IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-17490

NATIVE VILLAGE OF KIVALINA; CITY OF KIVALINA,
Plaintiffs-Appellants,

v.

EXXONMOBIL CORP.; BP P.L.C.; BP; AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; CONOCOPHILLIPS CO.; ROYAL DUTCH SHELL PLC; SHELL OIL CO.; PEABODY ENERGY CORP.; THE AES CORP.; AMERICAN ELEC. POWER CO., INC.; AMERICAN ELEC. POWER SERVICE CORP.; DUKE ENERGY CORP.; DTE ENERGY CO.; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS CO.; PINNACLE WEST CAPTIAL CORP.; THE SOUTHERN CO.; DYNEGY HOLDINGS, INC.; RELIANT ENERGY, INC.; XCEL ENERGY, INC.,
Defendants-Appellees.

On Appeal From The United States District Court
For the Northern District of California (No. 4:08-cv-01138-SBA)
The Honorable Saundra Brown Armstrong, U.S. District Judge

AMICI CURIAE BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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DISCLOSURE STATEMENT PURSUANT TO RULE 26.1 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that the associations represented on this brief have no parent corporations and have issued no stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE

The National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, and American Tort Reform Association ("*Amici*") represent large and small businesses throughout the United States. They have a substantial interest in ensuring that courts follow constitutional and traditional tort law principles. The nature of this case extends far beyond Alaska and the Ninth Circuit. It represents an effort to circumvent the legislative and executive branches on environmental policy issues, and has national and international implications. Should the Ninth Circuit reverse the court below and subject individual utilities and other businesses engaged in lawful conduct to liability for weather-related events, *Amici*'s members would be adversely affected.

Co-author of the brief, James A. Henderson, Jr., the Frank B. Ingersoll Professor of Law at Cornell Law School, has not accepted any remuneration for his work on this brief. A leading tort law scholar and reporter of the Restatement Third: Products Liability, Professor Henderson volunteered to assist because of his concern that this case would allow a court to usurp congressional and executive responsibilities and give rise to lawless, mass tort cases inconsistent with bounds of U.S. tort law. Amici received consent from the parties for the filing this brief.

STATEMENT OF THE CASE

Amici adopt Defendants-Appellees Statement of the Case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is one of several attempts in the past forty years to turn the tort of public nuisance into a "super tort" subjecting American businesses to liability for nearly any environmental harm – in this case, damages caused by the weather. *Amici* fully appreciate that being evacuated from one's homeland because of changes in weather patterns, as Plaintiffs' allege, would be unsettling to any people. *See* App. Opening Brief, at *8-9. The problem with Plaintiffs' legal action is that the defendants did not engage in any objective wrongful conduct that gives rise to liability and requires them to remedy Plaintiffs' alleged injuries.

The district court properly understood that the tort of public nuisance requires wrongful conduct; for its 700-year history in American and English law, it has required defendants to have *unreasonably interfered* with a public right. Op. at *10-11. The district court recognized that by ignoring the wrongful conduct requirement, "Plaintiffs are in effect asking this Court to make a *political judgment* that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming." Op. at *10-15 (emphasis added).

Judges schooled in public nuisance law's rules and policies have rejected similar efforts. Such cases were dismissed for failure to state a claim or, as the recent climate change cases, on political question and standing grounds. The jurists understood that removing wrongful causation or other elements from public

nuisance theory would be like removing breach and causation from negligence law; the result would be a "monster that would devour in one gulp the entire law of tort." *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).

In addition to creating unjust liability, the dangers of an amputated public nuisance theory is that individuals seeking to advance private political agendas could improperly manipulate the tort to impose "regulations" through courts that were not achieved through the political process. The lure of such a cause of action led environmental lawyers to seek changes to the tort of public nuisance beginning in the 1970s with the drafting of the Restatement (Second) of Torts. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 541 (2006). It is the reason public nuisance is the centerpiece of the most speculative mass tort suits of the past several decades. Former Secretary of Labor Robert Reich, who served under President Clinton, called these lawsuits "regulation through litigation" because they amounted to "faux legislation, which sacrifices democracy." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22.

As the district court pointed out, the political agenda at issue here is the direction of the U.S. energy policy. To adjudicate the wrongful causation aspect of their public nuisance claim, the court would have to determine for each defendant

"an acceptable limit" on its emissions of carbon dioxide, methane and other substances categorized as "greenhouse gases." Op. at *14. Those emitting below that limit would be deemed reasonable emitters; those exceeding that limit would be subject to massive retroactive liability.

