No. 09-17490

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

EXXONMOBIL CORPORATION; BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; CONOCOPHILLIPS COMPANY; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; PEABODY ENERGY CORPORATION; THE AES CORPORATION; AMERICAN ELECTRIC POWER COMPANY, INC.; AMERICAN ELECTRIC POWER SERVICES CORPORATION; DUKE ENERGY CORPORATION; DTE ENTERGY COMPANY; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; PINNACLE WEST CAPITAL CORPORATION; THE SOUTHERN COMPANY; DYNEGY HOLDINGS, INC.; RELIANT ENERGY, INC.; and EXCEL ENERGY, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
District Court Case No. 08-cv-02238 SBA

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY, INTEREST AND AUTHORITY OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographic region. The Chamber often represents its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The proper response to global climate change is an issue of profound concern to the Chamber's members. While virtually all of the nation's largest companies are Chamber members, more than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. The Chamber is concerned about the impact of global climate change public nuisance suits on both large and small producers and consumers of energy from fossil fuels, and efforts to use the courts to attempt to address climate change in a piecemeal fashion.

The Chamber works to discourage ill-conceived climate change policies and measures that could severely damage the security and economy of the United States, and instead encourages positive measures, such as long-term technological innovation and long-term clean technology deployment. The Chamber believes

[1] All parties have consented to the filing of this brief.

that lawsuits such as this one, which seek to impose damages against a subset of U.S. industry for contributing to global climate change, are an especially ill-conceived—and unfounded—response to climate change. A meaningful, rational, and politically legitimate response must be national in nature, and must be fashioned by the politically accountable branches of the federal government. The Chamber thus has a vital interest in ensuring that courts do not usurp the roles of the executive and legislative branches by entertaining this type of lawsuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' claims are breathtaking in scope. Plaintiffs seek redress from 20-some oil, gas, and utility companies for damages allegedly arising from global climate change under vague and far-reaching federal and state common law theories of "nuisance." In so doing, plaintiffs invite this Court to extend federal common law far beyond the limits recognized by the Supreme Court, weigh in on inherently political questions, and find standing based on a most attenuated series of allegations. Like the district court below, this Court should decline that invitation. *See* ER 1-24; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

The courts are neither equipped nor authorized to adjudicate this suit for two fundamental reasons. *First*, plaintiffs have failed to state a claim that looks remotely like the traditional "nuisance" claims recognized under federal common

law. Typically, such suits have been allowed to proceed only in very limited circumstances, as necessary to permit states to protect the integrity of the land and air within *specific geographic regions* against harm directly caused by a *discrete set of defendants* who were discharging *obviously noxious substances* such as sewage, trash, and toxic fumes. Under the guise of the same nuisance theories, plaintiffs instead ask the courts to assess fault for harms caused by emissions from literally billions of sources world-wide over the last three centuries. The common law and the courts are ill-equipped to address such staggeringly complex claims and the Supreme Court has made increasingly clear (even in less extreme situations) that courts are not to create or extend judge-made causes of action.

Second, the global magnitude of climate change and the necessity in any bid for redress to balance an enormously vast array of interrelated interests—economic, environmental, and geopolitical—are ill-suited to the *ad hoc* and piecemeal nature of litigation and take plaintiffs' claims well beyond the competence and authority of the federal courts. The separation of powers concerns animating the political question doctrine specifically prohibit courts from acting where, as here, there are no judicially manageable standards and any adjudication would inevitably require initial policy decisions and encroach on the foreign policy discretion of the political branches. What is a permissible amount of emissions for a given enterprise or for aggregate global emissions? Who should bear the costs of

limiting emissions? Should developed nations act even if developing nations do not? Such policy questions are not just complex—they simply have no "right" jurisprudential answers.

The centuries-long incubation period, global nature, and universal impact of climate change also stretch this case far beyond the case-or-controversy bounds of Article III. Indeed, the traceability of injury here is so attenuated, and the choice of defendants here is so arbitrary, that recognizing standing would permit literally anyone alleging climate-change based damages to sue any entity or natural person in the world—an absurd result that highlights just how inapt the judicial forum is for addressing such inherently global concerns.

Only the elected branches, not the courts, are equipped and authorized to develop an appropriate response to climate change. Recognizing such limitations, this Court should affirm the district court's judgment.

