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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NATIVE VILLAGE OF KIVALINA and CITY OF KIVALINA,

Plaintiffs,

vs.

EXXON MOBIL 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; DTE ENERGY COMPANY; DUKE ENERGY CORPORATION; DYNEGY HOLDINGS, INC.; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; MIRANT CORPORATION; NRG ENERGY; PINNACLE WET CAPITAL CORPORATION; RELIANT ENERGY, INC.; THE SOUTHERN COMPANY; AND XCEL ENERGY, INC.,

Defendants.

CASE NO. C 08-01138 SBA

REPLY MEMORANDUM IN SUPPORT OF MOTION OF CERTAIN OIL COMPANY DEFENDANTS TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1)

Time: December 9, 2008, 1:00 P.M.
Ctrm.: Courtroom 3, 1301 Clay Street, Oakland, California
The Honorable Saundra B. Armstrong

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I. INTRODUCTION

As Defendants have explained, *see* Motion to Dismiss Under Rule 12(b)(1) ("Motion") 13-29, this case presents a political question because adjudication of Plaintiffs' claims would require the Court to resolve fundamental questions of "'national polic[y]'" that are "'not legal in nature'" and that can only be resolved by a political judgment of the political branches. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (citation omitted). Although Plaintiffs style this as a simple common-law nuisance case, *see* Plaintiffs' Consolidated Opposition ("Opp.") 34, it is not that. Like the proverbial new wine poured into old wineskins—which "'bursts the skins,'" *Beason v. United Tech. Corp.*, 337 F.3d 271, 273 (2d Cir. 2003) (quoting *Mark* 2:2)—Plaintiffs' effort to squeeze the enormous "complexity of the initial global warming policy determinations" into the rubric of ordinary nuisance law stretches the judicial function well past the breaking point. *California v. General Motors Corp.* ("*GMC*"), No. C-06-5755-MJJ, 2007 WL 2726871 at *6 (N.D. Cal. Sept. 17, 2007), *appeal pending*, No. 07-16908 (9th Cir.). Plaintiffs' "recasting" of political questions "in tort terms does not provide standards for making or reviewing [such] judgments," *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005), and none of Plaintiffs' arguments supports departing from the unanimous authority on this point. *See GMC*, 2007 WL 2726871 at *16; *Connecticut v. American Elec. Power Co.* ("*AEP*"), 406 F. Supp. 2d 265, 270-74 (S.D.N.Y. 2005), *appeal pending*, No. 05-5104 (2d Cir.); *Comer v. Murphy Oil USA Inc.*, 1:05-CV-00436 (S.D. Miss. Aug. 30, 2007) (Exs. B, C to Collins Decl. in support of Motion), *appeal pending*, No. 07-60756 (5th Cir.).

The Complaint must also be dismissed because Plaintiffs cannot satisfy the "fair traceability" requirement of Article III standing. As Defendants have explained, *see* Motion 30, one of the "three elements" of the "irreducible constitutional minimum of standing" is that "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly … trace[able] to the challenged action of the defendant.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Because fair traceability is "an indispensable part of the plaintiff's case," *Lujan*, 504 U.S. at 561, Plaintiffs must plead "enough facts" to establish a theory of standing "that

is plausible on its face" and that rises "above the speculative level." *Bell Atlantic Co. v. Twombly*, 127 S. Ct. 1955, 1965, 1974 (2007). Plaintiffs' Opposition only serves to confirm that they have not satisfied, and cannot satisfy, this burden in at least two respects: (1) they cannot trace their injuries to Defendants' emissions as opposed to those of "'third part[ies] not before the court,'" *Lujan*, 504 U.S. at 560-61 (citation omitted), and (2) their claims rest on a causal chain that is "too attenuated," *Allen v. Wright*, 468 U.S. 737, 752 (1984). Plaintiffs' Opposition all but concedes that tracing is impossible, but they implore the Court to "keep pace with evolving developments" and to "provide relief for novel injuries." Opp. 105. The Court should reject this request to jettison established legal principles, and should grant the motion to dismiss.

II. ARGUMENT

A. Plaintiffs' Global Warming Claims Raise Nonjusticiable Political Questions

1. Plaintiffs' Theory That Defendants' Emissions Were at a Level That Wrongfully Contributed to Global Warming Raises Inherently Political Questions

A central problem with Plaintiffs' claim for global-warming-caused damages is that, to resolve the claim, the Court would have to decide that the *levels* of Defendants' greenhouse gas emissions from numerous activities in various places over the last several decades should now be considered *wrongful and tortious*, so as to justify requiring Defendants to compensate Plaintiffs. *See* Motion 16. But in contrast to a garden-variety nuisance claim that focuses on geographically localized pollution from a "source-certain," Plaintiffs seek to "impose damages on a much larger and unprecedented scale" by attributing responsibility to Defendants for injuries assertedly caused by an inherently global phenomenon that results from "multiple worldwide sources … across myriad industries and multiple countries." *GMC*, 2007 WL 2726871 at *15. Accordingly, in order for the Court to determine that Defendants' emissions (as opposed to those of others elsewhere in the U.S. or the world) should have been lower in the past, the Court would need to make an initial policy determination that attempts to assess the significance of any contribution to global warming from such emissions and then to weigh that against a number of fundamental national and international policy concerns. These concerns include: the importance of Defendants' activities to national energy policy, the overall economy, and national security; the

concern that *de facto* emissions caps would have a variety of serious adverse impacts on multiple sectors of the national economy; and the harm to the nation's foreign policy from such domestic caps (by, among other things, making it harder to achieve multi-lateral agreements to make the necessary *worldwide* reductions in greenhouse gases). As every court to consider the question thus far has concluded, the "identification and balancing of economic, environmental, foreign policy, and national security interests" on this enormous scale requires "'an initial policy determination of a kind clearly for non-judicial discretion.'" *AEP*, 406 F. Supp. 2d at 274 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); *GMC*, 2007 WL 2726871 at *8 (the "balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court").

Plaintiffs attempt to avoid this problem by making arguments that have been considered and rejected by the *GMC*, *AEP*, and *Comer* courts. They assert that applying nuisance law to global warming would not require the Court to make any evaluation of Defendants' emissions, *see* Opp. 49, 54, 59-60, 65-66; that Plaintiffs' decision to limit their claims to only monetary damages likewise avoids any political question, *see* Opp. 61, 63-64, 67; and that the political branches' actions in the field of global warming are sufficient to allow adjudication of this case, *see* Opp. 49-53, 55-59, 69-70. As in *GMC*, *AEP*, and *Comer*, these arguments are meritless.

a. Plaintiffs' Reliance Upon the Nuisance-Law Concept of "Unreasonable Interference" Highlights, Rather Than Resolves, the Political Question at the Heart of This Case

In their Opposition, Plaintiffs conspicuously do *not* dispute Defendants' core argument that *if* this suit will require the Court to retroactively determine the wrongfulness of Defendants' past emissions, then the action is barred by the political question doctrine. Instead, Plaintiffs dispute the premise of this argument by contending that "no such judgment[]" about the reasonableness of Defendants' emissions "will be necessary" to adjudicate this case. Opp. 60. That is true, Plaintiffs assert, because "[t]he 'unreasonable' element of public nuisance is focused *entirely* upon the harm, not upon the defendant's conduct." Opp. 49 (emphasis altered). According to Plaintiffs, the Court need only consider whether the "harm alleged here, destruction of the entire village" is "unreasonable." Opp. 36. Even assuming *arguendo* that public nuisance

principles could be applied here,[1] this argument is without merit.