Establishing such limits, which Congress and several administrations have carefully considered and, thus far, chosen not to impose, requires weighing numerous factors integral to the role of energy production and use in modern American society. These factors include, "inter alia, energy-producing alternatives that were available in the past and . . . their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level." Op. at *11. Courts are "ill-equipped or unequipped" to properly adjudicate such claims. *Comer v. Murphy Oil Co*., 585 F.3d 855, n.2 (5th Cir. 2009) (quoting district court's ruling) *vacated*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010).

This brief grounds Plaintiffs claims in public nuisance doctrine, explains where Plaintiffs' claims diverge from traditional public nuisance law, and shows why lawsuits naming private sector companies for weather-related injuries fail to state any recognized cause of action and are barred under the political question doctrine. With no anchor under any doctrine of tort law and no constitutional authority to adjudicate these political questions, this lawsuit must be dismissed.

ARGUMENT

I. THIS CASE IS AN UNPRECEDENTED STEP IN THE DECADES-LONG PURSUIT TO TURN THE TORT OF PUBLIC NUISANCE INTO A CATCH-ALL ENVIRONMENTAL "SUPER TORT"

A. Public Nuisance Law Has Distinct Elements and Boundaries

The tort of public nuisance has centuries of jurisprudence defining its purpose, elements and boundaries. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003). The four time-honored elements of public nuisance theory are: (1) the existence of a "public right"; (2) unreasonable conduct by the alleged tortfeasor in interfering with that public right; (3) control of the nuisance at the time of creation or abatement; and (4) proximate cause between defendant's unreasonable conduct and the public nuisance, and any alleged injury. *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 452-53 (R.I. 2009) (detailing the four elements as "essential to establish" a public nuisance claim).

The purpose of public nuisance law is to give governments the ability to stop a private party from engaging in quasi-criminal behavior that invaded a public right, and, when appropriate, require that party to abate the nuisance it created. *See* Restatement (Second), *supra*, § 821B cmt. a. The quintessential public nuisance is a barrier that stops people from using a public road. If a person unreasonably set that barrier, the government can sue to enjoin the person from blocking the road

and require him/her to remediate any damage to the road caused by the blockade. Governments cannot recover money damages under public nuisance law; government public nuisance actions are not punitive or compensatory in nature.

With regard to private plaintiffs, individuals only have standing to bring a claim if they have special injuries caused by the public nuisance. The injury must be a "harm of a different kind from that suffered by other persons exercising the same public right." Restatement (Second), *supra*, § 821C cmt. B ("It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree" than that suffered by the public at large."); *see also McKay v. Boyd Construction Co.*, 571 So. 2d 916, 921 (Miss. 1990). For instance, individuals sitting in traffic caused by a blockade, regardless of length or consequences, do not have public nuisance claims. A person specially injured by crashing into the blockade does, and the claim can be only for those special damages. Private plaintiffs cannot seek injunction or abatement orders under public nuisance law, and they must prove all four elements of the tort to sustain a claim.

B. Environmental Attorneys Have Attempted to Recast Public Nuisance as a "Super Tort" Since the Drafting of the Second Restatement

In the 1970s, environmental lawyers started a campaign to transform public nuisance from a restrained government law-enforcement tort into a tool for requiring businesses to remediate environmental conditions, regardless of fault,

and for advancing political agendas through courts. They tried to capitalize on the amorphous nature of the word "nuisance" and the fact that the tort had not been used much in the post-industrialized era, so many courts did not have a hardened view of how to apply the historic tort in modern times. *See* W. Page Keeton *et al*., *Prosser & Keeton on Torts* 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people.").

When William Prosser and John Wade captured public nuisance doctrine in the Restatement (Second), *supra*, § 821B, these environmental lawyers pursued changes to the tort that, according to a Sierra Club attorney, would have "[broken] the bounds of traditional public nuisance." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). Most notably, they tried to remove the wrongful conduct requirement so claims could be brought even when defendants were engaged in lawful activities – just as with Defendants' emissions. *See id.* They also sought to get rid of the special injury rule. Doing so would allow "severe" harms to be compensable, as sought here, even when not different in kind from harms to the public. They also wanted private plaintiffs, including interest groups, to be able to form class actions and seek injunctive relief or abatement costs. *See id*.

As the Sierra Club attorney explained, if courts adopted these changes, public nuisance theory would become a catch-all tort for forcing potentially non-culpable private interests to clean up and pay for a wide-range of perceived environmental harms, with few, if any, defenses. *See id*. at 838.

