No. 09-17490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF KIVALINA and CITY OF KIVALINA,
Plaintiffs-Appellants,

v.

EXXONMOBIL CORPORATION; BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; CONOCOPHILLIPS COMPANY; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; PEABODY ENERGY CORPORATION; THE AES CORPORATION; AMERICAN ELECTRIC POWER COMPANY, INC.; AMERICAN ELECTRIC POWER SERVICE CORPORATION; DTE ENERGY COMPANY; DUKE ENERGY CORPORATION; DYNERGY HOLDINGS, INC.; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; MIRANT CORPORATION; NRG ENERGY; PINNACLE WEST CAPITAL CORPORATION; RELIANT ENERGY, INC.; THE SOUTHERN COMPANY; AND XCEL ENERGY INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES SEEKING AFFIRMANCE

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The Washington Legal Foundation is a non-profit, public interest law and policy center based in Washington, D.C., with supporters in all fifty states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly participates as an amicus curiae in numerous cases in the U.S. Supreme Court and lower federal and state courts concerning environmental issues and the proper role of federal courts under Article III.

In particular, WLF filed an amicus brief in *Massachusetts v. EPA*, 549 U.S. 497 (2007), arguing that Congress did not authorize the EPA, under the Clean Air Act, to regulate carbon dioxide emissions for climate-change purposes. Although the Supreme Court held otherwise, its decision – that the Clean Air Act does authorize the EPA to regulate greenhouse gases – in fact supports the ruling below in this case, where the district court held that Plaintiffs' Complaint presents a nonjusticiable political question that can be resolved only as a matter of legislative or executive process.

WLF also filed an amicus brief in *California v. General Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), demonstrating again that global warming "liability" presents a nonjusticiable political question. In addition, WLF has published policy papers and conducted seminars critical of

the use of common law public nuisance claims to address global warming and similar public harms.

WLF supports each of the arguments made by Appellees in support of affirmance, but writes separately to argue that allowing the significant damages sought by the Plaintiffs in this action would not be in the public interest. The relief demanded here, by exposing the Defendants to virtually limitless liability, would threaten the viability of entire industrial sectors, even though those industrial sectors admittedly are minor contributors to global greenhouse gas levels, their emissions of greenhouse gases are entirely lawful, and they undoubtedly provide services of great social utility. Under these circumstances, WLF agrees with the judgment of the district court that this lawsuit presents a nonjusticiable political question, and that the Plaintiffs do not have standing to bring their claims in this action.

Appellants and Appellees have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Plaintiffs' Complaint demands that the Defendants be held jointly and severally liable for damages of up to $400 million on the theory that the village of Kivalina is being destroyed by global warming, to which the Defendants allegedly contribute. But Plaintiffs freely concede that the Defendants are only 19 of literally countless worldwide contributors to global warming. Moreover,

Plaintiffs' own sources for the emission figures in their Complaint show that Defendants' contribution to global greenhouse gas levels in a single year is less than 3%, and that number does not account for the temporal phenomenon, which Plaintiffs themselves allege, that "emissions persist in the atmosphere for centuries, and thus have a lasting effect on climate." And there is no allegation – nor could there be – that Defendants' emissions are unlawful or unpermitted. Indeed, the emissions about which Plaintiffs complain are lawful emissions made by companies that provide energy services of great social utility, and the majority of the Defendants are "power companies" already subject to extensive regulation. Plaintiffs further concede that emissions of greenhouse gases, whether by Defendants or anyone else, merge into an undifferentiated mass in the atmosphere before causing the alleged harm. Nevertheless, Plaintiffs make the purely conclusory allegation that the Defendants' emissions are the proximate cause of Kivalina's global-warming injury, even though Plaintiffs conceded before the district court that they are unable to trace their alleged injuries to any particular Defendant.

