Samuel R. Miller (SBN 66871)
srmiller@sidley.com
SIDLEY AUSTIN LLP
555 California Street
San Francisco, California 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-7400

David T. Buente Jr. (to be admitted *pro hac vice*)
dbuente@sidley.com
Joseph R. Guerra (to be admitted *pro hac vice*)
jguerra@sidley.com
Roger R. Martella Jr. (to be admitted *pro hac vice*)
rmartella@sidley.com
Quin M. Sorenson (to be admitted *pro hac vice*)
qsorenson@sidley.com
Karen K. Mongoven (to be admitted *pro hac vice*)
kmongoven@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Attorneys for Proposed Intervenor-Defendant
The National Association of Manufacturers

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ALEC L., et al. Plaintiffs, vs. LISA P. JACKSON, et al., Defendants.	Case No. 3:11-cv-02203-EMC Assigned to: Edward M. Chen **PROPOSED INTERVENOR-DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: November 28, 2011 Time: 2:30 p.m. Place: Courtroom 5, 17th Floor

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Proposed Intervenor-Defendant the National Association of Manufacturers ("NAM" or "Intervenor") opposes Plaintiffs' Motion for Preliminary Injunction ("PI Motion") (Dkt. #24). For the reasons set forth below, the Court should not issue Plaintiffs' requested preliminary injunction.

INTRODUCTION AND SUMMARY OF ARGUMENT

The order sought by Plaintiffs in this case—now as a matter of preliminary injunctive relief—is wholly unprecedented and breathtaking in scope. Alleging that the federal government is not "do[ing] its job," Plaintiffs ask this Court to commandeer six federal agencies and order them to "take bold," "immediate," and "extraordinary" actions "to reduce CO_2 emissions in the United States by at least six percent per year beginning in 2013." Amended Complaint for Declaratory and Injunctive Relief ("Am. Compl.") ¶¶ 2-3, 6 (Dkt. #4). Under Plaintiffs' requested relief, this Court would retain jurisdiction over those agencies for an indefinite period (potentially through the end of this century) until greenhouse gas ("GHG") emissions have been reduced to a level Plaintiffs deem acceptable, and neither Congress nor the Executive Branch, which are already taking steps to address GHG emissions and climate change, would have any authority or discretion to depart from these sought-after measures. Essentially, Plaintiffs ask this Court to serve as a special master over the atmosphere for the next 88 years, ordering and overseeing the defendant federal agencies' implementation of a remedial plan to "protect the atmosphere" from carbon dioxide ("CO_2") and other GHG emissions, thereby enforcing a purported fiduciary duty of the United States government to Plaintiffs, their fellow citizens, and future generations as a "trustee of the atmosphere."

This extraordinary order could not be granted under any circumstances, in light of constitutional separation of powers principles and myriad other jurisdictional and substantive bars to Plaintiffs' claims. But such an order would be particularly inappropriate as a matter of *preliminary* injunctive relief. Because the injunction Plaintiffs seek goes well beyond maintaining the status quo and would compel the federal government to take affirmative action (within an absurdly ambitious timeframe), it is a disfavored "mandatory" preliminary injunction. Plaintiffs have failed to satisfy *any* of the four elements required for entry of even a traditional preliminary injunction, much less the heightened evidentiary burden that governs the disfavored type of preliminary relief they seek.

First, Plaintiffs' claims are not only unlikely to succeed on the merits, they should be

dismissed on the pleadings based on a host of fatal jurisdictional and other deficiencies. As detailed in Intervenor's recently-filed Motion to Dismiss (Dkt. # 67), Plaintiffs purport to assert claims that raise plainly non-justiciable political questions; Plaintiffs lack Article III standing to assert such claims; and in any event, their complaint fails to state any claim for which relief can be granted. Moreover, even if the Court were to overlook these defects and recognize an unprecedented federal common law public trust doctrine against the federal government, Plaintiffs still have not demonstrated that they are likely to prevail. Under standard public trust doctrines and trust law generally, trustees are afforded a great deal of discretion in exercising their responsibilities, and their fiduciary judgments are not subject to second-guessing by the judiciary absent abuse of discretion. Plaintiffs do not and cannot make such a showing of abuse here, in light of the many actions that the federal government is already taking to address global climate change and the enormous harms that the more draconian measures Plaintiffs demand would inflict on our nation's economy. Nor have Plaintiffs established that any violation of Defendants' "trustee" responsibilities caused Plaintiffs any specific injury. Plaintiffs' showing of causation relies on inadequate lay opinion testimony, or on the opinions of experts who do not attempt to link Defendants' alleged failure to regulate GHG emissions to any injury asserted by Plaintiffs. In addition, Plaintiffs have not and cannot join other nations that are co-contributors to global CO_2 emissions and are necessary and indispensable parties to this action under Federal Rule of Civil Procedure 19. Indeed, Plaintiffs acknowledge that, to be effective, the relief they seek must be accompanied by comparable reductions by other foreign nations. Yet foreign nations are immune from suit and cannot be involuntarily joined in this action, which warrants its dismissal.

Second, Plaintiffs have failed to demonstrate that a mandatory preliminary injunction is necessary to prevent any irreparable injuries that would occur before this case could be heard on the merits. Plaintiffs' own declarations confirm that the future injuries they allege are not imminent, and that the current injuries they allege cannot be arrested or remediated in the near term. Moreover, in essentially claiming that there can be no delay in compelling the regulatory actions they seek, Plaintiffs ask the Court to ignore the uncertainty that inheres in all scientific predictions about complex systems such as the Earth's atmosphere. Indeed, the central study upon which they base

their demand for immediate action does not include any uncertainty analysis of the sort set forth in the studies by the United Nations' Intergovernmental Panel on Climate Change.

Third and fourth, the balance of harms and the public interest both weigh heavily against granting Plaintiffs' requested preliminary injunction. To grant the relief Plaintiffs seek would not only represent an unprecedented and entirely unconstitutional interference with the policies adopted by the Nation's elected representatives—by "a nonrepresentative and in large measure insulated, judicial branch," *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)—it would inflict grievous harms on the United States' economy. It would inflict those harms, moreover, without any prospect of achieving the atmospheric concentrations of GHGs that Plaintiffs themselves deem necessary to forestall future harms.

