05-5119-cv

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 PLAINTIFFS-APPELLANTS

MITCHELL S. BERNARD
NANCY S. MARKS
AMELIA E. TOLEDO
NATURAL RESOURCES DEFENSE COUNCIL, INC.
40 West 20th Street
New York, New York 10011
(212) 727-2700

MATTHEW F. PAWA
BENJAMIN A. KRASS
LAW OFFICES OF MATTHEW F. PAWA, P.C.
1280 Centre Street, Suite 230
Newton Centre, Massachusetts 02459
(617) 641-9550

Attorneys for Plaintiffs-Appellants
Open Space Institute, Inc., Open Space Conservancy, Inc.,
and Audubon Society of New Hampshire

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire certify that they are their own corporate parents and that they are non-stock corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES AND REGULATIONS

TREATIES

MISCELLANEOUS

PRELIMINARY STATEMENT

Plaintiffs-Appellants Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire ("Land Trusts" or "plaintiffs") have acquired and hold large tracts of land in New York and New Hampshire for ecological preservation, public enjoyment and scientific research. The Land Trusts seek injunctive relief under the federal common law of public nuisance against polluters that are the largest contributors to global warming in the United States and among the largest in the world. Global warming already has begun and will destroy the very ecological values and public purposes for which the Land Trusts have acquired and hold their properties. Defendants-Appellees ("Power Companies" or "defendants") are electric power corporations that own and operate fossil-fuel fired power plants in twenty states; collectively they emit approximately 650 million tons of carbon dioxide every year. Carbon dioxide emitted from fossil fuel combustion is the primary cause of global warming. The Land Trusts seek a court order requiring the Power Companies to reduce their emissions over a period of at least ten years. A parallel case, *Connecticut v. American Electric Power*, No. 05-5104 ("*Connecticut*"), also on appeal, was filed by eight States and the City of New York.

The Land Trusts appeal from a *sua sponte* dismissal and entry of final

judgment by the U.S. District Court for the Southern District of New York (Preska, J.). The district court wrongly held this case to be a nonjusticiable political question. This case in fact presents a proper claim under the federal common law of public nuisance applicable to unregulated, interstate pollution and is justiciable.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because the case is governed by federal common law. The district court also had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337 because the complaint presents claims against the Tennessee Valley Authority. *Jackson v. TVA*, 462 F. Supp. 45, 50-51 (M.D. Tenn. 1978), *aff'd*, 595 F.2d 1120 (6th Cir. 1979). Appellate jurisdiction is proper under 28 U.S.C. § 1291 because the appeal is from a final judgment disposing of all parties' claims.

This appeal is timely under Fed. R. App. P. 4(a)(1). The district court entered an Opinion and Order and a Judgment dismissing plaintiffs' complaint on September 19, 2005. Plaintiffs filed a Notice of Appeal on September 20, 2005. Following entry of an Amended Opinion and Order on September 23, 2005, plaintiffs filed an Amended Notice of Appeal on September 28, 2005.

ISSUES PRESENTED

1. Whether a case alleging liability under the federal common law of public nuisance and arising from defendants' interstate pollution contributing to global warming properly states a claim upon which relief may be granted and is within the district court's subject matter jurisdiction.

2. Whether a case alleging liability under the federal common law of public nuisance and arising from defendants' interstate pollution contributing to global warming presents a nonjusticiable political question.

3. Whether a case alleging liability under the federal common law of public nuisance for interstate pollution contributing to global warming is preempted.

4. Whether the Land Trusts, by alleging that defendants' pollution contributes to permanent injuries to real property preserved by them for unique environmental value and that reducing the pollution mitigates the injuries, have sufficiently pled the elements of standing.

STATEMENT OF THE CASE

This case seeks injunctive relief to reduce defendants' carbon dioxide pollution, which contributes to global warming. The Land Trusts have acquired and own substantial tracts of land in New York and New Hampshire for purposes of ecological preservation, public enjoyment, and scientific research. Global warming harms these properties. They filed this case in July, 2004 simultaneously with a parallel case by eight States and the City of New York. Defendants in both cases are electric power corporations that own and operate numerous fossil fuel-fired power plants located in twenty states other than New York and New Hampshire. Both cases allege that defendants are liable under federal common law because their interstate emissions of approximately 650 million tons of carbon dioxide contribute to a public nuisance harmful to plaintiffs. Both cases seek declaratory relief holding defendants jointly and severally liable and an injunction requiring defendants to reduce their pollution over a period of at least ten years.

All defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. Four defendants also moved to dismiss for lack of personal jurisdiction; defendant Tennessee Valley Authority ("TVA") moved to dismiss on federal discretionary function grounds. Defendants did not invoke–and expressly disclaimed–the political question doctrine as a basis of their motions.

See Reply in Support of Defendants' Motions to Dismiss the Complaints for Lack of Subject Matter Jurisdiction, at 10 ("The *Baker v. Carr* test for determining when the political question doctrine bars adjudication of a recognized cause of action is thus wholly irrelevant."); Transcript of Oral Argument (August 12, 2005) ("Tr.") at 59:19-20 ("but in all honesty, that is not the motion that we filed. . . .") (statement of Mr. Guerra for all defendants).

On September 19, 2005 the district court issued an Opinion and Order ("Opinion") dismissing both cases for lack of subject matter jurisdiction on the basis of the political question doctrine. The court construed defendants' separation of powers argument as a political question argument. *See* Opinion, SPA-12 ("I take [this] to be an argument that plaintiffs raise a non-justiciable political question."). The Opinion initially stated that, with respect to the 12(b)(1)/12(b)(6) motions, "Defendants' motions are granted." Opinion, SPA-3. However, the court proceeded to dismiss the cases *sua sponte* and deny all the defendants' motions to dismiss as moot. Opinion, SPA-19. The Clerk of the Court entered judgment accordingly. SPA-39.

After plaintiffs filed their notice of appeal, the district court issued an Amended Opinion and Order ("Amended Opinion"). The Amended Opinion eliminates an erroneous statement that the Bar Association of the City of New

York had filed an amicus brief in the cases. *See* Opinion, SPA-9; Amended Opinion, SPA-28. The amended opinion also eliminates a quote from an amicus brief of the Washington Legal Foundation ("WLF"), which was filed in another case, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir 2005), also addressing global warming. *See* Opinion, SPA-18; Amended Opinion, SPA-37. The original opinion quoted from the WLF amicus brief as if it were the D.C. Circuit's decision in *Massachusetts*. Opinion, SPA-18. No party had cited the WLF amicus brief in this case. Plaintiffs filed an amended notice of appeal.

STATEMENT OF FACTS

Defendants own and operate scores of power plants that together emit approximately 650 million tons of carbon dioxide every year. A-21. Carbon dioxide emitted from fossil fuel combustion is the primary "greenhouse gas." Greenhouse gases cause global warming by trapping atmospheric heat that otherwise would escape into space. A-39. Fossil-fuel fired power plants are the largest source of carbon dioxide emissions in the United States and their emissions are growing faster than the economy as a whole. A-40. Defendants are responsible for one quarter of the power sector's emissions and ten percent of all

carbon dioxide emissions from human activities in the United States. A-40. Moreover, defendants have emitted large quantities of carbon dioxide for many decades. A-41.

Natural processes that remove carbon dioxide from the atmosphere are unable to keep pace with the level of carbon dioxide emissions from fossil-fuel combustion. A-39. The atmospheric carbon dioxide concentration has increased approximately 34% since the industrial revolution began; one-third of this increase has occurred since 1980. A-39. Because the planet's natural systems take hundreds of years to absorb carbon dioxide, defendants' past, present, and future emissions will remain in the atmosphere and contribute to global warming for many decades and even centuries. A-41.

Official reports from American and international scientific bodies demonstrate the clear scientific consensus that global warming has begun, is caused primarily by carbon dioxide emissions from fossil-fuel combustion, is altering the natural world, and will accelerate unless action is taken to reduce emissions of carbon dioxide. A-37-38. Globally, the 1990s was the hottest decade on record and 1998 was the hottest year; at the time the complaint was filed, 2002 and 2003 were next warmest. A-41. By the end of this century, the planet's average temperature is projected to increase between 2.5 and 10.4 degrees

Fahrenheit. A-42. To put that increase in perspective, at the depths of the last ice age 20,000 years ago, the average temperature of the Earth was only seven to eleven degrees Fahrenheit cooler than today. *Connecticut* Joint Appendix ("CA") at CA-87.[1]

The Land Trusts acquire and maintain ecologically significant and sensitive properties in New York and New Hampshire for scientific and educational purposes and for human use and enjoyment. The Land Trusts own thousands of acres of ecologically sensitive land that they preserve as nature sanctuaries, outdoor research laboratories, wildlife preserves, recreation areas, and open space. A-21, A-23, A-43-45.

