No. 12-1072

IN THE

Supreme Court of the United States

NATIVE VILLAGE OF KIVALINA AND
CITY OF KIVALINA, PETITIONERS,

v.

EXXON MOBIL CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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Petitioners submit this reply brief to address Respondents' main arguments as to why this Court should not grant certiorari. Respondents have misstated the holding of *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), in an attempt to gloss over a clear conflict among this Court's precedents on the displacement of a federal common law claim for damages – a conflict that is expressly acknowledged in the concurring opinion below. Respondents also cannot sidestep the importance of this case by taking a results-oriented approach that is at odds with a prior decision of this Court. Finally, their attempt to identify a defect in this case as a vehicle for review under the law of standing or the political question doctrine also cannot be squared with this Court's rulings. When Respondents' multiple attempts to re-write this Court's precedents are set aside, what remains is a profoundly important case raising a legal issue in a realm that frequently merits this Court's attention and on which the Court's precedents conflict.

I. Respondents' Attempt to Gloss Over the Conflict in This Court's Displacement Cases Fails.

Respondents err in their contention that, after *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"), essentially all federal nuisance claims for damages based on air or water pollution are displaced by the Clean Water Act ("CWA") and Clean Air Act ("CAA"). Opp. 4 ("federal common law 'nuisance' claims based on water pollution [are] displaced by the Clean Water Act, regardless of ... the relief sought"). This argument was a plausible reading of the law as it existed immediately after *Middlesex*

County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981). But the Court in *Exxon Shipping* directly rejected this approach and, thus, upheld a common law pollution claim for damages. And in *AEP* itself, in which the plaintiffs sought only injunctive relief, the Court expressly based its decision on the fact that the relief the plaintiffs were seeking (*i.e.*, emissions caps) would have trenched on EPA's authority to set any necessary emissions limits under the CAA. *AEP*, 131 S. Ct. at 2538 ("The Act itself thus provides a means to seek limits on emissions ... – the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track."). Similarly, in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), the Court held that the plaintiffs' injunctive claims were displaced only after engaging in a detailed analysis demonstrating that each form of injunctive relief that the plaintiffs were requesting was within EPA's statutory authority under the CWA.

Respondents fail to discuss these fundamental aspects of *AEP* and *Milwaukee II*. They simply breeze over these cases. Opp. 6. If Respondents appear to do a convincing job arguing that the Court's cases are perfectly consistent, it is only because they have refused to acknowledge what two of them actually say.

Respondents then go further and misstate the holding of *Exxon Shipping*. They argue that *Exxon Shipping* was different from this case because, they contend, it involved a claim of "negligent maritime ship operations," rather than "pollutant emissions." Opp. 8. But in stating its holding the Court in *Exxon Shipping* could not have been clearer that it was ruling about pollution remedies: "we see no clear indication of

congressional intent to occupy the entire field of *pollution remedies*." *Exxon Shipping*, 554 U.S. at 489 (emphasis added). Moreover, the Court rejected the argument "that *any* tort action predicated on an oil spill is preempted" under the CWA, 554 U.S. at 488 (emphasis added), because it would be perverse to construe an environmental statute as precluding damage recoveries not even addressed by the statute:

> 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. 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' common law duties to refrain from injuring the bodies and livelihoods of private individuals.

Exxon Shipping, 554 U.S. at 488-89. It is thus erroneous to treat the expressly broad holding of *Exxon Shipping* as limited to maritime negligence.

Respondents also try to distinguish *Exxon Shipping* on the basis that the defendant there conceded that the CWA did not preempt federal common law claims against it for compensatory damages. They argue that the Court was therefore somehow required to accept this concession while trying to square it with an argument for displacing only the punitive damages remedy. Opp. 8 (*Exxon Shipping* "simply reflects the Court's response to the specific

arguments presented by the defendants in that case, concerning the preemption of particular remedies [punitive damages]."). But, again, *Exxon Shipping* expressly contradicts this reading of the case: the Court *did* consider whether the entire damages claim was displaced and rejected this position independent of, and before even acknowledging, the defendant's concession that compensatory remedies were not displaced. *Exxon Shipping*, 554 U.S. at 488-89.