For all of these reasons, the Court should deny the motion for a preliminary injunction.[1]

BACKGROUND

The complaint in this case, filed on May 4, 2011, and amended on July 27, 2011, claims that Defendants violated alleged duties as trustees of the natural resources of the United States by allowing an "atmospheric climate emergency" to develop as a result of increasing global GHG levels. Am. Compl. at 18, 38-39. Plaintiffs ask this Court to force a fundamental change in U.S. energy and climate change policy, by issuing an injunction forcing the defendant federal agencies to take "all necessary actions to reduce CO_2 emissions in the United States by at least six percent per year beginning in 2013," *id.* ¶ 21, which should apparently include eliminating all use of conventional fossil fuels in the United States. *Id.* ¶¶ 133-34. They further ask the Court to retain

[1] Intervenor has a wide variety of industry members who have differing views on whether climate change is presently occurring and whether it is anthropogenic. Members also have differing views on whether limiting GHG emissions will have any impact on global temperatures and whether models used to predict such impact have any accuracy. For purposes only of this Opposition and the supporting declarations, Intervenor will assume *arguendo* at certain points that limiting CO_2 emissions could have some impact on global temperatures and that this can be modeled. Even with these assumptions in place, Intervenor will show that the measures demanded by Plaintiffs in their Motion would have no significant impact on global temperatures, and the Court should deny their requested relief. This basis to deny the preliminary injunction is in addition to the numerous legal deficiencies Intervenor has addressed in detail in its Motion to Dismiss and the instant Opposition.

jurisdiction over this case "until such time as the Court is satisfied that all public trust violations have been fully and effectively remedied," which may not occur until the end of the century. *Id.* ¶ 22.

Plaintiffs' PI Motion asks for the central component of the relief requested in their complaint: to compel Defendants to issue a "Climate Action Plan" to this Court by March 19, 2012, without any apparent opportunity for public input. The plan would be required to set forth specific means to implement the following emissions "reductions trajectory": (1) capping United States CO_2 emissions at levels existing as of September 1, 2011; and (2) prohibiting significant deviation from the benchmark mitigation scenario of a minimum 6% annual reduction in CO_2 emissions, such that atmospheric CO_2 levels would return to 350 ppm by December 31, 2099. PI Motion at 1 (Notice of Motion).

ARGUMENT

I. PLAINTIFFS BEAR THE HEAVY BURDEN OF PROVING THE ELEMENTS REQUIRED FOR ENTRY OF A MANDATORY PRELIMINARY INJUNCTION.

A preliminary injunction is "an extraordinary and drastic remedy" that is never awarded as of right. *Gilman v. Schwarzenegger*, 638 F.3d 1101, 1105 (9th Cir. 2011). Whether to issue a preliminary injunction is committed to the discretion of the district court, *see Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009), but issuance of an overbroad injunction is an abuse of discretion, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009). "Injunctive relief may be inappropriate where it requires constant supervision by the court." *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) (declining on discretionary grounds to enjoin EPA from granting further extensions for permit applications from municipal and industrial dischargers). Plaintiffs must make a "clear showing" that they are entitled to preliminary injunctive relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To do so, they are required to demonstrate the following four factors: (1) they are likely to succeed on the merits of their claim; (2) they will likely suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Stormans*, 586 F.3d at 1127, *citing Winter*, 555 U.S. at 20. Plaintiffs face an even heavier burden of proof here,

because they are asking the Court to issue a "mandatory" preliminary injunction, a type of relief which is "particularly disfavored." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994), *citing Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979) (*quoting Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984).

Unlike the traditional "prohibitory" preliminary injunction, a mandatory preliminary injunction is one that "goes well beyond simply maintaining the status quo *pendente lite*." *Id.*; *see also O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 976-77 (10th Cir. 2004) ("disfavored" preliminary injunctions, including mandatory preliminary injunctions and those affording movants substantially all the relief they may recover at the conclusion of a full trial on the merits, are subject to a higher standard of review). A preliminary injunction requiring six federal agencies to develop, within an incredibly short time period, a detailed, far-reaching "Climate Action Plan" that would redefine the entire energy infrastructure of the United States, and forever impact the ability of domestic manufacturers to compete in the United States, goes well beyond preservation of the status quo before any hearing on the merits of this matter. *See Martin*, 740 F.2d at 675.

Because mandatory preliminary injunctive relief is "at odds with the historic purpose of the preliminary injunction" as described by the U.S. Supreme Court, which is to preserve the positions of the parties until trial can be held, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), courts should be "extremely cautious" about issuing such injunctions, *Martin*, 740 F.2d at 675. Such relief should be withheld "unless the facts and law clearly favor the moving party." *Stanley*, 13 F.3d at 1320. Plaintiffs have not satisfied this heavy burden of proof.[2]

[2] Plaintiffs suggest that they may satisfy the standard for preliminary injunctive relief if they can demonstrate only "serious questions going to the merits" of their claim, and that "the balance of hardships tips sharply" in their favor." PI Motion at 10, citing *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). This "alternative standard" should not apply to Plaintiffs' PI motion, because it is inconsistent with the heightened burden of proof applicable to *mandatory* preliminary injunctions. *See, e.g.*, *Stanley*, 13 F.3d at 1320. Regardless, even if the Court were to apply the "serious questions" test here, Plaintiffs do not come close to meeting that standard, for the reasons stated *infra*.

II. PLAINTIFFS FAIL TO ESTABLISH THE REQUISITE LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs have failed to demonstrate that they have a "likelihood of success" on the merits, much less that the facts and law clearly favor their request for a mandatory injunction. To the contrary, there are a litany of reasons why their lawsuit must fail. First, as stated in Intervenor's Motion to Dismiss, their complaint suffers from a series of fatal jurisdictional defects, and fails to state any valid claim for relief. Second, even if the Court were to entertain the unprecedented federal public trust doctrine claim that Plaintiffs purport to assert—and it manifestly should not—Plaintiffs have still failed to establish any likelihood that they could prevail on that claim, because they cannot establish that the federal defendants have violated their discretion as "trustees" of the atmosphere, or that any such violation caused Plaintiffs any specific injury. Third, they have not and cannot join foreign nations that are indispensable parties to this suit under Federal Rule of Civil Procedure 19.

A. Plaintiffs' Lawsuit Must Be Dismissed For Lack Of Jurisdiction And Failure To State A Claim.

As Intervenor has explained in detail in its separate Motion to Dismiss, the complaint in this case must be dismissed both for lack of jurisdiction and for failure to state a right to relief on the merits. Intervenor incorporates those arguments by reference, and only briefly recounts here the principal bases for that motion.

First, Plaintiffs' public trust claim raises a series of non-justiciable "political questions." Plaintiffs ask this court to direct agencies of the Executive Branch to promulgate sweeping regulations addressing GHG emissions in contravention of statutes enacted by the Legislative Branch, based on policy judgments expressly committed by the Constitution to those branches and without judicially manageable or discoverable standards. There could hardly be a clearer violation of the constitutional principle of separation of powers than commandeering the federal government in the manner Plaintiffs propose. Intervenor's Motion to Dismiss at 5-10.

Second, Plaintiffs lack Article III standing. Their alleged injuries—every imaginable harm purportedly associated with climate change—are shared by everyone on the planet, and the relief they seek—though drastic and devastating to our economy—will not redress those claimed injuries.

These claims represent precisely the kind of "generalized grievance" that the Supreme Court has consistently held insufficient to support standing. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (citing cases). For this reason, several courts considering challenges alleging harm from climate change have dismissed similar cases for failure to establish standing. Intervenor's Motion to Dismiss at 10-14.

