IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-17490

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

v.

EXXONMOBIL CORP.; BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; CONOCOPHILLIPS CO.; ROYAL DUTCH SHELL PLC; SHELL OIL CO.; PEABODY ENERGY CORP.; THE AES CORP.; AMERICAN ELEC. POWER CORP., INC.; AMERICAN ELEC. POWER SERVICES CORP.; DUKE ENERGY CORP.; DTE ENERGY CO.; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS CO.; PINNACLE WEST CAPITAL CORP.; THE SOUTHERN CO.; DYNEGY HOLDINGS, INC.; RELIANT ENERGY, INC.; XCEL ENERGY, INC.; NGR ENERGY; MIRANT CORP.
Defendants-Appellees,

On Appeal From The United States District Court
For the Northern District of California (No. 4:08-cv-01138-SBA)
The Honorable Saundra Brown Armstrong, United States District Judge

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AMICI CURIAE BRIEF OF CONGRESSMAN LAMAR SMITH AND CONGRESSMAN F. JAMES SENSENBRENNER, JR. IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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IDENTITY AND INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE

Congressman Lamar Smith is the Representative to the U.S. Congress for the 21st Congressional District of Texas and serves as the Ranking Republican Member of the House Judiciary Committee. As a member of the House of Representatives for more than 20 years, Congressman Smith has debated and voted on legislative initiatives addressing the issue and science of climate change, and emissions of a class of gasses generally referred to as "greenhouse gasses" or "GHGs."

F. James Sensenbrenner, Jr., a Member of Congress representing the 5th Congressional District of Wisconsin, was named the Ranking Republican of the Select Committee on Energy Independence and Global Warming in March 2007. Congressman Sensenbrenner brings nearly 30 years of Congressional experience to the position, including a four-year stint as the Chairman of the House Science Committee, where he solidified his reputation as an independent leader on science and environmental issues, as well as oversight. In 1997, during his tenure as the Science Committee Chairman, Congressman Sensenbrenner led the Congressional delegation to the Kyoto climate change treaty negotiations.

Congressmen Smith and Sensenbrenner submit this brief as *amici curiae* pursuant to Federal Rule of Appellate Procedure 29 and in conjunction with their motion for leave to file an amicus brief to assert to the Court that the U.S.

Constitution gives the Legislative and the Executive branches, not the Judiciary, the authority to make the highly political determinations that would have to be made to adjudicate Plaintiffs' claims.

STATEMENT OF THE CASE

Amici curiae adopt Defendants-Appellees Statement of the Case.

ARGUMENT

The villagers of Kivalina have undoubtedly suffered tragic personal and economic hardship in relocating their homes and businesses under the threat of destruction from coastal erosion. Weather-related events often cause widespread destruction, from hurricanes in the South, to floods and tornadoes in the Midwest, mudslides and earthquakes on the West Coast, and blizzards in New England.

In this lawsuit, Plaintiffs blame the weather-related event of coastal erosion on a specific segment of the U.S. business community, namely oil, utility, and selected energy producers. Plaintiffs seek to hold such select companies and industries responsible for weather-related events, and open the door to a new era of environmental regulation through litigation. *See Comer v. Murphy Oil, Inc.*, 585 F.3d 855 (2009), *appeal dismissed*, 2010 WL 2136658 (5th Cir. May 28, 2010); *Connecticut v. Amer. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009); *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971).

Plaintiffs' claim is that these businesses emitted certain gases into the atmosphere, which, when combined with other emissions caused "global warming," which, according to this theory, heated the water temperatures, thereby causing ice caps to melt, sea levels to rise and flooding of the small coastal village. Despite the fact that numerous sources, both natural and man-made, emit these same gases, and that the scientific connections between these gases and global warming remains controversial, Plaintiffs have chosen to limit their claims to just a segment of the U.S. energy industry. In so doing, they have framed their lawsuit about the way America produces, trades, and consumes energy. There is no issue more central to modern society than how energy is produced and consumed; it affects every business and home in America and throughout the world.