A defendant's conduct may constitute a "public nuisance" if, *inter alia*, it represents "an *unreasonable interference* with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979) ("RESTATEMENT") (emphasis added). As held in *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090 (1997), "[t]he 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." *Id*. at 1105 (emphasis added) (citing RESTATEMENT). Hornbook nuisance law underscores the point. *See* AM. JUR. 2D, *Nuisances* § 91 (2008) ("whether the invasion constituting an alleged nuisance is unreasonable in the sense that the harm to plaintiffs is greater than they should be required to bear in the circumstances *calls for the weighing of the gravity of the harm against the utility of the defendant's conduct*") (emphasis added); *see also* RESTATEMENT, § 826(a) (evaluating whether an interference is "unreasonable" generally requires the court to decide whether "the gravity of the harm outweighs the utility of the actor's conduct"); *id*., § 827, cmt. a (public nuisance principles generally require "determining whether the gravity of the interference with the public right outweighs the utility of the actor's conduct"). As *GMC* recognized, any such effort to decide "what is an *unreasonable* contribution to the sum of carbon dioxide in the Earth's atmosphere" and to establish a legal framework for "determining who should bear the costs associated with the *global* climate change that admittedly result[s] from multiple sources around the globe," would require the Court to make "an initial policy determination of the type reserved for the political branches of government." 2007 WL 2726871 at *10, *15 (emphasis added).

Plaintiffs' contrary argument focuses upon (and misconstrues) the principles of public nuisance law involving "intentional" conduct.[2] Plaintiffs misread Dean Prosser's comment that

[1] As Defendants explained in their Motion to Dismiss Under Rule 12(b)(6), the federal common law of nuisance does not extend to a claim for global-warming caused injuries, *id*. at 9-15, and any authority to develop federal common law here has been displaced by Congress, *id*. at 15-21.

[2] Defendants do not agree that their challenged conduct is properly analyzed as "intentional" in applying public nuisance law, such that Plaintiffs may avoid the additional requirements that would be needed to establish that the challenged conduct was either negligent or constituted an "abnormally dangerous" activity (the latter category, of course, has not been, and could not be, invoked by Plaintiffs). RESTATEMENT, § 821B, cmt. e (public nuisance tort action requires "an

intentional interference with another's property "'can be unreasonable even when the defendant's conduct is reasonable.'" Opp. 49 (quoting PROSSER & KEATON ON TORTS § 88, at p.629 (5th ed. 1984)). In the very same discussion quoted by Plaintiffs, Prosser frames the question as whether the plaintiff's loss allegedly "result[ing] from the intentional interference *ought to be allocated to the defendant*," and then lists several factors that must be considered, including the nature of the harm, the plaintiff's use of its property, the "relative capacity" of the parties to avoid or adapt to the circumstances causing the harm, and, notably, "the nature of the defendant's use of his property." PROSSER & KEATON, § 88, at pp. 629-30 (emphasis added). The Restatement likewise frames the question as whether, under the circumstances, the plaintiff "should be required to bear [the harm] without compensation" from the defendant. RESTATEMENT, § 829A. That normative judgment requires consideration of a number of factors, including whether the *financial burdens of requiring compensation for this harm and all other similar harms would make the continuation of the particular conduct at issue infeasible*. RESTATEMENT, § 826(b); *see also id*., § 821B, cmt. e ("If the interference … is intentional … it must also be unreasonable. (See § 822, and §§ 826-31, involving the weighing of the gravity of the harm against the utility of the conduct).").

Plaintiffs are thus wrong in contending that nuisance law would allow the Court to adjudicate liability here without the need to make any *normative* evaluation concerning the levels of Defendants' emissions. On the contrary, the inquiry suggested by nuisance law (were it applicable here) would require the Court to evaluate whether those emissions had reached such a level and magnitude that, in light of the value of those activities, the severity of the harms allegedly caused, and the costs and burdens of shifting liability for all such harms to those engaged in such conduct, liability for damages should nonetheless be imposed. As explained earlier, *see supra* at 2-3, the "balancing" that would be required here is of an entirely different order of magnitude than in a simple nuisance case, and would require the Court to make

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analysis substantially similar to that employed for the tort action for private nuisance," which is "set forth … in §§ 826-831"); *Acuna*, 14 Cal. 4th at 1105 n.3 (same). But even assuming *arguendo* that Defendants' challenged conduct could properly be deemed intentional, Plaintiffs are wrong in contending that its nature and utility are irrelevant to the analysis. *See* RESTATEMENT, § 821B, cmt. e. (in all variations of public nuisance law, "some aspect of the concept of unreasonableness is to be found"); *see supra* at 4.

inherently political judgments about how to evaluate competing and incommensurate "economic, environmental, foreign policy, and national security interests." *AEP*, 406 F. Supp. 2d at 274.[3]

As a result, the third *Baker* test for a political question is satisfied, because the necessary balancing of these competing interests requires an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217; *see GMC*, 2007 WL 2726871 at *8; *AEP*, 406 F. Supp. 2d at 274; *see also E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005) ("A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.").[4] The second *Baker* test is likewise met, because a generic invocation of nuisance principles leaves the Court without judicially manageable standards for "determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with global climate change that admittedly result from multiple sources around the globe." *GMC*, 2007 WL 2726871 at *15. And because the powers to make the requisite initial policy determinations were all textually committed by the Constitution to the political branches, the first *Baker* test is met as well. *Id*. at *13-*14. Accordingly, Plaintiffs' reliance upon public nuisance principles does not avoid or resolve the political question at the heart of this lawsuit, but merely restates and highlights it. *Schneider*, 412 F.3d at 197; *see also Alperin v. Vatican Bank*, 410 F.3d 532, 562 (9th Cir. 2005) (affirming political-question dismissal of wartime slave labor claims, which "present no mere tort suit").

Judge Jenkins reached precisely this conclusion in *GMC*. There, as here, the plaintiff (the State of California) argued that "'[t]he Court will not be required to determine whether [D]efendants' *actions* have been unreasonable, but [instead] whether the interference suffered by

[3] Accordingly, the fact that the Supreme Court held that a traditional garden-variety nuisance claim involving mercury pollution in Lake Erie did not raise a political question, *see Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496 (1971), says nothing about whether Plaintiffs' novel invocation of nuisance principles to create a worldwide global warming liability scheme is justiciable. *See GMC*, 2007 WL 2726871 at *15 ("none of the pollution-as-public-nuisance cases implicates a comparable number of national and international policy issues").

