

No. 09-17490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF KIVALINA, et al.,

Plaintiffs-Appellants,

v.

EXXONMOBILE CORPORATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Honorable Sandra B. Armstrong, District Judge

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF DEFENDANTS-APPELLEES**

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Center for Constitutional Jurisprudence respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of defendants-appellees. All parties have consented to filing of this brief.

The Center for Constitutional Jurisprudence is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of the limited role of the federal judiciary. The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court and many other courts, including the United States Supreme Court.

Implicated in this case are important decisions about the scope and authority of the federal judiciary. The Center has extensive experience in analyzing these questions from the historical and policy perspective embodied in the Constitution, and believes that such considerations must have a place in the present case.

Wherefore, the Center for Constitutional Jurisprudence respectfully moves this Court for leave to file to the accompanying brief amicus curiae.

DATED: July 6, 2010.

Respectfully submitted,

JOHN C. EASTMAN
Center for Constitutional Jurisprudence

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Center for Constitutional Jurisprudence, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF INTEREST OF AMICUS CURIAE

As required by Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

Amicus, Center for Constitutional Jurisprudence, is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of the limited role of the federal judiciary. The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court and many other courts, including the United States Supreme Court.

Implicated in this case are important decisions about the scope and authority of the federal judiciary. The Center has extensive experience in analyzing these questions from the historical and policy perspective embodied in the Constitution, and believes that such considerations must have a place in the present case.

STATEMENT OF THE CASE

Plaintiffs, an Alaskan Native Village and an Alaskan municipality, seek to state a claim for damages under a theory of public nuisance as a federal common law tort against utilities and energy companies that Plaintiffs allege have contributed to global warming. The court below dismissed the complaint, finding that Plaintiffs lacked standing to bring the claims and that the political question

doctrine prevented their adjudication in federal court. Amicus Center for Constitutional Jurisprudence notes another basis for upholding the judgment of dismissal—Plaintiffs cannot state a “federal common law tort” since none of the rationales underlying that very narrow exception to the rule in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), exist in this case and, in any event, any authority of the courts to authorize a federal common law tort based on the emission of carbon dioxide has been displaced by congressional action.

ARGUMENT

The federal judiciary is limited in its authority, possessing only that authority set out in the Constitution or authorized by Congress, “which is not to be expanded by judicial decree.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). This basic point is especially relevant in this case where Plaintiffs are seeking to have the federal court permit them to litigate a claim for damages that has not been authorized by Congress. Instead of relying on congressional enactment, Plaintiffs seek the creation of a “federal common law tort.” Two constitutional policies counsel against such a course of action in this case. On one side is the admonition that lawmaking is to be left to the legislature, and that the courts are to exercise only their judgment as to the facts and law as it exists, not their will as to what the law should be. *The Federalist* No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1999). On the other side is the

admonition that the states and their courts retain their sovereignty, and that this sovereignty not be violated by the federal courts. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

Federal common law may be appropriate where the application of state law to the case would be inappropriate as conflicting with federal interests. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). A federal common law rule of nuisance may also be appropriate where the application of state law to the case would violate the authority and interests of another state, thus disrupting the federal interest in state autonomy and harmony. *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1205 (9th Cir. 1988). This action, however, fails to demonstrate either ground for authorizing a federal common law tort. State law in this instance does not conflict with federal interests and there is no showing that an action based on Alaska law would interfere with California's (or any other state's) authority.

Finally, any federal common law remedy that may have existed for injuries alleged due to emission of carbon dioxide and other green house gasses has been displaced by Congressional action. Where Congress has acted to address the problem, the federal courts are not free to create tort remedies—especially where judicial action may conflict with ongoing administrative agency review of the issues that lie at the heart of the Plaintiffs' case.

