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.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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MISCELLANEOUS AUTHORITIES

PRELIMINARY STATEMENT

As a consequence of human-induced climate change, the Plaintiff States and City of New York are suffering serious harms, and will suffer potentially devastating harms, to their essential natural resources. They assert an interstate nuisance action against the five largest domestic contributors to global warming, seeking injunctive relief to decrease the magnitude and speed of the those harms.

Defendants raise two primary objections. First, they argue that there are many contributors to global warming, that they are but a small part of the problem, and that global warming science is too uncertain to attribute responsibility for Plaintiffs' injuries to them. Defendants, though, fail to acknowledge the nature of an interstate nuisance action and the principles upon which it is grounded. Interstate nuisance law permits a sovereign to eliminate or reduce injurious conditions before the public suffers harms or, at least, before all harms are realized. Plaintiffs, of course, will have to prove that Defendants' emissions are contributing to an increase in the magnitude and speed of their harms. But, as Plaintiffs are not seeking damages for already suffered harm, they will not have to link Defendants' emissions to particular injuries in order to monetize Defendants' share of the contribution. In a public nuisance abatement action, a sovereign may require reductions from major contributors, regardless of whether there are other contributory causes or whether particular injuries can be traced to

individual, joint contributors. Defendants' proposed limitations on federal common law and standing proceed from the contrary, faulty premise that a sovereign must be able to trace particular harms to particular contributors before it can abate contributions to a public nuisance.

Defendants' second objection is that global warming is a worldwide problem, which therefore requires a top-down, worldwide solution that will balance economic and social interests. Pointing to Congress' Commerce Clause power and the Executive's treaty-making power, they contend that the political branches are the only branches competent to provide such a global solution.

Plaintiffs do not and need not seek a global solution, though. And, more fundamentally, in arguing that either this or that branch must address particular global warming harms, Defendants present a false choice. Neither governmental structure nor precedent support their argument. The Framers recognized the value of both legislative policy solutions and of judicial application of principles to resolve controversies. Accordingly, they generally declined to categorize specific issues as exclusively lying within the province of one or another branch; at most, they assigned different functions to the different branches. Nowhere is this more evident than regarding issues such as interstate controversies: the Framers explicitly contemplated that such controversies could be resolved by courts

applying general principles of law, and could also be addressed, and the judicial resolution displaced by, political solutions.

This litigation falls comfortably within that system of constructive overlap. Nothing a court does in this litigation — which involves only adjudication of common law rights and responsibilities — prevents the political branches from crafting a global, political solution that would displace the common law principles applied here. Currently, however, neither the political branches' latent but unused power to address global warming, nor their study of the issue, come close to displacement of the States' existing interstate common-law remedies, any more than they demonstrate an intent to preempt state actions to address the problem within the States' own boundaries. Defendants' attempts to mold other doctrines into some kind of "displacement by silence" argument are no more availing: neither judicially acknowledged limitations on federal common law nor the political question doctrine require the result Defendants seek.

ARGUMENT

POINT I

THE COMPLAINT STATES A CLAIM UNDER FEDERAL COMMON LAW

Under well-established federal common law, Plaintiffs are entitled to abatement of out-of-state domestic contributions to interstate nuisances. Brief for State of Connecticut et al. ("States at __") at 47-57. Defendants answer with two theories limiting federal court power to remedy sovereign injuries: first, that federal common law applies only if the political branches of the federal government lack any power to address a problem, Brief of American Electric Power et al. ("AEP at __") at 15-20; and, second, that the federal common law of nuisance is limited to "simple" nuisances, which defendants define to include only the harms typically resolved in private nuisance actions and to exclude the harms that are the proper subject of public nuisance law, id. at 20-23. Defendants have turned the relevant case law on its head.

A. Federal Common Law Is Not Limited to Areas in Which Congress Cannot Act.

Plaintiffs earlier refuted the argument that Defendants relied on below – that interstate nuisance law was largely swept away by Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). States at 48-50. Here, Defendants mention that argument only in

passing, AEP at 19, 24-25, and instead focus on a novel "constitutional necessity" argument: The federal courts' adjudication of interstate controversies was a gap-filling measure, made necessary because Congress' Commerce Clause power did not reach such controversies. Now that the Commerce Clause power covers such controversies, they contend, federal common law has been displaced. AEP at 15-20.

