05-5119-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

OPEN SPACE INSTITUTE, INC., OPEN SPACE CONSERVANCY, INC., and AUDUBON SOCIETY OF NEW HAMPSHIRE,

Plaintiffs-Appellants,

—against—

AMERICAN ELECTRIC POWER COMPANY, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., and CINERGY CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES CINERGY CORPORATION AND XCEL ENERGY, INC.

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Dated: February 20, 2006

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees hereby state:

Cinergy Corporation has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

Xcel Energy, Inc. has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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PRELIMINARY STATEMENT

This appeal arises from an order dismissing two essentially identical lawsuits—one filed by three private land trusts, the other filed by eight States and New York City—that seek to abate the alleged public nuisance of global climate change. Through these actions, plaintiffs ask the federal courts to usurp the responsibilities of the political branches and to decide complex and far-reaching scientific and policy questions with sweeping implications for the nation's economy, security, and foreign relations. As American Electric Power Company, Inc., American Electric Power Service Corporation and Southern Company (hereinafter collectively "AEP") explain in detail in their brief, because the Constitution assigns the resolution of such issues to the political branches, and because courts lack discoverable and meaningful standards for resolving such issues, the District Court properly held that adjudication of plaintiffs' claims is barred under the political question doctrine. *See* Brief of Defendants-Appellees American Electric Power Company, *et al.*, ("AEP Br.") at 48-59.

The judgment below may also be affirmed on several alternative, though closely-related, grounds. As AEP explains, separation-of-powers principles foreclose use of the courts' extremely limited federal common law-making authority to provide a remedy for global climate change. Moreover, any

conceivable federal common law authority federal courts might have had to address this phenomenon has been displaced. *See id.* at 36-47.

We join in all of those arguments and incorporate them by reference herein. In addition, the dismissal below may be affirmed based on yet another separation-of-powers principle, this one grounded in Article III itself: this case raises no justiciable case or controversy because plaintiffs lack standing. Their complaint alleges speculative risks of future harms, none of which is sufficiently imminent to create a case or controversy. Indeed, the very judgment that the "probabilistic" risks of the future harms they allege are sufficient to warrant a remedy is a fundamental policy judgment that Congress, not the courts, has the competence and responsibility to make. Only Congress, moreover, can provide a meaningful form of redress for harms alleged to flow from greenhouse gases created by literally millions of human activities around the world.

The limits of Article III confirm that plaintiffs are seeking relief in the wrong forum. Congress can craft a national response to the issue of global climate change, and the President can negotiate treaties establishing an international response. Indeed, just last year, Congress debated various proposals, and the President conducted multilateral negotiations on climate change. Plaintiffs cannot short-circuit the democratic process and ask federal courts to create emissions standards that Congress has repeatedly declined to enact.

Nor can they use state nuisance law to mandate such standards. The very nature of plaintiffs' claim is that carbon dioxide emissions are allegedly harmful *only* in, or because of, their *interstate* nature—*i.e.*, only when they mix with other emissions throughout the atmosphere. States lack authority to regulate interstate harms where, as here, Congress has made clear that it considers such alleged harms a matter of uniquely federal concern requiring a coordinated *national* response. Indeed, plaintiffs' state nuisance claim is preempted for the additional reason that the state law-based emissions controls they seek would interfere with the coordinated national response that Congress has adopted and that the President is implementing: such controls would leave the President with less bargaining leverage than Congress intended him to have when he negotiates with other countries over emissions controls.

Standing is a threshold—and, in this case, dispositive—issue. To understand fully why plaintiffs lack standing, however, it is important to understand the flaws in their underlying claims. For example, plaintiffs argue that Article III's requirements of injury, causation and redressability cannot be more stringent than the showings required to succeed on the merits of their claims. But, in applying that principle, they misstate the showings that are required to make out a claim under the federal common law cause of action they invoke. Similarly, the various federal statutes that displace their purported federal common law cause of

action also demonstrate that their claims of injury ultimately depend on scientific and policy judgments that courts are not competent to make, and that Congress itself has declined to make. Accordingly, we respectfully refer the Court to the brief of AEP, which provides the necessary background to the arguments set forth in this brief.

STATEMENT OF APPELLATE JURISDICTION

Plaintiffs purported to bring this action under federal common law and predicated jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether plaintiffs have standing.
2. Whether plaintiffs' state-law nuisance claims are preempted.

STATEMENT OF THE CASE

Plaintiffs, three nonprofit land trusts, purport to bring claims under federal common law, or, alternatively state nuisance law, to abate the public nuisance of "global warming." A20 (Compl. ¶ 1). The relevant allegations of their complaint, the actions Congress and the Executive Branch have taken in response to the phenomenon of global climate change, and the basis of the decision below are all set out in full in the brief of AEP. We incorporate that discussion *in toto* here.

The land trusts filed a timely appeal from the dismissal of their complaint, and, although the District Court did not squarely address the issue, have briefed their standing to sue.[1]

STANDARD OF REVIEW

Defendants agree that the standard of review is *de novo* and that all properly pled factual allegations must be considered as true. *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996) ("[c]onclusory allegations or legal conclusions masquerading as factual conclusions" need not be accepted) (internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. To invoke the power of the federal courts, plaintiffs must satisfy Article III's core requirements of injury-in-fact, causation, and redressability. Plaintiffs cannot demonstrate that any of these core requirements is satisfied. While they claim that global climate change is currently affecting the environment, they allege no current injuries from these environmental effects. To the contrary, their complaint repeatedly alleges future harms and risks. None of these alleged future harms, however, is imminent.