For more than 200 years in the U.S., Congresses and Administrations have made important public policy decisions about the production and use of energy. These decisions reflect attempts to balance multiple, competing interests and cover a range of issues, from production capacity, to foreign dependency, to affordability for businesses and residents. Particularly in the past several decades, environmental concerns, such as those alleged in the case at bar, have played an increasing role in this balancing effort, as Congress has initiated policies to develop alternative and renewable energy sources and reduce environmental

impacts. Environmental interests, though, represent only one important brushstroke on the grand portrait of U.S. energy policy.

The American judiciary, particularly Article III courts, is the standard-bearer that sets an example for the world to follow in deciding cases and controversies. The U.S. Constitution gives the judiciary the authority to decide such cases and controversies and, when administering traditional tort claims, the courts have the tools and standards for assuring that injured parties can fairly seek recompense from culpable tortfeasors. U.S. Constitution, Art. III, § 2 cl. 1. The judiciary, however, is not constitutionally empowered and does not have the tools to balance all potentially affected stakeholders in the global warming, public policy debate. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866, 104 S.Ct. 2778 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."). The U.S. Constitution leaves these and other political questions solely to Congress and the Executive Branch. *Marbury v. Madison*, 5 U.S. 137, 170, 2 L.Ed. 60 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in court"); *Baker v. Carr*, 369 U.S. 186, 210-11, 82 S.Ct. 691 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers"); *Gilligan v. Morgan*, 413 U.S. 1, 5, 93 S.Ct. 2440 (1973) (declining a

"broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard" on the basis of an explicit constitutional textual commitment of that power to Congress and the president); *Nixon v. U.S.*, 506 U.S. 224, 234-35, 113 S.Ct. 732 (1993) (when case presents political questions, "judicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances.").[1] Because the case at bar states a political, not justiciable question, it should be dismissed. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215, 94 S.Ct. 2925 (1974) (where a case turns on a political question, courts lack the subject-matter jurisdiction necessary to proceed); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) (disputes involving political questions lie outside of Article III jurisdiction of courts); *California v. GMC*, C06-05755, 2007 U.S. Dist. LEXIS 66547 (N.D.

[1] In *Baker*, the U.S. Supreme Court explained:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each one has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political question already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. 217, 82 S.Ct. 691.

Cal. Sep. 17, 2007), *appeal voluntarily dismissed,* Order No. 07-16908 (9th Cir. June 24, 2009).

I. REGULATION OF EMISSIONS IS A COMPLEX POLICY ISSUE WITH THE POTENTIAL TO HAVE A SIGNIFICANT EFFECT ON THE DAILY LIVES OF AMERICANS

Plaintiffs' allegations that certain emissions contributed to global warming, and in turn their injuries, presents a global, political issue, not a case or controversy. The small class of plaintiffs and handful of U.S. energy companies represent only a sliver of interests affected by this lawsuit and U.S. energy policy. Over the years, Congress and Administrative agencies have heard from a myriad of individuals, businesses, workers, and consumer groups in an effort to strike the right balance when adjusting energy policy, including when trying to account for environmental concerns. This brief highlights just three of those groups to demonstrate the widespread political nature of setting U.S. energy policy with respect to the emissions at issue in this case.

First, from the production or defendant perspective, the U.S. is estimated to account for only 17% of global man-made emissions of the gases in question, of which Defendants, collectively, represent a smaller figure. *See* CRS Report for Congress, China's Greenhouse Gas Emissions and Mitigation Policies, Sept. 10, 2008, at 8, *available at* http://www.fas.org/sgp/crs/row/RL34659.pdf. There also are a myriad of naturally occurring sources of these GHGs that mix together in the

Earth's atmosphere with all other sources of these GHGs. For example, volcanoes, such as the one that recently erupted in Iceland shutting down air traffic in Europe, are a significant source of GHGs. So, too, are all living animals, including humans. *See* U.S. Envt'l Protection Agency, Natural Sources and Sinks of Carbon Dioxide, Climate Change – Greenhouse Gas Emissions, *at* http://www.epa.gov/climatechange/emissions/co2_natural.html.

