

No. 09-17490

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NATIVE VILLAGE OF KIVALINA; CITY OF KIVALINA,

Plaintiffs-Appellants,

v.

EXXONMOBILE CORPORATION; BP P.L.C.; BP AMERICA, INC.;  
BP PRODUCTS NORTH AMERICA, INC.; CHEVRON CORPORATION;  
CHEVRON U.S.A., INC.; CONOCOPHILLIPS CORPORATION; THE  
AES CORPORATION; AMERICAN ELECTRIC POWER COMPANY, INC.;  
AMERICAN ELECTRIC POWER SERVICES CORPORATION;  
DUKE ENERGY CORPORATION; DTE ENERGY COMPANY;  
EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS  
COMPANY; PINNACLE WEST CAPITAL CORPORATION; THE SOUTHERN  
COMPANY; DYNEGY HOLDINGS, INC.; RELIANT ENERGY, INC.;  
XCEL ENERGY, INC.,

Defendants-Appellees.

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

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**APPELLANTS' OPENING BRIEF**

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## **JURISDICTIONAL STATEMENT**

Subject matter jurisdiction is proper under 28 U.S.C. § 1331 because the case asserts a claim under federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). Appellate jurisdiction is proper under 28 U.S.C. § 1291 because the appeal is from a final judgment disposing of all claims.

This appeal is timely under Fed. R. App. P. 4(a)(1). The district court entered an Order granting defendants' motions to dismiss for lack of subject matter jurisdiction on October 15, 2009. Plaintiffs filed a Notice of Appeal on November 5, 2009.

## **ISSUES PRESENTED**

1. Whether Kivalina's allegations that defendants have contributed to global warming through their massive emissions of greenhouse gases, that some of the defendants have conspired and that all defendants have acted in concert, and that global warming threatens Kivalina with imminent destruction through coastal erosion, state proper claims of federal nuisance, conspiracy and concert of action upon which relief may be granted?
2. Whether a case alleging liability under the federal common law of public nuisance, conspiracy, and concert of action from defendants' contributions to global warming presents a nonjusticiable political question?

3. Whether the governing bodies of Kivalina – a municipality and a federally-recognized Indian tribe – have alleged sufficient facts to support standing when they have alleged that defendants’ nuisance, conspiracy and concert of action have contributed to global warming and thereby to loss of the village’s coastline such that the village must now relocate or face complete destruction?
4. Whether the Clear Air Act preempts Kivalina’s damages remedy for interstate pollution contributing to global warming under the federal common law of public nuisance?

### **STATUTORY ADDENDUM**

Pursuant to L.R. 28-2.7, a statutory addendum is submitted with this brief.

### **STATEMENT OF THE CASE**

The Native Village of Kivalina and the City of Kivalina (collectively “Kivalina”), bring this case for damages seeking compensation for the harm to which defendants – electric utilities, oil companies and the nation’s largest coal company – have contributed by their massive emissions of greenhouse gases (“GHGs”) and production of fossil fuels. Defendants’ GHG emissions have directly contributed to global warming, a public nuisance that is rapidly melting the sea ice that formerly protected the village from harsh fall and winter storms. Both

the United States Army Corps of Engineers and the General Accounting Office (“GAO”) have determined that Kivalina needs to relocate immediately, at a cost of between \$95 million and \$400 million, or be destroyed.

Kivalina brings this action under the federal common law of public nuisance to recover the damages it has suffered due to defendants’ GHG emissions and other conduct. Under *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (“*Milwaukee I*”), interstate pollution is governed by the federal common law of public nuisance and presents a federal question under 28 U.S.C. § 1331. Under *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 n.14 (1981) (“*Milwaukee II*”), the federal common law of nuisance applies unless and until Congress has displaced it with a statutory remedy, which has not occurred here.

Kivalina also alleges concert of action against all defendants. Further, it brings a conspiracy claim against certain defendants who have conspired to sow doubt about global warming science and create a false “scientific debate” about the causes and consequences of global warming so they could continue emitting GHGs. Kivalina has pled state-law nuisance claims in the alternative in order to preserve them. Kivalina sued as many of the nation’s most important contributors to the problem of global warming as it could in a single venue; three of the defendants are headquartered in California and, as alleged in the complaint, the

others engage in business in California.

Defendants filed five separate motions to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Some of the defendants also moved to dismiss for lack of personal jurisdiction, but the district court deferred full briefing. On October 15, 2009, the district court entered an Order dismissing this case on the basis of the political question doctrine and standing. ER 1-24. Kivalina filed a timely appeal.

Shortly before the district court issued its order dismissing this case, the Second Circuit reinstated a similar global warming case brought under the federal common law of public nuisance. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *petition for reh'g or reh'g en banc denied*, \_\_\_ F.3d \_\_\_ (Mar. 5, 2010). The Second Circuit held that the plaintiffs (states, a municipality and land trusts), who sought only injunctive relief, had stated a proper claim, had standing, and were not barred by the political question doctrine. *See also Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. Oct. 16, 2009) (holding that plaintiffs alleging property damage due to global warming under Mississippi law had standing and case did not present political question), *vacated, reh'g en banc granted*, 2010 U.S. App. LEXIS 4253 (5th Cir. Feb. 26, 2010). In its dismissal here, the district court stated its disagreement with the Second Circuit's decision in *Connecticut*.

## STATEMENT OF FACTS

The Native Village of Kivalina and the City of Kivalina are the governing bodies of an Inupiat Eskimo village of approximately 400 people. Excerpts of Record (“ER”) at 40, 43 (Complaint ¶¶ 1, 15). Kivalina is located on the tip of a six-mile barrier reef on the northwest coast of Alaska, about 70 miles north of the Arctic Circle. ER at 40, 43 (Complaint ¶¶ 1,15). Plaintiff Native Village of Kivalina is a self-governing, federally recognized Indian tribe established under the Indian Reorganization Act of 1934. ER at 43 (Complaint ¶ 13). Plaintiff City of Kivalina is a municipality incorporated in 1969 under Alaska state law. ER at 43 (Complaint ¶ 14). Kivalina and many of its citizens and residents own property and buildings in the village. ER at 43 (Complaint ¶¶ 13-14).

### **A. Global Warming Is Occurring.**

There is an overwhelming scientific consensus that anthropogenic emissions of GHGs, primarily carbon dioxide from fossil fuel combustion and methane releases from fossil fuel harvesting, are changing the Earth’s climate. ER at 72 (Complaint ¶¶ 132-134). GHG emissions from fossil fuels mix together in the atmosphere to form an indivisible whole, raising the GHG concentration worldwide and trapping atmospheric heat globally. ER at 70-71 (Complaint ¶¶ 123-127). Since the mid-nineteenth century, when global surface temperatures

were first recorded, the eight warmest years have occurred since 1998, and the fourteen warmest years have occurred since 1990. ER at 71, 83 (Complaint ¶¶ 128, 181). The Arctic is warming at approximately twice the average global rate. ER at 71 (Complaint ¶ 129). The Arctic Climate Impact Assessment (“ACIA”), a federally-sponsored evaluation of Arctic climate change, recently found that the Arctic climate is heating rapidly and that coastal communities face increasing exposure to storms and thawing ground, with severe consequences for buildings and infrastructure. ER at 83 (Complaint ¶ 184).

**B. Defendants’ Contributions to Global Warming.**

Defendants and their predecessors in interest have directly emitted large quantities of GHGs and have done so for many years. ER at 40, 83 (Complaint ¶¶ 3, 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 exploration, production and refining of petroleum and chemical manufacturing. ER at 78 (Complaint ¶¶ 163, 164). Additionally, the Oil Companies engage in coal mining, power generation, transmission of natural gas, and metals production, which also directly emit carbon dioxide, methane and other

GHGs. ER at 79 (Complaint ¶ 165).

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. ER at 80 (Complaint ¶ 170). Electric power plants that burn fossil fuels are the largest source of carbon dioxide emissions in the United States, emitting approximately 2.6 billion tons of carbon dioxide each year. ER at 81 (Complaint ¶ 172). The Power Companies are among the largest emitters of carbon dioxide in the United States. In 2004, just 19 companies accounted for 50 percent of U.S. electricity emissions. ER at 80 (Complaint ¶ 171).

Defendant Peabody Energy Corporation (“Peabody”), a coal company, directly emits large quantities of GHGs, principally methane, from its mining operations. ER at 82 (Complaint ¶ 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. ER at 82 (Complaint ¶ 178).

### **C. Global Warming Impacts on Kivalina.**

Kivalina's existence as a community depends on the sea ice that forms around the village in fall, winter, and spring and that protects it from the coastal storms that batter the coast of the Chukchi Sea. ER at 40, 43 (Complaint ¶¶ 4, 16). However, due to global warming, this landfast sea ice forms later in the year, attaches to the coast later, breaks up earlier, and is less extensive and thinner, subjecting Kivalina to greater coastal storm waves, storm surges and erosion. ER at 43, 84 (Complaint ¶¶ 16, 185). This rapidly accelerated erosion process is destroying the land upon which Kivalina is located. ER at 40, 43 (Complaint ¶¶ 4, 16). Houses and buildings are in imminent danger of falling into the sea. ER at 40 (Complaint ¶ 4). Critical infrastructure is threatened with permanent destruction. *Id.* Kivalina must be relocated soon or be abandoned and cease to exist. ER at 40, 44, 84 (Complaint ¶¶ 1, 4, 17, 185).

The U.S. Army Corps of Engineers and the GAO have both concluded that Kivalina must be relocated due to global warming. ER at 40 (Complaint ¶ 1). The Corps, in a 2006 report, concluded that global warming has affected sea ice adjacent to Kivalina. ER at 84 (Complaint ¶ 185). The GAO, in a 2003 report, reached similar conclusions regarding Kivalina: “[I]t is believed that the right combination of storm events could flood the entire village at any time.” ER at 84

(Complaint ¶ 185). The GAO concluded that “[r]emaining on the island . . . is no longer a viable option for the community.” *Id.* The GAO and Corps have estimated the relocation cost at \$95 million to \$400 million. ER at 40 (Complaint ¶ 1).