[4] Plaintiffs refer to the *Baker* tests as "factors," Opp. 54-55, a term that wrongly connotes a six-factor balancing test. On the contrary, *Baker*'s six alternative formulations of a political question constitute "six independent tests," any *one* of which is sufficient to establish that a case presents a nonjusticiable political question. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007).

California is unreasonable.'" *GMC*, 2007 WL 2726871 at *8 (quoting California's brief) (alterations made by the court). The court rejected this argument, holding that, however the formulation is phrased, "the Court is left to make an initial decision as to *what is unreasonable in the context of carbon dioxide emissions*." *Id*. (emphasis added). Adjudication of the plaintiff's claim thus "would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," with the inevitable result that the Court would "create a quotient or standard in order to quantify any potential damages that flow" from the defendants' emissions. *Id*.

Moreover, Plaintiffs effectively concede that adjudication of this suit would require the Court to engage in *ad hoc* line-drawing about the reasonableness of Defendants' emissions. Taken to its logical conclusion, Plaintiffs' contention that nuisance liability turns only on "whether the *harm* is unreasonable," Opp. 60, would necessarily mean that *all* contributors to that assertedly "unreasonable harm" are liable. At points in their Opposition, Plaintiffs clearly suggest as much. *See*, *e.g.*, Opp. 36-37 (under their unreasonable-harm theory, "each polluter who contributes to the nuisance is liable"). The resulting theory—if not limited in some way—would logically allow liability to be asserted against virtually any emitter in the world, and not only for Plaintiffs' injuries, but for all other serious harms caused by global warming. *Cf*. RESTATEMENT, § 826(b) (nuisance liability requires consideration of whether the logic of the theory asserted could require compensation of a broad range of similar injuries).[5] Plaintiffs attempt to avoid the resulting overwhelming unmanageability of their global-warming nuisance theory by making a concession that (from the point of view of the political question doctrine) they cannot afford to make, namely that liability should be limited to those persons whose *level of emissions* exceeded a certain (unspecified) "order[] of magnitude." Opp. 42. This is, of course, an implicit

[5] In challenging Defendants' emissions, Plaintiffs thus pointedly do *not* focus on any geographically specific activities of Defendants. That is sufficient to distinguish this case from *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006), upon which Plaintiffs rely. *See* Opp. 56, 64, 67. In *Barasich*, the court held that the political question doctrine did not apply to a claim that *local dredging activities* directly damaged marshlands that protected against coastal erosion from storms. *Id*. at 687-89. Notably, however, the court rejected the claim on the merits for lack of proximate causation, *id*. at 693-95—a ground that applies equally here. *See* Motion to Dismiss Under 12(b)(6) at 4-9.

concession (as if any were needed), that the focus cannot be solely on the harm, but must consider whether the defendants' emissions were in some sense *excessive*. And that "line drawing," Opp. 44, would require the Court to answer the very political question that Plaintiffs are attempting to avoid, namely, how to balance the competing fundamental questions of national policy so as to ascertain (retroactively) what *levels* of past greenhouse gas emissions should result in liability.

* * *

Applying nuisance principles here would thus require the Court to "determin[e] what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere," *GMC*, 2007 WL 2726871 at *15, and that would require the Court to make a fundamentally political judgment concerning how to balance competing "economic, environmental, foreign policy, and national security interests," *AEP*, 406 F. Supp. 2d at 274. The action must be dismissed as nonjusticiable.[6]

b. That Plaintiffs Seek Only Monetary Damages Does Nothing to Avoid the Need for an Initial Political Judgment Concerning How to Evaluate Emissions Levels

Plaintiffs also contend that the political question doctrine is inapplicable here because they seek only damages, not injunctive relief. Opp. 49. This argument fails. As the analysis above (and in Defendants' Motion) makes clear, the principal political question here arises, not from the remedy requested, but rather from the *theory of liability* asserted. *See supra* at 2-8; *see also* Motion 20 n.5. As the *GMC* court recognized, the distinction between damages and injunctive relief is "unconvincing" in this context "because regardless of the relief sought, the Court is left to make an initial decision as to what is unreasonable in the context of carbon dioxide emissions." *GMC*, 2007 WL 2726871 at *8. Moreover, contrary to what Plaintiffs suggest, the courts have not held that damages-only cases *never* raise political questions, but only that they are *less* likely

[6] Plaintiffs assert that, because there is federal question jurisdiction over a federal common law nuisance claim, any "proper" invocation of that federal subject matter jurisdiction cannot present a political question. Opp. 45. This argument is question-begging, because a particular invocation of federal question jurisdiction will not be "proper" if it would require the Court to adjudicate a political question. As the Ninth Circuit has held, the "presence of a political question" is itself a *jurisdictional* defect that "precludes a federal court, under Article III of the Constitution, from hearing or deciding the case presented." *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988) (citation and internal quotation marks omitted); *see also Corrie*, 503 F.3d at 981 ("Because the political question doctrine curbs a court's power under Article III to hear a case, the doctrine is inherently jurisdictional.").

to raise justiciability problems. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992).[7] Indeed, the courts have often found that damages claims raise political questions, including damages claims against private parties. *See*, *e.g.*, *Schneider*, 412 F.3d at 196-98 (former government official); *Corrie*, 503 F.3d at 983-84 (corporation); *Alperin*, 410 F.3d at 561 (religious order); *Mujica v. Occidental Petroleum Corp*, 381 F. Supp. 2d 1164, 1193-95 (C.D. Cal. 2005) (corporation), *appeal pending*, C.A. No. 05-56056 (9th Cir.).

Plaintiffs' argument on this score fails for the additional reason that it ultimately rests on the same erroneous understanding of public nuisance principles discussed earlier. Plaintiffs contend that, *because* they have limited the relief requested to damages, the Court need only consider the "unreasonableness" of the "harm" in determining whether to impose liability and can avoid having to evaluate the propriety of past levels of emissions. *See*, *e.g.*, Opp. 49. But as explained above, a public nuisance claim for damages *does* require consideration of a balance of competing policy considerations, including the utility of the emissions activities and the relative costs and effects of imposing liability. *See supra* at 3-6. As *GMC* correctly concluded, Plaintiffs are simply wrong in contending that a claim seeking only damages narrows the nuisance inquiry in a way that avoids the political question doctrine. *See GMC*, 2007 WL 2726871 at *8.

