No. 09-17490

IN THE 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 SERVICES CORPORATION; DTE ENERGY COMPANY; DUKE ENERGY CORP.; DYNEGY HOLDINGS, INC.; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; MIRANT CORPORATION; NRG ENERGY; PINNACLE WEST CAPITAL CORPORATION; RELIANT ENERGY, INC.; THE SOUTHERN COMPANY; and EXCEL ENERGY, INC.
Defendants – Appellees.

On Appeal from the United States District Court
for the Northern District of California (San Francisco Division)

BRIEF OF AMICUS CURIAE LAW PROFESSORS
IN SUPPORT OF PLAINTIFFS–APPELLANTS
NATIVE VILLAGE OF KIVALINA
And CITY OF KIVALINA

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IDENTITY, INTERESTS AND AUTHORITY OF THE AMICI CURIAE

Amicus curiae are law professors and scholars (listed on the signature page) who teach, research and write about constitutional, tort, environmental and climate law. Amici have an interest in informing the Court about the role of the political question doctrine in tort litigation involving climate change. Amici are of the opinion that the political question doctrine does not apply to bar federal common law causes of action in general and in particular those involving climate change. Amicus curiae law professors file this brief pursuant to Federal Rule of Appellate Procedure 29. Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.[1]

SUMMARY OF THE ARGUMENT

The court below improperly applied the political question doctrine in dismissing the plaintiffs' claims. This brief has two principal arguments. First, the political question doctrine does not apply to federal common law causes of action for climate change. Second, assuming the political question doctrine applies, climate change is neither textually nor prudentially committed to either Congress or the President. As the Second Circuit has done, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *petition for reh'g or reh'g en banc denied*, ___

[1] The parties have consented to the filing of this brief. No person or party has made a monetary contribution towards the preparation or submission of this brief.

F.3d ___ (Mar. 5, 2010) ("*AEP*"), the Ninth Circuit should reverse and remand with instructions to hear the plaintiffs' claims. The common law claims might succeed or fail on the merits, but the political question doctrine does not prevent courts from entering the climate change thicket.

ARGUMENT

I. INTRODUCTION

Climate change, as Chief Justice Roberts observes in his dissenting opinion in *Massachusetts v. EPA*, "may be a crisis, even the most pressing environmental problem of our time." 549 U.S. 497, 535 (2007) (Roberts, J., dissenting) (internal quotations omitted). The challenge is indifferent to political boundaries. Moreover, its causes and effects are not equally distributed. It is caused much more by some than by others. While a global phenomenon, its costs are distributed unevenly, borne more acutely by the poor, the elderly, the infirm, the politically disenfranchised, in essence, borne by people who live in vulnerable areas like Kivalina and lack the resources to adapt.

Since the time Justice Holmes sat on the Supreme Court, federal and state public nuisance theory has allowed states and individuals to seek relief when activities have unreasonably interfered with a right common to the general public. The common law can serve a similar function with respect to climate change. James R. May, *Climate Change, Constitutional Consignment, and the Political*

Question Doctrine, 58 Denver U. L. Rev. 919, 921 (2008) ("So one is left to wonder for what federal common law can exist if not for climate change. And if current circumstances concerning climate change do not warrant its use, then when possibly could it be so.")

The political question doctrine is a gloss on judicial authority in a separation of powers rubric that limits judicial review of issues textually or prudentially consigned to Congress, the President, or both. *See Baker v. Carr*, 369 U.S. 186, 210-27 (1962). To coin a phrase, the doctrine applies to disable federal courts from reviewing matters on the theory that they "ought not enter [the] political thicket." *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

The lower court's dismissal of plaintiffs' federal common law cause of action for public nuisance, *see Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. Sept. 30, 2009), is inappropriate. First, the political question doctrine does not apply to federal common law causes of action for climate change. Second, nothing about climate change or its harms is exclusively committed either to the Congress or to the President. As the Second Circuit recently held in *AEP*, federal common law provides ample and long-applied judicially discernible standards, and the elected branches have made initial policy determinations. The operative question here is whether the political question doctrine relegates the business of addressing alleged harm caused by climate

change exclusively to Congress and the President. It does not. The doctrine does not prevent federal courts from entertaining global warming cases under the federal common law.

II. THE POLITICAL QUESTION DOCTRINE DOES NOT APPLY TO FEDERAL COMMON LAW CAUSES OF ACTION FOR CLIMATE CHANGE

"Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." *Baker v. Carr*, 369 U.S. at 210-11.

