

1 JOHN F. DAUM (SBN 52313)
jdaum@omm.com
2 O'MELVENY & MYERS LLP
400 South Hope Street
3 Los Angeles, CA 90071-2899
Telephone: (213) 430-6111
4 Facsimile: (213) 430-6407

5 JONATHAN D. HACKER (*Pro hac vice* pending)
jhacker@omm.com
6 O'MELVENY & MYERS LLP
1625 Eye Street, NW
7 Washington, DC 20006-4001
Telephone: (202) 383-5300
8 Facsimile: (202) 383-5414

Attorneys for Defendant
9 EXXON MOBIL CORPORATION

10 [*Counsel Listing Continued on Next Page*]

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 NATIVE VILLAGE OF KIVALINA and CITY
OF KIVALINA,

15 Plaintiffs,

16 vs.

17 EXXON MOBIL CORPORATION; BP P.L.C.; BP
AMERICA INC.; BP PRODUCTS NORTH
18 AMERICA INC.; CHEVRON CORPORATION;
CHEVRON U.S.A., INC.; CONOCOPHILLIPS
19 COMPANY; ROYAL DUTCH SHELL PLC;
SHELL OIL COMPANY; PEABODY ENERGY
20 CORPORATION; THE AES CORPORATION;
AMERICAN ELECTRIC POWER COMPANY,
21 INC.; AMERICAN ELECTRIC POWER
SERVICES CORPORATION; DTE ENERGY
22 COMPANY; DUKE ENERGY CORPORATION;
DYNEGY HOLDINGS, INC.; EDISON
23 INTERNATIONAL; MIDAMERICAN ENERGY
HOLDINGS COMPANY; MIRANT
24 CORPORATION; NRG ENERGY; PINNACLE
WET CAPITAL CORPORATION; RELIANT
25 ENERGY, INC.; THE SOUTHERN COMPANY;
AND XCEL ENERGY, INC.,

26 Defendants.

CASE NO. C 08-01138 SBA

**NOTICE OF MOTION AND
MOTION OF CERTAIN OIL
COMPANY DEFENDANTS TO
DISMISS PLAINTIFFS'
COMPLAINT PURSUANT TO FED.
R. CIV. P. 12(b)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES**

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

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RONALD L. OLSON (SBN 44597)
Ronald.Olson@mto.com
DANIEL P. COLLINS (SBN 139164)
Daniel.Collins@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

JEROME C. ROTH (SBN 159483)
Jerome.Roth@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

Attorneys for Defendant
SHELL OIL COMPANY

STUART A. C. DRAKE (*Pro hac vice*)
sdrake@kirkland.com
ANDREW B. CLUBOK (*Pro hac vice*)
aclubok@kirkland.com
SUSAN E. ENGEL (*Pro hac vice*)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 879-5173
Facsimile: (202) 879-5200

ELIZABETH DEELEY (SBN 230798)
edeeley@kirkland.com
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 439-1861
Facsimile: (415) 439-1500

Attorneys for CONOCOPHILLIPS COMPANY

ROBERT MEADOWS (*Pro hac vice*)
rmeadows@kslaw.com
TRACIE J. RENFROE (*Pro hac vice*)
trenfroe@kslaw.com
JONATHAN L. MARSH (*Pro hac vice*)
jlmarsh@kslaw.com
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002-5213
Telephone: (713) 751-3200
Facsimile: (713) 751-3290

LISA KOBIALKA (SBN 191404)
lkobialka@kslaw.com
KING & SPALDING LLP
1000 Bridge Parkway, Suite 100
Redwood City, CA 94065
Telephone: (650) 590-0700
Facsimile: (650) 590-1900

Attorneys for Defendants
CHEVRON CORPORATION and
CHEVRON U.S.A. INC.

MATTHEW HEARTNEY (SBN 123516)
Matthew.Heartney@aporter.com
ARNOLD & PORTER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4150
Facsimile: (213) 243-4199

PHILIP H. CURTIS (*Pro hac vice*)
Philip.Curtis@aporter.com
MICHAEL B. GERRARD (*Pro hac vice*)
Michael.Gerrard@aporter.com
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
Telephone: (212) 715-1000
Facsimile: (212) 715-1399

Attorneys for BP AMERICA INC. AND BP
PRODUCTS NORTH AMERICA INC.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 9, 2008 at 1:00 P.M., or as soon thereafter as counsel may be heard in Courtroom 3 of the above-captioned Court, located at 1301 Clay Street, Oakland, California, 94612, Defendants Exxon Mobil Corporation, Shell Oil Company, Chevron Corporation, Chevron U.S.A. Inc., ConocoPhillips Company, BP America Inc., and BP Products North America Inc. (“Oil Company Defendants” or “Defendants”) will and hereby do move to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

The Oil Company Defendants seek dismissal of the Complaint based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the pleadings and records on file in this action, such additional authority and argument as may be presented in any Reply and at the hearing on this Motion, and such other matters of which this Court may take judicial notice.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case asserts tort claims without precedent in the annals of American law. Plaintiffs seek to hold a handful of U.S. businesses – including the Oil Company Defendants submitting this motion – liable in damages, on nuisance and conspiracy theories, for what plaintiffs themselves explicitly allege to be harms resulting from *centuries of all human activities across the entire planet Earth*. Even assuming the property losses plaintiffs assert could be traced to human-induced changes in the global climate – itself a staggeringly difficult problem of factual proof – no cognizable U.S. tort law, either federal or state, offers plaintiffs any basis for holding a small collection of defendants liable for the supposed atmospheric effects of all historical human industrial, commercial, agricultural, and residential activity worldwide.

In this memorandum, the Oil Company Defendants set forth three grounds on which plaintiffs’ claims must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6): (1) plaintiffs fail to plead facts supporting the causation element of their nuisance claims; (2) plaintiffs cannot pursue a federal common law nuisance claim because such claims are limited to

1 claims *by States seeking injunctive relief*, and because federal common law in any event has been
2 displaced by a federal statute addressing the subject of greenhouse gas emissions; and (3)
3 plaintiffs' conspiracy and concert of action claims are purely derivative of their underlying
4 nuisance claims and do not survive dismissal of those claims.

5 **FACTUAL ALLEGATIONS**

6 For ease of reference, the Oil Company Defendants include a brief recitation of plaintiffs'
7 factual allegations as relevant to the instant memorandum but otherwise rely upon the background
8 discussion in the Oil Company Defendants' memorandum of law in support of their motion to
9 dismiss plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(1).