C. Courts Have Long Rejected Efforts to Transform Public Nuisance Into a Catch-All Tort

The tort of public nuisance has proven not to be so malleable. The first test case was *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971), which is remarkably similar to this case. It was an action against corporations for emitting gases that, when mixed together, allegedly contributed to smog in Los Angeles. Private individuals sued the businesses for billions of dollars in compensatory and punitive damages.

In dismissing the claims, the court fully appreciated the inconsistency of the claims with traditional public nuisance law, the political nature of the underlying issues, and the proper role of the legislature, not the judiciary, in making regulatory decisions: plaintiffs were "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the court." *Id.* at 645. The court stated that granting relief would "halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent." *Id*. at 644.

Undeterred, some lawyers sought courts willing to overlook the political questions and allow a claim to survive a motion to dismiss. The threat of liability could force defendants to change business practices or facilitate regulatory or legislative changes. There has been an occasional limited or trial court success. For example, one court allowed a public nuisance action for water pollution against a defendant who did not contribute to the pollution and never owned or controlled the land where the pollution occurred. *See State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971 (Sup. Ct. 1983). The court admitted that determining responsibility was "essentially a political question to be decided in the legislative arena," but permitted the claim because, in its opinion, "[s]omeone must pay to correct the problem." *Id.* at 977.

All major attempts to remove wrongful causation and morph public nuisance theory into a "Super Tort" for speculative lawsuits have failed. In asbestos litigation, courts rejected cases from municipalities, school districts and other public entities asserting public nuisance claims against manufacturers to abate asbestos from public and private properties. *See, e.g.*, *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (public nuisance would "give rise to a cause of action . . . regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories"). In state attorney general litigation against tobacco manufacturers, the only court to address the public

nuisance claim rejected it. *See Texas v. American Tobacco Co*., 14 F. Supp. 2d 956 (E.D. Tex. 1997); *see also* Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 Def. Couns. J. 484 (2000). Governments and private plaintiffs also unsuccessfully alleged public nuisance claims in other mass tort litigations, including for harms caused by guns, lead paint, and drunk driving. *See*, *e.g.*, *City of Chicago v. Beretta U.S.A. Corp*., 821 N.E.2d 1099 (Ill. 2004); *Lead Indus. Ass'n*, 951 A.2d at 428; *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *Goodwin v. Anheuser-Busch, Inc.*, No. BC310105, 2005 WL 280330, at *8 (Cal. Super. Ct. order Jan. 28, 2005).

II. PLAINTIFFS CANNOT STATE A VIABLE TORT CLAIM

As with the cases above, instead of pleading a case under traditional public nuisance law Plaintiffs have changed the tort's elements to shoe-horn their harms into litigation. Neither federal common law, to the extent it even exists in this area, nor the tort law of any state, recognizes a cause of action that would render private parties liable for injuries caused by global weather patterns.

A. Plaintiffs' Recitation of Public Nuisance Theory is Completely Unfounded in Federal or State Law

Plaintiffs seek four fundamental changes to the tort: (1) Plaintiffs eliminate the element of unreasonable conduct; (2) Plaintiffs water down proximate cause; (3) by seeking damages, Plaintiffs are changing remedies the Village may seek,

which are limited to injunctive relief and abatement; and (4) Plaintiffs sidestep the special injury rule, alleging that any severe harm is actionable.

The house of cards upon which all of this is built is Plaintiffs' false notion that a public nuisance claim can be predicated solely upon an *unreasonable injury*: Kivalina sustained injuries that it ought not have to bear regardless of the merit and lawfulness of Defendants' conduct. *See* App. Opening Brief at *25 ("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.").

To support this argument, Plaintiffs improperly cite to the Restatement (Second), well-respected treatises, and cases. *See id*. at *24-26. All of these citations state that the *unreasonable injury* concept is limited to the tort of *private nuisance*. *See* Restatement (Second), *supra*, at §829A cmt. A ("The rule stated in this Section applies to conduct that results in a private nuisance."); W. Page Keeton, et al., Prosser and Keeton on the Law of Torts 651-52 (5th ed. 1984) (when the interference "affect[s] the plaintiff in a substantial way," it "constitute[s] a private nuisance"). The primary case cited is a private nuisance case. *See* App. Opening Brief at *49 (citing *Pendergast v. Aiken*, 293 N.C. 201 (1977) (calling itself a "private nuisance" case)). Indeed, all examples applying unreasonable or severe harm standards in these materials are *private nuisance* fact patterns.