ARGUMENT

I. PLAINTIFFS HAVE NOT STATED A CLAIM FOR RELIEF UNDER FEDERAL COMMON LAW

In limited instances, primarily near the beginning of the last century, the Supreme Court held that states can bring "simple type" public nuisance federal common law claims to enjoin environmental harms, including interstate pollution. *See, e.g.*, *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923). Labeling their action one for "nuisance," plaintiffs insist that they have similarly stated a claim

under federal common law. But the federal common law nuisance claims recognized in the past limited the courts to their traditional role of adjudicating disputes with discrete events, parties, and geographical areas, and did not permit the judiciary to trespass on the prerogatives of the political branches. And, in the wake of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court has dramatically limited the reach of federal common law, refusing to expand its scope. Despite its nuisance-suit appellation, plaintiffs' attempt to hold 20-some oil, gas, and utility companies accountable for the indivisible effects of global climate change contributed to by billions of emissions worldwide over centuries bears no resemblance to the traditionally-recognized federal common law nuisance action, and permitting it to advance would extend the federal courts' common law-making power far beyond the very limited authority recognized by the Supreme Court.

The Supreme Court has long understood that creating federal common law raises fundamental separation of powers concerns. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (refusing to fashion federal criminal common law). And, it is "needless to state that we are not in the free-wheeling days ante-dating *Erie R. Co. v. Tompkins*." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). In the modern era, the Supreme Court has made increasingly clear that courts are not to fashion or expand judicially-made causes of action. The Court

has "sworn off the habit of venturing beyond Congress's intent," *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), and stressed that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). *See also Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (refusing to extend *Bivens* liability where "judicial standard … would be endlessly knotty to work out" and damages remedy "may come better, if at all, through legislation"); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67-68 (2001) (noting that, since 1980, Court has "consistently refused to extend *Bivens* liability to *any new context* or new category of defendants" (emphasis added)). Although the Court has recognized the "need and authority" in some "limited areas" to formulate federal common law, such instances are "'few and restricted.'" *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Wheeldin*, 373 U.S. at 651).

The Supreme Court and this Court have recognized that federal common law is potentially viable only in two categories of cases—where Congress has empowered the courts to develop substantive law or where it is "'necessary to protect uniquely federal interests.'" *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)). On that basis, for example, in *Texas Industries*, the Supreme Court refused to create a common law cause of action for a defendant to seek contribution from other antitrust conspirators. *Id.* at 638-46.

The Court explained that the sheer "range of factors to be weighed" in deciding whether to create such an action "demonstrates the inappropriateness of judicial resolution of this complex issue" and stressed that, "regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve." *Id.* at 646. Similarly, in *National Audubon Society v. Department of Water*, 869 F.2d 1196, 1202-05 (9th Cir. 1988), in a case alleging interstate air pollution, this Court held that there is no cause of action under federal common law of public nuisance because Congress had not authorized courts to develop substantive law and the suit implicated no "uniquely federal interests."

This suit likewise falls into neither narrow category. As this Court explained in *National Audubon Society*, "Congress has not authorized the courts to develop a substantive law of air pollution." *Id.* at 1202. Nor is there "'a uniquely federal interest' in protecting the quality of the nation's air" that would call for a federal common law remedy. *Id.* at 1203, 1204 (expressly assuming that pollution extended interstate). The "'uniquely federal interest[s]'" that give rise to a federal common law claim "exist[] '*only* in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases.'" *Id*. at 1202 (emphasis added) (citation omitted). Those interests are no more implicated here than they were in *National Audubon Society*. This

Court should once again refuse the invitation to recognize a federal common law claim for nuisance to remedy interstate—indeed, in this case, global—air pollution.

The conventional nuisance claims arising from disputes among states—which *are* among the "few and restricted" instances in which the Supreme Court has recognized a federal common law cause of action—provide plaintiffs no support here. Each involved allegations that a discrete set of defendants directly caused harm with obviously toxic or dangerous substances in a geographically definable area. *See Missouri v. Illinois*, 200 U.S. 496 (1906) (sewage dumped by Chicago harmed cities along Mississippi river); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (toxic chemicals emitted by Tennessee companies harmed air quality in five Georgia counties); *New York v. New Jersey*, 256 U.S. 296 (1921) (sewage discharged by New Jersey harmed Upper New York Bay); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (drainage system altered by Minnesota caused flooding in North Dakota); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (garbage dumped by NYC harmed New Jersey shore); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*") (pollution discharged by Wisconsin cities harmed Lake Michigan).[2]