This theory cannot withstand scrutiny. Courts have never held that federal common law remedies are contingent on the absence of Congressional power. Thus, in Missouri v. Illinois, 200 U.S. 496 (1906) ("Missouri II"), the Court explained that, "whether Congress could act or not," the Constitution provided Missouri with a judicial remedy if Illinois or entities within Illinois created a public nuisance. Id. at 519-20. It explained that, in a previous case involving an obstruction of the Ohio River, "[i]t hardly was disputed that Congress could deal with the matter under its power to regulate commerce," but treated this fact as supporting, not undermining, the application of federal common law absent Congressional action. Id. at 518-19 (internal citation omitted). Finally, it acknowledged that some interstate nuisance cases might fall outside the Commerce Clause power, but that only meant that the Court should be particularly careful when articulating the rules in such cases. Id. at 520.

Similarly, many years later, the Court in Illinois v. Milwaukee, 406 U.S. 91 (1972) ("Milwaukee I"), agreed that

Illinois could invoke federal common law to abate its neighbor's discharges, even though Congress was then debating amendments to the Clean Water Act that would cover those discharges. By 1972, there was no doubt that Congress had the power to address water pollution in the Great Lakes.

In sum, laws — not latent, but unused powers — are necessary to displace federal common law:

> This Court has frequently resolved . . . controversies between a State that introduces pollutants to a waterway and a downstream State that objects. . . . [H]owever, we remained aware that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.

Arkansas v. Oklahoma, 503 U.S. 91, 98 (1992) (internal quotation marks omitted; emphasis added).[1]

In demanding exclusivity for areas in which Congress can act, Defendants seek a return to the Articles of Confederation, which granted Congress such a role. See Articles of Confederation, art. IX (1781). This structure, however, proved unworkable because Congress failed to act and, unrestrained by Congress, "[c]ompetition among the states . . . to gain control of scarce resources . . . constituted the normal course of affairs under the Confederation." Peter S. Onuf, The Origins of

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[1] The Court also frequently has resolved interstate water disputes where Congress indisputably had Commerce Clause power to legislate, refuting Defendants' mistaken reliance on Kansas v. Colorado, 206 U.S. 46 (1907); AEP at 17-18. See, e.g., Nebraska v. Wyoming, 515 U.S. 1 (1995); New Jersey v. New York, 283 U.S. 805 (1931).

the Federal Republic 187 (1983). Thus, the Constitutional Assembly rejected provisions that would have continued Congress' exclusive role in resolving the States' complaints, Missouri v. Illinois, 180 U.S. 208, 223 (1901) ("Missouri I"), and gave the federal judiciary the authority to resolve state complaints, at least in the first instance. Rhode Island v. Massachusetts, 37 U.S. 657, 737, 743 (1838); see also Georgia v. Tennessee Copper Co., 206 U.S. 237 (1907) ("Tennessee Copper"); Missouri II, 200 U.S. at 519. Pursuant to that authority, the federal courts have resolved, and continue to resolve, interstate controversies, regardless of the existence or absence of Congressional power.

B. Interstate Nuisance Actions Are Properly Brought For Abatement Of Serious Injuries To Widely Held Public Rights.

Defendants, drawing on isolated references to adjudication of "simple" nuisances, argue first that an interstate nuisance action can be brought only to address simple nuisances, and second that such simple nuisances encompass only those "where immediately noxious or harmful substances invade a State and cause severe localized harm that can be directly traced to an out-of-state source." AEP at 21. But the case law directly contradicts Defendants' contentions; furthermore, their theory that interstate nuisance law addresses "simple," one contributor, localized nuisances makes no conceptual sense, given that

interstate nuisance is meant to address injuries of "serious magnitude" and broad public significance. See, e.g., New York v. New Jersey, 256 U.S. 296, 309 (1921); Tennessee Copper, 206 U.S. at 238-39; Missouri II, 200 U.S. at 521.

1. The Supreme Court has not limited States' interstate nuisance cause of action to "simple" nuisances.

The Supreme Court has never identified the "simplicity" of a nuisance as a condition for relief. Rather, the cases establish that an interstate nuisance, whether simple or complex, is actionable so long as the complaining State proves its case.

The Court has referred to "simple" nuisances only four times, and then merely to describe a type of nuisance in which a complaining State will have little difficulty proving harm. Thus, in Missouri I, the Court rejected a motion to dismiss Missouri's complaint that Illinois' sewage was causing typhoid in Missouri. 180 U.S. at 249. Subsequently, after consideration of the parties' evidence, the Court noted that the link between sewage discharges and typhoid outbreaks 357 miles downstream was not simple, in the sense that no such link could have been identified with the "unassisted senses." Missouri II, 200 U.S. at 522. But the Court then considered whether Missouri, using the science of the day, had proven the complex nuisance alleged. It concluded that Missouri had not. Id. at 522-26. The Court

nowhere suggested that the "simple" nature of a nuisance is a condition for relief, but rather indicated that a "complex" nuisance is actionable, if proven.

Likewise, in North Dakota v. Minnesota, the Court stated that:

> [W]here one State . . . increases the flow into an interstate stream, so that . . . water is thrown upon the farms of another State, . . . 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.