Besides being based on a misstatement of nuisance law, Plaintiffs' argument that "imposing damages does not set policy," Opp. 67, fails for a more fundamental reason. As the Supreme Court has repeatedly reaffirmed, "common-law liability is 'premised on the existence of a legal duty,' and a tort judgment therefore establishes *that the defendant has violated a state-law obligation*." *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (citation omitted) (emphasis

[7] *Koohi*, upon which Plaintiffs rely heavily, is readily distinguishable. There, the Ninth Circuit held that judicially manageable standards existed for assessing whether the Government's accidental destruction of a civilian aircraft was negligent. 976 F.2d at 1331-32. Indeed, the Court emphasized that—apart from the military context in which it arose—the case involved an otherwise straightforward claim concerning a single "negligent operation of [a] naval vessel[]." *Id*. at 1331. Against that backdrop, the Court noted that the fact that the relief sought was limited to damages ensured that the Court could avoid any entanglement with military operations that might otherwise have created justiciability problems. *Id*. at 1332. Here, by contrast, the central difficulty is that there are no established and judicially manageable standards for making the fundamentally political judgments at the heart of this lawsuit. In *that* context, in which (unlike *Koohi*) a political question is inherently embedded in the liability determination, the Plaintiffs' choice to seek only monetary relief makes no difference to the justiciability analysis.

added). "[W]hile the common-law remedy is limited to damages, a liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id*. (citation and internal quotation marks omitted); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005) ("common-law duties" impose "requirements"). A judgment that, because of their past emissions, Defendants should pay damages to Plaintiffs is inescapably a judgment that Defendants have violated a common-law *duty* by releasing those emissions. Any such determination that Defendants' emissions exceeded a common-law-based standard would require this Court to *fashion* such a standard, but that runs headlong into the political question doctrine.

c. The Political Branches' Ongoing Consideration of Global Warming Issues Confirms the Fundamentally Political Nature of the Necessary Judgments

In their Opposition, Plaintiffs set up, and then knock down, a straw-man argument that Defendants have not made, namely that "the *mere existence* of international discussions and consideration of federal legislation renders this case nonjusticiable." Opp. 46 (emphasis added). Rather, the political branches' actions concerning global warming policy are significant in two critical respects here, neither of which Plaintiffs adequately address in their Opposition.

First, the ongoing and vigorous debate within the political branches over climate-change policy confirms that those branches have yet to make the initial policy determinations that would be necessary to make a case such as this one justiciable. As explained above, in the *absence* of a legislative framework for evaluating which emissions from what activities at what times should result in what liabilities to which plaintiffs, the case is nonjusticiable under the second and third *Baker* tests. *Baker*, 369 U.S. at 217; *see also supra* at 6; Motion 16-22. But the power to *make* the required initial policy determination regarding how to balance competing concerns about global warming, national security, energy policy, and foreign policy is "textually … commit[ted]" by the Constitution to the political branches. *See GMC*, 2007 WL 272 6871 at *13 (powers over "interstate commerce and foreign policy" are textually committed to the political branches). Adjudication of this suit would arrogate to the courts the political branches' constitutionally rooted powers to make the necessary initial and fundamental policy judgments, thereby also rendering the case nonjusticiable under the first *Baker* test. *Baker*, 369 U.S. at 217.

Plaintiffs deride *GMC*'s holding on this score as resting on the "breathtakingly broad proposition that matters of interstate commerce are political questions *anytime* Congress fails to regulate a matter" and on the premise that "*all* cases touching on foreign relations are political questions." Opp. 56-57 (emphasis added). Once again, this is a straw man created by Plaintiffs. The *GMC* court rested on no such sweeping propositions, but instead correctly recognized that the "*lack of judicially manageable standards*" here strengthens the "conclusion that there is a textually demonstrable commitment to a coordinate branch." 2007 WL 2726871 at *13 (emphasis added). That is, the lack of judicially manageable standards for adjudicating Plaintiffs' suit means that the branches charged with *creating* the necessary standards must first do so—and under our Constitution, that authority lies with Congress and the President. *Id*. The ongoing debate in the political branches confirms that they have yet to do so.

Second, although the political branches have not yet established a legal framework that would make this case justiciable, they *have* made certain fundamental policy choices that Plaintiffs' lawsuit improperly seeks to override. As Defendants have explained, the clear and considered judgment of the political branches thus far has been to decline to adopt emissions caps for U.S. emitters in the absence of an agreement from developing nations to participate in greenhouse gas reductions. Motion at 22-23.[8] Plaintiffs' suit would overturn such policy judgments by instead effectively having the Court award to developing nations such as India and China the sort of one-sided emissions caps they have been unable to obtain diplomatically. The political question doctrine bars this effort to have the courts *reverse* "foreign policy

[8] Plaintiffs criticize Defendants' reliance, on this point, on the EPA's 2003 statement that U.S. imposition of mandatory unilateral regulatory controls on greenhouse gas emissions would be inconsistent with the U.S.'s efforts to achieve *multilateral* agreement on reductions in emissions. Opp. 50-51; Motion 23 (citing *Control of Emissions of New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 52931 (Sept. 8, 2003)). Plaintiffs contend that the EPA's pronouncements concerning U.S. foreign policy "are not authoritative" because they were not issued by, or in consultation with, the State Department. Opp. 51. This argument overlooks the fact that the very point made by the EPA was reiterated by the President himself in April 2008. *See* 44 Weekly Compilation of Presidential Docs. 526 (Apr. 16, 2008) (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" and instead reaffirming the Administration's goal of achieving a "fair and effective international climate agreement"). The President's articulation of U.S. foreign policy is, of course, authoritative. *See*, *e.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (the President has "the lead role ... in foreign policy") (citations and internal quotation marks omitted).

determinations regarding the United States' role in the international concern about global warming." *GMC*, 2007 WL 2726871 at *14. And, for substantially the same reasons, adjudication of Plaintiffs' suit implicates the fourth, fifth, and sixth *Baker* tests, because judicial imposition of *de facto* emissions caps would "express[] [a] lack of the respect due coordinate branches of government" (fourth test); would fail to "adher[e] to a political decision already made" (fifth test); and would create the "potentiality of embarrassment from multifarious pronouncements by various departments on one question" (sixth test). *Baker*, 369 U.S. at 217.[9]

Plaintiffs argue that any such policy choices made by the political branches can give rise to a political question *only* if those policy choices independently have preemptive effect, so as to *displace* federal common law or to *preempt* state law. Opp. 48-54.[10] But Plaintiffs cite no authority whatsoever to support their novel view that the Court should merge together the separate and distinct doctrines of displacement of federal common law, preemption of state law, and the political question doctrine. The first two doctrines are focused on whether the political branches have sufficiently acted so as to *block* law-declaring authority *that would otherwise already exist*. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236 (1985) (addressing whether Congress had acted to displace "well-established" federal common law principles); *City of Milwaukee v. Illinois*, 451 U.S. 304, 316-32 (1981) (addressing whether congressional enactments had displaced federal common law authority that had previously been

[9] Plaintiffs are wrong in asserting (Opp. 69) that Defendants do not rely on these three *Baker* tests. *See* Motion 23-24 n.6 (specifically invoking these three tests). Plaintiffs are also wrong in contending that the Ninth Circuit has held that the fourth through sixth *Baker* tests are merely prudential, not jurisdictional. Opp. 55 (citing *Corrie*, 503 F.3d at 981). In fact, the opposite is true: *Corrie* merely noted that the Ninth Circuit had previously "pointed to *Justice Powell's view*" that the final three tests were prudential, but the *Corrie* court then went on to hold that, even if the doctrine was partly informed by prudential considerations, it remained nonetheless "at bottom a *jurisdictional* limitation imposed on the courts by the Constitution, and not by the judiciary itself." 503 F.3d at 981 (emphasis added).