10 Plaintiffs allege that a long-building rise in atmospheric greenhouse gas concentrations is
11 changing the planet's climate: "human activity" across the Earth "since the dawn of the industrial
12 revolution" has increased greenhouse gas levels which, in turn, have caused the earth to retain
13 more heat; this global warming has led to changing weather patterns and has delayed the annual
14 formation of sea ice in the Arctic, leaving the village of Kivalina susceptible to fierce winter
15 storm activity; and storm activity has damaged plaintiffs' real property. (Compl. ¶¶ 4, 16-17,
16 124-127, 132.) Because carbon dioxide "persist[s] in the atmosphere for several centuries," "each
17 year's emissions" are "added to those that came before," creating planet-wide levels of
18 atmospheric greenhouse gases that are warming the entire Earth's climate. (Compl. ¶ 125.)
19 Collectively, human activity worldwide has caused atmospheric carbon dioxide levels to
20 "increase[] by 35 percent" since "the 18th century." (*Id.*)

21 Plaintiffs' own allegations thus make clear the cause of the global warming and property
22 damage they allege: the activity of billions of persons over several hundred years. What they do
23 not – and could not – allege is that this state of affairs can actually be traced to the handful of
24 companies they name in their suit. Indeed, plaintiffs nowhere allege in terms that the Oil
25 Company Defendants (or even all the defendants) cause or caused global warming. Rather,
26 plaintiffs claim that the defendants can be held legally liable for all of plaintiffs' property damage
27 because each Oil Company Defendant, and the defendants collectively, were "substantial
28 contributors to global warming" through greenhouse gas emissions from their operations.

1 (Compl. ¶ 253; *see* Compl. ¶ 5.) In other words, by plaintiffs’ own account, it is not the
2 defendants’ own activities that have made the planet warmer – those activities are merely *part of*
3 the “human activity that releases greenhouse gases,” which, collectively over a period of two
4 centuries, has been “causing a change in the Earth’s climate.” (Compl. ¶ 132; *see* Compl. ¶¶ 181-
5 184.)

6 Defendants’ unspecified “contribution” to global warming nevertheless gives rise to
7 several claims for relief, in plaintiffs’ view. First is a federal common law claim for public
8 nuisance: defendants’ emissions allegedly interfere with “the rights to use and enjoy public and
9 private property in Kivalina.” (Compl. ¶ 250.) Second, and in the alternative, plaintiffs allege
10 that defendants are liable under state-law private and public nuisance theories. (Compl. ¶¶ 262-
11 267.) Third and fourth, plaintiffs allege that certain defendants have conspired and acted in
12 concert to create, contribute to, or maintain a public nuisance of global warming. (Compl.
13 ¶¶ 268-282.) According to plaintiffs, although emissions from the businesses they have named
14 have only contributed in some unspecified way to the centuries of human activities worldwide
15 that allegedly caused global climate change, these companies must be made to pay for all the
16 property damage plaintiffs attribute to this multi-century worldwide phenomenon. (Compl. ¶ 67.)

17 ARGUMENT

18 Under Rule 12(b)(6), “a motion to dismiss should be granted if the plaintiff is unable to
19 articulate ‘enough facts to state a claim to relief that is plausible on its face.’” *Oksner v. Blakey*,
20 2007 WL 3238659, at *2 (N.D. Cal. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.
21 1955, 1960 (2007)). In determining whether the complaint states a “plausible” claim, allegations
22 of fact are what matters – “labels and conclusions” are meaningless, and “a formulaic recitation
23 of the elements of a cause of action will not do.” *Twombly*, 127 S. Ct. at 1964-65; *see Oksner*,
24 2007 WL 3238659, at *2; *see also Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 802-03
25 (7th Cir. 2008) (“a defendant should not be forced to undergo costly discovery unless the
26 complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a
27 substantial case”).

28 Plaintiffs’ allegations, taken as true for purposes of this motion, fail to give rise to any

1 legally cognizable claims for several reasons. *First*, their nuisance claims fail because plaintiffs
 2 do not and cannot allege facts from which to establish any plausible claim that the Oil Company
 3 Defendants were the factual and legal cause of plaintiffs' property damage. *Second*, their federal
 4 common law claim fails because only States can assert federal common law nuisance claims, and
 5 the Clean Air Act in any event has displaced the authority of federal courts to create federal
 6 common law rules to regulate air pollution and climate change. *Third*, their "conspiracy" and
 7 "concert of action" claims fail because they are not independent torts, but simply are means of
 8 assigning secondary or derivative liability for an underlying tortious act. These secondary
 9 liability claims thus necessarily fall along with the primary nuisance claims.

10
 11 **I. PLAINTIFFS FAIL TO STATE A NUISANCE CLAIM BECAUSE THE FACTUAL**
 12 **ALLEGATIONS FAIL TO ESTABLISH THAT DEFENDANTS' EMISSIONS**
 13 **WERE AN ACTUAL OR LEGAL CAUSE OF PLAINTIFFS' INJURIES.**

14 The legal and factual flaws in plaintiffs' basic nuisance claims are numerous; this section
 15 focuses only on the most glaring legal defect in their theory: they do not and cannot allege facts
 16 establishing that the Oil Company Defendants' conduct was an actual and legal *cause* of the
 17 injuries plaintiffs assert. According to plaintiffs themselves, the true cause of global warming,
 18 and thus of their injuries, is not defendants' emissions, but *all greenhouse-gas emitting "human*
 19 *activity" worldwide since the dawn of the Industrial Revolution.* (Compl. ¶ 132.) As explained
 20 below, no legal principle allows plaintiffs to hold a handful of defendants, plucked from among
 21 all the world's innumerable greenhouse-gas emitters, liable in tort for all property damage
 22 allegedly caused by hundreds of years of human activity. *See Canyon County v. Syngenta Seeds,*
 23 *Inc.*, 519 F.3d 969, 982-83 (9th Cir. 2008) (affirming dismissal of complaint for failure to plead
 24 facts sufficient to establish causation); *Or. Laborers-Employers Health & Welfare Trust Fund v.*
 25 *Philip Morris, Inc.*, 185 F.3d 957, 962-64 (9th Cir. 1999) (same).

26 Causation is an "essential element" of any tort. W. Page Keeton et al., *Prosser & Keeton*
 27 *on Torts* § 41, at 263 (5th ed. 1984) ("*Prosser & Keeton*"). But causation does not, of course,
 28 encompass any and all acts that contributed in some way to the creation of a given event. *See*
Fairbanks N. Star Borough v. Rogers & Babler, 747 P.2d 528, 532 (Alaska 1987) ("[t]he event

1 without millions of causes is simply inconceivable”). “As a practical matter, legal responsibility
2 must be limited to those causes which are so closely connected with the result and of such
3 significance that the law is justified in imposing liability.” *Prosser & Keeton* § 41, at 264; *see*
4 *Restatement (Second) of Torts* § 431 cmt. a (“Restatement”).