263 U.S. 365, 374 (1923). Again, the Court suggested that a simple nuisance would be actionable, but it did not hold that only such nuisances are actionable.

Milwaukee I quoted the above-excerpted portion of North Dakota to show that water pollution may be actionable. 406 U.S. at 107 & n.8. Finally, in Arkansas v. Oklahoma, the Court quoted from Missouri II for the proposition that discharges from a water treatment facility that are cleaner than the receiving waters cannot be said to be harmful. 503 U.S. at 114 n.19. Thus, in no case has the Court attributed any significance to the simplicity or complexity of a nuisance, other than to suggest that proof of a simple nuisance may be easier.

2. Interstate nuisance doctrine governs serious public nuisances, not localized, private nuisances.

Defendants further argue that actionable interstate nuisances are limited to conditions involving [1] "localized harm" from [2] "immediately noxious or harmful substances" that are [3] "directly trace[able]" to [4] "an out-of-state source." AEP at 21.

Interstate nuisance precedent contradicts Defendants' proposed limitations. The Supreme Court has repeatedly emphasized that the touchstone of the interstate nuisance action is widespread, not "localized," harm. For example, in Missouri I, in explaining why Missouri's complaint stated a claim, the Court emphasized the pervasive nature of the harm: "[t]he health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State." 180 U.S. at 241. Similarly, in granting Georgia an injunction in Tennessee Copper, the Court emphasized the widespread nature of the harm in Georgia: "[W]e are satisfied by a preponderance of evidence that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not health, within the plaintiff State as to make out a case." 206 U.S. at 238-39.

Nor is interstate nuisance limited to "immediately noxious or harmful substances." For example, in North Dakota v. Minnesota, although the Court ultimately found North Dakota had not proved its case, it held that flooding may be actionable, even though water is not immediately noxious. 263 U.S. at 374.

Defendants' "directly traceable" requirement is also unfounded. Even in ordinary tort law, responsibility for an event is attributable to any actual cause if harm, or increased harm, is the natural product of that cause. See Caraballo v. United States, 830 F.2d 19, 22 (2d Cir. 1987) (actor is responsible if actions set in motion a "natural sequence" of occurrences). Here, Defendants' emissions will produce increased warming, with consequences such as rising sea levels, melting snowcaps, and increasing storm intensity, through natural, physical laws. The complexity of physical processes does not excuse Defendants' responsibility any more than causation and responsibility are negated by the physical and biological complexities in toxic tort cases. Cf. Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (hazardous chemicals leaking from landfill into drinking water, resulting in various ailments). Instead, responsibility is excused only by those "intervening cause[s]" that "interrupt[] the natural sequence of events . . . [and] prevent[] the natural and probable result of the original act or omission, . . . produc[ing] a different result that could not have been reasonably anticipated." Becker

v. Poling Transp. Corp., 356 F.3d 381, 392 (2d Cir. 2004) (internal quotation marks omitted). Defendants do not and cannot identify any such intervening cause.

The Supreme Court's interstate nuisance cases confirm that the "directness" of the causal chain is not an element of the cause of action. In Missouri I and Missouri II, the exposure pathway by which discharges might travel over 350 miles and etiology by which such discharges might result in disease involved complex natural phenomena, yet the Court did not hold that such complexity precluded legal responsibility. Rather, it permitted Missouri to present its proof. Similarly, in Tennessee Copper, 206 U.S. at 239, the Court enjoined sulfur dioxide emissions, though the natural processes by which such emissions contribute to forest destruction are anything but "direct." See Thad Godish, Air Quality 178-79 (2d ed. 1991); see also New York v. Shore Realty Co., 759 F.2d 1032 (2d Cir. 1985) (nuisance claim for injuries from toxic waste dump through leaking containers, groundwater flow, and human exposure).

Defendants' final claim, that interstate nuisance is limited to cases with a single or few clearly identified out-of-state sources, is not supported by a single decision holding that the mere presence of other contributors, either large or small, bars an action seeking abatement by the most significant contributors. The case law suggests that the mere presence of multiple contributors is a nonissue. For example, in Tennessee Copper,

the Court explicitly noted that Georgia could obtain relief from several out-of-state contributors to destruction of its forests, "whatever domestic destruction they have suffered." 206 U.S. at 238.[2]

The reason for this is clear. It was well-established by the time of Tennessee Copper that interstate nuisance law draws on general rules of public nuisance, see Missouri I, 180 U.S. at 243-47 (surveying and relying on state public nuisance decisions), which has never attributed significance to the mere fact of multiple contributors. Many seminal public nuisance cases of the time involved multiple contributors, many of whom were not specifically identifiable. See Lockwood Co. v. Lawrence, 77 Me. 297 (1885) (enjoining discharges of multiple sawmill operators); California v. Gold Run Ditch & Mining Co., 66 Cal. 155 (1884) (enjoining mining company's dumping into river, notwithstanding that wastes created danger only in conjunction with those of other mining companies); Woodyear v. Schaefer, 57 Md. 1 (1881) (enjoining one of many slaughterhouses from dumping blood into river). The law remains the same today. See Shore Realty, 759 F.2d at 1050-52 (affirming applicability of public nuisance law to one of multiple polluters).