#### **D. The Conspiracy Defendants’ Actions.**

Many energy 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”), have engaged in a long campaign to deceive the public about the science of global warming. ER at 86 (Complaint ¶ 189). Conspiracy Defendant ExxonMobil has been particularly active, for example, by channeling \$16 million over the 1998 to 2005 period to forty-two organizations that promote disinformation on global warming. ER at 95 (Complaint ¶ 231). Initially, the Conspiracy Defendants attempted to persuade the public that global warming was not occurring; the campaign later switched its focus to persuading the public that global warming is good for the planet or that, even if there may be ill effects, there is not enough scientific certainty to warrant action. ER at 86 (Complaint ¶189).

The Conspiracy Defendants engaged in this public relations campaign even

though they knew its premises to be false. In December, 1995, one of the Conspiracy Defendants' front groups, the Global Climate Coalition ("GCC"), admitted to its members in an internal document that: "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." ER at 90 (Complaint ¶ 205). At a GCC meeting in February, 1996, a trade association presented information to its members that some global warming impacts would be "potentially irreversible" and include "significant loss of life." ER at 90 (Complaint ¶ 207). Despite this knowledge, the Conspiracy Defendants continued to publicize "contrarian" theories about global warming and to downplay the threats from global warming so they could continue emitting GHGs. ER at 90.

#### **E. Federal Global Warming Policy.**

Although no federal statute, regulation, or treaty limits GHG emissions, several laws recognize that global warming is harmful and establish a policy that such emissions should be reduced. 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.

Similarly, 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.”

The Clean Air Act (“CAA”) does not provide any cause of action for damages for air pollution injuries. The CAA’s citizen-suit provision only provides for a civil action for violation of a CAA emission standard or limitation (or of a government order with respect to a CAA emission standard or limitation). 42 U.S.C. § 7604(a)(1). A district court has authority to issue orders to enforce the CAA’s emissions standards or order the Administrator to do so and to apply any appropriate civil penalties. 42 U.S.C. § 7604(a). But neither the citizen-suit provision nor anything else in the CAA or any other statute or regulation addresses compensatory damages remedies for injuries caused by air pollution.

The United States Environmental Protection Agency (“EPA”) does not

currently regulate GHG emissions under the CAA. Although the CAA requires research into technologies to reduce emissions and requires electric utilities to report their carbon dioxide emissions to EPA, those provisions do not limit emissions. *See* 42 U.S.C. § 7403(g)(1); 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.”). In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that the CAA authorizes EPA to regulate GHG emissions from new motor vehicles in the event that EPA determines such emissions meet the test set out in Section 202(a), 42 U.S.C. § 7521(a), *i.e.*, that they cause or contribute to air pollution and endanger public health or welfare. *Id.* at 528-35. EPA has issued such findings in response to *Massachusetts*. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1). EPA found that the “combined emissions of [six] greenhouse gases from new motor vehicles and new motor vehicle engines *contribute* to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a).” *Id.* at 66,496 (emphasis added). EPA’s contribution finding was based on the fact that new motor vehicle emissions are responsible for about four percent of global GHG

emissions and are the second largest U.S. source of GHG emissions after the electricity generating sector. *Id.* at 66,499. These facts “clearly establish that these emissions contribute to greenhouse gas concentrations.” *Id.*; *see also id.* at 66,506 (contribution finding does not require that “emissions from any one sector or group of sources are the sole or even the major part of an air pollution problem”). EPA also found that, given the nature of global warming, a contribution finding was warranted “at lower percentage levels of emissions than might otherwise be considered appropriate when addressing a more typical local or regional air pollution problem.” *Id.* at 66,538. Finally, EPA found that during this century, the “largest warming [in the United States] is projected to occur in winter over northern parts of Alaska.” *Id.* at 66,519; *see also id.* at 66,533 (“Reductions in Arctic sea ice increases extreme coastal erosion in Alaska, due to the increased exposure of the coastline to strong wave action.”).

EPA has recently proposed regulations concerning GHG emissions from motor vehicles. *See Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 74 Fed. Reg. 49,454 (Sept. 28, 2009). EPA has not indicated how, if at all, the endangerment and cause or contribute findings under CAA Title II (motor vehicles) would affect any potential regulation under Title I (stationary sources).

As EPA has stated: “An endangerment finding under one provision of the Clean Air Act would not by itself automatically trigger regulation under the entire Act.” EPA, Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act, <http://epa.gov/climatechange/endangerment.html>.

The United States is a party to the United Nations Framework Convention on Climate Change (“Framework Convention”), 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.” Framework Convention, art. IV § (2)(a). However, the Framework Convention does not impose 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.* art. IV § (2)(b).<sup>1</sup>

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<sup>1</sup> 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. *See 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.”).

## SUMMARY OF THE ARGUMENT

Kivalina has pled a federal common law claim for public nuisance. A public nuisance is an “unreasonable interference with a right common to the general public.” Restatement (Second) of Torts § 821B (1979). Specifically, Kivalina alleges that defendants’ emissions of GHGs have contributed to global warming, which is injuring Kivalina by melting the sea ice that formerly protected it from fall and winter storms; the result is a severe erosion problem such that the entire village must now relocate or be destroyed. *See, e.g.*, ER 40-41 (Complaint ¶¶ 1-5).

The district court’s dismissal of Kivalina’s claim was error for two principal reasons. First, the district court’s holding that this case presents a nonjusticiable political question rested on its incorrect belief that a public nuisance claim always requires the factfinder to “balance the utility and benefit of the alleged nuisance against the harm caused,” (ER 10), which the district court thought was impossible to do in a “principled, rational” fashion (ER 11). This was a pure error of law: The Restatement (Second) of Torts sets out several ways a defendant’s interference with a public right may be adjudged “unreasonable” that do *not* require any balancing analysis. *See, e.g.*, Restatement (Second) of Torts §§ 829A, 821B(2), 826(b) (1979). These provisions, *inter alia*, expressly dispense with the balancing

analysis where harm to the plaintiff is great and the plaintiff seeks damages.

Courts have tried public nuisance cases under these sections of the Restatement and issued judgments that defendants' conduct constituted nuisances, without requiring the fact-finder to engage in any balancing.

Second, the district court's decision that Kivalina lacked standing was based on an inaccurate belief that Article III standing requires Kivalina to trace pollution molecules back to individual defendants. But that impossible burden would raise the standing hurdle higher than the causation requirements necessary to state a proper public nuisance claim, which only require allegations that a defendant "contributes" to the nuisance. *See, e.g., Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001). Kivalina has clearly alleged that defendants, acting separately and in concert, have emitted large quantities of GHGs into the atmosphere, which contribute to the global warming that is destroying Kivalina. *See, e.g.,* ER 40-41 (Complaint ¶¶ 1-5). A public nuisance claim requires no more. *See, e.g., Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696-97 (7th Cir. 2008) (*en banc*) ("Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them had created a nuisance (the common law basis for treating pollution as a tort), pollution of a stream to even a slight extent becomes unreasonable [and therefore a nuisance] when similar pollution by others

makes the condition of the stream approach the danger point.”) (quotation omitted); Restatement (Second) of Torts § 881 cmt. d (1979) (“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.”). Article III can require no stricter showing because a court may not “raise the standing hurdle higher than the necessary showing for success in the merits in an action.” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). The district court thus incorrectly ruled that Kivalina does not have standing by imposing a higher causation burden than Kivalina bears under the law of public nuisance.

Kivalina respectfully requests the Court reverse the judgment of dismissal and remand for further proceedings.

### **STANDARD OF REVIEW**

The Court reviews dismissals under Rules 12(b)(1) and 12(b)(6) *de novo*, accepting all allegations as true and construing them in the light most favorable to the plaintiff. *Rhoades v. Avon Prods.*, 504 F. 3d 1151, 1156 (9th Cir. 2007).

Dismissal is “inappropriate unless the plaintiffs’ complaint fails to ‘state a claim to relief that is plausible on its face.’” *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1177 (9th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

## ARGUMENT

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

Although the District Court did not address defendants' argument that Kivalina failed to state a federal public nuisance claim, Kivalina addresses the question here, both because this Court has discretion to affirm on any ground and because a review of the nature of Kivalina's public nuisance claim is essential to the political question and standing analyses. *See, e.g., Lane v. Halliburton*, 529 F.3d 548, 561 (5th Cir. 2008) (political question analysis "incomplete" without reviewing plaintiff's claim "in some depth").

#### **A. Federal Common Law Applies.**

On the same day the Supreme Court repudiated "federal general common law" in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), it recognized the existence of certain specialized areas of federal common law in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), a case involving apportionment of water in an interstate stream. In *Milwaukee I*, the Supreme Court subsequently recognized that interstate pollution is one such special enclave of federal law, unanimously holding that "[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”).<sup>2</sup>

*Milwaukee I* was an original action in the Supreme Court by Illinois against several Wisconsin municipalities that were discharging inadequately treated sewage into Lake Michigan, leading to elevated bacterial levels along the Illinois shoreline. The Supreme Court held that the allegations of harm caused by interstate pollution gave rise to a claim under the federal common law of nuisance, *Milwaukee I*, 406 U.S. at 101-08, but it declined to exercise original jurisdiction because the claim gives rise to proper federal question jurisdiction. *Id.* at 98-101, 108 & n.10.

Illinois then re-filed its case in federal district court, joined by Michigan as a co-plaintiff, who complained that the nutrients in defendants’ discharges were contributing to eutrophication of the entire lake.<sup>3</sup> After a four-month bench trial, the trial court ordered injunctive relief to abate the nuisance, *Illinois v. City of*

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<sup>2</sup> The Court in *Milwaukee I* drew heavily upon *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907), an air pollution case in which the Court allowed an interstate nuisance claim for what is now recognized as acid rain. *See also Georgia v. Tennessee Copper*, 237 U.S. 474 (1915) (setting emissions limits on remaining defendant); *Missouri v. Illinois*, 180 U.S. 208 (1901) (interstate water pollution); *Connecticut*, 582 F.3d at 327-28 (reviewing “long line of federal common law of nuisance cases”).

<sup>3</sup> “Eutrophication” is nutrient overloading that causes excessive growth of algae, which depletes the water body of oxygen, leading to the collapse of the water body as a functioning ecosystem.

*Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), and the Seventh Circuit affirmed most of the relief. *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979).

