
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

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF DEFENDANTS-APPELLEES
AND IN SUPPORT OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellees Exxon Mobil Corp., *et al.* All parties to this appeal have consented to PLF's amicus participation.

IDENTITY AND INTEREST OF AMICUS CURIAE

PLF is a nonprofit legal advocacy organization which litigates in state and federal courts throughout the country in favor of the principles of limited government and economic freedom. PLF has a keen interest in ensuring that the foundational principles of standing and tort law are not improperly used to make innocent, deep-pocket defendants the insurers of harm from various, general environmental ills. PLF therefore is concerned with the adjudication of this appeal, as it raises significant questions regarding the interplay of standing, tort law, and global warming.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Native Village of Kivalina, *et al.*, have brought various claims against Appellees Exxon Mobil Corp., *et al.* (energy companies), for harms allegedly caused by the energy companies' greenhouse gas emissions. The district court dismissed the complaint for lack of standing and justiciability. *Native Vill. of Kivalina v. Exxonmobile Corp.*, 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009). The district court's dismissal should be affirmed for two reasons. First, Kivalina lacks standing to pursue its claims in federal court because it cannot establish that its injuries are fairly traceable to any purportedly wrongful or excessive greenhouse gas emission of the

energy companies. Second, Kivalina's claims are barred by the political question doctrine, which precludes federal courts from deciding cases that would require the insertion of the judiciary into fundamentally nonlegal, policy-based issues. For these reasons, more fully explained below, PLF urges this Court to uphold the district court's dismissal of Kivalina's claims.

I

KIVALINA'S GLOBAL WARMING RELATED INJURIES ARE NOT FAIRLY TRACEABLE TO THE ENERGY COMPANIES' EMISSIONS

A. Kivalina Cannot Meet a But-For Standard of Fair Traceability

Kivalina contends that its injuries are fairly traceable to the energy companies' emissions, reasoning that the energy companies' emissions contribute to the public nuisance of global warming, which in turn has caused the melting of sea ice that once protected Kivalina from fall and winter storms. *See* Opening Br. at 2-3, 61-62. The error in this standing analysis is its elimination of the essential requirement of fair traceability—namely, that a defendant's allegedly illegal conduct be a but-for cause of the plaintiff's injury. *See, e.g., Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973) (“[F]ederal plaintiffs must allege some threatened or actual injury *resulting from* the putatively illegal action before a federal court may assume jurisdiction.”) (emphasis added).

Assuming that global warming is happening, and further assuming that global warming has caused the melting of Kivalina's protective sea ice, it is impossible to trace the injuries resulting from such melting sea ice to the energy companies' emissions. In other words, it is impossible for Kivalina to establish that the energy companies' emissions, taken individually or in the aggregate, are a but-for cause of Kivalina's injuries. It is not known, for example, what quantity of greenhouse gases is necessary to cause (or accelerate) the melting of Kivalina's protective sea ice. Even if such a quantity can be known, Kivalina cannot show that this quantity of greenhouse gas emissions, absent the energy companies' contributions, is unreachable. In short, Kivalina cannot demonstrate that the energy companies' emissions are a but-for cause of its injuries.

A comparison between Kivalina's considerably relaxed fair traceability standard and United States Supreme Court cases affirming fair traceability confirms the former's faults. For example, in *Bennett v. Spear*, 520 U.S. 154 (1997), the fair traceability issue was whether a regulatory document issued by one federal agency exerted legal or coercive effect on another federal agency. To resolve the issue, the Court needed only to make a legal analysis of the regulatory document's effects, and then come to the common-sense conclusion that a federal agency is likely to conform its conduct where that conformity avoids illegality. *See id.* at 169-71. No difficult, arcane, and speculative scientific questions of causality were presented in *Bennett* as

they are here. Similarly, in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), the fair traceability analysis focused on whether invalidating a congressional board of review's veto power over a District of Columbia agency's actions would reduce airport noise and other air traffic externalities. The Court had no difficulty in finding fair traceability: more airplane traffic would lead to the injuries identified. The only significant issue was whether the board's veto power had some arguable relationship to the plan that would lead to airport traffic changes. *See id.* at 264-65. As in *Bennett*, so in *Metropolitan Washington*: the causal analysis for fair traceability was based on legal or common-sense links, not, as here, on difficult, arcane, and speculative scientific questions of causality.

