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.

EXXONMOBILE 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 SOLAR INDUSTRY AMICI CURIAE

IN SUPPORT OF PLAINTIFFS–APPELLANTS
NATIVE VILLAGE OF KIVALINA and CITY OF KIVALINA

Sean H. Donahue
Sean H. Donahue Law Office
2000 L St., NW, Suite 808
Washington, DC 20036
(202) 277-7085

Stephen F. Hinchman, Esq
537 Fosters Point
West Bath, ME 04530
(207) 837-8637

Counsel for Solar Industry Amici Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF THE SOLAR INDUSTRY AMICI CURIAE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

Proposed *amicus curiae* Akeena Solar, Inc., states that no parent or publicly held corporation owns 10 percent or more of its stock.

Proposed *amicus curiae* Petersen-Dean, Inc., states that no parent or publicly held corporation owns 10 percent or more of its stock.

Proposed *amicus curiae* Lumeta, Inc., states that it is wholly owned by DRI Companies, a privately held company and that no parent or publicly held corporation owns 10 percent or more of DRI Companies' stock.

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INTERESTS OF AMICI CURIAE

Amicus curiae are solar energy businesses that provide zero-emission energy systems for commercial and residential users in several states. The solar *amici* compete directly with many of the carbon-intensive, fossil fuel-based energy providers that are Defendants in this case. The solar *amici* offer a variety of manufacturing, wholesale, retail, construction, installation, financial, and administrative services to advance their products.

Akeena Solar, Inc., ("Akeena") is one of the largest installers of residential and commercial solar power systems in California and distributes solar systems throughout the nation to other solar installation companies. Akeena is headquartered in Los Gatos, Calif., and has been publicly traded since 2006. The company's mission is to lower electricity costs for residential and commercial buildings with its award winning Andalay solar photovoltaic system.[1] The company's installation business involves working with customers to design solar installation projects, as well as managing all the necessary paperwork for permitting, hookup, rebates, and incentives that come with a solar installation. As part of its distribution business, which it began last year, Akeena has contracted

[1] See http://www.akeena.com/about/index.php.

with Lowe's home improvement stores to provide its Andalay system and installation services nationwide.

Petersen-Dean, Inc., ("PetersenDean") is a full-service, national roofing and solar contractor, with 25 years of experience in complex residential, commercial, institutional, and government projects. PetersenDean's "Smarter Roof Systems" include design and installation of a variety of solar energy systems, including photovoltaic solar panels, integrated solar roofing tiles and shingles, and integrated solar laminates for metal roofing.[2] PetersenDean is headquartered in northern California and maintains fifteen regional offices in the states of California, Texas, Arizona, Florida and Nevada.

Lumeta, Inc., ("Lumeta") headquartered in Irvine, Cal., is a leading developer of building-integrated photovoltaic solar products.[3] Lumeta's management team originated in the roofing industry and has developed a solar energy system that integrates monocrystalline solar cell technology into a variety of flat roofs and profiled tile roof systems. Lumeta's products become a part of the roof, eliminating roof penetrations and reducing weight, which allows lower cost renewable energy systems without compromising aesthetics or functionality.

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[2] *See* http://www.petersendean.com/homeowners/smarterroof/home.html.

[3] *See* http://www.lumetasolar.com/.

Lumeta is a wholly owned subsidiary of DRI Companies, a privately held company that provides roofing and solar energy contracting services.[4]

As described more fully in the argument below, the solar industry *amici* have a strong interest in informing the Court regarding the market distortions and unfair competitive advantage created when carbon-intensive energy providers are allowed to freely discharge large volumes of greenhouse gas pollution and thereby externalize what should be a normal cost of doing business. *Amici* are of the opinion that greenhouse gasses are no different than any other pollutant under federal nuisance law, and that Defendants should be liable for harms caused by their activities.

The solar industry *amici* file this brief pursuant to Federal Rule of Appellate Procedure 29 and are authorized to state that the parties have consented to this filing.[5]

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[4] *See* http://www.dricompanies.com/.