Third, Plaintiffs have pled no cause of action as to which the federal government has waived sovereign immunity or that falls within the subject matter jurisdiction of this Court. The Supreme Court has repeatedly recognized that the public trust doctrine is a creature of state law, *e.g.*, *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 451, 453 (1892); it thus provides no cause of action against the federal government. Nor is there any basis for creating a federal common law version of the public trust doctrine, and an accompanying federal common law cause of action for enforcing that doctrine, particularly given the Supreme Court's admonitions against expansion of federal common law in areas—like this one—that involve "question[s] of federal ... policy" that are "a proper subject for congressional action, not for any creative power of [the judiciary]." *United States v. Standard Oil Co.*, 332 U.S. 301, 314 (1947). Indeed, it would violate virtually every precept governing the judiciary's limited authority to create federal common law to recognize an extra-constitutional basis for courts to override the lawmaking prerogatives of the political branches and compel them to enforce environmental protection standards that they themselves have not adopted. In all events, as the Supreme Court itself recently held in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2539-40 (2011) ("*AEP*"), any such federal common law cause of action is displaced by the series of laws, treaties and regulations the political branches have adopted in response to climate change. Intervenor's Motion to Dismiss at 14-22.

Finally, even if Plaintiffs could clear all of these insuperable barriers, they have failed to state any valid claim for relief under any version of the public trust doctrine recognized by state courts. Intervenor has not been able to identify any case in which a court applied the "public trust" doctrine to the atmosphere or to any similar type of "resource" that neither is nor could be owned or affirmatively utilized by a single government. *See, e.g.*, *Ill. Cent.*, 146 U.S. at 451-53. Nor have courts held that the doctrine, even when applicable, imposes any burden on governments to regulate

in a particular manner, as Plaintiffs here request. The traditional doctrine only restricts transfers of title to state-owned submerged lands, *id.*; even courts that have expanded the doctrine have not deemed it a source of judicial authority to order government agencies to enact particular regulations, *see id.* Intervenor's Motion to Dismiss at 22-25.

In short, because their complaint should be dismissed as a matter of law, Plaintiffs cannot show *any* likelihood of success, let alone a clear one. Their request for preliminary injunctive relief should therefore be denied.

B. Even If Plaintiffs Had Pled Valid And Justiciable Claims, They Have Failed To Establish A Likelihood Of Succeeding On Them.

Even if this Court were to (1) ignore Plaintiffs' lack of standing; (2) recognize an extraordinary federal common law cause of action grounded on the public trust doctrine; (3) expand that doctrine so that it applied to the atmosphere and empowered courts to compel exercises of regulatory authority; and (4) ignore the numerous justiciability problems that such an unprecedented cause of action raised, Plaintiffs still cannot show that they are likely to prevail on their claim. They have failed to establish that the federal defendants have abused their discretion as "trustees" of the atmosphere. Nor have Plaintiffs established that any such violation of defendants' "trustee" responsibilities caused Plaintiffs any specific injury.

1. Even if there were a federal common law public trust doctrine that escaped displacement, Plaintiffs have failed to show that defendants breached any trust principles.

Even accepting, for present purposes only, the many untenable premises that underlie Plaintiffs' assertion of a judicially enforceable public trust doctrine against the federal government, Plaintiffs have not shown any likelihood, much less a clear likelihood, that they will succeed in establishing a violation of any trust principles by Defendants. "The powers of trustees and the discharge of trusteeship responsibilities regularly involve the exercise of discretion." Restatement (Third) of Trusts § 50, cmt. a (2001); *see also Brady v. State*, 965 P.2d 1, 17 (Alaska 1998) (governmental administration of public trust resources is "a quintessential 'discretionary function'"). And "[w]hen a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion." Restatement (Third) of Trusts § 87

(2001). Accordingly, governments maintain considerable leeway in balancing competing priorities with the conservation of trust resources. At most, their obligation as trustees consists of a "duty to take the public trust into account … and to protect public trust uses *whenever feasible.*" *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 727-28 (Cal. 1983) (emphasis added). In striking a balance between competing interests, "the [government] may have to approve" actions "despite foreseeable harm to public trust uses." *Id.* at 728.[3] Plaintiffs cannot establish that Defendants failed to satisfy any alleged duties as trustees under this standard.

The federal government has enacted, or announced that it will soon enact, scores of regulations, executive orders, guidance documents, voluntary initiatives and research programs to reduce GHG emissions. *See* Declaration of Steven Messner ("Messner Decl.," filed herewith), Att. B. These actions encompass a wide range of techniques to that end, ranging from mandatory emission reductions from stationary sources (*i.e.*, factory and power plant smoke stacks) and mobile sources (cars and trucks) under various laws, to loan guarantees for clean energy projects and voluntary energy efficiency labeling standards for major appliances, to fossil fuel reduction initiatives by the Department of Defense. *Id.*[4] Plaintiffs they do not even acknowledge these measures and evidently deem them inadequate. But they have not demonstrated that, under the

[3] Plaintiffs' Motion cites no cases to the contrary, instead referencing academic commentary and unenforceable agency mission statements. PI Motion at 12-13. Plaintiffs cite no cases outlining any affirmative duties imposed by the common law public trust doctrine that cabin a trustee's discretion. Their citations to trustee duties established by federal statute, such as the Oil Pollution Act, PI Motion at 13, miss the point entirely. In these instances, Congress and the administrative agencies established detailed requirements for how agencies act as trustees under specific statutory circumstances. *See* 42 U.S.C. § 9607(f) (recovery for natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act); 33 U.S.C. § 2706 (recovery for natural resource damages under the Oil Pollution Act); 15 C.F.R. pt. 990, 43 C.F.R. pt. 11 (related natural resource damage regulations). The purpose of Plaintiffs' suit is not to enforce existing trustee duties, PI Motion at 18-19, but to create and enforce new ones in the *absence* of such laws and regulations. While Congress has the power to create trustee duties, and to specify how trustees exercise their discretion, it has chosen not to exercise that power here; Plaintiffs do not have that authority or discretion.

[4] Collectively, existing and proposed federal regulations as well as extension of current incentives and voluntary programs are estimated to yield approximately 36.6 gigatonnes of GHG reductions by 2050. Messner Decl. ¶ 22.

deferential standard of review applicable to the discretionary decisions of trustees, this government response to climate change constitutes an abuse of discretion.

Nor could they. Although Plaintiffs deem the federal government's actions to date inadequate, the regulatory measures Plaintiffs demand would irreparably harm the U.S. economy. Annual 6% reductions in U.S. GHG emissions could cost this country more than $15.5 trillion in economic output, measured by the net present value of gross domestic product, between now and 2050, and would place U.S. businesses at a competitive disadvantage vis-à-vis foreign producers. Declaration of W. David Montgomery, Ph.D ("Montgomery Decl.," filed herewith) ¶¶ 5, 15.[5] For example, faced with the mandatory emission reductions that Plaintiffs demand, primarily through the phase-out or phase-down of conventional fuels, Intervenor's members would be forced to re-constitute their operations to reduce direct CO_2 emissions and switch to more expensive and less available forms of energy. *Id.* ¶ 15. These decisions will impose significant costs on companies, forcing them to consider moving to other nations that lack such controls or raise prices, thus reducing their competitiveness with foreign nations. *See id.* ¶¶ 15-16; Declaration of Dr. Charles Moutray in Support of NAM's Motion for Intervention (Dkt. #66) ¶¶ 19-24. The resulting combination of higher prices and loss of jobs would have devastating effects on consumers and income-earners alike. *See also infra* §§ II.C & IV.