If liability should be associated with certain levels of man-made emissions, then the Legislative and Executive branches can take into account all of these sources, fully vet the veracity of the underlying science, and enact policies addressing a wide-range of sources. This lawsuit, however, only looks narrowly at one set of such sources – the energy-related companies Plaintiffs chose to name. From a legal perspective, it offends the notion of civil justice that Plaintiffs can seek recompense from only one small set of alleged tortfeasors and not others, with no opportunity for defendants to enjoin the other alleged tortfeasors, *i.e.*, the many other sources of carbon dioxide, methane, and other GHGs. From a practical perspective, a court would have to create new law effectively setting emissions levels in order to adjudicate Plaintiffs' claims; that new law would unfairly regulate only a small segment of the emissions sources.

Thus, this case is not about seeking recompense from any defined set of actual tortfeasors, which is the province of the judiciary, but picking winners and

losers among those who emit carbon dioxide, methane, and other GHGs. The winners and losers would not be based on any public policy grounds, but simply on whom Plaintiffs subjectively decided to blame. The impact of such "global warming" liability would have draconian, disproportionate impacts on these defendants, both in relation to other U.S. industries and in their competitive standing in the world economy.

Second, individuals most likely to face the immediate brunt of potential "global warming liability" are workers and communities that rely on the American energy industry for their jobs and livelihood. A number of states, including Alaska, California, Louisiana, and Texas, rely on these industries for stable economies, jobs, and taxes. Consider the testimony of Mr. Eugene M. Trisko, who came before the U.S. House of Representatives Committee on Energy and Commerce on behalf of the United Mine Workers of America, AFL-CIO to help Congress understand the employment impact of artificially capping emissions of certain energy sectors. *See* Committee on Energy and Commerce Energy and Environment Subcommittee, U.S. House of Representatives, Apr. 23, 2009 (testimony of Eugene M. Trisko, United Mine Workers of America, AFL-CIO, on American Clean Energy and Security Act).

Mr. Trisko explained that a proper way to reduce emissions may be through technological solutions, such as geological capture and storages of carbon dioxide,

and not artificial caps on emissions. His union supported climate change legislation that it believed would help America find the "appropriate balance of technology incentives, reasonable emission reduction targets and timetables, and safeguards for the economy." *Ibid.* When previous reductions in emissions ordered in the 1980s were not handled properly in Mr. Trisko's view, "coal production in major eastern coal producing states declined by more than 113 million annual tons between 1990 and 2000. More than 30,000 coal mining jobs were lost. Dozens of mining communities have all but ceased to exist across economically depressed Appalachia and the rural Midwest." *Ibid.*

Third are consumers of energy, which include every American business and resident. Consumers will be the largest "losers" if this lawsuit is allowed to proceed because the increased costs of liability and emissions reductions will be passed through to them by Defendants. Every business and home in America consumes energy, and every time U.S. costs of energy increase, American businesses and residents that use that energy are disadvantaged. The Affordable Power Alliance has researched the impact of energy costs that would directly result from artificial caps on carbon dioxide, methane, and other GHGs. *See* Affordable Power Alliance, *Potential Impact of the EPA Endangerment Finding on Low Income Groups and Minorities Executive Summary* (Mar. 2010). The Alliance cautions that such costs "will impact low income groups, the elderly, and

minorities disproportionately, both because they have lower incomes to begin with, but also because they have to spend proportionally more of their incomes on energy, and rising energy costs." *Id.* at 2. For years, Congress has facilitated the poorest Americans with home bills through the Low Income Home Energy Assistance Program ("LIHEAP"). Notwithstanding concerns some have with the public policies behind LIHEAP, demands on the program will grow significantly if this lawsuit is allowed to proceed.

If a trial court were required to administer this case, it could not hear from the vast majority of these constituencies because only a small fraction of these stakeholders are parties before the court. The reason courts are not provided with constitutional authority to adjudicate political questions is because courts do not have the institutional tools and standards to consider all of these competing interests. Thus, if this case were to proceed, liability would only be imposed against hand-picked "deep pockets" named by plaintiffs' attorneys, with no judicially manageable standards that would allow courts to "render a decision that is principled, rational, and based upon reasoned distinctions." *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874 (N.D. Cal. 2009).

Amici curiae have the utmost respect and confidence in the Article III courts and their judges, but it remains the exclusive role and responsibility of the Legislative branch to make such policy determinations and set emission standards.