5 To distinguish those antecedent causal factors for which legal liability may be assigned
6 from the universe of factors giving rise to any given event, courts generally ask two questions:
7 “whether the defendant’s conduct was the ‘cause in fact’ of the injury; and, if so, whether as a
8 matter of social policy the defendant should be held legally responsible for the injury.” *Osborn v.*
9 *Irwin Mem’l Blood Bank*, 5 Cal. App. 4th 234, 252 (1992); *see Staton ex rel. Vincent v. Fairbanks*
10 *Mem’l Hosp.*, 862 P.2d 847, 851 & n.7 (Alaska 1993) (causation involves “[t]wo distinct prongs”:
11 “actual causation, and a more intangible legal policy element”); *Prosser & Keeton* § 42, at 272-73
12 (“Once it is established that the defendant’s conduct has in fact been one of the causes of the
13 plaintiff’s injury, there remains the question whether the defendant should be legally responsible
14 for the injury.”).¹ The latter, policy-based inquiry is often referred to as “legal” or “proximate”
15 cause. *See Vincent*, 862 P.2d at 851 n.7; *Prosser & Keeton* § 42, at 273.²

16 As elaborated below, plaintiffs do not and cannot allege facts showing that defendants’
17 contributions to centuries of greenhouse gas emissions from worldwide human activities were an
18 actual or proximate cause of plaintiffs’ injuries.

19
20 ¹ Plaintiffs have not identified the source of law they believe governs their state-law
21 claims, but it is possible that those claims will be separately governed by the distinct and variable
22 tort laws of every U.S. and foreign jurisdiction in which defendants have greenhouse-gas emitting
23 facilities. *See Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (source state’s law governs
24 water-pollution nuisance claim). Although defendants take no position on the resolution of the
25 choice-of-law question at this time, disposition of this motion is nevertheless proper because,
while state tort rules conflict in various ways, plaintiffs’ claims cannot proceed under the most
basic causation principles applicable in any state and under federal common law, no matter how
those principles are articulated. For convenience, this brief relies primarily on precedents from
California and Alaska, as well as the Restatement and authoritative hornbooks, all of which
illustrate basic causation rules generally followed in all U.S. jurisdictions.

26 ² Some authorities, including most prominently the Restatement, use “legal” or
27 “proximate” cause to refer to all causal events that can result in legal liability, as opposed to those
28 events that are only causal in a “philosophic” sense. *Restatement* § 431 cmt. a. Such authorities
then generally divide the broad category of legal or proximate cause into the same factual and
policy prongs employed elsewhere. *See Prosser & Keeton* § 41, at 264; *Maupin v. Widling*, 192
Cal. App. 3d 568, 573 (1987).

1 **A. Plaintiffs Do Not Allege Facts Sufficient To Establish Causation-In-Fact.**

2 States vary in how they articulate the actual cause or cause-in-fact requirement, but most –
3 including California and Alaska – employ some version of the “substantial factor” test set forth in
4 §§ 431-433 of the Restatement. *See Vincent*, 862 P.2d at 851-52; *Parks Hiway Enters. v. CEM*
5 *Leasing, Inc.*, 995 P.2d 657, 666 (Alaska 2000) (applying “substantial factor” test to nuisance
6 claim); *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1052-53 (1991); *see also Prosser & Keeton* § 41,
7 at 267-68. Normally an act will be a “substantial factor” in causing an injury only when the
8 injury would not have happened but for the act. Restatement § 432(1); *Vincent*, 862 P.2d at 851;
9 *Mitchell*, 54 Cal.3d at 1052. Where a plaintiff claims injury allegedly caused by more than one
10 actor, the defendant’s act is deemed a “substantial factor” if it “by itself was sufficient to cause
11 the injury.” *Vincent*, 862 P.2d at 851; *see* Restatement § 432(2). In short, to be a substantial
12 factor in causing an injury, a defendant’s act must be either a necessary or sufficient cause of the
13 injury.

14 Plaintiffs do not allege that either is true here. They obviously cannot allege that global
15 warming never would have happened but for any one defendant’s emissions, nor do they allege
16 that global warming would not have happened but for all the defendants’ emissions. Global
17 warming, they say, is the product of *all* human activity for at least two centuries. *See supra* at 2-
18 3. Defendants’ emissions, they say, did no more than “substantially contribute” to atmospheric
19 changes, in some unquantified, unspecified, and undefined way. That is not enough to satisfy the
20 legal requirements of causation – as just noted, a “contribution” to an event, even a “substantial
21 contribution,” qualifies as a *legal cause* of the event only if the contributing act was, by itself,
22 necessary or sufficient to bring about the event. Plaintiffs make no such allegation here.

23 Plaintiffs instead apparently seek to evade this fundamental causation requirement on an
24 extraordinary theory of all-humanity joint liability: all human actors and entities that emit
25 greenhouse gases would be deemed joint tortfeasors, but only a small subset – defendants here –
26 would be held liable for all the harms caused by centuries of man-made greenhouse gas emissions
27 across the planet. Plaintiffs ground this theory mainly on inapposite cases involving river
28 pollution and similar situations, where each polluter’s own individual contribution was harmless

1 in itself – *i.e.*, neither necessary nor sufficient to cause plaintiffs’ injury – but where all the
2 contributions combined to create pollution sufficiently harmful to injure the plaintiff. *See Prosser*
3 *& Keeton* § 52, at 354 (“If several defendants independently pollute a stream, the impurities
4 traceable to each may be negligible and harmless, but all together may render the water entirely
5 unfit for use.”); *see, e.g., In re MTBE Prods. Liab. Litig.*, 447 F. Supp. 2d 289, 301 (S.D.N.Y.
6 2005); *Warren v. Parkhurst*, 78 N.E. 579, 582 (N.Y. 1906); *Woodyear v. Schaefer*, 57 Md. 1, 9-
7 11 (1904); *Lockwood Co. v. Lawrence*, 77 Me. 297, 306-10 (1885). Those cases have no
8 application here. They involve pollution of a particular location (such as a river or groundwater
9 area, or a localized air environment) by emissions of noxious chemicals from a discrete set of
10 polluters, which together are the entire source of the pollution. In those unique circumstances,
11 each individual contributor “is deemed to have caused the harm,” and courts have allowed
12 plaintiffs to “sue any entity that contributed to the commingled product that caused their injury.”
13 *MTBE*, 447 F. Supp. 2d at 301. Typically all the contributors are named as defendants in such
14 cases, but if not, as the *MTBE* court noted, it is only because the named defendants “can implead
15 other responsible parties.” *Id.* at 301-02.

16 Applied here, the theory invoked in those cases would mean that every “contributor” to
17 atmospheric greenhouse gas concentrations – *i.e.*, every human and commercial actor on the
18 planet, by plaintiffs’ own account – would be “deemed to have caused the harm.” Plaintiffs thus
19 would be entitled to sue any one contributor – perhaps a farmer driving a tractor in Nebraska, or a
20 shrimp fisherman running his boat off the Mississippi Gulf shore. The defendants likewise would
21 be entitled to implead all the billions of other worldwide contributors to the alleged harm. The
22 point, of course, is not that these are simple procedural maneuvers demonstrating why this case
23 can be treated just like a traditional pollution nuisance case. Just the opposite: the obvious
24 impossibility of treating this case like a traditional nuisance case demonstrates why it is *not* a
25 traditional nuisance case. Far from being an effort to hold an identifiable group of polluters liable
26 for a discrete nuisance caused entirely by that group, this case is an effort to hold a carefully
27 selected subgroup of U.S. businesses liable for an alleged nuisance caused by *everybody on the*
28 *planet* over several centuries’ time, ignoring all other contributors to the harm, including car and

1 truck drivers, construction and farming vehicle operators, manufacturing plants, and foreign
2 emitters of all kinds. There is simply no precedent for labeling every actor on Earth a tortfeasor,
3 and then seeking to impose damages liability for the consequences of all human activity on one,
4 two, or two dozen select actors. See *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 372
5 (S.D.N.Y. 2005) (“Cases applying the rule of concurrent wrongdoing typically involve a small
6 number of tortfeasors, such that the imposition of joint and several liability does not cause
7 disproportionate hardship to the defendants”); cf. *City of St. Louis v. Benjamin Moore & Co.*, 226
8 S.W.3d 110, 116 (Mo. 2007) (rejecting theory of causation that “risks exposing ... defendants to
9 liability greater than their responsibility and may allow the actual wrongdoer to escape liability
10 entirely”).