[5] *Amici* believe this filing is timely, since it was filed within seven days of Plaintiffs-Appellants' re-filing of their opening brief on March 11, 2010. *See* Amended 03/11/2010 15:04:56: Notice of Docket Activity (Docket #44)**.** In the event that supposition is incorrect, *Amici* seek leave of the court requesting acceptance of this brief pursuant to Fed. R. App. P. 29(e).

OVERVIEW AND SUMMARY OF ARGUMENT

The solar industry *amici* and other companies in the renewable energy field have shouldered the costs of producing thermal and electric energy from clean, renewable sources. These companies and their investors have devised technologies that produce energy without emitting the pollutants that contribute to global warming. At present, it is generally more expensive to produce energy using these technologies than from carbon-intensive fossil fuels. That cost differential is due in large part to the fact that competing fossil fuel-based companies can discharge massive amounts of carbon dioxide and other greenhouse gas ("GHG") pollutants into the atmosphere for free, imposing those costs upon others without their consent. Because of what is effectively a subsidy running from global warming victims and the public generally to the high-emissions energy producers, clean energy companies cannot reap the full market benefits of producing low- or zero-emissions energy.

The decision below, if approved, would exacerbate this problem. As is elaborated in Appellants' brief, nuisance law has traditionally served as an important means for injured parties to seek relief against enterprises that sought to profit by externalizing costs regardless of the harms caused to the health, real property, or natural resources of others. The district court's decision, however,

effectively exempts sources of greenhouse gas emissions from liability under the common law of nuisance.

The district court adopted two rationales for dismissing the complaint below: That the "political question" doctrine bars this suit, and that plaintiffs lack Article III standing. *Native Village of Kivalina v. Exxonmobile*, 663 F. Supp.2d 863, 876-77, 877-83 (C.D. Cal. 2009). Both of these threshold objections to the adjudication of nuisance claims against large private emitters of GHGs were persuasively and comprehensively rejected by the Second Circuit in *Connecticut v. AEP*, 582 F.3d 309, 321-31, 345-47 (2d Cir. 2009). Plaintiffs-Appellants' brief further demonstrates why neither ground supported dismissal in this case.

The Court should also reverse the decision below because it would deprive society of an important tool both to correct specific and discrete harms caused by firms that have avoided the full social costs of their activities – such as the costs inflicted by the total destruction due to Global Warming of the Native Village of Kivalina and the City of Kivalina (hereinafter "Kivalina") – and to prevent polluters from gaining an unfair and unwarranted advantage over low- or non-polluting competitors.

The district court's rulings, if upheld, would not be limited to this case, but would sweepingly defeat any effort to seek redress through nuisance law for harms arising from climate change (or other kinds of widespread pollution). This

amounts to an extraordinary and unprecedented grant of tort immunity to the largest sources of the most harmful pollutants of our time. Left uncorrected, it would have the effect of distorting energy markets in favor of dangerously polluting industries while also impeding the timely adoption of the new clean technologies urgently needed to address the climate crisis.

Therefore, *amici* respectfully ask the Court to reverse the judgment of the district court.

ARGUMENT

What nuisance law calls a tort, the field of economics terms an externality and market failure.

A nuisance occurs in law when "the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant." *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) *vacated on other grounds*, *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981); *see also* Restatement (Second) of Torts § 821B(1) (defining public nuisance as an "unreasonable interference with a right common to the general public").[6]

In economics, conduct that re-allocates part of the cost of doing business upon other parties without their consent (such as the pollution of public air and waters) is called an externality and is considered a distortion of the market.

> 'Our price system fails to take into account the environmental damage that the polluter inflicts on others. Economists call these damages. . . 'external social costs' (externalities). They reflect the ability of one entity, e.g., a company, to use water or air as a free resource for waste disposal, while others pay the cost in contaminated air or water.'

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[6] Interference with a public right is unreasonable and therefore tortious when the "conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, Restatement (Second) of Torts § 821B(2)(a), or when "the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." *Id*. § 821B(2)(c). These factors could not more perfectly describe global warming.

