Cool Lawsuits: Is Climate Change Litigation Dead After Kivalina v. ExxonMobil?

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COOL LAWSUITS – IS CLIMATE CHANGE LITIGATION DEAD AFTER KIVALINA V. EXXONMOBIL?

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I. Introduction

Can emitters of greenhouse gases (“GHGs”) ever be held liable for harms caused by climate change?

That is the limited question this Article addresses. While many commentators saw the Supreme Court’s 2007 decision in Massachusetts v. EPA (“Mass. v. EPA”) as an indication that such claims may receive favorable review, recent decisions suggest that there may be no theory under which the ExxonMobils of the world can be held liable for the effects of climate change.

Specifically, in September 2012, the Ninth Circuit Court of Appeals held that a native Alaskan village on the tip of a barrier reef, whose very existence was threatened by the effects of climate change, could not pursue public nuisance and conspiracy claims against multiple oil, energy, and utility companies. It is difficult to fathom a more legally compelling climate change plaintiff than the native village of Kivalina. While many plaintiffs will struggle to show both that they have suffered a particularized injury different from the rest of the populace, and that their injuries were fairly traceable to the effects of climate change, the plaintiffs in Kivalina were well-positioned to meet those standing requirements. Nonetheless, the Ninth Circuit found that the plaintiffs’ claims in Kivalina were “displaced,” and thus barred, by the Clean Air Act’s grant of authority to the EPA to regulate GHGs. The question is thus posed—is there any

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3 Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).
4 Id.
theory under which a GHG emitter can be forced to go to trial on whether their GHG-emitting actions have caused injury?

Most scientists find that a rising level of GHGs in the atmosphere has caused, and will continue to cause, global temperatures to rise.\(^5\) These scientists attribute the rising level of atmospheric GHGs to human activity, including especially the combustion of fossil fuels.\(^6\) This anthropogenic global warming ("AGW") causes, and will continue to cause, changes to the climate that result in injury to humans and the natural world.\(^7\) Thus, the climate change litigation considered in this Article is the attempt to hold liable those who emit significant amounts of GHGs for the injuries caused by AGW.

This Article will first briefly review the handful of pertinent cases that preceded, and in many respects led to, the *Kivalina* decision. The *Kivalina* decision itself will then be analyzed in some detail. The key is the next Section, which examines the status of the key legal principles as they relate to climate change litigation after *Kivalina* and the other cases. Specifically, the cases discussed shed light on how courts should examine the constitutional standing of climate change plaintiffs and the argument that claims based on climate change harms present non-justiciable political questions. Most importantly, the Section examines the displacement doctrine; though the legal reasoning of the Ninth Circuit in finding the *Kivalina* plaintiffs’ claims were displaced will likely be subject to deserved criticism, if its reasoning stands then there is little hope for traditional common law climate change claims. The final Section briefly considers one non-traditional claim pursued in recent years: seeking to use ‘public trust’ principles to compel government action to prevent further global warming.

\(^5\) See *Mass. v. EPA*, 549 U.S. at 504–05.
\(^6\) See id. at 507–09.
\(^7\) See id.
II. The Run-up to Kivalina

There are two Supreme Court cases that lay the groundwork for analyzing claims based on injuries traceable to climate change: Massachusetts v. EPA and American Electric Power v. Connecticut (“AEP v. Connecticut”). Although neither of these cases involved a claim for damages, they reflect the Supreme Court’s framework for assessing the jurisdictional bars of standing, political question and displacement that will most assuredly guide lower courts in considering claims for climate change damages. Aside from Kivalina, the other damage litigation to consider is the Comer line of cases, where victims of Hurricane Katrina sought damages from major GHG emitters.

A. Massachusetts v. EPA

In 2007, the Supreme Court ruled that GHGs are pollutants under the Clean Air Act (“CAA”), and that the EPA had to consider whether they are potentially dangerous to public health and welfare such that they must be regulated. Before reaching the merits, the Court had to decide whether the plaintiffs had standing to bring their claims. The Court’s standing analysis, discussed in more detail below, is at least as significant as the Court’s statutory analysis.

The suit was brought by a group of states, cities, and private land trusts, after the EPA had declined to act on a petition asking the EPA to issue regulations for GHG emissions from vehicle tailpipes. Because only one plaintiff needs to have standing for a lawsuit to proceed,

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9 Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), rev’d en banc 607 F.3d 1049 (5th Cir. 2010); see also Comer v. Murphy Oil USA, 839 F. Supp. 2d 849 (S.D. Miss. 2012); infra Section II.C.
11 Id. at 518.
12 Id. at 510–14.
the Court focused on the Commonwealth of Massachusetts.\textsuperscript{13} Not much has been written about the Court’s choice to focus its standing analysis solely on Massachusetts, probably because the legal principle underlying that choice—that only one plaintiff needs Article III standing—is uncontroversial. It is important for this paper, however, to recognize that the Court did not address the standing of private citizens, political subdivisions or non-coastal states. The Court concluded that Massachusetts met the three standing requirements—it had alleged injury from the effects of climate change, primarily in the form of imminent threats of harm to its coastal lands\textsuperscript{14}; the injury was traceable to the EPA’s failure to regulate GHGs, rejecting arguments that the causal connection was too attenuated\textsuperscript{15}; and the injury could be at least partially addressed by the EPA reconsidering its decision not to regulate, rejecting arguments that the proposed remedy would have only a \textit{de minimus} effect on an admittedly \textit{global} phenomenon.\textsuperscript{16}

Although it was a 5–4 decision, the majority had very little trouble once it reached the merits of the plaintiffs’ claims, since that consisted of a relatively straightforward reading of the CAA.\textsuperscript{17} The statutory definition of pollutant (“any physical, chemical or biological substance that is emitted into the ambient air”) left little doubt that CO2 and other GHGs were covered by the statute.\textsuperscript{18} The CAA also leaves little doubt that the EPA must decide whether the emission of pollutants, such as CO2, from vehicles has the potential to endanger public health or welfare; if

\begin{itemize}
\item \textsuperscript{13} \textit{Id.} at 518.
\item \textsuperscript{14} \textit{Id.} at 521–23.
\item \textsuperscript{15} \textit{Id.} at 523–24.
\item \textsuperscript{16} \textit{Id.} at 524–26.
\item \textsuperscript{17} \textit{Id.} at 528–29.
\item \textsuperscript{18} \textit{Id.}
\end{itemize}
so, the EPA must regulate such emissions.\textsuperscript{19} The Court did not decide what should result from the EPA’s endangerment analysis, only that it had to be undertaken.\textsuperscript{20}

The great irony for climate change plaintiffs is that, although \textit{Mass. v. EPA} looked like a great victory in laying the groundwork for recognizing climate change-related injuries, the conclusion that the CAA conferred authority to the EPA over GHGs may ultimately prove fatal to claims for climate change damage.\textsuperscript{21} As discussed below, the essence of the Ninth Circuit’s decision in \textit{Kivalina} is that, because the Supreme Court has determined the CAA covers GHGs, federal common law claims based on GHG emissions have been “displaced” by this congressional enactment.\textsuperscript{22}

\textbf{B. AEP v. Connecticut}

In 2011, the Supreme Court decided \textit{AEP v. Connecticut}.\textsuperscript{23} There the Court considered a claim by a State, directly against GHG-emitting entities, seeking to compel such entities to reduce their emissions.\textsuperscript{24} Connecticut and the other plaintiffs had brought suit against AEP and other major GHG emitters in 2004, well before the EPA had initiated efforts to regulate GHGs under the CAA.\textsuperscript{25} The Second Circuit’s decision allowing the suit to go forward was in 2009, before the EPA concluded the endangerment analysis required by \textit{Mass. v. EPA}.\textsuperscript{26}

\textsuperscript{19} \textit{Id.} at 534–35.
\textsuperscript{20} In December 2009, the EPA did issue its finding that GHGs are potentially dangerous to the public health and welfare. \textit{Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act}, 74 Fed. Reg. 66,496 (Dec. 15, 2009). As a result of the endangerment finding, EPA was required to regulate GHG emissions from vehicles. \textit{See} 42 U.S.C. \textsection 7251(a)(1) (2012). And once GHGs are “subject to regulation” under the Clean Air Act, their emissions from stationary sources must be regulated as well. \textit{See id.} \textsection 7411, 7475(a)(4).
\textsuperscript{21} \textit{Mass. v. EPA}, 549 U.S. at 534–35.
\textsuperscript{22} Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).
\textsuperscript{24} \textit{Id.} at 2532.
\textsuperscript{25} \textit{Id.} at 2533–34.
The Supreme Court’s central holding in *AEP v. Connecticut*, in its broadest reading, was that that the plaintiffs (states, local governments, and private citizens) could not maintain federal common law public nuisance claims against GHG-emitting utilities.27 Once the EPA began issuing regulations concerning GHGs, the Court’s displacement analysis was eminently foreseeable – no court should be crafting pollution emission standards at the same time the agency charged by Congress to set such standards is exercising its scientific expertise to promulgate its own standards. The Court’s precise holding is limited to those instances where the plaintiffs are seeking the imposition of court-fashioned emission limits on the utilities, rather than seeking damages28: “[w]e hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”29 The Court ruled that Congress’ delegation of power to the EPA to regulate CO2 emissions from power plants “displaced” any ability to impose similar requirements through litigation.30 The Court did not decide whether a claim seeking money damages would also be “displaced” by EPA regulations.

