05-5104 cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF CONNECTICUT, STATE OF NEW YORK, PEOPLE OF THE STATE OF CALIFORNIA EX REL. ATTORNEY GENERAL BILL LOCKYER, STATE OF IOWA, STATE OF NEW JERSEY, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WISCONSIN and CITY OF NEW YORK,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

UNIONS FOR JOBS AND THE ENVIRONMENT,

Defendant.

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

BRIEF FOR PLAINTIFFS-APPELLANTS

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MISCELLANEOUS

PRELIMINARY STATEMENT

Plaintiffs-Appellants States of California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, and City of New York ("Plaintiffs") appeal from the dismissal of this action and a related action brought by private land trusts (see Open Space Institute, Inc. et. al. v. American Electric Power, Inc. et. al., No. 05-5119-cv) ("Open Space") by the United States District Court for the Southern District of New York (Preska, J.). The district court held that Plaintiffs' action is barred by the political question doctrine.

Defendants are the nation's five largest polluters of carbon dioxide, a greenhouse gas. These emissions are trapping heat and have raised, and will raise further, the Earth's temperature, causing many climatic changes. Global warming is causing serious, and potentially devastating, consequences for Plaintiffs' essential resources. Just as Defendants' pollution contributes to these harms, so every incremental decrease in greenhouse gas emissions will reduce these injuries. Plaintiffs have taken steps to address carbon dioxide emissions within their borders, and here seek to abate Defendants' contributions.

Defendants are contributing to a public nuisance justiciable and actionable under federal common law.[1] Plaintiff States' demand for abatement of Defendants' emissions stands on

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[1] Plaintiffs concur in the arguments made in the private plaintiffs' brief in the Open Space appeal on this and all other points.

particularly firm ground. The States, in ratifying the Constitution, agreed to forgo pre-existing remedies for injuries caused by out-of-state actors, in exchange for a federal remedy. As the Supreme Court has repeatedly held, absent an adequate federal statutory remedy, a State has the right to a federal judicial remedy when other States or their citizens take actions contributing to serious injuries to quasi-sovereign interests. Thus, the federal courts have often adjudicated controversies between a State and another State or its citizens seeking to abate an interstate nuisance that contributes to injuries similar to those suffered by Plaintiffs here.

Plaintiffs' allegations state a claim under the principles established in these cases. Moreover, the political branches have not enacted a regulatory program for carbon dioxide pollution that preempts Plaintiffs' common law remedy. With respect to the district court's conclusion that the political question doctrine bars this action, the court erred: The Supreme Court and Second Circuit have only applied that doctrine in two narrow circumstances and have repeatedly declined to do so in tort-like cases such as this. Finally, Plaintiffs' current and certain future injuries establish standing.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs bring this action under federal common law. The district court had jurisdiction under 28 U.S.C. § 1331. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Does the political question doctrine bar Plaintiffs' nuisance action under interstate common law to limit Defendants' greenhouse gas emissions?

2. Do Plaintiffs have standing?

3. Does a nuisance action by Plaintiffs to limit Defendants' greenhouse gas emissions state a claim under federal common law?

4. Have the political branches preempted Plaintiffs' right to pursue a nuisance action to limit Defendants' greenhouse gas emissions?

STATEMENT OF THE CASE

A. Legal Background

The Supreme Court and lower federal courts have long heard, and issued rules of decision for, interstate controversies involving injuries caused by out-of-state sources to a State's quasi-sovereign interests in its natural and other essential resources. See, e.g., Illinois v. Milwaukee, 406 U.S. 91 (1971)

("Milwaukee I")(interstate nuisance case for water pollution); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) ("Tennessee Copper") (interstate nuisance case for air pollution). The federal courts' role in these public nuisance and other interstate common law cases has firm roots in the Constitution itself.

The Articles of Confederation had given Congress a "judicial" role in resolution of interstate disputes involving State sovereign interests. Rhode Island v. Massachusetts, 37 U.S. 657, 737 (1838). This mechanism proved fairly ineffective. See Peter S. Onuf, The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787 187 (1983). Thus, in ratifying the Constitution, "the States . . . transferred the decision of their controversies to [the Supreme] [C]ourt." Rhode Island, 37 U.S. at 743. This power to redress injuries to State quasi-sovereign interests was intended to act "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." North Dakota v. Minnesota, 263 U.S. 365, 372-73 (1923). Federal courts have exercised this jurisdiction for over 200 years in a wide variety of contexts. Missouri v. Illinois, 180 U.S. 208 (1901) ("Missouri I"); Missouri v. Illinois, 200 U.S. 496 (1906) ("Missouri II"); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); North Dakota, 263 U.S. 365.

Initially, the States invoked this right in territorial disputes.[2] But the Court recognized that "such cases manifestly do not cover the entire field [of] . . . controversies . . . for which the Constitution has provided a remedy." Missouri I, 180 U.S. at 241. Over time, the States faced increasing threats to their essential resources from other States and their citizens. See, e.g., Kansas v. Colorado, 206 U.S. 46, 80 (1907) (in water dispute, noting that "[c]ontroversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so"). Injuries to these interests, of course, could come not only from other States but from citizens of other States as well. See Milwaukee I (action against city); Tennessee Copper (action against private polluters).

The Supreme Court also has recognized the unique nature of the quasi-sovereign interest that States have in their natural resources. Such resources are a "treasure" that "offers a necessity of life" upon which a State's current and future populations depend. New Jersey v. New York, 283 U.S. 336, 342 (1931). Thus, "[i]n its capacity of quasi-sovereign," a "State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain," Tennessee

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[2] See, e.g., Rhode Island, 37 U.S. 657; see also New Jersey v. New York, 523 U.S. 767 (1998) (more recent territorial dispute).

Copper, 206 U.S. at 237, as well as the waters within its boundaries and those shared with others, Kansas v. Colorado, 185 U.S. 125, 144 (1902).[3]

The Supreme Court has been clear that, as with territorial disputes, threats to these interests — whether from other States or their citizens — must be "resolved by the . . . peaceful means of a suit" in the Supreme Court. Missouri II, 200 U.S. at 520-21; see also Tennessee Copper, 206 U.S. at 237; Missouri I, 180 U.S. at 241. Under this principle, the Supreme Court has adjudicated numerous disputes involving conflicting interstate uses of water supplies. See Arkansas v. Oklahoma, 503 U.S. 91, 98 (1992). And it has adjudicated controversies involving nuisance-type harms to quasi-sovereign interests. See New Jersey v. City of New York, 283 U.S. 473 (1931) (dumping of garbage into ocean); North Dakota, 263 U.S. 365 (irrigation projects allegedly contributing to flooding); New York v. New Jersey, 256 U.S. 296

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[3] See also Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (reaffirming States' quasi-sovereign interest in "protect[ing] the atmosphere, the water and the forests within its territory"). Indeed, under the public trust doctrine, the States have an obligation to protect the navigable waters and other essential resources within their borders. Illinois Central Railroad v. Illinois, 146 U.S. 387, 452-53 (1892) ("The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.").

(1921) (sewage discharge); Tennessee Copper, 206 U.S. at 237 (air pollution); Missouri II, 200 U.S. 496 (same); Missouri I, 180 U.S. 208 (sewage discharge); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852) (interference with navigation by a low bridge).[4] In deciding these disputes, the federal courts have looked to common law principles, but have emphasized that when States complain of harm to their quasi-sovereign interests, they are not subject to all the common law limitations applicable in disputes between private parties. See, e.g., Tennessee Copper, 206 U.S. at 237 (holding that a remedy must be provided "notwithstanding the hesitation that we might feel if the suit were between private parties").

While the expansion of federal statutory law governing environmental and similar matters has made federal common law nuisance cases less common, they remain an essential part of our jurisprudence and remain available to provide a federal remedy where a statutory one is lacking. See Arkansas, 503 U.S. at 98-99 (discussing the relationship in public nuisance cases between interstate common law remedy and statutory remedy).

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[4] In Milwaukee I, the Court affirmed that it had original jurisdiction to entertain such interstate nuisance disputes, but directed that they should be filed in the first instance in federal district court. Milwaukee I, 406 U.S. at 98, 108.

B. History Of The Case

1. Global Warming and The Threat To Plaintiffs' Quasi-Sovereign Interests

On July 21, 2004, Plaintiffs filed a complaint in the Southern District of New York ("complaint"). (Joint Appendix ("J.A.") 62-118). On the same date, a complaint was filed by the Open Space Institute, Inc. and two additional private land trusts against the same Defendants, alleging similar facts and asserting similar causes of action.

The complaint asserts a federal common law claim to abate a nuisance, alleging that Defendants, by virtue of their carbon dioxide emissions, are contributing to global warming. (J.A. 63 [Compl. ¶ 1]). Carbon dioxide is the primary "greenhouse gas," trapping heat in the atmosphere that otherwise would escape into space (J.A. 23 [Compl. ¶ 86). Defendants own and operate power plants that together emit approximately 650 million tons of carbon dioxide every year (J.A. 63 [Compl. ¶ 2]). 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 (J.A. 89 [Compl. ¶¶ 100,101]). Defendants are responsible for one quarter of the power sector's emissions, and one tenth of the entire country's emissions (J.A. 88 [Compl. ¶ 98]).