The Supreme Court granted *certiorari* to determine whether the Clean Water Act (“CWA”), enacted after its decision in *Milwaukee I*, had preempted the federal common law nuisance claim. The Court reaffirmed that federal common law applies when the courts are “compelled to consider federal questions which cannot be answered from federal statutes alone.” *Milwaukee II* (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.”). However, the Court held the CWA had preempted the plaintiffs’ federal common law nuisance claim for injunctive relief because court-imposed pollution limits to abate the nuisance would directly conflict with the limits established under defendants’ CWA permits. *Id.* at 320.

*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, 98-101, 110 (1992) (“[W]e have long recognized that interstate water pollution is controlled by *federal* law.”) (emphasis in original);

*Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (“[T]he control of interstate pollution is primarily a matter of federal law”).<sup>4</sup> Damages are a proper remedy under federal common law. *See, e.g., City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 & n.32 (7th Cir. 1979).

This Court, in *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988), recognized that under *Milwaukee I* “there is a federal common law when dealing with air and water in their ambient or interstate aspects.” *Id.* at 1203. Although *Audubon* found no interstate dispute sufficient to trigger federal common law, those facts are easily distinguished: *Audubon* involved localized dust pollution and thus the matter was appropriately resolved under California law, where the defendant was located and where both the pollution and harm occurred. “Because we conclude this is essentially a domestic

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<sup>4</sup> *Ouellette* also held that even where the CWA preempts certain federal common law causes of action, plaintiffs in an interstate pollution case retain their remedies under state public nuisance law as long as they invoke the law of the source state. *Ouellette*, 479 U.S. at 497. *Ouellette* also confirmed that federal and state public nuisance law are mutually exclusive. *Id.* at 488 (“the implicit corollary of [*Milwaukee I*] was that state common law was preempted”); *accord 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.”). Consistent with *Ouellette*, *Kivalina* has pled its state-law nuisance claims only in the alternative. *See also Kale v. Combined Ins. Co.*, 924 F.2d 1161, 1165 (1st Cir. 1991) (“when 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”).

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 (“[W]e 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 pollution at issue here. *See Connecticut*, 582 F.3d at 326-28; 350-71 (global warming public nuisance case governed by federal common law). Additionally, unlike local dust pollution, there is “a uniquely federal interest” in global warming. *Audubon*, 869 F.2d at 1203. Kivalina’s lawsuit arises from greenhouse gas pollution that affects the global climate, a matter that defendants have agreed, as they must, raises uniquely federal interests. *See Utility Defendants’ Motion to Dismiss (“Utilities MTD”)* (document #139) at 32 (“global climate change is predominantly a matter of federal concern”).

Here, federal common law governs because Kivalina has alleged that carbon dioxide pollution crosses state lines, and, by contributing to the process of global warming, causes transboundary harm in Alaska, where Kivalina is located. *See, e.g.* ER 44-69, 78, 83, 102 (Complaint ¶¶ 18-122, 163, 180, 254.) These allegations present a textbook case for the application of federal common law.

**B. Kivalina Has Properly Pled a Federal Public Nuisance Claim.**

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*, 256 F.3d at 291 (quotation omitted). The Second Circuit recently held that plaintiffs in a similar global warming case had sufficiently stated a claim under federal common law of public nuisance. *See Connecticut*, 582 F.3d at 326-29, 350-71.

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

A public nuisance is an “unreasonable interference with a right common to the general public.” Restatement (Second) of Torts § 821B(1) (1979); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1209 (9th Cir. 2003) (California law); *see also 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*.<sup>5</sup> Liability for public nuisance is generally predicated on either intentional or negligent conduct. *See* Restatement (Second) of Torts § 822 (1979). An intentional nuisance exists 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.” W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, *Prosser and Keeton on the Law of Torts* § 87 (5th ed. 1984) (hereinafter “Prosser and Keeton”); *see also United States v. Ira S. Bushey & Sons*, 363 F. Supp. 110, 120 (D. Vt. 1973) (“*Bushey II*”) (holding in federal nuisance case that “there need be no intent”), *aff’d without opinion*, 487 F.2d 1393 (2d Cir. 1973). Kivalina has pled an intentional nuisance and, alternatively, a negligent nuisance.

With respect to “unreasonableness,” the central question in a damages case such as this is whether it is unreasonable for the defendant to engage in the

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<sup>5</sup> The federal courts have looked to the Restatement to define the federal common law of public nuisance. *See, e.g., Connecticut*, 582 F.3d at 327-28, 352; *see also United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 935 (9th Cir. 2008) ([C]ourts should look to the Restatement (Second) of Torts, as well as to other sources of federal common law, for principles of joint and several liability applicable under CERCLA.”), *rev’d on other grounds*, 129 S. Ct. 1870 (2009).

interference without compensating the plaintiff for the harm that the interference has caused:

In determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done. Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. In an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped.

Restatement (Second) of Torts § 821B cmt. i (1979). The question of unreasonableness in a damages action is therefore not one of whether the defendant's conduct is reasonable or unreasonable but rather one of who should bear the cost of that conduct. A leading treatise explains:

Confusion has resulted from the fact that the intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. This is simply because a reasonable person could conclude that the plaintiff's loss resulting from the intentional interference ought to be allocated to the defendant. . . . Courts have often found the existence of a nuisance on the basis of unreasonable use when what was meant is that the interference was unreasonable, i.e., it was unreasonable for the defendant to act as he did without paying for the harm that was knowingly inflicted on the plaintiff. 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.

W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, *Prosser and Keeton on the Law of Torts* § 52 (5th ed. 1984) (hereinafter “Prosser and Keeton”); accord *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) (“[L]iability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct”).

Following these principles, the Restatement sets out several ways in which an interference may be adjudged to be “unreasonable” for public nuisance purposes. Section 829A provides: “An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation.” *See also id.* cmt. b (“[C]ertain types of harm may be so severe as to require a holding of unreasonableness as a matter of law, regardless of the utility of the conduct.”); *id.* illus. 1 & 2 (1979) (identifying damages to buildings and farms as examples of severe interferences requiring compensation). Section 829A is directly on point here because Kivalina alleges a severe harm, *i.e.*, its complete destruction.<sup>6</sup>

The public nuisance section itself, section 821B, states that an interference may be unreasonable if, *inter alia*, it “involves a significant interference with the

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<sup>6</sup> Sections 826 through 831 of the Restatement (Second) of Torts are located under the Private Nuisance Topic but, according to the comments, also apply to public nuisance.

public health, the public safety, the public peace, the public comfort or the public convenience,” or “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)(a); *Bushey II*, 363 F. Supp. at 120-21 (applying § 821B(2) factors in public nuisance trial). As the Restatement recognizes, these circumstances are disjunctive and “do not purport to be exclusive” in their definition of how conduct can be unreasonable. Restatement (Second) of Torts § 821B cmt. e (1979).<sup>7</sup>

Kivalina has stated a proper claim under the federal common law of public nuisance. Kivalina’s environmental injuries are quintessential harms to “public rights.” *See Connecticut*, 582 F.3d at 352-53; *Rich v. City of Benicia*, 98 Cal. App. 3d 428, 435 (1979) (“Unquestionably environmental concerns in general . . . involve preeminently important public rights.”). Moreover, the damage that global warming is causing to the entire public infrastructure of Kivalina, which now most be relocated *in toto* out of harm’s way along with the entire village, ER at 40-41, 44, 84-85 (Complaint ¶¶ 1, 4, 17, 185), constitutes harm to public rights. Kivalina

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<sup>7</sup> Unreasonableness is generally 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), although it may be resolved as a matter of law where the harm is particularly severe. *See, e.g.*, Restatement (Second) of Torts § 829A (1979).

has also properly alleged that defendants knew or should have known that their conduct was likely to contribute to global warming. ER at 41, 86-102, 104-105 (Complaint ¶¶ 5, 189-248, 252, 255, 269-75).

Kivalina has further made proper allegations that the interference is unreasonable. Kivalina alleges that defendants' conduct has contributed to the melting of the sea ice that formerly protected the village from fall and winter storms and therefore the village must be relocated (at a cost estimated at \$95 million to \$400 million) or abandoned. ER at 40, 43-44, 84-85, 101-103 (Complaint ¶¶ 1, 4, 16-17, 185-88, 250-51, 254, 264, 266). The harm to Kivalina's property – the imminent destruction of an entire village – is of sufficient severity that it is unreasonable for Kivalina to bear it without compensation under section 829A. These allegations also satisfy the unreasonableness factors of section 821B(2) because defendants are alleged to have: significantly interfered with the village's very survival (which is certainly part of the public health, safety, comfort and convenience); engaged in a continuing course of conduct with long-lasting – and likely permanent – impacts on Kivalina; and to have known or to have had reason to have known that their conduct was likely to harm the environment and vulnerable communities. Kivalina, like the plaintiffs in *Connecticut*, has properly pled an unreasonable interference with rights common to the general public. *See*

*Connecticut*, 582 F.3d at 352.

## **2. Kivalina Has Properly Pled Causation.**

In a multiple polluter case sounding in public nuisance, the court need not trace molecules back to defendants. Rather, public nuisance liability for pollution attaches to a defendant who “contributes” to the nuisance. *See, e.g., Cox*, 256 F.3d at 292 n.19 (“[N]uisance liability at common law has been based on actions which ‘contribute’ to the creation of a nuisance”). As the Restatement notes, “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 (1979). This is true even if each defendant’s contribution to the nuisance, standing alone, would not subject him to liability – a common fact pattern in pollution cases involving multiple polluters. The Restatement explains:

Situations may arise in which each of several persons contributes to a nuisance to a relatively slight extent, so that his contribution taken by itself would not be an unreasonable one and so would not subject him to liability; but the aggregate nuisance resulting from the contributions of all is a substantial interference, which becomes an unreasonable one. In these cases the liability of each contributor may depend upon whether he is aware of what the others are doing, so that his conduct becomes negligent or otherwise unreasonable in light of that knowledge. It may, for example, be unreasonable to pollute a stream to only a slight extent, harmless in itself, when the defendant knows that pollution by others is approaching or has reached the point where it causes or threatens serious interference with the rights of those who use the water.

*Id.* cmt. b. Prosser and Keeton state the same rule:

A number of courts have held that acts which individually would be innocent may be tortious if they thus combine to cause damage, in cases of pollution . . . . The explanation is that the standard of reasonable conduct applicable to each defendant is governed by the circumstances, including the activities of the other defendants.