[1] Although they successfully opposed consolidation of their appeal with that of the private land trusts, the private plaintiffs incorporate by reference the arguments the States and City make in their separate appeal (No. 05-5104). *See* OSI Br. at 13 n.2. Accordingly, defendants address in this appeal the relevant standing arguments made by both groups of plaintiffs. For the Court's convenience, we note that, as a result, the arguments in this brief are duplicative of our arguments in No. 05-5104.

Nor can plaintiffs rely on "probabilistic" risks of future harms to show injury-in-fact. This Court has deemed enhanced risk a cognizable injury only where Congress has enacted statutes to prevent that particular increased risk. *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003). Because there is no such statute here, a court can find standing only by making a fundamental policy decision that the probabilistic risks of future harms alleged here warrant a remedy. Such policy judgments, however, are for Congress to make, and Congress itself has declined to make that judgment with respect to the very risks plaintiffs allege.

Plaintiffs likewise do not and cannot allege that the future harms they seek to prevent are "fairly traceable" to defendants. In arguing otherwise, they rely on findings of causation in multiple-polluter cases under the Clean Water Act. But those cases involved discharges in excess of federally prescribed limits set by an expert and politically accountable body charged with protecting the public health. Such illegal discharges are presumed to be harmful and thus to cause injuries. Here, there are no federally prescribed mandatory limits. Because no presumption of causation is available, plaintiffs have no basis for alleging that defendants' emissions alone will cause any injury at all. Indeed, plaintiffs' theory is that those emissions cause harm only in conjunction with emissions from millions of sources throughout the world. By definition, therefore, such future harms are not "fairly traceable" to defendants.

Finally, plaintiffs do not and cannot allege that the relief they seek would or could remediate any future harms. The principle that abating presumptively harmful illegal discharges will provide redress is again inapplicable. Because effective relief depends on reaching the actions of third parties responsible for over 97% of global man-made emissions of carbon dioxide (as well as other greenhouse gases), plaintiffs cannot allege that any injunctive relief against defendants will redress any future injury they claim.

II. Plaintiffs' state-law nuisance claim is preempted. First, plaintiffs seek to remedy alleged harms that flow from carbon dioxide emissions only in their interstate and international nature—*i..e.*, only when and because those emissions mix with other emissions throughout the earth's atmosphere. Such interstate or international harms are not the province of state law, and, indeed, Congress itself has repeatedly made clear that it deems carbon dioxide emissions and global climate change to be an area of uniquely federal concern calling for a coordinated national response consisting of further study, voluntary (rather than mandatory) reductions and multilateral negotiations. Accordingly, plaintiffs' state-law claim conflicts with the method Congress has adopted for addressing this issue. Second, plaintiffs' state-law claim interferes with and undermines political branch management of foreign relations on this same subject. If successful, that claim will give rise to a scattershot and unilateral response—rather than a

comprehensive and multilateral response—leaving the President with "less to offer" other countries in negotiations over emissions reductions than Congress intended him to have, and risking unnecessary economic costs and burdens that Congress wishes to avoid.

ARGUMENT

I. PLAINTIFFS LACK STANDING.

The decision below should be affirmed because plaintiffs cannot satisfy Article III's requirements of injury-in-fact, causation, and redressability, "the irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

A. Plaintiffs Allege No Actionable Injury-in-Fact.

Plaintiffs allege no *current* injury. Although they allege that global warming "has begun," *e.g.*, A37 (Compl. ¶ 44), global warming is a "phenomenon," *Massachusetts v. EPA*, 415 F.3d 50, 56 (D.C. Cir. 2005) (Sentelle, J., concurring in the judgment), not an injury, as plaintiffs implicitly admit. *See* A51 (Compl. ¶ 101) (referring to "threatened injuries *from* global warming") (emphasis added). Similarly, while plaintiffs allege that global warming is currently causing increased atmospheric temperatures, reduced Arctic sea ice, loss of glaciers and rising sea levels, A41 (Compl. ¶¶ 57-59); States Br. at 42, these are current effects, not "concrete and particularized" injuries. *Lujan*, 504 U.S. at 560.

The only potential injuries-in-fact plaintiffs allege, such as water shortages, will occur, if at all, in the indefinite future. Indeed, their complaint speaks, over and over again, about what global warming "will" do,[2] "threaten[s]" to do,[3] or increases the risks of occurring.[4] The essential "injury" plaintiffs allege is that global warming creates a risk of future harm over the course of the next century. *See, e.g.*, A42 (Compl. ¶¶ 61, 63).[5]

Future harm, however, constitutes an injury-in-fact only when it is "'imminent.'" *Lujan*, 504 U.S. at 565 n.2; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("threat of injury must be both 'real and immediate'"). There must be a close temporal proximity between the complained-of conduct and the alleged harm. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("threatened injury" must be "certainly impending") (internal quotation marks omitted). Under these standards, the Supreme Court has rejected claims of "some