[10] Of course, the federal political branches *have* sufficiently acted so as to displace federal common law. *See* Motion to Dismiss Under 12(b)(6) at 15-21. Moreover, no question of federal preemption of state standards is present here at all. Unlike *Central Valley Chrysler-Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151, 1174-89 (E.D. Cal. 2007), and *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), Plaintiffs do not rely upon any *legislatively adopted* state-law program for regulation of emissions. And Plaintiffs at this time affirmatively disavow reliance upon state common law in this Court, stating that they have asserted these claims only "as a protective measure." Opp. 120.

recognized); *Central Valley*, 529 F. Supp. 2d at 1174-89 (addressing whether federal law and foreign policy preempted state statutes establishing program for regulating greenhouse gas emissions); *Green Mountain*, 508 F. Supp. 2d at 343-99 (same). By contrast, the political question doctrine addresses the *antecedent* question whether, consistent with separation-of-powers principles, the courts otherwise *already* possess sufficient tools to adjudicate a particular dispute (regardless of whether the political branches have affirmatively taken steps to *prohibit* any such authority). *See*, *e.g.*, *County of Oneida*, 470 U.S. at 248-50 (holding that Congress's ultimate supremacy over federal Indian law did not render nonjusticiable a suit invoking otherwise fully adequate and long-established federal common law authority). Indeed, Plaintiffs' argument that these various doctrines should be collapsed together is flatly inconsistent with *County of Oneida*, which *separately* addresses, in separately captioned sections of the opinion, "Preemption," 470 U.S. at 236-40, and "Nonjusticiability," *id*. at 248-50. Here, the answer to this antecedent question is that the courts *lack* sufficient tools to adjudicate the case. *See supra* at 2-8.

Plaintiffs also suggest that the political branches *have* already made the requisite initial policy judgment concerning greenhouse gases, and that this policy is that greenhouse gas emissions "should be reduced." Opp. 65-66; *see also* Opp. 53. This argument is unavailing. The various policy statements cited by Plaintiffs merely recite a goal of reducing *future* emissions; as a logical matter, such forward-looking aspirations say nothing about how to make *retroactive* policy judgments about whether and to what extent liability should attach for emissions that occurred long ago. Moreover, even if the political branches had made such a retroactive policy judgment, they have provided no yardstick by which to measure *how much* lower they should have been, for which activities, and in what time frames. *See GMC*, 2007 WL 2726871 at *8, *10 (how to achieve "reductions in carbon dioxide emissions is an issue still under active consideration" by the political branches and "a comprehensive global warning solution must be achieved by a broad array of domestic and international measures that are yet undefined").

2. Plaintiffs' Theory for Attributing Fault Also Raises Inherently Political Questions

Even if this Court had judicially manageable standards for determining which of

Defendants' past emissions were wrongful, the Court would still confront a second political question: in view of the concededly *worldwide* nature of the phenomenon of global warming, the Court has no principled way to allocate "fault" for *Plaintiffs'* injury (and all other similar injuries) to and among each potentially liable contributor to global warming. *See* Motion 24-28.

Plaintiffs' Opposition only confirms the staggeringly unmanageable nature of the litigation they seek to foist upon the Court. Plaintiffs themselves assert that, given "the inherently global nature of global warming," emissions of greenhouse gases from "the entire world" have combined over long periods of time, and only this overall centuries-long homogenous accumulation of gases "create[s] the effects described in plaintiffs' Complaint." Opp. 105. Plaintiffs' theory of liability would thus seemingly allow any person who allegedly suffered harms from global warming to sue *any* person who "contributes" (above some unspecified level) to that "nuisance." Opp. 36-37. In this respect, Plaintiffs' invocation of common-law principles of joint and several liability (Opp. 40) does not resolve the political question, but rather *amplifies* its magnitude to breathtaking proportions. A legal theory in which any person can arbitrarily choose to sue almost anyone else in the world for any alleged global-warming injury—and in which that defendant, in turn, can arbitrarily choose to sue almost anyone else for contribution, *see* Motion 27—is plainly not one that is "'principled, rational, and based upon reasoned distinctions.'" *Alperin*, 410 F.3d at 552 (citation omitted). Only a *legislatively* created system for allocating rights and liabilities can sort out the otherwise inherently intractable problem of determining "who should bear the costs associated with the global climate change that admittedly result[ed] from multiple sources around the globe," *GMC*, 2007 WL 2726871 at *15, because only a legislature can make the necessary *ad hoc* distinctions to untie the Gordian knot of worldwide liability that Plaintiffs proffer. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality).

Plaintiffs' Opposition offers only two responses to this justiciability problem, but neither is sufficient. First, Plaintiffs contend that Defendants "are responsible for more of the problem [of global warming] than anyone else in the nation that is the biggest historical emitter of greenhouse gases." Opp. 68. But this carefully worded comparative judgment—which makes only the limited point that the arbitrary collection of defendants that Plaintiffs have chosen to sue

cumulatively emit more greenhouse gases that any *single* entity *in the U.S.*—cannot obscure the fact that Plaintiffs have identified no principled basis for allocating liability for any *particular* harm of global warming entirely to *this* group of defendants. There are simply no judicially manageable tools for determining what damages may properly be attributed to a particular Defendant's emissions. *Comer v. Murphy Oil Co.*, *supra*, (Collins Decl., Ex. B), at 39-40.

Second, Plaintiffs contend that adjudicating this suit would not be unmanageable because (in their view) Defendants *cannot* "add to this litigation all other emitters of greenhouse gases." Opp. 68. That is wrong. Defendants unquestionably can add such parties to this litigation by, for example, asserting a third-party complaint against any "nonparty who is or may be liable to it for all or part of the claim against it." Fed. R. Civ. P. 14(a)(1). Indeed, Plaintiffs affirmatively concede that, if their claims were to go forward, Defendants "may obtain contribution from other responsible parties." Opp. 68 n.22. There are no "judicially discoverable and manageable standards" for allocating responsibility in the resulting monstrously complex and unwieldy litigation. *Baker*, 369 U.S. at 217.

