05-5119-cv

United States Court of Appeals
for the
Second Circuit

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

Plaintiffs-Appellants,

– against –

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

Defendants-Appellees.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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A. The Power Companies Have Conceded the Conditions for Applying Federal Common Law.

The Supreme Court could not be clearer that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"). Federal common law applies where "problems requiring federal answers are not addressed by federal statutory law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 n.14 (1981) ("*Milwaukee II*").

Appellees ("power companies") repeatedly concede the conditions for application of federal common law in this case. In their own words, the control of carbon dioxide emissions "is a matter of uniquely federal concern." Brief for Defendants-Appellees Cinergy Corporation and Xcel Energy, Inc. ("Cinergy") at 23; *accord id*. at 3, 7. And the problem of controlling carbon dioxide emissions is not addressed by federal statutory law because, they acknowledge, Congress has merely "decided to study the issue further." Brief for Defendants-Appellees American Electric Power Co., Inc., American Electric Power Service Corporation and Southern Company ("AEP") at 59; *see also* Cinergy at 13 ("no statute prevents the increased risks plaintiffs allege"). They argue only that "Congress

can" enact limits on carbon dioxide emissions and that Congress has "*debated* various proposals." AEP at 3 (emphases added). In short, the power companies have conceded that this case raises a problem requiring a federal answer that is not addressed by federal statutory law. Federal common law applies.[1]

B. The Power Companies' Proposed Restrictions on Federal Nuisance Are Unavailing.

1. Federal Nuisance is Not Restricted to "Simple Type" Nuisances.

The power companies argue at length that federal nuisances must only be of a "simple type." However, there is no such limitation. Only two federal nuisance

[1] The power companies are supported by four *amicus* briefs. (The Brief of *Amici* Senator Inhofe and the Washington Legal Foundation ("Inhofe *Amicus*") was filed only in No. 05-5104-cv but states that its arguments apply in this appeal, *see* Inhofe *Amicus* at 2 n.1). Of these, only the law professors' *amicus* brief was filed within seven days of the AEP and Cinergy briefs. The other *amicus* briefs thus should be disregarded as out-of-time. Fed. R. App. P. 29(e). Appellants further note that *Amicus* Unions for Jobs and the Environment ("UJAE") purports to represent unions but its major funder is a coal industry group. *See* Letter from Stephen L. Miller to Irl F. Engelhardt (June 18, 2004) (stating that coal industry group is UJAE's "major funder" and uses UJAE to "sow discord" among northeastern state governments negotiating to require greenhouse gas emissions reductions), *available at* http://www.heatisonline.org/contentserver/objecthandlers/index.cfm?id=4940&method=full.

cases have used the term "simple" in connection with "nuisance." The first contradicts the power companies' argument and the second does not support it.

The first case is *Missouri v. Illinois*, 200 U.S. 496 (1906) ("*Missouri II*"), dealing with sewage pollution alleged to have caused an increase in typhoid fever in a downstream state. Far from tying federal nuisance to those nuisances of a "simple type," the Court *distinguished* the properly pled interstate nuisance action before it – dealing with invisible and odorless pathogens in sewage – from the typical "simple" nuisance actions between neighbors:

> We have studied the plaintiff's statement of the facts in detail . . . . There is no pretence that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses – no visible increase of filth, no new smell. . . . The plaintiff's case depends upon an inference of the unseen.

Id. at 522. The Court did *not* decide that such a non-simple nuisance was not actionable. To the contrary, the Court expressly reaffirmed its prior decision, *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*"), in which it held that Missouri was entitled to pursue its (non-simple) federal nuisance case. *Missouri II*, 200 U.S. at 518, 520. In reaffirming its prior decision in the case, "the actual facts [of which] have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern

science," *id.* at 518, the Court could hardly have been clearer that federal nuisance would *not* be limited to old-fashioned notions of filthiness, odors, and other immediate and direct affronts to the senses that had characterized typical nuisances between neighbors under the "older common law." Rather, this new doctrine of federal nuisance would also recognize subtle and unseen threats as revealed by the ingenuities of science.

Notably, the Court in *Missouri II* denied relief only following a full evidentiary proceeding on the merits because the plaintiff had failed to demonstrate that the pathogens could survive the 357-mile trip downstream. Moreover, the defendant had demonstrated that its conduct (i.e., flushing large quantities of fresh water from Lake Michigan into the river along with Chicago's sewage), actually improved the water quality. *Id*. at 522-23. That Missouri ultimately failed in her proof is of no moment here. This global warming case is at the *Missouri I* stage, not the *Missouri II* stage.

The next (and last) federal nuisance case to use "simple" in connection with "nuisance" was *North Dakota v. Minnesota*, 263 U.S. 365 (1923), dealing with flooding of land. The Court reviewed state and federal nuisance cases and

concluded:

> It needs no argument, in the light of these authorities, to reach the conclusion that, where one State, by a change in its method of draining water from lands within its border, increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another State, the latter State has such an interest as quasi-sovereign in the comfort, health and prosperity of its farm owners that resort may be had to this Court for relief. It is the creation of a public nuisance of simple type for which a State may properly ask an injunction.

Id. at 374. Thus, in context, the Court merely recognized that flooding of land is easily cognizable as a nuisance. The Court nowhere said that "only" nuisances of a simple type are cognizable in federal nuisance. And as it turned out, the evidence in *North Dakota* was highly complex, involved a battle of experts, and required a lengthy factual analysis by the Court. *Id.* at 376-88.

The only other time "simple" appears in a federal nuisance case in connection with the word "nuisance" is in *Milwaukee I*, which did not use the term itself but merely reproduced much of the above block quote from *North Dakota*, *without comment*, in a footnote. *Milwaukee I*, 406 U.S. at 106 n.8. The footnote follows the statement that "[w]hen it comes to water pollution this Court has spoken in terms of 'a public nuisance.'" *Id.* at 106. The Court then cites three other cases that use the term "nuisance" or "public nuisance" (but not "simple" nuisance). Thus, in context, the Court's footnote was part and parcel of its point

that "nuisance" is the proper term and legal doctrine to employ in an interstate pollution case. The Court never stated that "simple" should be taken as a limiting principle on federal nuisance.

In fact, *Illinois v. Milwaukee* was itself, like *Missouri v. Illinois*, predicated upon an alleged increase in illness caused by invisible and odorless pathogens in sewage. *See Milwaukee II*, 451 U.S. at 309. This non-simple claim was cognizable, as was the even less simple claim that defendants were contributing to eutrophication of an entire Great Lake by way of the nutrient pollution contained in the sewage. *Id.* at 309 & n.3. The bench trial in that non-simple nuisance case "took four months." *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at *3 (N.D. Ill. 1973), *aff'd in relevant part and rev'd in part*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds, Milwaukee II*.

Faced with this authority belying their "simple" limitation, the power companies resort to placing "simple type" in quotation marks as something that, they say, the Supreme Court "explained" in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), and "noted" in *Milwaukee II*. AEP at 20-21, 55. But one can search *Tennessee Copper* and *Milwaukee II* in vain for the term "simple type" or even the word "simple." It simply is not there.