While its displacement analysis resulted in the dismissal of plaintiffs’ claims, an equally divided Court did find preliminarily that the plaintiffs had standing, and that their claims were not barred by the political question doctrine or any other “prudential” considerations.31 The

27 *AEP v. Connecticut*, 131 S.Ct. at 2532.
28 *Id.* at 2537.
29 *Id.*
30 *Id.*
31 *Id.* at 2535. The Court was “equally divided” because Justice Sotamayor recused herself, as she had sat on the Second Circuit panel that had heard arguments in the case before *certiorari* had been granted. The same four dissenters from the *Mass. v. EPA* decision likewise dissented with respect to the standing analysis in *AEP v. Connecticut*. 
Court provided very little analysis with respect to these conclusions; rather, it simply re-affirmed the *Mass. v. EPA* rationale.\(^{32}\)

**C. *Comer v. Murphy Oil USA***

The first climate change damage case to make it to the federal courts of appeals was *Comer v. Murphy Oil USA*.\(^{33}\) There, individuals who had suffered damage from Hurricane Katrina brought suit against various oil and energy companies alleging that emissions from the defendants’ activities made the damage from the hurricane worse than it would have been otherwise.\(^{34}\) The defendants moved to dismiss the plaintiffs’ claims, arguing both that they lacked standing and that their claims presented a non-justiciable political question.\(^{35}\) The district court granted the motion, apparently on political question grounds.\(^{36}\) A three-judge panel of the Fifth Circuit reversed, however, finding that plaintiffs had standing to pursue claims of nuisance, trespass and negligence, and that these claims were not barred by the political question doctrine.\(^{37}\)

This was clearly the high-water mark for climate change litigation. At this point, in late 2009, *Mass. v. EPA* was the law of the land, recognizing that there could be cognizable injuries from climate change; the EPA was working on, and would soon release, its finding that GHG emissions could reasonably be anticipated to endanger public health and welfare; the Second Circuit in *Connecticut v. AEP* had affirmed the ability of states to bring suit to compel power plants to reduce their emissions (the Supreme Court had not yet weighed in); and the Fifth

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\(^{32}\) *Id.*

\(^{33}\) 585 F.3d 855 (5th Cir. 2009).

\(^{34}\) *Id.* at 859.

\(^{35}\) *Id.*

\(^{36}\) *See id.* The district court did not issue a written opinion, and its rationale for granting the defendants’ motion to dismiss comes largely from its oral ruling from the bench. *See id.* at 860 n.2.

\(^{37}\) *Comer*, 585 F.3d at 860.
Circuit in *Comer* had held that private individuals could pursue individual damage claims against GHG emitters. The optimism from this confluence of events would, however, be short-lived.

The defendants in *Comer* sought *en banc* review of the three-judge panel’s decision.\(^{38}\) There were 16 judges on the full Fifth Circuit Court of appeals at that time.\(^{39}\) A quorum of nine considered the request, and ultimately granted the rehearing.\(^{40}\) This had the effect of vacating the panel’s decision and staying its mandate.\(^{41}\) Subsequent to the grant of rehearing, however, circumstances arose which caused one of the nine-member quorum to recuse himself, leaving the Fifth Circuit without a quorum and unable to conduct business.\(^{42}\) As a result, and since the panel’s decision had already been vacated, the district court’s decision dismissing the plaintiffs’ claims was reinstated.\(^{43}\)

A subsequent attempt by the *Comer* plaintiffs to re-file their claims was dismissed on *res judicata* and collateral estoppel grounds.\(^{44}\) Although the district court could have based its analysis solely on this conclusion, it went on to find that the plaintiffs lacked standing as their claims presented non-justiciable political questions, and therefore the Clean Air Act preempted their state law claims.\(^{45}\) The plaintiffs have again appealed to the Fifth Circuit.

In light of the unique procedural aspects of the *Comer* litigation, the Fifth Circuit panel’s decision has little if any precedential value.\(^{46}\) While the Fifth Circuit’s analysis of both the

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\(^{38}\) *Comer* v. Murphy Oil USA, 607 F.3d 1049, 1053–54 (5th Cir. 2010).

\(^{39}\) *Id.* at 1054.

\(^{40}\) *Id.* at 1053.

\(^{41}\) *Id.*

\(^{42}\) *Id.* at 1054.

\(^{43}\) *Id.* at 1054–55.

\(^{44}\) *Comer* v. Murphy Oil USA, 839 F. Supp. 2d 849, 852 (S.D. Miss. 2012).

\(^{45}\) *Id.*

\(^{46}\) See Asgeirsson v. Abbott, 696 F.3d 454, 459 (5th Cir. 2012) (noting that decisions vacated for rehearing *en banc* “are not precedent”).
standing and the political question bars is discussed below, as is the district court’s analysis in the re-filed action, these will have, at most, a persuasive effect on subsequent courts of appeal.

III.  Native Village of Kivalina v. ExxonMobil Corp.

The plaintiffs in Kivalina, like those in Comer, sought money damages from GHG emitters for injuries caused by climate change. The plaintiffs, a native Alaskan village and the subsequently incorporated city at the tip of a barrier reef, have seen their very survival threatened as a result of erosion of sea ice that has protected the village from powerful waves and coastal storms for decades. The Army Corps of Engineers estimated that it would cost between $95 million and $400 million to relocate the village. As the Ninth Circuit noted, citing to the U.S. Government Accountability Office, “[i]f the village is not relocated, it may soon cease to exist.” The village and the city sued 24 major oil and energy companies, under the federal common law of public nuisance, for compensatory damages.

In many respects, the village of Kivalina is the perfect plaintiff for pursuing a climate change damages claim. Unlike many non-state plaintiffs, the village is suffering from a particularized injury that is distinct from those experienced by others. Moreover, unlike many claimed injuries, the erosion of the protective sea ice is quite convincingly the result of global warming. Finally, the village’s monetary claim was anything but speculative in light of the Army Corps’ assessment.

47 Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012).
48 Id.
50 Kivalina, 696 F.3d at 853.
51 Kivalina, 663 F. Supp. 2d at 868.
Nonetheless, the district court granted the *Kivalina* defendants’ motion to dismiss.\(^{54}\) The district court found that the political question doctrine barred the claims, in that there was insufficient guidance as to what the appropriate levels of emissions should be and who should bear the cost of global warming, both of which were better suited for resolution by the non-judicial branches of government.\(^{55}\) The district court also held that the *Kivalina* plaintiffs lacked standing, not because they could not establish an injury-in-fact, but because they could not demonstrate their injury was caused by, or sufficiently traceable to, the defendants’ conduct.\(^{56}\)

The plaintiffs appealed to the Ninth Circuit.\(^{57}\) Most analysts believed that the Ninth Circuit was waiting for the Supreme Court’s decision is *AEP v. Connecticut* before deciding the *Kivalina* matter.\(^{58}\) Indeed, the Ninth Circuit did not address the district court’s grounds for dismissing the action, and instead relied solely on the Supreme Court’s displacement analysis in affirming the dismissal.\(^{59}\) The Ninth Circuit recognized the availability of public nuisance suits under the federal common law to address transboundary pollution disputes, but explained that such suits cannot be brought where Congress has addressed a federal issue by statute; in such instances, “there is no gap for the federal common law to fill.”\(^{60}\) If a federal statute speaks directly to the question at issue, then federal common law displaces these actions.\(^{61}\)

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\(^{54}\) *Kivalina*, 663 F.Supp. 2d at 869.

\(^{55}\) *Kivalina*, 696 F.3d at 855; see also *Kivalina*, 663 F. Supp. 2d at 874–77.

\(^{56}\) *Kivalina*, 696 F.3d at 855; see also *Kivalina*, 663 F. Supp. 2d at 879–82.

\(^{57}\) *Kivalina*, 696 F.3d at 853.

\(^{58}\) The Ninth Circuit conducted oral arguments after the Supreme Court’s decision in *AEP v. Connecticut*, more than two years after the lower court’s decision. The Ninth Circuit’s decision was nearly a year later.

\(^{59}\) *Kivalina*, 696 F.3d at 853.

\(^{60}\) Id. at 855–57.

\(^{61}\) Id. at 857.
Once the issue was so framed by the Ninth Circuit, it was an easy step to say that Congress had directly addressed the issue of domestic GHG emissions. First, in *Mass. v. EPA*, the Court had determined that the Clean Air Act covered GHGs. Then, in *AEP v. Connecticut*, the Supreme Court held that the Clean Air Act displaced any attempt to seek a judicially order reduction of GHG emissions from power plants. As the Ninth Circuit explained, “[t]he Supreme Court has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law.”

What will be, and should be, the most controversial part of the *Kivalina* decision is its extension of the *AEP v. Connecticut* displacement analysis to an action for damages. The Ninth Circuit recognized the distinction between claims for injunctive relief and claims for damages but held that, “if a cause of action is displaced, displacement is extended to all remedies.” Thus, for the Ninth Circuit, the *AEP v. Connecticut* decision compelled the conclusion that the village’s claim for damages was displaced. That conclusion will be examined with more scrutiny in Section IV.D., below.

**IV. Jurisdictional Bars to Bringing Climate Change Claims to Trial—Where Things Now Stand**

Emerging from the various decisions addressing climate change-related claims are four key questions that are likely to be at issue every time one of these claims is brought: (1) whether the plaintiff has “constitutional standing,” (2) whether the claim sought to be adjudicated is a

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62 *Id.*


65 *Kivalina*, 696 F.3d at 857.

66 *Id.*

“political question” committed to other branches of government, (3) whether state law claims have been “preempted” by federal action, and (4) whether the plaintiff’s claims have been “displaced” by legislative and regulatory activity. These are distinct from whether a plaintiff has a viable claim on the merits, as each of these defenses prevents a plaintiff from getting a claim to the ultimate fact-finder.68

While these four jurisdictional bars will be addressed in turn, it is clear that displacement is the most significant issue given the current state of the law. After AEP v. Connecticut and Kivalina, the displacement doctrine will clearly provide the most daunting challenge to climate change plaintiffs. Constitutional standing will also continue to be a significant hurdle, especially in establishing that the claimed injuries are fairly traceable to the defendant’s conduct, though the cases do provide some guidance as to how that bar can be cleared.