The global warming to which defendants contribute threatens to destroy the very ecological values for which the Land Trusts have acquired and hold their properties. A-48-49. Global warming raises sea levels via thermal expansion of seawater and melting of glaciers and ice sheets. A-47. The resulting sea level increase will inundate plaintiffs' low-lying property and damage fragile coastal habitats by salinizing marshes on plaintiffs' properties and destroying habitat for fish, migratory birds, and other wildlife essential to the purposes for which

[1] Plaintiffs respectfully disagree with the district court's statement that "plaintiffs acknowledge that there is some dispute about the rate and intensity of the process of global climate change." Amended Opinion, SPA-24.

plaintiffs have acquired and maintain these properties. A-47-48. Global warming also will harm hardwood forests that are a central ecological feature of plaintiffs' properties and that give the Northeast its fall colors. Several species of hardwood trees found on plaintiffs' properties, including maples, birches, and beeches, will be unable to survive the temperature increases projected to occur as a consequence of global warming. A-48. Global warming will increase smog levels, which correlate with heat; increased smog will diminish or destroy the health of plaintiffs' forests. A-48. Because of the interconnected nature of ecosystems, the loss or decline of tree species on plaintiffs' properties will cause the loss or decline of other species inhabiting the same properties, including birds, mammals, and insects that depend on specific tree species and on each other for their survival. A-48. Defendants' pollution contributes to global warming and thus intereferes with public rights, including "the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world." A-50; CA-105.

The planet's climate can shift suddenly when a gradual force brought to bear on Earth's climate causes it to reach a tipping point. Defendants' carbon dioxide emissions increase the risk of an abrupt and catastrophic climate change, which would magnify all the adverse effects of global warming and in particular magnify plaintiffs' injuries by reducing the time ecosystems have to adapt. A-42-

43.

The severity of plaintiffs' injuries depends upon the speed and magnitude of global warming, which in turn depends upon the level of carbon dioxide emissions. A-21-22, A-42-43. Reducing defendants' carbon dioxide emissions will reduce the injuries. A-43, A-49. Defendants have economically feasible options for generating electricity with fewer emissions, including changing fuels, improving efficiency, increasing generation from zero- or low-carbon energy sources, employing gasified coal with emissions capture, employing demand-side management techniques, and altering the dispatch order of their plants to use the cleaner plants more and the dirtier plants less. A-22.

No federal statute or regulation imposes any limits on carbon dioxide emissions. The Environmental Protection Agency ("EPA") has ruled that the Clean Air Act ("CAA") does not authorize carbon dioxide regulation. *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003), SPA-43-58. A challenge to this ruling was recently rejected. *Massachusetts*, 415 F.3d at 58-59. The CAA only requires research on "technologies for preventing or reducing multiple air pollutants, including . . . carbon dioxide, from stationary sources, including fossil fuel power plants," 42 U.S.C. § 7403(g)(1), SPA-62, and electric utilities to report their carbon dioxide

emissions to EPA, P.L. 101-549, Title VIII, § 821, 104 Stat. 2699 (Nov. 15, 1990) (uncodified), *reprinted at* 42 U.S.C. § 7651k-note ("Information Gathering on Greenhouse Gases Contributing to Global Climate Change."), SPA-68.

Likewise, there are no limitations on defendants' emissions under any treaty. The United States is a party to the United Nations Framework Convention on Climate Change ("Framework Convention" or "UNFCCC"), May 9, 1992, 1771 U.N.T.S. 107, SPA-69-101. Although the Framework Convention requires the United States and other developed nations to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases," UNFCCC at art. 4(2)(a), SPA-80, it does not impose binding emissions limits but instead establishes the general "aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases." UNFCCC at art. 4(2)(b), SPA-80. A subsequent treaty, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998) (entered into force, Feb.16, 2005), imposes nation-by-nation binding emissions limits on the developed nations of the world but the United States has not ratified the Protocol and thus is not a party to it. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003) ("A State only becomes bound by – that is,

becomes a party to – a treaty when it ratifies the treaty.").

Congress has, however, recognized that carbon dioxide emissions cause global warming and that global warming will have severe adverse impacts in the United States and Congress has expressed a national policy in favor of reducing such emissions. For example, the Global Climate Protection Act of 1987 provides:

> United States policy should seek to . . . . limit mankind's adverse effect on the global climate by–(A) slowing the rate of increase of concentrations of greenhouse gases in the atmosphere in the near term; and (B) stabilizing or reducing atmospheric concentrations of greenhouse gases over the long term . . . .

P.L. 100-204, Title XI, §1103(a) (uncodified), *reprinted at* 15 U.S.C. § 2901-note, SPA-41; *see also* Global Change Research Act of 1990, 15 U.S.C. § 2931(a)(2), SPA-42, ("human-induced changes, in conjunction with natural fluctuations, may lead to significant global warming and thus alter world climate patterns and increase global sea levels" with adverse effects on "agricultural and marine production, coastal habitability, biological diversity, human health, and global economic and social well-being."). In order to slow the rate of increase in atmospheric concentration, it is necessary to reduce emissions levels. A-20.

SUMMARY OF ARGUMENT

This case addresses global warming – an interstate public nuisance to which defendants contribute by their emissions of millions of tons of carbon dioxide every year. The case presents a proper and justiciable claim under the federal common law of public nuisance applicable to unregulated, interstate pollution and is within the district court's subject matter jurisdiction. The district court erred in holding that the case presents a nonjusticiable political question.[2]

In its unanimous opinion in *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"), the Supreme Court declared that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." The Court further held that such a claim presents a federal question under 28 U.S.C. § 1331. *Id*. at 99. The Land Trusts have stated a proper claim under this federal common law that is within the district court's jurisdiction. Carbon dioxide emissions are both ambient and interstate and they contribute to a public nuisance, i.e., an unreasonable interference with rights common to the general public. The public rights at issue are the rights to use, preserve and enjoy the natural world, which rights go to the core of the Land Trusts' mission. Global warming

[2] The Land Trusts hereby adopt the arguments of the governmental plaintiffs in *Connecticut* in relevant part.

interferes with these rights and causes special injury to the Land Trusts by causing permanent and irreparable environmental injury to their properties, which are preserved for their public value. The Power Companies' contributions to the nuisance may be enjoined regardless of the number of other polluters and regardless of whether these defendants' pollution alone would have created the nuisance.

This case is justiciable. None of the six factors of *Baker v. Carr*, 369 U.S. 186, 217 (1962), that must be "prominent on the face" of a case to indicate a political question are "inextricable from" this case. The first and dominant factor is absent here because interstate pollution cases are not "constitutionally committed" to the political branches. To the contrary, under *Milwaukee I*, such cases are constitutionally committed to the judiciary as federal questions. And this Court has repeatedly held that a case simply "touching upon" foreign affairs does not intrude into the political branches' exclusive constitutional zone; this global warming case against domestic companies for domestic conduct causing domestic harm does not come close to that exclusive zone. The second factor is absent because there is no "lack of judicially discoverable and manageable standards" for a federal public nuisance case. Rather, "the common law of tort provides clear and well-settled rules," *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir.

1991), that render this factor inapplicable and this would be so even if in the usual case such standards presented "a rather difficult adjudicatory task," *Lamont v. Woods*, 948 F.2d 825, 833 (2d Cir. 1991). The third factor only applies when it is "impossible" to decide the case in the absence of an "initial policy determination of a kind clearly for nonjudicial discretion" and is inapplicable because the availability of judicially manageable standards "obviates any need to make initial [nonjudicial] policy decisions." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). Finally, *Baker* factors four through six are "relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Id.* at 249. There can be no contradiction here given the clearly expressed policy in U.S. laws to reduce greenhouse gas emissions in order to mitigate global warming.

Congress and EPA have not preempted the federal claim here. In order to preempt, Congress must regulate the conduct at issue and provide a remedy. *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 238 (1985); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"). In *Milwaukee II*, the Court found preemption where the statute regulated the very pollutant at issue, EPA had issued permits setting numerical limits on the

discharges, and the statute provided a remedy to affected parties. *Id*. at 320. That has not happened here. In fact, EPA has ruled that greenhouse gas emissions are outside the scope of the Clean Air Act. 68 Fed. Reg. 52,928, SPA-50. Finally, the Land Trusts have made adequate allegations to support standing at the pleading stage. The district court's judgment of dismissal should be reversed.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal under Federal Rule of Civil Procedure Rule 12(b)(1) or 12(b)(6). *Curto v. Edmundson*, 392 F.3d 502, 503 (2d Cir. 2004). "Such dismissal is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

ARGUMENT

I. This Interstate Pollution Case Presents a Proper Federal Common Law Claim Within the District Court's Subject Matter Jurisdiction.

A. This Interstate Pollution Case States a Proper Claim Under the Federal Common Law of Public Nuisance.

1. Federal Common Law Applies to Unregulated, Interstate Pollution.

Federal common law applies to this interstate pollution case. "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I*, 406 U.S. at 103 (unanimous). *Milwaukee I* was a nuisance case addressing interstate pollution from several cities' sewage effluent, which was contaminating Lake Michigan with pathogens that threatened human health and with nutrients that contributed to eutrophication of the lake. The Court held interstate pollution to be an enclave of federal law due to the "overriding federal interest in the need for a uniform rule of decision" and because "the controversy touches basic interests of federalism." *Id*. at 105 n.6. The Court held that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance" but "until that comes to pass, federal courts will be empowered to appraise the equities" of interstate pollution cases. *Id*. at 107.