2. The "Exacting Standards" of Proof on the Merits Are Inapplicable Here.

The power companies claim that "exacting standards" of federal nuisance preclude this federal nuisance case. AEP at 19, 21, 22-23. But the "exacting standards" are standards of *proof on the merits applicable in cases against sovereign defendants* because of the "delicacy of interstate relationships." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951); *accord Missouri II*, 200 U.S. at 521 ("the case should be of serious magnitude, clearly and fully proved").[2] This case is not at the proof stage. Moreover, private defendants cannot avail themselves of the higher standards because the "sovereign state rationale recognized in the earlier cases is inapplicable" to them. *Milwaukee*, *supra*, 599 F.2d at 167. To the extent that the Court in *Tennessee Copper* counseled the exercise of "caution" in that federal nuisance case against private parties, the Court was, again, addressing the standard for deciding whether "the grounds alleged are proved," not whether a claim had been stated. *Tennessee Copper*, 206 U.S. at 237. Further, the higher standard allows the Supreme Court to "cope with

[2] The power companies place "exacting standards" in quotation marks followed by a citation to *Missouri II*. AEP at 21. But that case does not use the term.

original actions" and does not apply in district court. *Milwaukee, supra*, 599 F.2d at 166. The higher standard is irrelevant here.

3. "Noxious" Means "Harmful."

The power companies further contend that federal nuisance is limited to "noxious" pollutants and that carbon dioxide is not noxious. AEP at 20, 25-26. But even if *arguendo* there were a case announcing such a limit (and there is not), "noxious" just means "harmful or destructive to man or to other organisms." Webster's Third New International Dictionary 1547 (1986); *accord* Black's Law Dictionary 960 (5th ed. 1979) ("hurtful"; "[t]hat which tends to cause injury, especially to health or morals."); *Massachusetts v. Goldenberg*, 155 N.E. 2d 187, 192 (Mass. 1959) ("the word 'noxious' means 'hurtful, harmful, injurious, destructive, unwholesome'"). It does not mean "toxic" or "poisonous." *Dodd v. Independence Stove & Furnace Co.*, 51 S.W.2d 114, 118 (Mo. 1932) ("the word 'noxious'" includes dusts "which are not in their nature inherently harmful that is, of a poisonous nature"). As the primary cause of global warming, carbon dioxide causes injuries of exceptional and extraordinary severity and is thus "harmful."

Moreover, the power companies' version of "noxious" is inconsistent with case law. Water is not inherently harmful, yet too much water causes flooding and

gives rise to a federal nuisance claim. *North Dakota, supra*. Nor were the nutrients causing eutrophication in *Illinois v. Milwaukee* inherently harmful. In short, any arguable limit on federal nuisances to those that are "noxious" does not preclude this global warming case.

In a related argument, the power companies contend that an interstate pollutant must cause its harm "immediately" in order to give rise to a federal nuisance. AEP at 21, 25. Injunctive relief is proper, however, to "prevent nuisances that are threatened, and before irreparable mischief ensues," as well as to "arrest or abate those in progress." *Missouri I*, 180 U.S. at 244 (quotation omitted). In *Missouri I*, the discharges at issue had not even begun and the injunctive claim was proper. *Id*. Here, defendants emit millions of tons of carbon dioxide daily. The lag time between defendants' ongoing conduct and the manifestation of injury does not defeat the federal nuisance claim, especially given that their past conduct over many years has contributed to bringing the nuisance into existence today. A-20, A-41, A-49. Global warming, like eutrophication, does not occur overnight but is nonetheless a cognizable federal nuisance when considered in light of the nature of the problem: "Eutrophication is a gradual process in which the changes from year to year are imperceptible. One must measure in terms of decades if not longer intervals to see the difference." *Illinois*,

1973 U.S. Dist. LEXIS 15607, at *13. Defendants' carbon dioxide emissions are sufficiently harmful, and the harm is sufficiently immediate, to be actionable under federal nuisance law.

4. Federal Nuisance is Not Restricted to Matters That Congress Lacks Power to Regulate.

The power companies' next proposed limitation on federal nuisance – to areas that Congress lacks the power to regulate – requires little attention. *See* AEP at 16-19, 23. If that were true, the Supreme Court's decisions in *Milwaukee I and II* would be inexplicable. Even in the days when Congress' Commerce power was substantially restricted, the Court did not view that restriction as a reason for its own entry into federal nuisance - just the opposite. *Missouri II*, 200 U.S. at 520 ("If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable . . . ."). Here, where Congress undoubtedly *could act* to regulate the power companies' carbon dioxide emissions, the danger of a court irrevocably fixing a rule is utterly absent. The power companies thus have this principle exactly backwards.

5. Cases Addressing Whether to "Create" New Federal Common Law Remedies Are Inapposite.

The power companies contend that it is inappropriate for the judiciary to "create," ("formulate," "make") federal common law here. *See* AEP at 24-25, 32. However, under *Milwaukee I*, an enclave of federal specialized common law applicable to unregulated, interstate pollution already exists. In fact, the power companies' lead case on this point, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981), cites *Milwaukee I* for the rule that federal common law applies to "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations."

Moreover, the reason for not creating federal common law in cases like *Texas Industries* and *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981), *see* AEP at 24-25, 32, is entirely inapplicable here. Those cases declined to add a federal common law contribution claim where Congress *had already* created a statutory remedial scheme defining rights and remedies. The respect for Congress' "high policy" decision as to who may assert rights and remedies and against whom when Congress *has already* created a remedial scheme is irrelevant here.

The power companies' reliance upon *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *see* AEP at 32, is also misplaced. *Chevron* holds that where "Congress has not directly addressed the precise question at issue," the judiciary should defer to any permissible *agency interpretation* of the statute. *Chevron*, 467 U.S. at 843. Faced with an "agency construction of a statutory provision" resulting in a policy choice, the "responsibilities for assessing the wisdom of *such* policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Id*. at 866 (emphasis added). Beware the ellipsis: the power companies omit the word "such" from this portion of *Chevron* in an apparent attempt to generalize the meaning. AEP at 32. However, the Court was addressing only agency policy choices, not at issue here.

6. The Commerce Clause is Irrelevant to the Exercise of Federal Judicial Power.

The power companies lodge an objection to this case on the basis of the Commerce Clause, which, they contend, prohibits extraterritorial application of state law. AEP at 22, 29. However, plaintiffs are invoking *federal law* and the power of the *federal* sovereign through a *federal* court precisely because, as the

power companies admit, interstate and ambient air pollution is primarily "the concern of federal, not state, law." Cinergy at 25. Thus, cases such as *Healy v. Beer Institute*, 491 U.S. 324 (1989), addressing *state laws* with extraterritorial effect, are entirely extraneous. *See Arkansas v. Oklahoma*, 503 U.S. 91, 1056-59 (1992) (because interstate pollution "is controlled by *federal* law," federal sovereign may require out-of-state polluter to comply with affected state's more stringent standard, which becomes absorbed into federal law); *Milwaukee I*, 406 U.S. at 103 n.5 ("Any state law applied, however, will be absorbed as federal law."). In fact, so long as federal common law applies, state law is preempted and hence out of the picture. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) ("the implicit corollary of [*Milwaukee I*] was that state common law was preempted"). The Commerce Clause is irrelevant.