Carbon dioxide levels have increased approximately 34% since the Industrial Revolution, causing increased temperatures (J.A.

86 [Compl. ¶ 88]). As detailed in the complaint, this shift in climate is having, and will continue to have, substantial adverse impacts upon the people, environment, and property in the Plaintiff States. For example:

- Global warming is reducing, and will reduce, water supplies in the Plaintiff States. For example, global warming already has reduced California's mountain snowpack, which is the State's single largest drinking water source. (J.A. 96 [Compl. ¶ 119]).

- Increased temperatures increase smog (J.A. 92 [Compl. ¶ 111]). Increased heat also already has caused increased mortality and injury: Even now, before the substantial additional warming that is predicted, summertime heat waves kill more Americans than all other weather events combined (J.A. 92 [Compl. ¶¶ 109-110]). A one degree Fahrenheit warming, which is expected in the next few decades, could more than double heat-related deaths in New York City (J.A. 87, 92 & 118 [Compl. ¶¶ 92, 110 & Exh. 3]).

- Global warming is raising sea levels via thermal expansion of seawater and the melting of glaciers and ice sheets (J.A. 93 [Compl. ¶ 113]). Sea level rise, if unabated, will inundate low-lying property such as much of New York City's infrastructure, including airports, tunnels, sewers, and subway stations (J.A. 93-94 [Compl. ¶¶ 113-115]).

- Warming will harm many plant and animal species, and some species will become extinct (J.A. 100 [Compl. ¶ 132]). In Iowa and Wisconsin, warmer summer temperatures will reduce crop and livestock yields (J.A. 99 [Compl. ¶ 130]). More intense summertime storms will result in increased flooding, soil loss, and property damage (J.A. 99 [Compl. ¶ 131]).

To avert these and other injuries alleged in the complaint, Plaintiffs are acting now to reduce emissions within their

borders. For example, California, Connecticut, Iowa, New Jersey, New York, Rhode Island and Wisconsin have adopted renewable portfolio standards that require a significant portion of each States' electricity to come from carbon dioxide-free sources.[5] The New England States entered a compact with the eastern Canadian provinces on a regional Climate Change Action Plan;[6] and individual northeastern States have taken additional actions to reduce carbon dioxide emissions within their States.[7] California, New York, Connecticut, and Vermont are requiring reductions of greenhouse gas emissions from automobiles. See, e.g., Cal. (Health & Safety) Code § 43018.5. Reducing Defendants' carbon dioxide emissions will further reduce the speed and magnitude of warming, thereby reducing Plaintiffs' injuries (J.A. 104 [Compl. ¶¶ 147, 149]). Defendants have economically feasible options for generating electricity with lower emissions, including changing fuels, improving generation efficiency, increasing generation from zero- or low-carbon energy sources,

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[5] See, e.g., http://www.dps.state.ny.us/03e0188.htm (describing New York's renewable portfolio standard).

[6] See http://www.negc.org/documents/NEG-ECP%20CCAP.PDF at 7.

[7] See, e.g., N.J. Admin. Order 1998-09 (setting statewide emissions GHG reduction target of 3.5% below 1990 levels by 2005); 9 N.Y.C.R.R. § 5.111 (requiring state agencies to increase use of renewable energy in order to achieve 35% reduction of carbon dioxide emissions relative to 1990 levels); Vt. Stat. Ann. tit. 34, § 11-20 (state policy is to reduce greenhouse gas emissions in stages over the next decades).

capturing carbon emissions, employing demand-side management techniques, and altering the dispatch order of their plants (J.A. 64 [Compl. ¶ 5]). Indeed, reductions of emissions from the power sector are among the most cost-effective that can be made in the U.S. economy (J.A. 104 [Compl. ¶ 149]).

2. Procedural History

Defendants jointly moved to dismiss for lack of subject matter jurisdiction.[8] By Opinion and Order dated September 15, 2005 (J.A. 23-41), and Amended Opinion and Order dated September 16, 2005 (hereinafter "Op. __") (J.A. 43-61), the court dismissed the action under Rule 12(b)(1), holding that the action raised non-justiciable political questions, even though Defendants expressly disclaimed making a political question argument and the parties did not brief that issue extensively. Transcript of August 12, 2005, at 59. The court considered what it characterized as a history of "actions (and deliberate inactions) of Congress and the Executive" regarding carbon dioxide emissions. Op. at 17 (J.A. 59). It noted that Congress has expressed its opposition to a global warming treaty (the Kyoto

[8] All Defendants except American Electric Power Company, Inc. and American Electric Power Service Corporation also moved to dismiss for lack of personal jurisdiction. Tennessee Valley Authority moved to dismiss based on its status as an alleged instrumentality or agency of the United States performing a discretionary function.

Protocol) and that EPA has ruled that the Clean Air Act does not authorize carbon dioxide regulation. Op. at 8 (J.A. 50). The court expressed concern that, if courts adjudicate such controversies, "there would be no check on their resolutions," thus undermining "our system . . . of checks and balances." Op. at 1-2 (J.A. 43-44). Evaluating the six factors set forth in Baker v. Carr, 369 U.S. 186, 198 (1962), the court concluded that resolution of the issues in this case required an "initial policy determination" that can be made only by the exercise of "non-judicial discretion." Op. at 13-19 (J.A. 55-61).

Plaintiffs filed an appeal of the original Opinion and Order on September 20, 2005, and filed an amended Notice of Appeal after issuance of an Amended Opinion and Order on September 28, 2005. J.A. 20.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss de novo, accepting the plaintiff's allegations as true when considering the motion to dismiss. Tindall v. Poultney High Sch. Dist., 414 F.3d 281, 283 (2d Cir. 2005).

SUMMARY OF ARGUMENT

A long line of interstate nuisance cases recognizes that a State may demand that out-of-state actors contributing to injuries to the States' quasi-sovereign interests cease their harmful activities. See, e.g., Milwaukee I, 406 U.S. at 107; Tennessee Copper, 206 U.S. at 237. Here, Plaintiffs seek to limit Defendants' emissions in order to further abate the nuisance of global warming and thus avoid or at least mitigate a wide range of injuries, including potentially devastating ones, to the States' essential resources.

Plaintiffs' federal common law claim is justiciable. First, the political question doctrine establishes no bar. The doctrine is a narrow one that has been applied only to questions where a judicial determination will result in irreconcilable conflict with the other branches and which have been committed by the Constitution to decision by those other branches. Federal common law adjudication of domestic rights and obligations raises no such concern of irreconcilable conflict. Moreover, the Supreme Court has explicitly rejected the political question defense in interstate nuisance and related cases. Finally, application of the factors set forth in Baker, 369 U.S. at 217, makes clear that the district court erred in finding this a political question case.

Second, Plaintiffs have standing. They allege injuries to quasi-sovereign interests to which Defendants' pollution contributes. These injuries will be reduced by reductions in Defendants' greenhouse gas emissions. Thus, both as parens patriae and in their proprietary capacity, the States have standing.

Third, the complaint states a cognizable claim under federal common law that is not preempted. Defendants' conduct is contributing to serious injuries to Plaintiffs' quasi-sovereign interests. At the pleading stage that is all Plaintiffs have to allege. Nor have the political branches preempted or displaced such a claim: Those branches have done nothing more than authorize the study of climate change, and although various proposals have been considered in Congress, that branch has not enacted any regulatory standards for greenhouse gas emissions. Accordingly, Plaintiffs' right to redress in federal court for injuries to their quasi-sovereign interests has not been displaced.

ARGUMENT

POINT I

THE POLITICAL QUESTION DOCTRINE DOES NOT BAR ADJUDICATION OF PLAINTIFFS' COMMON LAW CLAIMS OF INTERSTATE INJURY

Plaintiffs assert a claim under interstate common law, seeking redress for the serious harms inflicted by Defendants' emissions on their essential resources. The district court's dismissal of this claim as a non-justiciable political question was incorrect for three reasons.

First, the political question doctrine does not bar all cases with political implications but only bars certain constitutional questions or questions of the rights, powers, and obligations of sovereigns (including the United States) in international affairs, where a court decision might foreclose action by the other branches. Second, the Supreme Court has explicitly rejected the political question defense in interstate nuisance actions. Finally, this case presents none of the factors set forth in the seminal case, Baker v. Carr factors necessary for the case to be found nonjusticiable.

A. The Political Question Doctrine Does Not Bar Federal Common Law Cases But Only Bars Certain Constitutional Determinations And Questions Of International Sovereign Right.

The claims presented here are not barred by the political question doctrine. That doctrine applies in only two narrow areas where a court decision cannot be readily overridden by the other branches and thus seriously intrudes upon the other branches. It is plainly not the case that a federal common law determination will constrain the powers of the other branches; Congress and the Executive can preempt federal common law principles.