It is hard to fathom how a failure to adopt regulatory measures that would have devastating impacts on the economy, and ultimately society at large, could possibly be deemed an "abuse" of discretion. It is thus plain that Plaintiffs have not established a likelihood that they will succeed in prevailing on such a claim, much less that the law and facts clearly favor the relief they seek. At bottom, Plaintiffs have not shown that Defendants have abused their discretion; they demand that Defendants exercise that discretion differently. They allege that Defendants have allowed "too many carbon emissions into Earth's atmosphere...." Am. Compl. ¶ 10. But arguments over "how much is too much" are not sufficient to justify preliminary relief. *See* Restatement (Third) of Trusts § 87,

[5] All cost estimates and economic impacts provided by Dr. Montgomery use the N_{ew}ERA model of the U.S. energy system and economy developed by National Economic Research Associates, Inc. Montgomery Decl. ¶ 11.

cmt. b (2001) ("[J]udicial intervention is not warranted merely because the court would have differently exercised the discretion.").[6]

2. Plaintiffs have failed to establish that they are likely to prevail on any claim that defendants' breach of their "trustee duties" caused Plaintiffs any specific harm.

In addition to satisfying the requirements of standing, a plaintiff cannot prevail on a claim for relief absent a showing that the defendants' challenged conduct caused (or, in the case of claims for injunctive relief, will cause) the plaintiff injury. *See, e.g., In re Hanford Nuclear Reserv. Litig.*, 292 F.3d 1124, 1133-34 (9th Cir. 2002) (to prevail in a mass tort case, "plaintiffs must establish both generic *and* individual causation. This means that they must establish that" the defendants' actions "were the cause-in-fact of their specific" injuries.). In the public trust context, this requirement ordinarily receives little if any judicial attention: the government has sold submerged lands or diverted waters subject to a public trust, and the sale or diversion directly harms those who use the waters above those lands or the waters that were diverted. But here, Plaintiffs' unprecedented failure-to-regulate-activities-affecting-the-atmosphere claim would (if cognizable) require Plaintiffs to demonstrate that Defendants' asserted breach of their trustee duties is the cause-in-fact of Plaintiffs' asserted injuries. Plaintiffs have failed to establish that they are likely to succeed with respect to this element of their asserted claim.

[6] In fact, the U.S. Supreme Court has twice cautioned against courts involving themselves in the particulars of how the executive branch of our government should approach CO_2 emissions. *See Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007) (EPA has "has "significant latitude as to the manner, timing, [and] content" of its regulations; the Court has "neither the expertise nor the authority to evaluate these policy judgments…."); *AEP*, 131 S. Ct. at 2539-40 (courts must "resist setting emissions standards by judicial decree" as EPA is "surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions."). The lower courts have similarly rejected requests to inject their own judgment regarding the timing of GHG regulations. *Cf. Massachusetts v. EPA*, No. 03-1361, 2 (D.C. Cir. Order of June 26, 2008) (Tatel, J., concurring) (following the Supreme Court decision, "nothing in [Clean Air Act] section 202, the Supreme Court's decision in *Massachusetts v. EPA*, or our remand order imposes a specific deadline by which EPA must determine whether a particular air pollutant poses a threat to public health or welfare"); *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, No. C 07-4936 CRB, 2008 U.S. Dist. LEXIS 27794 at *10-11 (N.D. Cal. Mar. 28, 2008) ("The Supreme Court was careful not to place a time limit on EPA" to make an endangerment determination under section 202).

For purposes of obtaining injunctive relief, Plaintiffs rely on a combination of lay and expert[7] opinion testimony that is insufficient to establish causation. Plaintiffs claim they are suffering irreparable harm, citing declarations by the minor Plaintiffs opining on the causes of a litany of purportedly current or future injuries. PI Motion at 20-22. After sifting through the allegations in Plaintiffs' own declarations, which include injuries to others[8] and injuries unquestionably not caused by climate change,[9] what remains are lay—not expert—opinions claiming that U.S. CO_2 emissions are, or will be, responsible for various alleged injuries to specific natural resources, cities or areas of the world, ranging from fish kills in the Shenandoah River to famine in Africa.[10] Two Plaintiffs also opine that U.S. CO_2 emissions are causing, or will cause, physical injuries.[11] While the protection of children's health is perhaps the most important element of any environmental regulatory regime, the declarations of non-expert minors cannot establish a credible link between Defendants' approach to

[7] The term "expert declarations" refers to those fourteen declarations submitted by persons other than the minor Plaintiffs and their attorney, Ms. Julia A. Olson. Intervenor reserves the right to challenge the qualifications of those persons as expert witnesses at the appropriate juncture.

[8] *See* Wallace Decl. ¶¶ 10, 12 (fire damage to other peoples' homes and exacerbation of asthma symptoms for other people); Grant Serrels Decl. ¶¶ 3, 10 (neighbors cutting down trees to protect their property, effect of Japanese beetles on crops).

[9] *See* Butler Decl. ¶ 6 (sour tasting polluted water in school fountain); *id.* ¶¶ 10, 12-13 (lack of water due to "the Navajo Tribe giving the U.S. Government our water rights"); Johnson Decl. ¶ 22 (impacts of the BP oil spill on Gulf Coast economy); Wallace Decl. ¶¶ 16, 17 (impacts of the BP oil spill on Gulf Coast wildlife and marshes); Grant Serrels Decl. ¶¶ 6, 14 (river pollution from "lax standards of factory discharge into the river" and logging in park lands).

[10] *See* Johnson Decl. ¶¶ 5-6, 8-21 (predictions of impacts on San Francisco Bay, Ocean Beach, area drinking water supply, biodiversity, agriculture, extreme weather events and malaria incidences); Wallace Decl. ¶¶ 3, 8-15, 17 (claims that climate change has or will cause impacts on African poverty, hunger and drought, sea level rise in New York City and New Orleans, heat waves, wildfires, water shortages in New York City, air quality in Los Angeles, wildlife in three states and Costa Rica); Kanuk Decl. ¶¶ 5-14 (impacts on sea ice formation, permafrost thaw, flooding, erosion, snowfall, rainfall, sewage overflows); Loorz Decl. ¶¶ 2, 6-7, 9-12 (predictions of extreme weather events, exacerbation of asthma, heat waves, damage to trees by beetles, rate of glacial melting, future rises in sea level); Grant Serrels Decl. ¶¶ 3, 6-11 (damage to trees by beetles, "extreme weather"-caused loss of electricity and water, wildfires in California, fish lesions, allergic heat rashes, sea level rises at Virginia Beach, damage to fruit trees by Japanese beetles, spread of invasive plants).