7. The Power Companies Cannot Evade the Principle of Joint and Several Liability Applicable in Multiple Polluter Cases.

Defendants argue that carbon dioxide cannot be the subject of federal nuisance because such nuisances must be caused by pollution that can be "directly" and "readily traced to an out-of-state source." AEP at 20-21, 27. However, this argument contradicts *Milwaukee I*, which holds that federal

common law applies to "air and water in their *ambient or interstate* aspects." 406 U.S. at 103 (emphasis added). Pollution that is "ambient" cannot be directly and readily traced to its source.

Moreover, this kind of attempt to hide in the thicket of multiple polluters – even a very large number of polluters – has been universally rejected. Defendants acknowledge, as they must, that state common law "impose[s] liability on joint contributors to a nuisance" but contend, without citation to a single case, that federal common law does not do so in the same "manner." AEP at 28. However, in *Illinois v. Milwaukee*, this argument was squarely rejected under federal nuisance law: "It is impossible to demonstrate that any Illinois resident has been infected by pathogens originating in Milwaukee sewage. Viruses and bacteria do not bear labels . . . ." *Illinois, supra*, 1973 U.S. Dist. LEXIS 15607, at *16. Similarly, on the eutrophication claim, the court held:

> Anyone who contributes to the injury is liable, even though his conduct, standing alone, might not have been sufficient to cause the injury. Here, it may be that Milwaukee's one million pounds of phosphorous a year would not cause a problem in the lake if there were no other phosphorous being added. But there is other phosphorous being added, and it is clear that the total amount of phosphorous being put into the lake is causing a problem.
>
> There may be a discharge so small that, as a practical matter, it can be regarded as de minimis, even though as a logical matter it is still part

> of the whole. But clearly that is not this case. We are dealing here with the most significant point source on the lake.

Id. at *22-23. And *Illinois v. Milwaukee* is far from the only federal common law case to apply joint and several liability on a subset of a very large numbers of polluters: federal courts do so all the time as a matter of federal common that fills a gap in CERCLA. *See* OSI Principal Br. at 29-30; *accord United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 184-87 (2d Cir. 2003) ("the fact that a single generator's waste would not in itself justify a response is irrelevant" under federal common law principles) (quotation omitted).

The power companies' arguments about the policy decisions as to who should bear the costs of reducing emissions and whether such costs should be spread across entire industries, etc., *see* AEP at 30-31, are entirely misplaced. That Congress someday may or may not decide those issues is no bar to the liability of individual polluters under common law. Indeed, even where Congress *already* has made such decisions with respect to other pollutants, common law remedies (under state law) continue to apply to the liability of individual polluters. *Ouellette*, 479 U.S. at 497; *Her Majesty the Queen in Right of Ontario v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989); *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58, 62 (D. Vt. 1987); *Ky. Hoggs, Inc. v. Wagner*, No. 80-3213, 1981 U.S.

App. LEXIS 11605 (6th Cir. July 9, 1981) (Table 663 F.2d 1072). Moreover, the alleged "policy" arguments raise issues of fact that cannot be resolved on a motion to dismiss. For example, plaintiffs allege that the power companies' emissions have been growing faster than those from the economy as a whole and, absent some action to control their emissions, will continue to do so for decades. A-40. Considering such facts will not transform a multiple-polluter case into a pure policy question.

Defendants repeatedly point out that they emit 2.5 percent of the world's current annual carbon dioxide emissions. AEP at 5, 9, 15, 27. But that does not defeat the claim in a multiple-polluter case. And in the context of an ambient or interstate pollution problem, for just five corporations to be responsible for 2.5 percent of emissions is a significant contribution. Indeed, if all carbon dioxide pollution from fossil fuel combustion came from sources as large as these five power companies, there only would be 200 polluters worldwide causing this extraordinary problem. Defendants are therefore apparently arguing, against all legal authority, that where 200 equally-responsible polluters contribute to an

ambient pollution problem, no subset of that 200 ever can be enjoined because the contribution of each is "too small."[3]

The power companies try to push the problem off on their own *amici* – the automobile industry – which, they say, is responsible in the U.S. for three times as many emissions as these five power companies. *See* Cinergy at 11 n.6. But if the entire automobile industry in the U.S. is responsible for 7.5% of world emissions – an amount these five power companies call "far greater" than their own, *id*. at 21 n.11 – then are they acknowledging that, merely by including more power company defendants, this suit would encompass a meaningful percentage? Just fifty U.S. power companies are responsible for 7.5% of world anthropogenic carbon emissions.[4] If liability is joint and several, there should be no difference between suing five defendants and suing fifty. As the district court and Seventh

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[3] The suggestions that the natural carbon cycle should be considered to be 95 percent of the carbon dioxide problem and that water vapor is 95 percent of the greenhouse gas problem, *see* Inhofe *Amicus* at 3-4 n.2, contradict the allegations of the complaint. *See* A-38-39.

[4] *See* Public Service Enterprise Group, et al., Benchmarking Air Emissions of the 100 Largest Electric Power Producers in the United States - 2002 at 3 (Apr. 2004) (fifty producers responsible for 75 percent of U.S. electric power sector emissions), *available at* http://www.nrdc.org/air/pollution/benchmarking/default.asp; A-40 (U.S. electric power sector responsible for 10 percent of world emissions).

Circuit properly recognized in *Illinois v. Milwaukee*, beyond some *de minimis* threshold, each contributor is liable.

C. The Land Trusts Are Proper Federal Plaintiffs.

The power companies contend that under federal nuisance a private party may never bring a claim even if special injury is established because, they say, federal nuisance is restricted to interstate relations and thus to State plaintiffs. Their argument, however, is entirely inconsistent with the case law and has no basis in policy, logic or common sense.

First, the contention that only a State may bring a federal nuisance claim is directly at odds with the Seventh Circuit's holding in *City of Evansville v. Kentucky Liquid Recycling, Inc*., 604 F.2d 1008, 1017-19 (7th Cir. 1979), that federal nuisance is *not* restricted to suits by sovereigns. In *Evansville* the court permitted a federal nuisance suit by a municipality based upon *Milwaukee I*'s holding that "'it is not only the character of the parties that requires us to apply federal law'" but rather "'where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism.'" *Id*. at 1017-18 (quoting *Milwaukee I*, 406 U.S. at 105). The court also observed that in *Tennessee Copper* the Supreme Court had "implicitly

assum[ed] that even a private party might file suit to enjoin interstate air pollution." *Id*. at 1018 n.30 (citing *Tennessee Copper*, 206 U.S. at 238).