Prosser & Keeton § 52; *see also id.* § 88B (“One may pollute a stream to some extent without any harm, but if several do the same thing the plaintiff’s use of the stream may be destroyed. It has been held consistently in these cases that each defendant is liable.”). As Judge Richard Posner, writing for the *en banc* Seventh Circuit, summarized the law:

Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them had created a nuisance (the common law basis for treating pollution as a tort), “pollution of a stream to even a slight extent becomes unreasonable [and therefore a nuisance] when similar pollution by others makes the condition of the stream approach the danger point. The single act itself becomes wrongful because it is done in the context of what others are doing.” Keeton et al., *supra*, § 52, p. 354. . . . If “each [defendant] bears a like relationship to the event” and “each seeks to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group, thus leaving the plaintiff without a remedy,” the attempt at escape fails; each is liable. *Id.*, § 41, p. 268.

*Boim*, 549 F.3d at 696-97 (*en banc*); *accord* Restatement (Second) of Torts § 881 cmt. d (1979) (“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.”).

This causation principle in multiple-polluter cases is widely accepted. Where the injury is indivisible, as it is here because GHGs combine in the atmosphere to harm Kivalina, ER 102 (Complaint ¶ 254), a plaintiff demonstrates causation by showing that each defendant contributes to the overall pollution load that has harmed the plaintiff. *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) (“[W]here there are multiple tortfeasors and the separate and independent acts of codefendants ‘concurrent, commingled and combined’ to 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*, 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); *Warren v. Parkhurst*, 92 N.Y.S. 725, 727 (N.Y. Sup. Ct. 1904) (where “the act of one defendant would not so contaminate the stream that the plaintiff could complain of him” each is liable because “while each defendant acts separately, he is acting at the same time in the same manner as the other defendants, knowing that the contributions by himself and the others acting

in the same way will result necessarily in the destruction of the plaintiff's property.”), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906); *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”).

In *Illinois v. Milwaukee* itself, the eutrophication problem that plaintiff Michigan complained of was caused not only by the six municipal defendants' sewage facilities but by thousands if not millions of sources of nitrogen and phosphorous, such as farms and airborne sources, that were spread over the entire watershed of Lake Michigan across multiple states and two sovereign nations. *See* 1973 U.S. Dist. LEXIS 15607, at \*15. 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.

*Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at \*20-21 (N.D. Ill.

1973), *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*.

Federal courts routinely apply the indivisible injury rule in cases of pollution injuries 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”). *See Burlington Northern & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1880-81 (2009) (adopting federal common law approach of *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983)). Under this common law approach to indivisible injury, the defendants are afforded an opportunity to demonstrate a basis for apportioning their liability. *See* Restatement (Second) of Torts § 433B.<sup>8</sup>

The Supreme Court applied a version of this “contribution” approach in its standing analysis in *Massachusetts v. EPA*. The coastal property owner was, like Kivalina, experiencing coastal erosion due to global warming. The Court held that “EPA’s refusal to regulate [greenhouse gas] emissions ‘contributes’ to Massachusetts’ injuries [of coastal erosion],” 549 U.S. at 523 (quoting Clean Air

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<sup>8</sup> Kivalina is not required to sue all contributors to the nuisance and defendants may not add them as indispensable parties. *See 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.”). However, defendants may bring separate contribution actions and may also apportion among themselves.

Act), even though the new motor vehicle emissions at issue were “a fraction of 4 percent of global emissions,” as the dissent pointed out. *Id.* at 544 (Roberts, C.J., dissenting). EPA itself has now made an official “contribution” finding with respect to such emissions. *See supra* Statement of Facts, Section E.

In the district court, defendants misleadingly likened themselves to ordinary citizens who drive cars and heat their homes with GHG-emitting fossil fuels, arguing that everyone in the world would be liable for global warming harms under the indivisible injury rule. They even argued that global warming is caused by people breathing,<sup>9</sup> which they know to be false. As alleged in the complaint, it is GHG emissions from fossil fuels that has thrown the planet’s natural carbon cycle out of balance. ER at 70 (Complaint ¶ 126). In any event, defendants’ argument that liability would extend to everyone on earth is baseless: tort law is capable of separating major industrial GHG emitters from ordinary citizens. *See, e.g.*, Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 36 (2005) (“When an actor’s negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm” there is no liability); *cf. United States*

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<sup>9</sup> *See* Utilities MTD at 10 (document #139); Motion of Certain Oil Company Defendants to Dismiss Plaintiffs’ Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) at 2 (document #134); Motion of Certain Oil Company Defendants to Dismiss Plaintiffs’ Complaint Pursuant to 12(b)(1) at 4 (document #135).

*v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (contributor whose “pollutants did not contribute more than background contamination and also cannot concentrate” may defeat CERCLA liability).

Kivalina has alleged that defendants’ actions quantitatively dwarf by many orders of magnitude the GHG emissions of the ordinary citizen and, given defendants’ knowledge, their actions differ qualitatively as well. Kivalina alleges that the defendants comprise most of the nation’s top contributors to global warming, that they are responsible for a substantial portion of the GHGs in the atmosphere that are harming Kivalina, and that each of the defendants 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. ER at 40, 44-69, 78-83, 102-104 (Complaint ¶¶ 3, 18-122, 180, 251-53, 260, 266). These allegations sufficiently state a claim that the defendants have contributed to the creation of a public nuisance.

**C. Kivalina Has Stated Proper Claims of Conspiracy and Concert of Action**

**1. Civil 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.*; see generally Restatement (Second) of Torts § 879 (1979).

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 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; *Burdett v. Reynoso*, No. C-06-00720, 2007 U.S. Dist. LEXIS 64871, at \*89 (N.D. Cal. Aug. 23, 2007) (collecting cases).

Here, the underlying claim is the federal common law of nuisance. 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”).

Kivalina has properly pled detailed factual averments in support of the elements of conspiracy. ER at 86-101, 104-105 (Complaint ¶¶ 189-248, 268-77). Kivalina alleges that the Conspiracy Defendants were aware of the devastating effects of their emissions but rather than addressing the problem engaged in a deceptive campaign to manufacture doubt about the dangers and causes of global warming so that they could continue their harmful emissions. ER at 86-101 (Complaint ¶¶ 189-248); *see also* ER at 71-75, 86-101 (Complaint ¶¶ 130-54, 191-248) (Conspiracy Defendants repeatedly attacked scientific consensus). Defendants also encouraged and assisted each other’s injurious conduct. ER at 87, 90-91 (Complaint ¶¶ 194, 205-08). Defendants’ common plan or course of conduct to sow doubt about the causes and consequences of global warming allowed them to continue their injurious pollution unabated. ER at 86 (Complaint ¶ 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.<sup>10</sup> Kivalina has stated a proper conspiracy claim.

## 2. Concert of Action

Kivalina also has pled a proper concert of action claim. Concert of action “permits a defendant to be held jointly and severally liable if it commits a tortious act in concert with another or pursuant to a common design, or a defendant gives substantial assistance to another knowing that the other’s conduct constitutes a breach of duty.” *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 632 (S.D.N.Y. 2001); *see generally* Restatement (Second) of Torts § 876 (1979).

Kivalina has sufficiently alleged that defendants engaged in 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. ER at 86-101 (Complaint ¶¶ 189-248).

Kivalina has alleged that the “purpose of [the long campaign by power, coal, and

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<sup>10</sup> The conspiracy allegations in this case are unlike those in *Comer*, where the plaintiffs complained of the “failure of the government to properly regulate and enforce environmental laws” and who thus lacked prudential standing. *Comer*, 585 F.3d at 869, *vacated*, \_\_\_F.3d\_\_\_. Kivalina’s conspiracy allegations are aimed at the agreement to continue the injurious conduct, *i.e.*, large-scale emissions of greenhouse gases, not at governmental failures to regulate.

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.” ER at 86 (Complaint ¶ 189). Kivalina has further alleged that the defendants acted in concert to create the underlying public nuisance itself. ER 102-03, 105-06 (Complaint ¶¶ 253, 255, 260, 278-282). These allegations state a valid cause of action for concert of action. *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); *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.”); *Warren*, 92 N.Y.S. at 727 (case against multiple polluters who are aware of the combined effect of their pollution properly alleges “unity of action, design and understanding, and that each defendant is deliberately acting with the others in

causing the destruction of the plaintiff's property.”).

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

The political question doctrine rests on concerns about the separation of powers: it asks whether a claim would require the judicial branch to perform a function that the Constitution entrusts to the legislative or executive branches. *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”). Adjudication of this case will not require the judiciary to engage in legislative or executive functions. Rather, it will require the judiciary to perform its core Article III role of resolving a current and real controversy between the parties, apply common-law doctrines and determine an appropriate damages award. In our constitutional system, it is the judiciary, rather than the political branches, that adjudicates whether persons may recover damages for injuries. *See Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion”). Questions about whether one person has a valid claim against another are within the core judicial function; they do not present political questions. *See* 13C Charles Alan Wright & Arthur R. Miller et. al., *Federal Practice and Procedure: Jurisdiction* § 3534.3 (3d ed. 2009 supp.)

(hereinafter Wright & Miller) (“[I]t seems unlikely that refusal to afford a remedy to one private citizen suing another will be explained as calling for resolution of a political question.”).

The fact that global warming has been the subject of political controversy does not cause this case to involve a nonjusticiable political question. *Baker*, 369 U.S. at 217 (“The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’”); *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (a case does not present a political question “merely because [the] decision may have significant political overtones.”); Wright & Miller § 3534.1 (“[P]olitical-question doctrine is not invoked simply because the issues presented are sensitive, and decision may involve the courts in considerable popular turmoil.”). Nor does it change the analysis that global warming has been debated in presidential campaigns, Congress, and international venues. *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 even though dispute was one “in which the legislative,

executive and judicial branches of the United States have all figured prominently.”).

Global warming, a public nuisance, is destroying Kivalina. Kivalina seeks damages from defendants who have contributed to this public nuisance, some of whom conspired in order to continue that nuisance and all of whom acted in concert. Kivalina does not challenge congressional or presidential action or inaction. Kivalina does not challenge U.S. foreign or military policy. 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). This case is justiciable.