Respondents assert that the Court's reasoning in *Exxon Shipping* that punitive damages were not displaced because they would not have "any frustrating effect on the CWA remedial scheme," *Exxon Shipping*, 554 U.S. at 89, should not apply with equal force to Kivalina's common law claim for compensatory damages. But they fail to articulate any principled basis for their proposed distinction between compensatory and punitive damages. Rather, they sidestep this issue with the conclusory assertion that *AEP* and *Milwaukee II* somehow "implicitly recognize" their approach. Opp. 8. Respondents thus take us back where we started: to Respondents' superficial reading of cases that, as Petitioners showed in their opening brief, actually lead to the opposite conclusion.

Respondents further contend there can be no conflict between *Exxon Shipping* and *Middlesex* given that the former expressly distinguished the latter. Opp. 9. But once again, Respondents fail to grapple with the actual reasoning of the Court and what it means here. In *Exxon Shipping* the Court distinguished *Middlesex* (and *Milwaukee II*, where, again, the plaintiffs sought injunctive relief only) on the ground that the claims in those cases "amounted to

arguments for effluent-discharge standards different from those provided by [statute]" whereas "Baker's private claims for economic injury do not threaten similar interference with federal regulatory goals." 554 U.S. at 489 n.7. The Court could thus harmonize *Middlesex* with *Exxon Shipping*'s no-displacement-of-damages decision only by implicitly finding that the injunctive claims in *Middlesex* so predominated their damages claims that the damages claims could not be untangled from the alleged violations of the CWA. But if *Middlesex* and *Exxon Shipping* are thus harmonized, then Respondents' arguments make no sense: this case is just like *Exxon Shipping* – a private claim of economic injury seeking *only* damages – and distinctly unlike *Middlesex* in the only manner that the Court found relevant. Kivalina does not seek any relief that could possibly interfere with any federal regulatory goals. Yet these two decisions of the Court confused the court of appeals, which relied on the wrong one. And that confusion is understandable given that *Middlesex* involved a damages claim and purported to establish the sweeping rule of displacement that Respondents say has survived the contrary ruling in *Exxon Shipping*.

The Court need not rely solely on Kivalina's word here as to the existence of a conflict. The opinion below concurring in the result states that *Exxon Shipping* "appears to be a departure from" *Middlesex*, Opp. 21a, and "suggests a different result" from the one reached here. *Id.* at 28a; *see also id.* at 14a ("I write separately to address what I view as tension in Supreme Court authority"). Respondents do not even acknowledge these statements.

In the end, Respondents have described a displacement test as they think it should be, that harkens back to *Middlesex*, and that is at odds with the holding of *Exxon Shipping* and the conflict-based reasoning of *AEP* and *Milwaukee II*. If Respondents are correct that *Middlesex* extinguished the federal common law of nuisance, and that a statute that says nothing about compensatory damages has somehow displaced Kivalina's federal damages remedy for harms from global warming, then *Exxon Shipping* must have been wrongly decided. The conflict among these decisions is palpable.

II. The Importance of the Issues and Legal Questions Merits Review by this Court.

Respondents make no attempt to contest the importance of the underlying subject matter. Nor do they dispute that this Court granted certiorari in *Massachusetts v. EPA*, 549 U.S. 497 (2007), due to the importance of the same underlying subject matter, even as the Court expressly acknowledged the absence of conflicting decisions. *Id.* at 505-06.

Respondents instead contend that the issue is not of exceptional importance merely because it was decided in their favor below. Opp. 15 ("[w]hile a decision to the contrary would have been extraordinary, likely warranting a writ of certiorari ...."). But this results-oriented approach fails to address whether the legal issue is, itself, one of importance. The frequent review by this Court of questions on the displacement of federal common law underscores the fundamental importance of the

question presented here – and of having this Court define the contours of a doctrine that separates two branches of the federal government.