Second, the power companies contention that private parties "are not beneficiaries of the Article III jurisdictional grant under which the Court fashioned" the federal nuisance remedy, AEP at 33, misstates the relevant jurisdictional grant. The Article III grant of original jurisdiction over controversies "in which a State shall be a party," U.S. Const. art. III § 2, is no longer the jurisdictional basis for interstate nuisance. That is the whole point of *Milwaukee I, i.e.*, that, interstate nuisances now "arise under" federal law. *Federal question* is thus the relevant jurisdictional grant here and, unlike the head of jurisdiction over controversies between States and citizens of other States, is subject matter-driven rather than party-driven. "There is nothing in the jurisdictional statute, 28 U.S.C. § 1331(a), on which the Supreme Court based its opinion in [*Milwaukee I*], to suggest that suits by citizens should be treated differently from suits by states." John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L. Q. 241, 280-81 (1972).[5]

[5] One of the authors of this article is counsel here for some of the power companies.

Indeed, States are entitled to pursue federal nuisance actions in district court under federal question jurisdiction not *because* they are States but *notwithstanding* that they are States who may invoke the Supreme Court's original jurisdiction. *Texas v. Pankey*, 441 F.2d 236, 242 (10th Cir. 1971) ("we hold that the State of Texas was not precluded on its character as a party from bringing a federal-rights suit in the district court under § 1331(a)"), *cited in Milwaukee I*, 406 U.S. at 99-100, 103, 108 n.9. And the power companies' theory of federal nuisance as driven purely by the *quid pro quo* for the exchange of sovereign rights, AEP at 29, also cannot explain why interstate pollution cases filed by the United States against private polluters arise under federal law. *Stream Pollution Control Bd. v. United States Steel Corp*., 512 F.2d 1036, 1040 n.9 (7th Cir. 1975) (Stevens, J.) (argument that federal nuisance "depends on the existence of a conflict between sovereigns" at odds with cases permitting United States to sue in federal nuisance). It is the "broad language" of *Milwaukee I* focusing on the subject matter that is the touchstone, *id.* at 1040, not the identity of the parties.

Third, the power companies' attempt to evade the case law permitting private parties to sue in federal nuisance is unavailing. They contend, for example, that the decision on the merits in *New England Legal Foundation v. Costle*, 666 F.2d 30 (2d Cir. 1981), merely affirmed a district court decision that

"assumed" numerous private parties and other non-State plaintiffs could pursue a federal nuisance action. But in point of fact, the district court addressed the issue, *see New England Legal Foundation v. Costle*, 475 F. Supp. 425, 441 n.18 (D. Conn. 1979), did not state it was "assuming" anything, and proceeded to reach the merits, which it could not have done on an assumption of standing. This Court's affirmance in *Costle* also was on the merits. In fact, this Court postponed ruling on the federal common law claim in *Costle* when the Supreme Court granted *certiorari* in *Milwaukee II*, *see New England Legal Foundation v. Costle*, 632 F.2d 936, 938 (2d Cir. 1980), a decision that would make no sense if the case could have been dismissed on the narrow ground that non-State plaintiffs lack standing in federal nuisance - for *Milwaukee II* entailed only State plaintiffs and thus could shine no light on the standing of non-State plaintiffs.[6]

[6] The power companies also focus on the descriptive statement in *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976), that federal nuisance had not been extended to non-State plaintiffs. *See* AEP at 35. But that statement was incorrect given that *Byram River v. Village of Port Chester*, 394 F. Supp. 618, 629 (S.D.N.Y. 1975), had done just that the year before. The power companies also fail to acknowledge that in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), the Court was careful not to address the private right of action issue. *See id.* at 11 n.17 (""[w]e therefore need not discuss the question") (emphasis added).

Fourth, as a matter of policy, barring all private parties from suing in federal nuisance would produce results that can only be characterized as unfair, bizarre, and anomalous. Because federal common law preempts state common law, it would mean that property owners harmed by pollution who otherwise would be fully entitled to bring a case under state public and private nuisance law would unfairly lose their right to sue whenever the pollution at issue triggered federal common law due to its ambient or interstate nature. Why should a polluter whose pollution is so extensive that it effects are felt in multiple states gain immunity from answering for its property damage? The object of federal law in such situations is uniformity and neutrality as between competing state interests, not exoneration of the polluter. Further, if Congress and EPA then started regulating the same pollutant under the CAA, then under *Ouellette* and its progeny the property owners would suddenly, and bizarrely, regain their state-law right to sue. And such a rule of law truly would be an anomaly because private parties may sue not only under state nuisance law when they have special injury, but also:

- under federal maritime nuisance law when they have special injury, *In re Exxon Valdez*, 104 F.3d 1196, 1197-98 (9th Cir. 1997);

- under federal common law to resolve title to land dependent upon a boundary between States, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 111 & n.13 (1938) (citing cases); and
- under federal common law to resolve disputes to water in interstate streams, *Id.* at 110; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (under *Hinderlider* "no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties."); *see also Milwaukee I*, 406 U.S. at 105 & n.7 (relying upon *Hinderlider*).

Fifth, the power companies' argument against private party standing in federal nuisance simply proves too much. It would disqualify the States from pursuing their proprietary claims where state-owned property is harmed by unregulated, interstate pollution. Here, in addition to their *parens patriae* interests, each of the States in No. 05-5104-cv have identified significant state-owned properties harmed by global warming, *see* OSI Principal Br. at 30-31, and the interests supporting those claims are the same as those of a private party. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-02 (1982) ("As a proprietor, [a State] is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those

interests in court.").[7] The land trusts – whose reason for being is to preserve ecologically valuable lands in perpetuity for public benefit – are proper plaintiffs.

II. THIS CASE IS CONSISTENT WITH THE SEPARATION OF POWERS.

Adjudication of this interstate pollution case addressing global warming is consistent with the separation of powers. The power companies make two fundamental errors in their separation of powers arguments.

First, they misconstrue the separation of powers as driven primarily by the need to protect the political branches from judicial encroachment when the primary purpose of the doctrine is the reverse. *Miller v. French*, 530 U.S. 327, 350 (2000) ("separation of powers principles are primarily addressed to the

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[7] The power companies reliance upon the discussion of *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852), in *California v. Sierra Club*, 451 U.S. 287 (1981), AEP at 33-34, is misplaced. *California* says that *Wheeling Bridge endorsed* the rule that "a court of equity could enjoin a public nuisance in a case brought by a private person who had sustained specific injury." 451 U.S. at 296 n.7. What the court rejected in *California* is not at issue here, i.e., the argument that *Wheeling Bridge* makes federal courts available to entertain nuisance actions "brought by private parties *with respect to obstructions on navigable rivers*." *Id.* (emphasis added). Moreover, whether the source of law in *Wheeling Bridge* was state or federal is not important to the special injury analysis but in point of fact the source of law was an interstate compact that "by the sanction of Congress, had become a law of the Union." *Missouri II*, 200 U.S. at 519.

structural concerns of protecting the role of the independent Judiciary within the constitutional design"); *Benjamin v. Jacobson*, 172 F.3d 144, 159-160 (2d Cir. 1999) (en banc) ("The separation of powers serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government" and "to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government.") (quotation omitted).