A. The Political Question Doctrine Applies in Only the Narrowest of Circumstances

The U.S. Constitution does not immunize "political questions" from judicial oversight. Yet in *Marbury v. Madison*, Chief Justice John Marshall observed that there are "irksome" and "delicate" questions that are inherently political and out of reach to the federal judiciary: "Questions, in their nature political or which are, by the Constitution and laws, submitted to the executive can never be made to this court." 5 U.S. 137, 169-70 (1803). From this has evolved the "political question doctrine."

The political question doctrine has proven one of "limited application." *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 681 (E.D. La. 2006). Applying the doctrine involves "a delicate exercise in constitutional interpretation" to be conducted on a "case-by-case inquiry." *Baker*, 369 U.S. at 211. It is to be used sparingly in the context of demonstrable "political questions"

committed to the elected branches, not simply to cases that involve political issues. *Id.* at 217. The U.S. Supreme Court has invoked the doctrine only a half a dozen times in more than two centuries. Traditional questions into which courts "ought not enter the political thicket" include political apportionment and gerrymandering, *Colegrove*, 328 U.S. at 549; impeachment, *Nixon v. United States*, 506 U.S. 224 (1993); constitutional amendments, *Coleman v. Miller*, 307 U.S. 433 (1939); and treaty abrogation, *Goldwater v. Carter*, 444 U.S. 996 (1979). It should not extend to foreclose the federal common law of public nuisance for climate change.

The courts should hew closely to the political question doctrine's limited reach. Since the political question doctrine lacks explicit constitutional textual footing, and is in some tension with constitutional provisions creating the judicial power, the court should avoid expanding its application to common law actions. First, the political question doctrine is not a necessary or inevitable attribute of the Constitution. The doctrine itself is not tethered to any constitutional language. Inherently a matter of constitutional theory and interpretation, the political question doctrine seems at war with the text of the Constitution, which grants federal courts "judicial authority" to resolve "cases and controversies" without any mention of limitation as to "political questions." U.S. Const. art. III, § 2, cl. 1. Hence, the political question is a gloss on judicial authority in a separation of powers rubric; the Constitution does not admit of any jurisdictional bar to prevent federal courts

from ruling on "political questions" or the like. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 622 (1976) ("The 'political question' doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts. Its authentic contents have general jurisprudential validity, and nothing but confusion is gained by giving them special handling in selected cases."). If anything, it is a tautology that acknowledges the role of the federal courts in helping to secure separation of powers. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 7-8, 9 (1959) ("[A]ll the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.")

An overly expansive view of the political question doctrine threatens inconsistency with an originalist's view of a tripartite constitutional system with coordinate legislative, executive and the judicial branches "checking" each other's power in three ways. First, expansive application of the doctrine is unnecessary. There is no constitutionally founded reason for federal courts to duck controversial issues so as to protect the legitimacy of the court's decisions: "[T]he federal courts' legitimacy is quite robust, [] there is no evidence that particular rulings

have any effect on the judiciary's legitimacy, and [] in any event, the courts' mission should be to uphold the Constitution and not worry about political capital." Erwin Chemerinsky, *Constitutional Law: Principles And Policies* 131-32 (Aspen Law & Business 2d ed. 2002); *see also,* Laurence Tribe, *American Constitutional Law viii* (2d ed. 1988) ("The highest mission of the Supreme Court . . . is not to conserve judicial credibility."). To be sure, 200 years ago, in the nation's quintessential "political" case, Chief Justice John Marshall famously wrote that "[i]t is emphatically the province and duty of the [courts] to say what the law is." *Marbury*, 5 U.S. at 177.

Second, the doctrine "confuses deference with abdication." Chemerinsky, *supra*, at 132. Thus, despite marking what most consider to be the nation's quintessential "political" case, the Court in *Marbury v. Madison* did not invoke the political question doctrine but instead ruled on the merits as to whether Mr. Marbury was entitled to the commission awarded him by President Adams that James Madison, President Jefferson's Secretary of State, refused to serve. *Marbury*, 5 U.S. at 146-47. And in the fountainhead case of *Baker v. Carr*, 369 U.S. at 210-11, the Court determined that the political question doctrine did not render non-justiciable the plaintiffs' challenge to state districting schema.