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[2] Defendants suggest that the domestic contributors the Court referred to may have been loggers, AEP at 28, but offers no support for this hypothesis.

Defendants seek support in several cases in which defendants prevailed where there were other contributors. See AEP at 28. But defendants did not prevail on the pleadings, as they would have if the presence of multiple contributors were a bar, but only prevailed after proving that they had not caused the harmful condition at all. Missouri II, 200 U.S. at 522-26; North Dakota, 263 U.S. at 385-87.

In the final analysis, Defendants propose to supplant the interstate nuisance doctrine found in the cases with a scaled-down version that would permit States only to address petty invasions. But they fail to acknowledge that public nuisance is concerned with broad public harms, not private tort injuries, and that in interstate nuisance, if anything, the emphasis on broad public harm is clearer still. While private nuisance is concerned with interferences with "private enjoyment of private property," public nuisance, which is "derived from . . . the sovereign's police power and not from tort law," vindicates "interest[s] . . . shared by the general public." Robert Abrams & Val Washington, The Misunderstood Law of Public Nuisance: A Comparison With Private Nuisance Twenty Years After Boomer, 54 Alb. L. Rev. 359, 362, 364 (1990) (collecting cases). Furthermore, as the case law recognizes, the interstate nuisance action was specifically created to address the most severe threats to state quasi-sovereign interests. The linchpin of an interstate nuisance is a harmful condition of such "serious

magnitude" and so widespread that it amounts to a threat to the sovereign and, if the sovereign were an independent nation, would be of "international importance." Missouri II, 200 U.S. at 518, 521.

While the presence of noxious substances may make it more likely that an injury will be sufficiently serious, Defendants' other proposed limitations would in fact render it less likely that the injury would be so serious as to justify the recognized interstate nuisance claim. Such injuries would be more akin to private nuisances. A problem caused by multiple actors, whose contributions aggregate into serious, widespread harm, is far more likely to implicate interstate nuisance's motivating concerns. Can Defendants really contend that interstate nuisance should be impotent to enjoin significant contributors from dumping hazardous wastes in a river, merely because similar dumping of waste could be traced to numerous other businesses and households, and harm is not localized? In sum, rather than permitting States to protect themselves from the gravest threats to their essential resources, Defendants' theory – unsupported by principle or precedent – would allow States to obtain judicial redress only for narrow invasions of the kinds of interests protected by private nuisance.

C. New York City May Properly Bring An Interstate Nuisance Action.

Defendants assert that New York City, because it is not a State, may not bring an interstate nuisance cause of action. AEP at 33. Defendants did not raise this contention below, and the district court did not address it, so the issue should be left in the first instance to the district court on remand. That said, a municipality's ability to state a claim under the federal common law of public nuisance is well-established. See City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979); Twp. of Long Beach v. City of New York, 445 F. Supp. 1203, 1213-14 (D.N.J. 1978).

Moreover, New York City's home rule powers make the question of whether municipalities generally may bring such a cause of action irrelevant. Because of New York State's constitutional structure and "[t]he substantial degree of autonomy historically enjoyed by New York City to act on matters of local concern," New York City has been deemed a proper party to invoke sovereign police powers in abating public nuisances. City of New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d 256, 264 (E.D.N.Y. 2004).

D. Plaintiffs' Claim Will Not Open The Floodgates.

Defendants and their amici repeatedly speculate that this case will open the floodgates to litigation. See, e.g., AEP at 30. The cause of action Plaintiffs invoke, though, is limited and provides no grounds for such concerns.

First, Plaintiffs invoke a line of cases in which sovereign States have brought interstate nuisance claims against domestic actors in other States. The Supreme Court cases upon which Plaintiffs rely recognize a cause of action that States, and by implication some municipalities, can invoke.[3]

Second, although this point anticipates the remedial stage of the litigation, a significant limitation on both potential plaintiffs and potential defendants is provided by the principle that, in an interstate nuisance action, the availability and form of injunctive relief may be limited by equitable principles. States at 54-55; see Nebraska v. Wyoming, 515 U.S. 1, 14-15 (1995) (in interstate water allocation dispute, a complaining State's failure to limit water use within its own borders might, under certain circumstances, "affect the relief") (citing

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[3] In OSI, private land trusts rely on the traditional right of a private party to bring a public nuisance action if the private party has a special interest distinct from the public at large. Plaintiffs here agree that the private land trusts, whose sole reason for existence is preservation of natural resources, have shown a special, indeed almost unique, public interest sufficient to invoke interstate nuisance.