[2] Similarly, plaintiffs' allegations are wholly unlike those traditionally found in state public nuisance cases. *See, e.g.*, *People v. Detroit White Lead Works*, 46 N.W. 735, 735-37 (Mich. 1890) ("unwholesome, offensive, and nauseating odors, smells, vapors, and smoke" emitted by factory harmed people "in the neighborhood"); *McAndrews v. Collerd*, 42 N.J.L. 189 (N.J. 1880) (explosives

Those carefully limited, traditional tort suits bear no resemblance in substance or scope to plaintiffs' suit. Instead, plaintiffs' claims implicate non-toxic substances emitted by billions of sources worldwide over the course of centuries, caused by everyone in every corner of the globe and—if plaintiffs' claims are to be believed—causing generalized harms worldwide. As Professor Laurence Tribe has explained, "[u]nlike traditional pollution cases, where discrete lines of causation can be drawn from individual polluters to their individual victims," climate change suits describe a "non-linear, collective impact of millions of fungible, climactically indistinguishable, and geographically dispersed emitters." *See* Laurence H. Tribe et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 15 (Washington Legal Found. Critical Legal Issues Series, Working Paper No. 169, 2010).

Furthermore, the conventional federal common law nuisance cause of action was recognized in suits brought by *states* seeking *injunctive relief* to address a specific environmental harm—not, as here, by other entities seeking damages in connection with an abstract harm felt the world over. *See National Audubon Soc'y,*

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stored in shed exploded and damaged houses within 1200-ft radius); *Wesson v. Washburn Iron Co.*, 95 Mass. (13 Allen) 95, 104 (Mass. 1866) ("noisome smells and noxious vapors" emitted by factory harmed the vicinity); *Mills v. Hall & Richards*, 9 Wend. 315, 316 (N.Y. Sup. Ct. 1832) (malarial pond caused "disease and death through the neighborhood").

869 F.2d at 1203 (in *Milwaukee I*, the "remedy [was] sought by *Illinois*" (emphasis in original)); *id*. at 1204 (in *Georgia v. Tennessee Copper*, "the plaintiff was *a state*" (emphasis added)). As the Supreme Court later explained, such cases did not necessarily create "a cause of action … brought under federal common law by a private plaintiff, seeking damages." *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981).

Even in new situations that are arguably analogous to traditional common law actions, the Supreme Court has made clear that federal courts do not have unchecked "freedom to create new common-law liabilities." *United States v. Standard Oil Co. of Cal*., 332 U.S. 301, 313 (1947). In *Standard Oil*, for example, the Court refused to impose federal common law tort liability in a suit brought by the government to recover damages for loss of a soldier's services when the soldier was struck by one of the defendant's trucks. Although the asserted cause of action was cloaked in traditional tort law garb, the Court recognized that, at root, the suit was about establishing "federal fiscal policy" and determining "the appropriateness of means to be used in executing the policy"—matters more "appropriate for uniform national treatment rather than diversified local disposition." *Id.* at 314, 311. Thus, although the Court acknowledged that the suit was properly subject to federal, as opposed to state, law, the Court emphatically held that the potential liability was for Congress, not the courts, to determine. *Id.* at 316-17.

Plaintiffs' claim fails on the same grounds. It blinks reality to suggest that plaintiffs' suit may be viewed as nothing more than a traditional common law nuisance action. *See* Br. 48. Far from the historically modest application of existing tort principles to a discrete nuisance, plaintiffs seek through this suit to have a single district court weigh the immeasurably complex interests and equities implicated by global climate change. In so doing, this lone judge would dictate the substance and implementation of federal climate change policy—with profound and inevitable effects on American businesses, jobs and individuals.

Because everyone on the planet contributes to greenhouse gas emissions, if plaintiffs' claims are permitted to go forward, all businesses—and, indeed, all individuals—will, overnight, become tortfeasors, subject to unpredictable and open-ended *joint-and-several* liability. Such an extraordinary scheme would wreak havoc on the economy, placing jobs and whole industries at risk. Here, even more than in *Standard Oil*, the "exercise of judicial power" to expand upon "traditionally established" liabilities "would be intruding within a field properly within Congress' control"—a liability that neither Congress nor the EPA has yet "seen fit" to impose. 332 U.S. at 314, 316 So, "[w]hatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of [the courts]." *Id.* at 314.

This Court has recognized that "'[t]he enactment of a federal rule in an area of national concern … is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.'" *National Audubon Soc'y*, 869 F.2d at 1201 (citation omitted). That principle should doom this "nuisance" suit, brought to redress harms caused by global climate change. If ever there were an area "better left to legislative judgment," this is it.