Lastly, the political question doctrine fails to recognize the public/private law dichotomy in our political system. Private common law is not foreclosed

when the elected branches have failed sufficiently to provide private redress. If it were otherwise, there would be no tort law. Indeed, even in public law cases, the doctrine threatens to sweep too broadly at every turn. *See* Henkin, *supra*, at n. 4 ("in that sense there are political questions in virtually every case, whenever a court reads and applies the Constitution or an act of Congress.").

Applying the doctrine in this case conflates the procedural question of whether the district court *could* decide the issue with the substantive question of whether it *should* provide a remedy for individuals suffering particular harms relating to climate change. Yet the political question doctrine does not apply to plaintiffs' common law causes of action.

B. The Political Question Doctrine Does Not Apply in Torts Cases Involving Climate Change.

Courts have frequently observed that the political question doctrine does not apply to tort actions, even when the tort actions are politically charged: "[T]he political question theory and the separation of powers doctrines do not ordinarily prevent individual tort recoveries." *McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983); *see also id.* ("political aspects present in . . . the decision to manufacture nuclear components [does not] rule out all the possible remedies which are available to people who are physically hurt or materially hurt"); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1364-65 (11th Cir. 2007) ("As the case appears to be an ordinary tort suit, there is no impossibility of

deciding without an initial policy determination of a kind clearly for nonjudicial discretion") (internal quotations omitted); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) ("The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question."); *but see Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007) (public nuisance claims were non-justiciable political questions).[2]

Applying the political question doctrine in tort actions seeking legal relief is especially problematic. For example, in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), the Ninth Circuit determined that the political question doctrine is not implicated in tort claims where the "plaintiff[] seek[s] only damages for [its] injuries." *Id.* at 1332. Instead of turning the case away under the political question doctrine, it held that "[d]amage actions are particularly manageable." *Id.*

Accordingly, the political question doctrine is not well suited to disable the use of federal common law causes of action for climate change for four reasons.

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[2] The claims in *Corrie* bear little resemblance to Kivalina's claims. In *Corrie*, the plaintiffs sought to hold Caterpillar liable for harm caused by bulldozers it sold to the Israeli Defense Forces that were used to destroy homes in the Palestinian Territories. *Id.* at 977. The United States paid for the bulldozers and "[this] decisive factor" made "the United States a direct actor . . . ." *Id.* at 982, 983 n. 8. This Court reasoned that it would have been impossible to impose liability on Caterpillar without "at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers." *Id.* at 982. Kivalina presents no claims beckoning the court to second-guess the decisions by the elected branches of government.

First, the purposes behind the political question doctrine have nothing to do with the plaintiffs' case. The doctrine's political philosophy is "essentially a function of the separation of powers" rooted in protecting quintessentially executive and legislative decisions. *U.S. Dep't of Commerce v. Montana*, 530 U.S. 442, 456 (quoting *Baker*, 369 U.S. at 217). Federal common law, however, implicates essential *judicial* tasks, not tasks normally left to exclusive executive or congressional control. Federal common law does not coerce either the Congress or the President to do anything, and does not upset separation of powers. Nor does recognition of the federal common law interfere in any way with the ability of the Congress or the President to use their constitutional powers to address the problem of climate change. Application of the political question doctrine here would thus reflect a false presumption that the courts must refrain from exercising their proper jurisdiction just because the problem is vexing to the other branches.

Second, the district court's approach here incorrectly assumes that courts are permitted to resolve only public law cases in the environmental field. Yet courts are permitted to adjudicate disputes involving more than just matters already subject to public law. Private law causes of action are an important element in our federal and state adjudicative machinery.

Third, application of the political question doctrine here assumes too much by embossing inaction in the political branches with preemptive effect. This

reasoning strips the courts of jurisdiction in all matters in which there is inaction by Congress and the Executive. On the contrary, lack of action in the elective branches may just as readily suggest the opposite result, that is, it is for the courts, and not Congress and the President, to fulfill their traditional interstitial role of providing common law relief in those instances where statutory or regulatory relief is not available. *See Milwaukee v. Illinois*, 451 U.S. 304 324 n.18 (1981) ("In imposing stricter effluent limitations the District Court was not 'filling a gap' in the regulatory scheme, it was providing a different regulatory scheme."); *In re Oswego Barge*, 664 F.2d 327, 339 (2d Cir. 1981) ("A judgment must be made whether applying judge-made law would entail 'filling a gap left by Congress' silence' or 'rewriting rules that Congress has affirmatively and specifically enacted.'") (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). As the appellants in *AEP* correctly pointed out in the Second Circuit, the Supreme Court has directly established in these cases the governing separation of power test as to whether judicial action in a federal common law case would invade the domain of the political branches. This test is one of preemption and it is not satisfied by inaction or legislative silence: "Congress's mere refusal to legislate . . . falls far short of an expression of legislative intent to supplant existing common law in that area." *United States v. Texas*, 507 U.S. 529, 535 (1993); s*ee also*