"Private and public nuisances are two distinct causes of action." *Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 640 A.2d 957 (R.I. 1994). They do not overlap. As Dean Prosser succinctly observed, the two torts "are quite unrelated except in the vague general way that each of them causes inconvenience to someone" and the two share a "common name." William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966); *see also* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359, 390 (1990) ("[T]he shared name further confuses an already badly confused area of law.").[1]

Unreasonable harm is a core concept to the tort of *private nuisance*, which is always a local dispute arising between private parties and centering on conflicting uses of neighboring private lands. The injury is the intentional invasion of a person's property that interferes with that person's use of the property. There is no public right or collective harm involved.

Replacing public nuisance's *unreasonable conduct* element with *unreasonable harm*, however, is antithetical to the tort of *public nuisance*. First, by bringing a government public nuisance action, Plaintiffs must focus on Defendant's conduct because their remedies are limited to injunctive relief and abatement. *See In re Lead Paint Litig.*, 924 A.2d at 499 ("public nuisance, by

[1] Alaska also distinguishes between public nuisance and private nuisance actions. *See Fernandes v. Portwine*, 56 P.3d 1 n. 9 (Alaska 2002).

definition, is related to conduct"). Second, eliminating the unreasonable conduct requirement cannot be reconciled with the Restatement's core principle that "If the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it." Restatement (Second), *supra*, at §821A, cmt. c. Finally, Plaintiffs' theory cannot coexist with the special injury rule, which is the only means for seeking damages under public nuisance law. Plaintiffs are not private individuals; even if they were, they only allege damages more severe than the alleged impact of climate change on other communities, not different in kind. *See* App. Opening Brief at *26 ("Kivalina alleges a severe harm").

As courts have held, eliminating the wrongful conduct requirement creates a defenseless tort allowing plaintiffs to "deliberately frame[] [their] case as a public nuisance action" to get around constraints of the American legal system. *Chicago v. American Cyanamid*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003).

B. Emitting GHGs Does Not Give Rise to a Claim for Public Nuisance

Under an unreasonable conduct analysis, it becomes clear that Defendants cannot be liable in public nuisance, which is presumably why Plaintiffs are trying to truncate and manipulate the tort. Public nuisance claims target quasi-criminal offenses that interfere with the rights of the public at-large. *See* Prosser, 52 Va. L. Rev. at 999. These "common law crimes" included threatening public health, such as by keeping diseased animals or explosives in a city; violating public morals,

including vagrancy; blocking public roads and waterways; and violating the peace, such as through bad odors. *See* Restatement (Second), *supra*, §821B cmt. B.[2]

Each of these activities is objectively wrong; public nuisances have little or no public benefit. *See* Restatement (Second), *supra*, § 828 cmt. e (public nuisances lack social value and are "contrary to common standards of decency"). This objective standard gives actors notice that such actions could lead to public nuisance liability. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to common law liability).

By contrast, the gases at issue in this case are necessary byproducts of public utilities and societal staples, such as electricity, gasoline and home heating oil. These products are necessary to modern life. Emitting gases to produce affordable energy is not quasi-criminal or objectively wrong. Congress and administrative agencies have assiduously studied and debated the very issues at play in this litigation, and have never imposed caps on emissions or suggested that a certain level of emissions would be unlawful. Some emissions are even required. *See, e.g.*, 90 U.S.C. § 863; C.F.R. § 75.323(b). Defendants, therefore, would have no reason to believe that current, lawful emissions give rise to liability.

[2] Given the quasi-criminal nature of public nuisance offenses, Alaska courts require clear and convincing evidence as the standard of proof in public nuisance abatement statutory actions. *Fernandes*, 56 P.3d at 5 (citing *Spenard Action Committee v. Lot 3, Block 1 Evergreen Subdivision*, 902 P.2d 766 (Alaska 1995)).

C. Proximate Causation Between Defendants' Emissions and Plaintiffs' Alleged Injuries Cannot Be Established

Causation is required for public nuisance claims, just as in other areas of tort law. *See* Keeton, *supra*, at § 41, 263 ("there [must be] some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered"). Plaintiffs must be able to show "direct" (factual) and "foreseeable" (legal) causation; *i.e.*, but-for Defendants' emissions Plaintiffs' injuries would not have occurred, and these injuries are closely related such that a reasonable person would see it as a likely result of his/her conduct. *See Owens Corning v. R.J. Reynolds Tobacco Co.*, 868 So. 2d 331, 341 (Miss. 2004); *cf.* Fowler V. Harper, et al., The Law of Torts § 20.2 (1986). Plaintiffs cannot meet either burden, and no information dependent on discovery will change these dynamics.