II. IN ANY EVENT, PLAINTIFFS' SUIT IS NON-JUSTICIABLE

A. This Suit Raises An Inherently Political Question

Even if plaintiffs have stated a federal common law cause of action for nuisance, their suit should be dismissed as non-justiciable. Consistent with the Framers' tripartite scheme, courts have no authority to opine on questions that are "in their nature political." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). As the Supreme Court has explained, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210-11 (1962); *accord EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784-85 (9th Cir. 2005); *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). Article III simply does not authorize "*whatever* judges choose to do" but, instead, the "law pronounced by the courts must be principled, rational, and based

upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality).

Under the familiar *Baker* framework, when a case presents no judicially manageable standards by which a court (or jury) can make a rational decision or requires an initial policy judgment (*Baker* factors 2 and 3), it is a matter that must be left in the first instance to the elected branches. 369 U.S. at 210-11, 217. The political question doctrine also bars adjudication where there is a textual commitment to another branch, a danger of disrespect to other branches, a need to adhere to a political decision already made, or the potential for embarrassing other branches (*Baker* factors 1 and 4-6). *Id.*

Here, the political question doctrine bars adjudication because, absent an initial policy judgment to allocate the costs of—and responsibility for—climate change, there are no rational standards by which a court can possibly determine whether this arbitrarily-selected set of defendants emitted an unreasonable amount of otherwise harmless substances and what responsibility, if any, they should bear for it. Further, any such judgment would have profound—and impermissible—impacts on U.S. foreign policy, constraining the ability of the President and Congress to reach meaningful international climate change agreements. Plaintiffs cannot paper over these intrusions on political branch prerogatives simply by affixing a "nuisance" label to their complaints.

1. Common law damage claims are not exempt from the political question doctrine

Plaintiffs and their *amici* law professors err in suggesting at the threshold that this case is justiciable simply because plaintiffs invoke "'[w]ell-settled principles of tort and public nuisance law,'" Br. 48 (citation omitted); *see* Br. of Law Professors 8-9 ("[T]he political question doctrine does not apply to tort actions."), or that damages actions are somehow immunized, *see, e.g.*, Br. 47; Br. of Law Professors 9. Common law causes of action of all stripes—including public nuisance claims for damages—are subject to the political question doctrine. *See, e.g.*, *Luther v. Borden*, 48 U.S. (7 How.) 1, 39-40 (1849) (trespass claim barred by political question doctrine); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-84 (9th Cir. 2007) (public nuisance claims barred political question doctrine); *El-Shifa Pharm. Indus. Co. v. United States*, No. 07-5174, --- F.3d ----, 2010 WL 2352183 (D.C. Cir. June 8, 2010) (en banc) (defamation claim barred by political question doctrine). Thus, as the *en banc* D.C. Circuit recently explained, a plaintiff may not "clear the political question bar" simply by "'recasting'" a claim "'in tort terms.'" *El-Shifa Pharm. Indus. Co.*, 2010 WL 2352183, at *6 (citation omitted). A common law claim, however characterized, cannot "require the court to reassess 'policy choices and value determinations' the Constitution entrusts to the political branches alone." *Id.* (citation omitted). This inquiry requires a careful, "'case-by-

case analysis to determine whether the question posed lies beyond judicial cognizance.'" *Corrie*, 503 F.3d at 982 (citation omitted).

2. Plaintiffs' claims are non-justiciable because they entail no manageable standards and would require the courts to make initial policy determinations reserved to the political branches

Plaintiffs also cannot establish the justiciability of their claims by knocking down their own straw men. Their public nuisance claims raise non-justiciable political questions *not* because "global warming has been the subject of political controversy" or because this is "'a behemoth of a case,'" Br. 41, 47, but because there are no judicially manageable standards and resolution of the claims would require myriad initial policy determinations reserved to the political branches.

