICES OF MATTHEW F. PAWA, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2008, I caused a copy of the foregoing PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' RULE 12(b)(1) AND 12(b)(6) MOTIONS TO DISMISS and PROPOSED ORDER DENYING MOTIONS TO DISMISS to be delivered to counsel to all parties via the Court's Electronic Case Filing system.

Dated: September 18, 2008

/S/ Luke W. Cole
Luke W. Cole

CERTIFICATE OF COMPLIANCE WITH GENERAL ORDER 45 ATTESTATION OF SIGNATURE

I, Luke W. Cole, hereby attest that concurrence in the filing of PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' RULE 12(b)(1) AND 12(b)(6) MOTIONS TO DISMISS has been obtained from all of the signatories.

Dated: September 18, 2008

/S/ Luke W. Cole
Luke W. Cole

Attorneys for Plaintiffs
NATIVE VILLAGE OF KIVALINA and
CITY OF KIVALINA