I

THE APPLICATION OF THE FEDERAL COMMON LAW OF PUBLIC NUISANCE IN THIS CASE WOULD BE A VIOLATION OF THE CONSTITUTIONAL AND STATUTORY MANDATE THAT STATE LAW SHOULD RULE WHERE APPLICABLE

The early Constitutional and statutory articulation of federal judicial authority reflected a concern that the federal judiciary would invade the authority and autonomy of the states and their courts. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923). This concern can be seen in letters of contemporaries at the time that Article III of the Constitution and the Federal Judiciary Act was debated: “My principal objections to the plan are . . . that the judicial department will be oppressive,” *id.* at 54 (quoting Elbridge Gerry); “There are no well-defined limits of the Judiciary powers, they seem to be left as a boundless ocean. . . . It would be a Herculean labor to attempt to describe the dangers with which they are replete,” *id.* at 54-55 (James Sullivan writing to Rufus King).

Proponents of the Constitution answered these concerns with the Federalist Papers—including *The Federalist* No. 78 by Hamilton. The answer to these concerns was that the federal system would retain state sovereignty: “[T]he States entered the federal system with their sovereignty intact; [and] the judicial authority in Article III is limited by this sovereignty.” *Blatchford*, 501 U.S. at 779. This

principle is not limited to suits against states in federal courts, but also applies where federal courts are asked to displace state law with the creation of a federal common law tort remedy.

The Federal Judiciary Act of 1789, establishing the inferior federal judiciary, likewise reflects these same principles:

The fact is that the final form of the [Federal Judiciary Act] and its subsequent history cannot be properly understood, unless it is realized that it was a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdiction.

Warren, *supra*, at 53. A fundamental aspect of the limitation on the authority of the federal judiciary is the statutory requirement that the federal courts apply the laws of the states where applicable, rather than creating federal law. This requirement was established by the First Congress in the Federal Judiciary Act, § 34, 1 Stat. 73 (1789). The wording has survived largely unchanged to the present: “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” 28 U.S.C.S. § 1652 (2010); *see also* Erwin Chemerinsky, *Federal Jurisdiction* 364 (5th ed. 2007). Thus, the Supreme Court famously held in the landmark case of *Erie R.R.*, 304 U.S. at 78:

There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts

The Court went so far as to call the creation of a federal common law, in as much as it invades the authority of the states, unconstitutional:

[T]he Constitution of the United States, . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Id. at 78-79.

Since *Erie*, the Supreme Court has repeatedly ruled that federal courts are restricted in their power to create new theories of liability. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004); *Atherton v. FDIC*, 519 U.S. 213, 226 (1997); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 315 (1947); Rodney B. Griffith & Thomas M. Goutman, *A Hiccup in Federal Common Law Jurisprudence: Sosa, Bestfoods and the Supreme Court’s Restraints on Development of Federal Rules of Corporate Liability*, 14 U. Miami Bus. L. Rev. 359, 361 (2006).

To be sure, the Supreme Court has found that the federal courts do have the authority to develop federal common law, but only in “a ‘few and restricted’ instances.” *Nat’l Audubon Soc’y*, 869 F.2d at 1201 (citing *Texas Indus.*, 451 U.S. at 640). Alexander Hamilton, in advocating the ratification of the Constitution, defended the federal court system as necessary to protect federal and state interests in a few areas. *The Federalist* No. 80 (Alexander Hamilton) (Clinton Rossiter ed., 1999). These areas—the “proper objects” of the authority of the federal courts— included cases interpreting the Constitution and federal laws, cases in which the United States is a party, cases that implicate concerns of international or interstate peace and harmony, cases of admiralty or maritime law, and cases in which the state courts could not be supposed to be impartial. *Id.* at 474. As the Supreme Court has explained, the application of state law to these areas would be improper, as it would frustrate the authority of the federal government, a sister state, or a foreign nation:

[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Indus., 451 U.S. at 641. *See also* Chemerinsky, *supra*, at 365-66. Thus, when the federal court is faced with a dispute in which the application of state law is inappropriate because it would frustrate the authority of a sovereign, and Congress has not given any direction on how to resolve the dispute, then the creation of a federal common law becomes a necessity. *Nat'l Audubon Soc'y*, 869 F.2d at 1202 (citing *Texas Indus.*, 451 U.S. at 641); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981) (*Milwaukee II*).