Atkinson v. Inter-American Dev. Bank, 156 F.3d 1335, 1342 (D.C. Cir. 1998) ("Congress does not express its intent by a failure to legislate").[3]

Last, even where the legislature has acted to address an environmental problem, the Supreme Court has recognized the courts' continuing role in providing private causes of action to redress individual harm. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987). The political question doctrine should not be applied merely to avoid factually complex cases, including those involving transboundary pollution. Applying the political question doctrine here runs counter to a rich history of cases in which federal courts have resolved claims involving scientifically complex transboundary pollution issues, *see* Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. Legal Stud. 403, 421 (1974), even those subject to international negotiations and treaties.

Regardless, even if the political question applies to plaintiffs' federal common law cause of action for public nuisance, it should not form the basis for dismissal because none of the doctrine's elements are inextricable in this case.

[3] *See also* Kenneth M. Murchison, *Interstate Pollution: The Need for Federal Common Law*, 6:1 Va. J. Nat. Res. L. 1, 36 (1986) ("Federal common law should continue to provide the rule of decision in cases falling within these gaps.").

III. EVEN IF THE POLITICAL QUESTION DOCTRINE APPLIES, IT DOES NOT BAR FEDERAL COMMON LAW CAUSES OF ACTION FOR CLIMATE CHANGE

Modern political question jurisprudence inquires as to "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker*, 369 U.S. at 198. In deciding whether to apply the doctrine, courts must "analyze representative cases and . . . infer from them . . . analytical threads." *Id*. at 211. "Prominent on the face of *any* case held to involve a political question is found" are six "formulations":

> (1) a *textually demonstrable constitutional commitment* of the issue to a coordinate political department; or (2) a *lack of judicially discoverable and manageable standards* for resolving it; or (3) the *impossibility of deciding* without an initial policy determination of the kind *clearly* for nonjudicial discretion; or (4) the *impossibility of a court's undertaking independent resolution* without expressing lack of the respect due coordinate branches of the government; or (5) *an unusual need for unquestioning adherence* to a political decision already made; or (6) the *potentiality of embarrassment* from multifarious pronouncements by various departments on one question.

Id. at 217 (emphasis added).

Dismissal is warranted only if at least one of these six elements is "inextricable" from the case. *Baker*, 369 U.S. at 217. The lower court dismissed the Plaintiffs' federal common law causes of action under *Baker* formulations #2 and #3. Yet none of *Baker's* formulations are inextricable from federal common law causes of action for climate change.

A. Plaintiffs' Federal Common Law Action is Not Constitutionally Consigned (*Baker* Formulation #1)

Plaintiffs' federal common law claims are not textually assigned to either Congress or the President. The most important and certain *Baker* formulation is the first, that is, whether the issue involves a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217; *see also Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality) (*Baker* formulations "probably listed in descending order of both importance and certainty"). *Baker's* "textual commitment" formulation is the "clearest statement of the six," and registers the "dominant consideration in any political question inquiry." *Barasich*, 467 F. Supp. 2d at 681 (quoting *Saldano v. O'Connell*, 322 F.3d 365, 369 (5th Cir. 2003) (citing *Nixon*, 506 U.S. at 252-53 (Souter, J., concurring))). It examines whether the commitment of the issue to an elected branch is "[p]rominent on the surface." *Baker*, 369 U.S. at 217. There is no assignment of plaintiffs' claims prominent from the surface of the Constitution.

Even the lower court did not think the issues in this case are textually consigned to the political branches. *Kivalina*, 663 F. Supp. 2d at 873. Climate causes of action are nothing like those matters the Supreme Court has held to be "constitutionally committed," such as federal congressional districting, foreign relations, impeachment of federal officers and constitutional amendments. For example, the Court has deployed the political question doctrine to foreclose

judicial review of a challenge to a state's districting scheme under the Republican Guaranty Clause, finding apportionment constitutionally committed to the House of Representatives: "[T]he Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House [of Representatives]." *Colegrove v. Green*, 328 U.S. at 552-54 ("petitioners ask of this Court what is beyond its competence to grant . . . . [T]his controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof."). Thus, the Court reasoned that "[c]ourts ought not to enter this political thicket." *Id.* at 556.