Robert H. Cutting & Lawrence B. Cahoon, *Thinking Outside the Box: Property Rights as a Key to Environmental Protection*, 22 Pace Envtl. L. Rev. 55, 65 (2005) (quoting The Council on Environmental Quality, *The State of the Environment* (1970)); *see also* James L. Huffman, *Environmental Protection and the Politics of Property Rights: The Public Interest in Private Property Rights*, 50 Okla. L. Rev. 377, 380 n.11, 383-84 (1997) (when "costs are 'externalized' to third parties, there is a market failure in the sense that one of the assumed conditions of an efficient market is missing").

In energy markets, the distorting effect of externalizing pollution is well established:

> [C]ertain environmental costs of production are not reflected in the market cost of the commodity (in this case, energy). To the extent that the ultimate consumer of these products does not pay these costs, or does not compensate people for harm done to them, they do not face the full cost of the services they purchase (i.e. implicitly their energy use is being subsidised) and thus energy resources will not be allocated efficiently.

Anthony Owen, *Renewable Energy: Externality Costs as Market Barriers*, 34 Energy Policy 632, 633-34 (2006); *see also* Robert H. Cutting & Lawrence B. Cahoon, *The "Gift" That Keeps On Giving: Global Warming Meets the Common Law*, 10 Vt. J. Envtl. L. 109, 113-117 (2008) ("[T[ransboundary pollution, such as GHG emissions, expose receptors as 'test subjects' of the pollution to long-term and short-term damages that are external social costs, or 'externalities.' This is a

market failure because . . . costs are borne by the receptor or the tax-payer (e.g. healthcare or cleanup costs).").

The common law nuisance doctrine seeks to correct such market failures by allowing those injured to seek redress for impacts they did not cause and that they should not reasonably be expected to bear alone. Restatement (Second) of Torts § 821B(2).

> Our system of law attempts to ensure that businesses are, on balance, socially beneficial by requiring that each enterprise bear its total production costs, as accurately as those costs can be ascertained. A fundamental means to this end is the institution of tort liability, which requires that persons harmed by business or other activity be compensated by the perpetrator of the damage.

Orchard View Farms, Inc. v. Martin Marietta Aluminum, 500 F. Supp. 984, 989 (D. Ore. 1980).

In the context of climate change, emissions of carbon dioxide represent "an externality par excellence as they distribute evenly around the globe, damaging air quality, the world's most precious public good." Hans-Werner Sinn, *Public Policies Against Global Warming: A Supply Side Approach*, 15 Int. Tax Pub. Fin. 360, 372 (2008). Indeed, the ability of very large polluters, such as defendants here, to emit greenhouse gasses without consequence or regulation has been termed by some economists as the "greatest and widest-ranging market failure ever

seen." Sir Nicholas Stern, *The Stern Review on The Economics of Climate Change*, at *i* (2006) (hereinafter as "*Stern Review 2006*").[7]

The current atmospheric concentration of carbon dioxide, the primary GHG pollutant, is around 390 parts per million ("ppm"), compared with only 280 ppm before the Industrial Revolution. Dr. Pieter Tans, National Oceanic & Atmospheric Administration Earth System Research Laboratory, *Trends in Atmospheric Carbon Dioxide* (March 2010); T.J. Blasing, U.S. Dep't of Energy Carbon Dioxide Information Analysis Center, *Recent Greenhouse Gas Concentrations* (Dec. 2009).[8] This growing level of GHG pollution already has caused a dangerous warming, with concomitant changes to the climate and impacts to property, health and natural resources. *See* National Academy of Sciences, *Understanding and Responding to Climate Change,* at 16-18 (2008).[9] Even with no further emissions, warming will continue and may accelerate in coming years due to inertia in the ocean and climate systems. James Hansen, et al., *Target*

[7] Available at http://www.hm-treasury.gov.uk/sternreview_index.htm. *See also* the Stern Review's subsequent update and response to criticisms: Sir Nicholas Stern, *The Economics of Climate Change*, 98 Am. Econ. Rev. 2 at 1 (2008), at http://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.98.2.1.