The federal common law of nuisance developed out of the federal court's authority to hear cases involving interstate disputes, and was originally analogized to boundary disputes—an area in which the application of one state's law would clearly be inappropriate as a violation of the other state's sovereignty. *See, e.g., Kansas v. Colorado*, 185 U.S. 125 (1902); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907). The common law of public nuisance has been wholly bounded by the few and restricted circumstances in which the application of state law to the dispute would be inappropriate as a violation of the interests and autonomy of a sister state. *See Nat'l Audubon Soc'y*, 869 F.2d at 1205.

In *Kansas*, 185 U.S. 125, the Court held that federal law would determine a case in which Kansas was suing Colorado for restricting the flow of a stream that ran through both states. *Id.* at 142. The Court reasoned that the states, by joining the Union, had bound themselves, according to the Constitution, to not make

treaties amongst themselves, or to take up arms against each other. *Id.* at 143. Thus, when there is a boundary dispute between two states, the only recourse a state has is to the federal courts. *Id.* at 144. The Court found that the same reasoning applied to a stream in which both states had an interest: “if a State of this Union deprives another State of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted?” *Id.* Similarly, in *Tenn. Copper Co.*, 206 U.S. at 237, the Court explained:

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

See also Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) (*Milwaukee I*) (stating that the purpose of the federal common law of nuisance is to protect the “ecological rights of a State” from their “improper impairment” occurring from “sources outside the State’s own territory”).

This Court recognized in its decision in *Nat’l Audubon Soc’y* that the federal common law of nuisance is *only* available in cases in which the application of state law would violate the autonomy of a sister state. *Nat’l Audubon Soc’y*, 869 F.2d at 1205. The federal common law of nuisance is not available to suits in which this concern is not present, even where the case involves interstate pollution. *See also*

Milwaukee II, 451 U.S. at 314 n.7 (stating, in the context of interstate pollution, that if the application of state law is not inappropriate, then it is mandatory).

In *Nat'l Audubon Soc'y*, the plaintiffs brought suit against a number of parties, including the state of California, the city of Los Angeles, and the Los Angeles water department, seeking to restrain the diversion of water to Los Angeles that would otherwise flow into Mono Lake. *Nat'l Audubon Soc'y*, 869 F.2d at 1198. Plaintiffs alleged that the reduced water level of Mono Lake caused air pollution that affected the surrounding areas in both California and Nevada. *Id.* at 1204. However, the court found that, despite the interstate nature of the pollution, there was absolutely no reason why the application of state law would be inappropriate as the application of state law presented no threat to the authority of a state. *Id.* at 1205. Thus, the dispute should be ruled by state, and not federal, law. *Id.* After reviewing the Supreme Court's reasoning in *Tenn. Copper Co.* and *Milwaukee I*, this Court concluded that:

The great similarity between these cases underscores the limited context in which the Court has been willing to recognize a federal common law nuisance claim based on air pollution due to an interstate dispute. It appears that the Court considers only those interstate controversies which involve *a state* suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control, and therefore subject to resolution according to federal common law.

Id. (emphasis added).

Plaintiffs in this case have failed to establish that the application of Alaska law to their claims would violate the autonomy of another state. As this Court noted in *Nat'l Audubon Soc'y*—an interstate pollution case—federal nuisance law is only available where it is “inappropriate for state law to control,” and it appears this is only so where a state is suing outside its own territory. *Nat'l Audubon Soc'y*, 869 F.2d at 1205.

Plaintiffs in this case have failed to allege any reason why this Court should find that the application of state law is inapplicable to this case. Thus, this Court should follow the decision in *Nat'l Audubon Soc'y*, and find that in the absence of a compelling reason to find that the application of state law is inappropriate, the application of state law is mandated.

The status of Plaintiffs in this case as a municipality and a Native Village does not recommend a different result. Neither a municipality nor Native Village have the sovereignty recognized in the federal system such that the application of state law would be inappropriate. Clearly, a municipality is no stranger to the application of state law, as it is daily constrained by state law. There is no indication whatsoever that the federal courts were intended to provide a separate body of law, apart from the state law, for claims brought by municipalities.