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

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); *see also Connecticut*, 582 F.3d at 329. A review of *Milwaukee I* itself demonstrates why this case is justiciable.

At the time *Milwaukee I* was decided, the Senate and House had already 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). Water pollution was a hotly contested political issue: President Nixon had immediately announced his opposition to the proposed bill, *id.* at 794, and vetoed it when it was presented to him six months after the Court's decision in *Milwaukee I.* *Id.* at 796. Congress overrode the veto within twenty-four hours. *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 Great Lakes water pollution. The treaty was signed 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.

The Court exercised its jurisdiction in *Milwaukee I.*, despite the intense activity of the political branches on the subject at issue. Although the Court did not address the political question doctrine in *Milwaukee I.*, its decision to permit the case to continue is significant. As this Court observed in a similar situation: “[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). Also instructive is *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), involving international and interstate pollution of Lake Erie with

mercury. *Wyandotte* expressly distinguished interstate pollution cases from “political questions” and held that the judiciary is “empowered to resolve this dispute in the first instance.” *Id.* at 496.<sup>11</sup> Kivalina’s interstate pollution case falls within the district court’s federal question jurisdiction and, like prior interstate pollution cases, is justiciable.

**B. The District Court Erred in Applying the *Baker v. Carr* Factors.**

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme 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). The factors are listed in descending order of

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<sup>11</sup> The suggestion in *Wyandotte* that state law would apply to interstate pollution was overruled in *Milwaukee I*, but other aspects of the case remain good law. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 735 (1981).

importance with 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). “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.” *Baker*, 369 U.S. at 217 (emphasis added). The district court rejected defendants’ *Baker* factor one argument but accepted their arguments under factors two and three. ER 7-15.

**1. There is No Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department (*Baker* Factor One).**

Defendants argued below that this litigation was constitutionally committed to the political branches because it involved their authority over foreign policy. According to defendants, foreign policy is somehow implicated by this litigation because it would require the court to “retroactive[ly] establish[]” emissions caps that might place the United States in an “inferior bargaining position” should it attempt to address GHG emissions by treaty. ER 8 (characterizing defendants’ argument). Putting aside the obvious falsity of the premise – it is difficult to see how a suit for damages requires any setting of emissions caps, whether retroactive or not – the district court disagreed with this contention, noting not only that defendants failed to identify any specific provision that entrusted this litigation to

the political branches but also that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” ER 9. Notably, two district courts have directly rejected the characterization of U.S. foreign policy that defendants advanced here.<sup>12</sup>

The district court’s conclusion with respect to *Baker* factor one was correct. The Supreme Court’s own review of foreign relations cases in *Baker* makes clear that the fact that a case involves foreign relations concerns does not make it a political question. *Baker*, 369 U.S. at 211-14; *see also* Wright & Miller § 3534.2 (“[T]he involvement of foreign relations does not of itself invoke political-question doctrine.”). No constitutional provision commits the issue involved in this lawsuit – whether and in what circumstances Kivalina may recover for injuries caused by defendants’ conduct – to the political branches. In fact, the only applicable constitutional provision, Article III, expressly commits to the judicial branch the power to resolve cases or controversies, including those arising under federal

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<sup>12</sup> *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1187 (E.D. Cal. 2007) (finding “absolutely nothing” to “support the contention that it is United States foreign policy to limit its own current efforts” to control greenhouse gas emissions); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 396 (D. Vt. 2007) (“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.”).

common law.

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

The courts are to take “an exhaustive search for applicable standards” *Alperin*, 410 F.3d at 552, that may be used to resolve a dispute. The search for principled standards is not to be confused with logistical obstacles, manageability issues, or evidentiary and proof problems. *Id.* at 553-54. Damages cases rarely present political questions because the resolution of liability and damages is well within judicial competency. *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.”); *see also Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 685 (E.D. La. 2006) (collecting cases).

In *Alperin*, this Court emphasized that the “courts have repeatedly risen to the challenge of handling cases involving international elements as well as massive, complex class actions” and rejected a political question argument notwithstanding that it was faced there with “a behemoth of a case.” 410 F.3d at 554. The key inquiry is whether the courts “have the legal tools to reach a ruling that is principled, rational, and based upon reasoned distinctions.” *Id.* at 552

(quotation omitted). In fact, “[s]o long as the nature of the inquiry is familiar to the courts, the fact that standards needed to resolve a claim have not yet been developed does not make the question a non-justiciable political one.” *Los Angeles County Bar Ass’n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992).

Here, the district court erred in holding there are no judicially discoverable and manageable standards for resolution of this case. ER 10-13. As outlined in more detail in Section I, this case is well-grounded in a long line of public nuisance cases, particularly those seeking damages for air and water pollution. “Well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs’ claims and the federal courts are competent to deal with these issues.” *Connecticut*, 582 F.3d at 329; *see also Alperin*, 410 F.3d at 554 (“the common law of tort provides clear and well-settled rules on which the district court can easily rely”) (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)). The applicable standards are not impossible to determine simply because this action involves claims arising from a new kind of pollution. *See Eu*, 979 F.2d at 702 (“Judicial standards for evaluating compliance with the constitutional dictates of due process and equal protection are well developed, although they have not often been applied to these facts.”). The judiciary is fully capable of hearing the evidence as to defendants’ contributions to

global warming, their knowledge of the harms to which they are contributing, the conspiracy of some of them to continue their behavior, the impact of global warming specifically on Kivalina, and the damages suffered.

The district court's decision that this case lacked judicially discoverable and manageable standards rested on two errors: first, a legal error regarding the elements of a public nuisance claim, and second, an error in its characterization of prior public nuisance pollution cases. Kivalina addresses each error in turn.

**a. A public nuisance claim does not require a balancing of interests.**

The district court's first error was a legal one: it concluded that in every nuisance case "the factfinder must . . . balance the utility and benefit of the nuisance against the harm caused." ER 10. However, as demonstrated in Section I.B.1, the central question in a nuisance action for damages is not one of balancing but rather one of allocation: a court asks which party should bear the cost of the harm that an interference has caused. Courts considering damages actions for nuisance have repeatedly emphasized this point. *See, e.g., Pendergrast v. Aiken*, 293 N.C. 201, 217-18 (1977) ("We emphasize that, even should alteration of the water flow by the defendant be reasonable in the sense that the social utility arising from the alteration outweighs the harm to the plaintiff, defendant may nevertheless be liable for damages for a private nuisance if the resulting interference with

another's use and enjoyment of land is greater than it is reasonable to require the other to bear under the circumstances without compensation"); *Jost v. Dairyland Power Cooperative*, 172 N.W.2d 647, 653-54 (Wis. 1969) ("We know of no acceptable rule of jurisprudence that permits those who are engaged in important and desirable enterprises to injure with impunity those who are engaged in enterprises of lesser economic significance . . . . We conclude that injuries caused by air pollution or other nuisance must be compensated irrespective of the utility of the offending conduct as compared to the injury."); accord Richard A. Epstein, *Torts* § 14.4 (1999) (dismissing the view that balancing is always required because "where the nuisance itself causes substantial discomfort to [plaintiff] or a substantial reduction in the value of her land, the court will not excuse [defendant] from *all* liability: the conduct, if deliberate and persistent, becomes as it were *per se* unreasonable.").

The Restatement (Second) of Torts provides several ways in which the reasonableness inquiry can be conducted that do *not* require any balancing because they focus exclusively on the severity of the interference. The section 829A test for whether a "severe" harm constitutes an "unreasonable" interference does not require any balancing. *See supra* Section I.B.1. The Restatement makes this explicit: "Other invasions may impose harm so severe that the recipient cannot be

expected to bear it without compensation, regardless of the utility of the activity in the abstract (*see* § 829A).” Restatement (Second) of Torts § 826 cmt. b (1979); *see id.* § 827 cmt. b (same); *id.* § 829 cmt. b (same). Courts applying section 829A have emphasized that it focuses exclusively on the severity of the interference and does not require any inquiry into the reasonableness or unreasonableness of the defendant’s conduct. *See, e.g., Pendergrast*, 293 N.C. at 217-18; *Jost*, 172 N.W. 2d at 653-54; *Hughes v. Emerald Mines Corp.*, 450 A.2d 1, 7 (Pa. Super. Ct. 1982) (holding on appeal after a jury trial that the harm to plaintiffs “was undeniably ‘severe’ and we are inclined to agree with the finder of fact that the loss is ‘greater than they should be required to bear without compensation’ *regardless of the utility of the conduct*”) (quoting Restatement § 829A). The total destruction of Kivalina’s existence as a village is “severe” and thus section 829A applies and no balancing is will be required.

The district court relied on section 821B of the Restatement for its proposition regarding the inevitability of balancing. ER 10. Yet it failed to acknowledge that section 821B itself sets out factors for establishing unreasonableness that do not require any balancing. *See supra* Section I.B.1. Courts considering public nuisance cases have applied these factors and rendered decisions without the need for any balancing analysis. *See, e.g., Bushey* 363 F.

Supp. at 120-23. In *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003), this Court, applying California law, reversed a district court’s dismissal of public nuisance claims with reference to the § 821B(2) factors. *Id.* at 1209-11; accord *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 627 (S.D.N.Y. 2001) (holding that private well owners properly stated a claim for public nuisance against defendant petroleum companies under § 821B(2) in case addressing groundwater pollution).

Even section 826 – the very section that sets forth the balancing test that the district court relied upon – makes clear that balancing is not always required:

An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if

- (a) the gravity of the harm outweighs the utility of the actor’s conduct,
- or*
- (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

Restatement (Second) of Torts §826 (1979) (emphasis added). The use of the disjunctive “or” means that the balancing test in § 826(a) is just one of two alternative tests. See *Hall v. Phillips*, 436 N.W.2d 139, 143 (Neb. 1989). As the Restatement explains, the alternative test in section 826(b) is particularly appropriate for damages cases:

It may sometimes be reasonable to operate an important activity if payment is made for the harm it is causing, but unreasonable to

continue it without paying . . . . The process of *comparing the general utility of the activity with the harm suffered* as a result is adequate if the suit is for an injunction prohibiting the activity. But it may sometimes be *incomplete* and therefore *inappropriate* when the suit is for *compensation for the harm imposed*. The action for damages does not seek to stop the activity; it seeks instead to place on the activity the cost of compensating for the harm it causes.