[11] *See* Loorz Decl. ¶ 6 (exacerbation of asthma); Grant Serrels Decl. ¶ 7 (heat rashes).

U.S. CO_2 emissions and any specific past, present or future alleged injury to Plaintiffs. *See United States v. Durham*, 464 F.3d 976, 982 (9th Cir. 2006) (lay opinion testimony restricted to witness' own observations and recollections); Fed. R. Evid. 701(c) (prohibiting lay opinions "based on scientific, technical, or other specialized knowledge…").

Nor do Plaintiffs' expert declarations fill this gap, as none addresses the purported injuries that are actually the subject of Plaintiffs' Motion. For example, no expert declaration opines that a 2010 heat wave in New Orleans, discussed by Madeline W., or the fish lesions discussed by Grant S., were actually caused by U.S. CO_2 emissions or climate change. *See* Wallace Decl. ¶ 9; Grant Serrels Decl. ¶ 6. Nor does any expert opine that the medical injuries alleged by other Plaintiffs resulted from those emissions.[12] While the expert declarations may go to generic causation—the question of whether CO_2 emissions *could* cause the harms alleged—they say nothing of "whether a particular individual suffers from a particular" injury *actually* caused by those emissions. And certainly none shows that defendants' alleged breach of their trustee responsibilities—*i.e.*, their alleged failure to adopt far more drastic regulatory measures—actually caused any specific injury. Plaintiffs are thus unlikely to prevail on the merits due to their failure to establish specific causation linking Defendants' failure to arrest and reduce U.S. CO_2 emissions to their specific injuries.

C. Plaintiffs Have Failed To Join Necessary And Indispensable Parties.

In addition to the fatal jurisdictional defects and other grounds for dismissal identified in Intervenor's Motion to Dismiss, Plaintiffs' lawsuit should be dismissed under Federal Rule of Civil Procedure 19 due to the absence of numerous indispensable parties to this lawsuit—the many foreign nations that are also material contributors to global GHG emissions.[13] Here, the joinder of other

[12] Moreover, for the two claims of medical injuries, Plaintiffs submitted no evidence from a treating physician. *See Sanderson v. Int'l Flavors & Fragrances*, 950 F. Supp. 981, 984 (C.D. Cal. 1996) (medical injuries "must be proven within a reasonable probability based upon competent expert testimony") (quoting *Jones v. Ortho Pharma. Corp.*, 163 Cal. App. 3d 396, 402 (Cal. App. 2 Dist. 1985)).

[13] Whether litigation may proceed in the absence of a particular person or entity requires a court to determine under Rule 19 if (1) the absent party is required to be joined in the matter, (2) whether it is feasible to join that party, and (3), if joinder is not feasible, whether the action should proceed in equity and good conscience. *See E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1077 (9th Cir. 2010).

foreign nations is required to provide effectively the relief Plaintiffs seek, yet the Court cannot compel their presence because they enjoy sovereign immunity. This lawsuit cannot fairly proceed in the absence of these parties without substantially prejudicing Defendants, who are charged with discharging policies in the interests of the people of the United States.

Emissions from the United States are but a decreasing fraction of global CO_2 emissions; today, according to Plaintiffs, the U.S. is responsible for 28% these emissions. Kartha Decl. ¶ 5. However, the projected rise in foreign CO_2 emissions will dwarf any reductions the United States may make. Forecasts show dramatic increases in global CO_2 emissions from other parts of the world due to increased energy usage and land use changes. Messner Decl. ¶ 17, Fig. 2. Without CO_2 emission reductions by other nations, non-U.S. sources will add an estimated 1,737.4 gigatonnes of CO_2 to the atmosphere between now and 2050. *Id.* This is more than three times the 520 gigatonne CO_2 emissions "budget" proposed by Dr. Kartha for the entire world. *See* Kartha Decl. ¶¶ 7, 12.[14] By comparison, Plaintiffs' request for a 6% per year reduction in U.S. emissions would prevent only 155.2 gigatons of CO_2 emissions. Messner Decl. ¶ 11, 19, Fig. 3. As a result, if Plaintiffs were to prevail against Defendants, there is no hope of reducing atmospheric CO_2 concentrations to their target of 350 ppm without dramatic reductions from other nations. *See* Messner Decl. ¶ 18, Fig. 3; Kartha Decl. ¶ 6 ("*global* emissions of carbon dioxide" must decline by 6% per year to achieve 350 ppm) (emphasis added); *id.* ¶¶ 15, 16 (discussing need to entice other countries to pursue simultaneous CO_2 reductions). Thus, in the absence of these other nations as parties to this lawsuit, "the court cannot accord [Plaintiffs] complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A). But foreign nations may not be involuntarily joined here, 28 U.S.C. § 1604 (foreign states immune from suit subject to agreements under international agreements or other limited exceptions not relevant here), nor have any foreign nations consented to suit by Plaintiffs in this action.

[14] Dr. Kartha provided no source or calculations in support of his 520 gigaton budget proposal. Dr. James Hansen, whose work Dr. Kartha relies upon in part, estimated that a 420 gigaton budget would be required for the years 2010-2050 to achieve an atmospheric CO_2 concentration of 350 ppm. *See* Messner Decl. ¶ 15.

It would not be "in equity and good conscience," Fed. R. Civ. P. 19(b), to proceed against the defendant federal agencies of the United States government alone. A four-factor test determines whether dismissal is proper in this situation: (1) the extent to which a judgment rendered in the person's absence might prejudice them or the existing parties; (2) the extent to which any prejudice could be lessened or avoided through the relief granted; (3) whether a judgment rendered in the parties' absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Fed. R. Civ. P. 19. As discussed below, each of these factors weighs in favor of dismissing Plaintiffs' claim.

First, the U.S. government—which by extension, means the American public—would be prejudiced in the absence of other nations. As discussed above, imposing Plaintiffs' requested relief on the United States alone would dramatically raise U.S. energy costs and place American companies at a competitive disadvantage to companies in nations that would not be affected by any relief this Court may order. *See supra* § II.B.1. It is for this very reason that the U.S. government has been engaged in a series of international negotiations to address climate change for nearly two decades. *See* United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38.

Second, there are no means by which this Court could implement Plaintiffs' requested relief while simultaneously sparing the United States from the economy-wide realignment impacts of imposing instantaneous, dramatic limits on GHG emissions and a phase-out of conventional fuels. Although Plaintiffs claim that mandates to use alternative energy sources and energy efficiency standards will be practically free of charge, *see* Mahkijani Decl. ¶¶ 2.a, 2.b, these claims are simply unsupportable. *See* Montgomery Decl. ¶¶ 34-43. Federal agencies cannot force certain technologies to develop or require costs of novel and untested energy technologies to simply decrease. Thus, under Plaintiffs' proposed regulatory regime, there would be no way to avoid extraordinary and unprecedented costs on the United States economy. *See also infra* § IV.