Kivalina attempts to get around the causal speculation inherent in its action by arguing that the evidentiary burden for standing is much less than that for determining the merits of its action. *Cf.* Opening Br. at 62-64 & n.17. But if the mere assertion of a causal link were sufficient to establish standing, then an action could never be dismissed on its pleadings for want of standing. Yet dismissal is precisely what was held proper in *Allen v. Wright*, 468 U.S. 737 (1984), where the Court, reviewing the respondents' complaint, concluded that the causal chain between the injury—racial discrimination by private schools—and the alleged illegality—tax exemptions to discriminatory private schools—was too speculative as a matter of law to meet the

requirements of fair traceability. *See id.* at 758-59. *See also id.* at 766 (“[R]espondents’ complaint . . . alleges no connection between the asserted desegregation injury and the challenged IRS conduct *direct enough* to overcome the substantial separation of powers barriers.”) (emphasis added).

Kivalina also contends that a rejection of its version of fair traceability would impermissibly impose a proximate-cause-like standard. *See* Opening Br. at 62. The fear is unfounded. The but-for requirement of fair traceability is something much less than proximate cause. *See* W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts* 273 (5th ed. 1984) (“The term ‘proximate cause’ is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established.”). *Cf.* Restatement (Second) of Torts § 430 (discussing “legal cause”). A plaintiff need not show that his harm was foreseeable, or that the causal links from the defendant’s actions to the proffered injury are knowable with metaphysical certitude; but what the plaintiff must show is that the causal path between action and injury exists at all. *See* Keeton, *supra*, at 266 (“The defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct.”). This Kivalina cannot do.

**B. *Massachusetts v. EPA* Does Not Support
a Finding of Fair Traceability Here**

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court held that the Commonwealth of Massachusetts had standing to challenge EPA's failure to initiate rule-making under the Clean Air Act to regulate carbon dioxide and other greenhouse gas emissions from new motor vehicles. 549 U.S. at 526. Kivalina contends that *Massachusetts* is on point: the Commonwealth contended that global warming was producing effects, such as sea-level rise, that were harming the state's coastline, just as Kivalina contends that the energy companies' emissions have led to the melting of protective sea ice, a resulting intensification in the effects of fall and winter storms, and consequent injuries to Kivalina's tribal and municipal property. *See* Opening Br. at 70, 74-75. Kivalina's argument overlooks the context of the Commonwealth's challenge.¹

The fair traceability question in *Massachusetts* was whether EPA's failure to regulate potentially all emissions from new motor vehicles in the United States

¹ Kivalina also argues that, like the Commonwealth, it is entitled to "special solicitude" in the Court's standing analysis. *See* Opening Br. at 75-77. *Cf. Massachusetts*, 549 U.S. at 518, 520. Below, the district court correctly observed that *Massachusetts*'s "special solicitude" rationale "is predicated on the rights a State relinquishes to the federal government when it 'enters the Union.'" *Kivalina*, 663 F. Supp. 2d at 882 (quoting *Massachusetts*, 549 U.S. at 519). As an Alaskan native village and tribe, that rationale does not apply to Kivalina. *See* Ans. Br. of Def.-Appellees Am. Elec. Power Co., *et al.*, at 28-29; Ans. Br. of Def.-Appellees Shell Oil Co., *et al.*, at 54-56; Ans. Br. of Def.-Appellees Peabody Energy Corp. at 46-47 & n.16.