In a public nuisance suit, a judge or jury must determine whether the defendants have caused an "*unreasonable* interference with a right common to the general public." Restatement (Second) of Torts (RST) § 821B (1979) (emphasis added). Determining whether an interference is reasonable inherently requires an exercise of judgment, a balancing of various factors and interests. As the Supreme Court has explained, applying the Restatement, public nuisance law "ordinarily entails" analysis of, among other things, the "degree of harm" posed by the activities, the "social value" of the activities, and their "suitability to the locality in question." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (1992) (citing RST §§ 826, 827, 828(a) & (b), 831); *see also, e.g., People ex rel.*

Gallo v. Acuna, 14 Cal. 4th 1090, 1105 (1997) ("The unreasonableness of a given interference represents a judgment reached by comparing the social utility of an activity against the gravity of the harm it inflicts, taking into account a handful of relevant factors." (citing RST §§ 826-31)). Although these decisions invariably involve determinations of policy, it is incremental, and courts appropriately make these sorts of assessments in routine cases against a backdrop of well-established common law, without trespass on the political domain. This case is entirely different, because the claim is not at all incremental in nature. In the guise of a routine nuisance action, plaintiffs have asked a single district court judge to balance the myriad environmental, economic, and geopolitical factors implicated by global climate change and make from whole cloth policy decisions that have been the subject of intense political debate and scrutiny within our political branches and with other nations through international diplomatic channels.

Plaintiffs try to minimize the enormity of the policy-making inherent in the adjudication of their suit. They insist that "the central question in a nuisance action for damages is not one of balancing but rather one of allocation: a court asks which party should bear the cost of the harm that an interference has caused." Br. 49. That is mere wordplay. However articulated, the fundamental problem here is that a public nuisance suit premised on global climate change—even one "only" seeking damages—would require a court to determine the "right" amount of

emissions in order to separate the blameworthy enterprises from the blameless ones. Such an inquiry necessarily would require a balancing of all of the relevant interests—weighing potential benefits of reduced emissions (even as other developing countries increase greenhouse gas emissions)[3] versus the profound impact on local economic growth and energy costs; ascertaining the availability of alternative fuel sources or new technologies to reduce emissions; and so on. *See, e.g.*, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003) ("It is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change."); 42 U.S.C. § 13381 (stabilizing and reducing U.S. carbon dioxide levels has "economic, energy, social, environmental, and competitive implications, including implications for jobs").

Because, as alleged, *every* enterprise—indeed *every person*—worldwide over the last three centuries is to some degree complicit in greenhouse gas emissions, this line-drawing is not just "difficult" for a court. The initial policy judgment about who "should bear the cost of the harm" is so intimately entwined

[3] Although plaintiffs deny that "a suit for damages requires any setting of emissions caps, whether retroactive or not," Br. 45, in determining what is a "reasonable" volume of emissions, the court would be both constraining future action and redressing past actions over a certain level—effectively, a cap.

with every sector of the economy and every facet of daily life that it is unquestionably "'a matter of high policy'" that must be "'resol[ved] within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.'" *Texas Indus.*, 451 U.S. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). Given the scope of the phenomenon of climate change, any attempt to adjudicate which greenhouse gas emissions are acceptable, and which are not, would require a court to dictate all facets of American life.

Plaintiffs attempt to avoid the enormity of the policy decisions implicated by any effort to assess responsibility for global climate change by positing that nuisance law can readily distinguish between negligible and significant amounts. *See* Br. 34-35. For example, plaintiffs contend that their own emissions are insignificant—that they "have contributed little or nothing to global warming." ER 85 ¶ 188.[4] Their attempt to disavow a "big enough" role is understandable because, under their own common law theory of liability, plaintiffs' recovery

[4] Despite their protestations, plaintiffs—like any other community—are unquestionably complicit in greenhouse gas emissions. *See* Alaska Village Electric Cooperative, *AVEC Facilities: Kivalina*, http://www.avec.org/communities/community.php?ID=19 (last visited July 6, 2010) (describing airstrip, electric facilities, and fuel tanks); *Comer v. Murphy Oil USA*, No. 05-cv-436, Transcript at 36 (S.D. Miss. Aug. 30, 2007) (oral disposition) ("all of us are responsible for the emission of CO_2"). Elsewhere, plaintiffs implicitly acknowledge as much. *See* ER 84-85 ¶ 185 (noting that AVEC's "tank farm" was relocated); ER 109 (picturing fuel tanks and power lines).

would otherwise be barred if a court found that liability is not apportionable. *See* RST § 840E cmt. d (when a plaintiff contributes to a non-apportionable harm, "the plaintiff's own responsibility for the entire harm will bar his recovery").