Under those circumstances, the district court correctly ruled that Plaintiffs have no standing to bring this lawsuit, because they have not alleged and cannot allege facts from which one could conclude that their injuries are fairly traceable to the Defendants' conduct. To avoid having to demonstrate causation, Plaintiffs

make a strict-liability argument that Defendants should be responsible for all of Kivalina's damages merely because their lawful emissions "contribute," albeit unquantifiably, to global warming. Plaintiffs repeatedly argue that this is a "principled" basis for assessing liability against these Defendants, but the "principles" on which Plaintiffs attempt to rely are "contribution" principles borrowed from traditional public nuisance law, and those principles were developed – and invariably applied – only where there was a strong geographic and temporal nexus among the area allegedly polluted, the alleged victims of that pollution, and the alleged polluters.

That is not this case, where Plaintiffs admittedly seek relief from only a handful of alleged "contributors" to global warming, and where emissions of greenhouse gases from anywhere in the world concededly merge in the atmosphere – where they may linger for centuries – and may travel to, and may allegedly result in damage in, any other part of the world. Under Plaintiffs' theory, therefore, a potentially unlimited number of Kivalinas exist globally– all of which would be able to sue these same Defendants or any other randomly chosen handful of emitters for any and all of their alleged damages. Plaintiffs have not identified any principle that would permit such unbounded liability, untethered to actual fault, nor is there any such principle to be located in the nuisance cases on which they rely. Indeed, faced with similar lawsuits that may lead to unlimited liability, courts –

applying the same principles identified by Plaintiffs – have refused to find liability where, as here, the nexus between plaintiff, defendant and pollution is simply too remote.

ARGUMENT

I. PLAINTIFFS IMPROPERLY DEMAND IMPOSITION OF JOINT AND SEVERAL LIABILITY OF $400 MILLION ON DEFENDANTS WHO ALLEGEDLY EMITTED LESS THAN 3 PERCENT OF THE WORLD'S GREENHOUSE GAS EMISSIONS IN ONE YEAR

Plaintiffs comprise the single Inupiat village of Kivalina, located north of the Arctic Circle with a population of 400. Plaintiffs' Excerpts of Record (ER) at 40, ¶ 1. Kivalina alleges that global warming is destroying the village by melting Arctic sea ice that formerly protected the village from winter storms, and that the village must be relocated at an estimated cost between $95 and $400 million. ER at 40, 43-44, ¶¶ 1, 16-17.

Kivalina seeks those relocation costs as damages from 19 Defendants and certain of their subsidiaries – five "oil companies," 13 "power companies," and one "coal company." ER at 78, 80, 82, 84-85, 103-104, ¶¶ 163, 170, 177, 185-86, 260, 266. But Plaintiffs' Complaint concedes that the 19 Defendants only "include many of the largest emitters of greenhouse gases in the United States," and their alleged "contribution" to global warming is characterized only as a "substantial portion." ER at 40, ¶ 3 (emphasis supplied). Plaintiffs further allege that Defendants' "contribution" to global warming is made "in combination with

emissions and conduct of others." ER at 102, ¶ 255.

Plaintiffs' own Complaint makes clear that those "others" are legion, and that they are not before this Court. Plaintiffs devote 26 pages of the Complaint to describing the Defendants and alleging that those Defendants emitted – in 2004 or 2006 and only in the United States – greenhouse gases ranging from 15 to 270 million tons per year. ER at 5-30, ¶¶ 18-122. But an IPCC Working Group Report – which Plaintiffs cite for the proposition that global warming has accelerated since 1980, ER at 70, ¶ 125 n.29 – states that total global emissions of greenhouse gases in 2004 were 49 billion metric tons. Of those 49 billion metric tons, the Department of Energy Report, also cited by Plaintiffs, estimates total U.S. emissions in 2004 as 7 billion tons, or 14% of the global total. The Carbon Disclosure Project Report and the CERES Report,[1] two other reports also cited by Plaintiffs, estimate the total emissions of the named Defendants (with the exception of Peabody Energy Corporation, which has not provided emission amounts) as 1.3 billion metric tons, or approximately 2.68% of the global total. Indeed, Plaintiffs allege that, in 2004, the "100 largest electric generating companies accounted for 89 percent of total generation industry emissions," ER at 80, ¶ 171, but Plaintiffs name only 13 "power companies" as Defendants. ER at

[1] The CERES Report discloses emissions in tons, not metric tons. Accordingly, amicus WLF did the basic math to convert the ton measurements in the CERES Report to metric tons.