B. Plaintiffs Cannot Demonstrate the "Fair Traceability" Required to Establish Article III Standing

1. Plaintiffs Cannot Fairly Trace Their Injuries to *Defendants'* Allegedly Wrongful Emissions, As Opposed to Those of Third Parties

In light of the allegations of the Complaint—which emphasize that greenhouse gas emissions "rapidly mix in the atmosphere" and remain there for "hundreds of years," and that two-thirds of the increase in carbon dioxide emissions occurred before 1980, *see* Compl., ¶¶ 125, 180, 254—it is unsurprising that Plaintiffs' Opposition effectively concedes that their injuries cannot be traced to *Defendants' emissions* in any traditional sense of that term. Thus, Plaintiffs' Opposition states that "greenhouse gases are common pollutants that are mixed together in the atmosphere" and are "impossible to trace," and any injury to Plaintiffs results only when each greenhouse gas emission "combines in the atmosphere with other emissions." Opp. 105. As a result, Plaintiffs have no hope of ever tracing their injuries to any particular wrongful emissions of Defendants; on the contrary, Plaintiff's theory (if correct) would give them Article III standing to sue virtually anyone in the world. But the point of fair traceability is that Plaintiffs must be

able *distinctively* to tie their injuries to Defendants' challenged conduct *as opposed to* the conduct of third parties not before the court (or other competing causal factors). *Lujan*, 504 U.S. at 561. Plaintiffs have cited no case—and Defendants are aware of none—in which a plaintiff has been found to have satisfied the "fair traceability" requirement by articulating a chain of causation that, by its very terms, necessarily would *also* apply to literally millions of persons not before the Court. Plaintiffs' theory does not establish fair traceability; it negates it.[11]

Plaintiffs nonetheless insist that they should be permitted to proceed because, in their view, the Court should "keep pace with evolving developments" and "provide relief for novel injuries." Opp. 105. This argument fails at the outset because it ignores the fact that fair traceability is an "*irreducible constitutional minimum*" that may not be disregarded. *Lujan*, 504 U.S. at 560 (emphasis added). Lacking any directly relevant precedent that would support their oxymoronic theory of universal traceability, Plaintiffs attempt to analogize this suit to various cases that have found standing in the context of *statutory* schemes regulating emissions. Opp. 97-105. For multiple reasons, this argument fails.

Most importantly, Plaintiffs overlook the fact that the existence of a congressionally created scheme of rights and liabilities has a crucial impact on the standing analysis. As the Supreme Court recently reiterated, "'Congress has the power to define injuries *and articulate chains of causation* that will give rise to a case or controversy where none existed before.'" *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (citation omitted) (emphasis added). That is not to say (as Plaintiffs wrongly suggest, *see* Opp. 99), that Congress can alter the Article III standing requirements themselves; rather, it means that in an appropriate exercise of its enumerated powers, Congress can *satisfy* those requirements by statutorily defining sufficient

[11] In view of the Complaint's insistence that greenhouse gases mix together in the atmosphere and remain for "hundreds of years," it is puzzling that Plaintiffs attack the concept of "inertia," which is merely the inevitable logical consequence of these allegations. Opp. 100. As the documents cited in Plaintiffs' own Complaint state, "inertia" refers to the theory that, because of the long persistence of greenhouse gases in the atmosphere, a reduction or stabilization in the levels of such gases inevitably would take a "few decades" to slow increases in global temperatures, and even then "[s]mall increases in global average temperatures could still be expected for several centuries." Collins Decl., Ex. G at 66 (Intergovernmental Panel on Climate Change report cited in Plaintiffs' Complaint ¶ 161). This only exacerbates Plaintiffs' complete inability to say which emissions by whom at what point in time produced their injuries (much less that those emissions can be considered to have been wrongful when made possibly decades ago).

causal relationships between conduct and injury that will give rise to liability on the part of particular persons—as opposed to all others—for certain specified injuries. That is why the Court in *Massachusetts* held that the existence of a *statutory* authorization to sue "is of critical importance to the standing inquiry." 127 S. Ct. at 1453. Here, of course, there is no statutory authorization to sue and no framework of congressionally created rights and chains of causation.[12]

The lack of fair traceability here is further confirmed by examining the specific statutory schemes—namely, the Clean Water Act and the Clean Act Air—that underlie the cases upon which Plaintiffs improperly rest their argument here. Plaintiffs place particular reliance upon *Public Int. Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), one of the earliest cases to examine how Article III standing principles apply in the context of an action brought under the Clean Water Act's provisions creating a statutory right to sue for certain violations of the Act. *Powell Duffryn* held that, "[*i*]*n a Clean Water Act case*," a private plaintiff may satisfy Article III's fair traceability requirement "by showing that a defendant has 1) discharged some pollutant *in concentrations greater than allowed by its permit* 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." 913 F.2d at 72 (emphasis added). By its express terms, this test is limited to the context of the "Clean Water Act" and draws upon, and is rooted in, the statutorily created framework of rights and liabilities articulated by Congress in that Act. *Id*.; *see also Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1151-52 (9th Cir. 2000) (addressing the "question of citizen standing *under the CWA*" and following *Powell Duffryn*) (emphasis added); *Natural Resources Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (holding that

[12] Plaintiffs are likewise wrong in suggesting that the Court in *Massachusetts* was merely making the trivially true observation that "Congress can create new *private rights of action* where none previously existed." Opp. 99 (emphasis added). In holding that Congress can "'*articulate chains of causation* that will give rise to a *case or controversy* where none existed before,'" 127 S. Ct. at 1453 (citation omitted) (emphasis added), the Court acknowledged that Congress can disentangle the *otherwise* hopelessly untraceable threads of causation by specifying which theories of causation connecting whose conduct with which injuries will give rise to a justiciable controversy. That articulation, of course, must satisfy Article III standards by *causally* "'relat[ing] the injury to the class of persons entitled to bring suit'"; it cannot arbitrarily assign rights to sue to persons whose only causally affected interest is a generalized concern "'in the proper administration of the laws.'" *Id*. (citation omitted).

Powell Duffyrn provides the standard for assessing "standing *under the Clean Water Act*") (emphasis added); *Northwest Envtl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 964 (D. Or. 2006) (applying *Powell Duffryn* to similar citizen-suit provisions of the Clean Air Act).

Powell Duffryn provides an appropriate test for assessing standing under the Clean Water Act because, inasmuch as the permit levels established under the Act are set "at the level necessary to protect the designated uses of the receiving waterways," it makes sense, in suits to enforce that Act, to conclude that the violation of these permit levels "*necessarily means that these uses may be harmed*" by the defendant's excessive discharges. *Friends of the Earth Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157 (4th Cir. 2000) (*en banc*) (emphasis added); *see also id*. at 161-62 (following *Powell Duffryn*); *Ecological Rights Found.*, 230 F.3d at 1152 n.12 (regulatory framework created by the Clean Water Act "embodies a range of prophylactic, procedural rules designed to reduce the *risk* of pollution"). *Powell Duffryn* and its progeny thus present a paradigmatic situation in which the Article III standing analysis rests critically on Congress's exercise of its "'power to define injuries and articulate chains of causation'" so as to "'give rise to a case or controversy where none existed before.'" *Massachusetts*, 127 S. Ct. at 1453 (citation omitted). Again, no such statutory framework applies here.