But that, again, requires a policy judgment as to what is too "little" to matter when it comes to assigning fault. Indeed, any determination in a specific case would necessarily require a court first to discern the appropriate *aggregate* level of world-wide emissions. Absent that initial policy judgment, there is no "right" cutoff and, thus, no judicially manageable standard. As Professor Tribe has noted, crafting solutions to greenhouse gas emissions is "so plainly immune to coherent judicial management as to be implicitly entrusted to political processes." Tribe, *supra*, at 24. Courts are "institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope." *Id*. at 21.

For precisely those reasons, every district court to consider federal common law claims seeking redress for global warming has found them to raise political questions beyond judicial purview.[5] The unanimity of trial judges on this point is telling, as they are on the front lines and most attuned to the manageability of such

[5] *California v. General Motors Corp*., No. 06-cv-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009); *Comer v. Murphy Oil USA*, No. 05-cv-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, No. 07-60756, --- F.3d ----, 2010 WL 2136658 (5th Cir. May 28, 2010); *Connecticut v. American Elec. Power Co*., 406 F. Supp. 2d 265, 271-74 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009); ER 1-24.

actions and the bounds of proper judicial competence. Although two court of appeals panels have disagreed (the Second and Fifth Circuits in *AEP* and *Comer*, respectively),[6] this Court should decline to follow their misguided and unfounded path. With their "quixotic and unyielding faith in nuisance doctrine," those panels "manifestly los[t] their way in the … real thicket of political question doctrine." Tribe, *supra*, at 17, 24.

3. Adjudication of plaintiffs' action would encroach on U.S. foreign policy and risk disrespecting or embarrassing the other branches

In addition to exceeding the bounds of judicial competence, adjudication of this suit would constrain U.S. foreign policy—a matter squarely committed to the other branches—and risk disrespecting or embarrassing the other branches (and our Nation) by running afoul of extant or emerging political decisions. *See Baker*, 369 U.S. at 211, 217; *Corrie*, 503 F.3d at 982-84; U.S. Const. art. II, §§ 2-3 (foreign affairs powers, including making treaties and appointing and receiving Ambassadors); *see also Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (plurality) (finding political question doctrine barred suit "involv[ing] the authority of the President in the conduct of our country's foreign relations").

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[6] *See Connecticut v. American Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) ("*AEP*"); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). In *Comer*, the *en banc* court agreed to hear the case and vacated the panel decision, but, upon losing a quorum, was unable to act, leaving the district court's judgment as the final word. 2010 WL 2136658 (5th Cir. May 28, 2010).

Under plaintiffs' common law theory, all enterprises (or whatever arbitrary subset thereof a given plaintiff chooses to sue) would be liable for *all damages stemming from global warming*. Such a sweeping (and absurd) outcome would uniquely and destructively disadvantage businesses operating in the United States and constrain the United States in its often delicate negotiations with other countries in trying to craft fair and sensible solutions. *See, e.g.*, President Barack H. Obama, Remarks by the President at the Morning Plenary Session of the United Nations Climate Change Conference, Copenhagen, Denmark (Dec. 18, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-morning-plenary-session-united-nations-climate-change-conference ("[I]t is in our mutual interest to achieve a global accord in which we agree to certain steps, and to hold each other accountable to certain commitments."); President George W. Bush, Remarks on Energy and Climate Change, 44 Weekly Comp. Pres. Doc. 524, 526 (Apr. 16, 2008) (reaffirming goal of reaching a "fair and effective international climate agreement" but rejecting the approach of "unilaterally impos[ing] regulatory costs that put American businesses at a disadvantage with their competitors abroad, which would simply drive American jobs overseas and increase emissions there"). Indeed, it would "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other

governments." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

The problem is not, as plaintiffs would have it, that their suit merely touches on or "involv[es] … foreign relations." Br. 46. It is that their suit would stymie the President's and Congress's ability to conduct foreign relations effectively in this sensitive area. Not surprisingly, given the global nature of the climate change phenomenon, the United States and other countries around the world are actively involved in discussions to address climate change through a coordinated framework. This Court has squarely held that the judiciary cannot "even indirectly" encroach on the political branches' ability to mold foreign policy—even where, as here, plaintiffs "purport to look no further than [the particular defendants]." *Corrie*, 503 F.3d at 984. But this suit would do just that. *See id.* at 982 (holding suit barred based on *Baker* factors 1 and 4-6 because "[i]t is difficult to see how [this Court] could impose liability … without at least *implicitly*" constraining foreign policy discretion (emphasis added)).[7] Although the district court did not rest its dismissal on this ground, it provides an independent and sufficient alternative basis to uphold the judgment below.