11 **B. Plaintiffs Fail To Allege Facts Sufficient To Establish Legal Causation.**

12 Even where a given act is a cause-in-fact of an injury, it will not result in liability unless it
13 is also a “proximate” or “legal” cause of the injury. See *Martinez v. Pacific Bell*, 225 Cal. App.
14 3d 1557, 1565-66 (1990) (proximate cause required for nuisance claims); Cal. Jur. 3d, Nuisances
15 § 36 (2008) (same). The basic proximate cause question is whether the act was “so significant
16 and important a cause that the defendant should be legally responsible.” *Vincent*, 862 P.2d at 851
17 (quoting *Prosser & Keeton* § 42, at 273); see *Osborn*, 5 Cal. App. 4th at 252. Because “both
18 significance and importance turn upon conclusions in terms of legal policy,” proximate cause “is
19 primarily a problem of law,” not fact. *Prosser & Keeton* § 42, at 273; see *Maupin*, 192 Cal. App.
20 3d at 573 (proximate cause is “question of law and social policy”). Under this principle, “[i]f the
21 force [the defendant] set in motion, has become, so to speak, merged in the general forces that
22 surround us . . . it can be followed no further. Any later combination of circumstances to which it
23 may contribute in some degree is too remote from the defendant to be chargeable to him.”
24 *Vincent*, 862 P.2d at 851 n.8 (quoting Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv.
25 L. Rev. 103, 112 (1911)).

26 There is no basis in law for assigning to the few defendants in this case all legal
27 responsibility for two centuries of worldwide human activity that allegedly has given rise to
28 climate change. By plaintiffs’ own account, defendants’ emissions “merged in the general forces

1 that surround us,” making no more than some indeterminate contribution to the “combination of
 2 circumstances” that allegedly resulted in plaintiffs’ harm. Indeed, the connection between
 3 defendants’ conduct and that harm could hardly be more attenuated. Plaintiffs allege that each
 4 company emits greenhouse gases, which combine with gases emitted by natural sources and
 5 countless unnamed persons, companies, and other human actors around the world, all going about
 6 the routine activities associated with human life over the past two hundred years. (Compl. ¶¶ 3,
 7 125.) The emissions from all these sources over all that time combine in the atmosphere,
 8 allegedly resulting in the earth’s retention of excessive heat. (Compl. ¶ 123.) Tertiary factors
 9 then come into play exacerbating the warming effect. (Compl. ¶ 127.) The warming attributable
 10 to greenhouse gases then inhibits the development of winter sea ice off the Alaskan coast, which
 11 leaves Kivalina more vulnerable to winter storm activity. (Compl. ¶ 185.) Finally, recurring
 12 storms erode the land Kivalina is built on. (Compl. ¶ 4.)

13 Those allegations do nothing whatsoever to demonstrate that defendants’ emissions made
 14 such a contribution to the chain of events that defendants themselves – alone among all the
 15 world’s emitters – can be singled out to bear all the legal consequences of more than two
 16 centuries’ worth of human activity. Plaintiffs might just as well have targeted steel mills in
 17 Pennsylvania, concrete plants in Georgia, farmers in the San Joaquin Valley, or a defendant class
 18 of all U.S. car and truck owners. Any designation of defendant greenhouse-gas emitters would be
 19 as arbitrary as this one, and equally inadequate to establish legal causation. Plaintiffs’ nuisance
 20 claims should be dismissed with prejudice.

21 **II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE FEDERAL COMMON**
 22 **LAW OF NUISANCE.**

23 **A. The Federal Common Law Does Not Recognize Private Nuisance Claims For**
 24 **Greenhouse Gas Emissions.**

25 No court has ever recognized a federal common law nuisance claim of the sort asserted by
 26 plaintiffs here. Precedents of the U.S. Supreme Court and other courts make clear that a federal
 27 common law nuisance claim may be asserted only by *a State seeking injunctive relief, i.e.,*
 28 *abatement of the nuisance.* Because plaintiffs here are not States, and they do not seek abatement,

1 their federal common law nuisance claim must be dismissed as a matter of law.

2 Plaintiffs' nuisance claim has no basis in those tiny shards of federal common law that
3 survived the Supreme Court's holding in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), that
4 "[t]here is no federal general common law." *Id.* at 78. Since *Erie*, courts have been required to
5 "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate
6 standards to be applied as a matter of federal law." *City of Milwaukee v. Illinois*, 451 U.S. 304,
7 317 (1981) ("*Milwaukee I*"); cf. *Medellin v. Texas*, 128 S. Ct. 1346, 1362 (2008) ("Our Framers
8 established a careful set of procedures that must be followed before federal law can be created
9 under the Constitution – vesting that decision in the political branches, subject to checks and
10 balances."). There are but a "few and restricted" instances in which the presumption against
11 federal common lawmaking can be overcome, including (1) cases "in which Congress has given
12 the courts the power to develop substantive law," and (2) cases "in which a federal rule of
13 decision is necessary to protect uniquely federal interests." *Tex. Indus., Inc. v. Radcliff Materials,*
14 *Inc.*, 451 U.S. 630, 640 (1980) (quotations and citations omitted). Neither of these exceptions has
15 any application here.

16 The first category can be easily dismissed: nobody contends that Congress has
17 affirmatively authorized the courts to regulate greenhouse gas emissions. Cf. *Nat'l Audubon*
18 *Soc'y v. Dep't of Water*, 869 F.2d 1196, 1202 (9th Cir. 1988) ("Congress has not authorized the
19 courts to develop a substantive law of air pollution."). The second category, too, can be
20 dismissed: as the Ninth Circuit has held, "there is not 'a uniquely federal interest' in protecting
21 the quality of the nation's air." *Id.* at 1203. In the absence of a *sovereign State* as plaintiff
22 asserting that pollution interferes with the use or enjoyment of its territory, courts have no
23 authority to create a federal common law nuisance tort. *Id.* at 1205.

24 Plaintiffs appear to base their claim principally on *Illinois v. City of Milwaukee*, 406 U.S.
25 91 (1972) ("*Milwaukee I*"), where the Supreme Court acknowledged the possibility that "federal
26 'common law'" might "give rise to a claim for abatement of a nuisance caused by interstate water
27 pollution." *Milwaukee II*, 451 U.S. 304, 307 (1981); see also *Middlesex County Sewerage Auth.*
28 *v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981) (describing *Milwaukee I*). But as the Ninth

1 Circuit made clear in *Audubon* – and as many other precedents confirm – federal common law
2 nuisance claims are available only to sovereign States seeking injunctive relief.