Baker, 369 U.S. at 210-11, 62 S.Ct. 691; *Nixon*, 506 U.S. at 234-35, 113 S.Ct. 732.

II. SETTING EMISSION STANDARDS OF GASES IS WITHIN THE PROVINCE OF THE LEGISLATIVE BRANCH (NOT THE JUDICIARY)

A. Congress Has Actively Debated Whether and How to Regulate Emissions of the Gases at Issue in this Case

The decision of whether and, if so, how emissions of certain gases should be regulated requires careful, scientific determinations, followed by deliberate and appropriate legislative and administrative action. Congress is vested with the authority to set federal emission standards for producers of the gases at issue in this lawsuit. *See Massachusetts v. EPA*, 549 U.S. 497, 113 S.Ct. 732 (2007). This is an area in which Congress has invested substantial time and resources to design a system that properly balances the many affected interests.

In this current Congress, more than 100 bill s have been introduced to address some aspect of global warming claims. This includes sweeping legislation to establish a system to regulate greenhouse gases, such as "cap and trade"[2] or carbon tax bills,[3] legislation intended to advance the field of study of global

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[2] *See, e.g.*, American Clean Energy and Security Act of 2009, H.R. 2454, S.1733, 111th Cong. (2009) (proposing cap and trade program to regulate carbon emissions); Cap and Dividend Act of 2009, H.R. 1862, 111th Cong. (2009) (same).

[3] *See, e.g.*, Save Our Climate Act of 2009, H.R. 594, 111th Cong. (2009) (proposing to reduce carbon dioxide emissions by imposing tax on fossil fuels); Safe Markets Development Act of 2009, H.R. 1666, 111th Cong. (2009) (proposing tax code changes to establish auction and revenue collection mechanism for a carbon market); Clean Environment and Stable Energy Market

warming,[4] legislation targeted at specific generators of greenhouse gases,[5] and even legislation designed to incentivize a reduction in greenhouse gas emissions in foreign countries.[6] In the past year, Congress held hearings and received testimony from hundreds of scientists and other climate change experts, policymakers, and key stakeholders.[7] These individuals include distinguished professors, economists, environmentalists, industry representatives, workers, and ordinary citizens.[8]

Act of 2009, H.R. 1683, 111th Cong. (2009) (proposing tax code changes and requirement of Federal emission permit for sale or use of greenhouse gas emission substances).

[4] *See, e.g.*, Greenhouse Gas Registry Act, H.R. 232, 111th Cong. (2009) (proposing registry of greenhouse gases and determination of certain gases impact on global warming); Carbon Capture and Storage Early Deployment Act, H.R.1689, 111th Cong. (2009) (proposing creation of a Carbon Storage Research Corporation to establish a program to accelerate the commercial availability of carbon dioxide capture and storage technologies).

[5] *See, e.g.*, Green Transit Act, H.R. 803, 111th Cong. (2009) (proposing to require metropolitan planning organizations to consider greenhouse gas emissions in long-range transportation plans); Clean, Low-Emission, Affordable, New Transportation Efficiency Act, H.R. 1329, 111th Cong. (2009) (proposing greenhouse gas reduction plan for transportation sector); Landfill Greenhouse Gas Reduction Act, H.R. 1342, 111th Cong. (2009) (proposing the use of solid waste disposal fees to fund greenhouse gas reduction projects)

[6] *See, e.g.*, Forest Carbon Emission Reduction Act, H.R. 1790, 111th Cong. (2009) (proposing incentives to reduce greenhouse gas emissions resulting from land conversion and deforestation in developing countries).

[7] A search of Westlaw's Congressional database returned more than 1,200 transcripts of individuals testifying before Congress on the topic global warming or climate change. Over 200 of these transcripts were within the past year.

[8] It is important to note that several experts question the science claimed to support global warming, and are of the opinion that the science does not support "man-made" global warming. *See, e.g.*, Committee on Environment and Public

Over the last three decades, Congress has actively considered the science of global warming and potential liability for the release of certain gases. Examples include:

- 1978: Congress established a "national climate program" intended to increase the general knowledge about the global climate "through research, data collection, assessments, information dissemination, and international cooperation." National Climate Program Act of 1978, 15 U.S.C. §§ 2901.