A. Standing

The standing requirement stems from Article III of the Constitution, which directs that federal courts only have jurisdiction to hear “cases or controversies.”69 The basic standing analysis has three components: injury-in-fact, causation, and redressability.70 The Supreme Court has applied this analysis to claims based on alleged injuries from pollution or environmental harm and more specifically explained that a plaintiff must show that:

- it has suffered a concrete and particularized injury that is either actual or imminent;
- the injury is fairly traceable to the defendant; and

68 As such, nothing in this analysis addresses whether a plaintiff can prove that a particular defendant has in fact caused the claimed climate change related injury. The legal arguments of standing, political question, preemption and displacement are raised at the pretrial motion stage, usually by a motion to dismiss. Ruling on a motion to dismiss requires the court to assume that all of the plaintiffs’ factual allegations are true, and to answer the question of whether those facts are sufficient to state a claim for relief. See Mohamad v. Palestinian Auth., 132 S.Ct. 1702, 1705 (2012).
a favorable decision will likely redress that injury.\textsuperscript{71}

In both of the Supreme Court cases discussed above – \textit{Mass. v. EPA} and \textit{AEP v. Connecticut} – the Court specifically found that at least some of the plaintiffs had standing. The standing analysis in \textit{Mass. v. EPA} is quite extensive, while the majority in \textit{AEP v. Connecticut} merely reaffirmed that analysis.\textsuperscript{72} Unfortunately for damage-seeking plaintiffs, this Supreme Court precedent does not carry the day for non-state plaintiffs who are not proceeding under the citizen suit provision of the CAA. This is because the \textit{Mass. v. EPA} Court applied a relaxed injury standard to state-plaintiffs, and the Court also did not require traditional redressability because the CAA specifically affords citizens the right to bring claims for violations of the Act.\textsuperscript{73} Nonetheless, there are lessons that can be gleaned from \textit{Mass. v. EPA} that will inform the analysis where non-state plaintiffs and non-citizen suits are involved.

Standing was at issue in both \textit{Comer} and \textit{Kivalina} as well. In both instances, the district courts concluded that the plaintiffs lacked standing primarily because they could not meet the causation or traceability prong of the standing analysis.\textsuperscript{74} The Fifth Circuit panel in \textit{Comer}, in its vacated opinion, reached the opposite result, finding that the plaintiffs did have standing.\textsuperscript{75} And

\textsuperscript{71} Id.

\textsuperscript{72} The Court in \textit{AEP v. Connecticut} reiterated the divide that existed in the \textit{Mass. v. EPA} opinion, where a four-member minority (Chief Justice Roberts, and Justices Scalia, Thomas and Alito) would have held that the Massachusetts Petitioners lacked Article III standing. While Justice Sotomayor did not participate in the \textit{AEP} decision, four members of the Court – presumably three from the \textit{Massachusetts} majority (Justices Kennedy, Ginsberg and Breyer) and newer Justice Kagan – held that “at least some plaintiffs have Article III standing under \textit{Massachusetts}.” Am. Elec. Power Co. v. Connecticut 131 S.Ct. 2527, 2535 (2011). Thus, by an equally divided Court, jurisdiction was properly exercised over the plaintiffs’ claims. \textit{Id}. Conventional wisdom is that Justice Sotomayor would have agreed that the plaintiffs had standing; regardless, as matters presently stand, that finding is the Supreme Court’s most recent pronouncement on the question.

\textsuperscript{73} \textit{Massachusetts v. EPA}, 549 U.S. 497, 518–519 (2007).


\textsuperscript{75} Comer v. Murphy Oil USA, 585 F.3d 855, 864–67 (5th Cir. 2009).
the Ninth Circuit in *Kivalina* did not address the issue, relying solely of the contention that the plaintiffs’ claims were displaced.\(^{76}\)

As explained below, the recognition in *Mass. v. EPA* of various harms associated with climate change likely paves the way for certain plaintiffs to meet the injury-in-fact element. Although this element was relaxed for state-plaintiffs, non-state plaintiffs must still show that their claimed injury is particularized, or different from that experienced by the populace at large. That is not, however, an insurmountable hurdle. Damage-seeking climate change plaintiffs will likely face the most difficulty in establishing the second prong, causation or ‘traceability.’ That determination will likely turn on whether courts adopt, as the Fifth Circuit *Comer* panel did and as was arguably suggested by the Supreme Court in *Mass. v. EPA*, a standard that requires only a showing that the defendant’s GHG emissions “contributed to” the global warming that caused the claimed injury. Climate change plaintiffs seeking compensatory damages are likely to have little trouble with the redressability element, at least if they meet the first two elements.

1. **Injury-in-fact**

   Traditional standing analysis requires the plaintiff to allege a “concrete” and “particularized” injury.\(^{77}\) In *Mass. v. EPA*, the Court afforded “special solicitude” to Massachusetts in analyzing its claimed injury.\(^{78}\) While it is not obvious exactly how this affected the Court’s standing analysis, it appears that instead of asking whether Massachusetts suffered a concrete or particularized injury (actual or imminent) as required under *Lujan*, the Court asked instead whether Massachusetts’ land or air had been harmed (or imminently threatened), such

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\(^{76}\) Native Vill. of Kivalina v. ExxonMobil USA, 696 F.3d at 849, 858 (9th Cir. 2012).


\(^{78}\) *Mass. v. EPA*, 549 U.S. at 520.
that it would take action through its sovereign processes if it could. The majority found that this relaxed injury standard was met.

At the time a motion to dismiss is filed (where the allegations in the complaint are accepted as true), private plaintiffs should have little trouble establishing the “concreteness” of a claimed injury from climate change, even without the “special solicitude” afforded states. The Mass. v. EPA Court cited a litany of actual and predicted harms flowing from climate change—including glacial and snow cover melt, rising sea levels, decreased water supply, ecosystem changes, increased spreading of disease, increased hurricane ferocity—to show that the injuries alleged there were real and concrete. If someone loses property or is injured from these deleterious effects of climate change, there should be a concrete injury.

What will likely be the more contested component to this analysis is whether a claimed injury is “particularized” to the private plaintiff. The general defense argument will be, even if these effects of climate change are happening, they are being felt by everyone. Thus, no plaintiff has standing to complain about these global effects. The Supreme Court recognized that these claimed injuries were “widely shared,” but did not agree that this made them any less particularized at least with respect to Massachusetts. Significantly, the Court focused on the

79 See id. at 518–20; Lujan, 504 U.S. at 559. This reformulated standing analysis is premised on the Court’s recognition that a state, by entering the union, has given up certain sovereign prerogatives to combat climate change—it cannot negotiate emission reduction treaties with other nations or invade another state to force it to reduce emissions. Instead, the state has ceded its ability to protect those sovereign interests (in land, air and water) to the federal government. A state must be able to sue the federal government (EPA) if it is failing to protect those interests. This recognition by the Court allowed the states to get past the motion to dismiss stage with allegations that their land and sea are being adversely affected by sea level rise, etc.
80 Mass. v.EPA, 549 U.S. at 520.
81 Id. at 521–22. Courts addressing the standing issue are almost always accepting the plaintiffs’ allegations as true. Proving these claimed effects of climate change will be the subject of expert scientific duels before a fact-finder.
82 Id. at 522.
fact that Massachusetts is a coastal state. As such, Massachusetts stood to lose coastal property and incur substantial remediation costs if sea levels continued to rise as predicted. Thus, as a landowner, Massachusetts’ claim of injury was particularized for standing analysis purposes.

The injury-in-fact analysis in Mass. v. EPA, bolstered by AEP v. Connecticut, should satisfy the injury component of standing for states as plaintiffs, even in a claim for damages. Most states could allege that something particular to that state will be adversely affected by climate change. Using only the climate change impacts that were alleged and recognized as “concrete” by the Mass. v. EPA Court -- all coastal states could assert the same “particularized” injury as Massachusetts; mountainous western states that rely upon snow packed mountains for water storage and supply could allege a particularized injury from glacial and snow melt; southeastern states that face a regular hurricane season could allege a particularized injury from increased hurricane intensity; states with a large mosquito population could allege a particularized injury from the increased spread of disease; etc. Other projected impacts of climate change provide the necessary fodder for claims by every state based on their unique characteristics. For instance, it is not hard to fathom water-starved farm belt states claiming a particularized injury from crop loss, or southwestern states claiming a particularized injury from drought and desertification.

83 Id. at 522–23.
84 Id. (“The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be ‘either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events.’ Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars.”). Id.
85 Id. at 523.
86 Connecticut had the same alleged injury as Massachusetts (sea level rise, etc.), and five justices specifically found that injury to be sufficiently particularized as it relates to state plaintiffs. See Am. Elec. Power Co. v. Connecticut, 131 S.Ct. 2527 (2011).
There is no reason to believe that the injury-in-fact component will be analyzed differently depending on the type of relief the state is seeking. Going forward, state-plaintiffs should be able to allege that they have suffered the requisite injury to pursue claims for damages or injunctive relief.