[8] Available at http://cdiac.ornl.gov/pns/current_ghg.html and http://cdiac.ornl.gov/pns/current_ghg.html, respectively. *See also Stern Review 2006* at *4 fig. 1-1* (U.K. Met Office's Hadley Centre data show total concentrations of all greenhouse gasses in the atmosphere of 430 ppm in carbon dioxide equivalents).

[9] Available at http://dels.nas.edu/dels/rpt_briefs/climate_change_2008_final.pdf.

Atmospheric CO2: Where Should Humanity Aim?, 2 The Open Atmospheric Sci. J. 217, 221 (2008); *Stern Review 2006* at *iii, 11-12*. *See also Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1190-91 (9th Cir. 2008) (summarizing science on climate change).

Approximately 70 percent of the accumulated global stock of GHG pollution currently in the atmosphere originally derived from energy and development activities in North America and Europe, *Stern Review 2006* at *xi, 175*; *see also* Sir Nicholas Stern, *The Economics of Climate Change*, 98 Am. Econ. Rev. 2 at 28-29, 29 fig. 9 (2008) (hereinafter as "*Stern Review 2008*"),[10] a non-insubstantial portion of which is due to the activities of Defendants. The claim here is that those emissions have contributed to ongoing harms to a discrete and identifiable victim of global warming, Kivalina. Under both nuisance doctrine and economic theory, if proven, compensation is due.

But the district court has gone in the opposite direction. By categorically *exempting* global warming pollution from the tort doctrines that apply to other

[10] See also Eileen Claussen & Lisa McNeilly, *Equity & Global Climate Change: The Complex Elements of Global Fairness*, Pew Center on Global Climate Change, at 28-31 (1998) (citing "Carbon Dioxide Information Analysis Center, Dataset: Global, Regional, and National Annual CO2–Emissions from Fossil–Fuel Burning, Hydraulic Cement Production, and Gas Flaring: 1751–1995") at http://www.pewclimate.org/docUploads/pol_equity.pdf; U.S. Environmental Protection Agency, Global Greenhouse Gas Data, Fig. 2 (March 17, 2009), at http://www.epa.gov/climatechange/emissions/globalghg.html.

pollution sources, the district court has unintentionally given fossil fuel-based energy industries a license to emit unlimited volumes of GHGs without having to pay for the harms that pollution may cause to Plaintiffs or others. This unfettered ability to pollute for free not only constitutes a "permanent," "continuing," and "significant interference with the public health," Restatement (Second) of Torts, §§ 821B(2)(a),(c) it also gives polluters an unfair competitive advantage against companies like *amici* that have internalized the costs of avoiding pollution by devising and marketing non-polluting technologies – the very low carbon and renewable energy technologies that are widely viewed as a critical step in the effort to reduce the risk of catastrophic climate change. *See, e.g.,* National Academy of Sciences, *supra* at 22; Hansen, *supra* at 16; *Stern Review 2006* at *xiii; see also* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1, 5 (2003) (internalizing the costs of climate change through tort litigation would "make alternative energy sources and more efficient consumption of fossil fuels more desirable, thereby reducing the level of greenhouse gas emissions").

The competitive advantage enjoyed by firms that externalize their GHG emissions is not only unfair and inefficient, it is also "enormous, a huge short term incentive to pollute." Cutting & Cahoon, *The "Gift" That Keeps On Giving: Global Warming Meets the Common Law*, *supra*, at 113-114. Properly enforced,

nuisance law would eliminate at least some portion of this incentive to pollute, particularly where there are discrete and identifiable victims.

The imposition of liability on major GHG emitters is also critical to ensure that future energy investments are made with due consideration of the full social costs. *See* Xinyu Hua and Kathryn E. Spier, *Information and Externalities in Sequential Litigation*, 161 J. Institutional & Theoretical Econ. 215 (2005) (damages awards tend to increase economic efficiency by spreading information about costs, allowing future defendants to determine which precautions to take to mitigate risks and avoid future injuries). Investments in energy infrastructure tend to be costly, and therefore such investments (and the market distortions that influence those investments) tend to be long-lived. Thus, "if significant externalities are not priced into the marketplace then associated environmental degradation will also be 'locked- in' and, as a consequence, more environmentally benign technologies could be 'locked-out'." Owen, *supra*, at 634.