[7] *Massachusetts v. EPA*, 549 U.S. 497 (2007), is not to the contrary. There, the Court addressed the allocation of foreign policymaking authority as between the President and Congress, but nowhere suggested that the *courts* were empowered to weigh in. *Id*. at 533-34. Indeed, the Court stressed that it has "neither the expertise nor the authority to evaluate these policy judgments." *Id.* at 533.

B. Plaintiffs Lack Standing

This case is also non-justiciable because plaintiffs lack standing. *See No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988) ("'The concepts of standing and political question are separate aspects of justiciability, and either the absence of standing or the presence of a political question precludes a federal court, under Article III of the Constitution, from hearing or deciding the case presented.'" (citation omitted)). More particularly, plaintiffs have failed to establish the causation necessary for Article III standing because they have not shown that their injuries are "fairly traceable" to the defendants' emissions. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008).

1. The nature of carbon dioxide emissions makes it impossible for plaintiffs to "fairly trace" their alleged injuries to defendants' conduct

As the district court found, the very nature of the alleged injury in this case prevents plaintiffs from demonstrating causation. ER 15-22. Plaintiffs mischaracterize the district court's causation analysis as requiring them to "trace molecules" to prove traceability. Br. 61. The district court did no such thing. Applying established standards, it simply found that plaintiffs did not show a "substantial likelihood" that their injuries were caused by defendants' conduct as

opposed to "'the independent action of some third party not before the court.'" ER 19, 16 (quoting *Salmon Spawning & Recovery Alliance*, 545 F.3d at 1227).

As the district court correctly pointed out, "the source of greenhouse gasses are undifferentiated and cannot be traced to any particular source, let alone defendant, given that they 'rapidly mix in the atmosphere' and 'inevitably merge[] with the accumulation of emissions in California and the rest of the world.'" ER 20 (quoting Complaint) (alterations in original). This accumulation of emissions comes from innumerable sources around the globe—including the plaintiffs themselves. The very nature of greenhouse gas emissions makes it impossible to show a "substantial likelihood" that it was carbon dioxide emissions from the defendants—and not the literally billions of "'third part[ies] not before the court'"—that caused plaintiffs' alleged injuries. ER 16. The bounds of Article III require plaintiffs to tie their injuries to defendant's conduct in order to ensure that the right people are before the court, *see, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 167 (1997), but the nature of the injury makes that impossible here.

Even if plaintiffs could somehow trace carbon dioxide molecules from defendants' emissions through all the processes that constitute global warming, the chain of causation remains hopelessly attenuated. A plaintiff is required to prove more than that the defendant's action simply triggered a series of other events that in some sense contributed to the alleged injury. *See Benefiel v. Exxon Corp*., 959

F.2d 805, 807 (9th Cir. 1992) (citing RST §§ 431, 433, 440-453 (1965)). Here, plaintiffs allege that centuries of global emissions, mixing together in the atmosphere with other greenhouse gasses in an undifferentiated mass, caused the cascading series of climate changes that are the culprits of plaintiffs' harm. Defendants' alleged conduct is not only a single link at the far end of this centuries-long chain of events, but also thousands of miles away from the plaintiffs. *See Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996) (finding even an 18-mile distance between point of discharge and plaintiff's harm is "too large to infer causation"). Defendant's actions cannot be adjudged substantially likely to have brought about plaintiffs' harm; at most, they created a classic "'situation harmless unless acted upon by other forces for which [they were] not responsible.'" *Benefiel*, 959 F.2d at 807 (quoting RST § 433(b)); *see also Center for Biological Diversity v. United States Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (denying standing where causal link between adoption of a federal leasing program and damage from climate change was too attenuated).

Lowering the causation threshold to confer Article III standing on plaintiffs would yield absurd results. As Professor Tribe recently warned, "the undifferentiated nature of any one defendant's contribution to plaintiffs' injuries enables plaintiffs—if courts let them—to wield the hammer of federal common

law against any emitter of their choosing." Tribe, *supra*, at 16 (criticizing *AEP*). Without the commonsense traceability standard required by Article III, plaintiffs would arguably have standing to sue virtually any emitter in the world for their alleged global warming related injuries—from an everyday car owner or homeowner to a multi-national corporation—without any proof that the alleged conduct had any real and substantial link to plaintiffs' injuries.

Article III's case or controversy constraint, by requiring plaintiffs to "fairly trace" their injuries to these particular defendants, ensures that courts are not called upon to make free-ranging policy judgments on global problems that can only properly be addressed by the political branches. Permitting this suit to proceed would vitiate that structural limitation and force judges well beyond their legitimate authority and core area of competence.