With respect to private citizens and political subdivisions as plaintiffs, the injury component necessarily does not track *Mass. v. EPA* precisely. The finding of injury to the state was premised upon the state’s sovereign interest in preventing harm to the land, sea and air within its borders. A private citizen would not share that same interest and would have to show the “particularized injury” that has long been the lynchpin of environmental standing analyses. This means that such plaintiffs must have suffered some injury that is distinct from any injury suffered by the public at large.87

In *Comer*, the Fifth Circuit panel found that those who suffered property damage and physical injuries from Hurricane Katrina did have such a particularized injury for standing purposes.88 In neither the Fifth Circuit nor the district court on remand did the defendants even contest that the *Comer* plaintiffs had suffered a concrete and particularized injury.89 In *Kivalina*,

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87 The obvious twist presented by the *Kivalina* case is what to do with political subdivisions like cities and villages. The district court in that case found that the plaintiffs were not entitled to the “special solicitude” afforded states in the standing analysis. Native Vill. of Kivalina v. Exxon Mobil Corp., 696 F.3d 849, 882 (9th Cir. 2012). The court reasoned that, because political subdivisions do not relinquish their sovereign interests when they join the union, they are more like private citizens than states when it comes to analyzing their injuries. *Id.* The district court’s reasoning is specious. A significant premise for its argument is either that political subdivisions have no sovereign interest in the land, air and water within their borders, or that they have the ability to negotiate with other nations or invade a nearby town to protect their sovereign interests. Obviously, the latter is an absurdity: clearly political subdivisions do not have the ability to negotiate or enforce climate change treaties or utilize other tools to meaningfully reverse global warming trends. They, like the states, rely on the federal government for such needs. What remains is the idea that the district court in *Kivalina* must have based this particular argument on the supposition that political subdivisions have no sovereign interests in the resources within their boundaries, a conclusion that is not necessarily obvious.

88 Comer v. Murphy Oil USA, 585 F.3d 855, 863−864 (5th Cir. 2009).

89 *See id.; see also* Comer v. Murphy Oil USA, 839 F. Supp. 2d 849, 858 (S.D. Miss. 2012).
likewise, the only component of the standing analysis that was challenged was causation.\textsuperscript{90} It is difficult to fathom an argument that a village facing destruction from the erosion of a particular chunk of protective sea ice is not suffering a particularized injury.

While the particularized injury component of the standing analysis will likely preclude citizens in general from suing for damages for the widespread effects of climate change (e.g., because it is hotter or the arctic ice is melting), \textit{Comer} and \textit{Kivalina} both present instances where non-state plaintiffs can demonstrate particularized injuries from the effects of climate change which will be sufficient to get past a motion to dismiss.

\textbf{2. Causation}

Causation, sometimes referred to as “traceability,” is perhaps the most contentious and unsettled component of the standing analysis as it relates to climate change plaintiffs. The \textit{Lujan} Court explained that “there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”\textsuperscript{91} The “fairly traceable” requirement is a lower standard that the proximate causation that must be shown at trial.\textsuperscript{92} Although the premise that anthropogenic emissions are causally connected to global warming is easily demonstrated for standing purposes, the problem comes in demonstrating that the emissions of the named defendant(s) caused the warming, which led to the plaintiffs’ alleged injuries.

For many, there is a fundamental logical disconnect with suing a particular entity over climate change when, in a very real sense, the entire global population contributes to GHG

\textsuperscript{90} \textit{See Kivalina}, 696 F.3d at 855.
\textsuperscript{92} \textit{See, e.g.}, \textit{League of United Latin Am. Citizens v. City of Boerne}, 659 F.3d 421, 431 (5th Cir. 2011).
emissions. This defense argument against standing implicates the causation component, although it has some force in assessing the redressability prong as well. If the defendant’s activities are responsible for only a miniscule percentage of global emissions, and if the plaintiff too has emitted GHGs (all plaintiffs have), and if climate change would have happened even without a particular defendant’s emissions, and if the premise that there is some anthropogenic cause for climate change remains disputed – how can the plaintiff ever prove that a particular defendant’s activities caused” the plaintiff’s injury?

In Mass. v. EPA, the EPA conceded that manmade GHG emissions were causally connected to global warming; per the Court, this amounted to a concession that the EPA’s decision not to regulate vehicle emissions “contributed to” Massachusetts’ claimed injuries. The EPA nonetheless argued that, in light of the various sources of GHG emissions, not regulating vehicle emissions contributes so insignificantly to global warming, and thus to Massachusetts’ injuries, that it cannot be haled into federal court to answer for them. The Supreme Court rejected this argument, noting that even small incremental regulatory steps would help alleviate Massachusetts’ injuries, such that its failure to take such steps satisfied the traceability component.

The vacated Fifth Circuit panel decision in Comer relied upon the Supreme Court’s analysis in finding that the Hurricane Katrina victims had, for standing purposes, sufficiently alleged a causal chain connecting the defendants’ emissions of GHGs with rising sea levels and the increased severity of Hurricane Katrina, and connecting those phenomena with the plaintiffs’

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94 Id. at 523–24.
95 Id. at 524. While the Court in Mass. v. EPA appeared to relax the ‘injury’ component because the Petitioner was a state, and to relax the immediacy and redressibility requirements because Massachusetts was bringing its action under the citizen suit provision, it does not appear that the Court was relaxing the causation standard for either of those reasons. Thus, its causation analysis should be applicable to suits by private plaintiffs against emitters.
claimed injuries. In so doing, the panel read the Supreme Court’s analysis as requiring only that the defendants’ claimed actions “contribute to” the claimed injuries: “Thus, the Court recognized, in the same context as the instant case, that injuries may be fairly traceable to actions that contribute to, rather than solely or materially cause, greenhouse gas emissions and global warming.”96 Emphasizing that (a) the plaintiffs’ allegations needed to be accepted as true at the motion to dismiss stage, (b) an indirect causal relationship (rather than proximate causation) will suffice, and (c) alleged contribution to the harm is sufficient for traceability purposes, the Fifth Circuit panel concluded that the plaintiffs’ alleged chain of causation – from the defendants’ emissions, to warmer temperatures and rising sea levels, to greater property damage from Hurricane Katrina – was sufficiently strong to withstand a motion to dismiss.97

After the panel’s decision was vacated and the case re-filed, the district court in Comer disagreed with the panel’s assessment. The Comer district court specifically rejected the Fifth Circuit panel’s determination that the causation component is met simply by showing that the defendants’ emissions “contributed to” the kinds of injuries suffered.98 The district court argued that the “contributed to” standard originated in Clean Water Act (CWA) cases as one of three elements needed to show causation, and that it did not by itself satisfy the causation component.99 That GHGs contribute to global warming, which in turn creates a danger for extreme weather events did not, in the district court’s opinion, show that the plaintiffs’ property damage is fairly traceable to the defendants’ emissions:

At most, plaintiffs can argue that the types of emissions released by the defendants, when combined with similar emissions released over a significant period of time by innumerable manmade and naturally-occurring sources

96 Comer v. Murphy Oil USA, 585 F.3d 855, 866 (5th Cir. 2009) (emphasis added).
97 Id. at 864–66.
99 Id. at 859–61.
encompassing the entire planet, may have contributed to global warming, which caused sea temperatures to rise, which in turn caused glaciers and icebergs to melt, which caused sea levels to rise, which may have strengthened Hurricane Katrina, which damaged the plaintiffs’ property.\(^\text{100}\)

While the Ninth Circuit in \textit{Kivalina} did not undertake a standing analysis, the district court took an approach similar to the \textit{Comer} district court in finding that the \textit{Kivalina} plaintiffs could not meet the causation component for Article III standing. Specifically, it too rejected the notion that causation is met by showing that the defendants’ actions (emissions) “contributed to” the plaintiffs’ claimed injuries.\(^\text{101}\) That court too noted that the “contribution” standard came from CWA cases where there was the additional element that the plaintiffs show that the discharges into the waters exceeded the permit limits.\(^\text{102}\) Per the district court, there is a presumption in those CWA cases, where the defendant exceeds the permit’s discharge limits, of a substantial likelihood that the defendant’s discharge caused the plaintiffs’ harm; but that presumption does not exist in climate change cases because there are no EPA-prescribed limits with respect to GHG emissions.\(^\text{103}\) As such, in the absence of the presumption, plaintiffs are not entitled to take advantage of the lesser “contribution” standard. And, without that standard, climate change plaintiffs can \textit{never} show that their alleged injuries are fairly traceable to a particular defendant’s emissions because there are so many other sources of GHG emissions.

Whether the causation requirement can be met merely by showing that the defendants’ emissions “contributed to” the plaintiffs’ injuries is thus more than an academic exercise. If, as the \textit{Comer} district court maintains, the causation standard requires more than a causal connection with several links in the chain, something more akin to a direct connection between the

\(^{100}\text{Id. at 861.}\)
\(^{101}\text{Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009).}\)
\(^{102}\text{Id. at 879.}\)
\(^{103}\text{Id. at 879–80.}\)
emissions and the alleged harm, then it is difficult to see how any climate change plaintiff will ever be able to meet that standard. There are always going to be significant emissions from innumerable other sources over a long period of time that will prevent a direct causal connection to the emissions from a particular defendant. If, on the other hand, the standard is whether the defendants’ emissions “contributed to” the plaintiffs’ injuries, then the Mass. v. EPA Court has provided guidance establishing that even minor contributions to global emissions could provide a sufficient nexus.

Without deciding whether the Comer plaintiffs met the causation component, the district court’s analysis rejecting the “contributed to” standard seems flawed for several reasons. First, it urges that the standard comes from CWA cases, which only include the “contributed to” standard as one of three elements for establishing causation. The entire CWA causation analysis, according to the Comer district court, requires a plaintiff to show that the defendant (1) discharged a pollutant contrary to its permit (2) into a waterway in which plaintiffs have an interest that may be adversely affected, “and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.” Clearly, a climate change plaintiff is also going to have to meet the pseudo-equivalent of the first two elements as well – demonstrating that the defendants’ emissions included some gases that trap radiant energy, and that the plaintiffs are in the zone of interest that would be affected by warming temperatures. If those elements are met, however, then the causation component should be satisfied if the defendants’ global warming-causing emissions “contribute to” the type of injuries the plaintiffs suffered.