The political question doctrine is "a function of the separation of powers," Baker, 396 U.S. at 210, designed to avoid "inappropriate interference" by the Judiciary in the business of the other branches, United States v. Munoz-Flores, 495 U.S. 385, 394 (1990). While "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which would preclude the establishment of a Nation capable of governing itself," separation of powers constraints operate to ensure that no action would "accrete to a single Branch powers more appropriately diffused among separate Branches or . . . undermine the authority and independence of one or another coordinate

Branch." Mistretta v. United States, 488 U.S. 361, 381-82 (1989) (internal quotation marks and citations omitted).

In a case such as this involving the obligations of domestic actors under federal common law, the political branches remain free to modify or displace any principles that the judiciary applies and to dictate that courts follow any standards they formulate. Consequently, there is no danger of the judiciary monopolizing powers that the Constitution "diffused among separate Branches," id., or granted exclusively to one of the other branches. With no such danger, there is no call for the protections of the political question doctrine, and neither the Supreme Court nor the Second Circuit have ever found the political question doctrine to bar adjudication of a case arising solely under common law.[9]

As to constitutional questions, the first type of claim that has been deemed a political question, these claims can implicate separation of powers concerns because a judicial determination

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[9] There are a few nominally "common law" cases in which courts have found a political question. But the claims in these cases in fact turned upon questions of constitutional or international sovereign right, and it was the constitutional or international sovereign right issues, not the common law ones, that were the focus of political question concerns. See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (trespass claim, depending on guarantee clause claim); Commercial Trust Co. v. Miller, 262 U.S. 51 (1923) (German citizen's property recovery claim, depending on whether Germany was still at war with the United States).

cannot be overridden by the political branches — at least not without constitutional amendment. See Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 409-410 (1932) (Brandeis, J., dissenting) (noting that political branches are not "free to correct . . . judicial error" with respect to constitutional rulings); see also Lincoln's First Inaugural Address, Mar. 4, 1861, in 6 Messages and Papers of the Presidents 5 (J. Richardson ed. 1900) (cautioning of danger when the policy of the government is "irrevocably fixed" by constitutional rulings). Because constitutional rulings will often be the last word on a subject, they raise the "danger" of "[o]ne branch of the government . . . encroach[ing] on the domain of another." Sinking Fund Cases, 99 U.S. 700, 718 (1879).

Of course, the courts' power to interpret the Constitution is well-established, and existence of a constitutional question alone is insufficient to establish the existence of a political question. E.g., Munoz-Flores, 495 U.S. at 391. But the courts implicitly have recognized the almost unique danger that this power poses to the other branches: All of the domestic controversies in which the Supreme Court or Second Circuit have found a political question have involved a constitutional issue.[10] Indeed, most of the domestic cases where the Supreme

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[10] See, e.g., Nixon v. United States, 506 U.S. 224 (1993) (claim that Senate failed to comply with constitutional

(continued...)

Court and Second Circuit even seriously have entertained political question arguments — though ultimately rejecting any political question bar — have involved constitutional questions. Compare, e.g., Vieth v. Jubelirer, 541 U.S. 267, 271-306 (2004) (plurality)(concluding that constitutionally based political gerrymandering claims raise non-justiciable political questions), with id. at 306-07 (Kennedy, J., concurring) (disagreeing with plurality's political question conclusion).

Adjudication of questions of international sovereign right can also raise separation of powers concerns and thus may raise a non-justiciable political question. See Foster v. Neilson, 27 U.S. 253, 309 (1829) (counseling caution in cases seeking an authoritative declaration regarding "the foreign intercourse of the nation" or challenging the United States' "assert[ion] and mainten[ance of] its interests against foreign powers"). International law lacks the clear rules and procedures for establishing primacy of legal determinations that one finds in domestic law. As the Supreme Court has held, it may be

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[10] (...continued)
requirements for impeachment); Goldwater v. Carter, 444 U.S. 996, 1002-1005 (1979) (Rehnquist, J., concurring) (constitutional claim that President Carter lacked power to unilaterally rescind treaty); Gilligan v. Morgan, 413 U.S. 1 (1973) (claim that due process clause constrained permissible actions of state national guard); Coleman v. Miller, 307 U.S. 433 (1939) (claim that state ratification of constitutional amendment failed to satisfy Article V requirements).

intolerable for multiple branches of the U.S. government to render conflicting determinations on questions of international sovereign right, thereby leaving other nation states to identify the official U.S. position on such questions:

> If [courts could adjudicate such issues] . . ., cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war.

Williams v. Suffolk Ins. Co., 38 U.S. 415, 420 (1839); see Ex Parte Republic of Peru, 318 U.S. 578, 588-89 (1943) (noting that court resolution of a question of international sovereign right would result in an "antagonistic jurisdiction") (quoting United States v. Lee, 106 U.S. 196, 209 (1882)).

Because of this potential for irreconcilable conflict, questions of international sovereign right "uniquely demand single-voiced statement of the Government's views." Baker, 369 U.S. at 211. Thus, while "[not] every case or controversy which touches foreign relations lies beyond judicial cognizance," id. at 209, the courts have held a number of questions of international sovereign right non-justiciable. For example, claims requiring courts to make an independent determination

regarding the recognition of foreign governments[11] or the legality of United States military conduct abroad[12] present non-justiciable political questions.[13]

This case, by contrast, presents no question of constitutional law or international sovereign right. As a common law case, its resolution will not in any way impede action by the other branches, and thus the political question bar is inapplicable.

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[11] E.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (Cuba); Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (Mexico); Matimak Trading Co. v. Khalily, 118 F.3d 76 (2d Cir. 1997) (Hong Kong).

[12] E.g., Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (challenges to military action abroad); Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34 (2d Cir. 1985) (challenge to military preparations abroad).

[13] In addition to these examples, the courts sometimes have declined to make independent determinations on the following questions of international sovereign right: the international legal status of relations between the United States and a foreign sovereign, e.g., Padilla v. United States, 352 F.3d 695, 712 (2d Cir. 2003) (whether state of armed conflict exists), rev'd on other grounds Rumsfeld v. Padilla, 542 U.S. 426 (2004); claims asserted by the United States in international relations, Jones v. United States, 137 U.S. 202 (1890) (adjudication of claims to territory); Foster, 27 U.S. 253 (same); the rights of foreign sovereigns, e.g. Ex Parte Republic of Peru, 318 U.S. 578; recognition of sovereign Indian nations, e.g., United States v. Holliday, 70 U.S. 407 (1866); and state succession to legal rights and obligations, e.g., Terlinden v. Ames, 184 U.S. 270, 288 (1902); 767 Third Ave. Assocs. v. Consulate General of Yugoslavia, 218 F.3d 152, 160 (2d Cir. 2000); Can v. United States, 14 F.3d 160, 163 (2d Cir. 1994).

Defendants below, in arguing that adjudication raised separation of powers concerns, relied on cases concerning questions of international sovereign right. Memorandum of Law in Support of Defendants' Motions to Dismiss The Complaints for Lack of Subject Matter Jurisdiction and for Failure to State A Claim ("Def. Mem.") at 15. But their argument ignores that "[not] every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker, 369 U.S. at 209. The courts have refused to conflate cases that touch on subjects of international concern with those seeking final determinations of an international sovereign right. Compare, e.g., Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) ("ordinary tort suit[s]" are justiciable despite intense and complex international implications), with Can, 14 F.3d at 163 (in dispute over South Vietnamese assets, executive has power to decide whether to recognize a private party's claim or a "competing claim" of the existing Vietnamese government).

In sum, the danger of irreconcilable conflict that underlies the political question doctrine is wholly lacking in a case involving the obligations of domestic actors under non-constitutional domestic law. The political branches remain free to modify or displace domestic, common law principles. There is no danger that common law principles that the judiciary applies in a case such as this will be viewed as binding in the

international arena. Invocation of the political question bar here would thus represent an unprecedented and unwarranted expansion of this narrow exception to the federal courts' duty to resolve controversies before them.

B. The Supreme Court Already Has Explicitly Rejected The Political Question Defense in Interstate Nuisance and Related Cases.

Justiciability of this case is confirmed by the Supreme Court's repeated holdings that State claims for redress for injuries to their quasi-sovereign interests — including interstate pollution claims — are justiciable. In these cases, the Supreme Court has disposed of separation of powers concerns and, in particular, arguments about the inappropriateness of such disputes for judicial resolution.

For example, in an early territorial dispute brought by Rhode Island, Massachusetts asserted that the case raised non-justiciable political questions:

> Can the allegiance of five thousand American citizens, natives of Massachusetts, and owing her the duties of citizens, . . . be changed by a decree of this Court . . . as if they were serfs on the soil of Russia . . .?[14]

The Court rejected the argument. It acknowledged that adjudication of all inter-sovereign disputes is "political" in

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[14] Rhode Island v. Massachusetts, 37 U.S. 657, 1838 U.S. LEXIS 372, *** 60 (1838).

the sense that the decision will be "decisive as to the exercise of political power." 37 U.S. at 736. But it held: "Under the old and new confederacy [controversies between States] could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before." Id. at 737.