The Court's observation with respect to possible future regulation likely was no accident. At the time the case was argued and decided, the Senate and House already had passed bills that would overhaul the nation's water pollution laws and require sewage facilities to adhere to strict permit limitations. *See* Cong. Q. Inc., Congress and the Nation, Vol. III 1969-1972, at 779-80 (1973). Like global warming, water pollution was a hotly contested political issue - President Nixon had immediately announced his opposition to the Senate bill. *Id*. at 794. Six months after the Court's decision, a final bill was sent to the President, who vetoed (and denounced) it in October, 1972. *Id*. at 796. Within twenty-four hours, Congress overrode the veto. *Id*. at 792. Pollution of the Great Lakes was a matter that also touched upon foreign relations: as the Court was hearing *Milwaukee I*, the United States and Canada were negotiating a treaty specifically addressing water pollution from municipal sewage and other sources. The treaty was signed and entered into force only nine days before the Court rendered its decision. *See* Agreement on Great Lakes Water Quality, Apr. 15, 1972, U.S.-Canada, art. V, 23 U.S.T. 301.

Milwaukee I remains good law. When the case returned to the Supreme Court following enactment of the amendments, the Court affirmed that there had been a proper "federal common-law claim at the commencement of the suit."

Milwaukee II, 451 U.S. at 312 n.5. The Court found the plaintiffs' federal common law nuisance claim preempted, however, because the amendments regulated the very sewage discharges at issue and provided the plaintiffs with a remedy. *Id*. at 320; *see also infra* Section III. Under *Milwaukee II*, federal common law applies when the courts are "compelled to consider federal questions which cannot be answered from federal statutes alone." *Id*. at 314 (quotation omitted); *see also id*. at 319 n.14 (federal common law applies where "problems requiring federal answers are not addressed by federal statutory law."). Following *Milwaukee II*, the Supreme Court has continued to rely upon *Milwaukee I*, *e.g.*, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 n.13 (1981), and adhered to the view that "the control of interstate pollution is primarily a matter of federal law," *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).[3]

The roots of *Milwaukee I* go deep. The Supreme Court has long recognized the federal common law of public nuisance in a variety of cases involving

[3] Where federal common law applies it preempts state common law. *Ouellette*, 479 U.S. at 488 ("the implicit corollary of [*Milwaukee I*] was that state common law was preempted"). However, where federal common law is preempted, *Ouellette* permits application of the nuisance law of the source state to interstate pollution. *Id*. at 497-99. Plaintiffs thus have pled their state-law claims in the alternative to federal law and under the laws of the source states.

interstate pollution or other interstate harm. *See, e.g.*, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (interstate air pollution); *Missouri v. Illinois*, 180 U.S. 208 (1901) (interstate water pollution); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (interstate flooding of land); *New Jersey v. New York City*, 283 U.S. 473 (1931) (ocean dumping causing interstate fouling of beaches). The doctrine protects proprietary interests where there is significant interstate harm to a party with special injury, *see Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 560-67 (1851), as well as States' "quasi-sovereign interests," *Tennessee Copper*, 206 U.S. at 237.

The federal common law of public nuisance is a well-recognized species of "federal specialized common law." The Supreme Court recognized federal specialized common law in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), dealing with apportionment of water in an interstate stream, the same day that it repudiated "federal general common law" in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938). *Milwaukee I* relied upon the simultaneous decisions in *Hinderlider* and *Erie* in recognizing interstate pollution as a special enclave of federal law. 406 U.S. at 105 & n.7. Federal specialized common law applies to "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Texas Indus.*,

451 U.S. at 641.

Federal common law governs this case because carbon dioxide pollution from defendants' power plants crosses state lines, and, by contributing to the process of global warming, causes transboundary harm in New York and New Hampshire where the plaintiff land trusts are located. *See Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1281 n.15 (D. Conn. 1976) (Newman, J.) ("'Interstate effect' is used here to mean pollution originating within one state adversely affecting another state."), *aff'd without opinion sub nom. East End Yacht Club v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977). Carbon dioxide is both "ambient" and "interstate" under *Milwaukee I*. In fact, carbon dioxide emissions are *inherently* ambient and interstate because carbon dioxide emitted in any one state affects the concentration of carbon dioxide in other states. A-50. These emissions, moreover, are entirely unregulated at the federal level. Federal common law applies.

2. Defendants' Pollution Unreasonably Interferes With Public Rights.

A public nuisance under federal common law is "'an unreasonable interference with a right common to the general public.'" *In re Oswego Barge Corp.*, 664 F.2d 327, 332 n.5 (2d Cir. 1981) ("*Oswego Barge I*") (quoting *United States v. Ira S. Bushey & Sons*, 363 F. Supp. 110, 120 (D. Vt. 1973) (Oakes, J.) ("*Bushey II*"), *aff'd without opinion*, 487 F.2d 1393 (2d Cir. 1973)); *see also* Restatement (Second) of Torts ("Restatement") § 821B(1) (1979) (same). The Land Trusts have pled a proper federal nuisance claim.

Pollution is a classic public nuisance under any law – state, federal or maritime. In *Washington v. General Motors Corp*., 406 U.S. 109, 114 (1972), decided the same day as *Milwaukee I*, the Court declared that "[a]ir pollution is, of course, one of the most notorious types of public nuisance in modern experience." Numerous air pollution cases have been adjudicated under federal or state public nuisance law, including some cases dealing with international air pollution. *See, e.g.*, *Tennessee Copper*, 206 U.S. 230 (interstate air pollution); *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213, 215 (6th Cir. 1974) (international air pollution); *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58, 62 (D. Vt. 1987) (interstate air pollution); *see also Her Majesty the Queen in Right of the*

Province of Ontario v. City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989) (reviewing nuisance law in parallel air pollution suits by Ontario and U.S. non-profit groups against U.S. municipality). This Court has held oil pollution to be actionable in nuisance under maritime law. *Oswego Barge I,* 664 F.2d at 334.[4]

Nuisance law, in fact, is the foundation of environmental law. *Cox v. City of Dallas,* 256 F.3d 281, 291 (5th Cir. 2001) ("The theory of nuisance lends itself naturally to combating the harms created by environmental problems. . . . The deepest doctrinal roots of modern environmental law are found in principles of nuisance. . . . Nuisance actions have challenged virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation.") (quotation omitted). Nuisance law continues to play a vital role in complementing and upholding environmental statutes. *See, e.g., New York v. Shore Realty Corp.,* 759 F.2d 1032, 1049-53 (2d Cir. 1985) (state entitled to injunctive relief under public nuisance law but not federal Superfund statute); *Commonwealth Edison*, 271 F.3d at 1352 (upholding federal cost contribution statute because utilities could have been held liable under common law of

[4] It is appropriate under federal common law to look to state-law nuisance cases and to the Restatement *See North Dakota*, 263 U.S. at 372 (looking to state law); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1352-54 (Fed. Cir. 2001) (Restatement); *Bushey II*, 363 F. Supp. at 120-21 (Restatement).

nuisance).

The public rights at issue here are "the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world." A-50, A-51-52; CA-105. These are clear public rights. *Cf. United States v. Ira S. Bushey & Sons, Inc*., 346 F. Supp. 145, 150 (D. Vt. 1972) (Oakes, J.) ("*Bushey I*") (plaintiff stated proper claim because "rights to the use and enjoyment of water not polluted by petroleum" are public rights under federal common law), *aff'd without opinion*, 487 F.2d 1393 (2d Cir. 1973); *Rich v. City of Benicia*, 98 Cal. App. 3d 428, 435 (Cal. Ct. App. 1979) ("Unquestionably environmental concerns in general . . . involve preeminently important public rights.").

The global warming to which defendants contribute unreasonably interferes with these public rights by harming forests, coastal marshes and ecology on plaintiffs' properties, which they hold for public purposes. A-47-49. "Unreasonably" refers primarily to the interference, not the defendant's conduct. *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) ("liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct"); William L. Prosser and W. Page Keeton, The Law of Torts § 52 (5th ed. 1984) (the "interference . . . can be unreasonable even when the defendant's conduct is reasonable."). Unreasonableness is a question of fact, *Bushey I*, 346 F. Supp. at

150, and is often judged by a series of factors, including "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," or "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." Restatement § 821B(2); *accord*, *Bushey II*, 363 F. Supp. at 120-21; *see also Commonwealth Edison*, at 271 F.3d at 1353 n.30 (where "so many others are affected" the "conduct is unreasonable and enjoinable") (quotation omitted). The allegations of profound and irreversible impacts on the very ecological values and public benefits for which plaintiffs' have acquired and hold their properties constitute sufficient allegations of unreasonable interference.