By defining the “contribution” standard that was at least arguably sanctioned by the Court in Mass. v. EPA only by reference to the CWA cases, the district courts are trying to fit a

104 Id. at 859 (emphasis in original) (citing Pub. Interest Research Grp. of N.J., Inc. v. Duffryn Terminals Inc., 913 F.2d 64, 72 (3d Cir. 1990)).
square peg into a round hole. They are arguing that plaintiffs can only utilize the contribution standard to meet the traceability component by showing that a defendant’s emissions exceeded a particular permit limit. But because EPA has not yet prescribed emission limits that have been incorporated into permits, that will never be present for climate change plaintiffs. Moreover, and importantly, because climate change plaintiffs can never show a direct one-step connection between their claimed injuries and emissions from a particular source, climate change plaintiffs can never meet the causation element necessary to establish standing as long as EPA has not set limits which are exceeded. Of course, once EPA does prescribe emission standards under the Clean Air Act, then these courts would most assuredly find (as discussed below) that damage claims under the federal common law are “displaced” by the CAA and EPA’s regulations and that state law claims for damages are preempted. This circular Catch-22 leaves climate change plaintiffs without the ability to ever make it to trial.

That the district courts in Comer and Kivalina are misreading the Supreme Court’s guidance on the “contribution” standard is demonstrated when the Comer district court urges that, “[i]f contribution were enough, presumably there would have been no need for the Supreme Court to grant Massachusetts special solicitude in its standing analysis.”\(^{105}\) The “special solicitude” granted to Massachusetts by the Supreme Court did not affect the causation component of its standing analysis. Rather, that solicitude made it easier for Massachusetts to meet the injury-in-fact component. As discussed above, Massachusetts did not have to demonstrate a particularized injury to its property; instead, it was enough for the state to show that the land and air within its boundaries were harmed or threatened such that it would take

\(^{105}\) Id. at 861.
actions to protect those sovereign interests if it could.\footnote{106}{Massachusetts v. EPA, 549 U.S. 497, 518–519, 521 (2007).} The causation analysis would appear, under \textit{Mass. v. EPA}, to be the same regardless of whether the plaintiff is a state or a private citizen.

Ultimately, appellate courts are going to have to decide whether the district courts were correct in rejecting the “contribution” standard. That a majority of the Supreme Court, in both \textit{Mass. v. EPA} and \textit{AEP v. Connecticut}, found causation strong enough to support standing suggests that some standard akin to “contribution” would be sufficient to trace the claimed injuries to a particular defendant’s emissions. The Court in \textit{Mass. v. EPA} specifically considered that there would be a multi-linked chain needed to trace the claimed harm back to the defendant’s actions, and that those actions were only a small fraction of the problem with respect to atmospheric GHG concentrations – yet it still found causation to support constitutional standing based on EPA’s failure to regulate vehicle emissions.\footnote{107}{\textit{Id.} at 524–25.} The causal chain was even more analogous in \textit{AEP v. Connecticut}. Although the Court there offered little analysis in finding sufficient Article III standing, the claimed injuries were sufficiently traceable to the emissions from particular power plants. It is almost impossible to square the Supreme Court’s standing conclusions in those cases with the analyses of the district courts in \textit{Comer} and \textit{Kivalina}.

Even if the causation component can be met “merely” by showing that (a) the defendants emitted heat-trapping gases, (b) the plaintiffs’ injuries are of the type caused by global warming, and (c) defendants’ activities “contributed to” the plaintiffs’ injuries, this does not automatically mean that every climate change plaintiff will meet that standard. There may be certain claimed injuries that are simply too attenuated to support a link to heat-trapping emissions, or a particular
defendant’s emissions may be so miniscule as to make a mockery of the traceability requirement. As the Comer panel noted, proving causation at trial in any of these climate change cases will be difficult and in many cases impossible. But, at the pleading stage, a defendant making significant contributions to the rising GHG concentrations in the atmosphere should not be able, on standing grounds, to avoid being haled into court for injuries that are particularized to an individual plaintiff and are clearly attributable to the claimed effects of global warming.

3. Redressability

Redressability is probably the least contentious of the standing components when it comes to damage-seeking climate change plaintiffs. The Lujan Court explained that it must be “likely,” rather than “speculative,” that the injury will be redressed by a favorable decision.\(^\text{108}\)

Redressability concerns arise more in the context of seeking injunctive relief to curtail activity that is causing harm to the environment. This was the case in Lujan and Mass. v. EPA; in those cases there will be questions of whether the requested relief will bring back the depleted species, or clean the polluted area, or stop the sea levels from rising. When a plaintiff has a particular injury traceable to the defendants’ activities, seeking monetary compensation for that injury will usually be a means of “redressing” the injury. Indeed, despite the skepticism against standing of the district courts in Comer and Kivalina, they recognized that redressability was not at issue.\(^\text{109}\)

The only real argument that could be made against redressability in this context is a variation of the causation argument. Since the particular defendant’s contribution to the alleged injury is so small in comparison to all GHG emissions and so attenuated through several causal

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links, whatever remedy a particular defendant could be saddled with will not really address the claimed injury. The Mass. v. EPA Court dealt with a similar argument. Even if EPA began regulating vehicle emissions, it will not save Massachusetts coast line, given the amount of emissions from all other sources and the projected rise in emissions in nations like China and India. While the Court likely applied a lesser redressability standard there because that suit was brought under the citizen suit provision of the Clean Air Act, how the Court dealt with the problem is still instructive:

While it is true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. See also Larson v. Valente, 456 U.S. 228, 244 n. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (“[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury”) . . . . Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

In sum—at least according to petitioners' uncontested affidavits—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek.

Climate change plaintiffs seeking monetary damages should have little trouble satisfying the redressability component of the standing analysis, so long as they can also show a particularized injury fairly traceable to the defendants’ conduct. The Comer plaintiffs sought

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111 Id. at 517–518 (“[A] litigant to whom Congress has ‘accorded a procedural right to protect his concrete interests,’— . . . here, the right to challenge agency action unlawfully withheld . . . —‘can assert that right without meeting all the normal standards for redressability and immediacy,’ . . . When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” (internal citations omitted)).
112 Id. at 525–26.
compensation for the property damage they suffered when Hurricane Katrina caused the seas to surge. The Kivalina plaintiffs sought compensation for the cost of relocating the village. It is difficult to fathom how the relief sought in those cases would not redress the injuries alleged.

B. Political Question

The idea behind the political question doctrine is that courts should not decide matters that are committed, by either the text of the Constitution or by prudential considerations, to the other branches of government. The Supreme Court has only seen fit to apply the doctrine a handful of times, in cases involving such matters as constitutional amendments, political apportionment, treaty abrogation, and Senate impeachment proceedings. Modern political question jurisprudence is guided to a remarkable degree by the Supreme Court’s 1962 decision in Baker v. Carr. Under that decision, dismissal may be proper (but is not compelled) only if one of the following six “formulations” is inextricably intertwined with a case:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

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115 Colegrove, 328 U.S. at 556.
118 Baker, 369 U.S. at 186.
119 Id. at 217.
Although the district courts in both *Kivalina* and *Comer* found that the political question doctrine was a bar to considering climate change claims by damages-seeking plaintiffs, none of the appellate courts considering climate change claims has agreed. The Second Circuit in *Connecticut v. AEP* carefully considered and rejected a contention that the claims there presented non-justiciable political questions, a conclusion that the Supreme Court in *AEP v. Connecticut* affirmed without explanation. The Fifth Circuit panel in *Comer* also found no political question bar, while the Ninth Circuit in *Kivalina* did not address the issue.

While some defendants may pay lip service to the first *Baker* formulation, since it is undoubtedly the most dispositive, matters related to climate change or air pollution are not committed by constitutional text to the political branches of government. Nor are formulations 4 through 6 seriously argued as reasons why climate change matters present non-justiciable political questions. The real political question challenges are made under the second *Baker* formulation (whether there are judicially discoverable and manageable standards to address the claims) and the third criterion (whether resolution requires an initial policy determination by the elected branches).

No doubt, trying to calculate damages for an injury caused by climate change could be a daunting task. However, to suggest that there are no discoverable and manageable standards for a court to apply in calculating damages is probably an overstatement. The standards for a public nuisance claim (the most commonly pursued theory for recovery) are well-settled. It is a common matter for courts to reach the merits and make appropriate awards even where many

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123 Comer v. Murphy Oil USA, 585 F.3d 855, 873–879 (5th Cir. 2009).
124 See, e.g., Restatement (Second) of Torts, § 821B.
tortfeasors may have contributed to a claimed harm. Federal courts are well-suited to resolve new and complex issues and cases.\textsuperscript{125}

The third \textit{Baker} formulation also does not require dismissal on political question grounds. Contrary to the analyses by the district courts, this formulation supports dismissal only where it is “impossible” for the court to act without a “policy determination of the kind clearly committed for nonjudicial discretion.”\textsuperscript{126} More importantly, the elected branches have, through various legislative and administrative actions, already made an initial policy determination that reducing GHG emissions is desirable. While the \textit{Kivalina} district court ruled that courts are being asked to make an initial determination as to who should be responsible for the effects of climate change, courts in these cases are simply being asked to find who, under tort law, should pay the damages. While that may or may not be an insurmountable task at trial, there is no initial policy determination needed from another branch of government before a court can undertake to meet that task. Principles of market share liability, permissive and mandatory joinder, joint and several liability, and intervening and supervening causes are all judicially-crafted tools in a court’s arsenal as it tries to assess damages; these do not require some policy determination from the President or Congress before they can be applied.