According to Plaintiffs' logic and Rube Goldberg-esque causation allegations, billions of sources of GHGs have allegedly contributed to climate change for two hundred years. Thus, no Defendant could be a "but for" cause of their alleged harms. As the district court appreciated, "[t]o the extent that the combustion of fossil fuels is causing global warming, it is evidence that any person, entity or industry which uses or consumes such fuels bears at least some responsibility for Plaintiffs' harm." *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, n 4 (N.D. Cal. 2009). To avoid this fact, Plaintiffs seek a mere "contribution" test unsupported by federal or state tort law. *See, e.g.*,

Texas Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris, Inc., 21 F. Supp. 2d 664, 668 (E.D. Tex. 1998) (in industry-wide suits, "the nexus between cause and effect [for each defendant] is too attenuated to justify liability.").

Even if Plaintiffs' allegations are true, therefore, no Defendant could have reasonably foreseen Plaintiffs' injuries or "should have avoided the injury" by doing something differently on their own. Dan B. Dobbs, *The Law of Torts* § 180, 444 (2000). When legal causation cannot be shown, years of time-consuming, expensive discovery should be avoided. This was the policy behind the U.S. Supreme Court rulings in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), requiring plausible evidence that a case can succeed even at the motion to dismiss stage.

D. Federal Common Law Does Not Provide a Basis for Plaintiffs' Public Nuisance Claim

Plaintiffs' attempt to cast their claims in the federal common law of public nuisance should also be rejected, though they should be dismissed under federal or state law. *See* Theodore J. Boutrous, Jr. and Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance,"* 35 Ecology L. Currents 80, 87-88 (2008).

The notion of federal common law for a private tort claim is misguided. *See Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) ("there is no federal general common law"). Courts have identified only a handful of arenas in which federal common law can develop, namely admiralty and maritime cases, interstate

disputes, proceedings raising matters of international relations, actions involving gaps in federal statutory provisions, and cases concerning the legal relations and proprietary interests of the United States. *See* Jack H. Friedenthal et al., Civil Procedure 223 (1985). Federal common law helps avoid war between states where it is inappropriate to apply state tort law or unfair to apply one state's law over the other. *See* Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 N.W.U. L. Rev. 551, 562-63 (2008).

Most federal common law public nuisance cases involving claims against private sector parties were decided pre-*Erie*, when applying federal common law was less exceptional. *See, e.g., Georgia v. Tennessee Copper Co*., 206 U.S. 230, 236 (1907) (Georgia brought an original action in the U.S. Supreme Court alleging that operations of private Tennessee companies caused damage in Georgia). When federal courts have, on occasion, applied federal public nuisance common law in the post-*Erie* era, the cases involved litigation between states over interstate pollution. *See, e.g., Illinois v. City of Milwaukee,* 406 U.S. 91, 104 (1972) (Illinois sought to require Wisconsin cities to abate a public nuisance in interstate navigable waters). This fact pattern is consistent with federal common law nuisance actions pre-*Erie*. *See, e.g., New Jersey v. City of New York*, 283 U.S. 473, 481-82 (1931) (granting injunction to New York City to stem water pollution originating from New Jersey); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (relating to

interstate flooding from changes in local drainage methods); *New York v. New Jersey*, 256 U.S. 296, 311-12 (1921) (denying New York an injunction against New Jersey to stem pollution flowing into New York waters); *Missouri v. Illinois*, 200 U.S. 496 (1906) (finding Missouri was not entitled to injunctive relief against Illinois for pollution); *Missouri v. Illinois*, 180 U.S. 208 (1901) (same).

If this Court applies the blank slate of federal common law, rather than state law, it should not take Plaintiffs' bait to change traditional public nuisance theory and create a new and expansive type of claim. It should closely adhere to the tort's long-standing principles and elements. With the public nuisance claims failing, so too do the civil conspiracy and concert of action claims, both of which must be accompanied by a recognized tort.

III. THE COURT WOULD HAVE TO ADDRESS COMPLEX POLITICAL QUESTIONS TO DETERMINE WHETHER THE ELEMENTS OF PUBLIC NUISANCE ARE SATISFIED

The district court, in dismissing the claims on political questions grounds, correctly understood the claims' political nature. In the early 2000s, environmental advocates focused significant policy efforts on their climate change agenda. The allegations were that man-made emissions of CO_2, methane and other such gases – collectively termed "greenhouse gases" or "GHGs" – caused climate changes and that those climate changes had serious long-term consequences for the environment. Vice-President Gore's movie, "An Inconvenient Truth," won an

Academy Award, and he was awarded the Nobel Peace Prize for his efforts. Their short-term political goal was to restrict emissions of man-made GHGs, but their efforts did not immediately define environmental policy in the United States.