Second, the power companies argue for a hermetically-sealed separation of the branches of government. However, the Constitution contemplates overlapping authority between the branches: "'we have never held that the Constitution requires that the three branches of Government operate with absolute independence." *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (quotation omitted). In the words of Justice Jackson:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), *quoted in Morrison*, 487 U.S. at 694. Because, the Framers believed, "'the legislative department is every where extending the sphere of its activity, and

drawing all power into its impetuous vortex,'" they erected an independent Judiciary and made it coequal with the other branches. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221-22 (1995) (quoting The Federalist No. 48, pp. 333, 337 (J. Cooke ed. 1961)). Adjudication of this case does not violate the separation of powers.

A. The "Bargaining Chip" Theory Contradicts U.S. Policy.

The power companies state that "the President has not formulated his foreign policy in a formal and binding instrument," Cinergy at 34, but contend that any mandatory reduction in domestic greenhouse gas emissions would undercut the President's bargaining position in negotiating mandatory limits with developing nations. AEP at 46, 54; Cinergy at 32. However, this argument contradicts express U.S. policy.

In the United Nations Framework Convention on Climate Change ("UNFCCC"), a treaty ratified by the Senate and to which the U.S. is a party, the U.S. expressly agreed to "adopt national policies and take corresponding measures" that "*will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions*. . . ." UNFCCC at Art. IV ¶2(a), SPA-80 (emphasis added). In other words, rather than trying to leverage action in developing countries by *holding back* domestic action, the policy that the

U.S. adopted when it became a party to the UNFCCC is to leverage developing country action by *leading by example.* The reasons the United States and other developed nations agreed to take the lead are that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries," and "per capita emissions in developing countries are still relatively low." *Id.* at Preamble, SPA-70. Consistent with the UNFCCC, the official U.S. position is that, without awaiting action by other nations, the U.S. is "currently pursuing a broad range of strategies to reduce net emissions of greenhouse gases." Third National Communication of the United States of America Under the UNFCCC (U.S. Department of State, May, 2002) at 51.[8]

Indeed, at the most recent meeting of the parties to the UNFCCC and to the Kyoto Protocol, the lead United States negotiators expressly stated that current U.S. policy is to oppose negotiations over binding limits on greenhouse gas emissions – whether under the UNFCCC, the Kyoto Protocol, or any other forum – even if those negotiations include limits for developing countries.[9] There is thus

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[8] Available at http://unfccc.int/resource/docs/natc/usnc3.pdf.

[9] *See* COP11/MOP1 Press Conference, Harlan L. Watson, Senior Climate Negotiator and Special Representative and Alternate Head of the U.S. Delegation, Montreal, Canada (Nov. 29, 2005) ("the United States is opposed to any such discussions under the Framework Convention. . . . We see no change in current conditions that would result in a negotiated agreement consistent with the U.S.

no rational basis for any claim that domestic emissions reductions could be withheld in order to gain diplomatic leverage over developing nations.[10]

Contrary to the power companies' argument, the U.S. experience with international negotiations on chlorofluorocarbons ("CFCs") and other gases that deplete the ozone layer does not support the bargaining chip theory and in fact contradicts it. The United States took unilateral steps in the 1970s at the federal and state levels to reduce CFC emissions. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 157, 91 Stat. 685, 729-30 (1977) (authorizing EPA to

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approach. . . . We are not a party to the Kyoto Protocol and we do not support any such approach under the Convention for future commitments."), *available at* http://www.state.gov/g/oes/rls/rm/57449.htm; Press Briefing by the Delegation of the United States COP11/MOP1, Paula Dobriansky, Under Secretary of State for Democracy and Global Affairs and Head of the U.S. Delegation, Remarks to the Conference of Parties to the UNFCCC, Montreal, Canada (Dec. 7, 2005) ("It is our belief that progress cannot be made through these formalized discussions. . . . [W]e also believe firmly that negotiations will not reap progress, as I indicated, because there are differing perspectives."), *available at* http://www.state.gov/g/rls/rm/2005/57867.htm.

[10] Nor would the bargaining chip argument make sense with respect to U.S. relations with developed nations. The Kyoto Protocol entered into force earlier this year and imposes binding emissions reductions on developed nations other the United States. Moreover, as a signatory (but not a party) to the Protocol, the United States is "obliged to refrain from acts that would defeat the object and purpose of the agreement." Restatement (Third) of the Foreign Relations Law of the United States, Vol. 1 (1987), § 312(3); *see also* David M. Ackerman, *Global Climate Change: Selected Legal Questions About the Kyoto Protocol*, CRS Report for Congress, No. 98-349A (Mar. 29, 2001) (same).

regulate gases that may affect ozone layer); Certain Fluorocarbons (Chloroflurocarbons) as Propellants, 43 Fed. Reg. 11,301 (1978) (banning CFCs as propellants in certain aerosol uses); Or. Rev. Stat. §§ 468A.650, 468A.655 (2003) (state law enacted in 1975 banning aerosol sprays containing CFCs). These early reductions created an economic advantage for the U.S. in reducing CFCs and the U.S. sought reductions by other countries in international negotiations. *See* Elias Mossos, *The Montreal Protocol and the Difficulty With International Change*, 10 Alb. L. Envtl. Outlook 1, 7 & n.22 (2005). In 1987 the United States joined twenty-three other (primarily developed) nations in signing a treaty imposing mandatory obligations to reduce the harmful gases. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc No. 100-10, 1522 U.N.T.S. 29. The U.S. ratified the treaty the following year and Congress incorporated its obligations into the CAA in 1990. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, tit. VI, 104 Stat. 2399, 2648, *codified at*, 42 U.S.C §§ 7671-7671q. The power companies have cited not a shred of evidence that developing nations responded to any of the U.S. reductions by intentionally increasing their own emissions or that such emissions increased faster than they would have absent the U.S. emissions reductions. In fact, the leadership of the U.S. was followed by the developing nations coming to the table

in large numbers via the 1990 London Amendments to the Protocol. *See* Mossos, *supra*, at 12-13, 16-17, 25. The Montreal Protocol and London Amendments now have been ratified by 189 and 180 nations, respectively.[11] The ozone layer experience thus contradicts the bargaining chip theory.

Notably, the only case law the power companies offer in support of the bargaining chip theory consists of Supremacy Clause cases addressing preemption of *state law*. AEP at 46-47. Those cases are of no moment here because federal common law itself preempts state law, *Ouellette*, 479 U.S. at 488, and ensures a neutral federal forum. The Supremacy Clause argument does highlight a significant point, however. To accept the bargaining chip theory would endanger numerous state laws governing greenhouse gas emissions - a position defendants openly advocated below. Tr. at 116, SPA-123 ("If state by state they regulated internally mandatory caps . . . it would be inconsistent with the federal approach . . . ."); *see also Cent. Valley Chrysler-Jeep Inc. v. Witherspoon*, 2005 U.S. Dist. LEXIS 26536 (E.D. Cal. 2005) (pending challenge by automobile industry to state law regulating carbon dioxide emissions); N.H. Rev. Stat. Ann. § 125-O (2005) (state statute regulating power plant emissions of carbon dioxide). Yet the

[11] *See* http://ozone.unep.org/Treaties_and_Ratification/2C_ratificationTable.asp.

administration has apparently stated its support of legally-binding domestic emissions reductions under state law. S*ee* Anthony DePalma, *Nine States in Plan to Cut Emissions by Power Plants*, N.Y. Times, Aug. 24, 2005, at A1 (quoting chairman of White House Council on Environmental Quality as stating with respect to legally-mandatory emissions reductions by Northeastern States, "[w]e welcome all efforts").