\textbf{C. Preemption}

There is no need to spend much time on preemption, at least in the limited sense it has been considered in recent climate change cases, as those cases have not really altered or added much insight into how preemption traditionally applies.

\textsuperscript{125} The district court acknowledged this in \textit{Kivalina}, before stating that it was not persuaded: “…federal courts undoubtedly are well suited to resolve new and complex issues and cases . . .” Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009).
Claims to redress injuries allegedly caused by a defendant’s activities are tort claims. Most tort claims are developed by judicial decisions under state law. Claims for climate change harm are almost always brought under a public nuisance theory, alleging that the defendants’ activities (i.e., emissions) unreasonably interfered with a right or interest enjoyed by the public at large.\(^\text{127}\) While most, if not all, states recognize some sort of common law public nuisance claim, claims for environmental harm involving air or water in their “ambient or interstate aspects” implicate national concerns, and thus invoke the federal common law.\(^\text{128}\) Nonetheless, perhaps due to the uncertainty of the existence of a “federal common law” which would adequately address claimed harms, or due to the uncertainty of whether private individuals can pursue a federal public nuisance claim, climate change plaintiffs will almost always invoke the state common law as well.\(^\text{129}\) Thus, in addition to federal public nuisance theories, climate change plaintiffs frequently invoke the state law of public and private nuisance, and may invoke state theories such as negligence or trespass.\(^\text{130}\)

When a climate change case is filed, defendants will almost always argue that the plaintiffs’ claims are “preempted,” usually by the Clean Air Act. In _AEP v. Connecticut_, the Supreme Court made clear, however, that there is a distinction between how congressional enactments affect the federal common law, on the one hand, and state law, on the other.\(^\text{131}\) The former is properly considered under the principles of “displacement,” imprecise terminology from prior cases notwithstanding. Whether the common law ability to bring a federal public

\(^{127}\text{See, e.g., AEP v. Connecticut, 131 S.Ct. at 2534; Comer v. Murphy Oil USA, 839 F. Supp. 2d 849, 854 (S.D. Miss. 2012). For the definition of a public nuisance, see Restatement (Second) of Torts § 821B(1).}\)


\(^{129}\text{See, e.g., Comer, 839 F. Supp. 2d at 854: Kivalina, 663 F. Supp. 2d at 869.}\)

\(^{130}\text{See, e.g., Comer, 839 F. Supp. 2d. at 584; Kivalina, 663 F. Supp. 2d at 869.}\)

\(^{131}\text{AEP v. Connecticut, 131 S.Ct. at 2537.}\)
nuisance claim based on defendants’ GHG emissions is displaced by the Clean Air Act is discussed in the next section. That is the hot issue after *AEP v. Connecticut* and *Kivalina*.

Whether supplemental state law claims are “preempted” by some federal law has not received much attention. In *AEP v. Connecticut*, the Court, after finding the federal claims were displaced, declined to consider whether the state law claims were preempted, because the parties had not briefed the issue.\(^{132}\) The Supreme Court has previously explained that, if a case should be resolved by reference to federal common law or if a congressional enactment is intended to occupy an entire field, then the state common law will be preempted.\(^{133}\) In the re-filed *Comer* action, the district court found that the supplemental state law claims hinged on a determination that the defendants’ emissions were unreasonable, a determination that is preempted by the Clean Air Act; thus, the state law claims were also dismissed.\(^{134}\)

In sum, although the state law preemption issue with respect to climate change claims has not been fully explored at the appellate level, the Supreme Court has provided some guidance which suggests that state law claims will likely be preempted. First, the *Connecticut v. AEP* Court said that interstate environmental harm claims are properly matters of national concern to support the emergence of federal common law in the area. The *AEP* court further ruled that, where federal common law applies, state common law should be preempted.\(^{135}\) Moreover, as discussed below, the *AEP* and *Kivalina* cases have held that the regulatory scheme provided by the Clean Air Act left no gap for federal common law claims.\(^{136}\) If that principle survives with

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\(^{132}\) *Id.* at 2540.


\(^{134}\) *Comer*, 839 F. Supp. 2d, at 865.

\(^{135}\) See *AEP v. Connecticut*, 131 S.Ct. at 2535; *Int’l Paper Co.*, 479 U.S. at 488.

\(^{136}\) *AEP v. Connecticut*, 131 S.Ct. at 2538−39; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012).
respect to damage claims, it is hard to imagine a court finding that the CAA left a gap for state common law. Thus, ultimately, generalized state law claims are very likely to be preempted.

**D. Displacement**

Future disposition of the question of whether damage-seeking climate change plaintiffs can ever get past the motion to dismiss stage will almost assuredly turn on whether the Ninth Circuit’s displacement analysis in *Kivalina* becomes the law of the land. That court relied solely on the finding that, by enacting the Clean Air Act to authorize the EPA to regulate pollutants such as CO2, Congress “displaced” the federal common law with respect to claims based on alleged injuries from CO2 emissions.137 Because damage claims for climate change injuries are almost always based on the common law, and because state law claims will (as discussed above) face a significant preemption hurdle, the Ninth Circuit’s displacement analysis serves as an almost complete bar to such claims.

Historically, displacement is frequently lumped with “preemption,” at least by terminology.138 These climate change cases make clear the legal distinction between the two doctrines. While preemption is concerned with state law versus federal law, displacement is concerned with federal decisional law versus federal legislative action.139 To understand the principle of displacement, one begins by recognizing the emergence of federal common law in

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137 *Kivalina*, 696 F.3d at 858.
138 See, e.g., *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 11 (1981) (“[T]he federal common law of nuisance has been fully pre-empted in the area of ocean pollution”).
139 The Court explained the distinction between preemption and displacement: “[W]hen Congress addresses a question previously governed by a decision rested on federal common law, the Court has explained, ‘the need for such an unusual exercise of law-making by federal courts disappears.’” Legislative displacement of federal common law does not require the ‘same sort of evidence of a clear and manifest [congressional] purpose’ demanded for preemption of state law. . . . ‘[D]ue regard for the presuppositions of our embracing federal system . . . as a promoter of democracy,’ . . . does not enter the calculus, for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest. . . . The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute ‘speak[s] directly to [the] question’ at issue.” (internal citations omitted).
areas of national concern after the landmark decision in *Erie R. Co. v. Tompkins*.\(^{140}\) The basic scheme of the Constitution necessitates that federal law address areas of national concern.\(^{141}\) Environmental protection, dealing with “air and water in their ambient or interstate aspects,” is undoubtedly an area where national legislation is appropriate and where federal decisional law fills in the gaps in federal legislative schemes.\(^{142}\) Historically, one area where the federal common law has emerged is where one state brings suit to abate pollution emanating from another state; in such instances, a claim for public nuisance has been permitted by the courts.\(^{143}\) However, as the Supreme Court explained in *AEP v. Connecticut*, when Congress speaks directly regarding such an issue of national concern, it displaces any need for federal courts to create the controlling law.\(^{144}\)

The Supreme Court applied this displacement principle in *AEP v. Connecticut*. Recall that the state-plaintiffs there had brought an action seeking to have a federal court compel the named fossil-fuel fired power plants to reduce their CO2 emissions by some amount to be determined by the trial court. The Supreme Court explained that, because Congress had enacted the Clean Air Act authorizing EPA to set emission limits on pollutants, and because the *Mass v. EPA* Court had conclusively established that CO2 was subject to the Clean Air Act, any attempt to limit CO2 emissions through judicial action was displaced.\(^{145}\) “The critical point is that Congress delegated to the EPA the decision whether and how to regulate carbon-dioxide

\(^{140}\) 304 U.S. 64 (1938).
\(^{141}\) See *AEP v. Connecticut*, 131 S.Ct. at 2535.
\(^{144}\) *AEP v. Connecticut*, 131 S.Ct. at 2536–37.
\(^{145}\) Id. at 2537–40.
emissions from power plants; the delegation is what displaces federal common law.”

Taking these words for their literal meaning, and there is no reason not to -- so long as there is a Clean Air Act which gives EPA the authority to regulate CO2 emissions, claims for injunctive relief to control emissions will fail under a displacement analysis.

The rub is whether the Supreme Court’s displacement analysis applies to claims for damages. The Ninth Circuit in *Kivalina* held that it did. This conclusion is not obviously compelled by logic or by the Supreme Court’s analysis in *AEP*.

It is easy to understand, conceptually, why plaintiffs should not be asking courts to set emissions standards for certain entities when EPA is already charged with setting (and is in fact taking steps to set) such standards. It makes sense to say such *abatement* actions are “displaced” by the authority given to EPA under the Clean Air Act. However, it is quite a different matter to say that the claim of a private individual or political subdivision for *damages* caused by another entity’s emissions is somehow displaced by the fact that the Clean Air Act gives EPA regulatory authority over emissions.

It is also clear that the Supreme Court’s decision in *AEP v. Connecticut* does not, standing alone, *compel* the conclusion that a climate change-based claim for damages is also displaced. The specific holding articulated by the Court is limited to attempts to reduce emissions, rather than seeking damages: “We hold that the Clean Air Act and the EPA actions it authorizes *displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.*”

Crucial to the decision in *AEP v. Connecticut* was the Supreme Court’s judgment that the EPA was the best entity to craft an appropriate emission reduction scheme, and that the principle of displacement left no room for a “parallel track” to

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146 *Id.* at 2538.
147 *Id.* at 2537 (emphasis added).
seek emission limits by invoking the federal common law.\textsuperscript{148} That rationale simply does not hold up when the plaintiffs are seeking compensatory damages for alleged injuries caused by climate change, as such plaintiffs are not undermining the prescribed limits or regulatory framework.