Intent is not required under federal nuisance law. *Bushey II*, 363 F. Supp. at 120 ("there need be no intent"); *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) ("The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant"), *vacated on other grounds*, *Milwaukee II*. Where intent has been required in nuisance, such as in state law, it is satisfied where "the defendant has created or continued the condition causing the interference with full knowledge

that the harm to the plaintiff's interests are occurring or are substantially certain to follow." Prosser & Keeton, *supra*, § 87. For example, "a defendant who continues to spray chemicals into the air after he is notified that they are blown onto the plaintiff's land is to be regarded as intending that result." *Id.* Plaintiffs have made proper allegations of intentional nuisance (and negligent nuisance) in the alternative to their strict liability nuisance allegations. A-22, A-24-29, A-51-57. Plaintiffs have properly pled an unreasonable interference with public rights.

3. Defendants Contribute to Global Warming and May be Enjoined Regardless of Other Contributors

Public nuisance liability attaches where a defendant causes *or contributes to* the nuisance. *See, e.g., Cox*, 256 F.3d at 292 n.19 ("nuisance liability at common law has been based on actions which 'contribute' to the creation of a nuisance"); *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 281 (E.D.N.Y. 2004) (same). Thus, each and every contributor to the nuisance may be separately enjoined regardless of whether the defendant's contribution by itself would create the nuisance. Restatement § 840E ("the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution"); *Beretta*, 315 F. Supp. 2d at 282 ("Where it is difficult or impossible to separate the

injury caused by one contributing actor from that caused by another and where each contributing actor's responsibility individually does not constitute a substantial interference with a public right, defendants may still be found liable for conduct creating in the aggregate a public nuisance if the suit is one for injunctive relief"); Prosser & Keeton, *supra*, § 52 ("Pollution of a stream to even a slight extent becomes unreasonable when similar pollution by others makes the condition of the stream approach the danger point."). This fundamental principle of nuisance law has been borne out in numerous cases that, like global warming, involve a large number of polluters.

For example, in *Illinois v. Milwaukee*, defendants' discharges of the nutrients nitrogen and phosphorus were contributing to eutrophication of the lake – as were thousands of other non-point sources all over the watershed. Defendants argued that the vast number of contributors defeated liability but the district court disagreed. *See Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), at *20-22 ("If defendants' argument were to be adopted, it would be impossible to impose liability on any polluter"), *aff'd in relevant part and rev'd in part*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds, Milwaukee II*. The court enjoined untreated discharges from 239 overflow points on the defendants' sewage systems under federal common law and the Seventh Circuit affirmed this

aspect of the injunction. 599 F.2d at 177.

Three seminal state-law cases are also illustrative of this principle. In *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884), California brought a public nuisance abatement action against a mining company that was dumping mine tailings in a river. The defendant's pollution alone would not have caused injury given the "vast amount" of mining previously undertaken on the river and the large number of mines still operating. *Id.* at 1156. The court nonetheless upheld an injunction because "in an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined, jointly or severally." *Id.* at 1157.

In *Woodyear v. Schaefer*, 57 Md. 1 (Md. 1881), a nuisance action against a water polluter by a downstream landowner, the court held:

> It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained. The extent to which the appellee has contributed to the nuisance, may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing alone, might amount to little or nothing. But it is when all are united together, and contribute to a common result, that they become important as factors, in producing the mischief complained of.

Id. at 9-10 (citations omitted). The court ordered an injunction.

In the third case, *The Lockwood Co. v. Lawrence*, 77 Me. 297 (Me. 1885), a downstream landowner sought an injunction against sawmill operators dumping waste into the stream. The court held:

> In the case at bar, it may be that the act of any one respondent alone might not be sufficient cause for any well grounded action on the part of the complainants; but when the individual acts of the several respondents, through the combined results of these individual acts, produce appreciable and serious injury, it is a single result, not traceable perhaps to any particular one of these respondents, but a result for which they may be liable in equity as contributing to the common nuisance . . .

Id. at 309-310.[5]

Federal courts frequently apply this principle of joint and several liability as a matter of federal common law gap-filling under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601-75 ("CERCLA"). Such cases typically involve numerous contributors to a hazardous waste site. Congress did not legislatively establish joint and several liability in CERCLA; rather, federal courts have applied joint and several liability in such cases as a matter of federal common law. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (adopting rule of *United States v. Chem-Dyne*

[5] *See also United States v. Luce*, 141 F. 385, 412 (C.C.D. Del. 1905) (relying upon all three of these state-law cases in federal nuisance case enjoining partial contributor to odor pollution).

Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983)).

This global warming case is thus grounded in a well-established body of law permitting injunctive relief against one of numerous polluters. While global warming is indeed a widespread pollution problem, a surprisingly small number of entities are responsible for a substantial portion of the fossil-fuel emissions that cause the problem. The five defendants here are responsible for one quarter of the U.S. power sector's emissions and ten percent of all carbon dioxide emissions from human activities in the United States. A-40. Global warming is similar to other pollution problems that have been litigated for more than a century as public nuisances against one or a few of numerous contributors. The complaint properly alleges that defendants' emissions of carbon dioxide contribute to global warming.

4. The Land Trusts Have Special Injury and Are Proper Federal Plaintiffs.

The Supreme Court held in *Milwaukee I* that "it is not only the character of the parties that requires us to apply federal law" in ambient or interstate pollution cases such as this but rather the important federal interests at stake. 406 U.S. at 105 n.6. The Land Trusts bring their claims of property injury on the same basis as the governmental plaintiffs have done with respect to government-owned

property harmed by global warming. CA-65-67, CA-93-95, CA-100, CA-102.

The Land Trusts satisfy the traditional public nuisance rule limiting the private right of action to those with special injury. Special injury is generally defined as injury different in kind from that suffered by the general public. *See* Restatement § 821C. Physical harm to property or interference with use and enjoyment of property constitutes injury different in kind. *See, e.g., Ariz. Copper Co. v. Gillespie*, 230 U.S. 46, 57 (1913) ("Here the appellee alleged a special grievance to himself affecting the enjoyment and value of his property rights as a riparian owner. . . ."); *City of Portland v. Boeing Co.*, 179 F. Supp. 2d 1190, 1195–96 (D. Or. 2001) ("When a public nuisance interferes with an individual's right to use and enjoy his real property, the individual suffers special injury and may bring an action against the perpetrator of the nuisance.") (quotation omitted); *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 712 P.2d 914, 918 (Ariz. 1985) ("[A]n injury to plaintiff's interest in land is sufficient to distinguish plaintiff's injuries from those experienced by the general public and to give the plaintiff-landowner standing to bring the action.") (citations omitted); *Chickasaw Bluffs Conservancy v. City of Memphis*, 1997 WL 135967, at *7 (Tenn. Ct. App. Mar. 25, 1997) ("[T]he Conservancy will sustain a special injury not common to the citizenry at large [because it] . . . was organized and incorporated

for the express purpose of protecting the property involved and the public's historical use of the property . . . .").[6] The reason for this rule is that "every plot of land [is] traditionally unique in the eyes of the law." William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1018 (1966). The Land Trusts own real property that is harmed by the nuisance and thus have injury different in kind from that of the general public.[7]

Moreover, plaintiffs are landowners organized for the express purpose of protecting ecologically significant and unique property and they maintain their properties for public use and benefit. The nuisance threatens these properties' ecological values with severe harm. A-44, A-46-50. This constitutes special injury. Indeed, a conservation land trust has perhaps the strongest claim for special injury that can be made: it is a private property owner whose charter,

---

[6] Although *Chickasaw Bluffs* was a mandamus case rather than a nuisance case, the same special injury rule applied.

[7] In *Wheeling Bridge* the Supreme Court defined special injury as injury greater in either kind *or* degree. *See Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 355 (1876) (under *Wheeling Bridge* special injury may be "common to the public at large, and only *greater in degree* to the complainants.") (emphasis added); *Carver v. San Pedro, L.A. & S.L.R. Co.*, 151 F. 334, 335 (C.S.D. Cal. 1906) (same). Degree is also relevant to the different-in-kind analysis. Restatement § 821C cmt. c ("[I]n determining whether there is a difference in the kind of harm, the degree of interference may be a factor of importance that must be considered."). The land trusts own thousands of acres of land, A-4; A-25-26, and thus have injury that is greater in degree than the average member of the general public.

purpose and mission is to preserve land for public use, enjoyment and benefit. Thus, the conundrum often faced by private plaintiffs suing in public nuisance, *i.e.*, that the harm must interfere with *public* rights but also harm the plaintiff differently, is totally absent in a case by a land trust seeking to enforce private property rights that are bound up with public purposes. The land trusts have special injury.

Defendants argued below that federal nuisance law is different and precludes a private party from ever bringing a claim. This is incorrect. For example, in *New England Legal Foundation v. Costle*, 666 F.2d 30 (2d Cir. 1981), non-profit groups, municipalities and citizens sued a New York power plant in federal nuisance for interstate air pollution causing harms in Connecticut. The district court had held that "[i]t may not be essential for the state to be a formal party to a federal common law nuisance action, however, where the interests of the state are sufficiently implicated in a dispute of clearly interstate nature." 475 F. Supp. 425, 440 n.18 (D. Conn. 1979) (Newman, J.). This Court affirmed on the merits "substantially for the reasons set forth by Judge Newman." 666 F.2d at 33.