The Court has found that the political question doctrine forecloses judicial review of presidential abrogation of a treaty. In *Goldwater v. Carter*, the Court in a plurality opinion ruled that the issue of whether the President could terminate a treaty unilaterally without Senate involvement is non-justiciable because "it involves the authority of the President in the conduct of our country's foreign relations," which is textually committed to the President under Article II. 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring). Likewise, it held that the impeachment process is constitutionally committed to the elected branches under Articles I and II of the U.S. Constitution. *Nixon*, 506 U.S. at 234-35 ("judicial review would be inconsistent with the Framers' insistence that our system be one

of checks and balances.") Finally, the Court has held that questions surrounding the constitutional amendment process are constitutionally committed. *Coleman*, 307 U.S. at 452-55 (challenges to the duration for holding open proposed constitutional amendments committed to Congress under Article V).

Indeed, the Supreme Court has never applied the doctrine except in cases where either Congress or the President had made, or would be required to make, a decision on the issue in the course of carrying out their constitutional responsibilities. Here, by comparison, the environmental problems addressed by public nuisance law are not committed either to Congress or to the President. While climate change presents an environmental problem of unprecedented magnitude, it is, in essence, an environmental problem that is no more constitutionally committed to Congress or the President than any other. Although the Congress and the President may exercise constitutional prerogatives to remedy the impact of climate change on the plaintiffs, nothing in the Constitution requires either to exercise that authority.

The leading case, *AEP*, rejected the political question doctrine as a means for dismissing a federal common law public nuisance case for climate change. In *AEP*, eight states, a municipality and three private conservation organizations sued the nation's five largest emitters of carbon dioxide in the United States, seeking injunctive relief under federal common law. In reversing the lower court, the

Second Circuit held that no aspect of the political question doctrine applied to enjoin judicial review, and in particular that climate change is not constitutionally consigned to the elected branches. *AEP*, 582 F.3d at 325, 330-33; *see also*, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) (plaintiffs' state common law causes of action do not present non-justiciable political question), *vacated, reh'g en banc granted*, 2010 U.S. App. LEXIS 4253 (5th Cir. Feb. 26, 2010).

Similarly, in *Barasich*, *supra*, a federal court applied this reasoning in holding that there is no textual constitutional commitment to the coordinate branches for a cause of action alleging that defendants' network of nearly 10,000 miles of petroleum pipelines in south Louisiana so altered the hydrology and physiology of more than one million acres of marshlands that it exacerbated the adverse affects of Hurricane Katrina, causing personal injury, death, and property. *Barasich*, 467 F. Supp. 2d at 679-80, 682 ("Here, the defendants do not contend, and the Court does not find, that there is a textually demonstrable commitment of coastal erosion questions to a coordinate political department.")

Only a single district court has thus far found that there is a "textually demonstrable constitutional commitment" of climate change issues to a coordinate political department, under the Treaty and Commerce Clauses. *California v. General Motors Corp*. No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. _____ ("*GM*"). *GM* is incorrectly decided for

two reasons. First, while the United States is party to a treaty addressing climate change, the existence of a ratified treaty does not mean a matter within its scope is somehow constitutionally consigned to the Senate. *See* United Nations Framework Convention on Climate Change ("UNFCCC"), May 9, 1992, 1771 U.N.T.S. 107, at art. IV § (2)(a) (establishing a goal that the United States and other developed nations "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases."). Nonetheless, the UNFCCC does not supply any remedies for plaintiffs like Kivalina.

Second, *GM*'s holding that the judiciary may not exercise its jurisdiction whenever Congress has authority – even untapped – to regulate a matter of interstate commerce, is breathtakingly overbroad. This rationale knows no limits and would wipe away the basic fundamentals of a common law system, in which the courts have the power to act unless and until precluded from doing so by affirmative legislative action. The *GM* court offered no support for this rationale beyond a single case dealing with Commerce Clause limits on state authority to impose tort law extra-territorially, a separate issue with no bearing here. *See GM,* 2007 WL 2726871, at * 14 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)). But, as the *AEP* appellants correctly pointed out in their Second Circuit appeal, a case invoking federal common law poses no such threat to interstate

commerce because it invokes *federal law* and the power of the *federal* sovereign through a *federal* court. Thus, cases such as *Gore* are extraneous to the analysis at hand. *See Arkansas v. Oklahoma*, 503 U.S. 91, 1056-59 (1992) (because interstate pollution "is controlled by *federal* law," federal sovereign may require out-of-state polluter to comply with affected state's more stringent standard, which becomes absorbed into federal law); *Milwaukee I*, 406 U.S. at 103 n.5 ("Any state law applied, however, will be absorbed as federal law."). Therefore, Congress' authority under the Commerce Clause is irrelevant to workings of the political question doctrine.