Finally, official U.S. policy is not altered by the power companies' sundry collection of items such as a 1997 Senate resolution ("Byrd-Hagel Resolution"), a press release, and expired appropriations riders prohibiting implementation of a treaty that was never ratified. AEP at 8, 45. The Byrd-Hagel Senate resolution is non-binding and has been countermanded by a more recent one. *See* 151 Cong. Rec. S6980, S7033, S7037 (daily ed. June 22, 2005) (calling for legally binding limits "on emission of greenhouse gases that slow, stop, and reverse the growth of such emissions" and that "will encourage comparable action by other nations"); *see also* 151 Cong. Rec. S7267, S7282 (daily ed. June 23, 2005) ("almost from the day of that vote [on the Byrd-Hagel Resolution] those on both sides of the issue have misrepresented and misconstrued its intent. What was meant as a guide for action has instead been invoked, time and again, as an excuse for inaction.") (statement of Sen. Byrd). With respect to the press release, the power companies

call it a "transcript," but it is still, by its own terms, just a press release and lacks the force of law. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329-30 (1994) ("The Executive Branch actions – press releases, letters, and *amicus* briefs – on which Colgate here relies are merely precatory" and "lack the force of law"). Even if the press release were to be given any force, which it should not, the President said therein that "[w]e can make great progress in reducing emissions, and we will." Office of the Press Secretary, President Bush Discusses Global Climate Change (June 11, 2001), *available at* www.whitehouse.gov/news/releases/2001/06/20010611-2.html. The bargaining chip theory contradicts U.S. law and must be rejected.

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

The power companies have misstated the law of preemption. Their argument that, under *In re Oswego Barge Corp.*, 664 F.2d 327, 339 (2d Cir. 1981) ("*Oswego Barge I*"), Congress preempts federal judge-made law anytime it merely "legislates on the subject" in general without addressing remedies, AEP at 37, is demonstrably incorrect. In *Oswego Barge I* this Court held a federal nuisance action preempted because the statute "legislates on the subject *of recovery by the*

United States of its costs of cleaning up oil spilled into American waters." 664 F.2d at 339 (emphasis added); *accord In re Oswego Barge Corp.*, 673 F.2d 47, 48 (2d Cir. 1982) ("*Oswego Barge II*") ("in this instance *the precise and comprehensive statutory damage remedy* Congress has created for the United States is exclusive of non-statutory damage remedies.") (emphasis added).

The power companies are effectively asking the Court to disregard the Supreme Court's controlling decision in *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985). There, Congress had quite clearly legislated on the general subject and had even "augmented the protection of Indian property rights previously afforded by federal common law by adding an additional statutory prohibition." *Oneida Indian Nation of New York State v. County of Oneida*, 719 F.2d 525, 531 (2d Cir. 1983), *aff'd in part and rev'd in part on other grounds*, 470 U.S. at 236. But because the statute "did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment," there was no preemption. *Id*. The Supreme Court emphasized there is preemption only where Congress has spoken "*directly*" to the "*particular* issue." 470 U.S. at 236-37 (emphases in original) (quotation omitted). The power companies' request for a broad approach to preemption of federal

common law directly contradicts this instruction in *County of Oneida* to apply a narrow approach.[12]

There is a presumption *against* preemption of long-established federal common law. *United States v. Texas*, 507 U.S. 529, 534 (1993); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 10 (1st Cir. 2005) ("To show displacement of the [federal] common law causes of action . . . [defendant] must overcome this presumption"). The contrary *Milwaukee II* presumption in favor of preemption of federal common law applies *only* where Congress has provided a comprehensive remedial scheme:

> Section 1321(f) establishes a *comprehensive remedial scheme* providing for both strict liability up to specified limits and recovery of full costs upon proof of willful negligence or willful misconduct within the privity and knowledge of the owner. We must *therefore* start with a presumption that non-FWPCA maritime liabilities and remedies for oil spill cleanup costs of the United States have been preempted.

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[12] The power companies argue that *County of Oneida* involved a statute whose purpose was consistent with the federal common law claim whereas environmental statutes balance some unnamed "competing considerations." AEP at 43-44. This unsupported argument is incorrect. *See, e.g.*, 42 U.S.C. § 7401(b) (purposes of CAA); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001) (CAA "does not permit the EPA to consider costs in setting the [ambient air quality] standards"); *Oxygenated Fuels Ass'n, Inc. v. Pataki*, 293 F. Supp. 2d 170, 174 (N.D.N.Y. 2003) ("enhancement of air quality is clearly the overriding goal of CAA"); SPA-42 (purposes of Global Change Research Act).

Oswego Barge I, 664 F.2d at 339-40 (emphasis added); *accord Oswego Barge II*, 673 F.2d at 48 ("When Congress legislates on a subject *as comprehensively and precisely* as it has here, *City of Milwaukee* instructs that a presumption arises that common law within the scope of the subject of the legislation has been preempted.") (emphasis added). There is no comprehensive or precise remedial scheme for the claims at issue here. Thus, the power companies cannot avail themselves of the *Milwaukee II* presumption but rather must themselves rebut the presumption against preemption.

The power companies' reliance on *Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982), is misplaced. In *Outboard Marine*, a water pollution case addressing the residual effects of discharges pre-dating amendment of the water pollution control statute at issue in *Milwaukee II*, the court found preemption because Congress had "obviously considered" the "problem of pre-1972 discharges, and *specifically the appropriate role in the statutory scheme for remedies against polluters*." *Id*. at 478 (emphasis added).

The statutes upon which the power companies rely are plainly insufficient to preempt federal common law. These statutes merely require scientific research, technology development, and reporting of emissions levels by electric utilities. AEP at 38-40. Congress did not enact a remedial scheme nor, if it matters, did

Congress ever state that no action should be taken to reduce emissions of carbon dioxide or other greenhouse gases. One of the statutes actually states that "[n]othing in this [subchapter] shall be construed, interpreted, or applied to preclude or delay the planning or implementation of any Federal action designed, in whole or in part, to address the threats of stratospheric ozone depletion or global climate change." 15 U.S.C. § 2938(c). Given Congress' express statement that it was not trying to tie the hands of federal agencies, it could not have meant by negative implication to tie the hands of a coequal branch of government.[13]

In fact, Congress has stated plainly that "United States policy should seek to . . . limit mankind's adverse effect on the global climate by–(A) slowing the rate of increase of concentrations of greenhouse gases in the atmosphere in the near term; and (B) stabilizing or reducing atmospheric concentrations of greenhouse gases over the long term . . . ." Global Climate Protection Act of 1987, Pub. L. No. 100-204, Title XI, §1103(a) (uncodified), *reprinted at* 15 U.S.C. § 2901-note, SPA-41. The only way to slow the rate of increase of atmospheric concentrations of

[13] The power companies misrepresent a portion of the legislative history of the Energy Policy Act of 1992, *see* AEP at 45, which does not tie all mandatory domestic emissions reductions to international negotiations but rather states that "[w]e should take cost-effective actions that will reduce greenhouse gas emissions." H.R. Rep. No. 102-474, pt. 1 at 152 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 1975.

greenhouse gases is to reduce their absolute emissions levels. A-39. Far from being preempted by such broad legislative policies, federal nuisance is justified by them. *Milwaukee I*, 406 U.S. at 103 n.5; *Oswego Barge I*, 664 F.2d at 339 n.15.