3 In *Audubon*, the Ninth Circuit rejected an environmental group’s attempt to bring a federal
4 nuisance claim against the Los Angeles Department of Water and Power to enjoin the Department
5 from diverting streams away from a California lake, a diversion which allegedly caused “dust
6 storms” polluting both California and Nevada air. The court held that plaintiffs’ nuisance claims
7 were not cognizable under federal common law because, *inter alia*, they did not implicate the
8 “uniquely federal interests” necessary to permit creation of a federal common law claim.
9 *Audubon*, 869 F.2d at 1202. A “uniquely federal interest,” the court explained, “exists only in
10 such narrow areas as those concerned with [1] the rights and obligations of the United States, [2]
11 interstate and international disputes implicating the conflicting rights of states or our relations
12 with foreign nations, and [3] admiralty cases.” *Id.*

13 None of those interests was implicated in *Audubon* and none is implicated here.
14 Admiralty, of course, is as irrelevant here as it was there. So too are “rights and obligations of the
15 United States.” *Audubon* makes clear that those interests are limited to “rights and obligations of
16 the United States *as sovereign*,” which is what “required application of federal law” in prior
17 cases. *Id.* at 1204; *see id.* at 1203 (describing cases involving the Federal Government’s own
18 contractual rights and commercial paper obligations). Thus, although the plaintiffs asserted
19 “some unquantified federal interest in protecting the nation’s air quality,” that interest did not
20 suffice to allow creation of a federal common law nuisance claim because it “d[id] not necessarily
21 involve the authority and duties of the United States *as sovereign*” thereby “making application of
22 [state] law inappropriate.” *Id.* at 1204 (emphasis added). Likewise here, plaintiffs’ “air
23 pollution” nuisance claims are not based on, and do not implicate, sovereign rights of the United
24 States requiring the application of federal law.

25 Nor does this case implicate the type of “interstate dispute” deemed sufficient in *Audubon*
26 to allow application of federal common law. Such cases, the Ninth Circuit emphasized, include
27 “only those interstate controversies which involve *a state* suing sources outside of its own
28 territory.” *Id.* at 1205 (emphasis added); *see also Sea Clammers*, 453 U.S. at 21 (*Milwaukee I* did

1 not create “a cause of action ... brought under federal common law by *a private plaintiff, seeking*
 2 *damages*” (emphasis added)). *Audubon* confirms that interstate controversies involve “uniquely
 3 federal interests” for purposes of federal common law only when a sovereign State is asserting its
 4 own sovereign right in the quality of its air. 869 F.2d at 1204-05; *see also Jackson v. Johns-*
 5 *Manville Sales Corp.*, 750 F.2d 1314, 1324-25 (5th Cir. 1985) (dispute must “involve the rights
 6 and duties of states as discrete political entities,” making it inappropriate for state law to control);
 7 *Comm. for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1010 (4th Cir.
 8 1976) (federal common law of public nuisance is limited to disputes asserting rights of States);
 9 *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1013-14 (E.D. La. 1993)
 10 (private party cannot assert public nuisance action under federal common law).³

11 No State is a party to this case, nor are “the environmental rights of a State” at issue.
 12 *Milwaukee I*, 406 U.S. at 107 n.9 (quotation omitted). There are thus no “uniquely federal
 13 interests” here, even though the issue may extend beyond the borders of a single State, and even
 14 across all States. “The enactment of a federal rule in an area of national concern ... is generally
 15 made not by the federal judiciary, purposefully insulated from democratic pressures, but by the
 16 people through their elected representatives in Congress.” *Audubon*, 869 F.2d at 1201; *see*
 17 *Jackson*, 750 F.2d at 1324-25 (“Clearly, if federal courts are to remain courts of limited powers as
 18 required under *Erie*, a dispute ... cannot become ‘interstate,’ in the sense of requiring the
 19 application of federal common law, merely because the conflict is not confined within the
 20 boundaries of a single state.”). Outside such recognized federal common-law domains as

21 _____
 22 ³ These cases follow from Supreme Court precedents tying the recognition of limited
 23 federal common law remedies to the fact that States surrendered certain rights upon entering the
 24 Union and now lack the means for resolving interstate disputes – means which they possessed
 25 before surrendering their rights as independent sovereigns. *Cf. Massachusetts v. EPA*, 549 U.S.
 26 497, 127 S. Ct. 1438, 1454 (2007) (“When a State enters the Union, it surrenders certain
 27 sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in
 28 greenhouse gas emissions.”). For example, the Court created a remedy for boundary disputes
 between States in *Rhode Island v. Massachusetts*, 37 U.S. 657, 724 (1838), because the States had
 surrendered their “power ... to settle a controverted boundary between themselves ... or in any
 department of the government,” other than the courts. In *Missouri v. Illinois*, 180 U.S. 208
 (1901) (“*Missouri P*”), and in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) – both
 pre-*Erie* decisions – the Supreme Court held that the States could seek abatement for
 transboundary nuisance disputes, because the States had surrendered their authority to “forcibl[y]
 abate[] ... outside nuisances.” *Id.*

1 admiralty, courts are authorized to create federal common law as a “necessary expedient”
2 (*Milwaukee II*, 451 U.S. at 314; *Audubon*, 869 F.2d at 1204) only when the rights and obligations
3 of federal and State sovereigns are involved. No such interests are implicated here.

4 Indeed, even where sovereign States are involved, the Supreme Court has cautioned that
5 only “some ... demands” to *abate* alleged nuisances warrant the creation of federal common law.
6 *Tennessee Copper*, 206 U.S. at 237 (emphasis added). A State may properly seek an *injunction*
7 for “a public nuisance of simple type,” *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923),
8 including, for example, where city garbage washes up on a neighboring State’s beaches, *New*
9 *Jersey v. New York*, 283 U.S. 473, 476 (1931), where “noxious gas” directly destroys crops,
10 *Tennessee Copper*, 206 U.S. at 236, and where city sewage is deposited in public waterways used
11 downstream for drinking, agriculture and manufacturing, *Missouri v. Illinois*, 200 U.S. 496, 517
12 (1906) (“*Missouri II*”).