Missouri II, 200 U.S. at 522); Illinois v. Milwaukee, 599 F.2d 151, 172-73 (7th Cir. 1979) ("there is precedent, in a case of this kind, for considering the rules of the complaining State as an indication of what is appropriate for the protection of the residents of that state," though "[a] trial court is not limited by the law of the complaining state with respect to each detail of the relief to be granted"), vacated on other grounds, Milwaukee v. Illinois, 451 U.S. 304 (1981) ("Milwaukee II").

Third, the history of public nuisance prosecution belies the suggestion that sovereign States will pursue minor contributors. Because resources are limited and because States take their role in serving the public interest seriously, the record demonstrates that they have consistently targeted only the most significant contributors to very serious injuries. Indeed, because of the States' restraint, courts have rarely had any reason to address the issue of de minimis contributors. Cf. Illinois v. Milwaukee, 1973 U.S. Dist. LEXIS 15607, at * 22-23 (N.D. Ill. 1973) ("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."), aff'd in relevant part and rev'd in part, 599 F.2d 151, vacated on other grounds, Milwaukee II, supra. While this may be of no comfort to Defendants, the five largest carbon dioxide polluters, it does close the floodgates.

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

As Defendants agree, the Supreme Court's decisions in Milwaukee I, Milwaukee II, and County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 236-37 (1985), establish the framework for determining whether the States' federal common law remedy is displaced. In interstate pollution cases, where federal law governs rather than state law, the question is simply "whether federal statutory or federal common law governs." Milwaukee II, 451 U.S. at 316-17. Here, where no federal statutory law governs, federal common law must provide the rule of decision.

Arguments similar to Defendants' contention that global warming research and reporting statutes alone displace the States' common-law remedy were rejected in Milwaukee I and County of Oneida. States at 60-61. Defendants do not contest that water pollution laws in place at the time of Milwaukee I were more comprehensive than the research and reporting provisions here, but suggest that the Milwaukee I Court did not undertake "a detailed displacement analysis." AEP at 41. In fact, the Court evaluated the existing statutory requirements, 406 U.S. at 101-03, and concluded that the "remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress." Id. at 103 (emphasis added).

Similarly, in County of Oneida, the Court found it decisive that the Indian land rights legislation at issue, unlike the amended Clean Water Act in Milwaukee II, did not "'[speak] directly,'" to the relevant question — the "question of remedies for unlawful conveyances of Indian land." 470 U.S. at 237 (quoting Milwaukee II, 451 U.S. at 315) (emphasis in original) Defendants attempt to distinguish County of Oneida, claiming that a subsequent Congress passed legislation that indicated its recognition that common-law suits existed earlier. AEP at 43. But it is well-established that the "view of a later Congress cannot control the interpretation of an earlier enacted statute," O'Gilvie v. United States, 519 U.S. 79, 90 (1996), so any subsequent law could not have governed the Court's decision.

Nor do Defendants benefit from the "presumption" in favor of preemption discussed in In re Oswego Barge Corp., 664 F.2d 327 (2d Cir. 1981). Contrary to Defendants' argument, the Supreme Court has identified a presumption against abrogation of federal common law. See United States v. Texas, 507 U.S. 529, 534 (1993). The Oswego Barge presumption applies only if the federal legislation addresses the same subject as the disputed common-law claim. In Oswego Barge, this Court defined the subject narrowly as "recovery by the United States of its costs of cleaning up oil spilled into American waters," not oil spills in general, and concluded that the statute displaced common-law claims for costs of responding to an oil spill in American waters but not the

costs of responding to the same spill in Canadian waters. 664 F.2d at 339, 345. If a claim for recovery of costs of responding to a spill in Canadian waters falls outside the scope of oil spill cost-recovery legislation, a claim to reduce injuries caused by global warming emissions must fall outside the scope of global warming research and reporting legislation.

Defendants' reliance on Illinois v. Outboard Marine Corp., 680 F.2d 473 (7th Cir. 1982), is also misplaced. There, the Seventh Circuit rejected common-law claims relating to pre-Clean Water Act discharges because "Congress has obviously considered the problem of pre-1972 discharges, and enacted some solution." Id. at 478 (emphasis added). Here, Congress has enacted no such solution. Although Congress has periodically considered global warming, it has not enacted a comprehensive solution — or indeed, any solution — to the problem nor a remedy for Plaintiffs' injuries. Indeed, Defendants' argument that Congress enacted research and study provisions to enable it to make a policy choice regarding the appropriate response to global warming, AEP at 40, effectively concedes that Congress has not yet made that policy choice.