The U.S. Government's perceived reluctance to curb such emissions caused environmental lawyers to turn to another venue – the courts – to pursue their cause. *See* Environmental Litigation: Law and Strategy 1 (Cary R. Perlman, ed. 2009) ("[F]our years ago, the issue had no significant legal footprint in the United States. Since then, however, the issue has exploded onto the legal scene, resulting in enormous social and economic shockwaves."). Environmental groups and state government allies began with a lawsuit requiring the Bush Administration to revisit its denial of rulemaking on GHG emissions under the Clean Air Act. *See Massachusetts v. U.S. Environmental Protection Agency*, 549 U.S. 497 (2007). That case was followed by four lawsuits, including this one, against private sector interests associated with producing and using energy products. John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, Bus. Week, Oct. 30, 2006, at 34 (observing this "ambitious legal war on oil, electric power, auto, and other companies").

The first private sector case, *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), was brought by a few state attorneys general to require specific reductions in GHG

emissions per year for ten years. A second public lawsuit, *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), was filed by California's attorney general against car-makers for making cars that emit exhaust. Finally, two cases, the instant case and *Comer*, 585 F.3d at 855, seek recovery for specific injuries from weather events allegedly caused or made worse by global warming.

All four federal trial courts dismissed the claims as political questions. *See Kivalina*, 663 F. Supp. 2d at 877 ("allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch"); *General Motors*, 2007 WL 2726871 at *13 (claim "expos[es] automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce"); *Comer*, 585 F.3d at 860 n.2 (citing the district court's ruling that the global warming debate "has no place in the court"); *AEP*, 406 F. Supp. 2d at 274 ("Because resolution of the issues presented here requires identification and balancing of environmental, foreign policy, and national security interests, an initial policy determination of a kind clearly for non-judicial discretion is required.") (internal citation omitted). These knowledgeable judges from diverse jurisdictions recognized the inherently political nature of the issues presented and determinations that would have to be made to adjudicate the claims.

A. The Determination of Reasonable Versus Unreasonable Conduct Requires the Court to Establish Emission Standards

In a claim for public nuisance, all plaintiffs – both government plaintiffs, as in *AEP*, *General Motors*, and the instant case, and private plaintiffs, as in *Comer* – must prove both that a public nuisance exists and that the defendant engaged in *unreasonable* conduct that proximately caused the nuisance. The constitutional difficulty with these cases, as the trial courts recognized, is that there are no "judicially discoverable and manageable standards" for assessing unreasonableness of a Defendant's conduct with respect to emissions of GHGs. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (setting criteria for the political question standards).

GHGs, presuming *arguendo* that they affect climate, have been released for centuries from sources – both natural and man-made – around the world. The trial court, in this case, would have to determine that, for each Defendant, emissions above a certain level *unreasonably* contributed to the Kivalina's hazardous conditions, while emissions below that amount were *reasonable*, even if allegedly contributing to those conditions. Such a court-created threshold for massive liability would be the *de facto* cap on emissions for each Defendant, but have no effect on any other source of GHGs, in this country or elsewhere. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328-29 (2008) ("tort duties of care" under state law "directly regulate" a defendant's conduct).

Determining whether emissions should be reduced, by how much, and for which industries is exactly the kind of policy determination alluded to in *Baker* as being of "non-judicial discretion" and the province of Congress and federal regulators. The activities underlying these lawsuits involve public utilities and other energy sources necessary to modern ways of life. The public relies on these products for turning on lights, heating their homes, having electricity to run everyday appliances, and meeting their most basic transportation needs. In addition, the costs and benefits of reducing emissions are uncertain, highly speculative, and have proven extraordinarily controversial. *See*, *e.g*., Andrew C. Revkin, *Hacked E-mail is New Fodder for Climate Dispute*, N.Y. Times, Nov. 20, 2009. Moreover, "[a]ny potential benefit of [GHG] regulation could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emissions reductions." EPA, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52931 (Sept. 8, 2003).

Such global political decisions should not be decided in courts on limited information provided by lawyers on each side of a case. Weighing costs, benefits and social value of producing and using essential resources and factoring in any adverse effects of their production and use is part of the delicate balancing for which only Congress and administrative agencies are suited. They can conduct public hearings, commission research, engage in meaningful discourse with foreign

nations, and consider the interests of all stakeholders. These branches of government, unlike the Judiciary, have the authority and competent tools to investigate and set this nation's emissions policy.