The condition in *Costle* for private parties to invoke federal nuisance law–that the interests of a state must be sufficiently implicated–is unquestionably satisfied here where eight States have filed a nearly identical complaint against the

same defendants. Other courts have similarly permitted private parties to bring federal common law cases or noted the propriety of such cases, particularly where the case seeks injunctive relief or where the interests of a State are sufficiently implicated. *See Nat'l Sea Clammers Ass'n v. New York City*, 616 F.2d 1222, 1233 (3d Cir. 1980) ("We hold that the common law nuisance remedy recognized in *Illinois v. City of Milwaukee* is available in suits by private parties."), *rev'd on other grounds Sub. Nom. Middlesex County Sewerage Auth v. Nat'l Sea Claimers Ass'n*, 453 U.S. 1 (1981); *Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1009 n.8 (4th Cir. 1976) (*en banc*) ("It is not essential that one or more states be formal parties if the interests of the state are sufficiently implicated."); *Parsell, supra,* 421 F. Supp. at 1281 ("[T]here is some justification for limiting any right of action under *Illinois v. Milwaukee* to private parties seeking injunctive relief rather than damages."), *aff'd*, 573 F.2d 1289; *Byram River v. Vill. of Port Chester*, 394 F. Supp. 618, 629 (S.D.N.Y. 1975) (denying motion to dismiss complaint by private landowners, citizens group and municipality under federal common law of public nuisance). In fact, in *National Sea Clammers* the court held that "private parties should be permitted, and indeed encouraged, to participate in the abatement of such nuisances." 616 F.2d at 1234.

The right of a property owner with special injury to sue in public nuisance is

ancient. In *Wheeling Bridge*, where the Court held a low bridge to be a public nuisance, Pennsylvania sued in public nuisance only in its capacity as a property owner: "in the present case, the State of Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court a protection of its property, on the same ground and to the same extent as a corporation or individual may ask it." 54 U.S. at 560-61. The Court held that "[a]ny individual may abate a public nuisance," *id*. at 566, and invoked the rule that where the nuisance harms plaintiffs' "enjoyment of their property and the value of it," then it "worked a special injury to the plaintiffs," *id.* at 567 (quotation omitted). Thus, "[a] court of equity will not only interfere upon the information of the attorney-general, but also upon the application of private parties." *Id*. (quotation omitted). The Land Trusts are proper plaintiffs, have properly alleged a special injury, and have stated a claim upon which relief may be granted.

B. The District Court Had Proper Subject Matter Jurisdiction.

A claim under the federal common law of public nuisance presents a federal question under Article III of the Constitution and 28 U.S.C. § 1331. *Milwaukee I*, 406 U.S. at 99. "It is beyond dispute that if federal common law governs a case, that case presents a federal question within the subject matter jurisdiction of the

federal courts, just as if the case were governed by a federal statute." *Woodward Governor Co. v. Curtiss-Wright Flight Sys.*, 164 F.3d 123, 126 (2d Cir. 1999) (citing *Milwaukee I*). Here, the Land Trusts allege that defendants' interstate carbon dioxide pollution contributes to global warming and thereby causes transboundary harms to plaintiffs' property. These allegations raise a question under *Milwaukee I* that is governed by federal law. Federal question jurisdiction is therefore proper.[8]

Finally, where subject matter jurisdiction is proper, a nonjurisdictional limitation on the exercise of jurisdiction "must be interpreted narrowly in light of the virtually unflagging obligation of federal courts to exercise the jurisdiction given them." *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 80 (2d Cir. 2001) (quotation omitted). Justiciability is nonjurisdictional; the district court erred in ruling otherwise. *Powell v. McCormack*, 395 U.S. 486, 511 (1969) ("there is a significant difference between determining whether a federal court has 'jurisdiction of the subject matter' and determining whether a cause over which a court has subject matter jurisdiction is 'justiciable.'"); *767 Third Ave. Assocs. v.*

[8] Jurisdiction is proper even if, *arguendo*, there were any doubt about whether the Land Trusts have stated a claim. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 96 (1998) ("the nonexistence of a cause of action [is] no proper basis for a jurisdictional dismissal.").

Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152, 163 n.10 (2d Cir. 2000) (error to "simply conflate the question of jurisdiction with that of justiciability"); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (political question is "nonjurisdictional, prudential" doctrine). Because subject matter jurisdiction is proper here, the political question doctrine must be narrowly construed.

II. This Case Does Not Present a Nonjusticiable Political Question.

Under the long-established federal common law of public nuisance, the federal judiciary is empowered to decide interstate pollution cases and is preempted from doing so only if the political branches have regulated the pollutant at issue and provided a remedy. *See infra* Section III. The district court turned this applicable law on its head by holding that *inaction* by the political branches renders an interstate pollution case a nonjusticiable political question. Both doctrines–preemption of federal common law and political question–are species of the separation of powers, *Milwaukee II*, 451 U.S. at 315; *Baker v. Carr*, 369 U.S. 186, 217 (1962), and thus should be read in harmony. This case presents no political question.

"The political question doctrine must be cautiously invoked . . ." *Can v.*

United States, 14 F.3d 160, 163 (2d Cir. 1994). There is a significant difference between a nonjusticiable political question and a political issue. *Baker*, 369 U.S. at 217 (1962) ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'"); *United States Dept of Commerce v. Montana*, 503 U.S. 442, 445, 458 (1992) (no political question notwithstanding that issue of apportioning House seats "has motivated partisan and sectional debate during important portions of our history" and was of "significance in [that] year's congressional and Presidential elections"); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) ("Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions."). The district court's decision here would blur, if not erase, this important distinction, by equating a political issue with a political question.

Moreover, the district court's opinion would constitute an unprecedented expansion of the political question doctrine. In *Ohio v. Wyandotte Chemicals Corp*., 401 U.S. 493 (1971), involving international and interstate pollution of Lake Erie with mercury, the Court specifically distinguished interstate pollution cases from "political questions" and held that under *Tennessee Copper* and other interstate pollution cases, the judiciary is "empowered to resolve this dispute in the first instance." *Id.* at 496. *Wyandotte* by itself demonstrates the district court's

error and is dispositive here.[9]

In its landmark decision in *Baker v. Carr*, the Court rejected a political question argument in a case challenging apportionment of state legislative districts. *Baker* identified six factors that may indicate a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found [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.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.

369 U.S. at 217 (numbering added). The first factor is "the dominant consideration in any political question inquiry." *Lamont v. Woods*, 948 F.2d 825,

---

[9] *Wyandotte's* indication that state law should apply to interstate nuisance cases, *id*. at 499 n.3, was dictum and was overruled the following year in *Milwaukee I*. *See Ouellette*, 479 U.S. at 488. Other aspects of *Wyandotte* remain good law. *See, e.g., Puerto Rico v. Bramkamp*, 654 F.2d 212, 216 n.4 (2d Cir. 1981).

831 (2d Cir. 1991); *see also Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (first factor "is of particular importance"). The district court only addressed the third factor. Amended Opinion, SPA-32-38. None of the *Baker* factors is "inextricable" from the case at bar.

A. Interstate Pollution Cases are Not Constitutionally Committed to the Political Branches (*Baker* Factor One).

The first *Baker* factor is utterly absent here. There is nothing in the Constitution committing interstate pollution cases to Congress or the Executive Branch. Rather, interstate pollution cases are federal questions under Article III and are thus committed to the judiciary. *Milwaukee I*, 401 U.S. at 99.

1. This Case Does Not Interfere With Foreign Affairs.

Judicial resolution of this case will not interfere with the conduct of foreign affairs. The Supreme Court in *Baker* cautioned against "sweeping statements to the effect that all questions touching foreign relations are political questions" and warned "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211; *accord*, *Kadic*, 70 F.3d at 249 ("[n]ot every case 'touching foreign relations' is nonjusticiable")

(quoting *Baker*). In cases touching upon foreign affairs, therefore, this Court has read "constitutionally committed" narrowly. *Planned Parenthood Fed'n of Am. Inc. v. Agency for Int'l Dev*. 838 F.2d 649, 655-56 (2d Cir. 1988) ("precise issue" of whether implementation of a foreign policy relating to abortion unconstitutionally restricts free speech rights not constitutionally committed to political branches); *Lamont*, 948 F.2d at 832 (whether foreign aid program providing grants to sectarian schools in foreign nations violates Establishment Clause not constitutionally committed to the political branches).

This global warming case by domestic plaintiffs against domestic companies for domestic conduct raises a far weaker argument for alleged interference with foreign affairs than the leading cases rejecting alleged foreign affairs interferences. For example, in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), wildlife conservation groups sought a writ of mandamus to compel the Secretary of Commerce to certify that Japan was violating a whaling treaty. The case was brought just days before consummation of an executive agreement between the United States and Japan to resolve the dispute and, when the district court issued the writ, Japan informed the United States that it would adhere to the agreement only upon reversal of the writ. The Court held that while it was "cognizant" of the foreign relations implications and

of "the premier role which both Congress and the Executive play in this field," nonetheless there was no political question because "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id*. at 230. The issue in *Japan Whaling* was "a matter of intense worldwide concern." *Id*. at 242 (Marshall, J., dissenting on the merits). In *Kadic* and *Klinghoffer*, *supra*, this Court held that international law claims and tort claims, respectively, arising from harms occurring outside the United States in the course of armed struggles seeking political power, were not constitutionally committed to the political branches. If *Japan Whaling*, *Kadic* and *Klinghoffe*r did not improperly intrude into foreign affairs, then this case certainly does not.