“contributed to” the Commonwealth’s injury. *See* 549 U.S. at 524-25. Although the Court answered in the affirmative, its reasoning is distinguishable from Kivalina’s action. In *Massachusetts*, the allegedly illegal activity was the failure to regulate. *See id.* at 523. Just as in *Bennett* and *Metropolitan Washington*, the fair traceability analysis in *Massachusetts* required the Court to embark on a modest analysis of whether an agency’s regulatory activity could have demonstrable, real-world effects on the conduct of third parties. *See Massachusetts*, 549 U.S. at 524 (noting need to show “a small incremental step” rather than resolution of the problem “in one fell regulatory swoop”). In contrast here, Kivalina’s proffered causal chain is made up entirely of difficult, arcane, and speculative scientific issues that were absent from *Massachusetts*.² Kivalina is correct that “the dispositive question is whether each step in the causal chain is empirical or rather involves a high degree of speculation or

² For similar reasons, Kivalina’s reliance on *Center for Biological Diversity v. National Highway Traffic Safety Administration (NHTSA)*, 538 F.3d 1172 (9th Cir. 2008), *see* Opening Br. at 68, 73, is misplaced. There the Court faulted NHTSA for failing to conduct a cumulative impact analysis of its corporate average fuel economy standard (CAFE) covering sport utility vehicles, minivans, and pick-up trucks. *See NHTSA*, 538 F.3d at 1215-17. Not even NHTSA disputed that its regulatory control over such a large portion of the country’s vehicle greenhouse gas emissions would have a demonstrable effect on global warming. *See id.* at 1216 (“NHTSA does not dispute that the CAFE standard will have an effect on global warming due to an increase in greenhouse gas emissions.”). In contrast here, not only is the causal link between the energy company’s emissions and Kivalina’s injuries hotly disputed, the purported causal chain is considerably different from the causal chain at issue in *NHTSA*, *i.e.*, the link between a CAFE standard governing light truck fuel economy and global warming generally.

conjecture.” Opening Br. at 71. *Cf. Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 717 n.31 (D.C. Cir. 1977) (fair traceability is concerned “not with the length of the chain of causation, but . . . the plausibility of the links that comprise the chain”). Nevertheless, Kivalina avoids the critical issue: whether its injuries involve the *predictable* effects of the energy companies’ past emissions not just on the natural environment, but also on *the particular sea ice* that protects Kivalina from harsh fall and winter storms. The requirement of such a cause-and-effect relationship remains regardless of the extent of time or distance of space between the alleged wrongful activity and the injury. *Cf. Opening Br.* at 73-74. And it is the plausibility of the causal link that Kivalina cannot establish.

C. Neither the Doctrine of Alternate Causation, Nor a “Contribution Rationale,” Can Help Kivalina

Kivalina argues generally that fair traceability can be established by the energy companies’ alleged contribution to Kivalina’s injuries. Opening Br. at 66-67. Kivalina advances two basic theories to support that conclusion. One is that Kivalina need not show that the energy companies are the only causers of its injuries, relying on the proposition that standing is not defeated simply because there is more than one person or entity that caused the harm. *Cf. id.* at 66 (contending that a contrary rule “would shut the courthouse door on all common law claims in a multiple polluter

situation”); *id.* at 62 (citing to common law causation standards for public nuisance torts). Kivalina’s theory of alternate causation is misplaced in this context.

Alternate causation is a doctrine derived from tort law, ensuring that a wrongdoer cannot escape liability on the grounds that there are other actors who, standing alone, could have caused the same injury. *See Keeton, supra*, at 268 (“If the defendant’s conduct was a substantial factor in causing the plaintiff’s injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result.”). *See also* Restatement (Second) of Torts § 433B. An example of the doctrine at work is a hunting party, where two hunters negligently shoot a third member of their group, having mistaken him for a deer. The shots from either of the two hunters would have been sufficient to kill the third hunter; but that does not mean that the two hunters can thereby escape liability for the third hunter’s death. Key to the doctrine’s applicability is the requirement that each of the alleged wrongdoers be a potential but-for cause of the injury. In other words—A and B are alternate causes of harm X if, but only if, A or B could cause X where the other putative causes ceased to exist. Put in terms of the hunting party example, hunter A can be an alternate cause of fellow hunter X’s death if, but only if, death would still ensue notwithstanding the absence of hunter B.