80, ¶ 170.

Moreover, Plaintiffs' allegations of the Defendants' contribution to global greenhouse gas levels for a single year do not take into account a crucial temporal factor – as Plaintiffs themselves allege, a "large fraction of carbon dioxide emissions persist in the atmosphere for several centuries." ER at 70, ¶ 125. Thus, on its face, the Complaint shows that, given existing levels of greenhouse gases in the atmosphere, much of which may have been there for centuries, the impact on global greenhouse gas levels in a single year in the 21st century must be less than a simple percentage calculation for that one year.

On these threadbare allegations, Plaintiffs sue just a handful of companies that allegedly "contribute" to global warming – albeit a select, deep-pocketed handful – and demand as much as $400 million in damages under nuisance theories. ER at 101-106, ¶¶ 249-82. But the Complaint also alleges that the Defendants emit greenhouse gases at diverse locations, and that "emissions do[] not remain localized and inevitably merge[] with the accumulation of emissions … in the world." ER at 42, ¶ 10. And – although Plaintiffs allege that the Defendants emit greenhouse gases, and that Kivalina has been injured by global warming – Plaintiffs' allegations that these Defendants caused Kivalina's injury are bald conclusions.

For example, Plaintiffs allege that they suffer injury "from defendants'

contributions to global warming," ER at 101, ¶ 250; that Defendants' emissions "are a direct and proximate contributing cause of global warming and of [Plaintiffs'] injuries," ER at 102, ¶ 251; and that Defendants' emissions "rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon dioxide and other greenhouse gases worldwide. The heating that results from the increased carbon dioxide and other greenhouse gas concentrations to which defendants contribute cause specific, identifiable impacts in Kivalina." ER at 102, ¶ 254.

As shown below, those conclusory causation allegations are not sufficient to support the imposition of joint and several liability for Kivalina's alleged damages on this group of Defendants, whose alleged "contribution" to global warming in 2004, according to Plaintiffs' own sources, is only approximately 2.68%, and who were apparently selected as Defendants because they may be amenable to the jurisdiction of the U.S. Courts, or because they are highly solvent.

II. THE DISTRICT COURT CORRECTLY HELD THAT KIVALINA HAS NO STANDING TO ASSERT ITS CLAIMS

It is well established that Article III standing requires a plaintiff to show: 1) a concrete injury; 2) "that the injury is fairly traceable to the challenged action of the defendant"; and 3) that the court can redress the injury. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 937 (9th Cir. 2005) (citation omitted). Because "Plaintiffs concede that they are unable to trace their alleged injuries to

any particular Defendant," the district court correctly held that the Plaintiffs lack standing "based on their inability to establish causation under Article III." ER at 16, 23.

A. Plaintiffs Identify No Principle by Which This Group of Emitters Should Be Held Liable for Alleged Harm They Did Not Cause

As shown above, Plaintiffs do not dispute that the Defendants are only some of the people and entities worldwide that emit greenhouse gases. Indeed, in their initial brief on appeal, Plaintiffs concede that the "Power Companies are among the largest emitters of carbon dioxide" in the U.S., and that the Defendants "comprise most of the nation's top contributors to global warming." Kivalina Br. at 7, 35 (emphasis supplied). Plaintiffs further concede that "it is … true that many unnamed entities *also* have contributed to global warming in varying degrees." *Id.* at 69 (emphasis in original). And Plaintiffs' own sources show that the 19 Defendants emitted no more than 2.68% of worldwide greenhouse gas emissions generated from human activity in a single year, into an atmosphere where "carbon dioxide emissions persist … several centuries." ER at 70, ¶ 125.