2. The Clean Water Act's "contribution" approach to Article III standing is inapplicable to this case

Unable to prove traceability, plaintiffs argue that they need only to allege that defendants' conduct "contributed" to their harm. But the Clean Water Act cases on which they rely are inapplicable here. In those cases, contribution was sufficient because it was presumed that a discharge in excess of federally mandated standards created the requisite "substantial likelihood" that the discharge caused plaintiffs' injury. ER 16-19. The district court correctly declined to apply that

theory here because, absent any federal standards limiting the discharge of greenhouse gasses, there is no presumption of causation. ER 19.

Plaintiffs urge the court to apply the contribution theory outside the unique statutory context in which it arose, to confer universal standing on any environmental plaintiff protesting any activity that legally emits greenhouse gasses and thereby "causes or contributes" to the "kinds of injuries" they allege result from global warming. Br. 64-65. If the contribution theory is applied outside of the CWA context as plaintiffs suggest, it would not be limited to global warming cases, but would provide standing across the board to all environmental plaintiffs that allege a defendant's conduct, however attenuated or slight, "causes or contributes to the kind of injuries" they experience. *Id*. That is far from the normal understanding of Article III standing requirements. *See Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996). The relaxed traceability standard applicable to CWA cases in which defendants have exceeded federal discharge standards is an exception to the ordinary rule, not a replacement for it.[8]

[8] Even under the standard applicable in CWA cases, of course, plaintiffs still lack standing because they cannot come close to establishing that their injuries lie within a specific geographic area of concern. *See Texas Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 974 (7th Cir. 2005). Courts have rejected geographic separations of as few as 18 miles as too large to infer causation, *see Crown Cent. Petroleum Corp.*, 95 F.3d at 361, and plaintiffs seek standing based on an unbounded—global—area.

3. *Massachusetts v. EPA* does not support standing in this case

Plaintiffs' reliance on *Massachusetts v. EPA*, 549 U.S. 497 (2007), is also unavailing. Although the Court there found sufficient traceability based on auto emissions' "contributions" to global warming, that case is fundamentally different because it was brought by states and involved a statutorily-conferred procedural right for the plaintiff states to challenge the EPA's denial of their rulemaking petition. *Id.* at 523, 506. The *Massachusetts* Court took pains to make clear that, as a state, Massachusetts was afforded "special solicitude" in its standing analysis (which plaintiffs here, who are not states, do not enjoy), *id.* at 520, and that suits to enforce procedural rights are not subject to the same standing requirements as traditional causes of action, *id.* at 518-19. *See also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1155 (2009) ("[O]nly a 'person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal [standing requirements].'" (citation omitted)).

Here, plaintiffs are not states and invoke no procedural right, and their bid for universal standing to sue anyone in the chain of greenhouse gas emissions founders on the shoals of longstanding and well-established bounds of Article III. The absence of standing reflects and highlights the inherent inadequacy of the judicial forum to address the manifestly political issues raised by global climate change.

CONCLUSION

Plaintiffs ask this Court to direct a lone trial judge, under the guise of conventional nuisance principles, to create sweeping new federal common law that would purport to assign blame and liability for global climate change on American businesses in an *ad hoc* and piecemeal basis and disrupt every facet of daily life. This Court should refuse to do so. Allowing plaintiffs with no traceable injuries and courts without clear governing standards to arrogate to themselves the power to reorder complex national economic relationships undermines the fair notice and predictability that businesses need to order their affairs and over-steps the ongoing democratic process. Such a non-judicial and ill-advised course deprives all interested parties of the chance to be heard by politically accountable actors who can appropriately consider all relevant interests—business, consumer, and environmental—before fundamentally transforming the nation. Instead, this Court should adhere to the proper judicial role mandated by Article III and reject the invitation to dramatically expand upon traditional federal common law remedies, to weigh in on inherently political questions, and to grant unlimited standing.

For all of the foregoing reasons, this Court should affirm the district court's dismissal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(B), the foregoing Brief of Amicus Curiae contains 6,912 words, excluding the parts of the brief exempted by Fed. R. App. P. 37(a)(7)(B)(iii); and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because the brief is proportionately spaced and has a typeface of 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July 2010, I caused the foregoing to be filed with the Clerk, U.S. Court of Appeals for the Ninth Circuit using the Court's 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 have mailed 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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