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[2] *E.g.*, A21-22, A41-43; A45-49 (Compl. ¶¶ 6-8, 58-59, 61, 63, 68, 75, 80-88).
[3] *E.g.*, A51 (Compl. ¶¶ 99-102).
[4] *E.g.*, A42-43 (Compl. ¶ 64).
[5] In their appeal, the States obliquely suggest, for the first time, that they have alleged the current injury of actual deaths from increased heat. *See* States Br. at 42. In the relevant portions of the complaint that they cite, however, the States alleged only that heat "is a major public health threat" that can cause fatalities, and that global climate change "is *expected to* cause intensified and prolonged summertime heat." *See* JA in No. 05-5104 at A92 (Compl. ¶¶ 109-110) (emphasis added). Indeed, when challenged below to identify any allegation of a current injury, the States cited only California's alleged loss of snowpack. Pls. Omnibus Opp. at 36. By contrast, they identified alleged future heat-related deaths as a *future* risk purportedly demonstrating injury-in-fact. *Id.* at 37.

day" injuries, and concluded that an injury that assertedly would occur "'in this lifetime'" was insufficient under Article III. *Lujan*, 504 U.S. at 564 n.2. In *McConnell v. FEC*, 540 U.S. 93, 226 (2003), it held that Senator McConnell lacked standing to challenge a campaign finance provision that could not apply to him until 2008. Because his alleged injury was not "'certainly impending,'" it was "too remote *temporally* to satisfy Article III standing." *Id.* (emphasis in original omitted; emphasis added); *Whitmore*, 495 U.S. at 155 ("'injury in fact' . . . . must be concrete in both a qualitative *and temporal* sense") (emphasis added); *Lujan*, 504 U.S. at 564 n.2 (discussing imminence in temporal terms).

Here, plaintiffs fail to allege any future harms are imminent. They simply claim that future injuries "will" occur at some unspecified future date. The closest plaintiffs come to identifying a timeframe for the alleged harms is their contention that, "[i]n the absence of restrictions on carbon dioxide emissions," global average temperatures will increase "2.5 to 10.4 degrees Fahrenheit from 1990 levels *by 2100*," A42 (Compl. ¶ 61) (emphasis added), and that these projected temperature increases will cause the specified harms, *id.* (Compl. ¶ 63). Because the four-year delay in *McConnell* was insufficiently imminent to satisfy Article III, the century-long horizon identified by plaintiffs here is far too distant and indefinite to meet the imminence requirement. *See also Shain v. Veneman*, 376 F.3d 815, 818-19 (8th Cir. 2004) (risk of harms from a sewage plant built in a

100-year flood plain too "remote"; an "imminent" harm must be "immediate"), *cert. denied*, 543 U.S. 1090 (2005). Merely labeling such distant future harms as "imminent," *e.g.* A51 (Compl. ¶ 101), does not satisfy Article III. *See De Jesus*, 87 F.3d at 70 ("[c]onclusory allegations or legal conclusions masquerading as factual conclusions" are insufficient) (internal quotation marks omitted); *accord Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) ("bald assertions and conclusions of law will not suffice").[6]

Accordingly, plaintiffs are forced to argue that an increased risk of harm is a cognizable injury. States Br. at 43; OSI Br. at 60. But the case they rely upon, *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003), identified enhanced risk as an injury only where Congress had enacted statutes to prevent the very increased risk the plaintiffs alleged. The Court took pains to note that "the very purpose" of the statutes at issue was "to minimize . . . risk," *id*. at 634, and found that "'increased risk of potential harm . . . is an injury in fact'" "where the purpose of

[6] The D.C. Circuit's fractured ruling in *Massachusetts* likewise does not establish that alleged future injuries from global warming are sufficient for standing. States Br. at 45; OSI Br. at 59. Judge Randolph, who announced the court's judgment, did "not resolve whether petitioners ha[d] standing," 415 F.3d at 61 (Tatel, J., dissenting), and Judge Sentelle concluded they did not. *Id.* at 60 (Sentelle, J., concurring in the judgment). In all events, the petitioners in that case sought regulation of an entire industry, which is responsible for emissions nearly three times larger than those at issue here. *Id*. at 65 (Tatel, J., dissenting).

the statute is to eliminate uncertainty as to health risks." *Id.; see also id.* at 635 (same).[7]

This Court's other decisions recognizing injuries-in-fact based upon enhanced risk have likewise done so based on regulatory or legislative determinations that a particular risk is unacceptable. For instance, in holding that exposure to sulfur dioxide levels within regulated limits could constitute an injury-in-fact, the Court relied on Congress' recognition that "there are potentially adverse affects from air pollution at levels *below* the [national standards]," and on Congress' statement that one of the purposes of the Clean Air Act ("CAA") is "'to protect public health and welfare from any actual or potential adverse effect which . . . may reasonably be anticipated to occur from air pollution or from exposure to pollutants in other media . . . *notwithstanding attainment and maintenance of all national ambient air quality standards.*'" *LaFleur v. Whitman*,

[7] Plaintiffs cite *Baur* for the proposition that where government studies and statements confirm several of plaintiff's key allegations, an injury is "especially cognizable." OSI Br. at 60. The Court deemed such studies relevant, however, only after finding that the plaintiff had alleged a risk of future harm that the statute was designed to prevent. In all events, the government findings plaintiffs cite here hardly "confirm" their allegations; at most, they hypothesize that global warming might be occurring. *See, e.g.*, A38 (Compl. ¶ 46) (U.S. National Academy of Sciences speculating that "'most of the observed warming of the last 50 years is *likely* to have been due to the increase in greenhouse gas concentrations'") (emphasis added)); *see also Massachusetts*, 415 F.3d at 56-57 (Randolph, J.) (quoting NAS study as finding "'considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases,'" and observing that "past assumptions about effects of future greenhouse gas emissions have proven to be erroneously high").