The doctrine of alternate causation has no applicability here. Assuming that there exist one or more greenhouse gas emitters who could have caused, or

contributed to, Kivalina's injuries, Kivalina still cannot prove that the energy companies are among that class of emitters. It is not enough for establishing fair traceability that the energy companies emit any quantity of greenhouse gases; rather, they must be among that class of emitters that has a meaningful impact on climate change. To determine whether the energy companies fall within that class would require the implausible showing that, absent the other greenhouse gas emitters but with the energy companies, Kivalina's injuries would have occurred (or would have been worsened). The doctrine of alternate causation allows a plaintiff to get around the problem of multiple but-for harm-causers; it does not transform an independently irrelevant action into a but-for cause of the plaintiff's injury.

In addition to alternate causation, Kivalina's fair traceability analysis relies on the proposition that, even though the energy companies' emissions may not have caused Kivalina's injuries, it is enough that the emissions contributed to that injury. *See, e.g.*, Opening Br. at 62-64 & n.16. The use of this contribution rationale is in error, for several reasons.

First, the contribution rationale cannot be used as an end-run around the but-for requirement of fair traceability. What the rationale allows is for a plaintiff to seek partial redress of his injuries by pointing to illegal action that, although not responsible for the entirety of the injury, is nevertheless responsible for a part of that injury. *Cf. Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (“[A plaintiff] need not

show that a favorable decision will relieve his *every* injury.”). In other words, the contribution rationale allows the plaintiff to sue against the but-for causer of incremental injury. *See, e.g., Massachusetts*, 549 U.S. at 524 (no standing obstacle to a suit seeking “incremental” change). By implication, therefore, the contribution rationale does not authorize suit against an alleged “contributor” where it cannot be demonstrated, or even reasonably presumed, that the alleged wrongdoer took action that made any real contribution to, or worsening of, the plaintiff’s injury. *Cf. id.* at 526 (noting that the “risk of catastrophic harm” to Massachusetts “would be reduced to some extent” if the Commonwealth were given judicial redress).

Second, no support exists for Kivalina’s expanded contribution rationale in *Massachusetts*. As explained above, the Supreme Court concluded that it was reasonable to credit the Commonwealth’s contention that EPA’s failure to regulate emissions from new motor vehicles contributed in some meaningful way to the Commonwealth’s injuries. *See id.* at 523-26. To be sure, the Court’s opinion did not set forth this requirement in so many words. But the Court also made the point that, if EPA did in fact choose to regulate, such regulation would serve to limit or slow down the harms of global warming. *See id.* at 525-26:

While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. . . . A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

(citation and footnote omitted). That observation would have been irrelevant if the Commonwealth had not been required to show *meaningful* contribution: for it is absurd to say that Action X contributes to Harm Y, if Action X has absolutely no effect on Harm Y.

Third, Kivalina improperly relies on the “contribution” case law as developed largely in the Clean Water Act (CWA) context. All of the cases but one³ cited by Kivalina (whether dealing with the CWA, other environmental laws, or public nuisance) concern instances where the alleged polluter was worsening, to some degree, a discrete geographical area, *i.e.*, not the entire Earth.⁴ The courts could

³ In *Northwest Environmental Defense Center v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Or. 2006), the court affirmed the plaintiffs’ standing in a Clean Air Act challenge, holding that the defendant’s emission contributed to ozone depletion and global warming, which in turn harmed discrete areas in Oregon used by the plaintiffs. PLF believes that *Owens* is wrongly decided and should be overruled.