The CAA does not preempt this federal nuisance claim. The power industry (and their trade association *amici*) achieved a major objective when they convinced EPA to rule that it has no jurisdiction under the CAA over carbon dioxide emissions. *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).[14] Yet they now contend that the political branches have somehow claimed solely for themselves the right to address mandatory limits on greenhouse gas emissions from major domestic sources. In *New England Legal Foundation v. Costle*, 666 F.2d 30, 32 n.2 (2d Cir. 1981), this Court observed that the selective regulatory structure of the CAA suggests that it does not preempt federal common law claims with respect to interstate air pollution that EPA has not regulated. Here, where EPA has ruled it

[14] *See also* Bob Kemper & Paul Singer, *When Congress Returns, Environmental Tussle Expected*, Chi. Trib., Aug. 23, 2003, at C10 ("industry lobbied intensely" for EPA global warming ruling); Seth Borenstein, *Bush Giving Business a Boost; Environmental Rule Changes Fulfill Corporate Wish List*, Pittsburgh Post-Gazette, Sept. 21, 2003, at A-11 (quoting *Amicus* U.S. Chamber of Commerce vice-president as stating that "[w]e certainly had a number of victories this week" with EPA ruling on global warming and other issues).

does not even have the power to regulate at all, there cannot possibly be preemption.

In short, by contending that Congress' failure to act has preemptive effect, the power companies invite the Court to turn the "speak directly" standard on its head. This invitation must be rejected.

C. This Case Presents No Political Question.

The power companies repeatedly disavowed the political question doctrine in the district court. *See* OSI Principal Br. at 5; *see also* SPA-120 ("We have not argued the political question doctrine."). In advancing their new position here, they make several significant errors.

First, even as they correctly point out that the political question inquiry requires analysis of the precise facts and posture of the particular case, the power companies ignore the salient features of this case. AEP at 48-49. This case involves domestic plaintiffs suing private, domestic defendants for domestic conduct causing domestic, environmental injuries. Unlike the cases cited by the power companies, it does not deal, for example, with a challenge to U.S. military operations abroad. *Id*. at 49-50.

Second, the power companies' argument that the Commerce Clause somehow constitutes a textual commitment of greenhouse gas emissions limits to Congress improperly conflates congressional authority to legislate with constitutional commitment. To establish constitutional commitment, the provision must be far more specific than simply authorizing legislative power. Not even plenary power by Congress over a subject matter establishes constitutional commitment. *County of Oneida*, 470 U.S. at 249.[15]

Third, in contending that there are no judicially-discoverable and manageable standards, the power companies improperly take issue with the facts alleged in the complaint. For example, they contend there are "scientific uncertainties" with respect to global warming, AEP at 55, whereas the complaint alleges a "clear scientific consensus" on global warming. A-37-38. The complaint also alleges that "[d]efendants have available to them practical, feasible and economically viable options for reducing carbon dioxide emissions without

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[15] The power companies suggest that *County of Oneida* is based upon federal statutes rather than federal common law but they cite the wrong *Oneida* case. *See* AEP at 53, 56 (citing *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982)). *County of Oneida* was unquestionably based upon federal common law. *See County of Oneida*, 719 F.2d at 531 ("We conclude that the Oneidas may assert a federal common law action to recover damages for the Counties' wrongful possession of their land."), *aff'd in part and rev'd in part on other grounds*, 470 U.S. at 236 ("we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law.").

significantly increasing the cost of electricity to their customers." A-22. The power companies' attempt to re-characterize this factual allegation as a "legal or policy conclusion[]," AEP at 56 n.21, must be rejected.[16]

Nor is there a lack of meaningful standards. AEP at 56. All public nuisance actions require there to be an "unreasonable interference" with public rights and courts have been able to give that standard meaning by reviewing the evidence in each case. *E.g.*, *Georgia v. Tennessee Copper Co*., 237 U.S. 474, 477-78 (1915) (setting emissions limits based upon scientific evidence); *cf. United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990) ("To be sure, the courts must develop standards" but there is "no reason that developing such standards will be more difficult in this context than any other."). At the appropriate time the relevant factual issues, such as the level at which global warming becomes dangerous, the

[16] The *amici* also improperly seek to dispute the factual allegations of the complaint. *See Amici* Law Professors Br. at 10-11 (contending that "almost every aspect of the [global warming] issue is open to debate, including whether and to what extent human activity is affecting the Earth's natural climate variations"), *id.* at 18 (alleging that "the extent of the emissions reductions that may be necessary" is "unknown" and "knowable."); UJAE *Amicus* at 7 (claiming that "there are no economically feasible or commercially viable technologies to reduce CO2 emissions from fossil fuel-burning stationary sources"). *Amicus* Inhofe has famously said that global warming is the "greatest hoax ever perpetrated on the American people," *see* Michael Mann, et al., Senator Inhofe on Climate Change, RealClimate.org (Jan. 10. 2005), *available at* http://www.realclimate.org/index.php?p=97, but a neutral fact-finder assessing the evidence may well disagree with his opinion.

atmospheric concentration of carbon dioxide that corresponds to such warming, the emissions reductions necessary to avoid such warming, and the defendants' appropriate share of such reductions, will be addressed by drawing upon the extraordinary body of scientific knowledge that has been brought to bear on this problem. This is not the time for factual disputes.

Fourth, the power companies argue, based upon *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), that pollution cases are difficult to manage. But even as it acknowledged their complexities, *Wyandotte* distinguished interstate pollution cases from "political questions." *Id*. at 496. Moreover, the Court in *Wyandotte* was addressing the problem of exercising its original jurisdiction to hear complex scientific evidence and, the following year, resolved that problem in *Milwaukee I*. Notably, the dissenting Justice in *Wyandotte*, who contended that such cases in fact are quite manageable, *see id.* at 510-12 (Douglas, J., dissenting), was the author of the unanimous opinion in *Milwaukee I*.