Although the Supreme Court has decided that it will not always exercise its original jurisdiction over interstate nuisance cases, see Milwaukee I, 406 U.S. at 98, 108, it has unequivocally held that Rhode Island's finding of justiciability applies in such cases. Id. This was implicit when Justice Holmes explained in Tennessee Copper, an interstate nuisance case:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

206 U.S. at 237; see also Missouri II, 200 U.S. at 518-519 (same).

The point was then made explicitly in Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), where the Court affirmed the justiciability of interstate nuisance actions. Ohio sought to enjoin discharges of mercury into Lake Erie by out-of-state

sources. In rejecting jurisdictional bars to the action, it held that the case did not "seek to embroil this tribunal in 'political questions.'" Id. at 496. "[T]his Court has often adjudicated controversies between States and between a State and citizens of another State seeking to abate a nuisance that exists in one State yet produces noxious consequences in another." Id.

Indeed the Supreme Court has resolved numerous interstate nuisance cases that raise common law claims, without expressing any reservations about their justiciability. It has adjudicated Georgia's demand that industry in Tennessee desist from emitting sulfur dioxide harming Georgia's agriculture Tennessee Copper, 206 U.S. 230; Missouri's allegation that sewage discharges from Chicago had contributed to "a visible change of [the Mississippi River] from a pure stream into a polluted and poisonous ditch," Missouri II, 200 U.S. at 518; and New Jersey's claim that garbage from New York City was polluting New Jersey's beaches, New Jersey v. New York City, 283 U.S. 473.

Similarly, here Plaintiffs allege serious harm to their forests, waters, water supplies and public health contributed to by Defendants' pollution; the district court's conclusion that this case is not justiciable cannot be reconciled with the courts' longstanding role in adjudicating such controversies and explicit holdings that such controversies are justiciable.

C. Under The Factors Enumerated In Baker v. Carr, This Case Raises No Political Question.

In Baker, the Supreme Court identified the following factors to be considered in determining whether the political question doctrine bars adjudication of a claim:

> [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.

369 U.S. at 217. As in Baker, these factors are absent in this case, confirming that it is justiciable.

1. There is no textually demonstrable commitment of the issues in this case to the political branches.

Although the district court did not explicitly address this factor, the "dominant consideration in any political question inquiry is whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political

department." 767 Third Ave. Assocs., 218 F.3d at 160 (internal quotation marks and citation omitted). A State's entitlement to relief from domestic actors for injuries to quasi-sovereign interests clearly is not a question committed solely to the political branches. Indeed, as this Court held in Klinghoffer, with respect to "ordinary tort suit[s]," "the department to whom [the] issue has been 'constitutionally committed' is none other than . . . the Judiciary." 937 F.2d at 44, 49. Almost two centuries of Supreme Court adjudication of controversies involving injuries to State quasi-sovereign interests establishes that the same holds with respect to federal common law nuisance claims brought by States: They are committed, at least in the first instance, to the national judiciary.

This case stands in stark contrast to cases in which courts have found a "textually demonstrable" constitutional commitment to the other branches. In Nixon, the Supreme Court held that challenges to Senate impeachment procedures are non-justiciable, relying on the Constitution's instruction that the Senate has the "sole" power of impeachment. 506 U.S. at 229-30. Similarly, based on the Constitution's grant of "executive authority to appoint ambassadors to foreign nations and to receive ambassadors and public ministers from foreign nations," this Court held that recognition of foreign governments is a question committed to the executive. See Can, 14 F.3d at 163. Here, no similar textually

demonstrable constitutional commitment to the other branches exists.

2. This case will be decided under judicially manageable standards and does not require an initial policy determination for nonjudicial discretion.

The district court analyzed only the third Baker factor, whether an "initial policy determination" for "nonjudicial discretion" is necessary. The third factor, in conjunction with the second factor — whether "judicially manageable standards" exist — ensures that an issue is appropriate for resolution by judicial method, that is, by principled adjudication, as opposed to "nonjudicial discretion." See Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (the second and third Baker prongs ask whether "resolution of the question [would] demand that a court move beyond areas of judicial expertise").

The second Baker factor clearly poses no problem here. Courts regularly decide nuisance cases of all sorts and, as noted above, frequently have decided interstate nuisance cases involving injuries to State quasi-sovereign interests. Principled, common law adjudication of such cases lies squarely within the judiciary's core competence; methods of common law adjudication are familiar, and, for purposes of the Baker analysis, it does not matter that common law principles must be

applied to new factual contexts. See Klinghoffer, 937 F.2d at 49 (common law tort provided "clear and well-settled rules" for adjudication of tort claims against Palestine Liberation Organization, notwithstanding that claims arose in novel context of complex, international terrorist incident).

In pollution and other nuisance-type cases, courts examine the magnitude of the injury, issues of causation and contribution, and equitable factors. See, e.g., Georgia v. Tennessee Copper Co., 240 U.S. 650, 650-51 (1916) (setting emissions limits and imposing monitoring requirements); Georgia v. Tennessee Copper Co., 237 U.S. 678, 678 (1915) (discussing facts relevant to appropriate emissions limitations); Georgia v. Tennessee Copper Co., 237 U.S. 474, 474-78 (1915) (assessing adequacy of steps taken by defendants); Tennessee Copper, 206 U.S. 230 (adjudicating merits of interstate nuisance controversy). These are judicially manageable and appropriate inquiries.

The potential complexity of the facts or societal significance of the remedies is not a bar. For example, in Oneida Indian Nation of New York v. County of Oneida, this Court considered the seriousness of the injuries and potential remedies. Rejecting an argument that a Native American land claim poses a political question because a remedy would have "catastrophic ramifications," this Court noted that "'we know of

no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be addressed.'" 719 F.2d 525, 539 (2d Cir. 1983) (internal quotation marks and citation omitted), aff'd in relevant part, 470 U.S. 226 (1985). Similarly, in Norwalk CORE v. Norwalk Development Agency, 395 F.2d 920, 929 (2d Cir. 1968), this Court rejected an argument that a lawsuit alleging racial discrimination in urban renewal planning raised a nonjusticiable political question. With regard to the complexity of issues that would be addressed in fashioning a remedy, the court found that "[w]ith this case only at the pleadings stage, we do not think that we should speculate on what specific remedies might be appropriate if the plaintiffs' allegations are proved." Id.

Of course, in crafting a remedy for this case, the district court may be called upon to evaluate the availability and cost of means to reduce emissions. Consideration of such facts at the remedy stage, though, is "judicially manageable." See Reserve Mining Co. v. EPA, 514 F.2d 492, 536-42 (8th Cir. 1975) (affirming injunctive relief in air pollution case requiring $243 million investment in pollution control at facility supplying 12% of nation's taconite ore). Moreover, although not precisely analogous, courts regularly examine the severity of injury and balance equities in pollution cases based on statutory violations. See e.g., Weinberger v. Romero-Barcelo, 456 U.S.

305, 314 n.7 (1982)(relief in a Clean Water Act citizens' suit "is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies").

Nor is any "initial policy determination of a kind clearly for nonjudicial discretion," Baker, 369 U.S. at 217, required here. The Supreme Court repeatedly has concluded that it is appropriate — indeed, it is the duty of the courts — to decide interstate controversies involving harms to States' essential resources. To the extent the decision to subject such disputes to judicial adjudication involved a prior "policy" choice, that choice was made by the States when they ratified the Constitution and so "transferred the decision of their controversies to [the Supreme Court]." Rhode Island, 37 U.S. at 743.

The district court, in holding that the political question bar applies here, suggested a number of reasons why this case can only be resolved by policymakers, applying "non-judicial discretion." First, the court thought that any attempt to address injuries from global warming must be part of a comprehensive solution. Second, citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 847 (1984), for the proposition that a "typical air pollution case[]" requires a balancing of all relevant economic and environmental

interests,[15] the court believed that such a balancing necessarily would require a prior policy determination by the political branches. Op. at 14-16 (J.A. 56-58). The court also cited concerns that "[u]nilateral [capping of greenhouse gas emissions] could . . . weaken U.S. efforts to persuade key developing countries to reduce [their emissions]," or that domestic restrictions might compromise national security. Op. at 17 (J.A. 59).