Restatement (Second) of Torts § 826 cmt. f. (1979) (emphasis added); *see also Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen*, 384 N.W.2d 692, 695-98 (Wis. 1986) (“We find . . . nothing inherent in the sec. 826(b) test which dictates that the fact finder must undertake a social utility analysis of an actor’s conduct in order to reach a determination of the reasonableness of that conduct.”); *Furrer v. Talent Irrigation Dist.*, 258 Or. 494, 509-10 (1970) (“The requested instruction, in effect, would have told the jury that it could deny plaintiff recovery if it decided that the social value of operating the canal was sufficiently great. This would clearly have constituted reversible error.”). Thus, balancing would be unnecessary even under § 826(b).

Assuming *arguendo* that any balancing were appropriate, which it is not, the district court was nonetheless incorrect to hold that there are no judicial standards by which the factfinder could analyze “the energy producing alternatives that were available in the past and consider their respective impact on far ranging issues” and weigh them against “the risk that increasing greenhouse gases would in turn

increase the risk of causing flooding along the coast of a remote Alaskan locale.”

ER at 11. Any public nuisance case challenging industrial operations raises similar questions when the balancing test is employed:

The process of weighing the gravity of the harm against the utility of the conduct assesses the social value of the actor’s activity *in general*. Thus in the case of noise and other harassment created by the operation of an airport, the utility depends upon the social value of aviation and the need for air transportation. In the case of a cement factory polluting the air with dust, the utility may be reflected in society’s need for building materials.

Restatement (Second) of Torts § 826 cmt. f (1979) (emphasis added). Courts frequently engage in such balancing in nuisance cases. *See, e.g. Cooper v. Tennessee Valley Auth.*, 593 F. Supp. 2d 812, 831 (W.D.N.C. 2009) (although “generation of power at low cost to the consuming public has a high social utility . . . the vast extent of the harms caused in North Carolina by the secondary pollutants emitted by these plants outweighs any utility that may exist from leaving their pollution untreated.”); *Cook v. Rockwell Int’l Corp.*, 2006 U.S. Dist. LEXIS 89544, at \*40-43 (D. Colo. Dec. 7, 2006) (analyzing jury instructions on nuisance given at the end of four and a half month trial that were based, *inter alia*, on § 826(a)). The energy industry is not exempt from this test.<sup>13</sup>

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<sup>13</sup> Extensive issues of global warming science and technologies to reduce emissions have already passed *Daubert* muster. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 310-25, 339-41 (D. Vt. 2007).

It is true, of course, that this is a large and complex case. But in *Alperin*, the enormous size and nature of the plaintiffs' complex case – which, unlike this case, touched directly on issues of foreign affairs – did not change the fact that, “at heart, the Holocaust Survivors seek compensation for stolen property, a claim that is very familiar in our courts.” *Alperin*, 410 F.3d at 553-54. So too, public nuisance is a familiar claim to the judiciary, requiring courts to employ familiar standards to assess scientific evidence and determine whether there is an unreasonable interference with public rights.

**b. The district court improperly distinguished prior public nuisance law.**

The district court attempted to bolster its political question ruling by distinguishing prior public nuisance law as allegedly involving a “discrete number of polluters that were identified as causing a specific injury to a specific area.” ER at 12. However, Kivalina *is* suffering a specific injury in a specific area – its annihilation from the very specific location that is being wiped from the map by global warming. The size of the geographic area affected *in addition* to Kivalina does not diminish the specificity of *this plaintiff's* injury. That a thousand towns on a polluted river or lake may be affected does not undercut the specificity of the injury to each.

As to “discrete,” the district court was simply incorrect. Due to the nature of

pollution, it is common to find public nuisance cases involving large numbers of sources of pollution where the plaintiff has sued only the largest sources. *See Illinois v. Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at \*15 (eutrophication problem caused not only by the six municipal defendants' sewage facilities but by innumerable non-point sources such as farms and airborne sources). The cases already discussed, *see supra* Section I.B.2, demonstrate that courts frequently consider pollution cases involving multiple polluters – indeed, this has been a common fact pattern since at least the nineteenth century. *See California v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1156 (Cal. 1884) (defendant's pollution alone would not have caused injury given the “vast amount” of mining previously and currently undertaken on the river by numerous others but defendant still liable for contributing to the nuisance); *Woodyear v. Schaefer*, 57 Md. 1, 9 (Md. 1881) (“It is no answer to a complaint of nuisance that *a great many others* are committing similar acts of nuisance upon the stream.”) (emphasis added); *The Lockwood Co. v. Lawrence*, 77 Me. 297 (Me. 1885) (same).<sup>14</sup>

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<sup>14</sup> The district court purported to distinguish cases cited by Kivalina and by the Second Circuit in *Connecticut*. *See* ER at 12 & n.3 (discussing *Missouri v. Illinois*, 180 U.S. 208 (1901), *Missouri v. Illinois*, 200 U.S. 496 (1906), *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907), and *Georgia v. Tennessee Cooper*, 237 U.S. 474 (1915)). But those cases – which neither Kivalina nor the Second Circuit in fact had relied upon with respect to the whether a nuisance action may proceed against a subset of a large numbers of polluters – do not say how many polluters

Finally, the district court erroneously depicted Kivalina’s global warming injuries as resulting from numerous steps in a lengthy chain, which it contrasted with environmental cases alleging a permit violation. ER at 13 (“In a water pollution case the discharge in excess of the amount permitted is presumed harmful.”). This ignores *Massachusetts*, where the Supreme Court, after reviewing record evidence, accepted a causal chain virtually identical to that alleged here. *See* 549 U.S. at 521-26. The comparison with this aspect of the permit cases also was unfair: in a common law public nuisance case there is, by definition, no permit violation because there is no regulation, which is why common law is employed in the first place. The chain of events alleged here – that greenhouse gases trap atmospheric heat, which is melting the ice that formerly protected Kivalina from fall and winter storms, thus causing Kivalina to be washed away, ER 40-41 (Complaint ¶¶ 1, 3-4) – is neither lengthy nor unusual for a public nuisance case. *See, e.g., Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at \*11-16 (nutrients discharged by defendants and others caused algal blooms, which depleted lake of oxygen, which threatened ecology of lake). Public nuisance law provides standards for principled adjudication of this case.

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were contributing to the nuisances. The issue of proceeding against a subset of multiple polluters “never arose.” *Connecticut*, 582 F.3d at 356 (discussing *Tennessee Copper*).

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

The district court also erred in holding that adjudication of this case would require it to make a non-judicial policy decision. It applied the same faulty reasoning as it had for *Baker* factor two, *i.e.*, that Kivalina’s “federal nuisance claim inherently requires the fact-finder to consider both the harm experienced by Plaintiff as well as the utility or value of Defendants’ actions.” ER 14. As set forth above, nuisance law does not inherently require any balancing.

Additionally, even if, *arguendo*, an initial policy decision from the political branches were necessary, it has already been provided. The official U.S. policy is that GHG emissions should be reduced. *See supra* Statement of Facts, Section E; *see also* James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 *Denver Univ. L. Rev.* 919, 951 (2008) (it is “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]”). The generalized policy pronouncements by the political branches that GHG pollution should be reduced are precisely the kind of positive law that support the application of federal nuisance law. *See Milwaukee I*, 406 U.S. at 102-03 (relying upon general policies in environmental statutes); *Connecticut*, 582 F.3d

at 351 n.28.

The district court next contended that the decision about who should be required to pay for global warming injuries “requires the judiciary to make a policy decision.” ER at 14. But determining liability for injuries from a public nuisance is a quintessentially judicial function. Although the political branches *could* enact statutes or regulations establishing a liability regime for injuries caused by global warming, they have not done so. And even when Congress *has* enacted a pollution liability regime, public nuisance continues to apply full force. *See, e.g., California v. Campbell*, 138 F.3d 772 (9th Cir. 1998) (case presenting both nuisance and CERCLA claims); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049-53 (2d Cir. 1985) (same).

The district court erred when it stated that it would be “arbitrary” to hold the named defendants liable when “virtually everyone on Earth is responsible” for global warming, incorrectly stating that Kivalina had somehow “acknowledge[d]” this to be true. ER at 14-15. Kivalina in fact had argued on the first page of its brief below that “[i]t is a common misconception that ‘everyone causes global warming.’” Plaintiffs’ Corrected Consolidated Memorandum Points and Authorities in Opposition to Defendants’ Motions to Dismiss at 1 (document #155). Defendants are among the largest U.S. contributors to global warming. ER

at 40 (Complaint ¶ 3). It is perfectly appropriate to hold them liable even if other entities also have contributed to global warming. And it is not an uncommon judicial function to hold a subset of multiple polluters liable where pollution is widespread. Defendants will have their day in court where they may try to establish a basis for apportioning liability. Alternatively, defendants may bring a contribution action against other contributors.

This case requires no initial policy decision of a nonjudicial kind that has not already been made.<sup>15</sup>

### **III. KIVALINA HAS STANDING.**

Kivalina has properly pled facts that satisfy the constitutional minimum standing requirements consisting of (1) an injury in fact, (2) causation, and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (“*Lujan II*”). At the pleading stage “general factual allegations of injury resulting from the defendant’s conduct may suffice,” for on a motion to dismiss the court must ““presume that general allegations embrace those specific facts that are necessary to support the claim.”” *Id.* at 561 (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990)).

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<sup>15</sup> Kivalina does not address the “prudential” *Baker* factors four through six because the district court did not consider them and defendants all but conceded them below.

The district court did not question Kivalina’s ability to meet the first and third standing elements. Defendants themselves essentially conceded injury and redressability in the district court and for good reason: it is beyond dispute that Kivalina alleges a concrete and particularized injury – complete destruction of the village through a process that is well underway – and that this injury can be redressed by the compensatory damages it seeks here. But the district court incorrectly held that Kivalina had failed to plead facts to demonstrate causation.

**A. Causation is Satisfied Because Defendants Contribute to a Public Nuisance That Injures Kivalina.**

The district court incorrectly believed that a public nuisance case against multiple polluters requires the plaintiff to trace molecules. It claimed Kivalina alleged an “extremely attenuated causation scenario” (ER 19) and that it could not show causation because “there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular point in time.” ER at 20. The court thus concluded that “it is entirely irrelevant whether any defendant ‘contributed’ to the harm” that Kivalina is suffering. ER at 19.