Finally, the major trade association for the power companies and other *amici* argue that individual polluters should not be held liable because global warming requires broadly applicable national and international rules rather than a "patchwork" of judicial rules. *See* Brief for *Amici Curiae* Alliance of Automobile Manufacturers, *et al.* at 20-22. However, this argument is disingenuous as many

of these same groups have engaged in a long campaign to dissuade the political branches from ever adopting such broad rules, which they strenuously oppose.[17] Their further argument that countless companies could be sued individually if this case were allowed to proceed is entirely unsupported and is contradicted by those who have researched the question.[18]

The power companies and their *amici* are really protesting the application of judicial remedies to individual companies that contribute to a large-scale wrong. But this Court has rejected that very justiciability argument in a case that sought

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[17] *See, e.g.*, Clean Power Act, S. 556: Hearing Before Senate Comm. on Env't & Pub. Works, 107th Cong. (Nov. 15, 2001) ("EEI [*Amicus* Edison Electric Institute] opposes regulation of carbon dioxide (CO_2) and other greenhouse gases as pollutants under the Clean Air Act or other statutes.") (Statement of Gerard M. Anderson on behalf of *Amicus* EEI), *available at* http://epw.senate.gov/107th/Anderson_1115.htm; Christopher Drew & Richard A. Oppel, Jr., *Air War – Remaking Energy Policy: How Power Lobby Won Battle of Pollution Control at EPA*, N.Y. Times, Mar. 6, 2004, at A1; John H. Cushman Jr., *Industrial Group Plans to Battle Climate Treaty*, N.Y. Times, Apr. 26, 1998, at A1 (*Amicus* American Petroleum Institute planned campaign to battle industry-wide rules on climate change); *see also* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1, 4 n.12 (2003) (industry has "been devoting enormous resources to confounding the public with an appalling public relations campaign of deception and disinformation") (quotation omitted); Matthew L. Wald, *Pro-Coal Ad Campaign Disputes Warming Idea*, N.Y. Times, July 8, 1991, at D2 (*Amicus* EEI helped organize campaign to "'reposition global warming as theory (not fact).'").

[18] *See* Grossman, *supra*, 28 Colum. J. Envtl. L. at 29 ("there are a limited number of relevant companies").

vindication of American Indian title to over five million acres of New York land stretching from Pennsylvania to the Canadian border:

> The defendants point to the scale of the wrong alleged and the size of the remedy sought as rendering the claims nonjusticiable. We do not doubt that a declaratory judgment declaring the New York treaties invalid could cause substantial dislocations in the affected lands casting a cloud over all current title holders, and that the impact of a monetary award could be heavy. Yet 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 redressed. Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and "disruptive" remedies. . . . However preferable a legislative solution might be, in its absence the Oneidas' claims are justiciable notwithstanding the complexity of the issues involved and the magnitude of the relief requested.

Oneida Indian Nation of New York, 691 F.2d at 1083 (citations and footnote omitted). The size of the global warming problem does not render this case a political question. And here, as in that case, "[e]ven were no other relief appropriate, the request for declaratory relief would alone render the claims justiciable." 691 F.2d at 1082.

By the power companies' standards, nearly every issue would become a political question. Their analysis would have barred the courts from considering desegregation cases, which resolved cases involving matters that the political branches were actively involved in. There is no need to create new political question law, however. This case is justiciable.

IV. THE LAND TRUSTS HAVE STANDING.

Given the fact-intensive nature of standing, it would be wholly inappropriate at this stage to deny plaintiffs the opportunity to demonstrate the relevant facts. *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 689 (1973) ("we deal here simply with the pleadings"); *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003).

The complaint here alleges that global warming has begun, has increased temperature throughout the world, A-37-38, and already has "resulted in poleward and altitudinal shifts of plant and animal ranges, and the decline of animal and plant populations in many locations throughout the world," A-41. It further alleges that the land trusts' hold "properties whose special ecological value will be diminished or destroyed by the global warming to which Defendants' carbon dioxide emissions contribute." A-43, A-45-46. Although the complaint alleges that global warming will *continue and worsen* for a very long time, A-42-43, it nowhere states that the injuries will be held off for *any* period of time. Rather, it states repeatedly that the injuries "will" occur, A-47-48, and states that they are "imminent," A-51. The certainty of the injuries here distinguishes cases such as *Whitmore v. Arkansas*, 495 U.S. 149 (1990), involving contingent injuries. *Cf.*

Motorola Credit Corp. v. Uzan, 388 F.3d 39, 55 (2d Cir. 2004) ("injury to [plaintiffs] was not contingent on any future event").

The power companies creatively string together various allegations of the complaint to provide the appearance of a long chain of causal events culminating in injury (including allegations that are not in the causal chain). Cinergy at 18-19. However, the complaint actually alleges far fewer steps, i.e., that defendants' carbon dioxide emissions trap heat and that the heat causes all injuries - including the direct destruction of climate-dependent ecosystems on plaintiffs' properties. A-38-41, A-48-51. Moreover, the Supreme Court has rejected "attenuated line of causation" arguments at the pleading stage. *SCRAP*, 412 U.S. at 688. The power companies' unsupported argument that, in a multiple polluter case, each defendant's discharges must be "at levels that are inherently harmful" and must "alone cause" the harm, Cinergy at 18-19, is the exact opposite of the law in such cases. *See supra* Section IB7.[19]

[19] The power companies' reliance on *Texas Independent Producers & Royalty Owners Association v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005), is misplaced as the plaintiff there failed to "establish that any discharge has actually occurred." In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-43 (1976), the defendant's conduct might have had nothing to do at all with the harm alleged.

Finally, the power companies' contention that statutory cases are different for purposes of causation and redressability is incorrect. *Raines v. Byrd*, 521 US 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing"); *Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 147 (2d Cir. 1992) ("Congress may not dispense with the dictates of Article III" but may only define rights for purposes of injury-in-fact.).[20]

The land trusts deserve the same opportunity as other plaintiffs have enjoyed in recent global warming cases to introduce evidence in support of their allegations on standing. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir 2005); *Friends of the Earth, Inc. v. Watson*, No. C 02-4106-JSW (N.D. Cal. Aug. 23, 2005), *available at* http://www.climatelawsuit.org. The Land Trusts have standing.

[20] The power companies state that *United States EPA ex rel. McKeown v. Port Auth.*, 162 F. Supp. 2d 173, 190 (S.D.N.Y. 2001), was a federal common law case but the court there interpreted the *pro se* complaint's erroneous invocation of federal common law "as alleging violations of federal statutes governing those subject matters."

V. THE LAND TRUSTS' ALTERNATIVE STATE-LAW CLAIMS ARE BEYOND THE SCOPE OF THE APPEAL.

The alternative state-law claims are not preempted. *See Ouellette*, 479 U.S. 481; *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *see also supra* Section IIA. Those claims, moreover, are beyond the scope of this appeal. *Thompson v. County of Franklin*, 15 F.3d 245, 253 (2d Cir. 1994) ("preferred practice" is to remand issue not addressed below where it has been "briefed and argued only cursorily in this Court.") (quotation omitted). Prior to addressing the state-law claims, the Court would need to undertake a supplemental jurisdiction analysis. The power companies argued below that "there is no basis for exercising supplemental jurisdiction." *See* Memo. of Law in Support of Defs. Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim at 38. Yet they now urge the Court to rule on the supplemental claims. The issue is complicated by the claims against TVA, which give rise to original federal jurisdiction so long as TVA remains in the case. *See* OSI Principal Br. at 2. And given that federal common law preempts state common law, under *Ouellette* the state-law claims will remain inoperative unless and until Congress and EPA begin regulating carbon dioxide. The Court should not rule on the state-law claims.

CONCLUSION

The land trusts respectfully request the Court reverse the order dismissing the case.

Dated: March 16, 2006

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Dated: March 16, 2006

_____

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Reply Brief for Plaintiffs-Appellants

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

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