Tacitly recognizing that even under Plaintiffs' theory, the Defendants' emissions could not be more than a small part of the source of the harm they allege, Plaintiffs repeatedly argue that they are "not required to sue all contributors to the nuisance." Kivalina Br. at 33 n.8. Plaintiffs even argue that they "sued as many of the nation's most important contributors to the problem of global warming

as [they] could in a single venue." *Id.* at 3. But Plaintiffs offer no support for that extraordinary assertion, which is simply incorrect. Indeed, Plaintiffs' own sources identify numerous other U.S. companies – and entire industry segments – that do business nationwide and worldwide, several of which have carbon footprints greater than those of the Defendants.

Moreover, Plaintiffs repeatedly argue that there are "principled standards" by which the Court can determine liability here, and that the courts "have the legal tools to reach a ruling that is principled, rational, and based upon reasoned distinctions." *Id.* at 47 (citation and internal quotation marks omitted). Plaintiffs are absolutely correct that a court adjudicating a $400 million claim for damages – based on the lawful emission of greenhouse gases – must have a principled basis on which to determine liability. But the "principles" to which Plaintiffs advert are simply "principles of tort and public nuisance law," and Plaintiffs' argument is simply that "[p]ublic nuisance law provides standards for principled adjudication of this case." *Id.* at 48, 57 (citation and internal quotation marks omitted).

Plaintiffs are incorrect. As shown below, traditional tort principles of nuisance law, developed in radically different contexts, fall far short of providing principled standards to determine liability for emission of greenhouse gases.

B. "Contribution" Principles Developed in Air and Water Pollution Cases and Under Various Statutes Are Not Adequate to Determine Liability for Global Warming

In the Complaint and their initial brief, Plaintiffs rely heavily on the argument that "[i]n a multiple polluter case sounding in public nuisance, … liability for pollution attaches to a defendant who 'contributes' to the nuisance." *Id.* at 29. Plaintiffs also argue that the fact that other persons contribute to the nuisance – even if they are not joined in the litigation – does not bar joint and several liability for any harm caused by the nuisance. *Id.* But Plaintiffs' own authorities show that principle was developed in air and water pollution cases where a clear nexus existed linking the territory affected by the pollution, the alleged polluters, and the plaintiffs' alleged injury. In particular, because of that nexus, the group of plaintiffs – and defendants – were finite and capable of determination.

Indeed, it is not difficult to identify a principled basis for assessing joint and several liability, on a "contribution" basis, where the plaintiffs' residential neighborhoods were adjacent to two illegal dumps, and where the "contributing" defendants were the owners of those dumps and the government agencies that should have been policing them. That is precisely the factual situation in *Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2001), which is the very first case Plaintiffs cite in support of their argument that they have pled causation under a nuisance

theory. Kivalina Br. at 29. And the same pattern appears in case after case cited by Kivalina. *See, e.g., Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213, 215 (6th Cir. 1974) (assessing joint and several liability against three corporations operating seven plants emitting air pollution "immediately across" the river from the 13 plaintiff families); *Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1270 (N.D. Okla. 2003) (same under CERCLA, where plaintiff alleged that defendants polluted two lakes "from which [plaintiff] draws its water supply"), *vacated pursuant to settlement* (N.D. Okla. 2003); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337, 338 (Tenn. 1976) (same, where plaintiffs were residents of Alton Park and alleged air and water pollution from defendant's "chemical … plant in Alton Park"); *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1155 (Cal. 1884) (same with respect to injunctive relief, where the defendants were multiple polluters of a single river).