Likewise, Alaskan Native Villages have not been recognized to have the sovereignty, even the quasi-sovereignty of a federally-recognized tribe. *Native*

Vill. of Stevens v. Alaska Mgmt. & Planning, 757 P.2d 32, 34 (Alaska 1988) (holding that Native Villages are “not self-governing or in any meaningful sense sovereign,” and that “Congress intended that most Alaska Native groups not be treated as sovereigns”). Further, this Court has held that application of state law to damage claims by recognized tribes is appropriate. *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 714-15 (9th Cir. 1980) (holding that the application of state law to a contract dispute between a Native tribe and contractor is appropriate, and so state law should be applied).

Under *Milwaukee I*, a private party could, in theory, state a claim for federal common law if the non-state party can allege that the application of state law to their case would have the effect of violating the autonomy of a another state. *Milwaukee I*, 406 U.S. at 105 n.6 (stating in dicta that the character of the parties may not be dispositive alone, but rather whether the application of state law would be inappropriate due to “an overriding federal interest” or the “interests of federalism”). The Supreme Court has yet to decide a case in which it has found that the federal common law of public nuisance should apply to a dispute between non-state parties, and very few courts at all have been willing to apply the federal law of common nuisance to cases between non-state parties. *See Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train*, 375 F. Supp. 1148, 1153 (D. Md. 1974) (holding that federal common law of public nuisance is unavailable

to non-state parties), *aff'd en banc*, 539 F.2d 1006 (4th Cir. 1976); *but see Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309 (2nd Cir. 2009) (holding that application of federal law of nuisance to claims of both state and non-state parties in case was acceptable).

In *Am. Elec. Power Co.*, 582 F.3d 309, the Second Circuit ventured into this uncharted territory and found that federal law should be applied where a number of states, a city, and some land trusts sued a number of power companies operating fossil-fuel burning power plants, seeking abatement of the “ongoing contribution[] to the public nuisance of global warming.” *Id.* at 314. The court found that the application of federal law was appropriate not only for the claims brought by the states, but also for the claims by the city and the land trusts: “Private parties and governmental entities that are not states may well have an equally strong claim to relief in a circumstance invoking an overriding federal interest or where the controversy touches issues of federalism.” *Id.* at 366.

However, the court did not elaborate on what “overriding federal interest” or “interests of federalism” were implicated in the case, except to state there was a federal interests in the “a uniform rule of decision.” *Id.* at 365. The Court in that case also did not discuss why federal courts may have the authority to decide, as opposed to Congress, that there is a federal interest in a national, uniform rule, and that such a rule should be developed by the courts, “purposefully insulated from

democratic pressures” and not “by the people through their elected representatives in Congress.” *Milwaukee II*, 451 U.S. at 313. Without any indication by the *Am. Elec. Power Co.* court or by Plaintiffs in this case why the application of state law to the claims of private parties might be inappropriate, and why this Court should fashion federal law to displace the state law, this Court should find that state law, and not federal law, applies to this case.

In any event, Congress has spoken to this issue. In doing so, Congress has displaced any authority federal courts may have had to create remedies under a theory of federal common law public nuisance.

II

CONGRESS HAS DISPLACED ANY AUTHORITY FEDERAL COURTS MAY HAVE HAD TO DECLARE A FEDERAL COMMON LAW REMEDY IN THIS CASE

As the Court in *Milwaukee I* recognized, “[n]ew federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.” *Milwaukee I*, 406 U.S. at 107. At issue in the Milwaukee litigation was a claim by the States of Illinois and Michigan against the City of Milwaukee for water pollution flowing into Lake Michigan. After suit was filed, Congress enacted the Federal Water Pollution Control Act of 1972 making it illegal to discharge pollutants into the waters of the United States without a permit from the Environmental Protection Agency. *Milwaukee II*, 451 U.S. at 310-11.

The Court in *Milwaukee II* noted: “When Congress has not spoken to a particular issue, however, and when there exists a ‘significant conflict between some federal policy or interest and the use of state law,’ the Court has found it necessary, in a ‘few and restricted’ instances to develop federal common law.” *Id.* at 313 (citations omitted). However, the judicial authority to create federal common law is “subject to the paramount authority of Congress.” *Id.* Where Congress has acted, the Court presumes “that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.” *Id.* at 317. Thus, the Court ruled, regarding the federal common law public nuisance claims raised by the states for water pollution, that Congress had “not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.” *Id.* This same conclusion should be drawn for claims based on damages from global warming, alleged to be caused by the emission of carbon dioxide.