Moreover, Plaintiffs themselves contend that the Clean Water Act's citizen-suit provisions rest upon Congress's grant of "new *procedural* rights to members of the public" to enforce the requirements of the administrative regime established by the Act. Opp. 100 (emphasis added); *see also Ecological Rights Found.*, 230 F.3d at 1152 n.12 (Clean Water Act "embodies a range of prophylactic, *procedural* rules") (emphasis added). As the Supreme Court has long held and recently reaffirmed, a statutorily created "*procedural* right" can give rise to standing "'*without meeting all of the normal standards for redressability and immediacy*.'" *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan*, 504 U.S. at 572 n.7) (citation omitted). A statutorily created "procedural" right thus is subject to *different* and more lenient Article III standards than other types of rights, as this Court has also recognized. *See Center for Biological Diversity v. Brennan*, No. C-06-7062-SBA, 2007 WL 2408901 at *11 (N.D. Cal. Aug. 21, 2007) ("Reliance on procedural harms relaxes a plaintiff's burden on the traceability and redressability prongs of the

Article III standing test."). Likewise, the standing analysis of the Clean Air Act case on which Plaintiffs principally rely also rested on the premise that that Act creates "procedural" rights that are subject to "'relaxed'" Article III standards. *Northwest Envtl.*, 434 F. Supp. 2d at 964 (citation omitted). Here, however, Plaintiffs concede that their suit does not invoke any statutorily created procedural right, but instead rests upon alleged "*substantive*" rights. Opp. 100. As such, Plaintiffs' action is *not* governed by the more lenient Article III standards that apply to suits invoking statutory procedural rights.

For similar reasons, Plaintiffs' attempt to analogize this case to the administrative law challenge brought by Massachusetts against the EPA under the Clean Air Act also fails. The suit in *Massachusetts* rested on the invocation of statutorily created "procedural right[s]"—namely, "the right to challenge agency action unlawfully withheld" and the "concomitant procedural right to challenge the [EPA's] rejection of [Massachusetts'] rulemaking petition as arbitrary and capricious." 127 S. Ct. at 1453-54. As a result, the Court concluded, Massachusetts only needed to show "*some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id*. at 1453 (emphasis added). It was in that context—as well as in light of Massachusetts' special status as a "sovereign State," *id*. at 1454—that the Court held that "challenges to *regulatory action*" by an administrative agency concerning greenhouse gas emissions could give rise to Article III standing. *Id*. at 1457 (emphasis added). Once again, however, Plaintiffs do not invoke any such "procedural right."

Furthermore, even if *Powell Duffryn*'s Clean Water Act test applied here, Plaintiffs cannot satisfy it. Courts examining Article III standing in the context of the Clean Water Act have insisted that there be *geographic proximity* between the defendant's excessive emissions and the affected waters that give rise to the plaintiff's injury. *See*, *e.g.*, *Texas Independent Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005) (*en banc*) ("[T]o satisfy the 'fairly traceable' causation requirement, there must be a distinction between the plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to that defendant.") (internal quotation omitted). Indeed, even the cases relied upon by Plaintiffs make this very point. *Gaston Copper*, 304 F.3d at 161-62 (noting that

defendant's discharges occurred only four miles upstream from the plaintiff's lake and that no other potential emitter in the vicinity had been identified); *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996) (holding that eighteen-mile distance from discharge to place of alleged impact on plaintiff was "too large to infer causation" for standing purposes); *Northwest Envtl.*, 434 F. Supp. 2d at 969 (emphasizing "strong geographical nexus" between plaintiffs and the defendant's facility). Plaintiffs' only response is to assert that the relevant geographically proximate area here should be "*the entire world*, given the inherently global nature of global warming." Opp. 101 (emphasis added). This argument does not *apply* the geographic proximity requirement of the Clean Water Act cases, but would *eliminate* it. Indeed, Plaintiffs' argument is flatly inconsistent with *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996), which holds that, in the context of emissions into *very large waterways*, the plaintiff must "demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing."

Plaintiffs complain that a refusal to find standing here would mean that "plaintiffs are less likely to obtain judicial relief from the most threatening and widespread environmental injuries." Opp. 101. That is wrong. The problem here is not simply the numerosity of the potential plaintiffs and defendants, but rather the inability of Plaintiffs to *trace* any particular injury to any particular wrongful emissions of Defendants. Under Article III standing analysis, "'[w]hile it does not matter how many persons have been injured by the challenged action, the party bringing the suit *must* show that *the action* injures him in a concrete and personal way.'" *Massachusetts*, 127 S. Ct. at 1453 (emphasis added) (citation omitted); *see also Northwest Entl.*, 434 F. Supp. 2d at 965-66 (while there is no rule that "injury to all is injury to none," it remains true that "a litigant must articulate how he has been or will be harmed by the defendant's conduct").

2. <u>Plaintiffs' Theory of Causation Is Too Attenuated to Satisfy Article III</u>

As Defendants have explained (Motion 37-39), Plaintiffs cannot establish fair traceability for the additional reason that "[t]he links in the chain of causation between the challenged … conduct and the asserted injury are far too weak for the chain as a whole to sustain [Plaintiffs'] standing." *Allen*, 468 U.S. at 759. Plaintiffs' contrary arguments are all without merit.

Plaintiffs initially appear to suggest that a complaint *cannot* be dismissed at the pleading stage based on an "'attenuated line of causation.'" Opp. 103 (quoting *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 688-89 (1973)). This suggestion is refuted by *Allen v. Wright*, which held that a complaint was properly subject to dismissal at the pleading stage for lack of Article III standing, because the "line of causation" alleged in the complaint was "attenuated at best." 468 U.S. at 757. As the Court explained, the "'*indirectness* of the injury … may make it substantially more difficult to meet the minimum requirement of Article III,'" even at the pleading stage. *Id*. at 757-58 (citation omitted); *see also Warth v. Seldin*, 422 U.S. 490, 509 (1975) (upholding dismissal of complaint where the "line of causation" was too indirect). *SCRAP* found that the allegations *in that particular case* were not so attenuated as to fail at the pleading stage, but that does not mean that a dismissal on attenuation-of-causation grounds is *never* appropriate. In addition to being contrary to *Allen*, such a broad reading of *SCRAP* was expressly rejected by the Supreme Court in *Simon*. 426 U.S. at 45 n.25 (rejecting court of appeals' broad reading of *SCRAP* and instead holding that the case merely held that the causal chain alleged there was not too attenuated).

Plaintiffs also assert that, in any event, the line of causation between Defendants' emissions and Plaintiffs' injuries is "short and direct." Opp. 103. This argument fails, because Plaintiffs' three-step chain is achieved only by summarizing the causal theory at a very high level of generality that obscures and consolidates a number of constituent links. (For example, all of the causal steps between the mere fact of Defendants' emissions and the ultimate loss of sea ice in the Chukchi Sea are repackaged by Plaintiffs into only two steps.) This rhetorical artifice cannot obviate the fact that Plaintiffs' causal theory inescapably rests on a long and complex chain of causation—one that is mediated through a worldwide confluence of forces stretching over centuries. Motion 37-38. Where, as here, a causal chain must be followed through multiple steps, over a very long period of time, and on a global scale, any effort to fairly trace the threads of causation will inexorably devolve into "pure speculation." *Allen*, 468 U.S. at 758.