More fundamentally, *Baker* formulation #1 requires the commitment to be "textual," not inferential. The Constitution must textually address the matter at hand. Unlike the Constitution's specific consignment of congressional districting to Congress under the Guaranty Clause in *Colegrove*, the process for Presidential negotiation and Senate ratification of treaties under the Treaty Clause in *Goldwater v. Carter*, the process for Senate conviction of impeachable offenses under the Impeachment Clauses in *United States v. Nixon*, and the process for amending the U.S. Constitution under Article V in *Coleman v. Miller*, the Constitution does not assign climate issues to either political branch. Thus, this prong does not apply. Federal common law for climate change is not cordoned off from judicial review.

Moreover, federal common law supplies long applied standards for addressing plaintiffs' climate claims.

B. Existence of Judicially Discoverable/Manageable Standards (*Baker* Formulation #2)

The district court incorrectly held that there is a lack of "precise" judicially discoverable and manageable standards to address plaintiffs' damages claims for violating the federal common law of public nuisance. *Kivalina*, 663 F. Supp. 2d at 874-76. Again, the district court is mistaken. The standard for evaluating whether a public nuisance exists is long settled: whether the alleged activity creates an "unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979). Public nuisance cases are generally brought by public entities, such as states as *parens patriae*, to protect state resources and the interests of a state's citizens. Courts are equipped to determine whether defendants' actions constitute an "unreasonable interference with a right common to the general public." *See Milwaukee I*; *Tenn. Copper*, 206 U.S. at 237-39; *Missouri v. Illinois*, 200 U.S. 496, 520, 526 (1906). Causation for public nuisance can be collective. Any defendant that contributes to the nuisance can be liable. *Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001).

Since the nation's founding the federal common law has afforded the means for states and citizens to seek redress for harmful and insufficiently-regulated activities and to recover demonstrable personal and property damages. In fact,

there is a rich history of cases applying federal common law to transboundary pollution in the face of insufficient federal regulation. Brenner, *supra*, at 421. The more venerated as applied to the harms caused by transboundary pollution include *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), and *Missouri v. Illinois*, 200 U.S. 496 (1906) (water pollution); *New Jersey v. New York*, 284 U.S. 585 (1931) (solid waste); and *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (air pollution).

Basic public nuisance standards are applicable to climate change. However challenging it may be to evaluate what constitutes an "unreasonable interference," that standard is a judicially discernible standard that the courts are fully capable of applying. The defendants here are alleged to have contributed to global warming by their massive emissions of greenhouse gases. When the harm is indivisible, application of the contribution principle is particularly appropriate. Defendants have the opportunity to seek apportionment in an indivisible injury case. David A. Grossman, *Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1, 31 (2003). Hence, in the climate change context, it is plausible to find that a defendant contributes to an unreasonable interference with a right common to the general public. *See id*. at 27; *see also Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696-97 (7th Cir. 2008) (*en banc*); *Warren v. Parkhurst*, 92 N.Y.S. 725, 727 (N.Y. Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906); Restatement

(Second) of Torts § 881 cmt. d (1979) ("It is also immaterial that the act of one of them by itself would not constitute a tort if the actor knows or should know of the contributing acts of the others.").

Courts are also well equipped to reach the merits and mete out relief for harm to private parties or sovereigns. *Oswego Barge Corp.*, 664 F.2d at 332 n.5. Accordingly, federal common law potentially provides a basis for compensation for personal or property damage. Daniel A. Farber, *Climate Change, Federalism, and the Constitution* 50 Ariz. L. Rev. 879 (2008) (discussing possible framework for compensating climate change victims). It also provides a means for paying the costs of monitoring, protecting, restoring, or providing substitutes for existing resources. *Id*. at 165.

In the leading case directly on point, the Second Circuit correctly held that the federal common law provides discrete, discernible standards to apply to climate causes of action. In *AEP*, the Second Circuit held that the federal common law for public nuisance is justiciable, reversing the lower court. *AEP*, 582 F.3d at 332. It held that the common law amply supplies judicial standards for deciding whether there is an "unreasonable [use or] interference with a right common to the general public." *Id.* at 328.