300 F.3d 256, 270 (2d Cir. 2002) (omissions in original) (quoting 42 U.S.C. § 7470(1)). Similarly, in *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003), the Court recognized injury based upon increased health-related uncertainty where the plaintiff alleged that EPA had failed to enforce the CAA, *id.* at 325-26, which, as the Court stated in *LaFleur*, was designed to protect the public from both "actual" and "potential adverse effect[s]." 300 F.3d at 270. Thus, when Congress directs an agency to exercise its scientific and policy expertise to protect the public from certain risks and the agency fails to do so, plaintiffs are harmed by their exposure to a risk or uncertainty Congress intended to eliminate.[8]

Plaintiffs cannot rely on increased risk to show injury here, however, because no statute prevents the increased risks plaintiffs allege, which is precisely why they seek a federal common law remedy. Indeed, the reasoning in *Baur* confirms (yet again) why plaintiffs' claims run afoul of separation-of-powers principles, this time those embodied in Article III. Where a plaintiff is suffering no current or immediately impending injury, a court that exercises judicial power

[8] *City of Los Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990), *overruled on other grounds by Florida Audubon Soc'y v. Bentson*, 94 F.3d 658 (.D.C. Cir. 1996), which the States cite, Br. at 45-46, is another example of such injury. That case involved a claim that an agency had failed to comply with the National Environmental Policy Act, which "includes a strong mandate to anticipate . . . environmental crises" and "*predict* the environmental effects of proposed action *before* the action is taken and those effects fully known." 912 F.3d at 496 (internal quotation marks and citation omitted).

based on its assessment of "probabilistic . . . environmental injuries," OSI Br. at 60, is really making a policy judgment: a determination, based on an assessment of scientific probabilities, that a risk of harm is sufficiently grave to warrant a remedy (should the allegations ultimately be proved).[9] This is a policy judgment that Congress itself has *not* seen fit to make with respect to the future harms plaintiffs allege, and one that courts lack the institutional competence to make. As the Seventh Circuit recently held, in the absence of a traditional cognizable injury-in-fact, there is no "legally protected interest" that can form the basis of an injury for standing purposes where Congress or its delegee has not determined that a risk of harm is unacceptable. *Texas Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 974 (7th Cir. 2005).

This fact distinguishes the various cases arising under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), that plaintiffs cite. Where Congress or its delegee has established thresholds for discharges under the CWA, it has made a scientific policy judgment that such discharges create an unacceptable risk of harm. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157 (4th Cir. 2000) (en banc) ("discharge restrictions are set at the level

[9] In setting discharge limits, agencies exercising policymaking authority delegated by Congress usually do not eliminate *all* risks to human health or the environment. *See, e.g.*, *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1523-24 & n.9 (9th Cir. 1995) (establishing limits for dioxin that were "not *likely* to jeopardize the continued existence of the bald eagle" and were expected to result in 23 cancers per million people from bioaccumulation) (emphasis added).

necessary to protect the designated uses of the receiving waterways"). Accordingly, where those levels are exceeded, a presumption of injury arises. *Id.*; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) ("a company's continuous and pervasive *illegal* discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms") (emphasis added).[10] This presumption of injury in many statutorily regulated fields explains why "courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes." *Baur*, 352 F.3d at 633.

The easier access to courtrooms facilitated by such a statutory presumption creates no risk that courts will interfere with the policy functions of the political branches. Under the CWA, for instance, EPA plays a central role in establishing what substances can be discharged, and in what amounts, *see, e.g.*, 33 U.S.C. § 1342. A citizen suit for a permit violation simply enforces the scientific and policy judgments of EPA and the States, to which Congress has delegated its policy discretion. By contrast, where Congress has not established limits, no

[10] Under the CWA, a plaintiff must also have "an interest" in a body of water "which is or may be adversely affected." 33 U.S.C. § 1365(g). Thus, a permit violation alone is insufficient to establish injury-in-fact; the violation must affect some recreational, aesthetic or economic interest the plaintiff has in the water, such as an interest in swimming or fishing. *See Laidlaw*, 528 U.S. at 184.

presumption of injury arises. There is no threshold to exceed and no indication that Congress has deemed a risk of harm to be undue.

In short, plaintiffs have not alleged an actionable injury-in-fact. They allege no current or immediately threatened harm, no violation of an environmental statute, and no legislative or agency determination that the risks and uncertainties of which they complain constitute risks that Congress intended to eliminate.

B. Plaintiffs Have Not Alleged Causation.

To satisfy the causation requirement, the alleged injury must be "'fairly traceable' to the actions of the defendant." *Bennett v. Spear,* 520 U.S. 154, 162 (1997). In the case of threatened injuries, plaintiffs must allege not only that the threat is imminent, but also that the challenged conduct is "substantially likely" to cause "a demonstrable increase" in an alleged risk. *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665, 669 (D.C. Cir. 1996); *accord Greenberg v. Bush*, 150 F. Supp. 2d 447, 455 (E.D.N.Y. 2001). Where, as here, numerous entities contribute to an alleged harm, plaintiffs bear a special burden of linking their injury to defendants' particular emissions. *See Texas Indep. Producers*, 410 F.3d at 974 (failure to account for pollution attributable to other major sources precluded traceability to industry's discharges).

Plaintiffs have not remotely satisfied these burdens. They do not allege that defendants' conduct is the direct cause of the future ills they recite in

their complaint. Nor do plaintiffs even claim that defendants' emissions have caused or will cause global warming (or, conversely, that global warming would not occur in the absence of defendants' emissions). Instead, plaintiffs allege that defendants' emissions, which allegedly account for 2.5% of man-made carbon dioxide emissions, "contribute" to global warming. A51 (Compl. ¶ 100).