When some of the same Respondents here presented the Court with a certiorari petition in *AEP* arguing that "[t]he questions presented by this case are recurring and of exceptional importance to the Nation," Petition for a Writ of Certiorari, *American Electric Power Co. v. Connecticut*, U.S. Supreme Court No. 10-174, at 12 (Aug. 2, 2010), the Court agreed and granted the petition. Nothing has changed in the intervening time.

III. This Case Is an Appropriate Vehicle for Review.

Respondents are also wrong to contend that the Petitioners lack standing and that their claims present political questions.

Respondents argue that plaintiffs lack standing because they cannot fairly trace their injuries to defendants' particular emissions. Opp. 12-13. But the Court squarely rejected that argument in *Massachusetts*. There, the Court held that the plaintiffs demonstrated causation sufficient to establish standing when EPA's refusal to regulate new motor vehicle emissions contributed to plaintiffs' injuries from greenhouse gas emissions in a case, like this one, dealing with coastal injuries. *Massachusetts*, 549 U.S. at 523-25. The Respondents' standing argument is even less persuasive in a public nuisance case like this one than it was in *Massachusetts* because here it would impose a stricter standing requirement than necessary

to state a proper public nuisance claim on the merits, which only requires allegations that a defendant "contributes" to the nuisance. *See, e.g., Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696-97 (7th Cir. 2008) (*en banc*) (Posner, J.) ("Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them had created a nuisance ..., pollution of a stream to even a slight extent becomes unreasonable [and therefore a nuisance] when similar pollution by others makes the condition of the stream approach the danger point.") (quotation marks omitted); *Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001). Article III can require no stricter showing because a court may not "raise the standing hurdle higher than the necessary showing for success on the merits in an action." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Put another way, standing is substantially less difficult to establish here than it was in *Massachusetts* because Kivalina has sued private party emitters directly, whereas in *Massachusetts* plaintiffs sued the government for failing to regulate third parties, a form of standing that "is ordinarily substantially more difficult to establish" than in a direct case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation marks omitted). Kivalina therefore does not need any special solicitude in the standing analysis.

Respondents incorrectly contend that *AEP* supports their standing argument. They point out that in *AEP* an equally divided court (Justice Sotomayor not participating) said that only "some" of the plaintiffs in that case had standing – which Respondents interpret

as a *sub silentio* finding that only the State plaintiffs and not the private plaintiffs had standing, based on the "special solicitude" extended to States by *Massachusetts*, 549 U.S. at 518-20. Opp. 13. Yet what *AEP* actually said was that "*at least* some" of the plaintiffs had standing. *AEP*, 131 S. Ct. at 2535 (emphasis added). *AEP* was simply applying the familiar rule that where the Court finds a single plaintiff to have proper standing it need not inquire as to the standing of other plaintiffs. *See, e.g., Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs.").[1] Respondents' objection on standing is no bar to review.

On the political question doctrine, Respondents contend that a public nuisance damages claim requires the factfinder to balance "the relative social and economic utility of various commercial activities." Opp. 14. This is a pure error of law: there are several ways a defendant's interference with a public right may be adjudged "unreasonable" that do *not* require any balancing analysis. *See, e.g., Restatement (Second) of Torts* §§ 829A, 821B(2), 826(b) (1979). These provisions expressly dispense with the balancing analysis where, as here, harm to the plaintiff is great and the plaintiff seeks damages. The political question doctrine, moreover, is a fish out of water in this tort case among

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[1] Moreover, the *Massachusetts* decision was ultimately based on a property rights analysis that did not depend on the sovereign status of the owner. *See Massachusetts*, 549 U.S. at 539 (Roberts, C.J., dissenting) ("The Court asserts that Massachusetts is entitled to "special solicitude" due to its 'quasi-sovereign interests,' but then applies our Article III standing test to the asserted injury of the Commonwealth's loss of coastal property.") (citations omitted).

private parties and should get no more attention here than it did in *AEP*. *See AEP*, 131 S. Ct. at 2535 n.6.

CONCLUSION

The certiorari petition should be granted.

Respectfully submitted,

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