13 The claims in such “simple nuisance” cases could not differ more starkly from the claims
14 involved here. Plaintiffs allege that the accumulation of greenhouse gas emissions over hundreds
15 of years has created a greenhouse effect, which has allegedly caused average global temperatures
16 to increase, which has allegedly caused arctic ice to form later in the year than it otherwise would,
17 which has allegedly reduced a protective barrier against storms, which has allegedly resulted in
18 more storm damage to the Plaintiffs’ village, which in turn allegedly requires the expenditure of
19 hundreds of millions of dollars for relocation. (Compl. ¶¶ 1-4, 123-31.) Plaintiffs assert that one
20 of countless contributing factors in this centuries-long global phenomenon – *i.e.*, defendants’
21 worldwide carbon dioxide and methane emissions – mixes indiscriminately in the global
22 atmosphere with natural elements and gases produced for more than a hundred years by billions
23 of other individuals, firms, and governments not before this Court, and allegedly contributes in
24 some indeterminate degree to global harm through a hopelessly attenuated chain of causation.
25 The application of federal common law to address and regulate such a phenomenon would draw
26 this Court into a vast morass of hotly contested environmental policy issues bearing no
27 resemblance to the simple adjudication of a common tort claim. *See Milwaukee II*, 451 U.S. at
28 317, 325 (recognizing that federal courts applying “vague and indeterminate nuisance concepts

1 and maxims of equity jurisprudence” are ill-equipped to confront problems like interstate
2 pollution, which is “particularly unsuited to the approach inevitable under a regime of federal
3 common law”).

4 Additionally, plaintiffs are seeking only monetary damages – not abatement of the
5 nuisance. (Compl. ¶ 6 & “Relief Requested”) The Supreme Court has never held that a plaintiff
6 may bring a federal common law nuisance action seeking damages rather than abatement. *See*
7 *Sea Clammers*, 453 U.S. at 10-12 & nn.17, 21 (reserving the question). To the contrary, several
8 precedents suggest that damages would not be available. *See Milwaukee I*, 406 U.S. at 108 n.10
9 (“[T]he kind of *equitable* relief to be accorded lies in the discretion of the chancellor.” (emphasis
10 added)); *Tennessee Copper*, 206 U.S. at 237-38 (noting “the difficulty of valuing [the type of
11 rights at issue in a federal common law public nuisance action] in money”); *Missouri I*, 180 U.S.
12 at 244 (“The grounds of this jurisdiction, in cases of ... public nuisances, is the ability of courts of
13 *equity* to give a more speedy, effectual and permanent remedy than can be had at law.” (emphasis
14 added)). There is no basis for moving “considerably beyond” prior precedent in this case by
15 creating a damages remedy. *Sea Clammers*, 453 U.S. at 10; *see also* Donald G. Gifford, *Public*
16 *Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 745-46 (2003)
17 (“Historically, public nuisance most often was not regarded as a tort, but instead as a basis for
18 public officials to pursue criminal prosecutions or seek injunctive relief to abate harmful conduct.
19 Only in limited circumstances was a tort remedy available to an individual, and apparently never
20 to the state or municipality.”).

21 Finally, there is no basis for extending the federal common law of nuisance to these
22 particular plaintiffs, a municipality and a Native tribe. As Supreme Court precedent makes clear,
23 the basis for federal common law remedies rests on the States’ relinquishment of sovereign
24 warmaking powers that would otherwise be used to resolve intersovereign disputes in exchange
25 for entering into the Union and receiving the rights and protections attendant to statehood.⁴ As a

26 ⁴ *See supra* note 3; *see also Missouri II*, 200 U.S. at 520-21 (“It may be imagined that a
27 nuisance might be created by a State upon a navigable river like the Danube, which would
28 amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created
by a State upon the Mississippi, the controversy would be resolved by the more peaceful means of
a suit in this court.”); *Missouri I*, 180 U.S. at 241 (Court must provide remedy because the State’s

1 mere instrumentality of the State, the City of Kivalina has no independent right to conduct
 2 statecraft and is thus not entitled to consideration from the federal government for a bargain it did
 3 not make. *Cf. Alden v. Maine*, 527 U.S. 706, 756 (1999) (although Congress may not subject a
 4 State to suit in its own courts, no such constitutional right extends to municipalities).⁵

5 The Native Village of Kivalina has no more authority to cloak itself in the State's
 6 sovereignty than does the City. While the Supreme Court has held that Indian Tribes may assert
 7 "aboriginal" property rights under federal common law, *Oneida Indian Nation v. County of*
 8 *Oneida*, 414 U.S. 661, 676 (1974), Alaskan Native Villages do not hold "aboriginal" property
 9 rights. The Alaska Native Claims Settlement Act ("ANCSA") – which was enacted "to end the
 10 sort of federal supervision over Indian affairs that had previously marked federal Indian policy,"
 11 *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523-24 (1998) – extinguished all
 12 aboriginal claims to Alaska land, 42 U.S.C. § 1618(a), and then reconveyed title to "village
 13 corporations," *id.* § 1618(b). Plaintiff Native Village of Kivalina therefore holds title to its land
 14 by federal conveyance, and like the property rights of municipalities and private parties, such title
 15 rights are governed by state property law. *Oneida Nation*, 414 U.S. at 676 (distinguishing
 16 aboriginal property rights (an issue of federal law) from property rights by federal conveyance,
 17 which are governed by state property law). Because the Native Village cannot claim the status of
 18 a sovereign State, its claims do not create uniquely federal interests necessitating the application
 19 of federal common law.

20 **B. Congress Has Displaced Any Authority Of Federal Courts To Develop Their**
 21 **Own Common Law Rules To Regulate Greenhouse Gas Emissions.**

22 As the previous section demonstrated, no court has ever recognized a federal common law
 23

24 "[d]iplomatic powers and the right to make war [had] been surrendered to the general
 government").

25 ⁵ Nor can a municipality represent the State as a whole, since municipalities within a
 26 single State may have conflicting interests. *See Milwaukee I*, 406 U.S. at 96-97 ("The City of
 27 Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed
 28 area of the Delaware River and its tributaries and depend upon those waters. If we undertook to
 evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an
 intramural dispute over the distribution of water within the Commonwealth." (quoting *New Jersey*
v. New York, 345 U.S. 369, 373 (1953))).

1 nuisance claim akin to plaintiffs’ claim here. That is reason enough for the Court to reject
2 plaintiffs’ claim, but there is another reason as well: Congress has already enacted a statute
3 submitting the subject of nationwide greenhouse gas emissions and global warming to the
4 regulatory authority of a federal agency, thereby displacing the authority of courts to fashion their
5 own rules and standards governing the same subject under the guise of federal common law.