That public nuisance law is purposefully flexible, and thus inherently imprecise, does not mean that it does not provide the judiciary with sufficiently

discoverable or manageable standards. To hold otherwise would be to eliminate public nuisance law and any other common law standards that require discretion and judgment based upon individualized facts. As the court noted in *Barasich*, that the courts—and not the Constitution or Congress—supply the standard is immaterial. 467 F. Supp. 2d at 676.

The Court has found judicially discoverable and manageable standards under more austere legal constructs than public nuisance, such as the Equal Protection Clause. In *Baker v. Carr*, voters in Tennessee complained that the malapportionment of the Tennessee General Assembly violated the Equal Protection Clause "by virtue of the debasement of their votes." 369 U.S. at 188. Even though the Tennessee Constitution allocated representation in the General Assembly based on population, the assembly had not re-apportioned its districts since 1901 despite a dramatic population shift from rural to urban centers amply populated by racial and ethnic minorities. The plaintiffs asked the Court to enjoin further elections until districts could be reapportioned "by mathematical application of the Tennessee constitutional formulae" to match U.S. Census figures. *Id.* at 195. The lower court declined to enter the "political thicket." *Id.* at 196-97. Reversing, the Supreme Court held that "[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to the courts since the enactment of the Fourteenth Amendment to determine … on

particular facts …" *Id.* at 226. Likewise, federal public nuisance doctrine is "well developed and familiar."

One other district court incorrectly held that there is a lack of applicable judicially discoverable or manageable standards under federal common law causes of action to apportion damages for climate change. In *GM*, *supra*, 2007 WL 2726871, *2 , the court dismissed the action as a non-justiciable political question, concluding that it could not reach a ruling because a "legal framework" was lacking, insofar as the court "is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide . . . or in determining who should bear the costs . . . ." *Id.* Yet whether judicially discoverable and manageable standards have been refined and applied in a specific context is not dispositive of whether such standards are *available*. *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) ("So long as the nature of the inquiry is familiar to the courts, the fact that standards needed to resolve a claim have not yet been developed does not make the question a non-justiciable political one."). Thus, even if no court has yet "fashioned" standards for deciding how to resolve liability for global warming injuries, this does not mean that it cannot and should not be done. *See also* May, *supra*, at 943 (*GM* decision "seems to ignore that two centuries of common law amply supply judicial standards for deciding whether

there is a an 'unreasonable interference . . . with a right common to the general public.'")

Cases finding a lack of judicially discoverable standards in other contexts, including political gerrymandering, naturalization and military policies, are distinguishable. In *Luther v. Borden*, 48 U.S. 1 (1849), the Court held that challenges to disproportionate apportioning of federal congressional districts under the Guaranty Clause are judicially unmanageable. There, two competing groups laid claim to being the rightful government of the State of Rhode Island following a disputed statewide election. Likewise, in finding the challenge to the election results non-justiciable, the *Vieth* plurality rejected a claim of political gerrymandering due to the lack of any "judicially discernible and manageable standards" to determine what would constitute constitutionally equitable voting districts. The common thread in this line of cases is the Guaranty Clause, which unlike the public nuisance doctrine, "is not a repository of judicially manageable standards . . . to identify a State's lawful government." *Baker*, 369 U.S. at 223. The federal public nuisance doctrine, on the other hand, has been applied for well over a hundred years to all kinds of pollution problems and thus enjoys the benefit of a well-developed set of standards.

Other cases that have dismissed claims as failing to supply judicially discernible standards under the political question doctrine are distinguishable.

Other circuit courts have concluded that state challenges under the Naturalization Clause to federal immigration programs are non-justiciable due to the lack of standards for assessing the constitutionality of immigration policies. *See*, *e.g.*, *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997). Others still have held that the lack of judicially discoverable standards renders challenges to military policies unreviewable. *See*, *e.g.*, *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009) (tactical decisions); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (military aid); *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973) (military action); *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984) (deployment of weapons). But courts have been reluctant to dismiss claims on the mere chance that a political question may eventually present itself. *See*, *e.g.*, *McMahon*, 502 F.3d 1331 (negligence claim could be resolved without reviewing military decision-making); *Lane v. Haliburton*, 529 F.3d 548 (5th Cir. 2008) (fraud and negligence claims could be resolved without reviewing military decision-making); *Getz v. Boeing Co.*, No. CV 07-6396 CW, 2008 WL 2705099 (N.D. Cal. July 8, 2008) (negligence, strict product liability, and breach of warranty claims could be resolved without reviewing military decision-making). By comparison, Kivalina's public nuisance claim, like the claims for negligence in *McMahon*, *Lane*, and *Getz*, involve a well-

developed field of common law and do not require the courts to review the decisions made by the elected branches.