Finally, Defendants rely on state-law preemption cases to argue that the States' federal common-law claim is displaced. AEP at 46-48. But the Supremacy Clause considerations governing state-law preemption differ from the separation of powers principles governing displacement of federal common law, and the

Supreme Court has made clear that case law regarding the former does not govern the latter. Milwaukee II, 451 U.S. at 316. However, even if the principles of state-law preemption were applicable, they do not preempt the States' claims, as explained below. See infra at Point IV; see also infra at 26-27.

In sum, Plaintiffs' federal common-law claim properly applies to the global warming injuries alleged here and is not displaced by what little Congress has done.

POINT II

THE POLITICAL QUESTION DOCTRINE DOES NOT BAR PLAINTIFFS' COMMON-LAW CLAIMS

Defendants seek to supplant the limited political question doctrine in the case law with one that would foreclose litigation based on an amorphous, subjective assessment of whether a case involves "policy."

The political question doctrine, though, bars only a narrow class of cases in which the exercise of jurisdiction could bring the courts into irreconcilable conflict that could so interfere with the work of the political branches as to undermine their independence. There is no such potential here. States at 16-23.

A. The Political Question Doctrine Creates No Bar Where The Political Branches Can Readily Supplant The Relevant Common-Law Principles.

The political question doctrine exists to police "inappropriate interference" by the judiciary in the business of the other branches. United States v. Munoz-Flores, 495 U.S. 385, 394 (1990). Courts have found impermissible interference only in cases requiring adjudication of constitutional issues or those pertaining to the rights, powers and obligations of sovereigns in international affairs (questions of "international sovereign right"). States at 16. A court's resolution of such issues may be the last word, sometimes leading to irreconcilable conflict with the other branches. Id. at 17-21.

Defendants complain that this is a "sweeping generalization[]," AEP at 48, but fail to explain why it is not accurate and dispositive. Defendants' cases merely confirm that nonjusticiable political questions have been found only in cases involving constitutional or international sovereign rights issues. AEP at 50. For example, in Greenham Women against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985), plaintiffs argued that the nation's deployment of cruise missiles in Europe was actionable, because it: "contravene[d] several customary norms of international law"; "violate[d] [plaintiffs'] rights guaranteed by the fifth and ninth amendments"; and encroached on Congress'

"constitutional right and responsibility" to declare war and provide for the general defense. 591 F. Supp. at 1334. Thus, every claim required adjudication of international sovereign rights or constitutional issues.

In Zuckerbraun v. General Dynamics Corp., 755 F. Supp. 1134, 1141-42 (D. Conn. 1990), aff'd, 935 F.2d 544 (2d Cir. 1991), this Court did not address the political question issue. Compare AEP at 50, with 935 F.2d at 548 n.11 (expressly declining to reach question). The district court, however, did. The plaintiff claimed that casualties suffered during an Iraqi attack on a United States navy vessel were attributable to defective weapons design. 755 F. Supp. at 1135. As the district court noted, "[o]n the issue of causation, this court would need to examine the appropriateness of the [Navy's] rules of engagement" and "the appropriateness of the reaction of the USS Stark crew." Id. at 1142. The appropriateness of military action, of course, depends on the international norms of war restraining such action. Moreover, the United States had negotiated a settlement with the Iraqi government, id. at 1136, so plaintiffs' claims effectively challenged the terms of an international agreement.

Similarly, Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), confirms rather than refutes Plaintiffs' categorization of the cases. The case, a challenge to military actions in Cambodia, squarely raised "the constitutional propriety of the means by which Congress has chosen to ratify and approve the

protracted military operations in Southeast Asia." 484 F.2d at 1309 (internal quotation marks omitted). It also involved the compliance of the United States with international legal norms: allegedly, at the same time the United States "was publicly proclaiming respect for Cambodian neutrality," it was "secretly" bombing Cambodia. Id. at 1317 (Oakes, J., dissenting). Holtzman was squarely a constitutional and international sovereign rights case.

Finally, Defendants note that courts do not always find a political question in cases involving constitutional or international sovereign-rights issues. AEP at 49-50. The observation is true, but uninteresting. Plaintiffs argue that a political question is found only in matters of constitutional or international sovereign right, and there is no such question here. Plaintiffs never suggested that the existence of a constitutional or international sovereign rights issue would always foreclose adjudication. See States at 18, 19.

B. Review of the Baker v. Carr Factors Confirms That The States' Claim for Relief Is Justiciable.

A review of the factors set forth in Baker v. Carr, 369 U.S. 186, 198 (1962), confirms that the political question doctrine presents no bar. States at 26-37. Defendants' responses are unavailing.