In an effort to elide these fatal flaws, plaintiffs invoke joint and several liability principles and the nuisance concept of an indivisible harm to suggest that defendants' contribution, no matter how minor, establishes causation. OSI Br. at 61; States Br. at 43. To require more than this, they say, would "'raise the standing hurdle higher than the necessary showing for success on the merits in an action.'" OSI Br. at 61. But, as AEP has explained in its separate brief, to state a valid federal common law cause of action for a simple nuisance, it is plainly *not* enough to allege a minor contribution. Rather, plaintiffs must allege harms that are *directly* traceable to an out-of-state discharge of noxious or immediately harmful substances. *See* AEP Br. at 19-23, 28-29. Article III's "*fairly* traceable" requirement is thus a lower hurdle than that required to succeed on the merits, though still one plaintiffs cannot overcome.

Nor can plaintiffs rely on multiple-polluter cases under the CWA. Discharges in amounts that Congress or its delegees have proscribed as harmful are presumed to cause injuries. *See, e.g.*, *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d

546, 557 (5th Cir. 1996) (causation found, despite multiple polluters, because defendant had "'discharged some pollutant *in concentrations greater than allowed by its permit* . . . and . . . the pollutant cause[d] or contribute[d] to the kinds of injuries alleged'") (emphasis added) (quoting *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.3d 64, 72 (3d Cir. 1990)); *Gaston Copper*, 204 F.3d at 162 (same); *NRDC, Inc. v. Watkins*, 954 F.2d 974, 977, 980 (4th Cir. 1992) (causation shown "if harmful pollution from" discharges, which "consistently violated" permit, "can be shown in publicly accessible" waterways). Here, the principle that causation is presumed by contributions of a harmful pollutant in amounts that exceed federally prescribed limits is wholly inapplicable.

In the absence of that presumption, plaintiffs cannot possibly allege that defendants' emissions will cause their future injuries. In a paradigmatic multiple-contributors case, a defendant discharges substances at levels that are inherently harmful, and a plaintiff suffering harms caused by multiple discharges of such substances is not required to isolate the harm caused by the defendant's contribution. Here, carbon dioxide is not inherently harmful, and even when combined with contributions from millions of sources around the world, it does not become toxic. Instead, defendants' emissions mix with worldwide emissions, which *collectively* are alleged to trap heat in the earth's atmosphere, which in turn

is alleged to raise near-surface temperatures, which in turn is alleged to reduce snowpacks and Arctic summer ice and cause changes in the earth's atmosphere, which in turn will allegedly cause the future flooding, water shortages and heat-related adverse health effects plaintiffs seek to forestall. The defect in plaintiffs' allegations of causation is not simply that they do not and cannot isolate *which* harms will be caused by defendants' emissions. Rather, it is that they cannot legitimately allege that defendants' emissions would alone cause *any* future harms.

C. Plaintiffs Do Not, And Cannot, Allege Redressability.

Finally, for these same reasons, the injuries plaintiffs allege are not redressable. "Redressability examines whether the relief sought . . . will likely alleviate the particularized injury alleged by the plaintiff." *Florida Audubon*, 94 F.3d at 663-64; *see also Allen v. Wright*, 468 U.S. 739, 751 (1984) ("relief from the injury must be 'likely' to follow from a favorable decision"); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 n.6 (2d Cir. 1989) (there must be "a substantial likelihood that the relief requested will have a *substantial* ameliorative effect on the specific injury alleged") (emphasis added).

Plaintiffs do not and cannot allege that a fractional reduction of 2.5% of world-wide man-made carbon dioxide emissions would or could remediate the alleged future harms they seek to forestall. Plaintiffs tacitly concede as much by seeking to abate only defendants' "contribut[ion]" to global warming. A51

(Compl. ¶ 100). In other words, the emission reductions plaintiffs seek are merely a part of the overall reductions "necessary" to slow global warming. *See* States Br. at 45; OSI Br. at 63. Thus, plaintiffs themselves acknowledge that the alleged risk of future harms of global warming will *not* be forestalled, or "substantial[ly] ameliorat[ed]," by a partial reduction of defendants' minor contribution alone. *Fulani*, 882 F.2d at 628 n.6. Indeed, this concession is compelled by the very nature of carbon dioxide emissions and their alleged role in causing global climate change; as EPA has explained, any possible benefit from reductions of such emissions by U.S. industries can be completely offset due to increased emissions in other parts of the world. 68 Fed. Reg. 52922, 52931 (Sept. 8, 2003).

In *Lujan*, a plurality of the Court held that redressability was lacking in very similar circumstances. There, plaintiffs challenged agency failures to consider the impact of foreign funding decisions on endangered species. 504 U.S. at 558-59, 563. The plurality rejected this challenge, noting "that the agencies generally supply only a fraction of the funding" for a specified foreign project. "[The Agency for International Development], for example, has provided less than 10% of the funding." *Id.* at 571. Thus, because there was no showing that the elimination of this partial contributing cause would redress the claimed injury, there was no standing. *Id*. If 10% was insufficient in *Lujan*, then some *fraction* of the 2.5% alleged here certainly must be inadequate as well.