The cases that *have* found nonjusticiable political questions because of foreign affairs stand in even starker contrast with this case. For example, in *In re Austrian and German Holocaust Litigation*, 250 F.3d 156, 164 (2d Cir. 2001), this Court held–unsurprisingly–that a district court order that "seemingly requires the German legislature to make a finding of legal peace and to do so before its summer recess" impermissibly intruded into political affairs. Similarly, cases that affect the recognition of a foreign government present a political question. *See, e.g., Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918) (whether to recognize new

government of Mexico); *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000) (whether former Balkan states had succeeded to debts of former government of Yugoslavia). This domestic case does not even come close to such an interference.

Defendants argued below that an interference with foreign affairs was evident from statutes that assign the State Department responsibility for dealing with aspects of the global warming problem. *See, e.g.*, 15 U.S.C. § 2901-note, SPA-41 (Secretary of State responsible for coordinating "those aspects of United States policy requiring action [on global warming] through the channels of multilateral diplomacy"). However, "Congress' delegation to the President is not a 'textually demonstrable *constitutional* commitment.'" *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 249 n.24 (1985) (quoting *Baker*, 369 U.S. at 217). In *Oneida*, the Court held that *constitutional* commitment was not established in a federal common law case alleging unlawful possession of Indian lands where *Congress* had prohibited transfer of Indian lands without a federal treaty and authorized the President to eject unlawful settlers. *See id*. at 238 & n.11.

To be sure, the United States is a party to a treaty, the Framework Convention, that commits developed nations, including the United States, to the

general "aim" of reducing their greenhouse gas emissions collectively or individually to 1990 levels. SPA-80. This treaty does not, however, evidence a *constitutional* (or any other) commitment of domestic greenhouse gas emissions to the political branches. Nor does it purport to resolve the claims at issue here, much less provide exclusive authority to the President to do so. *See Oneida*, 470 U.S. at 249 n.24 (treaty authorizing but not requiring President to resolve claims does not establish political question). Moreover, there is no political question where, as here, "plaintiffs do not seek to adjudicate the lawfulness or political wisdom of the government's [foreign] policy." *Lamont*, 948 F.2d at 832.

In any event, it is simply beyond dispute that interstate pollution cases–even ones that touch upon foreign affairs–are constitutionally committed to the Judicial Branch. *Milwaukee I*, 406 U.S. at 99; *Wyandotte*, 401 U.S. 495-96. The fact that Article III allows the judiciary to apply common law to decide interstate controversies "does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare." *Missouri v. Illinois*, 200 U.S. 496, 519 (1906). As this Court held in another tort case, "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own – the Judiciary." *Klinghoffer*, 937 F.2d at 49.

2. This Case Does Not Invade a Constitutionally Exclusive Domain of the Political Branches on Domestic Policy.

As with foreign affairs, a broad grant of authority to the political branches in an area of domestic policy is insufficient to demonstrate constitutional commitment. *See, e.g.*, *Oneida*, 470 U.S. at 249 ("Congress' plenary power in Indian affairs under Art. 1, § 8, cl. 3, does not mean that litigation involving such matters necessarily entails nonjusticiable political questions."). Even a demonstrable constitutional commitment of an issue to a coordinate branch of government is confined to the precise issue so committed. *Powell v. McCormack*, 395 U.S. 486, 548 (1969) ("Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."). Constitutional commitment is only established where the text of the Constitution vests exclusive authority to a coordinate branch. *Nixon v. United States*, 506 U.S. 224, 229-32 (1993) (impeachment trial procedure committed to Senate by constitutional provision that the "Senate shall have sole power to try all Impeachments").[10]

[10] In the Court's most recent political question case, not even the issue of political gerrymandering could muster a majority in favor of finding a political question. *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004)) (rejecting "plurality's conclusions as to nonjusticiability") (Kennedy, J., concurring in the judgment); *id.* at 317 ("five Members of the Court are convinced that the plurality's answer" to the question of justiciability "is erroneous.") (Stevens, J., dissenting).

One of the judiciary's characteristic roles is to decide common law claims such as public nuisance. And, under *Milwaukee I,* the federal judiciary is assigned the duty to decide federal common law claims arising from interstate pollution. Just as Congress and the Executive Branch do not hear challenges to the constitutionality of a statute or an executive action, neither can those political branches decide a public nuisance case. Resolution of this interstate pollution case is constitutionally committed to the judiciary. "This factor alone, then, strongly suggests that the political question doctrine does not apply." *Klinghoffer*, 937 F 2d at 49.

B. There are Judicially Discoverable and Manageable Standards for Resolving This Interstate Pollution Case (*Baker* Factor Two).

There are well-recognized legal norms for adjudicating a public nuisance case. *See supra* at IA2-4. Thus, "because the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does not require the court to render a decision in the absence of judicially discoverable and manageable standards." *Klinghoffer*, 937 F.2d 49 (quotation omitted). Even where a judicial norm presents "a rather difficult adjudicatory task" in the usual case, the presence of a foreign affairs issue does not, by itself, establish an absence

of manageable standards. *Lamont*, 948 F.2d at 833. In *Planned Parenthood*, this Court rejected a lack-of-standards argument where the "district court's analysis was premised on the erroneous assumption that [the] case requires an evaluation of the policies articulated in the [foreign policy] Statement." 838 F.2d at 656. The Court held the usual standards applicable in a free speech case to be as judicially manageable as usual. *Id*. Thus, the foreign policy implications of global warming do not override the normal public nuisance standards. And, because there is an interrelationship between *Baker* factors one and two, *Nixon*, 506 U.S. at 228, the existence of such judicially manageable standards "further undermines the claim that such suits relate to matters that are constitutionally committed to another branch." *Kadic*, 70 F.3d at 249.

C. Deciding This Interstate Pollution Case Does Not Require an Initial Policy Determination by the Political Branches (*Baker* Factor Three).

The district court apparently believed that the political branches had failed to supply a required "initial policy decision" here by declining to regulate carbon dioxide emissions through legislation and by not ratifying the Kyoto Protocol. Amended Opinion, SPA-27, SPA-36-37; *see also* Tr. at 28:2-4, SPA-117. However, as set forth in *Milwaukee I* and *Milwuakee II*, the federal common law

of public nuisance exists precisely where there is an absence of regulation by the political branches. Because this interstate pollution case is governed by recognized judicial standards under the federal common law of public nuisance, there is no need to make an initial policy decision of a nonjudicial kind. *Kadic*, 70 F.3d at 249 (existence of judicially discoverable and manageable standards "obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion.").

Even assuming *arguendo* a need for an initial policy determination in this case, Congress expressly has provided one in the Global Climate Protection Act of 1987 and other statutes. P.L. 100-204, Title XI, §1103(a), SPA-41 (U.S. policy is to limit mankind's impact on climate by slowing rate of increase atmospheric greenhouse gas concentrations over short-term and stabilizing or reducing concentrations over long-term); 42 U.S.C. § 7403(g)(1), SPA-62 (requiring research on "technologies for *preventing or reducing* multiple air pollutants, including . . . carbon dioxide, from stationary sources, including fossil fuel power plants") (emphasis added). Thus, "[a]ny initial policy decision that might conceivably be required has already been made." *Klinghoffer*, 937 F.2d at 50

n.3.[11]

The district court apparently questioned this official U.S. policy based upon miscellaneous materials from the political branches containing various objections to the Kyoto Protocol. Amended Opinion, SPA-27 (citing S. Res. 98, 105th Cong. (1997); White House press release denominated a "transcript"; and expired budget riders), *see also* Tr. at 28:3-4, SPA-117. These materials, however, do not purport to alter official U.S. policy and some are not even law. *Yang v. Cal. Dep't of Social Servs.*, 183 F.3d 953, 958 n.3 (9th Cir. 1999) ("sense of Congress resolutions do not have the force of law."). With respect to the White House press release, the district court correctly recognized in a subsequent portion of its opinion that this document is not law. Amended Opinion, SPA-37 ("official United States policy is expressed by statutes and treaties in force, not press releases").[12]

---

[11] *See also* U.S. Dep't of State, U.S. Climate Action Report – 2002: Third National Communication of the United States of America Under the United Nations Framework Convention on Climate Change 51 (May, 2002), SPA-103 (United States is "currently pursuing a broad range of strategies to reduce net emissions of greenhouse gases."), *available at* http://unfccc.int/resource/docs/natc/usnc3.pdf.

[12] Although this portion of the district court's opinion rebukes plaintiffs for quoting from the press release to show its consistency with U.S. policy to reduce emissions, it was defendants who proffered the document, *see* Memorandum of Law in Support of Defendants' Motions to Dismiss the Complaints for Lack of

The general U.S. policy in favor of reducing emissions of carbon dioxide and other greenhouse gases set forth in official U.S. laws is perfectly consistent with the exercise of federal common law authority. *Milwaukee I*, 406 U.S. at 103 n.5 (federal common law may take notice of federal statutory policies); *accord*, *Oswego Barge I*, 664 F.2d at 339 n.15. In short, there is no need for an initial policy determination here and, if there were, it already has been made.