⁴ See *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971) (nuisance abatement action for pollution of Lake Erie); *Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964 (7th Cir. 2005) (CWA challenge to a nationwide stormwater permit based on alleged pollution to various discrete waterbodies); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000) (CWA challenge to pollution in Yager Creek, a tributary of the navigable Eel River); *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000) (same as to San Diego Bay); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (en banc) (same as to a manmade lake and the Edisto River); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996) (same as to Galveston Bay); *Natural Res. Def. Council v. Watkins*, 954 F.2d 974 (4th Cir. 1992) (same as to the Savannah River); *Pub. Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64 (3d Cir. 1990) (same as to Kill Van Kull, a regulable waterbody); *Ill. ex rel. Scott v. City of Milwaukee*, No. 72 C 1253, 1973 U.S. Dist. (continued...)

therefore entertain the benign presumption that such alleged pollution would worsen the plaintiff's injury (which was a function of the geographical area's polluted status). Thus, these "contribution" cases do not stand for the proposition that but-for causation is irrelevant for fair traceability. Instead, they stand for the proposition that but-for causation may be reasonably presumed where the plaintiff is injured by the polluted status of a discrete geographical area, and the defendant's actions worsen that polluted state.

These cases have no application here because the twin bases for the reasonable presumption of but-for causation—a discrete geographical area and a discrete set of potential polluters—are absent. Instead, here the geographical area is the entire Earth's atmosphere, and the set of potential polluters includes every emitter of

⁴ (...continued)

LEXIS 15607 (N.D. Ill. 1973) (public nuisance challenge to pollution in Lake Michigan). *Cf. Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2005) (National Environmental Policy Act and Marine Mammal Protection Act challenge to expansion of oil refinery dock along the Strait of Georgia in northeast Puget Sound). Kivalina also relies on *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), in which the State of Georgia sought to enjoin the emission of noxious sulphuric gases which were the byproducts of the defendant's mining operations. The case is clearly distinguishable in that there was no dispute that the defendant's operations were the but-for and proximate cause of the state's injuries. *See id.* at 238 ("It is not denied that the defendants generate in their works near the Georgia line large quantities of sulphur dioxide which becomes sulphurous acid by its mixture with the air. It hardly is denied and cannot be denied with success that this gas often is carried by the wind great distances and over great tracts of Georgia land. On the evidence the pollution of the air and the magnitude of that pollution are not open to dispute.").

greenhouse gases. In these circumstances, it would not be reasonable to maintain the presumption of but-for causation. Contrast that conclusion with *Massachusetts*, where the Court impliedly found such presumption reasonable because the alleged wrongdoer—EPA—had regulatory control over a significant class of polluters. *See* 549 U.S. at 523-25.

Ultimately, Kivalina's failure to identify a but-for cause among the energy companies merely underscores that redress is to be sought from the political branches. The purpose of modern standing doctrine is to ensure that only controversies truly fit for the judicial power are presented for decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring). The doctrine's purpose is to ensure that the judiciary not become a substitute for the political decisionmaking process. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). If potentially every emitter of greenhouse gases throughout the world is a but-for cause of, or contributor to, Kivalina's injuries, then the concepts of but-for causation and fair traceability as limitations on the judicial power are entirely vacuous. "Injuries" that are caused by everyone and by no one entity or person are not grievances fit for the judicial power.

II

KIVALINA’S CLAIMS DO NOT RAISE JUSTICIABLE QUESTIONS

A. A Litigant Raises a Nonjusticiable Political Question If There Are No Discoverable and Manageable Standards for Resolution

Kivalina has raised a novel question as to whether the nuisance doctrine may be extended to hold private entities liable for their de minimis and undifferentiated contribution to the international problem of climate change, which, as noted above, Kivalina asserts has caused a loss of sea ice that would otherwise protect the City from harsh winters. *Kivalina*, 663 F. Supp. 2d at 868. Kivalina improperly argues that this question is justiciable, but fails to explain how a court can address its claims without making initial political judgements.