Relying once again on CWA cases, plaintiffs claim that they need only allege that defendants' contribution will be redressed, not that the injuries themselves will abate. States Br. at 45; OSI Br. at 63. But where illegal discharges are presumed to cause harm, it follows that abating those discharges will ameliorate those presumed harms. Because there is no presumption of harm here, there is no basis for presuming that the relief plaintiffs seek will have any "substantial ameliorative effect" on the alleged harms they seek to prevent. *Fulani*, 882 F.2d at 628 n.6.

Instead, as plaintiffs tacitly admit, the harms they allege can be redressed only if the relief they seek is combined with other reductions in carbon dioxide and other greenhouse gas emissions by parties not before the Court.[11] Where effective relief depends on reaching the actions of third parties, courts have repeatedly recognized that there is no standing, for the simple reason that "the 'case or controversy' limitation of Art. III . . . requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant,

[11] This is demonstrated by the very different (though still legally insufficient) allegations made in *Massachusetts v. EPA*. There, the petitioners did not claim that eliminating the far greater percentage of man-made carbon dioxide emissions contributed by the U.S. automobile industry would alone redress global warming, but rather that, if EPA limited those emissions, other countries would follow suit. 415 F.3d at 66 (Tatel, J., dissenting). Plaintiffs do not and cannot allege that an injunction in this case would lead other countries to reduce greenhouse gas emissions. Indeed, Congress and the President have concluded that unilateral reductions will have the opposite effect.

and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *see also Allen*, 468 U.S. at 757-59; *Warth v. Seldin*, 422 U.S. 490, 504-07 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-19 (1973). Here, where over 97% of global man-made emissions of carbon dioxide are attributable to parties not before the Court, there is *no* prospect that the relief plaintiffs request would be effective.

The decision in *United States EPA ex rel. McKeown v. Port Authority*, 162 F. Supp. 2d 173, 184 (S.D.N.Y.), *aff'd*, 23 Fed. Appx. 81 (2d Cir. 2001), illustrates this principle. The plaintiffs in that case claimed that the use of tollbooths in various states—including New York and New Jersey (defendants in that case, but plaintiffs here)—caused vehicles to idle, and therefore increased air pollution in violation of numerous federal statutes and federal common law. *Id.* at 180. Defendants argued, and the district court agreed, that the claimed injury was not redressable, because the complained-of emissions are "caused by . . . millions of people not parties to this action," and that even if all toll booths were removed, the emissions would nonetheless occur. *Id.* at 184. That is precisely the situation here, and, for precisely the same reasons, plaintiffs cannot allege that their claimed future injuries are redressable.

II. PLAINTIFFS' STATE LAW CLAIM IS PREEMPTED.

Plaintiffs' state law claim is preempted. There is no presumption in favor of state regulation of carbon dioxide and global climate change—an area of predominant, if not exclusive, federal concern—and use of state law to impose mandatory emissions limits conflicts with the method Congress has adopted for addressing this issue. In addition, plaintiffs' state-law claim will give rise to a patchwork approach that undermines the political branches' efforts to achieve a comprehensive and multilateral response.

A. Congress Has Recognized That Carbon Dioxide Emissions And Global Climate Change Are Matters Of Federal Concern That Require A Coordinated National Response.

Plaintiffs' state law claim is preempted because mandatory regulation of emissions of non-noxious greenhouse gases is a matter of uniquely federal concern that Congress has decided should be addressed on a comprehensive national basis. Use of state law to impose unilateral, mandatory emission restrictions would frustrate and conflict with Congress' intent to fashion a uniform, coordinated and comprehensive approach to global climate change. States, moreover, cannot regulate such emissions in any meaningful way: the harms of global climate change will allegedly result from the collective agency of emissions solely in their inter-state (and international) nature, which are beyond the authority or ability of any State to regulate. Given these unique circumstances, the laws

Congress has enacted requiring study of the phenomenon and calling for voluntary and technology-based responses preclude use of state law to impose mandatory emissions limits in order to address the same alleged problems.

When Congress legislates "'in a field which the States have traditionally occupied,'" courts presume "'that the historic police powers of the States were not to be superseded by the [federal statute] unless that was the clear and manifest purpose of Congress.'" *United States v. Locke*, 529 U.S. 89, 108 (2000) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Supreme Court has made clear, however, that certain areas are so uniquely the concern of the federal government that state law can be preempted even in the absence of any direct conflict with a federal statute or treaty. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (foreign affairs); *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875) (immigration); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08 (1988) (liability of government contractors). In other areas, such as admiralty, federal interests are so predominant that "there is no beginning assumption that concurrent regulation . . . is a valid exercise of [a State's] police powers" and thus there is no presumption against preemption. *Locke*, 529 U.S. at 108 (addressing maritime commerce). In light of repeated congressional pronouncements that global climate change should be addressed on a national and eventually

multilateral basis, regulation of activities alleged to cause global climate change necessarily falls, at a minimum, in the latter category.