The district court in essence sought to re-write over a hundred years of case law governing multiple polluter causation by requiring Kivalina to trace molecules. As explained in more detail in Section I.B.2, it is sufficient for a plaintiff to prove

that a defendant contributes to the public nuisance; the plaintiff is not required to demonstrate which particular molecules emitted by which particular source caused the injury. The district court’s ruling therefore violates the cardinal rule that courts may not “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). Here, the sufficiency “of Plaintiffs’ allegations of traceability must be evaluated in accordance with the standard by which a common law public nuisance action imposes liability on contributors to an indivisible harm.” *Connecticut*, 582 F.3d at 346. The nuisance “contribution” standard sets a ceiling for Kivalina’s burden of pleading under the traceability element. Standing, presents, if anything, a lower hurdle. *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008) (“[F]or purposes of satisfying Article III’s causation requirement, we are concerned with something less than the concept of proximate cause.”) (quotation omitted). To require more for standing than is required to satisfy the applicable tort causation standard was error.

**B. Clean Water Act Authorities Demonstrate Kivalina Has Standing.**

As Kivalina argued in the district court, the common-law rule that polluters are liable when they contribute to a nuisance has a counterpart in the standing

analysis commonly applied in cases under the CWA. CWA cases unanimously hold that environmental plaintiffs in a multiple polluter case need not trace molecules to establish the causation prong of standing.<sup>16</sup> Although it is true that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,” *Massachusetts*, 549 U.S. at 516, it is also true that “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Raines v. Byrd*, 521 US 811, 820 n.3 (1997). And because the “CWA’s citizen suit provision extends standing to the outer boundaries set by the ‘case or controversy’ requirement of Article III of the Constitution,” the “statutory and constitutional standing issues therefore merge” and the “only issue”

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<sup>16</sup> See, e.g., *Natural Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000) (“rather than pinpointing the origins of particular molecules, a plaintiff 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.”) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000)); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996) (“Given the number of entities discharging chemicals into Galveston Bay, it would be virtually impossible for any of Sierra Club’s members to trace his injuries to Cedar Point’s discharge in particular. Rather, it is sufficient for Sierra Club to show that Cedar Point’s discharge of produced water contributes to the pollution that impairs Douglas’s use of the bay.”) (quotations and brackets omitted); *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn*, 913 F.2d 64, 72 (3d Cir. 1990).

is “whether the plaintiffs have standing under Article III to proceed to the merits of their lawsuit.” *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000). The CWA cases therefore provide additional authority here.<sup>17</sup>

The district court believed that the CWA cases did not support Kivalina’s standing for four reasons: first, that they require a plaintiff to establish that a permit has been exceeded; second, that they require a plaintiff to identify particular polluters as the “seed” of the injury; third, that they require a particularly short causal chain; and fourth, that they require a zone of injury that the district court held Kivalina cannot establish. Each of these attempts to distinguish the CWA cases lacks merit.

#### **1. Kivalina Need Not Show a Permit Exceedance.**

The district court believed the CWA cases require the plaintiff to establish “that a defendant’s discharge *exceeds* Congressionally-prescribed federal limits” in order to apply the contribution principle because the permit defines a numerical pollution limit above which any pollution is presumed harmful. ER at 19. But that aspect of these CWA cases is not essential to the contribution principle. In

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<sup>17</sup> Notably the CWA cases were all resolved on an evidentiary basis, as were *Massachusetts* and *Northwest Environmental Defense*. Kivalina is entitled to its evidentiary opportunity.

*Massachusetts*, the plaintiff established causation on a contribution theory in a global warming case in the absence of any permit violation; the plaintiff was challenging EPA's refusal to decide whether to regulate greenhouse gases at all. Similarly, in *Northwest Environmental Defense Center v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Or. 2006), the plaintiffs established standing on a contribution theory in a case challenging emissions of a chemical that contributes to both global warming and destruction of the ozone layer where there was no exceedance of a permit level; plaintiffs there alleged the defendant had failed to obtain any permit at all for construction of a facility.

The district court's error can readily be seen by examining the three-part test applicable in these CWA cases: that a defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit, (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant, and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs. *Powell Duffryn*, 913 F.2d at 72. The district court improperly conflated elements one and three. As the Second Circuit held, the "first prong is inapplicable here" because "there is no statute governing carbon dioxide emissions." *Connecticut*, 582 F. 3d at 346; *see also Powell Duffryn*, 913 F.2d at 72-73 (the causation test "will require more than showing a mere exceedance of a

permit limit”).

The district court’s holding would shut the courthouse door on all common law claims in a multiple polluter situation. There would be no small irony in such a ruling, as the CWA contribution principle is, on its face, an apparent codification of this common law rule. Kivalina’s allegations that defendants’ emissions mix together into an indivisible and undifferentiated whole is not something Kivalina “concedes,” as the district court believed. ER at 20, 21. On the contrary, it is precisely the allegation that makes GHG emissions well-suited for application of the contribution principle.

**2. The District Court Erred in Requiring That Particular Polluters Must be the “Seed” of Kivalina’s Injury.**

The district court committed further error by holding that, even if the contribution theory applies in a common law case, Kivalina’s complaint is deficient because it has not “alleged that the ‘seed’ of [its] injury can be traced to any of the defendants.” ER at 20 (citing *Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 974 (7th Cir. 2005)). But the “seed of injury” approach in CWA cases, which has not been adopted by this Circuit, does not require a plaintiff to identify the original source or a single source of the pollution; it only requires the plaintiff to establish that the defendants – whether singly or with others – contributed to the pollution. The district court was simply wrong in

stating that “the Fifth Circuit [sic] in *Tex. Indep. Producers*” somehow “recognized that the ‘contribution’ approach to standing is dependent upon the plaintiffs’ ability to plead and prove the defendant’s ‘polluting source as the seed of his injury, and [that] the owner of the polluting source has supplied no alternative culprit . . .’” ER at 18 (quoting *Tex. Indep. Producers*, 410 F.3d at 974) (internal quotation omitted). The Seventh Circuit in *Texas Independent Producers* said nothing about the contribution approach being so contingent. The only thing it held a plaintiff “must show” is “that a defendant discharges a pollutant [which] causes or contributes to the kinds of injuries alleged in the specific geographic area of concern.” 410 F.3d at 973-74 (quoting *Gaston Copper*, 204 F.3d at 161).<sup>18</sup> Nor does it defeat standing if unsued persons also contributed to plaintiff’s injury. “In order to obtain standing, plaintiffs need not sue *every* discharger in one action, since the pollution of any one may be shown to cause some part of the injury suffered.” *Powell Duffryn*, 913 F.2d at 72 n.8.

By the same token, the district court was in error to hold, as part of its seed of the injury theory, that the global nature of greenhouse gas emissions and the fact that such emissions have been occurring for many years somehow defeats the

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<sup>18</sup> In *Texas Independent Producers* the plaintiff failed to prove it had standing because its evidence did “not establish that *any* discharge has actually occurred into the water bodies.” 410 F.3d at 973 (emphasis added).

causal element of standing. ER at 20. In a regulatory context, this Court has directly held that the global nature of climate change does not defeat the causal relationship between each contribution and the resulting consequences. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1225 (9th Cir. 2008) (“NHTSA acknowledges that carbon emissions contribute to global warming, and it does not dispute the scientific evidence that Petitioners presented concerning the significant effect of incremental increases in greenhouses gases.”); *see also id.* at 1217 (“The fact that climate change is largely a global phenomenon that includes actions that are outside of [the agency’s] control . . . does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming.”) (quotation omitted). Other pollution problems are, like global warming, international and even global in scope; many involve pollutants that accumulate over very long periods of time. *See Northwest Envtl. Def.*, *supra*, 434 F. Supp. 2d at 967-68 (destruction of ozone layer). Mercury and acid rain pollution have been accumulating in the environment for a century from a vast number of sources, including foreign sources, yet no one would doubt that standing is proper in a

public nuisance case against contributors of these “conventional” pollutants.<sup>19</sup> In *Illinois v. Milwaukee*, the district court was faced with a problem occurring over decades or longer:

Eutrophication 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. Viewed in these terms, the evidence leaves no doubt that Lake Michigan is undergoing increased and accelerated eutrophication.

*Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at \*13 (N.D. Ill.

1973), *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*. Nonetheless the trial court in that case did not hesitate to impose a public nuisance remedy against the largest contributors to the nuisance.

In essence, the district court misconceived the task in a multiple polluter case as one of determining which defendants are the *sole* cause of harm. But taking the allegations of the complaint as true, all of the defendants in fact have contributed to global warming. And while it is also true that many unnamed entities *also* have contributed to global warming in varying degrees, that does not absolve defendants from having played

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<sup>19</sup> See, e.g., *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971) (mercury pollution of Great Lake from domestic and international sources); *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907) (suit against two contributors to acid rain).

a causal role as contributing factors to global warming and its attendant harms to Kivalina.<sup>20</sup> The district court’s “seed of the injury” standard is inconsistent with over a hundred years of public nuisance law holding that polluters may be held liable when the pollution from multiple polluters combines into an indivisible and harmful whole.

### **3. The Causal Chain is Not Attenuated.**

The district court further erred in holding that the causal chain leading to Kivalina’s injuries is too attenuated. The district court characterized the causal steps as “tenuous” and dependant “on an attenuated sequence of events that purportedly follow from the Defendants’ alleged ‘excessive’ discharge of greenhouse gases.” ER at 22. However, the Supreme Court already has accepted the causal steps of global warming for purposes of standing. *See Massachusetts*, 549 U.S. at 523-24. Further, the district court wrongly focused on the number of steps in the causal chain rather than on the validity of each step. *See* ER at 13 (listing alleged causal steps each of which allegedly “*in turn*” causes the other).

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<sup>20</sup> Although there are numerous sources of GHG emissions, there is a far greater concentration over such emissions in the hands of a relatively small group of corporations than is commonly realized. *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1, 29 (2003) (“There are a limited number of relevant companies in these [U.S. fossil fuel energy] sectors.”).