These concerns reflect a misunderstanding of Plaintiffs' case, and in no way warrant application of the political question bar. The States are not seeking — and they are not obligated to await — a comprehensive solution to global warming. Plaintiffs claim that particular domestic actors who are beyond their legislative control — the five largest domestic emitters of carbon dioxide in the United States — are contributing to concrete injuries to their quasi-sovereign interests. They are entitled to have a court determine, according to common law principles, whether these out-of-state domestic actors are liable for contributing to injuries to the States' quasi-sovereign interests. This does not require any prior non-judicial,

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[15] This reference to Chevron is incorrect. The cited reference says nothing about courts engaging in a balancing of societal interests, but noted that Congress balanced two competing interests in crafting the specific Clean Air Act provision at issue in that case. 467 U.S. at 847.

discretionary policy determination such as developing plans for the national economy, any more, for example, than adjudication of Indian land claims requires a comprehensive solution balancing all economic interests. See Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1083 (2d Cir. 1982) (although a legislative solution to the native American land claims may be preferable, the "claims are justiciable notwithstanding the complexity of the issues involved").[16]

Nor does the district court's emphasis on the international implications of global warming support its conclusion that this case requires an exercise of non-judicial discretion. The court failed to recognize a critical distinction between questions of international sovereign right and questions of international concern. See supra at 19-22. Only the latter is present here. This action seeks adjudication of purely domestic obligations of domestic actors to address their contribution to injuries to the States' essential resources. Speculation about the effect that adjudication of a case against domestic firms, under U.S. law, might have on international negotiations over international legal obligations, or speculation about the potential effects on

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[16] When the Supreme Court addressed the sewage at issue in Milwaukee I, Congress was considering a "comprehensive" solution to water pollution addressing sewage, industrial wastes, and many other forms of water pollution. The Court, though, allowed Illinois's case against specific polluters to proceed.

national security, is misplaced. Domestic actors are subject to domestically binding obligations, both judicial and statutory, on all manner of subjects that also are the topic of international negotiations. See Anne-Marie Slaughter, A New World Order 16 (2004) (noting pervasiveness of issues on which officials are "judging, regulating, and legislating domestically" while simultaneously officials seek to "address the governance problems that arise" when those issues "spill beyond . . . borders").

It is only in cases involving questions of international sovereign right — which are not present here — where courts have given the executive branch the relative freedom to act that Defendants and the court below would provide. See Padilla, 352 F.3d at 713 (while the Executive is given "the widest latitude of interpretation" of its own powers "when turned against the outside world," when the President's powers are "turned inward," the Executive enjoys "no such indulgence")(internal citation and quotation marks omitted); cf. Miami Nation of Indians, Inc. v. Dep't of Interior, 255 F.3d 342, 347 (7th Cir. 2001) (on questions of international, intersovereign relations, the executive sometimes is permitted to act based on considerations of "speed, secrecy, freedom from the constraint of rules — and the unjudicial mindset that goes by the name Realpolitik"). But executive actions in international affairs are not being

challenged here, and Plaintiffs do not seek a declaration of internationally binding obligations.

In sum, resolution of this case requires only those types of liability and remedial decisions with which courts are familiar, and neither requires nor interferes with prior non-judicial determinations by the political branches.

3. Adjudication of this action will not demonstrate "lack of respect" for the political branches, contravene any relevant "political decision already made," or "embarrass" the nation.

Adjudication of this case does not implicate the fourth through sixth Baker factors.

As to the fourth factor, adjudication of this matter expresses no "lack of respect" for the political branches. In cases involving alleged injuries to States' quasi-sovereign interests, the Supreme Court has often adjudicated questions of domestic, interstate responsibilities. Since the Articles of Confederation, the political branches have not had an exclusive responsibility for such questions, and the judiciary's resolution of disputes that it has long resolved shows no disrespect for the political branches.

As to the fifth factor, as in Klinghoffer, "no prior political decisions are questioned — or even implicated — by the

matter." 937 F.2d at 50. For the same reasons that federal common law is not displaced here by federal law, see infra at Point III.C, there is no conflict between this adjudication and prior decisions taken by the political branches. By contrast, Whiteman et al. v. Dorotheum GMBH & Co. KG, 2005 U.S. App. LEXIS 25253 (2d Cir. Nov. 23, 2005), involved a true conflict between adjudication and a political decision. In that case, the executive branch and the Austrian government entered into an executive agreement establishing a fund to compensate Austrian Jewish victims of the Nazi regime for holocaust-related property losses. Id. at *3. The class action was "the one remaining litigation obstacle to the implementation" of the executive agreement. Id. at *46. This Court concluded that allowing the class action against the Austrian Government, Austrian instrumentalities, and other Austrian entities to proceed would be patently inconsistent with the intent of the executive agreement, which was to implement a final resolution of such claims in the lifetimes of holocaust survivors. Id. at *45-46. It thus held the claims non-justiciable. Id. In this case, recognition of the Defendants' domestic law obligations will create no similar conflict with international negotiations on global warming.

Finally, there is no danger of "embarrassment" from competing pronouncements. The political branches can readily

incorporate, modify, or displace any principles applied in this and other common law cases. Moreover, the official U.S. position, as expressed by its signing and ratification of the United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, is to reduce carbon dioxide emissions. Resolution of the States' claim can cause no embarrassment.

As stated by this Court, 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 v. Karadzic, 70 F.3d 232, 249-50 (2d Cir. 1995). Adjudication here will neither contradict prior decisions of the political branches nor "seriously interfere" with any important governmental interest.

In sum, the district court's determination that this common law action presents a political question represented an expansion of the doctrine wholly unwarranted by the separation-of-powers principles underlying the doctrine, Supreme Court or Second Circuit principles, or the Baker factors. It should be reversed.

POINT II

PLAINTIFFS HAVE STANDING

While the district court did not resolve this question,[17] the comprehensive allegations in the complaint establish the standing of the States to bring this litigation. The complaint alleges injuries to the States' quasi-sovereign interests – the sine qua non of parens patriae standing – as well as injuries to the States' proprietary interests. In addition, the complaint alleges that Defendants' emissions contribute to the States' injuries, and that reducing Defendants' emissions will reduce the magnitude of those injuries. Nothing more is required. As the Supreme Court cautioned in Laidlaw, it would be inappropriate to "raise the standing hurdle higher than the necessary showing for success on the merits." 528 U.S. at 181. Plaintiffs have successfully stated a claim under federal common law, see infra Point III, and dismissal on standing grounds would thus be particularly unwarranted.

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[17] The court below did not dispose of Defendants' standing arguments, but stated that the standing inquiry is intertwined with the merits of the case. Op. at 12 n.6 (J.A. 54). Because the district court's dismissal on political question grounds is erroneous, however, this Court has an obligation to address the question of standing. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180 (2000).

A. Plaintiff States Have Parens Patriae Standing.

Parens patriae standing allows the States to "represent the interests of their citizens in enjoining [a] public nuisance[]." Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 603 (1982). Under this long-standing doctrine, a "sufficiently concrete" quasi-sovereign interest in the "well-being [of its residents] . . . create[s] an actual controversy between the State and the defendant." Id. at 602; accord Connecticut ex rel. Blumenthal v. Cahill, 217 F.3d 93, 97 (2d Cir. 2000). Principles of parens patriae standing are distinct from those applicable to private parties because "a State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention." Snapp, 458 U.S. at 612 (Brennan, J., concurring).[18]

To ensure that a State's quasi-sovereign interest in protecting the well-being of its populace is not "too vague to survive the standing requirements of Art. III," the Supreme Court

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[18] In addition to the quasi-sovereign interests that form the basis for the States' parens patriae standing, the States and City of New York have proprietary interests at stake, such as harm to public property, including the City's infrastructure or state beaches (J.A. 93-94, 95, 98 [Compl. ¶¶ 114, 117, 125]), and the costs that the States and City will incur in responding to global warming (J.A. 91-92, 93-94, 102 [Compl. ¶¶ 107, 114, 142]). See Snapp, 458 U.S. at 601-02.

has held that to establish parens patriae standing, a State's complaint must (1) "articulate an interest apart from the interests of particular private parties"; (2) "express a quasi-sovereign interest" (e.g., the "health and well-being – both physical and economic – of its residents in general"); and (3) "allege[] injury to a sufficiently substantial segment of its population," including any "indirect effects of the injury." Snapp, 458 U.S. at 602, 607. Each of these requirements is satisfied here.

First, the States' interest in protecting their residents and essential resources from the harmful impacts of carbon dioxide emissions stands apart from any interest held by private entities. Safeguarding the public health, welfare, and resources of its citizens is a core State obligation.

Second, the States seek to vindicate a quasi-sovereign interest in the health and well-being of their residents, who are threatened by heat waves, inundation of coastal property, forest and agricultural losses, and other harms attendant to global warming. As the Supreme Court has recognized, environmental public nuisance cases are the consummate example of a State's pursuit of a quasi-sovereign interest. Snapp, 458 U.S. at 603-05 (citing New York v. New Jersey, 256 U.S. 296 (1921) (water pollution); Tennessee Copper, 206 U.S. at 237 (air pollution); Missouri I, 180 U.S. at 241 (water pollution)). For the same

reasons that the States could avail themselves of parens patriae standing in these cases, they may do so in this litigation as well.

Third, the complaint alleges injury to a "sufficiently substantial segment" of the States' populations. With regard to this factor, the Supreme Court has given the States a wide berth in determining whether litigation may vindicate their quasi-sovereign interests. The significant harms alleged by the States, such as reduction in water supplies, reduced air quality and deaths in heat waves, and sea level rise causing loss of shorelines and damage to urban infrastructure, is clearly sufficient. See Snapp, 458 U.S. at 599 (standing present based on creation of 787 jobs); New York v. 11 Cornwell Co., 695 F.2d 34, 39-40 (2d Cir. 1982) (creation of residence for 8-10 mentally retarded persons is adequate, based in part on the more attenuated benefits that would flow to "similar people in years to come").