Indeed, the Supreme Court has recognized that "air and water in their ambient or *interstate* aspects" are the concern of federal, not state, law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*") (emphasis added). This is so not merely because it is inappropriate to allow any one State's law to govern a dispute between two States. States Br. at 49. It is also because the very interstate nature of the affected air or water creates "an overriding federal interest in the need for a uniform rule of decision or . . . touches basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6. In a traditional case of air or water pollution, however, the same substance can cause both interstate and purely intra-state injuries, and state law could and traditionally did regulate purely intra-state emissions or discharges to the extent they caused intra-state harms. Accordingly, in the CWA, Congress included a savings clause that preserved such traditional intra-state regulatory authority, and that also made clear that Congress believed that the nuisance law of a source State can be used when water pollution causes out-of-state harms. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

Greenhouse gases, however, are fundamentally different. Carbon dioxide emitted from a power plant does not cause any purely intra-state injuries the way plumes of sulphuric acid from a smelting plant, or raw sewage pumped

into a local lake, do. *See* AEP Br. at 20-21 (discussing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) and *Missouri v. Illinois*, 180 U.S. 208 (1901)). The carbon dioxide emissions from a power plant do not return to the ground and cause harms through any noxious properties. Nor do such emissions float above the plant or any limited or identifiable area and, by themselves, trap heat in that area. Rather, emissions from the plants targeted by plaintiffs are alleged to cause injury *only* by mixing evenly throughout the interstate and international atmosphere with other emissions from around the world. As plaintiffs allege, it is only in this mixed, *interstate and international* nature, that defendants' emissions, along with countless other emissions, allegedly trap heat throughout the earth's atmosphere and thereby allegedly cause global climate change. A40, A50 (Compl. ¶¶ 53, 97).

It has not been the province or concern of state law to regulate substances that are harmful only in or because of their purely interstate or international nature. Moreover, state law simply cannot regulate carbon dioxide emissions in any meaningful way. The very nature of greenhouse gas emissions and global climate change is such that reductions compelled by one State's nuisance law can be completely offset by increased emissions in other States or other countries, thus negating any possible abatement of the alleged nuisance. *See* 68 Fed. Reg. at 52931 (EPA) ("[a]ny potential benefit . . . could be lost to the

extent other nations decided to let their emissions significantly increase in view of U.S. emission reductions"). The only meaningful means of addressing such emissions, therefore, is on a coordinated, national basis that includes negotiations with other nations.

Only the federal government can provide such a response, and Congress itself has repeatedly recognized that greenhouse gas emissions are a uniquely federal concern calling for a uniform, national and eventually multilateral response. It has found that research is "crucial to the development of an effective *United States* response" to global climate change, made it U.S. policy to "work toward *multilateral [international] agreements*," and directed the Secretary of State to undertake negotiations toward that end. *See* Pub. L. No. 100-204, tit. XI, §§ 1102(3), 1103(a), 101 Stat. 1407, 1408 (1987) (emphases added) (codified at 15 U.S.C. § 2901 note); *see also* H.R. Rep. No. 102-474, pt. 1, at 152 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1975 (mandatory measures should be undertaken "only in the context of concerted international action"). Congress has likewise required research findings to be provided to EPA, to enable that federal agency to formulate "a *coordinated national policy* on global climate change." 15 U.S.C. § 2938(b)(1) (emphasis added); *see also* 42 U.S.C. § 13381 (calling for study of "the feasibility and economic, energy, social, environmental, and competitive implications" of stabilizing "greenhouses gases *in the United States*"

and of "enabl[ing] the *United States* to comply with any obligations" achieved through international negotiations) (emphases added); *id.* § 13389 (calling for "*national strategy* to promote the deployment and commercialization" of technologies to reduce greenhouse gas intensity); 151 Cong. Rec. S7033 (daily ed. June 22, 2005) (Senate resolution calling for "*comprehensive* and effective *national* program" that "will not significantly harm the United States economy" and "will encourage comparable action *by other nations*") (emphases added). And Congress has expressly disapproved unilateral reductions in U.S. greenhouse gas emissions: not only did the Senate pass a resolution criticizing the Kyoto Protocol on this ground, S. Res. 98, 105th Cong. (1997), but, until President Bush announced his opposition to it, Congress enacted a series of appropriations that barred EPA from implementing the Protocol. *See* Pub. L. No. 105-276, tit. III, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, tit. III, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, app. A 114 Stat. 1441, 1441A-41 (2000).

In these circumstances, state law is preempted by Congress' various enactments calling for study of the problem and of potential responses, and for voluntary reductions and multilateral negotiations. Where States have no long-standing history of regulating carbon dioxide emissions to address global climate change, where their authority to address the problem is doubtful at best and futile in all events, and where there is an overriding need for a uniform national

approach, Congress' considered judgment, reflected in no fewer than five statutes enacted over nearly 30 years, that the U.S. should not adopt mandatory emissions limits unilaterally suffices to preempt any use of state nuisance law to impose mandatory limits on greenhouse gas emissions. *See Locke*, 529 U.S. at 110 ("[W]here failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation") (internal quotation marks omitted; alteration in original); *Cf. Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision to regulate"). Even if, as plaintiffs claim, the goals of state nuisance law and these federal statutes are the same—*i.e.*, to forestall potential future harms of global warming—"[t]he fact of a common end hardly neutralizes conflicting means." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 (2000). State law is preempted when, as here, "it interferes with the methods by which the federal statute was designed to reach this goal." *Ouellette*, 479 U.S. at 494; *see also Clean Air Mkts. Group v. Pataki*, 338 F.3d 82, 89 (2d Cir. 2003).

B. Plaintiffs' State-Law Claim Conflicts With And Impermissibly Undermines The Nation's Foreign Policy Approach To Global Climate Change.

Not only is there no room for state nuisance law in this area, plaintiffs' state-law nuisance claim is preempted for essentially the same reasons their federal common law claim is displaced: it undermines the foreign policy approach to global climate change that Congress established and the President is implementing. The Constitution entrusts the federal government with "full and exclusive responsibility" for the conduct of foreign affairs. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). Accordingly, as the Supreme Court held in *Zschernig*, 389 U.S. at 441, and recently reaffirmed in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Constitution itself preempts state action that interferes with the federal government's exercise of its foreign relations power.