Despite the fact that the AEP Supreme Court was concerned only with a claim for abatement, the Ninth Circuit concluded that “AEP extinguished Kivalina’s federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions.”\textsuperscript{149} The Ninth Circuit based this decision almost entirely on two Supreme Court cases – \textit{Exxon Shipping Co. v. Baker}\textsuperscript{150} and \textit{Middlesex County Sewerage Authority v. National Sea Clammers Ass’n}\textsuperscript{151}—urging that, once “a cause of action is displaced, displacement is extended as to all remedies”\textsuperscript{152}:

Under \textit{Exxon} and \textit{Middlesex}, displacement of a federal common law right of action means displacement of remedies. Thus, \textit{AEP} extinguished Kivalina’s federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions.\textsuperscript{153}

Whether those Supreme Court opinions support the Ninth Circuit’s conclusion is questionable.

The Supreme Court decided \textit{Middlesex} in 1981, and \textit{Exxon Shipping} in 2008. Both were actions brought under the Clean Water Act. While there is one phrase from the \textit{Exxon Shipping} case that the Ninth Circuit relies upon—“we have rejected similar attempts to sever remedies from their causes of action”\textsuperscript{154}—it is difficult to fathom how that opinion, properly understood,

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 2538; see also \textit{id.} at 2540 (“The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits.”).
\item Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012).
\item 554 U.S. 471 (2008).
\item 453 U.S. 1 (1981).
\item \textit{Kivalina}, 696 F.3d at 857.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
supports the Ninth Circuit’s conclusion. To the contrary, a fair reading of Exxon Shipping directly undermines the Ninth Circuit’s displacement analysis, a fact which the concurring opinion in Kivalina makes quite persuasively.\footnote{Kivalina, 696 F.3d at 862–63 (Pro, J., concurring).}

\textit{Exxon Shipping} involved the 1989 oil spill in Prince William Sound, Alaska. While Exxon was assessed various fines under the CWA, private individuals brought common law claims for business losses and punitive damages as a result of the spill. In the relevant inquiry, the Supreme Court considered whether the penalties afforded by the CWA displaced (the Court used the term “preempted”) “the common law punitive-damage remedies at issue here.”\footnote{Exxon Shipping Co., 554 U.S. at 488.} Despite the fact that the CWA charged the EPA with prescribing effluent limits and provided various mechanisms for enforcing such limits, the Court held that preemption \textit{did not} apply to the common law claims for punitive damages.\footnote{Id. at 488–89.} Exxon was not even arguing that, because the CWA precludes claims for injunctive relief to abate water pollution (a truism supported by prior case law\footnote{See Milwaukee v. Illinois, 451 U.S. 304 (1981) (“Milwaukee II”).}), claims for money damages must be precluded as well. Indeed, Exxon \textit{conceded} that common law claims for compensatory damages survived the comprehensive regulatory scheme under the CWA, a concession that the Supreme Court made clear was the only tenable position to take:

\begin{quote}
Exxon could be arguing that, because the saving clause [of the CWA] makes no mention of preserving punitive damages for economic loss, they are preempted. But so, of course, would a number of other categories of damages awards that Exxon did not claim were preempted. If Exxon were correct here, there would be preemption of provisions for compensatory damages for thwarting economic activity or, for that matter, compensatory damages for physical, personal injury from oil spills or other water pollution. \textit{But we find it too hard to conclude that a statute expressly geared to protecting “water,” “shorelines,” and “natural resources” was intended to eliminate sub silentio oil companies'} (\textit{Milwaukee II}).
\end{quote}
common law duties to refrain from injuring the bodies and livelihoods of private individuals.

Perhaps on account of its overbreadth, Exxon disclaims taking this position, admitting that the CWA does not displace compensatory remedies for consequences of water pollution, even those for economic harms.\(^{159}\)

What Exxon was arguing is that, although preemption did not apply to a claim for compensatory damages, it did somehow preclude a claim for punitive damages.\(^{160}\) It is in this context that the Court made the statement that “we have rejected similar attempts to sever remedies from their causes of action.”\(^{161}\) It borders on intellectually dishonest for the Ninth Circuit to pull that phrase out of context and attempt to assert that it somehow supports the displacement analysis it applied in Kivalina. The Exxon Shipping Court went on to reject the displacement argument since the CWA did not express a congressional intent to occupy the entire field of pollution remedies, and an award of damages would not frustrate the remedial scheme of the CWA.\(^{162}\) Clearly, the Exxon Shipping decision undermines rather than supports the Ninth Circuit’s conclusion that the existence of the Clean Air Act displaces common law public nuisance claims for the effects of climate change.

In contrast, the earlier Middlesex decision does appear to support the Ninth Circuit’s conclusion. There, a group of fishermen brought suit against various officials for polluting the New York Harbor and the Hudson River.\(^{163}\) The plaintiffs invoked four different federal environmental statutes, the Federal Tort Claims Act, several state environmental statutes, the federal common law, state tort law and the U.S. Constitution in seeking injunctive relief,

\(^{159}\) *Exxon Shipping Co.*, 554 U.S. at 488–89 (emphasis added).

\(^{160}\) Id. at 489.

\(^{161}\) Id.

\(^{162}\) Id.

declaratory relief, and compensatory and punitive damages. With respect to the plaintiffs’ federal common law nuisance claims, the Court found that they were displaced (the Court again used the word preempted) by the more comprehensive scope of the Clean Water Act. In Milwaukee I, the Court had found that public nuisance claims for injunctive relief for water pollution could be heard by the federal courts. After that decision, however, the CWA was completely revised such that, when the case came back up to the Supreme Court, the claims were found to be displaced. In extending these holdings to the damages claims, the Middlesex Court explained:

[W]e need not decide whether a cause of action may be brought under federal law by a private plaintiff, seeking damages. The Court has now held that the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the [CWA], which was completely revised soon after the decision in [Milwaukee I].

While the Middlesex decision seems to support a broad conclusion that a comprehensive pollution abatement statute such as the Clean Air Act should displace climate change-related damages claims, the later-in-time Exxon Shipping decision would seem to support the exact opposite result. One way to avoid this apparent conflict is to consider what the Exxon Shipping Court said about the Middlesex decision. After finding that “punitive damages for private harms” would not frustrate the CWA remedial scheme, the Exxon Shipping Court noted that the case “differs from” Middlesex, “where plaintiffs’ common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the CWA.” The Court seemed to be acknowledging that the plaintiffs in Middlesex had so intertwined the

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164 Id. at 5.
165 Id. at 21–22.
statutory and common law claims, and the requests for injunctive and monetary relief, that what they were really seeking to do was avoid the prescribed limits and enforcement mechanisms of the CWA. In contrast, the Court characterized the punitive damage claims in Exxon Shipping as “private claims for economic injury [which] do not threaten similar interference with federal regulatory goals . . . .”\textsuperscript{170}

While there are good reasons to be skeptical that the Ninth Circuit’s analysis will withstand the test of time, based as it is on superficial if not erroneous readings of Exxon Shipping and Middlesex, there may be more compelling reasons why its ultimate conclusion is the correct one. Plaintiff’s most often bring these climate change actions, regardless of the relief sought, under a public nuisance theory.\textsuperscript{171} A public nuisance exists where a defendant unreasonably interferes with the use and enjoyment of a right common to the general public.\textsuperscript{172} But what constitutes an “unreasonable” interference, in the context of a claim against a GHG-emitting defendant, would seem to require consideration of business necessity, economics, technology and energy security that are more properly vested with the elected branches of government. Ultimately, the displacement inquiry may circle back around to the political question inquiry that has not gained much traction at the appellate level.

Then again, the displacement analysis ultimately may turn on how “the issue” is framed. As the Court in \textit{AEP v. Connecticut} explained, it is only when Congress speaks “directly” to the issue that the federal common law is displaced. Did Congress, through the Clean Air Act, speak directly to the GHG emission limits? The answer is probably ‘yes.’ Did Congress, through the Clean Air Act, speak directly to the issue of whether private individuals harmed by global

\textsuperscript{170} Id.
\textsuperscript{171} While plaintiffs have tried to utilize theories of trespass, private nuisance, negligence, fraud and civil conspiracy, it is difficult to escape the fact that the common law of public nuisance is the best fit.
\textsuperscript{172} \textit{See}, \textit{e.g.}, Restatement (Second) of Torts § 821B(1).
warming can seek compensation from major GHG emitters? The answer is probably ‘no.’ Such an easily manipulated framework allows for results-oriented judicial analyses that are likely to lead to inconsistent decisions.

If the *Kivalina* analysis stands as is, then it is difficult to fathom any plaintiff ever being able to recover for any injury caused by the air or water polluting activities of another. This would seem to go beyond just climate change based claims, and extend at least to all trans-state pollution that would typically be challenged under public nuisance theory. Both the Clean Air Act and the Clean Water Act are comprehensive regulatory schemes vesting the EPA with authority to determine appropriate emission and effluent discharge levels. A public nuisance claim for damages requires a judicial finding that emission or discharge levels of a particular defendant are “unreasonable.” Therefore, does *Kivalina* not require dismissal of all such damage claims? If that is the intended or necessary consequence of the Kivalina decision, then it represents a radical departure from environmental jurisprudence—such as *Exxon Shipping*—that has developed in this country to date.

In sum, as the law stands now, displacement is likely to be a difficult bar for climate change plaintiffs to clear. That said, there are reasons to believe that the Ninth Circuit’s approach will not be the final word on the matter.