The Court should not approve of a uniquely restrictive interpretation of nuisance law – gerrymandered to exclude the doctrine's application to emissions of GHGs, so as to allow major emitters to impose the costs of their profit-directed activities onto the public. As indicated by the especially poignant example of Kivalina, those costs can be enormous and unreasonable in scope. They should be internalized as part of the cost of producing energy just as the law requires of any

other kind of pollution. *See, e.g., City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979) (municipality had stated proper claim under federal common law of public nuisance against corporation that polluted river); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.,* 175 F. Supp. 2d 593, 627 (S.D.N.Y. 2001) (property owners had properly stated a claim for public nuisance against numerous defendant petroleum companies who had contributed to groundwater pollution).

The district court suggested that dismissing on political question grounds would save the judiciary from having "to make a policy decision about who should bear the cost of global warming." *Native Village of Kivalina*, 663 F. Supp.2d at 876-77. But this is not a case in which judges can remain neutral by refusing to engage. The court's decision, by categorically removing the traditional obligations and remedies of nuisance law from the realm of GHG emissions, has assigned the burden of those costs to the very entities the common law nuisance doctrine traditionally has protected, including those directly harmed by pollution, and competing firms who are not able or inclined to export the costs of their business onto the public.[11]

[11] To be sure, Congress – as part of a comprehensive climate change legislation or otherwise – might choose to displace some or all kinds of nuisance claims directed at GHG emissions. *Cf. International Paper Co. v. Ouellette,* 479 U.S. 481, 494-498 (1987) (concluding that Clean Water Act preempted some state nuisance claims but not others). But in the absence of congressional action, there is no basis

When the costs of pollution are externalized, the polluter obtains an unwarranted public subsidy, the clean company that provides a similar product but without infringing upon the public good must compete on an uneven and unfair playing field, and the public health and welfare can be endangered with impunity. While no one would suggest that nuisance law, standing alone, can provide the solution to global warming, it has traditionally provided a flexible, adaptable body of law has addressed serious social problems that share essential features with the problem of global warming. There is no basis for a categorical exemption like that created by the decision below. Emitters of GHGs should be required to face the same common law standards that have constrained other polluters; victims of the pollution should be entitled to the same redress; and *amici* and similar clean energy firms should not be forced to compete against energy companies bearing a judicially approved license to pollute for free.

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for exempting such emissions from the operation of the common law. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) (until Congress intervenes, federal courts are empowered to appraise the equities of the suits alleging creation of a public nuisance by pollution).

CONCLUSION

The judgment of the district court should be reversed.

DATED: March 18, 2010

Respectfully submitted,

/s/ Sean H. Donahue

Sean H. Donahue
Sean H. Donahue Law Office
2000 L St., NW Suite 808
Washington, DC 20036

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a) and Ninth Circuit Rule 9(c), the undersigned hereby certifies that the attached brief, filed on behalf of the Solar Industry *Amici Curiae*, is proportionally spaced, in a typeface of 14 point or more, and contains less than 7,000 words exclusive of those materials not required to be counted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

DATED: March 18, 2010

/s/ Sean H. Donahue

Sean H. Donahue
Sean H. Donahue Law Office
2000 L St., NW Suite 808
Washington, DC 20036

PROOF OF SERVICE

I hereby certify that on March 18, 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:

David T. Buente Jr.
SIDLEY AUSTIN LLP
1501 K Street, N.W. Washington, DC 20005

Samuel R. Miller
SIDLEY AUSTIN, LLP Suite 5000
555 California St. San Francisco, CA 94104-1715

DATED: March 18, 2010

/s/ Sean H. Donahue

Sean H. Donahue
Sean H. Donahue Law Office
2000 L St., NW Suite 808
Washington, DC 20036