B. The Complaint Adequately Alleges That Defendants' Emissions Contribute to Cognizable Injuries.

The allegations of the complaint satisfy the three-part test set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotations and citations omitted):

> First, the plaintiff must have suffered an injury in fact . . .; [s]econd, there must be

> a causal connection between the injury and the conduct complained of . . .; [and] [t]hird, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

1. The alleged injuries are sufficiently imminent to confer standing.

The injuries alleged in the complaint are more than imminent enough to confer standing; as the complaint notes, some of the harms identified in the complaint already have occurred and others are inevitable. The complaint alleges that the temperature already has risen in the Plaintiff States due to global warming, causing increased summertime smog and deadly heat waves (J.A. 85, 90-91, 92 [Compl. ¶¶ 82, 104-105, 109, 111]); and that increasing temperatures are raising sea levels (J.A. 93 [Compl. ¶ 113]), and have reduced the Sierra Nevada snowpack (J.A. 96 [Compl. ¶ 119]). Additionally, the complaint alleges dramatic future injuries that will result if temperatures continue to increase (J.A. 92, 93-94, 99 [Compl. ¶¶ 109-110, 111, 113-15, 130-31]).

Although some of the States' alleged injuries may not be realized for years because of the pace of warming, they are by no means the type of "'conjectural' or 'hypothetical'" harms that the Supreme Court has found to be inadequate. Cf. Lujan, 504 U.S. at 560-61. Rather, they are certain to occur because of the

consequences, based on the laws of physics and chemistry, of the documented increased carbon dioxide in the atmosphere. And even setting aside those harms that are now occurring, and those that are inevitable, the increased risks of harm posed by Defendants' carbon dioxide emissions alone would suffice for standing. See Baur v. Veneman, 352 F.3d 625, 637-43 (2d Cir. 2003) (injury-in-fact satisfied by "credible threat of future injury" due to the increased risk of mad cow disease allegedly resulting from Agriculture Department's policies).

2. Defendants' alleged contributions to carbon-dioxide emissions are sufficient to establish standing.

Defendants complained below that the States lacked standing because they had chosen to pursue only the most significant U.S. contributors to carbon-dioxide emissions. The Supreme Court's recent decision in Laidlaw explains why this choice does not vitiate the States' standing.

Because the common law of nuisance imposes liability on contributors to an indivisible harm, to establish standing, plaintiffs must allege only that each defendant contributes to the pollution that causes plaintiffs' injuries. In Laidlaw, for example, plaintiffs were not required to demonstrate that specific discharges of mercury traced to defendants were causing discrete environmental harm, but only that the pollution of the

river to which they contributed, taken as a whole, was injuring plaintiffs. Id. at 182-83; see also Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992) (standing established if defendant "contributes to the pollution"); PIRG v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 n.8 (3d Cir. 1990) (plaintiff "need not sue every discharger [of pollutants] 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) (traceability requirement does not require plaintiff in an environmental case to connect the harm to the "particular molecules" emitted by defendants); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 558 (5th Cir. 1996) (defendant's contribution to pollution suffices for traceability). Here, the complaint alleges that Defendants contribute to the pollution (J.A. 87-91, 106 [Compl. ¶¶ 91, 97, 101, 102, 106, 155, 163]).

3. Reduction of Defendants' carbon-dioxide emissions will reduce Plaintiffs States' injuries.

Likewise, the complaint sufficiently alleges that "the harmful consequences of global warming can be avoided or mitigated by reducing such [carbon dioxide] emissions" (J.A. 88, 104 [Compl. ¶¶ 97, 147]). Reducing these Defendants' emissions "will contribute to a reduction in the risk and threat of injury

to the plaintiffs and their citizens and residents from global warming" (J.A. 104 [Compl. ¶ 148]). These allegations are sufficient to demonstrate that reduction of Defendants' emissions will adequately redress the harms sustained by the States. The Third Circuit reached just this conclusion in Powell Duffryn, explaining that reduction of one polluters' discharge to a polluted waterway satisfies the redressability requirement:

> Where a plaintiff complains of harm to water quality because a defendant exceeded its permit limits, an injunction will redress that injury at least in part. If [defendant] complies with its permit, the pollution in the Kill Van Kull will decrease. Plaintiffs need not show that the waterway will be returned to pristine conditions in order to satisfy the minimal requirements of Article III.

Id. at 73. See also Watkins, 954 F.2d at 980 ("plaintiffs need not show that a particular defendant is the only cause of their injury").

In short, the concrete harms to quasi-sovereign and proprietary interests alleged in the complaint provide Plaintiffs with standing. Indeed, global warming injuries have already been found sufficient for standing. See Massachusetts v. EPA, 415 F.3d 50, 55 (D.C. Cir. 2005) (Randolph, J.) (standing allegations would be sufficient to withstand a summary judgment motion); id. at 65-66 (Tatel, J.) (finding that Massachusetts had established standing); City of Los Angeles v. Nat' Highway Traffic Safety

Admin., 912 F.2d 478 (D.C. Cir. 1990).[19] Plaintiffs should thus have the opportunity to seek abatement in federal court of the grave harms contributed to by Defendants' carbon dioxide emissions.

POINT III

THE COMPLAINT STATES A CLAIM UNDER FEDERAL COMMON LAW THAT IS NOT PREEMPTED

It cannot be seriously disputed that "the control of interstate pollution is primarily a matter of federal law." International Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987); see also Milwaukee I, 406 U.S. at 103 ("When we deal with air and water [pollution] in their ambient or interstate aspects, there is a federal common law."). When "problems requiring federal answers are not addressed by federal statutory law," federal common law applies. Milwaukee II, 451 U.S. at 319 n. 14; see also Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 674 (1974) ("absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law"). EPA has determined that greenhouse gas

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[19] The dissent in City of Los Angeles also would have required a showing of "incremental harm" from the agencies' action and a "marginal effect on the probability, the severity, or the imminence of global warming." Id. at 484 (Ginsburg, J., dissenting). As alleged in the complaint, a reduction in Defendants' contributions alone will reduce Plaintiffs' injuries from global warming (J.A. 104 [Compl. ¶ 147]).

emissions are not regulated by the Clean Air Act. This case therefore squarely raises questions for federal common law.

The court below did not address whether the complaint stated a claim or, if so, whether it was preempted by federal statutory programs. Defendants, however, moved to dismiss on both grounds. As demonstrated below, the complaint relies upon a long-established common law theory that has a vibrant and continuing force. It plainly also states a claim, alleging injuries of a serious magnitude to the states' quasi-sovereign interests contributed to by Defendants' emissions. Plaintiffs' action is not preempted, because neither Congress nor Executive action has provided the States with a remedy for the injuries alleged.

A. Plaintiffs States' Complaint Invokes A Well-Established Enclave Of Federal Common Law.

Defendants argued below that federal common law nuisance principles were confined to the annals of history or, at least, to the specific pollutants involved in Milwaukee I or Tennessee Copper. See Def. Mem. at 18 (arguing that "there are compelling reasons to doubt" that "Milwaukee I is still good law"); see generally id. at 18-21. The premise of their argument was that after Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), all the earlier federal common law nuisance cases lost their relevance and that Milwaukee I, a more recent case, was an outlier. This

argument misconstrues Erie and ignores the Supreme Court's repeated post-Erie affirmation of the vitality of interstate common law. See Arkansas, 503 U.S. at 98-99.

Although Erie did away with "general" federal common law, "post-Erie understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way." Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004). Of these limited enclaves, few are better established than the federal nuisance common law by which States seek redress for interstate harms to quasi-sovereign interests. See Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 641 (1981) ("[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign relations, and admiralty cases." [emphasis added]).

The retention of the federal interstate nuisance cause of action is intricately linked to our constitutional structure. Indeed, the States' right to seek redress in federal court for injuries from out-of-state sources to their quasi-sovereign interests was a precondition for ratification of the Constitution. See supra at 3-7. As Justice Holmes explained, the States gave up many of the remedies they would have had as independent sovereigns, but "they did not thereby agree to submit

to whatever might be done." Tennessee Copper, 206 U.S. at 237. Furthermore, federal common law must be applied for the pragmatic choice-of-law reason that no individual State's laws are appropriate in such a dispute. See West Virginia ex rel Dyer, 341 U.S. 22, 28 (1951) (holding in interstate pollution dispute, neither the law of a complaining state nor the law of a source state is appropriate, because "[a] State cannot be its own ultimate judge in [an interstate] controversy").[20]

Firmly rooted in these fundamental precepts of federal common law, the Supreme Court's pre-Erie interstate nuisance cases have been cited repeatedly in recent decisions as exemplars of federal court common law adjudication. See, e.g., Nebraska v. Wyoming, 515 U.S. 1, 15, 20 (1995) (citing Missouri II for proposition that relief in interstate controversies may turn on equitable doctrines and Tennessee Copper for proposition that States may obtain relief for quasi-sovereign interests that differ from their citizens); Ouellette, 497 U.S. at 487-88 & n.7 (recognizing that Tennessee Copper and Missouri II support application of federal common law to claims of "use and misuse of interstate water"); Texas v. New Mexico, 462 U.S. 554, 571 n.18 (1983) (citing Missouri II as defining "model case" for Supreme

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[20] This general rule is not contradicted by Ouellette, 479 U.S. at 492-97, in which the Court concluded that, with respect to certain water pollution, the Clean Water Act preempted federal common law and the state law of an affected state, but preserved actions under the law of a source state.