But that is not this case, where Plaintiffs concede, as they must, that the Defendants are but 19 of innumerable worldwide emitters of greenhouse gases, and where the "emissions do[] not remain localized and inevitably merge[] with the accumulation of emissions in California and in the world." ER at 42, ¶ 10. Nor can Plaintiffs take issue with the district court's ruling that "prior public nuisance law" involves a "discrete number of polluters that were identified as causing a specific injury to a specific area," Kivalina Br. at 55 (citation and internal

quotation marks omitted), by arguing only that "Kivalina *is* suffering a specific injury in a specific area." *Id.* (emphasis supplied). That argument simply ignores the fact that the number of potential defendants here is unlimited, and Plaintiffs themselves allege that greenhouse gas emissions cause damage not just in Kivalina but worldwide, which makes it also incorrect for Plaintiffs to suggest that Kivalina is a singular plaintiff.

Indeed, Plaintiffs themselves argue that the fact "[t]hat a thousand towns on a polluted river or lake may be affected does not undercut the specificity of the injury to each." *Id.* But Plaintiffs' argument shows that under their own theory – which, at its essence, is that the Defendants, because they emit greenhouse gases into the undifferentiated world concentration of greenhouse gases in the atmosphere, are liable for any harm caused anywhere by that world concentration of greenhouse gases – there are thousands of potential Kivalinas. Indeed, the IPCC Report on which Plaintiffs rely identifies numerous existing or potential impacts from global warming, for example depletion of commercial fish stock in Iceland, flooding of small Pacific islands, and beach erosion and destruction of coral reef habitats in the Caribbean that would threaten the beach-based tourism industry.

If this lawsuit is allowed to proceed under Plaintiffs' theory of liability – based on common-law nuisance principles derived from the California gold rush, untethered to any principle of proximity or geographic nexus – the result is that

potential Kivalinas like Iceland, the Maldives or Barbados could swamp the American court system with lawsuits against these same 19 Defendants and/or others. In short, the Defendants here, and countless other greenhouse-gas emitters who are amenable to U.S. jurisdiction, could be sued in the American courts by, and may be liable for damages to, virtually any person, place or entity claiming damage due to global warming.

As Laurence Tribe has observed:

> Unlike traditional pollution cases, where discrete lines of causation can be drawn from individual polluters to their individual victims, climate change results only from the non-linear, collective impact of millions of fungible, climatically indistinguishable, and geographically dispersed emitters. Given this fact, granting a plaintiff relief from the coastline-changing or other adverse consequences of global climate change bears no genuine resemblance to identifying a responsible defendant …. To the contrary, worldwide climate change is a systemic phenomenon that is intractable to anything but a systemic political solution, one that the adversarial and insulated model of nuisance litigation is structurally incapable of providing."

Laurence H. Tribe, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 15 (Wash. Legal Found., Critical Legal Issues, Working Paper No. 169, 2010). The D.C. Circuit, rejecting an environmental claim under the National Environmental Policy Act ("NEPA") for lack of standing, observed that the "federal judiciary is not a back-seat Congress nor some sort of super-agency." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 672 (D.C. Cir. 1996). And in this Court, Judge Kozinski has observed that the "eagerness of judges to expand the horizons of tort liability is symptomatic of a

more insidious disease: the novel belief that any problem can be ameliorated if only a court gets involved." *OKI Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 316 (9th Cir. 1989) (Kozinski, J., concurring). And that is particularly true where, as here, there is "the risk of exotic new causes of action and incalculable damages." *Id.* (citation omitted).

In a similar global warming case seeking damages, this lack of principled legal standards to determine liability was central to the recent decision in *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), where the district court held that traditional nuisance cases

> do not provide the Court with [a] legal framework or applicable standards upon which to allocate fault or damages, if any, in this case. 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 that admittedly result[s] from multiple sources around the globe.

Id., 2007 WL 2726871, at *15. That lack of principled guidance led the *General Motors* court to hold that the plaintiffs' claims presented a nonjusticiable political question. *Id.* at *16. For similar reasons, the district court below also held, correctly, that Kivalina's claim presents a nonjusticiable political question, because the "allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." ER at 15.