This was factually and legally unsound. Factually, the district court added a step regarding the ice caps melting and the oceans rising even though the complaint does not anywhere allege that the melting of the *landfast sea ice* at Kivalina is being caused by either the melting of the polar ice caps on Greenland and Antarctica or by rising sea levels. Rather, it alleges that the melting of the landfast sea ice adjacent to Kivalina itself directly results from the higher temperatures caused by global warming. ER at 40, 84 (Complaint ¶¶ 4, 185).<sup>21</sup> Legally, the number of links in a causal chain is not what matters in assessing attenuation, as defendants themselves acknowledged below. *See* Reply in Support of the Utility Defendants’ Motion to Dismiss (document #161) at 12 n.9 (“No magic number renders a chain too long.”). Rather, the dispositive question is whether each step in the causal chain is empirical or rather involves a high degree of speculation or conjecture, particularly about the future actions of third parties. *See Allen v. Wright*, 468 U.S. 737, 758 (1984); *Ocean Advocates v. United States Army Corps of Eng’rs*, 402 F.3d 846, 860 (9th Cir. 2005) (holding causal link between issuance of permit for oil platform and plaintiff’s injuries arising from increased ship traffic

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<sup>21</sup> The allegations in the complaint regarding sea level rise and melting ice caps are limited to demonstrating that global warming is actually occurring and that emissions of GHGs have been known to cause a variety of harms for a long time. ER at 71-73, 75, 77 (Complaint ¶¶ 130-31, 145, 153 and 161).

not tenuous or abstract notwithstanding that “other factors may also cause additional tanker traffic and increase the attendant risk of an oil spill.”); *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”).<sup>22</sup> Here, none of the causal links requires speculation, conjecture, or inquiry into the likely actions of third parties. Kivalina has asserted that defendants emit GHGs, that these GHG emissions contribute to global warming, and that global warming is destroying Kivalina. *See, e.g.*, ER 40-41 (Complaint ¶¶ 1-5). These are facts that Kivalina will establish at the appropriate stage and that directly track the empirically provable causes and effects of global warming.

#### **4. The District Court Failed to Identify the Proper Zone of Injury.**

The district court also erred when it ruled that Kivalina is “not within the zone of discharge,” a concept prevalent in CWA cases, even though, as alleged in the complaint, GHG emissions affect the worldwide concentration of such gases

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<sup>22</sup> The district court relied on *Center for Biological Diversity v. U.S. Department of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009), but in that case the plaintiff did “not allege that Interior’s acts will cause damage to any of its own territory,” *id.* at 477, and its causation was fatally dependent upon showing that third parties “might act in a certain way in the future.” *Id.* at 479.

and have a planetary warming effect. ER at 21. The district court's zone of discharge ruling would, again, impermissibly raise the standing hurdle higher than the bar for success on the merits. "[P]roximity in point of time or space is no part of the definition of proximate cause." *Ileto*, 349 F.3d at 1206. And a "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* § 181 (2001). This Court recently held that the global nature of GHG emissions is *not* a fact that defeats proximate cause. *See NHTSA*, 538 F.3d at 1217 ("NHTSA's regulations are the proximate cause of those air pollutants" notwithstanding global nature of the problem); *accord Covington v. Jefferson County*, 358 F.3d 626, 655 n.12 (9th Cir. 2004) ("Article III permits an open standing theory on issues of widespread or even global impact, subject to prudential standing limits.") (Gould, J. concurring).

The district court justified its importation of geographic and temporal restrictions out of concern that Defendants would be susceptible to lawsuits from every person who had been harmed by global warming. ER at 21-22. But

standing is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

*Massachusetts*, 549 U.S. at 526 n.24 (quotation omitted); *accord FEC v. Akins*, 524 US 11, 24 (1998) (standing proper where “large numbers of individuals suffer the same common-law injury” such as “a widespread mass tort”); *Baur v. Veneman*, 352 F.3d 625, 635 (2d Cir. 2003) (widely shared injury consisting of nationwide risk of eating tainted beef); *Northwest Env'tl. Def.*, 434 F. Supp. 2d at 965 (“Adverse effects from the emissions will not necessarily be limited to Oregon, yet Plaintiffs’ injuries are not diminished by the mere fact that other persons may also be injured by the Defendant’s conduct.”). Here, as alleged in the complaint, defendants’ emissions affect the concentration of greenhouse gases in the entire atmosphere. ER at 70-71 (Complaint at ¶¶ 123-27). The result is an alteration of the global climate with specific consequences on specific localities. Kivalina is one of the most vulnerable communities in the world to this emissions-driven process and defendants are among the planet’s most important contributors to it. Kivalina has properly pled facts showing it is within any arguably applicable zone of discharge.

**C. Kivalina Requires No Special Solitude to Establish Standing.**

Finally, Kivalina needs no special solitude to establish standing. To be sure, the Supreme Court in *Massachusetts* stated it had accorded the state plaintiff there “special solitude” in its standing analysis due to its procedural right to bring

a suit under the CAA's citizens suit provision as well as the *parens patriae* standing historically accorded to states. 549 U.S. at 520. But the Court then proceeded to apply the three-part standing test of injury, causation and redressability in the ordinary manner as applicable to any plaintiff and held that Massachusetts' status as a *property owner* gave it standing:

According to petitioners' unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have already begun to swallow Massachusetts' coastal land. Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury *in its capacity as a landowner*.

*Id.* at 522 (citations, quotation and footnote omitted) (emphasis added). The State did not require, nor did the Court actually provide, any special solicitude. *Id.* at 539-40 ("The Court asserts that Massachusetts is entitled to 'special solicitude' due to its 'quasi-sovereign interests,' but then applies our Article III standing test to the asserted injury of the Commonwealth's loss of coastal property.") (Roberts, C.J., dissenting). Massachusetts' injury is virtually the same injury that Kivalina alleges here.

If this Court nonetheless decides it is necessary to address the issue, however, the Native Village of Kivalina must be accorded the same special solicitude as a state. A sovereign has *parens patriae* standing to protect quasi-sovereign interests, i.e., 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). The Native Village of 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). As a sovereign, the Native Village, 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*, 458 U.S. at 607; 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-sovereign interests.” *Massachusetts*, 549 U.S. at 520; accord *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001) (recognizing that *parens patriae* gives tribe standing); *Dep’t of Health & Soc. Servs. v. Native Vill. of Curyung*, 151 P.3d 388, 399-400 (Alaska 2006) (upholding right of Alaska Native Villages to bring suit *parens patriae*).

The “special solicitude” discussion in *Massachusetts* centers on the unique relationship between quasi-sovereigns and the federal government. Tribes, like the States, are quasi-sovereigns and possess a special relationship with the federal government. 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 protection.” *Worcester v. Georgia*, 31 U.S. 515, 560-561 (1832). Because tribes, like states, necessarily gave up certain rights, they too must be able to protect their sovereign interests in federal court. The district court thus erred in holding that the “special solitude [sic] recognized by the Court is predicated on the rights that a *State*,” and not a tribe, “relinquishes to the federal government.” ER at 23.

#### **IV. THE CLEAN AIR ACT DOES NOT PREEMPT KIVALINA’S CLAIMS.**

Defendants argued in the district court that the CAA preempts Kivalina’s federal common law nuisance claim. Although the district court did not reach this argument, Kivalina responds briefly here.

Congress preempts a federal common law cause of action when it “speak[s] directly to the question addressed by the common law.” *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008) (“*Exxon*”). This is a demanding test: it is not sufficient that Congress legislate in an area related to the common law cause of

action but rather:

[T]he 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, 236-37 (1985).

No provision of the CAA speaks directly to the question “otherwise answered by federal common law,” i.e., whether and how to compensate victims of global warming or air pollution generally. The CAA is silent on the availability of damages for injuries caused by air pollution. Here, as this Court noted in *In re Exxon Valdez*, “[i]t is reasonable to infer that had Congress meant to limit the remedies for private damage to private interests, it would have said so.” 270 F.3d 1215, 1231 (9th Cir. 2001), *aff’d in relevant part by Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2617-19 (2008); *accord County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1349 (9th Cir. 2009) (“We presume that Congress legislates with the expectation that the principles of the federal common law will apply except when a statutory purpose to the contrary is evident.”) (internal quotation marks and citation omitted).

The Supreme Court has repeatedly recognized that remedies lie at the center

of the preemption inquiry. In *Oneida*, the Court held that a federal common law claim for illegal occupation of Native American lands was not preempted by a statute that generally addressed the issue by prohibiting conveyances of tribal lands without the approval of the federal government. 470 U.S. at 231-32. The legislation authorized the President to remove illegal occupants of aboriginal lands but, critically, did not speak directly to the question of the remedies the tribes might have in cases of unlawfully conveyed land: “The Nonintercourse Act of 1793 does not speak directly to the question of *remedies* for unlawful conveyances of Indian land” and “did not establish a *comprehensive remedial plan* for dealing with violations of Indian property rights.” *Id.* at 237 (emphasis added). *Oneida* is dispositive here: nothing in the CAA establishes a “comprehensive remedial plan” for compensating persons whose injuries are caused by global warming or air pollution of any kind.

By contrast, in *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (“*Milwaukee II*”), the Court held that the CWA had preempted Illinois’ injunctive relief claims for abatement of the nuisance because the CWA specifically prohibited “*every* point source discharge” of water pollution unless it was covered by a CWA permit; therefore any court-issued injunction to abate the nuisance would necessarily “impose more stringent limitations than those imposed under the regulatory regime

by reference to federal common law.” *Id.* at 319-20; *accord Exxon*, 128 S. Ct. at 2619 n.7 (in *Milwaukee II* the “plaintiffs’ common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the CWA.”); *Arkansas v. Oklahoma*, 503 U.S. 91, 99 (1992) (*Milwaukee II* found preemption because Congress had provided a federal remedy). Here, the CAA provides no federal remedy, and unlike in *Milwaukee* there is not even a potential conflict with a federal statute or regulation: Kivalina only requests monetary relief; it does not ask a court to set any emissions standards that could even theoretically conflict with any standards that EPA might eventually set under the CAA.

### CONCLUSION

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

Dated: March 10, 2010

Respectfully submitted,

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Signature of Attorney or  
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s/Matthew F. Pawa

("s/" plus typed name is acceptable for electronically-filed documents)

Date March 10, 2010

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## PROOF OF SERVICE

I hereby certify that on March 10, 2010, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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