V. The Public Trust Cases – an Alternative Approach to Climate Change Litigation

One avenue plaintiffs have recently attempted is to seek judicially-imposed emission reductions through the “public trust” doctrine. The federal litigation currently pursuing this approach is *Alec L. v. Jackson*. Though a seemingly novel cause of action, the public trust
doctrine actually dates back to Justinian Law of Ancient Rome.\footnote{Origins of the Public Trust Doctrine, COLO. WATER CONGRESS, http://www.cowatercongress.org/Public%20Trust%20Initiatives/Public%20Trust%20Doctrine%20Background.pdf?id...A-74A14B2EE6A2 (last visited Feb. 16, 2013).} Under Roman law, the air, the rivers, the sea and the shore were incapable of private ownership.\footnote{The Public Trust Doctrine, CAL. ST. LANDS COMMISSION http://www.slc.ca.gov/policy_statements/public_trust/public_trust_doctrine.pdf (last visited Feb. 16, 2013).} The Romans regarded these resources as sacred and dedicated to the use of the public.\footnote{Id.} The public trust doctrine imposes on the state trustee environmental duties that are owed to, and enforceable by, the public.\footnote{Id.} The public trust doctrine has always been controversial in American jurisprudence; U.S. law favors ownership of natural resources as private property.\footnote{Joseph D. Kearney & Thomas W. Merrill, The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central, 71 U. CHI. L. REV. 799 2004.} The public trust doctrine directly conflicts with this ownership mentality by treating some resources as subject to a perpetual trust that forecloses private exclusionary rights.\footnote{Haochen Sun, Toward a New Social-Political Theory of the Public Trust Doctrine, 35 VT. L. REV. 563 (2011).}

The plaintiffs in \textit{Alec L.} were supported by a group of not-for-profit organizations – Our Children’s Trust, iMatter, and WITNESS – in bringing suit against American regulators: EPA, and the Departments of Interior, Agriculture, Energy, Defense and Commerce.\footnote{Complaint, Alec L. v. Jackson, No. C-11-2203 EMC, 2011 WL 8583134 (N.D. Cal. Dec. 6, 2011).} The plaintiffs are all youth leaders purporting to represent future generations of the United States. They allege that, if climate change and carbon emissions continue to escalate, the agencies are causing irrevocable damage to the nation’s natural resources.\footnote{Id.} The theory is that the government acts as trustee for the benefit of the beneficiaries (the plaintiffs) by preserving and maintaining the
public trust’s res, the natural resources of the U.S. The plaintiffs have sought declaratory and injunctive relief to prevent a further increase in U.S. carbon dioxide emissions and to force government action to reduce CO2 emissions consistent with what current scientific analysis deems necessary to slow further climate change.

The public trust doctrine cases differ from the climate change litigation discussed above because, instead of seeking to enjoin the emitters and/or recover compensatory damages, the plaintiffs are suing the agencies and seeking to have the atmosphere incorporated into the public trust as a resource. The plaintiffs urge that, if the court declares the atmosphere as a resource included in the res, then the United States will have an affirmative duty to protect and restore that trust asset; specifically, they seek the reduction of global CO2 concentrations to levels prescribed by climate scientist Dr. James Hansen. Hansen filed an amicus brief detailing the climbing rate of CO2 emissions in the U.S. The plaintiffs’ amended complaint is detailed and alleges a particularized injury to the nation’s youth. Nonetheless, one of their challenges is that the atmosphere is not a resource solely of the United States. While Dr. Hansen honestly acknowledges that that climate change is a global issue, he tries to (as he legally must) focus on how it affects the nation’s resources. For example, his brief details how sea level rise affects the United States in particular and how climate change makes the country more susceptible to storm surges like those experienced during Hurricane Katrina.

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184 Id.
187 Id.
Although the public trust cases lend themselves to the same issues that plaintiffs face in other climate change litigation, an amicus brief filed by the law professors, including Joseph Sax, lays a solid foundation as to why this case is justiciable, meaning the political question doctrine and displacement principles do not apply to public trust litigation. Referring to themselves as “amicus law professors,” they argue that judicial enforcement of fiduciary obligations is necessary when the political branches abdicate their responsibility to protect the res of the trust.188 Since the Obama administration has yet to promulgate rules consistent with the Court’s finding in Mass. v. EPA, six-years-old now, the immediacy needed to respond to rising CO2 emissions allows the court to declare the atmosphere a natural resource in the public trust requiring agency oversight and protection.189 The plaintiffs in Alec L. are not even seeking damages.190 They simply want the court to make the agencies affirmatively protect them, as beneficiaries, from further irrevocable damage to the atmosphere.191

The public trust plaintiffs argue that they are not subject to displacement because, unlike AEP v. Connecticut, the plaintiffs are not seeking to judicially impose emission limits on power plants.192 The plaintiffs are not even telling the United States government how to manage carbon emissions concerning the atmosphere.193 The plaintiffs did not file a nuisance claim.194 The plaintiffs are asking only that the government include the atmosphere as part of the public trust

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191 Id.
193 Id.
resources such that the agencies can and must affirmatively act as fiduciaries to protect the res.\textsuperscript{195} It is a different animal than prior climate change claims.

Not all agree. The “Huffman Brief,” as it is known in the litigation, was filed by law professors who challenge the viability of the plaintiffs’ claims. Without legal citation, they argue that the Clean Air Act in fact displaces the public trust claims.\textsuperscript{196} They also argue that there is no federal Public Trust Doctrine and, even if there were, the Public Trust Doctrine does not require the federal government to protect the climate.\textsuperscript{197}

The Huffman Brief appears to have been the primary impetus for the D.C. District Court’s dismissal of the case. Originally filed in the Northern District of California, the case was transferred to the D.C. Circuit Court for the convenience of the government.\textsuperscript{198} The Huffman brief argued\textsuperscript{199}, and the district court agreed, that dismissal was proper under \textit{PPL Montana, LLC v. Montana}.\textsuperscript{200} In dismissing the case, the district court explained that, although courts have expanded the public trust doctrine to afford remedies to plaintiffs on a federal level involving water conservation and management, the plaintiffs in this case departed significantly from the traditional application of the doctrine.\textsuperscript{201} The Huffman brief apparently persuaded the court that dismissal was proper under \textit{PPL Montana, LLC v. Montana} for lack of federal question

\textsuperscript{196} Memorandum in Support of Plaintiff’s Motion for Reconsideration, Alec L., No. C-11-2203, 2011 WL 8583134.
\textsuperscript{197} Id.
\textsuperscript{201} 132 S.Ct. 1215 (2012). That case involved an action by an electric utility that operated hydroelectric dams against the State of Montana for a declaration that the State could not seek compensation for the utility's use of State riverbeds. The State counterclaimed seeking a declaration that the utility was required to compensate the State for its use of state lands, and damages for the utility's use of those lands without compensation. The lower court entered judgment against the utility for $40,956,180, and the Montana Supreme Court affirmed. \textit{PPL Montana, LLC v. State}, 355 Mont. 402, 229 P.3d 421.
\textsuperscript{201} Alec L. v. Jackson, 863 F. Supp. 2d. 11 (2012).
jurisdiction. *PPL Montana* does not, however, compel dismissal of *Alec L*. The action brought in *PPL Montana* was under the Montana state constitution regarding Montana’s state public trust doctrine, the navigability of a waterway and the plaintiffs’ statutory rights to use it.  

202 The Supreme Court never held that the public trust doctrine does not provide a federal cause of action or was not actionable under the federal constitution.  

203 There are court opinions dating back to the 1800s directly recognizing such an action though, as the plaintiffs acknowledged, the doctrine had not been invoked in recent years.

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The plaintiffs in *Alec L.* are now seeking reconsideration through Rule 59, as their case was dismissed with prejudice for failure to raise a federal question, and thus a lack of federal jurisdiction under Section1331.  

205 Realistically, it appears that the *Alec L.* plaintiffs will, like other private climate change plaintiffs, be barred long before they ever get to be heard on the merits. That is unfortunate, as they may have avoided some of the preliminary bars that traditional climate change plaintiffs have faced.

If traditional climate change cases are going to turn on the determination that Congress has charged the EPA with all-encompassing authority over GHG emissions, then at some point individuals allegedly harmed by the effects of climate change, including perhaps future generations, should be able to compel the EPA or the federal government to take concrete steps to mitigate the worst effects of climate change. The public trust cases are an honest, if novel, attempt to do just that. With the likely failure of those efforts, however, recourse will probably be limited to the citizen suit enforcement procedures of the Clean Air Act.

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202 *PPL Montana, LLC*, 132 S. Ct. at 1221.  
204 Id.  
VI. Conclusion

The *Kivalina* decision made it much more unlikely that GHG emitters will ever be held liable for injuries claimed to have been suffered as a result of the impacts of climate change. The Supreme Court has conclusively established that GHG emitters cannot be sued for injunctive relief to compel them to reduce their emissions, because Congress, through the Clean Air Act, has exclusively charged the EPA with authority to craft the appropriate GHG emission levels. The Ninth Circuit in *Kivalina* took that one step further in holding that, not only are emission abatement claims displaced by the Clean Air Act, but so too are claims for compensatory damages.

While there are a myriad of difficult and legitimate challenges associated with trying to hold GHG emitters liable for the effects of climate change, the route taken by the *Kivalina* court is based on a questionable legal analysis and potentially represents a radical departure from environmental damage if taken to its logical extreme. Its legal analysis is questionable because it purports to rely on a 2008 Supreme Court decision that affirmed Exxon’s liability for water pollution compensatory and punitive damages despite the presence of a comprehensive regulatory scheme under the Clean Water Act. It is potentially a far-reaching change in the law in that, taken to its logical conclusion, it would preclude all public nuisance claims for at least trans-state air and water pollution. If *Kivalina* becomes the law of the land, there does not appear to be any viable avenue for climate change plaintiffs to have their claims heard on the merits, regardless of the relief sought.