Moreover, Plaintiffs offer no answer to those intractable problems of

allocation by arguing: 1) that, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that "the plaintiff established causation on a contribution theory in a global warming case in the absence of any permit violation," Kivalina Br. at 65; or 2) that the "EPA itself has now made an official 'contribution' finding with respect to such emissions." *Id.* at 34. *Massachusetts* was not a suit for damages but an attempt to compel the EPA to regulate greenhouse gas emissions, and the Supreme Court's opinion – which discussed at length the national and international attempts to reach a legislative or diplomatic solution to the effects of global warming, *see Massachusetts*, 549 U.S. at 508-09 – in fact supports the proposition that the solution to Plaintiffs' complaints should be devised at a legislative or diplomatic level, not through traditional models of tort liability. And we are aware of no court holding that, because the Supreme Court has determined that greenhouse gases fit within the definition of "air pollutant" under the Clean Air Act, their lawful emission is nevertheless *per se* tortious, simply because of their theoretical and unquantifiable "contribution" to global warming when combined with the sum of other sources worldwide. In this case, Kivalina is asking this Court to recognize a new cause of action – cloaked in the centuries-old garb of public nuisance doctrine – that would open the door to unlimited liability.

C. Courts, Including This Court, Have Consistently Articulated Principles for Restricting Liability in Pollution Cases Where, as Here, the Nexus Between Plaintiff and Defendant Is Too Remote

It is precisely the specter of unlimited liability, unmoored by any principle that would determine liability in proportion to responsibility, that has led numerous courts, applying the same principles that Plaintiffs rely on, to refuse to allow cases to go forward where there is insufficient proximity or geographic nexus. Indeed, as the Fifth Circuit has held, "[a]t some point, … we can no longer assume that an injury is fairly traceable to a defendant's conduct solely on the basis of the observation that water runs downstream." *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 359, 362 (5th Cir. 1996) (holding that plaintiff has no standing to sue because the alleged harm – at a lake "18 miles and three tributaries from the source of unlawful water pollution" – is not fairly traceable to the defendant's alleged water discharges). In *Texas Independent Producers and Royalty Owners Assoc. v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005), the Seventh Circuit found that a plaintiff lacked standing because the alleged environmental injury was not fairly traceable to the alleged pollution, where, as here, the plaintiff made only conclusory allegations that there was a connection between alleged sources of pollution and particular locations.

This Court has reached a similar result in cases under NEPA, requiring a "geographic nexus" between a plaintiff and the alleged source of the environmental

impact. *See, e.g.*, *Ashley Creek Phosphate Co.*, 420 F.3d at 938 (finding no standing where the plaintiff, in Utah, "lacks any judicially recognizable nexus to the area that would be affected by mining [in Idaho], … approximately 250 miles away"). The Fourth Circuit reached a similar result in another NEPA action, holding that there was no standing because the alleged injury was not fairly traceable to the challenged conduct, in part because – as is the case here, where Defendants are admittedly just a handful of U.S. emitters of greenhouse gases – "'one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts.'" *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324 (4th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

Indeed, as this Court recognized in *Ashley Creek* – when it observed that "[u]nder [plaintiff's] theory of liability, any owner of a phosphate mine, whether located in Alaska, Utah, or Florida, would have standing to challenge the EIS. Why stop there?" *Ashley Creek*, 420 F.3d at 939 – there must be some principled basis on which to assign blame for an injury, which means that a theory of liability without any limiting principle, such as Kivalina's theory, cannot be adopted. The Seventh Circuit made a similar observation in another case presenting a novel theory of liability, *Pollack v. D.O.J.*, 577 F.3d 736, 742 (7th Cir. 2009), in which the plaintiff alleged that he was injured by lead pollution because he drinks water

from Lake Michigan, adjacent to which the United States operates a gun range that deposits lead bullets in the Lake. The court, however, held that the plaintiff lacked standing, noting that, "[t]aken to its extreme, [plaintiff's] argument would permit any person living on or near Lake Michigan to assert that he has been harmed by the bullets, because the lead could potentially have been carried to every part of the lake." *Id.*