C. Existence of Initial Policy Determination (*Baker* Formulation #3)

The court below also incorrectly held that an alleged lack of an initial policy determination by the elected branches made the case non-justiciable. *Kivalina*, 663 F. Supp. 2d at 877. The district court here, like the district courts in *GM* and *AEP*, misapplied the *Baker* formulation #3 in three respects. First, *Baker* did not say that courts could *never* act without an initial policy determination by the elected branches. *Baker* stated that the political question doctrine applies only where it is "*impossible*" for the judiciary to act without a "policy determination of the kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217 (emphasis added). The policy determinations required by the common law are ones that have traditionally been left to the courts' discretion; they are not "clearly" relegated to "nonjudicial discretion."

Second, while the political branches have not, as discussed earlier, comprehensively regulated greenhouse gas emissions, the federal government has taken steps that amount to "initial policy determinations" that, as a general matter, greenhouse gas emissions should be reduced. A "policy" includes "[t]he general principles by which a government is guided in its management of public affairs." *Black's Law Dictionary* 1196 (8th ed. 2004). This definition directs the reader to

the term "public policy," which means "[b]roadly, principles and standards regarded by the legislature or by the courts as being fundamental concern to the state and the whole of society." *Id.* at 1267. Legislative acquiescence to this policy is evidenced by the Senate's ratification of the UNFCCC, and by the numerous enactments to study climate change. *See*, *e.g.*, 15 U.S.C. § 2901 note ("United States policy should seek to . . . identify technologies and activities to limit mankind's adverse effect on the global climate by . . . stabilizing or reducing atmospheric concentrations of greenhouse gases over the long term . . . ."); 42 U.S.C. § 7401, et seq. ("primary goal of this chapter is to encourage . . . reasonable Federal, State, and local governmental actions . . . for pollution prevention"); Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56260-01(Oct. 30, 2009) (mandating reporting of greenhouse gas emissions by fossil fuel suppliers and industrial gas suppliers, direct greenhouse gas emitters and manufacturers of heavy-duty and off-road vehicles and engines); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496-01 (Dec. 15, 2009) (finding that "greenhouse gases … endanger both the public health and the public welfare of current and future generations.").

Last, allowing federal common law causes of action is consistent with the policy of reducing greenhouse gas emissions. Judicial remedies do not establish an

initial policy but instead are informed by the implementation of existing policy. *See Milwaukee I*, 406 U.S. at 103 n.5 ("While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision"); *AEP*, 582 F.3d at 351; *County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1251(9th Cir. 2009) (finding federal common law contract action to be compatible with policies underlying federal statute); *see also* Alice Kaswan, *Climate Change and the Courts*, 28 No. 5 Andrews Envtl. Litig. Rep. *12, at *15 (2007) ("it is tempting to jump to the conclusion that such claims are barred by the political question doctrine.").

D. *Baker* Formulations #4 Through #6 do not Apply

The district court did not engage any of the remaining *Baker* formulations, none of which apply here. First, it is not "impossible" for the court to resolve plaintiffs' federal common law cause of action for climate change "without expressing lack of the respect due coordinate branches of the government." (*Baker* formulation #4). As explained *supra,* resolving plaintiffs' causes of action do not force action by either Congress or the President. Second, there is not an "an unusual need for unquestioning adherence to a political decision already made," say, to limit or preclude Plaintiffs' cause of action. (*Baker* formulation #5). Third, resolving Plaintiffs' claims for common law harm does not engender "multifarious

pronouncements" that will "embarrass" the elected branches. (*Baker* formulation #6).

CONCLUSION

There is no constitutional or prudential justification for relegating climate change entirely to the political branches. The political question doctrine does not prevent courts from entering the climate change thicket.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief:

1. Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007, 14 point, Times New Roman Font.

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PROOF OF SERVICE

I hereby certify that on March 17, 2010, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I understand that the following counsel have agreed to accept service through their co-counsel whom are registered CM/ECF users: Allison D. Wood, Paul E. Gutermann, Kamran Salour and Michael B. Gerrard. I will mail the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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