D. The Remaining Prudential Considerations Are Inapplicable (*Baker* Factors Four Through Six).

The remaining prudential considerations of *Baker* do not apply. "The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic*, 70 F.3d at 249. There can be no contradiction here given the clearly expressed policy in U.S. laws to reduce greenhouse gas emissions in order to mitigate global warming. "Because this lawsuit is consistent

---

Subject Matter Jurisdiction and Failure to State a Claim ("Def.Br.") at 7, 16, 40-41, and plaintiffs who urged the court to disregard it, *see* Tr. at 45:5, SPA-119 ("It simply is not binding on this court.") (statement of Mr. Blumenthal for all plaintiffs).

with both the Executive and Legislative Branch's attitude toward [the issue], resolution of this case does not have the potential for 'embarrassment from multifarious pronouncements by various departments on one question.'" *Klinghoffer*, 937 F.2d at 50; *cf. Whiteman v. Dorotheum GbmH & Co.*, 2005 WL 3117196, at*12 (2d Cir. Nov. 23, 2005) (*Baker* factor four established in suit against foreign sovereign where executive provided "alternative forum" that "is capable of providing meaningful relief") (quotation omitted). Defendants recognized below that there could be no contradiction when they argued merely that Congress is "empowered" to enact a regulatory statute, that the President "can" negotiate treaties, and that the political branches "have endeavored to achieve" an international solution. Def.Br. at 3, 16. Those assertions of potential future action do not identify a decision that judicial resolution of this case could contradict.

E. Balancing the Equities Will be Possible.

Finally, the district court erred in holding it to be "impossible" for a court to balance the equities in this case and render judgment without further input from the political branches. Amended Opinion, SPA-33. "Absent the clearest command to the contrary from Congress, federal courts retain their equitable

power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *accord*, *Town of Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) ("Broader injunctive relief is appropriate, of course, where substantial danger to the environment . . . is established."); *Reserve Mining Co. v. EPA*, 514 F.2d 492, 536-42 (8th Cir. 1975) (affirming injunctive relief in air pollution case by federal and state governments and several environmental groups requiring $243 million investment in pollution control at facility supplying twelve percent of ore for nation's steel production). And "any framing of equitable relief against the defendant in an otherwise constitutionally permissible case or controversy clearly does not amount to usurpation of the legislative power." *Bushey I*, 346 F. Supp. at 150.

The district court relied upon *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Amended Opinion, SPA-33 ("As the Supreme Court has recognized, to resolve air pollution cases, courts must

strike a balance 'between interests seeking . . . .'") (quoting *Chevron*, 467 U.S. at 847). In fact, *Chevron* was not describing "cases," "courts," or *judicial* balancing at all but rather a 1976 legislative battle: "As always in this area, *the legislative struggle* was basically between interests seeking . . ." 476 U.S. at 847 (emphasis added). *Chevron* thus does not support the district court's ruling.

The district court also thought that it could not evaluate the impact of relief on the entire nation's "energy sufficiency and thus its national security." Amended Opinion, SPA-34. But this assumes plaintiffs will be unable to prove their allegation that "Defendants have available to them practical and economically viable options for reducing their carbon dioxide emissions without significantly increasing the cost of electricity to their customers." A-22. Plaintiffs are entitled to their day in court. This case presents a justiciable controversy.

III. Congress and EPA Have Not Preempted a Federal Common Law Claim for Carbon Dioxide Emissions.

Congress and EPA have not preempted a federal common law claim for carbon dioxide emissions. EPA in fact has expressly ruled that regulation of carbon dioxide and other greenhouse gas emissions is outside the statutory ambit of the CAA. 68 Fed. Reg. at 52,928; *Massachusetts*, 415 F.3d 50 (denying

petition challenging EPA ruling); *see also Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 550 (8th Cir. 2003) (carbon dioxide "not subject to the statutory cap" on air emissions). Statutes relating to global warming merely require scientific research and reporting of emissions levels by utilities.

Congressional inaction does not preempt. "Congress's mere refusal to legislate . . . falls far short of an expression of legislative intent to supplant existing [federal] common law in that area." *United States v. Texas*, 507 U.S. 529, 535 (1993) (quotation omitted). Rather, preemption of federal common law occurs only where Congress has spoken directly to the particular issue:

> In determining whether a federal statute pre-empts common-law causes of action, the relevant inquiry is whether the statute "[speaks] *directly* to [the] question" otherwise answered by federal common law. *Milwaukee II*, *supra*, at 315. (emphasis added). As we stated in *Milwaukee II*, federal common law is used as a "necessary expedient" when Congress has not "spoken to a *particular* issue."

Oneida, 470 U.S. at 236-37 (emphases in original). In *Oneida*, the Court held that a federal common law claim for illegal occupation of Native American lands was not preempted by a statute that generally addressed the issue by prohibiting divestiture of such lands absent a U.S. treaty. The legislation authorized the President to remove forcibly illegal occupants of aboriginal lands but did not "address directly the problem of restoring unlawfully conveyed lands to the

Indians, *in contrast to the specific remedial provisions* contained in [the water pollution statute at issue in *Milwaukee II]*." *Id.* at 238 (emphasis added). The Court also held that a treaty requiring the tribe to lodge complaints with the President did not preempt federal common law. *Id*. at 249 n.24.

In *Milwaukee II*, the Court found preemption where the statute regulated the very pollutant at issue and EPA had issued permits setting numerical limits on the discharges.

> There is thus no question that the problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress. This being so there is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime by reference to federal common law . . . .

451 U.S. at 320; *accord, Arkansas v. Oklahoma*, 503 U.S. 91, 99 (1992) (*Milwaukee II* found preemption because Congress had provided a federal remedy). The CAA does not currently regulate carbon dioxide emissions, much less provide a remedy.

In *Oswego Barge*, this Court applied *Milwaukee II* and found preemption of maritime tort claims by the United States because the statute "legislates on the subject of recovery by the United States of its costs of cleaning up oil spilled into American waters." *Oswego Barge I*, 664 F.2d at 339; *see also In re Oswego*

Barge, 673 F.2d 47, 48 (2d Cir. 1982) ("*Oswego Barge II*") ("in this instance *the precise and comprehensive statutory damage remedy* Congress has created for the United States is exclusive of non-statutory damage remedies.") (emphasis added); *accord, Senator Linie GmbH & Co. KG v. Sunway Line, Inc*., 291 F.3d 145, 167 (2d Cir. 2002) ("by setting forth in detail the rights, duties, liabilities, and immunities of carriers, [the statute] extensively governs the relations of carriers and shippers . . . ."). Significantly, *Oswego Barge* further held that the statute *did not* preempt a maritime tort claim for cleanup costs in Canadian waters because such waters are outside the scope of the statute. *Oswego Barge I*, 664 F.2d at 344-345. Here, Congress has not legislated on the subject of carbon dioxide emissions limits nor provided any remedy.

There is, moreover, a fundamental difference between the CAA and the post-1972 Clean Water Act at issue in *Milwaukee II*:

> [T]he Clean Air Act differs substantially from the Water Pollution Control Act in areas which the majority of the Court in [*Milwaukee II*] found were especially significant but which bear no relation to the facts herein. For example, Justice Rehnquist, writing for the majority in [*Milwaukee II*] found it especially significant that under the Water Pollution Control Act the EPA regulated *every* point source of water pollution. 451 U.S. at 318 (emphasis in original). Under the Clean Air Act, in contrast, the states and the EPA are not required to control effluents from every source, but only from those sources which are

> found by the states and the agency to threaten national ambient air quality standards.

New England Legal Foundation v. Costle, 666 F.2d 30, 32 n.2 (2d Cir. 1981); *see also United States v. Tennessee Air Pollution Control Bd.*, 185 F.3d 529, 534 (6th Cir. 1999) (addressing "significant differences between the Clean Water Act and the Clean Air Act"). Because the post-1972 water pollution act prohibits *all* discharges to navigable waters from *all* point sources, it leaves no room for federal common law. *Milwaukee II*, 451 U.S. at 318*; Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981). In contrast, the CAA selectively regulates only certain pollutants.[13]

Because of this key difference between the two statutes, this Court in *Costle* left open the question here, i.e., whether the CAA preempts actions involving

---

[13] *See also National Audubon Soc'y v. Dep't. of Water*, 869 F.2d 1196, 1213 (9th Cir. 1988) (Reinhardt, J., dissenting on other grounds) ("[T]he structure of the Clean Air Act is closer to that of the pre-1972 Federal Water Pollution Control Act (FWPCA) – which the Supreme Court held in *Milwaukee I* did *not* preempt federal common law, 406 U.S. at 107 – than it is to that of the Clean Water Act."). The majority opinion in *National Audubon Society* did not address the issue because it held the pollution was insufficiently interstate to trigger federal common law. Two district courts have found that the CAA preempts federal common law but did not address interstate or unregulated pollution. *See Reeger v. Mill Serv., Inc.*, 593 F. Supp. 360, 363 (W.D. Pa. 1984) (local emissions from a hazardous waste facility); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) (local air pollution from a landfill).

unregulated emissions. It does not. Congress has not spoken directly to the issue of regulating or otherwise providing remedies for carbon dioxide emissions. The absence of any regulation of carbon dioxide is in striking contrast to the statute at issue in *Milwaukee II*. *See* 451 U.S. at 324 n.18 ("In imposing stricter effluent limitations the district court was not 'filling a gap' in the regulatory scheme, it was providing a different regulatory scheme."). The CAA is extraordinarily "comprehensive" within its domain, *Weiler v. Chatham Forest Products,* 370 F.3d 339 (2d Cir. 2004), but under current law as interpreted by EPA, that domain simply does not include regulation of carbon dioxide emissions. It "contains no remedial provision," *Oneida*, 470 U.S. at 238, for such emissions and thus does not preeempt.