D. This Case, and Cases Like It, Present a New and Potentially Limitless Theory of Liability That Would Require the Courts to Apply a New Doctrinal Framework to Determine Liability, Just as the Courts Have Done in Response to Antitrust and RICO Claims

In at least two similar circumstances – antitrust and RICO – where courts were facing a theory of liability that was potentially limitless, their response has been to develop new doctrines that are both principled and equitable. For example, in *Assoc. General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 521-23 (1983), an antitrust action seeking $25 million in damages where there were 250 members of the defendant association and 1,000 unidentified co-conspirators, the Court observed that a "literal reading of the [Clayton Act] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Id.* at 529.

But the Court concluded that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages." *Id.* at 535. Accordingly, in a case where the alleged injury

was "indirect," the Court turned to traditional "judge-made rules circumscrib[ing] the availability of damages recoveries in both tort and contract litigation – doctrines such as foreseeability and proximate cause," because, "despite the broad wording of [the statute], there is a point beyond which the wrongdoer should not be held liable." *Id.* at 532, 534 (citation and internal quotation marks omitted). And those limitations were particularly appropriate where, as here, "the chain of causation … contains several somewhat vaguely defined links," *id.* at 540, and where the claim presented "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id.* at 543-44. Accordingly, the Court held that the plaintiffs were without standing to bring their "massive and complex damages litigation." *Id.* at 545.

The Supreme Court has applied a similar analysis to RICO claims, where an "expansive reading" of the statute could lead to similarly unbounded liability. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992). Thus, the Court turned to "'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," which simply "recogni[zes that] claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id.* at 268-69 (citations omitted). *See also Anza v. Ideal Steel Supply*

Corp., 547 U.S. 451, 460 (2006) ("The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.").

This Court has applied the same principles to both antitrust and RICO claims. Indeed, to determine whether an alleged injury is "too remote" for RICO or antitrust liability, this Court evaluates (1) whether there are more direct victims of the alleged harm; "(2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." *Or. Laborers-Emp'rs Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963 (9th Cir. 1999) (emphasis supplied). *See also Ass'n of Wash. Public Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 701 (9th Cir. 2001) ("A direct relationship between the injury and the alleged wrongdoing has been one of the 'central elements' of the proximate causation determination.") (citing *Or. Laborers*, 185 F.3d at 963); *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir. 2008) (finding no RICO standing where the "causal chain would also be difficult to ascertain because there are numerous alternative causes that might be the actual source or sources of [plaintiff's] alleged harm").

There is no dispute that proximate cause is an element of Plaintiffs' nuisance

claims. *See Illinois v. Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) (detailing elements under federal nuisance law); *Martinez v. Pacific Bell*, 275 Cal. Rptr. 878, 884 (Cal. Ct. App. 1991) (detailing elements under state nuisance law); Kivalina Br. at 73. And those nuisance claims – which are as broad as or broader than any antitrust or RICO claims that this Court has addressed, and which threaten equally ruinous liability even though the alleged causation is, at best, tenuous and uncertain – cry out for the application of principles like the standing principles developed for application to RICO and antitrust actions. Indeed, a recent court decision addressing a similarly novel claim – a county's action against firearm manufacturers alleging that the manufacturers' negligent marketing policy had created a public nuisance – expressly looked to *Associated General Contractors*, and its principle of antitrust standing, to determine whether there was a principled basis for allowing the county's lawsuit to proceed against the firearm manufacturers. *Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 258 (D.N.J. 2000). The *Camden County* court determined that, as here, "there is a strong likelihood that a trial would involve exceedingly complex apportionment of liability," and held that the plaintiff had no standing to assert its nuisance claim. *Id.* at 264.

CONCLUSION

For all of the foregoing reasons, as well as all of the reasons advanced by the Appellees, WLF urges this Court to affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief:

1. Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,290 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003, 14 point, Times New Roman font.

DATED: July 7, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have today caused the foregoing document to be sent by overnight delivery to the following non-CM/ECF participants:

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