The political question doctrine provides that some issues are beyond the purview of the federal courts. *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”). The doctrine bars federal courts from considering novel questions which do not lend themselves to principled resolution. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). As Chief Justice Marshall explained: “It is emphatically the province and duty of the judicial department to say what the law is,” but it is beyond the province of the courts to consider “[q]uestions, in their nature political, or which are, by the

constitution and laws, submitted to the executive.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 170 (1803). Marshall’s opinion established that the judicial department exceeds its power if it seeks to decide two sorts of questions: (1) questions expressly committed to a coordinate branch by positive law; or (2) questions not expressly committed to a coordinate branch, but by their nature political and thus unsuited for judicial resolution. *Vieth*, 541 U.S. at 277-78.

In spelling out the powers of the judicial department, Marshall prudently recognized that some questions are nonjusticiable by their very nature. *Marbury*, 5 U.S. at 165 (“If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.”). While he identified one subset of those questions as being constitutionally committed to another branch of government, he also indicated that quintessentially political questions are nonjusticiable as well. *Id.* at 170. Thus, in determining whether a question is justiciable, a court must not only consider whether the question has been committed to another branch of government, but it must also look to the very nature of the question presented. *Baker*, 369 U.S. at 211-12 (Court must make a “discriminating analysis of the particular question posed”).

Had Marshall simply said that questions submitted to another branch are beyond the purview of the federal courts, the question of justiciability would be straightforward; courts would look simply to the text of the Constitution, and that

would be the end of the inquiry. Yet Marshall indicated that the realm of nonjusticiable questions is not so limited, and the Supreme Court therefore extends its analysis in determining the justiciability of questions. *Vieth*, 541 U.S. at 277-78. *Baker v. Carr* provides that there are six considerations relevant in the determination of whether a particular question is barred by the political question doctrine. *Baker*, 369 U.S. at 217.

Consideration of (1) whether there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” is only the first stage of the inquiry. *Id.* *Baker* provides that we must also consider: (2) whether there is “a lack of judicially discoverable and manageable standards for resolving” the question; (3) whether resolution will require an initial policy decision; (4) whether a judicial resolution would express a lack of respect for a coordinate branch of government; (5) whether there is “an unusual need for unquestioning adherence to a political decision already made;” and (6) whether there is potential for “embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217.

Though all six of the considerations set forth in *Baker* may be relevant in determining whether a question is a nonjusticiable political question, the Court has since indicated that the first two considerations are particularly important: If a court finds either a textual commitment or a lack of judicially manageable standards, it will

hold the question to be nonjusticiable. *Vieth*, 541 U.S. at 277-78. Consideration of whether the issue is capable of coherent and principled resolution by the courts is of equal importance in determining justiciability. *Id.*

The judicial department does not make the law; it merely adduces the law through practical reasoning and analysis, applying rules to facts. *Id.* “[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions,” for judicial action must be “governed by *standard*, by *rule*.” *Id.* A court cannot settle a question where there are no standards guiding its analysis, for in the absence of such rules the court’s resolution of a question would no longer be a judicial act at all. *Id.*

Where a question lacks judicially discoverable and manageable standards for its resolution, it is quintessentially a political question in nature because its resolution demands the exercise of political judgment. *Id.* It would be impossible for the court to resolve such a question without being arbitrary in its proclamation of the law, or making an initial policy decision. Either way the court would be making positive law, rather than interpreting existing law. For this reason, the political question doctrine provides that such questions are necessarily reserved for the legislative and executive branches. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) (holding that the question of whether Rhode Island had established a new government was inherently political and unsuited for judicial resolution). These questions are nonjusticiable in

the same manner as would be a question expressly reserved to the other branches; in either case, resolution would require the court to step beyond its sphere of authority and invade the province of the coordinate branches. *Baker*, 369 U.S. at 210.

A court cannot presume a question to be justiciable simply because it is raised within the context of a traditional tort claim, and has not been expressly committed to another branch of government. Accordingly, the district court properly made a serious inquiry into whether there are judicially manageable standards for resolution of the questions presented in this suit, and found none. Kivalina asserts that the nuisance doctrine provides such standards, but Kivalina has failed to explain how those standards can be applied in a judicially manageable way to resolve the novel questions presented in this case without making impermissible political judgments.