Third, as discussed in detail above, the projected influx of foreign CO_2 emissions means that the United States cannot reduce global CO_2 levels to 350 ppm on its own. *See* Messner Decl. ¶¶ 9, 17-20. Plaintiffs have conceded this point. Am. Compl. ¶ 143; Kartha Decl. ¶¶ 6, 15, 16. As stated

in Plaintiffs' complaint, reducing carbon dioxide emissions to 350 ppm is simply a means to the end of "prevent[ing] heating beyond 1º C (1.8º F) (which scientific analysis deems catastrophic)." Am. Compl. at 3, ¶ 8. Therefore, imposing a judgment on Defendants in the absence other foreign nations which materially contribute to global GHG emissions would be a fruitless exercise in terms of providing effective relief to Plaintiffs.

Finally, courts have consistently held that a sovereign's interest in immunity outweighs an individual plaintiff's interest in having an adequate alternate remedy. *E.g.*, *Pit River Home & Agric. Co-Op Ass'n v. United States*, 30 F.3d 1088, 1102 (9th Cir. 1994) (sovereign defendant's "interest in maintaining its sovereign immunity outweighs the [plaintiff's] interest in litigating its claim."). In sum, many foreign nations are indispensable parties to this suit, yet none of them may be involuntarily joined here. Thus, Federal Rule of Civil Procedure 19 warrants dismissal of this action.

III. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY WILL SUFFER IMMEDIATE IRREPARABLE HARM ABSENT PRELIMINARY INJUNCTIVE RELIEF.

To obtain preliminary injunctive relief, Plaintiffs "must do more than merely allege imminent harm sufficient to establish standing; [they] must *demonstrate* immediate threatened injury…". *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668 (9th Cir. 1988) (emphasis in original). Moreover, Plaintiffs must demonstrate that they will suffer irreparable harm *while awaiting a full hearing on the merits*, and that this harm is so severe the Court must act to preserve its ability to adjudicate the case. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) ("Only if he will suffer irreparable harm *in the interim* … can he get a preliminary injunction") (emphasis added); *see also Univ. of Tex.*, 451 U.S. at 395 ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held"). Here, Plaintiffs' allegations of injury are insufficient to support Article III standing, *see generally* Intervenor's Motion to Dismiss at 10-14, much less establish the threat of immediate irreparable harm. Plaintiffs have not identified a single injury that will: (1) manifest itself before a full merits hearing; or (2) undermine this Court's ability to render a meaningful decision on the merits.

Most of Plaintiffs' expert declarations speak about harms, not within the coming weeks or

months, but towards the end of the century, when Madeline W. and Garrett and Grant S., the youngest of the Plaintiffs, will be 103 years old.[15] Others speak only of potential injuries that may occur at some unspecified point in the future. *See, e.g.*, Susteren Decl. (discussing increases in psychological and social disorders in the vague future); Hoegh-Guldberg Decl. ¶¶ 25, 36 (discussing decline of coral reefs at future CO_2 levels of 450 ppm and 500 ppm). Even where Plaintiffs' expert declarations allege that U.S. CO_2 emissions are already causing ecological harm, such as drought conditions in the American Southwest, Overpeck Decl. ¶¶ 4-6, or pine beetle outbreaks, Parmesan Decl. ¶ 11, or where Plaintiffs claim that they are already experiencing climate-change related injuries, there is no discussion of why Plaintiffs require the extraordinary remedy of mandatory preliminary injunctive relief prior to completion of a trial on the merits.

By Plaintiffs' own admission, the threatened injuries they allege cannot possibly be arrested or remediated in the near term. *See, e.g.*, PI Motion at 19 ("Because of climate inertia and 'heating already in the pipeline,' the status quo of our climate cannot feasibly be maintained; it will continue to change."). Nor will a preliminary injunction ordering Defendants to develop a remedial plan to reduce GHG emissions remediate the current harms Plaintiffs allege. According to Plaintiffs' own expert, their requested emission reductions could only avoid "many though not all of the most severe consequences of climate change" sometime "within this century." Kartha Decl. ¶ 6; *see also* Kharecha Decl. ¶ 24, Fig. 7 (Plaintiffs' requested relief would reduce CO_2 concentrations to 350 ppm sometime after 2050). Plaintiffs have not explained why a mandatory preliminary injunction of such an unprecedented scope must issue now instead of after a full hearing on the merits. Given this obvious deficiency, the Court can deny their Motion on this basis alone.

Moreover, insofar as Plaintiffs contend that time is of the essence, and that delaying relief until the conclusion of a trial on the merits is thus unacceptable, they are asking the Court to ignore

[15] *See, e.g.*, Rahmstorf Decl. ¶ 2 (sea level rise "could reach 1 meter or even more by the end of this century…."); Lobell Decl. ¶ 31 (describing potential for crop damage "by 2080-2099"); Parmesan Decl. ¶ 19 (harm to natural systems "over the next 50 years regardless of which path we take…."); Running Decl. ¶ 3 (discussing ecosystem adaptation "over the next 30-50 years."); Makhijani Decl. ¶ 7 (discussing CO_2 emission phasedown over the next 30-50 years).

the uncertainty inherent in all scientific predictions based on complex modeling, and in particular the uncertainty inherent in the paper on which they base their claim that it is essential to reduce U.S. CO_2 concentrations by 6% per year. The 6% per year figure is largely based on a paper published by NASA scientist Dr. Paul Hansen. Kartha Decl. ¶ 6; Declaration of William J. Warren-Hicks, Ph.D ("Warren-Hicks Decl.," filed herewith) ¶ 6. This figure resulted from a model designed to predict the behavior of an incredibly complex system—the Earth's atmosphere—to project global CO_2 concentrations nearly 90 years into the future. Warren-Hicks Decl. ¶ 6. Yet, in contrast to the modeling underlying the work of the Intergovernmental Panel on Climate Change, Dr. Hansen performed no uncertainty analysis. *Id.* An analysis of the total uncertainties involved in any model is required to determine "the degree of belief in model predictions." *Id.* ¶ 11. Without an understanding of these uncertainties, there is no way of knowing whether 6% annual CO_2 reductions will attain a target goal of 350 ppm. *Id.* ¶ 15. Such uncertainty precludes issuance of a mandatory preliminary injunction that would commandeer the machinery of the federal government and compel adoption of regulatory measures that, as Intervenor explains next, would inflict irreparable harm on the nation's economy.

IV. THE BALANCE OF HARMS WEIGHS AGAINST PLAINTIFFS.

Plaintiffs must also demonstrate that their alleged harms outweigh other harms the proposed preliminary injunction would cause. It is their burden to show that the balance of the equities tips in their favor. *Winter*, 555 U.S. at 20; *see also Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987) (court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief"). Plaintiffs have failed to meet this burden. As discussed above, Plaintiffs will not likely suffer any irreparable injury between now and a full consideration of the merits. Their proposed preliminary injunction, however, would inflict grievous harm on the American economy in exchange for a "Climate Recovery Plan" that would have virtually no impact on worldwide GHG emissions.