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

Contrary to the arguments of Defendants and their amici, neither the Commerce Clause nor any constitutional provision regarding the Executive's foreign affairs powers establish a "textually demonstrable commitment" to the political branches of questions concerning mandatory restrictions on greenhouse gas emissions.

First, the claim that any issue that Congress has authority to address under its Commerce Clause power is "textually committed" to Congress is completely untenable. The theory would sweep all manner of issues that federal courts routinely adjudicate under federal common law into political question purgatory. See, e.g., Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 816-20 (2001) (discussing long-standing federal common-law role in maritime cases that squarely fall within Congress' power to regulate); Nebraska, 515 U.S. 1 (interstate water rights); Milwaukee I, 406 U.S. at 107. See also County of Oneida, 470 U.S. at 249 (rejecting political question bar to federal common-law claim, notwithstanding Congress' clear power to regulate under Indian Commerce Clause). Defendants' reading of the political question doctrine would render displacement analysis pointless, because any subject within Congress' power to address would automatically fall

outside of judicial authority, regardless of whether Congress legislated on the subject and intended to preempt.

Second, Defendants and their amici's position on the reach of the Executive's exclusive foreign affairs powers again ignores an obvious limitation in the case law: unlike this case, all their cited cases involved regulation of foreign relations — relations between the United States (or its citizens) and foreign sovereigns (or their citizens). See States at 27-28, 34-35. For example, in 767 Third Avenue Associates v. Consulate General of Yugoslavia, 218 F.3d 152 (2d Cir. 2000), and Can v. United States, 14 F.3d 160 (2d Cir. 1994), courts were asked to adjudicate the effect of international legal principles of state succession on the property rights of foreign governments. See also Brief of Amici Law Professors ("Amici Law Professors") at 18-20 (relying on Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005) (suit by Chilean official challenging actions taken by the United States government against the Chilean government)).

Similarly, the state-law preemption cases on which the amici rely, Amici Law Professors at 20-22, not only were grounded in federalism considerations alien to the political question doctrine, but also all involved attempted regulation of foreign relations — relations between domestic and foreign actors. The courts explicitly emphasized this latter fact in exploring the reach of the Executive's exclusive power. For example, in American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003), the

Court struck down a state law that would have required disclosures by foreign insurance companies potentially implicated in Nazi Germany's theft of property from Holocaust victims. It explained that the President's expansive powers in "dealing with other nations" includes resolution of "wartime claims against . . . nominally private" foreign entities, because it is often impossible in wartime to separate the actions of private industry from those of a foreign government. Id. at 415-16 (internal quotation marks omitted); see also Zschernig v. Miller, 389 U.S. 429, 441 (1968) (invalidating Oregon law barring foreigners' inheritance of property based on political system of home country); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 53 (1st Cir. 1999) (invalidating state boycott of businesses dealing with Burma, because "the design and intent of the law is to affect the affairs of a foreign country"), aff'd on other grounds Crosby v. Nat'l Foreign Trade Council 530 U.S. 363 (2000).

Thus, neither the Commerce Clause nor the President's foreign affairs powers constitute a textually demonstrable commitment of domestic carbon dioxide emissions limits to other branches.

2. This case will be decided under judicially manageable standards.

Defendants next argue that "[t]he complexities in [ordinary pollution cases] pale in comparison to those presented here" and that the court will have to conduct an open-ended inquiry into a broader social and economic calculus to resolve the case. AEP at 55-57. But this argument depends on a mischaracterization of the issues presented. Clear, manageable principles exist to resolve this matter.

First, on the determination of liability, federal courts have applied principles of strict liability in interstate nuisance cases. See States at 51-54. Defendants do not disagree on this point. AEP at 21-22. Strict liability is obviously "judicially manageable." A court must adjudicate causation, to be sure, and in this case scientific evidence will have to be considered. But no case has ever held that a case lacks "judicially manageable standards" merely because a question of causation raises difficult scientific questions. Complex causation issues occur repeatedly in, for example, toxic tort litigation, where courts must weigh scientific evidence regarding chemical pathways and the etiology of disease.[4] Such cases often

[4] See, e.g., In re Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990) (PCBs and various illnesses); Sterling, 855 F.2d 1188 (leaking hazardous chemicals and such ailments as "immune system impairment").

involve "evidence on the frontiers of science." Daniel Farber, Toxic Causation, 71 Minn. L. Rev. 1219, 1220 (1987). The science relevant to carbon dioxide's impact on climate, for the most part, is governed by basic, long-established principles of chemistry and physics, see IPCC, Climate Change 2001: The Scientific Basis 87-88 (2001), and is no more complex than the science in many other cases.