Court exercise of original jurisdiction); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 963 (1982) (Rehnquist, J., dissenting) (Tennessee Copper established "the traditional authority of a State over resources within its boundaries which are essential not only to the well-being but often the very lives of its citizens"); Snapp, 458 U.S. 592 (identifying the natural resource injuries at issue in Missouri II and Tennessee Copper as paradigmatic injuries for which a State has standing to seek redress); West Virginia ex rel. Dyer, 341 U.S. at 26-27 (citing Missouri I for proposition that States may seek a remedy for interstate pollution in litigation in the federal courts and Missouri II for the proposition that the court chooses principles to suit the purpose).

Federal nuisance common law cases, from Missouri I to Milwaukee I, remain good law. Plaintiffs invoke a viable cause of action under those cases.

B. Plaintiffs' Complaint States A Claim Under Federal Common Law.

The States' complaint, which alleges that Defendants are contributing to potentially catastrophic injuries to Plaintiffs' quasi-sovereign interests in their natural and human resources, states a claim for relief under interstate common law.

1. An interstate nuisance claim states a claim against those contributing to serious injuries to quasi-sovereign interests.

The Supreme Court has articulated principles for adjudication of interstate controversies involving quasi-sovereign interests. Those principles draw upon the common law governing private disputes but firmly acknowledge the sovereign status of parties and sovereign nature of the injuries. See Tennessee Copper, 206 U.S. at 237-38.

With respect to nuisances, the Supreme Court has concluded that, where out-of-state actors lie beyond the reach of a State's police powers, those actors will be strictly liable for contributing to "serious" injuries to "quasi-sovereign interests" in the State. As the Seventh Circuit concluded in reviewing Supreme Court nuisance cases involving injuries to quasi-sovereign interests, "[t]he elements of a claim . . . 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." Illinois v. City of Milwaukee, 599 F.2d 151, 165 (7th Cir. 1979), rev'd on other grounds, 451 U.S. 304 (1981).

The deference due to the sovereign States requires respect for their decision to ask the federal courts for assistance in addresssing injuries to quasi-sovereign interests. Cf. Missouri II, 200 U.S. at 520 (limitations generally applicable in public

nuisance actions involving private parties "have no application to an independent state").[21] For example, finding federal common law nuisance claims adequately pleaded, the Court in Tennessee Copper enjoined sulfur dioxide emissions of the defendant out-of-state actors, holding:

> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale . . ., that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

206 U.S. at 238. Thus, without inquiry into fault, Georgia "may insist that an infraction of [quasi-sovereign rights] shall be stopped." 206 U.S. at 237. Similarly, in Milwaukee I, 406 U.S. at 107, the Court held that "a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor."

While it may be that not all claims of injury to a State's interests state a claim under this interstate common law, there is no question that a complaint states a claim where it alleges

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[21] Municipalities and, under appropriate circumstances, citizens, also have the right to proceed in federal common law to abate interstate pollution. City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1018 (7th Cir. 1979)

injuries to quasi-sovereign interests of "serious magnitude." See Missouri II, 200 U.S. at 518, 521.[22] As the model case of injuries of "serious magnitude," the Court specified injuries that, if the States had retained their full sovereignty and independence, would have been of "international importance." Missouri II, 200 U.S. at 518, 521; see also Tennessee Copper, 206 U.S. at 237 (connecting State's right to judicial relief to State's loss of power to engage in "forcible abatement of outside nuisances").

However the required threshold level of injury is characterized, the injuries alleged here suffice to state a claim. The specific harms alleged in the complaint fit comfortably within the range of federal common law nuisance cases that the Supreme Court has allowed to proceed:

- contaminated water supplies, compare Complaint ¶¶ 118, 119, 122-127 (J.A. 95-96, 97-99), with Milwaukee I, supra;
- inundation of land, compare Complaint ¶¶ 113-115 (J.A. 93-94), with North Dakota v. Minnesota, 263 U.S. 365;

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[22] The threshold requirement of "serious magnitude" originated in cases where States invoked the Supreme Court's original jurisdiction. See Texas v. New Mexico, 462 U.S. at 571 n.18. Because the injuries alleged in the complaint are of "serious magnitude," this Court need not address whether, or under what circumstances, injuries that fall below this threshold might still be subject to strict liability standards in interstate nuisance actions brought in the first instance in the district courts.

- harm to vegetation and agriculture from air pollution, compare Complaint ¶¶ 130, 133, 134, 137 (J.A. 99-101), with Tennessee Copper, 206 U.S. at 236 ("a wholesale destruction of forests, orchards, and crops");

- interference with navigation and commerce, compare Complaint ¶ 123 (J.A. 97-98), with Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518; and

- injury to public health, safety, and comfort, compare Complaint ¶¶ 110, 111, 114, 120 (J.A. 92-94, 96), with Missouri I, 180 U.S. 208; Milwaukee I, supra.

Plaintiffs' complaint therefore states a claim under federal common law.

2. Equitable considerations can not serve as the basis for dismissal of the States' federal common law claim at this initial stage of the litigation.

The Supreme Court has made clear that, although equitable considerations play a role at the remedial stage of an interstate common law action, they have no role at the pleading stage. In Nebraska v. Wyoming, the Supreme Court held that Nebraska could proceed with a claim that Wyoming's pumping of groundwater threatened the flow of the North Platte River into Nebraska. The Court acknowledged that (as Wyoming argued in opposition to Nebraska's claim), Missouri II and Kansas v. Colorado "recognize[d] that relief on the merits may turn on the equities" in an interstate controversy. 515 U.S. at 15. But it concluded that Wyoming's attempt to raise the equities of water allocation

in a motion on the pleadings "is, at best, premature." Id. In both the Missouri case and Kansas v. Colorado, such considerations were "decided after trial." Id. In any event, here Plaintiffs have alleged the many steps they are taking to reduce carbon dioxide emissions within these States. See supra at 10.

3. Plaintiffs have stated an interstate nuisance common law claim regardless of the existence of other polluters.

Natural resources injuries due to pollution — the "paradigmatic" federal common law case — rarely occur because of just one polluter. For example, sources besides Tennessee Copper polluted Georgia's air. Tennessee Copper, 206 U.S. at 238 (Georgia could demand that the defendant copper companies restrict emissions that were contributing to the destruction of Georgia's forests, "whatever domestic destruction they have suffered"). But just as state common law of nuisance holds liable all those who contributed to a joint nuisance, see Restatement (Second) of Torts § 840 E, so does federal common law.

The district court in Illinois ex rel. Scott v. City of Milwaukee addressed this precise issue under federal common law,

where defendants' discharges of nutrients like nitrogen and phosphorous were contributing to eutrophication of the lake:

> Defendants argue that they cannot be held liable for their nutrient discharges into the lake in the absence of a showing that the elimination or reduction of those discharges would, of itself, "measurably" improve the condition of the lake. . . . In this connection, they point out that, whatever controls are imposed upon point sources, there will still be large inputs of nutrients from non-point sources which are not subject to control.
>
> If defendants' argument were to be adopted, it would be impossible to impose liability on any polluter. . . . The correct rule would seem to be that any discharger who contributes an aliquot of a total combined discharge which causes a nuisance may be enjoined from continuing his discharge. Either that is true or it is impossible to enjoin point dischargers.

1973 U.S. Dist. LEXIS 15607, at *20-*22 (N.D. Ill. 1973), aff'd in part and rev'd in part, 599 F.2d 151 (7th Cir. 1979), vacated on other grounds, Milwaukee II, 451 U.S. 304 (1981).

Similarly, in New Jersey v. City of New York, New Jersey sought to enjoin New York City from dumping garbage in the Atlantic Ocean, alleging that the garbage was washing ashore on its beaches. New York City explicitly asserted as a defense that "for many years garbage in large quantities has been and is being dumped by others" near New Jersey beaches and that "this material would float upon the New Jersey beaches alleged to have been polluted," so "if any injury or damage is suffered by New Jersey,

. . . the injury is not chargeable to defendant." 283 U.S. at 477. Notwithstanding the many potential sources for garbage washing ashore on New Jersey beaches, the Court issued the requested injunction. Id. at 483.

For the same reasons, Plaintiffs' decision to seek redress solely against the top five domestic carbon dioxide emitters cannot serve as the basis for dismissal of their federal common law claim.

C. Congress Has Not Preempted Interstate Common Law Nuisance Principles As Applied To Injuries From Greenhouse Gas Emissions.