A. Plaintiffs' Proposed Injunction Would Significantly Harm The U.S. Economy.

As discussed earlier, implementing 6% per annum CO_2 emission reductions in the United States would irreparably harm the country's economy. Even under an economically optimal

implementation scenario, Plaintiffs' proposed relief could cause a 6.3% decline in gross domestic product by 2050 and a loss of more than $15.5 trillion in economic output between 2013 and 2050. Montgomery Decl. ¶¶ 5, 10. This equates to $2.3 trillion in 2010 dollars in the year 2050. *Id.* ¶ 5. Average earnings could decline by approximately $3,900 by 2050 due to lower wage income. *Id.* ¶ 10. This potential economic decline will be accompanied by likely significant increases in energy costs through higher motor fuel, natural gas and electricity prices. *Id.*[16]

The potential increases in energy costs to businesses that would result from Plaintiffs' requested relief would put American industry at a distinct competitive disadvantage when compared to foreign operators, creating a powerful incentive for energy-intensive industries to re-locate to other countries lacking CO_2 emission restrictions. *Id.* ¶ 15. This phenomenon, termed "leakage," was estimated to be approximately 10% in a study of a scenario assuming the United States only implemented a cap-and-trade policy and all other major emitting countries also required CO_2 reductions. *Id.* ¶ 16. Even more industries would leave the United States if other countries failed to implement concomitant CO_2 reduction schemes. *Id.*

The declaration from Plaintiffs' expert, Dr. Makhijani, provides no basis for ignoring these extraordinary harms or assuming that this Court could somehow order the creation of a new United States energy system at little or no economic cost. Dr. Makhijani, an electrical engineer with no apparent economic background, provides fantastic claims (almost always without citation) about how this Court could rely upon experimental, untested technologies to overhaul everything from how we generate electricity to how we build our homes. All of this, he avers, can be accomplished in the near future at a "reasonable cost" (a term that Dr. Makhijani neglects to either quantify or define). Makhijani Decl. ¶ 2.a. Intervenor could not hope to offer a point-by-point rebuttal in the limited time and space available. However, issuing a preliminary injunction that relies on Dr. Makhijani's testimony would constitute a perilous—and improper—leap into the unknown.

Dr. Makhijani's declaration provides no estimates of what his various proposals might cost.

[16] Estimating economic costs so far into the future entails significant uncertainties. The estimates cited by Dr. Montgomery could be significantly higher. Montgomery Decl. ¶ 6.

Instead, he makes conclusory, uncited assurances that costs will be "reasonable," Makhijani Decl. ¶ 2.a, or asserts that, whatever the costs may be, they are worthwhile sacrifices for the progress of modern society. *Id.* ¶ 13. To the extent he does acknowledge economic "hardship," he summarily states that a carbon tax "can be used to offset any regressive income impacts, create employment in the affected areas, encourage new energy infrastructure in the affected areas, and so on." *Id.* ¶¶ 2.i, 135. He provides no estimates, analyses or citations to studies in support of this auspicious claim, nor do Plaintiffs explain how the Court could order the Executive Branch to impose such a tax, when our Constitution requires that federal taxes originate in the House of Representatives. U.S. Const. art. I, § 7.

The majority of Dr. Makhijani's declaration follows a predictable three-step formula: (1) announce that a new low-emission technology *could be* developed; (2) state that, once developed, the technology could quickly and seamlessly replace existing technologies; and then (3) make simplistic and unsupported claims about economic feasibility. In one example, he claims that, based on a Navy *press release* regarding *tests* of diesel hybrid vehicles, "the military market for hybrids will likely transform the market for large vehicles, including commercial trucks much more rapidly than has been foreseen." Makhijani Decl. ¶ 59. Dr. Makhijani, who has no apparent experience in the development or commercialization of heavy duty engines, provides no analysis or citation for this claim, no estimate of how much transitioning heavy duty vehicles to hybrid-diesel engines might cost or when such a transition can be expected.[17] Dr. Makhijani cannot predict with any degree of certainty which new energy technologies will succeed or fail, when they can be scaled up for commercial use, or how much they will cost. *See id.* ¶¶ 41-43. As a result, Dr. Makhijani's assurances that Plaintiffs' requested relief will be painless are baseless.

[17] Detailed analyses in support of such a claim should be required given the wide array of technologies subject to military testing. These have included myriad curiosities, ranging from jetpacks to zeppelins, yet they are not our transportation future. *See* Daniel H. Wilson, Ph.D., *Where's My Jetpack?* (Bloomsbury 2007) at 19-20 (discussing military testing and subsequent abandonment of jetpacks); *id.* at 27 (military's "Walrus program" for heavy-lift zeppelins). The premise that military testing of a technology inexorably leads to rapid commercialization requires extensive explanation because it is largely counter-factual.

At the very least, there are too many questions regarding the economic impacts of Plaintiffs' requested relief to grant such an extraordinary injunction without the benefit of regular discovery and cross-examination of Dr. Makhijani and Plaintiffs' other experts. For instance, he puts great stock in energy efficiency measures. Makhijani Decl. ¶¶ 14-41; *see also id.* ¶ 82 (claiming that the U.S. could cut its electricity demand in *half* through efficiency measures). Economists, however, disagree on the economic benefits of energy efficiency measures. Montgomery Decl. ¶¶ 30-31. Studies of energy efficiency measures found that they create incentives that overestimate the amount of energy savings. *Id.* ¶ 30. Other market forces, such as the quality of energy efficient substitutes and consumer preferences, often result in an underestimation in economic savings. *Id.* Lastly, Dr. Makhijani likely made a common mistake in comparing his estimate of energy efficiency improvements with baselines that have often already assumed future efficiencies. *Id.* ¶ 31. This results in a double-counting of future improvements that will never actually materialize. *Id.*

B. Plaintiffs' Requested Relief Would Not Abate Global Climate Change.

The foregoing extraordinary injuries to the economy and society at large are more than sufficient to demonstrate that the balance of harms militates conclusively against issuance of the mandatory preliminary injunction Plaintiffs seek. But the imbalance of harms is even more pronounced. Plaintiffs' Motion rests on the faulty premise that ordering annual CO_2 emission reductions of 6% per annum in the United States will reduce *global* CO_2 emissions to 350 ppm and forestall future temperature increases. Because there is no sound basis for that assumption, the relief Plaintiffs seek would inflict grievous harms without actually achieving the reductions Plaintiffs deem necessary.

As noted earlier, the 350 ppm goal is derived from the work of Dr. James Hansen. Kartha Decl. ¶¶ 7, 10. But according to Dr. Hansen himself, atmospheric CO_2 emissions would only reach 350 ppm if *global* CO_2 emissions are reduced by 6% per year—not just those of the United States. James Hansen et al., *Target Atmospheric CO_2: Where Should Humanity Aim?*, The Open Atmospheric Science Journal 2:217-231 (2008)[18]; *see* Messner Decl. ¶ 12; *see also* Kartha Decl. ¶ 6

[18] *Available at* http://www.columbia.edu/~jeh1/2008/TargetCO2_20080407.pdf.