6 As a general matter, “federal courts create federal common law only as a necessary
7 expedient when problems requiring federal answers are not addressed by federal statutory law.”
8 *Milwaukee II*, 451 U.S. at 319 n.14. Thus a threshold question for any court considering the
9 creation of a federal common law cause of action is whether Congress has already enacted a
10 statute addressing the problem at issue. Although this inquiry is sometimes framed as whether
11 the federal statute “preempts” federal common law, *see, e.g., County of Oneida v. Oneida Indian*
12 *Nation*, 470 U.S. 226, 236-237 (1985), the standard for displacement of federal common law
13 differs significantly from the standard for preemption of state law. Whereas preemption involves
14 federalism and concern for state sovereign rights, displacement of federal common law involves
15 only a federal separation of powers question – *i.e.*, “which branch of the Federal Government is
16 the source of *federal* law.” *Milwaukee II*, 451 U.S. at 319 n.14. In answering that question,
17 courts “start with the assumption that it is for Congress, not federal courts, to articulate the
18 appropriate standards to be applied as a matter of federal law.” *Id.* at 317. This rule reflects the
19 Supreme Court’s longstanding “commitment to the separation of powers,” which the Court has
20 described as “too fundamental to continue to rely on federal common law by judicially decreeing
21 what accords with common sense and the public weal when Congress has addressed the
22 problem.” *Id.* at 315. Thus, “[w]hile federalism concerns create a presumption against
23 preemption of state law, including state common law, separation of powers concerns create a
24 presumption *in favor of* preemption of federal common law whenever it can be said that Congress
25 has legislated on the subject.” *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981)
26 (emphasis added); *accord United States v. Tenet Healthcare Corp.*, 343 F. Supp. 2d 922, 933
27 (C.D. Cal. 2004); *see also Milwaukee II*, 451 U.S. at 317 n.9 (“the very concerns about displacing
28 state law which counsel against finding pre-emption of *state* law in the absence of clear intent

1 actually suggest a willingness to find congressional displacement of *federal* common law”).⁶

2 Unlike in the preemption context, the displacement question is not whether Congress has
3 “affirmatively proscribed” the asserted federal common law claim, *Milwaukee II*, 451 U.S. at 315,
4 or whether there is “evidence of a clear and manifest purpose” to displace federal common-law
5 rules, *id.* at 317. The question instead is simply “whether the legislative scheme ‘spoke directly’”
6 to the issue before the court. *Id.* at 315 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618,
7 625 (1978)). If Congress has “legislated on the subject,” *Oswego Barge*, 664 F.2d at 335, that
8 legislation obviates the need for (and thus displaces) distinct judicial regulation of the same
9 subject through the imposition of judge-made common law rules.⁷

10 The question here, then, is whether Congress has directly addressed the subject of
11 greenhouse gas emissions and global warming. Because Congress has indeed spoken directly to
12 that subject in the Clean Air Act (“CAA”) – by assigning regulatory responsibility over the issue
13 to the Environmental Protection Agency (“EPA”), as the Supreme Court recently held – this
14 Court cannot regulate the same subject by creating federal common law nuisance liability.

15 In *Massachusetts v. EPA*, the Supreme Court held that carbon dioxide falls within the
16 CAA’s definition of an “air pollutant,” *see* 127 S. Ct. at 1459-60 (citing 42 U.S.C. § 7602(g)),
17 and that the EPA therefore “has the statutory authority to regulate the emission of such gases
18 from new motor vehicles,” *id.* at 1462. (The same definition of “air pollutant” applies to CAA
19 provisions addressing emissions from stationary sources. *See* 42 U.S.C. §§ 7408-7411.) The
20 Supreme Court recognized that the Congresses that drafted the CAA “might not have appreciated
21 the possibility that burning fossil fuels could lead to global warming.” *Id.* Nevertheless, the

22 ⁶ Given the difference between federal statutory preemption of state law and federal
23 statutory displacement of federal common law, this memorandum uses the term “displacement”
rather than preemption to refer to the latter concept.

24 ⁷ The presumption in favor of displacement may have less force when the statute would
25 “invade ... long-established and familiar principles” of common law. *United States v. Texas*, 507
26 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)); *see also In*
27 *re Hanford Nuclear Reservation Litig.*, 521 F.3d 1028, 1044 (9th Cir. 2008); *Kasza v. Browner*,
133 F.3d 1159, 1167-68 (9th Cir. 1998). But of course a private nuisance tort challenging
28 worldwide carbon dioxide emissions and planetary climate change is neither “long-established”
nor “familiar.” *See Sea Clammers*, 453 U.S. at 10 (allowing a federal common law nuisance
claim for damages would go “considerably beyond” prior precedent). The usual presumption
favoring displacement therefore applies. *See Milwaukee II*, 451 U.S. at 317 & n.9.

1 Supreme Court held, “they did understand that without regulatory flexibility, changing
2 circumstances and scientific developments would soon render the Clean Air Act obsolete.” *Id.*
3 Therefore, Congress “intentional[ly]” granted the EPA broad authority over “any” air pollutant in
4 order “to confer the flexibility necessary to forestall such obsolescence.” *Id.* Based on that
5 conclusion, the Court held that the EPA erred in declining to consider whether carbon dioxide
6 endangers the public health or welfare.

7 Plaintiffs’ complaint addresses precisely the subject already addressed by the CAA as
8 construed in *Massachusetts* – the regulation of greenhouse gas emissions allegedly contributing to
9 global warming. Plaintiffs would have this Court make not only the kind of environmental risk
10 and public health findings Congress committed to the EPA, but also the kind of regulatory
11 judgments the agency may make only upon satisfaction of certain prerequisites. But instead of
12 applying comprehensive administrative factfinding tools, technical expertise, and calibrated
13 regulatory mechanisms, the Court could act only through the “application of often vague and
14 indeterminate nuisance concepts” (*Milwaukee II*, 451 U.S. at 317) and the blunt remedy of
15 damages awards. The Ninth Circuit has already recognized that a federal common law nuisance
16 theory is displaced by the Clean Water Act because “a nuisance theory would enable a federal
17 district judge to substitute a different balancing of interests from the one made by the agency to
18 which Congress assigned the job in the [Clean Water Act’s] NPDES permit system.” *In re Exxon*
19 *Valdez*, 270 F.3d 1215, 1230-31 (9th Cir. 2001), *aff’d in relevant part, Exxon Shipping Co. v.*
20 *Baker*, ___ S. Ct. ___, 2008 WL 2511219 (2008); *see also Milwaukee II*, 451 U.S. at 325 (“Not only
21 are the technical problems difficult – doubtless the reason Congress vested authority to administer
22 the [Clean Water] Act in administrative agencies possessing the necessary expertise – but the
23 general area is particularly unsuited to the approach inevitable under a regime of federal common
24 law.”). For the same reasons, federal common law nuisance liability is an inappropriate
25 supplement to the EPA’s regulatory authority here.

26 The CAA “was intended comprehensively to regulate, through guidelines and controls, the
27 complexities of restraining and curtailing modern day air pollution.” *Bunker Hill Co. Lead &*
28 *Zinc Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981); *see also Chevron U.S.A. Inc. v. NRDC*,

1 467 U.S. 837, 848 (1984) (1977 amendments to CAA are “a lengthy, detailed, technical, complex
2 and comprehensive response to a major social issue.”); *MVMA v. N.Y. State Dep’t of Envtl.*
3 *Conservation*, 17 F.3d 521, 524-25 (2d Cir. 1994) (describing CAA as “one of the most
4 comprehensive pieces of legislation in our nation’s history”). “Nothing in the Clean Air Act
5 suggests Congress intended to rely for enforcement of this Act upon a federal common law
6 remedy.” *Audubon*, 869 F.2d at 1202. It therefore leaves no room for plaintiffs’ attempt to seek,
7 through judicial lawmaking, a balancing of policy interests distinct from the balance struck by the
8 EPA pursuant to its statutory authority.