**B. There Are No Judicially Manageable Standards
for Resolution of the Question That Kivalina Raises**

**1. The Court Cannot Determine the Reasonableness of
the Energy Companies' Emissions Without Making an
Initial Policy Decision or Exercising Political Judgment**

The political question doctrine bars the court from considering issues where there are no judicially manageable standards for resolution, regardless of whether the issues are raised in the context of a familiar cause of action. *Baker*, 369 U.S. at 211-12. In this case, Kivalina seeks to extend the common law nuisance doctrine in a new and unprecedented manner, yet existing nuisance doctrines do not afford courts the

tools necessary coherently to manage the problem of climate change. Laurence H. Tribe, et al., Wash. Legal Found., *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-20 (2010).⁵

The nuisance and negligence doctrines are based upon an already vague standard that completely breaks down when one seeks to extend it to international climate issues. The nuisance doctrine assigns liability for injuries caused by unreasonable use of one's property. *Newman v. Holmes*, 122 F.3d 650, 653 (8th Cir. 1997) (“[T]he duty to act reasonably is a negligence standard.”); Keeton, *supra*, at 619. The doctrine developed as a means of vindicating the rights of individuals in discrete instances in which they have been injured by another. Thomas C. Grey, *Accidental Torts*, 54 Vand. L. Rev. 1225, 1226 (2001) (Oliver Wendell Holmes, Jr., and other early commentators organized the tort doctrine around the problem of accidental injury.). For example, in the past the nuisance doctrine was applied to hold actors liable for their noxious emissions in discrete instances, as when a smelter causes injury to neighbors. *See, e.g., Georgia v. Tenn. Copper Co.*, 237 U.S. 474, 477-78 (1915).

In traditional tort cases, there are always discrete lines of causation between individual tortfeasors and individual victims. *See* Tribe, *supra*, at 15. Although there

⁵ Available at http://www.wlf.org/publishing/publication_detail.asp?id=2132 (last visited July 1, 2010).

is room to dispute the reasonableness of the emitter's actions, the standard for assessing liability is readily determinable in light of the discrete impact on the plaintiff's property. Alan Calnan, *The Fault(s) in Negligence Law*, 25 Quinnipiac L. Rev. 695, 702 (2007) ("The ultimate source of reasonableness is reason."). Yet that standard of review cannot be extended to address the international climate change issue because there is no discrete relationship between an individual emitter and the individual victim—instead, the alleged injury occurs from "the non-linear, collective impact of millions of fungible, climatically indistinguishable, and geographically dispersed emitters." Tribe, *supra*, at 15. Unlike previous nuisance actions involving the discharge or emission of pollutants, the assignment of liability in a suit over global warming would not be based on a reasoned consideration of the defendant's direct impact on the plaintiff, but upon a weighing of political judgment.

In the present action, Kivalina asserts that the energy companies acted unreasonably in emitting pollutants, thereby causing them injury; however, Kivalina does not assert that the energy companies' discrete actions directly caused this injury. Instead, Kivalina asks the Court to go one step further: to hold the energy companies liable for their de minimis and undifferentiated contribution to the collective problem of international climate change. Yet there are no standards for determining the reasonableness of the energy companies' contribution to such a systemic problem. *California v. GMC*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at *46 (N.D.

Cal. Sept. 17, 2007) (“The Court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth’s atmosphere, or in determining who should bear the costs associated with the global climate change.”). Kivalina merely asserts that the energy companies acted unreasonably because they emitted more than other potential defendants, but Kivalina offers no basis for determining when liability should attach under its novel nuisance theory.