B. The Determination of Causation Necessarily Involves Political Questions Given the Global Sources of GHGs

Under Plaintiffs' causation allegations, there are "multiple worldwide sources of [GHGs] across myriad industries and multiple countries." *General Motors*, 2007 WL 2726871, at *15.[3] These dynamics accentuate the fact that Plaintiffs made a *political* decision to sue companies associated with the energy industry. As the district court pointed out, "[t]he seemingly arbitrary selection of Defendants, coupled with the gravity and extent of the harm alleged in this case, underscores the conclusion that the allocation of responsibility for global warming is best left to the executive or legislative branch." Op. at n 4.

The release of GHGs is not particular to any defendant, industry or country, as CO_2, methane and other gases are released through numerous man-made and natural activities around the world. The United States accounts for 17% of global man-made emissions of GHGs; Defendants count for just a subset of that amount. For example, GHGs are released through fossil fuel combustion, power plants,

[3] The causation allegations associated with these claims give rise to three distinct grounds for dismissal: (1) constitutional political question; (2) constitutional standing, as Plaintiffs' harms cannot be traced to any Defendant; and (3) failure to state a claim in tort law.

manufacturing, and auto and airplane exhaust throughout the world. *See id.* ("Plaintiffs readily acknowledge that the 'transportation sector' is responsible for an 'enormous quantity' of greenhouse gas emissions. Nonetheless, Plaintiffs have chosen not to include any members of the transportation sector in his lawsuit."); *see also* CRS Report for Congress, China's Greenhouse Gas Emissions and Mitigation Policies, Sept. 10, 2008, at 8, *available at* http://www.fas.org/sgp/crs/row/ RL34659.pdf. Natural sources include volcanic outgassing, animal releases of gas (particularly from livestock), and breathing of all living aerobic organisms.[4] When mixed in the Earth's atmosphere, GHGs from any one source cannot be distinguished from GHGs of the many other sources.

Therefore, Plaintiffs could have named innumerable sources from all around the world as allegedly causing their weather-related harms. Instead, Plaintiffs chose perceived "deep pocket" companies associated with the U.S. energy industry, not sources in China, India, or elsewhere that have made more significant contributions to emissions at issue. Further, Plaintiffs seek to stop Defendants from bringing into the litigation the many other sources of GHGs. *See* App. Opening Brief at n. 8 ("Kivalina is not required to sue all contributors to the nuisance and defendants may not add them.").

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[4] *See* Natural Sources and Sinks of Carbon Dioxide, Environmental Protection Agency, Climate Change – Greenhouse Gas Emissions, *at* http://www.epa.gov/climatechange/emissions/co2_natural.html.

Giving Plaintiffs the sole opportunity to make the "political judgment that the two dozen Defendants . . . should be the only ones to bear the cost of contributing to global warming" violates the *Baker* standard that federal courts have "a manageable method of discerning the entities that are creating and contributing to the alleged nuisance." *Kivalina*, 663 F. Supp. 2d at 874 (plaintiffs cannot show that "any particular emissions by any specific person, entity, group [*sic*] at any particular point in time" caused "any particular alleged effect of global warming") (internal citations and footnotes omitted); *General Motors*, 2007 WL 2726871, at *15. Consequently, federal courts have no authority to subject a sector of the American economy to liability for Plaintiffs' alleged harms.

C. Advocates of the Litigation Candidly Recognize That it is Born Out of Frustration With the Legislative Process

With surprising candor, the litigation's advocates and sponsors have acknowledged the political purpose of the lawsuits. *See* Robert Meltz, Cong. Research Serv. Rep. for Cong., Climate Change Litigation: A Growing Phenomenon 33 (2008), *available at* http://www.elaw.org/system/files/CRS_4_7_08.pdf ("Many proponents of litigation or unilateral state action freely concede that such initiatives are make-do efforts that . . . may prod the national government to act.").

John Echeverria, Executive Director of Georgetown University's Environmental Law & Policy Institute, said "this boomlet in global warming

litigation represents frustration with the White House's and Congress' failure to come to grips with the issue . . . [s]o the courts, for better or worse, are taking the lead." *See* Carey & Woellert at 34. Connecticut Attorney General Richard Blumenthal, lead attorney general in *AEP*, whose private contingency fee lawyers are counsel in this case as well, stated:

> [T]his lawsuit began with a lump in the throat, a gut feeling, emotion, that CO_2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. . . . [We were] brainstorming about what could be done.

Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, 30 Colum. J. Envtl. L. 335, 339 (2005) [hereinafter "Symposium"]. Gerald Maples, lead plaintiffs' attorney in *Comer*, acknowledged that his "primary goal was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol." Mark Schleifstein, *Global Warming Suit Gets Go-Ahead*, Times-Picayune, Oct. 17, 2009, at 3, *available at* 2009 WLNR 20528599.

Proponents have also acknowledged the inappropriateness of judicial action. *See* Symposium, *supra*, at 343 (quoting Maine Attorney General Rowe: "[I]t's a shame that we're here . . . trying to sue [companies] . . . because the federal government is being inactive."). One of the Second Circuit judges, Peter Hall, who decided to allow the *AEP* case to continue conceded that "[y]ou really don't want a

district judge supervising your relief in all of this stuff" but "[t]o the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense." *Key Judge Downplays Prospects for Successful Climate Change Suits*, Clean Air Report, Vol. 21 Iss. 5, Mar. 2, 2010.

Matthew Pawa, a lead attorney in this case and in *AEP*, also acknowledged their political value. His purpose for bring these cases, even if they do not fit within the traditional tort litigation, is to get the judiciary and the public "used to the idea of liability." Rachel Morris, *People v. CO2*, Slate, Apr. 20, 2010. While such end-games may entice those sympathetic to a particular set of plaintiffs or a particular political agenda, they are policy matters, not theories for liability. Article III does not provide federal courts with authority to settle the national policy "'debate' about global warming." *Comer*, 585 F.3d at 860 n. 2. Notwithstanding the masking of political questions in common law causes of action, trying to subject private interests to liability for weather events allegedly connected to "global warming" is not a case or controversy.

IV. ALLOWING THIS LAWSUIT TO PROCEED WOULD USHER IN A NEW UNBOUNDED ERA OF CIVIL LITIGATION

A. The Lawsuit Would Give Rise to Endless Liability

Allowing this case to proceed beyond a motion to dismiss could subject these Defendants to highly speculative, mass tort cases after every harsh weather event. Ice erosion around Kivalina, Hurricane Katrina, and concerns of attorneys

general in *AEP* are not unique to these communities. Every hurricane, flood, draught, and heat-related condition could spawn climate change claims.

Further, such a ruling would revive speculative uses of public nuisance theory for other political purposes, including "to mandate the redesign of" products and regulate business methods. *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001). Plaintiffs would use the threat of massive liability to leverage companies to accept changes to business practices or products, no matter how invalid or unpopular with policy-makers or the public at-large.[5]

The result would be the exact catch-all social and environmental tort courts expressly rejected for decades. *See Spitzer v. Sturm, Ruger & Co.*, 309 A.D. 91, 96 (N.Y. App. Div. 2003) ("All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born."). There would be no broad consideration of the importance of the conduct or product at question, whether policy changes sought

[5] Getting to discovery can be victory enough in cause-oriented cases. Discovery provides access to documents and the potential for damaging a defendant's reputation. *See, e.g.*, Richard A. Daynard, et al., Private Enforcement: Litigation as a Tool to Prevent Obesity 408 (2004); Kate Zernike, *Lawyers Shift Focus From Big Tobacco to Big Food*, N.Y. Times, Apr. 9, 2004.

are unnecessary, and consequences of those policy changes, including whether consumers can afford to ultimately bear the costs of the changes.

B. Congress and the Executive Are the Proper Institutions to Assess and Regulate Any Public Risks Associated with Climate Change

"Public risk" cases, such as this one, expose the weakness of the judiciary to administer cases where there is no objective wrongful conduct. As a backwards-looking compensation and enforcement mechanism, "the tort system is ill-equipped to handle" public risks, particularly where there is a "need for specialized experience in assessing risks and control measures." 2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991). By contrast, Congress and administrative agencies can fully vet Plaintiffs' scientific claims and engage in thorough risk-benefit analyses. Liability can then complement the legislative and regulatory regime by requiring companies to pay compensation should they cause harm by operating outside of duly enacted laws.

CONCLUSION

For these reasons, the Court should affirm the District Court's ruling that these claims are nonjusticiable. In the alternative, the Court should dismiss the case as failing to state a claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in Times New Roman, 14 point.

2. The brief also complies with Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,953 words.

/s/ Phil Goldberg
Phil Goldberg

Dated: July 7, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2010, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I will mail the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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