Congress has established “a comprehensive policy to address climate change, which policy tries to slow the growth of emissions, strengthen science, technology, and institutions, and enhance international cooperation.” Jay M. Zitter, *Annotation, Liability of Corporations for Climate Change and Weather*

Conditions, 46 A.L.R.6th 345 (2010). First and foremost of Congressional actions is the Clean Air Act. As the Supreme Court recognized in *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007), “the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a ‘judgment’ that such emissions contribute to climate change.” EPA issued just such a finding on December 7, 2009. 74 Fed. Reg. 66496 (2009). EPA has also recently issued a regulation for determining which stationary sources are subject to permitting requirements for greenhouse gas emissions under the Clean Air Act. 40 C.F.R. Parts 51, 52, 70, 71 (May 13, 2010).

Not only has Congress enacted a comprehensive legal framework to deal with the issue raised by Plaintiffs’ complaint, but the administrative agency assigned the job of drafting regulations to implement that legal framework is still considering the policy and scientific issues implicated by the law. There is no room for the courts to create remedies based on federal common law. Congress has “not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.” *Milwaukee II*, 451 U.S. at 317.

Nor is the Clean Air Act the only regulatory scheme enacted by Congress on this issue. For instance, over a decade ago, Congress passed the Global Change Research Act of 1990, which called for “a comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change.” 15 U.S.C.S. § 2931(b) (2010). The Act states a Congressional intent to address climate change by research, prediction, and comprehensive and coordinated action. Such a stance indicates a Congressional intent to retain its lawmaking authority on the issue of climate change. Climate change has been, and continues to be, a complex and politically turbulent subject—an area ill-suited for the courts, “purposefully insulated from democratic pressures,” and rather requiring the voice of “the people through their elected representatives in Congress.” *Milwaukee II*, 451 U.S. at 313.

Alexander Hamilton emphasized the importance of the limited authority of the judiciary and termed the judiciary “the weakest of the three departments of power.” *The Federalist* No. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1999). “The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary . . . can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment.” “The courts must declare the sense of the law; and if they should be

disposed to exercise will instead of judgment, the consequence would . . . be the substitution of their pleasure to that of the legislative body.” *Id.* at 467.

As the district court in this case noted, a nuisance claim requires the determination by the court that the harm suffered was unreasonable—that is, whether the gravity of the harm outweighs the utility of the conduct. *Native Vill. of Kivalina v. Exxonmobil Corp.*, 663 F. Supp. 2d 863, 874 (N.D. Cal. 2009). In this particular case, “[t]hat process, by definition, entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants.” *Id.* at 876.

But Congress has, in the Clean Air Act, “created a complex and comprehensive legislative scheme to protect and improve the nation’s air quality.” *Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 534 (2nd Cir. 2004). Part of the complex and comprehensive scheme is the monitoring and regulating of greenhouse gas emissions, the authority to do so being delegated to the discretion of the Environmental Protection Agency. *Am. Elec. Power Co.*, 582 F.3d at 376. *See also Massachusetts*, 549 U.S. 497 (holding that Congress has authorized the EPA to regulate greenhouse gas emissions). Plaintiffs in this case, by asking that the Court make a determination that the greenhouse gas emissions of the Defendants were unreasonable, ask the Court to second-guess the regulatory

system that Congress has established to deal with greenhouse gas emissions, and which decided that the emissions levels were not unreasonable.

This Court should hold, as did the district court, that such a determination is outside the authority granted to the federal courts: “the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch.” *Native Vill. of Kivalina*, 663 F. Supp. 2d at 877.

CONCLUSION

The claim presented by plaintiffs does not fall within the exceedingly narrow circumstances in which federal courts may become “law makers” through the process of creating federal common law. Plaintiffs are neither a state, nor have they demonstrated that their claim will interfere with the authority of a state. In any event, Congress has already acted on this issue and has thus removed whatever

authority may have existed for the federal courts to create a federal common law remedy. Amicus urges this Court to affirm the judgment of dismissal.

DATED: July 6, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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DATED: July 6, 2010.

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I hereby certify that 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 on July 6, 2010.

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