- 1980: Through the Energy Security Act, Congress commissioned a study by the National Academy of Sciences to analyze the "projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion, coal-conversion and related synthetic fuels activities." Energy Security Act, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75 (1980).

- 1990: Congress enacted the Global Changes Research Act, which established a ten-year research program for global climate issues. 15 U.S.C. §§ 2931 to 2939.

- 1992: President George H. W. Bush signed the United Nations Framework Convention on Climate Change ("UNFCCC"), a nonbinding agreement of 154 nations to reduce atmospheric concentrations of carbon dioxide and other GHGs to "prevent dangerous anthropogenic interference with the [Earth's] climate system." S. Treaty Doc. No. 102-38, Art. 2, p. 5 (1992).

- 1997: UNFCC member nations negotiated the Kyoto Protocol that called for mandatory reductions of GHG emissions of developed nations. S. Res. 98, 105th Cong. (1997).

- 1997: President Bill Clinton signed the Kyoto Protocol but did not present it to the Senate for ratification, which expressed concern that the economic

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Works, U.S. Senate, Feb. 25, 2009 (s tatement of William Happer, Princeton University Professor of Physics), *available at* 2009 WL 459034 (F.D.C.H.); Committee on Natural Resources, Subcommittee on National Parks, Forests and Public Lands, U.S. House of Representatives, Apr. 7, 2009 (statement of John Coleman, Senior Meteorologist, KUSI), *available at* 2009 WL 931695 (F.D.C.H.).

burdens of reducing carbon dioxide emissions would fall on industrialized nations.

- 2003: In denying a petition to regulate emissions of carbon dioxide and other GHGs from motor vehicles under the Clean Air Act in 2003, the EPA emphasized the "economic and political significance" of the regulation of activities that might lead to global climate change and the impact on "[v]irtually every sector of the U.S. economy." U.S. Envt'l Protection Agency, Control of Emissions From New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52922, 52928, 52931 (Sept. 8, 2003).

- 2007: President George W. Bush opposed the Kyoto Protocol because it exempted developing nations, did not include two major types of pollutants, and would have a significant negative economic impact on the United States.

- 2009: The Copenhagen Climate Conference considered renewing the Kyoto Protocol, which is set to expire in 2012, and encouraged all nations to reduce emissions of GHGs. The conference resulted in a limited, non-binding agreement called the Copenhagen Accord.

Thus, the lack of setting specific emission levels for carbon dioxide is not a reflection on the fact that Congress has simply not considered the issue, but a demonstration that the majority of Congress has never supported such artificial caps.

B. Businesses Should Have Advance Notice of New Emission Standards and a Reasonable Opportunity to Come Into Compliance

A core aspect of the political nature of the issue before the Court is that if a court were to effectively set emission standards through common law tort liability, such liability would be imposed retroactively, without warning. Businesses that fully complied with environmental and other laws and regulations in place, some

of whom have been willing participants in the legislative debate over global warming, would nevertheless be blindsided with potentially crippling liability. *BMW of N. Am. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589 (1996) ("Elementary notices of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

Defendants in this lawsuit would have no idea that they were engaged in tortious conduct, no idea what level of emissions would lead to liability, and no idea what level or what reduction in emissions would avoid liability. When liability is not based on objectively wrongful conduct, but subjective decisions of courts, plaintiffs and personal injury lawyers, it is a clear indication that the issue is best left to the legislature. If members of this Court cannot conclusively provide defendants right now with a clear standard for liability, *i.e.*, what level of emissions amounts to tortious conduct, it must dismiss this case.

Congressional and executive branch action could then establish such standards, if warranted, and apply those standards prospectively so that all affected parties could take appropriate steps to avoid liability.

CONCLUSION

For these reasons, this Court should affirm the District Court's ruling and hold that liability for emissions alleged to contribute to global warming represents a political question reserved for the Legislative and Executive branches.

Dated: July 7, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

1. This brief 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 the brief has been prepared in proportionally-spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point.

2. The brief also complies with Fed. R. App. P. 29(d) and Fed. R. App. 32(a)(7)(b) because it contains 3,759 (less than 7,000) words.

/s/ Earl L. Hagström
Earl L. Hagström

Dated: July 7, 2010

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 will mail the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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