("*global* emissions of carbon dioxide from burning fossil fuels" must *also* decline by 6% per year in order to reach atmospheric concentrations of 350 ppm by the end of the century) (emphasis added). Thus, Plaintiffs simply assume that once the United States enacts 6% per year CO_2 emission cuts, all remaining countries will follow suit. *See* Kartha Decl. ¶¶ 15, 16 (assuming that other nations will have the "[p]olitical willingness" to make "ambitious emission reduction efforts" once the United States does so).

Indeed, this assumption is essential to Plaintiffs' requested relief. First, equivalent emission reductions in all other countries are necessary to avoid "leakage," where energy-intensive industries simply re-locate from the United States to other countries and continue emitting CO_2 unabated (or even increase emissions). *See* Montgomery Decl. ¶¶ 15-16. Second, the assumption is necessary because, as explained above, without dramatic emission reductions collectively by other countries, Plaintiffs' requested relief would be nothing more than a futile symbolic gesture that would be entirely engulfed by other nation's increased emissions. *See supra* § II.C (explaining why Plaintiffs' lawsuit should not proceed under Fed. R. Civ. P. 19 in the absence of foreign nations). Yet Plaintiffs provide no evidence that other countries, whose CO_2 emissions are large and growing, such as China, India, Brazil, and Indonesia, would reciprocate with 6% annual reductions of their own. Nor, as explained *supra*, is there any basis for joining them as parties in order to achieve the reductions that, according to Plaintiffs themselves, are necessary to forestall the future harms they allege.

In short, because the relief Plaintiffs seek would inflict massive harm to the U.S. economy yet would not forestall the alleged harms they seek to prevent, the balance of harms forecloses issuance of the mandatory preliminary injunction Plaintiffs demand.

V. PRELIMINARY RELIEF WOULD SEVERELY HARM THE PUBLIC INTEREST.

Finally, granting Plaintiffs' requested preliminary injunction would be contrary to the public interest. Even accepting *arguendo* that reducing only U.S. CO_2 emissions would meaningfully impact global ambient CO_2 levels, Plaintiffs' requested relief would harm the public interest, not only because of the economic consequences discussed above, but also because those consequences would greatly diminish the United States' ability to adapt to climate change. "Adaptation" refers to responses to climate change that ameliorate its adverse effects, such as infrastructure improvements

to protect against sea level rise or reduce storm damage. Montgomery Decl. ¶ 35. Although adaptation is generally estimated to be less expensive than emission reductions, adaptation projects still entail economic resources. *Id.* ¶ 36. "[M]andating emission limits that take away that economic capacity can make the impacts of climate change worse." *Id.* ¶ 37. Thus, Plaintiffs' requested relief would dramatically diminish economic growth in pursuit of a vain effort to prevent climate change while sapping the resources required for adaptation.

Lastly, the nature of the current political and democratic debate on climate change—scorned by Plaintiffs—is extraordinarily important to the public interest. Despite the certainty of Plaintiffs' conviction and the belief of their witnesses, the American people and their elected representatives are engaged in an ongoing, multifaceted discussion regarding whether global climate change is a problem that needs to be addressed, and if it is, what specific actions should be taken to address this global issue, what options can be pursued where benefits outweigh social and economic costs, and how to develop domestic and international regimes to address it, taking into consideration aspects of diplomacy, foreign affairs, and domestic and energy security. There has been no shortage of attention to the issue, either in public debate or in Congress. *See, e.g.*, 125 Cong. Rec. S.31212-13 (Nov. 7, 1979) (statement of Sen. Ribicoff discussing need for legislation to address the "CO_2 problem"); Pub. L. No. 95-367 (1978), codified at 15 U.S.C. 2901, *et seq.* (National Climate Program Act recognizing need for international approach to climate change and additional study); S. Res. 98, 105th Cong. (1997) (Senate Resolution holding that U.S. should not sign Kyoto Protocol absent specific conditions); S. 2191, 110th Cong. (2007) (Lieberman-Warner Climate Security Act of 2007 passed out of Senate Committee but failed to receive vote on Senate floor); H.R. 2524, 111th Cong. (2009) ("Waxman-Markey" cap-and-trade bill narrowly passed House 219-212 but died in Senate).[19] A special Select Committee on Energy Independence and Global Warming was created for the 110th and 111th Congress, holding dozens of hearings on climate change. *http://globalwarming.house.gov/pubs/testimony*. Plaintiffs do not dispute that Congress has

[19] All actions on legislation, including vote counts, are available through the Library of Congress' "Thomas" website, http://thomas.loc.gov/home/thomas.php#.

considered responses to CO_2 emissions for an extended period of time. *See* PI Motion at 17 ("legislators were clearly aware of the threats climate change posed" in 1978); Speth Decl. ¶¶ 3-6 (describing work on global warming at the White House in 1979). Thirty-five years of Congressional and administrative attention have not been fruitless, as the Executive Branch has undertaken a long list of actions to address climate change issues. *See* Messner Decl. ¶ 21 & Att. B.

Taking the extraordinarily important decisions about how to address climate change, and at what cost, out of the hands of our elected representatives is the central feature of Plaintiffs' requested relief. Plaintiffs now ask this Court to seize control of the political process and impose potentially radical policies upon an electorate that has not consented to them. Contrary to Plaintiffs' apparent beliefs, the preservation of a democratic government *is* in the public interest. Were the Court to grant Plaintiffs' Motion, it would be overruling the considered judgments of both the legislative and executive branches to date, and short-circuiting the political consensus necessary to effectuate meaningful societal change. Issuing a regulatory preliminary injunction that displaces the decisions of the elective branches should be undertaken reluctantly, if undertaken at all. *See Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies*, 970 F.2d 273, 277-78 (7th Cir. 1992) ("Courts should be and generally are, reluctant to issue 'regulatory' injunctions, that is, injunctions that constitute the issuing court an ad hoc regulatory agency to supervise the activities of the parties."); *Richardson*, 418 U.S. at 188 (Powell, J., concurring) ("We should ever be mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch").

Plaintiffs speciously claim that they are not requesting "this Court [to] issue an order telling Congress or any federal agency *how* to protect our natural resources, but rather issue an order requiring our federal government to do its job." Am. Compl. ¶ 3. What Plaintiffs actually request of this Court is an order declaring them the winner of a political debate that is still ongoing. *See, e.g.*, Speth Decl. ¶ 8 ("My conclusion is that normal political and policymaking processes in the United States have completely failed…."). Subverting the political process in this manner is unquestionably against the public interest.

CONCLUSION

For all the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be denied.

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Respectfully submitted,

SIDLEY AUSTIN LLP

By: /s/ Samuel R. Miller

Attorneys for Intervenor
The National Association of Manufacturers