Here, as noted, Congress specifically directed the Secretary of State to coordinate U.S. negotiations on global climate change to effectuate the congressionally-established U.S. policy of "work[ing] toward multilateral agreements." 15 U.S.C. § 2901 note. Three Presidents have actively implemented this multilateral strategy, under which the nation is committed to working "within the United Nations framework and elsewhere to develop . . . an effective and science-based response to the issue of global warming." *See* Tr., *President Bush Discusses Global Climate Change*, (June 11, 2001), *available at*

http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html (citing federal statutes instructing the executive branch to take coordinated international action on global warming). Congress has likewise made clear that the United States should not reduce carbon dioxide emissions unilaterally or shoulder burdens that developing nations do not bear. *See supra* at 28.

Through this lawsuit, however, plaintiffs seek unilateral emission reductions that will plainly undermine the nation's multilateral strategy. If plaintiffs succeed, suits could be brought against a range of greenhouse gas "contributors," and federal courts would become the vehicle for developing, imposing, and supervising implementation of a series of requirements for unilateral reduction of U.S. emissions. *See* David A. Grossman, *Warming Up To A Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1, 6 (2003) (arguing that, because of the "lack of meaningful political action in the United States," litigation is "the best tool for addressing climate change" and laying out associated strategy for doing so).

This undermines Congress' strategy in two ways. First, it reduces the bargaining leverage the President needs to implement a multilateral strategy by giving him less to offer in exchange for reductions by other nations. Congress has concluded that any response to global climate change "will require vigorous efforts to achieve international cooperation." Pub. L. No. 100-204, tit. XI, § 1102(5), 101

Stat. at 1408. Yet, as EPA has explained, unilateral reductions could "weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies." 68 Fed. Reg. at 52931. Because plaintiffs' state law claim would, if successful, give the President "less to offer" other countries, and thus "less . . . diplomatic leverage," than Congress intended him to have, that claim is preempted. *Crosby*, 530 U.S. at 377.

Second, unilateral reductions would prove counter-productive. Reductions could impose significant costs on U.S. businesses and consumers, yet "[a]ny potential benefit . . . could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emission reductions." 68 Fed. Reg. at 52931. EPA pointed out that this occurred when the United States unilaterally reduced gases that deplete stratospheric ozone. *Id.* at 52931 n.5. These are precisely the dangers Congress has sought to avoid by insisting on least-cost responses developed as part of a multilateral approach. Because a state law nuisance action to address global climate change "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Crosby*, 530 U.S. at 377 (quoting *Hines*, 312 U.S. at 67), it is preempted.

Indeed, even if the President alone decided on the foregoing multilateral strategy, plaintiffs' state law claims would have to yield. In *Zschernig*, the Court invalidated an Oregon probate statute that prohibited inheritance by a

non-resident alien unless the alien could establish, among other things, that the inheritance would not be subject to confiscation by his or her government and that U.S. citizens would enjoy a reciprocal right of inheritance in the alien's country. Although the Oregon statute operated in an area traditionally governed by state law, and although the Court found no direct conflict between the Oregon statute and federal statutes, treaties, or any federal interest, the Court nonetheless invalidated the state law as an unconstitutional interference with the federal government's foreign-affairs power. The Court concluded that the law had "more than some incidental or indirect effect" on foreign relations, and therefore constituted a forbidden "intrusion by the State into the field of foreign affairs." 389 U.S. at 432, 434 (internal quotation marks omitted).

In *Garamendi*, the Court described two "contrasting" theories of the scope of foreign-affairs preemption evident in *Zschernig*: the majority's view that the federal government's foreign-affairs power wholly occupies the field, and the view, identified with Justice Harlan's concurring opinion, that state action addressed to subjects within the states' "traditional competence" is preempted only if it conflicts with the federal government's foreign policy. *Garamendi*, 539 U.S. at 418-19 (citing *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring in result)). The Court determined that it need not choose between the field preemption and conflict preemption theories, however, because the state law at issue created a "sufficiently

clear conflict" with federal policy to require preemption even under Justice Harlan's more restrictive view. *Id*. at 420.

The same is true here, where plaintiffs' state law nuisance claim would, if successful, interfere with the President's conduct of foreign affairs by undermining his bargaining leverage and employing a unilateral, rather than multilateral, approach. It does not matter whether state nuisance law was designed or intended to cause such interference; state law is preempted where "a State has acted . . . in a way that *affects* foreign relations." *Id*. at 420 n.11. The fact that the President has not formulated his foreign policy in a formal and binding instrument, such as an executive agreement, is irrelevant. *Id*. at 422 n.13.

For these additional reasons, therefore, any use of state nuisance law to impose carbon dioxide emission limits to address global climate change is preempted.

CONCLUSION

For all of the foregoing reasons, the judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), counsel for Defendants-Appellees certify that this brief contains 8,187 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared using Microsoft Word in a proportionally spaced 14-point Times New Roman typeface.

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Joseph R. Guerra

ANTI-VIRUS CERTIFICATION

Case Name: Open Space Institute, Inc., et al., v. American Electric Power Company, Inc., et al.

Docket Number: 05-5119-cv

I, Bradford C. Mulder, hereby certify that the Appellees' Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using McAfee Virus Scan Enterprise version 8.x and found to be VIRUS FREE.

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Case Name: Open Space v. American Electric

Docket/Case No. 05-5119-cv