9 Nor is it relevant for purposes of displacement analysis that the EPA has only begun to act
10 or that plaintiffs may be dissatisfied with the pace or substance of the regulatory scheme
11 established by federal statute. All that matters is that there *is* federal legislation addressing the
12 subject, which by definition reflects Congress’s judgment about how federal law ought to address
13 the problem identified by the plaintiff. In the CAA, Congress determined that the appropriate
14 method for addressing environmental effects of greenhouse gas and other emissions was to
15 delegate regulatory authority to the federal agency equipped with the expertise and tools to gather
16 information and balance competing policy concerns. So far as federal common law is concerned,
17 that judgment is conclusive: “Federal courts lack authority to impose more stringent [regulations]
18 under federal common law than those imposed by the agency charged by Congress with
19 administering this comprehensive scheme.” *Milwaukee II*, 451 U.S. at 320; *see also Jesinger v.*
20 *Nev. Fed. Credit Union*, 24 F.3d 1127, 1132 (9th Cir. 1994) (same); *accord Exxon Shipping Co.*
21 *v. Baker*, ___ S. Ct. ___, 2008 WL 2511219, at *10 n.7 (2008) (explaining that “common law
22 nuisance claims” in *Sea Clammers* and *Milwaukee II* were displaced because they “amounted to
23 arguments for effluent-discharge standards different from those provided by the [Clean Water
24 Act]”). Indeed, even if the EPA were to determine that certain emissions do *not* pose a danger to
25 the public health and welfare, the EPA’s decision not to regulate “would have as much
26 [displacement] force as a decision to regulate.” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66
27 (2002); *see also Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (holding that despite
28 the absence of a “comprehensive maritime code,” federal common law remedy is displaced by

1 “[t]he Death on the High Seas Act, [which] announces Congress’ considered judgment on such
 2 issues as the beneficiaries, the limitations period, contributory negligence, survival and
 3 damages”); *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982) (declining to
 4 create common law to supplement a non-comprehensive federal congressional scheme and stating
 5 “[a]dopting this distinction [between a ‘remedy’ and mere action] ... would be no different from
 6 holding that the solution Congress chose is not adequate”).

7 If a party objects to a federal statute or regulations as insufficiently onerous or
 8 comprehensive, the proper response is to seek statutory or regulatory change – it is not to ask a
 9 court to impose its own separate regulatory approach by creating federal common law tort
 10 liability. Plaintiffs’ federal common law nuisance claim must be dismissed.

11 **III. PLAINTIFFS FAIL TO STATE A CONSPIRACY OR CONCERT OF ACTION**
 12 **CLAIM.**

13 While Counts I and II assert public and private nuisance claims, Counts III and IV do not
 14 assert substantive torts at all, but instead allege theories of secondary actor liability. Specifically,
 15 Count III alleges a conspiracy among some (but not all) defendants to “participate in the
 16 intentional creation, contribution to and/or maintenance of a public nuisance, global warming,” by
 17 “mislead[ing] the public with respect to the science of global warming,” which would “delay
 18 public awareness of the issue” and prevent the public from “forc[ing] a change in the Conspiracy
 19 Defendants’ behavior.” (Compl. ¶ 269.) Count IV alleges a “concert of action” claim, which is
 20 merely a mechanism for pursuing a joint liability theory against all defendants collectively.⁸

21 Because plaintiffs’ underlying federal and state tort claims fail, their claims that
 22 defendants conspired or acted in concert to commit those underlying torts necessarily fail as well.
 23 Neither conspiracy nor concert of action is an independent cause of action – each theory is purely
 24 derivative of an underlying tort. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th
 25

26 ⁸ The Supreme Court has expressed doubt over the viability of any concert of action
 27 claim. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164,
 28 181 (1994) (“[The concert of action theory] has been at best uncertain in application.... [T]he
 leading cases applying this doctrine are statutory securities cases, with the common-law
 precedents largely confined to isolated acts of adolescents in rural society.” (quotation omitted)).

1 503, 514 (1994) (“Conspiracy is not an independent tort; it cannot create a duty or abrogate an
2 immunity. It allows tort recovery only against a party who already owes the duty and is not
3 immune from liability based on applicable substantive tort law principles.”); *Pac. Tel. & Tel. Co.*
4 *v. MCI Telecomm. Corp.*, 649 F.2d 1315, 1319 (9th Cir. 1981) (“Unlike its criminal counterpart
5 ... in order to be actionable [California law of civil conspiracy] requires [an] independently
6 wrongful act and resulting damages.”); *Christensen v. NCH Corp.*, 956 P.2d 468, 476 (Alaska
7 1998) (“adjunct theor[y]” of civil conspiracy “founder[s]” where primary tort is dismissed);
8 *Chavers v. Gatke Corp.*, 107 Cal. App. 4th 606, 615 (2003) (applying reasoning of *Applied*
9 *Equipment* to concert of action theory). Plaintiffs do not specify whether these claims are
10 asserted under federal common law or state law, but the point holds either way. *See Central*
11 *Bank*, 511 U.S. at 181 (citing *Prosser & Keeton* § 46, at 322-24) (concert of action); *Medallion*
12 *TV Enters., Inc. v. SelecTV of Cal., Inc.*, 627 F. Supp. 1290, 1298 (C.D. Cal. 1986) (conspiracy).

13 Finally, plaintiffs’ conspiracy claim must be dismissed because it seeks to hold certain
14 defendants liable for activity that is protected by the First Amendment to the U.S. Constitution.
15 Plaintiffs allege that these defendants sought to prevent legislative restrictions on their emissions
16 by making or sponsoring false statements in the public and political debate over global warming.
17 (Compl. ¶ 269.) But as explained in Part II.A. of the Utility Defendants’ memorandum in support
18 of their motion to dismiss Count III, the Petition and Speech Clauses of the First Amendment
19 prohibit courts from adjudicating the truth or falsity of viewpoints expressed in a hotly contested
20 public policy debate. Accordingly, plaintiffs’ conspiracy claim cannot proceed.

21 CONCLUSION

22 For the foregoing reasons, plaintiffs’ claims should be dismissed with prejudice.
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Respectfully Submitted,

MUNGER, TOLLES & OLSON LLP

O'MELVENY & MYERS LLP

By: /S/ Daniel P. Collins
Daniel P. Collins

By: /S/ John F. Daum
John F. Daum

Attorneys for Defendant
SHELL OIL COMPANY

Attorneys for Defendant
EXXON MOBIL CORPORATION

KING & SPALDING LLP

KIRKLAND & ELLIS LLP

By: /S/ Tracie J. Renfroe
Tracie J. Renfroe

By: /S/ Andrew B. Clubok
Andrew B. Clubok

Attorneys for Defendants
CHEVRON CORPORATION and CHEVRON
U.S.A. INC.

Attorneys for Defendant
CONOCOPHILLIPS COMPANY

ARNOLD & PORTER LLP

By: /S/ Matthew Heartney
Matthew Heartney

Attorneys for Defendants
BP AMERICA INC. AND BP PRODUCTS
NORTH AMERICA INC.