Kivalina’s nuisance theory requires a court to make an initial determination as to what level of contribution triggers liability. Stuart Buck, *Common Law Environmental Protection: The Common Law and the Environment in the Courts*, 58 Case W. Res. 621, 642 (2008) (“[W]e all emit carbon in some form, even if only exhaling. . . . So if there is to be a lawsuit over global warming, the most basic question is: who should sue whom?”). Since almost every human action may be said to contribute to the world’s emissions, there must be some threshold at which liability attaches under Kivalina’s theory. But the establishment of such a threshold would represent both an impermissible policy choice as to what level of emissions are acceptable, and a political question as to who should bear the burden of curbing emissions. *GMC*, 2007 U.S. Dist. LEXIS 68547, at *19-*20 (global warming cases require an initial policy decision entailing a balancing of competing social costs, which our system commits to the elected branches).

The reasonableness of the energy companies' emissions can only be assessed once some sort of reasonableness standard has been established by lawmakers in the determination of what should be done to address this collective problem. The common law standards entailed in the nuisance doctrine only contemplate the remedy of discrete injuries; to extend them to address the climate change problem would require the court to make an impermissible policy decision as to the "best" or "preferable" means of addressing an international problem, and would require the determination of the political question of who should bear the burden of curbing emissions. Tribe, *supra*, at 20. Such policy decisions remain beyond the purview of the courts, as they are inherently political and legislative in nature. *Baker*, 369 U.S. at 217 (political question doctrine applies when it is impossible to decide a case without making a policy decision); *see also Vieth*, 541 U.S. at 296 (refusing to make a policy determination as to when "political gerrymandering has gone too far").

2. Courts Are Incapable of Providing Relief in a Fair and Equitable Manner in This Case

There are no manageable standards for resolution of the issues presented in this case because this Court is incapable of redressing Kivalina's injury in a fair and equitable manner. Unlike other cases, incremental relief is inappropriate in the global warming context because it is inherently unfair and inequitable to allow a plaintiff capriciously to single out defendants to bear the burden of liability for the collective

actions of all humanity. Such collective problems require collective resolution in the form of generally applicable rules and regulations, but no court is qualified to promulgate the law in this fashion. Tribe, *supra*, at 14.

Where, as in this case, a plaintiff alleges an injury caused by the collective actions of all humanity, the court is simply incapable of fashioning relief in an equitable manner because it has no power to bind the masses. Climate change is a global phenomenon, supposedly caused by the collective actions of millions of emitters throughout the world. Many of these emitters reside beyond the reach of this Court's—or any American court's—jurisdiction, and even assuming jurisdiction over all contributors, it would be impractical to join all such defendants in one suit. *See Buck, supra*, at 642. Therefore, the issue is judicially unmanageable, for it is both impossible and impractical for any court to provide an equitable remedy to address the asserted cause of Kivalina's injuries.

The only way to resolve the problem of climate change is to coordinate human behavior so as to ensure the reduction of global emissions, but this cannot be done by any court order. *Leclerc v. Webb*, 270 F. Supp. 2d 779, 793 (E.D. La. 2003) (“This Court cannot make law.”). Human behavior can only be collectively coordinated through the enactment of generally applicable positive laws. While courts lack the power to order human behavior in this manner, our constitutional system of government vests the coordinate branches of government with that power. Congress

is vested with enumerated powers to enact such laws in response to such collective issues of importance to the nation. U.S. Const. art. I, § 8. Likewise, the President has the power to enter treaties, with the advice and consent of the Senate, in order to address collective issues affecting the international community. U.S. Const. art. II, § 2. While the courts are naturally incapable of addressing such collective issues, it remains the natural prerogative of the democratically elected coordinate branches to address them, as those branches represent the collective body of the sovereign American people. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.”).

CONCLUSION

Kivalina cannot plausibly trace its injuries to the individual or aggregate emissions of the energy companies. Even if it could, adjudication of its tort and related claims would require this Court impermissibly to exercise political and

policy-making functions. The Court should therefore affirm the dismissal of Kivalina's claims.

DATED: July 6, 2010.

Respectfully submitted,

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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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