Finally, application of the federal common law of public nuisance for interstate pollution has not been displaced (or preempted) by any federal statutory or regulatory limits on carbon dioxide emissions from power plants.[23] Preemption in this context results only when Congress speaks directly to an issue otherwise addressed by federal common law. EPA has determined that the Clean Air Act does not authorize any regulation of carbon dioxide, Control of Emissions from New Highway Vehicles & Engines, 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003), and, without

[23] This brief uses the terms "displace" and "preempt" interchangeably, as do the relevant cases. As used here, the term "preemption" should not be confused with preemption of state law. The tests for preemption of federal common law and preemption of state law are distinct. See Milwaukee II, 451 U.S. at 316-17.

reaching that issue, the D.C. Circuit rejected a challenge to that decision. Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), reh'g denied, 2005 U.S. App. LEXIS 26560 (D.C. Cir. Dec. 2., 2005).[24] In the absence of any such regulation, or any other remedy for the injuries alleged here, there can be no preemption of the States' federal common law remedy.

The Supreme Court has long held that a federal statute preempts federal common law only where:

> the statute "[speaks] directly to [the] question" otherwise answered by federal common law. Milwaukee II, supra, [451 U.S.] 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." 451 U.S., at 313-14 (emphasis added).

County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 236-37 (1985). Contrary to the district court's understanding, see Op. at 18, "Congress's mere refusal to legislate [in an area] . . . falls far short of an expression of legislative intent to supplant existing common law in that area." United States v. Texas, 507 U.S. 529, 535 (1993) (internal

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[24] In New England Legal Foundation v. Costle, 666 F.2d 30, 32 n.2 (2d Cir. 1981), this Court left open the question of whether the Clean Air Act is sufficiently comprehensive that it preempts application of the federal common law to air pollution. Regardless of whether the Clean Air Act displaces the application of federal common law to pollutants and sources within its scope, that preemption cannot encompass remedies regarding carbon dioxide emissions, as long carbon dioxide emissions fall outside the scope of the Clean Air Act.

quotation marks omitted); see also Atkinson v. Inter-American Dev. Bank, 156 F.3d 1335, 1342 (D.C. Cir. 1998) ("Congress does not express its intent by a failure to legislate").

The Supreme Court's decision in Oneida makes clear that a federal statute cannot preempt a federal common law action unless it provides a remedy for claims that otherwise would be governed by federal common law. There, the Oneida Nation sued for damages stemming from the allegedly illegal occupation of their aboriginal lands. Congress had spoken generally to the issue of improper divestiture of such lands by forbidding their transfer absent a U.S. treaty, subject to criminal penalties. However, the Court concluded that the Oneidas' claim for damages was not preempted because the statute did not "address directly the problem of restoring unlawfully conveyed land to the Indians, in contrast to the specific remedial provisions contained in [the water pollution statute at issue in Milwaukee II]." 470 U.S. at 239; see also In re Oswego Barge Corp., 664 F.2d 327, 344-45 (2d Cir. 1981) (holding that the provisions of the Clean Water Act, by establishing a comprehensive remedial scheme for recovery of oil spill cleanup costs by the United States, preempted maritime tort claims by the United States insofar as the cleanup costs arose from oil spilled in American waters);[25] Cleveland v. Beltman

[25] Significantly, in Oswego Barge, this Court further held that the statute did not preempt a maritime tort claim for (continued...)

N. Am. Co., 30 F.3d 373, 381 (2d Cir. 1994) (federal common law claim is preempted "because the issue of a shipper's compensation for actual loss or injury to its property has been comprehensively and directly addressed by [the statute]").

Here, EPA has determined that the Clean Air Act does not regulate carbon dioxide emissions, and Congress has not enacted any other legislation that provides a remedy for harm caused by carbon dioxide emissions from electric utilities (or any other sources of carbon dioxide pollution). While various federal statutes provide for research and reporting of carbon dioxide emissions from power plants, infra at 63, these efforts in no way seek to reduce these emissions. This case, therefore, stands on all fours with the status of statutory regulation of water pollution at the time of Milwaukee I, and the same result is compelled by that decision: No statute provides a remedy, so there is no preemption of federal common law. When Milwaukee I was decided in 1972, a number of federal statutory provisions related to the claims at issue, including funding for sewage treatment plants, water quality standards for interstate waters, and interstate pollution reduction agreements focused on clean-up

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[25] (...continued)
cleanup costs in Canadian waters because such waters are outside the scope of the statute. Id. at 344.

of the Great Lakes.[26] Because none of these provisions specifically provided limits on Milwaukee's discharges or provided a remedy to Illinois, the Court found that they did not preempt Illinois' claim under federal common law:

> It may happen 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 the suits alleging creation of a public nuisance by water pollution.

Milwaukee I, 406 U.S. at 107.

Subsequent events illustrate what it does take to preempt federal common law. Even as the Court issued its Milwaukee I decision in April 1972 finding no preemption, Congress was already in the process of enacting new federal laws that would govern discharges from sewage treatment plants. The Senate had passed comprehensive water pollution legislation in November

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[26] The statutory provisions then in existence prohibited discharges into navigable waters without a permit, but excepted discharges of sewage and stormwater, River and Harbor Act of 1899, ch. 425, § 13, 30 Stat. 1121 (codified at 33 U.S.C. § 403); provided loans to construct sewage treatment plants, Federal Water Pollution Control Act of 1948, Pub. L. No. 89-234, 62 Stat. 1155 (codified at 33 U.S.C. § 466); provided for state water quality standards applicable to interstate waters, Water Quality Act of 1965, Pub. L. No. 80-845, § 5(a), 79 Stat. 903, 907-908; provided funding to communities to meet these standards, Clean Water Restoration Act of 1966, Pub. L. No. 89-753, § 101, 80 Stat. 1246; and authorized interstate agreements for cleaning up the Great Lakes, Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 15(a), 84 Stat. 91, 104.

1971, but, as it was not yet effective law, there was no preemption. See Milwaukee II, 451 U.S. at 310, 327 n.19.

Very shortly after the Milwaukee I decision, the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, were enacted. This legislation contained several new provisions that bore directly on Illinois' common law claims against Milwaukee: Every point source discharge was now required to have a permit; states now had an administrative remedy to participate in the permitting of facilities in nearby states; and EPA was given the authority to veto any permits that may affect the waters of other States. Milwaukee II, 451 U.S. at 318, 325-26.

By the time the Court faced the preemption issue again in 1981, the Milwaukee-area sewage treatment plants at issue had been issued discharge permits. Id. at 319-20. Under these circumstances, the Court found that Illinois' federal common law claims were now preempted by the permit system and the other remedies provided by the Clean Water Act, and by the actual issuance of 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, as the District Court did in this case.

Id.; see also Arkansas v. Oklahoma, 503 U.S. 91, 99 (emphasizing that federal common law was preempted in Milwaukee II precisely because "Congress had addressed many of the problems we had identified in Milwaukee I").

A comparison of the legislation bearing on carbon dioxide emissions from power plants with the regulation of sewage treatment plant discharges at issue in Milwaukee I and Milwaukee II demonstrates that the States' federal common law action here has not been preempted. The treatment of carbon dioxide emissions under federal law now is, if anything, less comprehensive and effective than the treatment of sewage treatment plants at the time of Milwaukee I. Just as municipal sewer discharges were exempt from the prohibition on discharges into interstate waters of the 1899 River & Harbor Act, carbon dioxide emissions are not currently regulated under the Clean Air Act. Moreover, the EPA has determined that carbon dioxide emissions do not even fall within the scope of the statute. There are no interstate air quality standards for carbon dioxide as there were applicable interstate quality standards in 1971. The current laws consist only of a combination of research and voluntary efforts. See 42 U.S.C. § 7403(g) (research into control technologies for a variety of regulated and unregulated substances, including carbon dioxide); id. § 7651k note (requiring power plants to report their carbon dioxide emissions

to EPA); 15 U.S.C. § 2921 et. seq. (establishing climate change research program). Yet even these research and reporting provisions are less extensive than the water pollution control programs existing in 1971, which provided funding for sewage treatment plants and established an interstate cooperation program for the Great Lakes.[27]

By contrast, as noted in Arkansas, the 1972 legislation that the Supreme Court found to preempt Illinois' federal common law claim in Milwaukee II regulated sewage treatment plant discharges in an extremely comprehensive manner. Therefore, under the Supreme Court's decisions in Milwaukee I and Milwaukee II, common law remedies for power plant emissions of carbon dioxide are not preempted. To paraphrase the Court in Milwaukee I, the day may come that implementation of carbon dioxide limitations for the utility sector will preempt the federal common law. But that day has not yet arrived, and accordingly, Plaintiffs' federal common law claims have not been preempted.

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[27] Illinois attempted to resolve its dispute with Milwaukee through this interstate cooperation procedure; along with other Great Lakes states, Illinois had developed and agreed to water quality standards, and administrative abatement orders had been issued to municipalities regarding their sewage discharges. See Brief of the Sewerage Commission of the City of Milwaukee in Milwaukee I, at 4-5 (reproduced in the Addendum to this brief).

CONCLUSION

For all of the foregoing reasons, the district court's order dismissing the complaint on the pleadings should be reversed and this action should be remanded to the district court for further proceedings on the merits.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, Assistant Solicitor General in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,997 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of December, 2005, I served by regular United States postal mail TWO COPIES of Brief for Plaintiffs-Appellants and ONE COPY of the Joint Appendix upon the following named person(s) as lead counsel for Appellees:

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