IV. Plaintiffs Have Standing.

The standing inquiry is fact-intensive and thus only requires, at the pleading stage, general allegations. *Baur v. Veneman,* 352 F.3d 625, 631 (2d Cir. 2003) ("[A]t the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury."). As the district court correctly recognized, "an analysis of plaintiffs' standing would involve an analysis of the merits of plaintiffs' claims." Amended Opinion, SPA-31. At this stage, the

Land Trusts need only make proper allegations to support standing, which they have done.

The elements of standing are injury-in-fact, traceability and redressability. *Baur*, 352 F.3d at 632. The Land Trusts note that all three elements were recently held to be satisfied in a case addressing global warming that involved a factual record raising some of the same injuries at issue here. *See Massachusetts*, 415 F.3d at 55 ("petitioners . . . submitted enough evidence raising genuine issues of material fact to defeat" a summary judgment challenge to standing) (Randoph, J.); *id*. at 64 ("In my view, declarations submitted by petitioners clearly establish that the Commonwealth of Massachusetts has satisfied each element of Article III standing--injury, causation, and redressability) (Tatel, J., dissenting).

A. Plaintiffs Have Alleged Injury-In-Fact.

The Land Trusts allege that defendants contribute to global warming and thus to inundation of their land, damage to fragile coastal habitats they have preserved, damage to forests, and permanent destruction of the ecology on preservation lands. A-47-50. These are severe and irreparable harms to the very purposes of the land trusts and greatly exceed the "identifiable trifle" required by Article III. *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (quotation

omitted).

Three principles of standing law are important to the injury-in-fact analysis here. First, "as the Supreme Court recently explained in *FEC v. Akins*, 524 U.S. 11, 24 (1998), injury-in-fact may be found although the asserted harm is 'widely shared' if the harm is sufficiently concrete and particularized." *Baur*, 352 F.3d at 635. "And while [plaintiffs] could certainly seek redress through the political process, as recommended by the district court, the fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes." *Id.* at 635-36 (quotation omitted).

Second, "environmental harm . . . is by nature probabilistic" and thus "an unreasonable exposure to risk may itself cause cognizable injury." *Id*. at 634 (quotation omitted). While plaintiffs here allege that their injuries "will" occur, A-47-49, the inherently probabilistic nature of environmental injuries does not mean that the risks and threats from global warming do not cause injury-in-fact. Enhanced risk is a "qualitative, not quantitative" inquiry and is especially cognizable as injury where, as here, "government studies and statements confirm several of [plaintiffs'] key allegations." *Baur*, 352 F.3d at 637 (quotation omitted). And the "probability of harm which a plaintiff must demonstrate in

order to allege a cognizable injury-in-fact logically varies with the severity of the probable harm." *Baur*, 352 F.3d at 637.

Third, "the injury-in-fact analysis is highly case-specific." *Baur*, 352 F.3d at 637; *see also McConnell v. FEC*, 540 U.S. 93, 227 (2003) (standing "often turns on the nature and source of the claim asserted") (quotation omitted). The certainty and immediacy of plaintiffs' injuries thus must be considered in light of the nature of global warming. While the climate does not change overnight, that does not render plaintiffs' injuries any less concrete. Plaintiffs have pled a proper injury-in-fact.

B. Plaintiffs' Injuries are "Fairly Traceable" to Defendants' Emissions.

A key principle in this case with respect to both traceability and redressability is that courts 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.*, U.S. 167, 181 (2000). Because success on the merits in this multiple-polluter case is joint and several, *supra* Section IA3, the *Laidlaw* prohibition on raising the bar through standing means that traceability and redressability must be assessed by examining the impact of defendants'

emissions (or reductions in emissions) jointly with all other fossil fuel emissions. Consistent with this principle, standing law requires only that each defendant "*contributes* to the pollution" that causes plaintiffs' injuries. *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992); *accord*, *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.* 913 F.2d 64, 72 n.8 (3d Cir. 1990) ("In order to obtain standing, plaintiffs need not sue *every* discharger in one action, since the pollution of any one may be shown to cause some part of the injury suffered."); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (plaintiff need not connect harm to "particular molecules" emitted by defendants).

The Land Trusts allege that the level and rate of warming depend upon the level of carbon dioxide emissions and that the warming will accelerate if carbon dioxide emissions are not reduced. A-43. Further, "[g]lobal warming will diminish or destroy the particular ecological and aesthetic values that caused plaintiffs to acquire, and cause them to maintain, the properties they hold in trust." A-48-49; *see also* A-50. The fact that other fossil-fuel sources of carbon dioxide emissions also contribute to global warming does not defeat the causal connection between defendants' contribution and the injuries. Plaintiffs' injuries are "fairly traceable" to defendants' carbon dioxide emissions.

C. Plaintiffs' Injuries are Redressable.

In accordance with *Laidlaw*, plaintiffs need only allege that the relief requested will redress the named defendants' contribution, not that the relief will result in an unpolluted resource. *Powell Duffryn*, 913 F.2d at 73 ("plaintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III"); *Watkins*, 954 F.2d at 980 ("plaintiffs need not show that . . . absent the defendant's activities, the plaintiffs would enjoy undisturbed use of a resource").

Accordingly, the allegation that "[r]eductions in Defendants' massive carbon dioxide emissions will reduce all injuries and risks of injuries to the public, and all special injuries to plaintiffs, from global warming," A-49, is sufficient. *See also* A-49 at ¶89. Indeed, the Land Trusts have tied their injuries to the absence of any restraint on defendants's emissions, A-21, A-42-43 ("defendants' unrestrained emissions"), and hence to the continuing "unrestrained global warming," A-47-48. Plaintiffs' have made sufficient standing allegations.

CONCLUSION

Plaintiffs respectfully request the Court reverse the district court's judgment of dismissal and remand for further proceedings.

Dated: December 15, 2005

By:

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

MATTHEW F. PAWA
BENJAMIN A. KRASS
Law Offices of Matthew F. Pawa, P.C.
1280 Centre Street, Suite 230
Newton Centre, MA 02459
(617) 641-9550

MITCHELL S. BERNARD
NANCY S. MARKS
AMELIA E. TOLEDO
Natural Resources Defense Council, Inc.
40 West 20th Street
New York, NY 10011
(212) 727-2700

Certificate of Compliance With Fed. R. App. P. 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version in Times New Roman 14 point type.

Dated: December 15, 2005

_____

Matthew F. Pawa
Attorney for the Plaintiffs-Appellants
Open Space Institute, Inc., Open
Space Conservancy, Inc., and
Audubon Society of New Hampshire

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: OPEN SPACE INSTITUTE, *et al.* v. AMERICAN ELECTRIC POWER COMPANY, *et al.*

DOCKET NUMBER: 05-5119-cv

I, Matthew F. Pawa, certify that I have scanned for viruses the PDF version of the Appellants' Brief that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

The name and the version of the anti-virus detector that was used is Micro Trend Office Scan 6.0.

If you know, please indicate the version of revision and/or the anti-virus signature files: unknown.

_____

Matthew F. Pawa

Date: December 15, 2005

Provided as a courtesy by AppealTech.

STATE OF NEW YORK)
SS.
COUNTY OF NEW YORK)

Filed
☐ **Email**

_____, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or _____

_____.

That on the 15th day of December, 2005, deponent personally served via email the

Brief for Plaintiffs-Appellants

upon the attorneys who represent the indicated parties in this action, and at the email addresses below stated, which are those that have been designated by said attorneys for that purpose.

Names of attorneys served, together within the names of the clients represented and the attorney's designated email addresses.

Joseph Guerra
Sidley Austin Brown & Wood
Attorneys for Defendants-Appellees
jguerra@Sidley.com

Shawn Patrick Regan
Hunton & Williams, LLP
Attorneys for Defendant-Appellee
sregan@hunton.com

Michael L. Rice
Jones Day Reavis & Pogue
Attorneys for Defendant-Appellee
mlrice@JonesDay.com

Edwin W. Small
Edwin W. Small, Esq.
Attorney for Defendant-Appellee
ewsmall@tva.gov

Sworn to before me this
15th day of December, 2005.

_____

ORIGINAL

11460