Plaintiffs contend that their chain of causation is not too speculative because (in their view) each link in the chain, viewed in isolation, is not speculative. Opp. 103-04. This argument

is wrong, because it ignores the role of competing causal factors at each link. *See* Motion 38. In any event, the question is not merely one of evaluating each link in isolation; on the contrary, there is a lack of fair traceability where, as here, the length of "*the chain as a whole*" renders it too weak, too speculative, and too dependent upon the actions of third parties not before the court. *Allen*, 468 U.S. at 759 (chain of causation was too attenuated where it rested upon speculation about the collective impact of too many independent decisions) (emphasis added); *see also In re African American Slave Descendants Litig.*, 471 F.3d 754, 759 (7th Cir. 2006) (no Article III standing where "causal chain is too long and has too many weak links").

In sum, Plaintiffs' Opposition never confronts the overarching attenuation issue here: their theory of a link between their injuries and Defendants' emissions relies on the conduct of too many parties over too long a period of time and dispersed over too broad a geographic area.

3. Plaintiff Native Village of Kivalina Is Not Entitled to the Special Solicitude That in Some Circumstances Is Afforded to the Sovereign States of the Union

Finally, Plaintiffs contend that, "[a]s a sovereign," the Native Village of Kivalina must be given any "special solicitude" in the Article III standing analysis that was afforded to the State plaintiff in *Massachusetts v. EPA*. Opp. 107.[13] For several reasons, this argument is meritless.

The "special solicitude" that the Village seeks to invoke rests on factors that are not present here. In *Massachusetts*, the Court applied such solicitude because of (1) Massachusetts' invocation of a statutorily created "procedural right"; and (2) Massachusetts' stake in protecting its "quasi-sovereign interests," namely its "well-founded desire to preserve its *sovereign* territory today." 127 S. Ct. at 1454-55 (emphasis added). The former ground is not relevant here, as explained above. *See supra* at 18-19. The latter rationale also does not apply to the Village, which lacks the features of a *State* that were critical in *Massachusetts*. The Village assumes that *any capacity to sue in parens patriae* would lead to "special solicitude," but that is not what

[13] Plaintiffs actually contend that the Supreme Court did *not* afford Massachusetts any solicitude at all in the standing analysis, but instead applied ordinary Article III principles. Opp. 107. This argument is belied by the Supreme Court's explicit statements that Massachusetts "is entitled to special solicitude in our standing analysis" and that "[i]t is of considerable relevance that the party seeking review here is a *sovereign State* and not, as it was in *Lujan*, a private individual." *Massachusetts*, 127 S. Ct. at 1454-55 (emphasis added).

Massachusetts holds. On the contrary, the Court relied on the fact that, under the Constitution, "[w]hen *a State enters the Union*, it surrenders certain sovereign prerogatives" to the "Federal Government," and "special solicitude" is therefore warranted under Article III when a State sues the Federal Government, under a federal statutory scheme, to enforce quasi-sovereign rights that the State otherwise could have protected had it retained its full sovereignty. 127 S. Ct. at 1454. This rationale does not apply to the Village, which did not surrender its sovereignty as the price of acceding to the Constitution. *Cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) ("it would be absurd to suggest that the tribes surrendered immunity [from suits by States] *in a convention to which they were not even parties*") (emphasis added).

In any event, even if the Village were correct that special solicitude is warranted whenever a sovereign can sue as *parens patriae*, the Village's argument would still fail. The Ninth Circuit has held that, for Indian Tribes to sue as *parens patriae*, they must *both* satisfy the requirements for *parens patriae* standing *and* allege that "the citizens they purport to represent as *parens patriae*" also have standing. *Table Bluff Reservation* (*Wiyot Tribe*) *v. Philip Morris Inc.*, 256 F.3d 879, 885 (9th Cir. 2001). But for all of the reasons explained above, and in Defendants' Motion, none of the citizens the Village purports to represent has standing.

Moreover, the Village cannot invoke *parens patriae* in this case for the further reason that it lacks sovereignty in any sense that would be relevant here. It is well settled that, under the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601, *et seq*. ("ANCSA"), all aboriginal titles to land in Alaska have been extinguished and all territorial reservations (with one exception) have been revoked; instead, "ANCSA transferred reservation lands to *private, state-chartered* Native corporations." *Alaska v. Native Village of Venetie,* 522 U.S. 520, 532 (1998) (emphasis added). In the absence of any sovereign territory, any residual "sovereignty" possessed by the Village is quite narrow and extends at most only to such purely internal matters as child custody (a question bearing directly upon tribal membership). *See John v. Baker*, 982 P.2d 738, 753-59 (Alaska 1999). And because a sovereign's standing to sue as *parens patriae* turns on "whether the injury is one that the [sovereign], if it could, would likely attempt to address through its *sovereign lawmaking powers*," *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607

(1982) (emphasis added); *see also Massachusetts*, 127 S. Ct. at 1454 (same), the ability to sue as *parens patriae* cannot extend to matters that are wholly outside the sovereign powers of the sovereign that seeks to invoke such standing. The one case that the Village relies upon to support its claim to sue in *parens patriae* is consistent with that limitation, because it recognizes a right of a village to sue, as *parens patriae*, with respect to matters of *child custody*—a subject matter that directly relates to the limited residual sovereignty the Village may possess. *Alaska Dept. of Health and Soc. Servs. v. Native Village of Curyung*, 151 P.3d 388, 402 (Alaska 2006). Because the Village lacks any sovereignty over any territory and lacks any relevant sovereignty vis-à-vis Defendants, *Native Village of Venetie*, 522 U.S. at 525, 532; *see generally Montana v. United States,* 450 U.S. 544, 565 (1981) (tribal sovereignty generally does not extend to nonmembers), there is no relevant sense in which it can invoke a capacity to sue as *parens patriae* here.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed with prejudice.

Dated: November 18, 2008

Respectfully Submitted,

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DECLARATION PURSUANT TO GENERAL ORDER 45, SECTION X

I, Daniel P. Collins, declare and attest, pursuant to this Court's General Order 45, section X, subparagraph B, that I am an ECF User and the filer of this document and that concurrence in the filing of this document has been obtained from each of the other signatories (in addition to myself) shown on page 24 of this document. I further declare and attest, pursuant to that same subparagraph of General Order 45, that I will maintain records to support this concurrence for subsequent production for the court if so ordered or for inspection upon request by a party until one year after final resolution of the action (including appeal, if any).

I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Dated November 18, 2008

/s/ Daniel P. Collins
Daniel P. Collins