Second, the standards by which the court will decide entitlement to injunctive relief are also "judicially manageable." While remedial determinations can present difficult issues, here, as in other cases, the court need only focus on facts specific to the parties in the litigation; it need not inquire into broader social and economic interests. For example, in crafting an appropriate remedy, interstate nuisance case law provides for some inquiry in the "rules of the complaining state," see supra at 18 (quoting Illinois, 599 F.2d 151), as well as the cost to the companies and disruption to their customers, see, e.g., Georgia v. Tennessee Copper Co., 237 U.S. 474, 474-78 (1915) (delay in injunction afforded to permit continued operation). But those issues are far from Defendants' parade of unmanageables — courts "balanc[ing]" "jobs, the economy and the nation's security . . . against the risks" of climate change. AEP at 55-56. This case simply does not require the court to engage in the broader balancing of interests that a legislature might perform. See AEP at 22 (Defendants agree that, in

Tennessee Copper, "the [Supreme] Court plainly contemplated that an actionable nuisance . . . would not entail . . . balancing").

Indeed, the remedial issues in this case will likely be more manageable than those presented in cases that courts routinely adjudicate. For example, in fashioning a remedy in interstate water allocation disputes, the courts apply a principle of "[e]quitable apportionment," pursuant to which they consider "all relevant factors, including":

> [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

Colorado v. New Mexico, 459 U.S. 176, 183 (1982) (internal quotation marks omitted). Likewise, courts routinely apply complex principles to resolve tort cases involving ex post claims for damages from multiple joint tort-feasors. See generally H.L.A. Hart & Tony Honore, Causation in the Law 205-53 (1985) (discussing cases of "concurrent causes," and multiplicity of approaches to apportioning responsibility and damages). Such retrospective allocation of responsibility among contributors raises more complex issues than a prospective determination to restrain major contributors from adding to a nuisance.

3. Resolution of this case does not require an initial policy decision appropriate only for nonjudicial discretion.

Given that judicially manageable standards exist, the remaining question is whether it is illegitimate to decide this case by the clear principles laid out in precedent. Defendants contend that a global solution, crafted on policy considerations, is preferable. From this, they conclude that only the political branches can act. AEP at 57-58.

However, under the political question doctrine, courts have asked not whether Congress or the Executive can address the issue, but whether only Congress or the Executive can do so. Baker, 369 U.S. at 217 (whether case can only be resolved by "nonjudicial discretion"). And the Supreme Court has made clear that it is not the exclusive province of Congress or the Executive to abate "a nuisance that exists in one State yet produces noxious consequences in another." See Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 496 (1971); States at 6-7.

That Plaintiffs' injuries are part of a worldwide problem does not mean Defendants' contribution to that problem cannot be addressed through principled adjudication. Defendants cite no authority for the proposition that the political question doctrine bars adjudication unless all relevant actors can be conveniently joined and a comprehensive solution engineered. Water shortage, for example, is rarely an isolated problem that

can be conclusively resolved in litigation. Yet the federal courts have repeatedly adjudicated complaints by one State that challenge particular water uses in another State for their contribution to the broader problem of water scarcity. See, e.g., Nebraska, 515 U.S. 1 (addressing Nebraska's complaints concerning specific uses of Platte River tributaries, during continuing litigation regarding Platte River water allocation); Hinderlider v. La Plata River Co. & Cherry Creek Ditch Co., 304 U.S. 92 (1995) (Colorado River). Similarly, terrorism may be a worldwide problem, but a court can entertain a suit by particular plaintiffs who can assign contributory responsibility to particular defendants, though it cannot provide perfect justice against the broader terrorist networks that also may be responsible. See Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991).

In short, if Plaintiffs' injuries are remedied by such a political solution, so much the better. But, until then, the political question doctrine does not compel States to sit by while the largest domestic contributors continue their greenhouse gas emissions unabated, increasing the States' injuries.

4. 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.

Defendants argue that adjudication would interfere with, or show lack of respect for, Congress's decision to study the issue of global warming and the executive's decision to pursue multilateral agreements. AEP at 59. Amici law professors press the related "bargaining chip" argument that judicial action would undermine the executive's bargaining power in multilateral negotiations. Amici Law Professors at 20-25.

Even assuming that one could characterize Congress and the Executive as having a unified policy, see Open Space Institute Brief at 26-28, this case will not interfere improperly with any articulated policy. States at 35-37. If the political branches intend that nothing shall be done domestically — either because, in their estimation, global warming warrants no response or that the nation's interests are best served by playing a global game of chicken and its position would be enhanced by domestic inaction — the political branches can pass legislation manifesting such an intent. Defendants' attempt to find such an intent in Congressional study legislation or the multifarious pronouncements of the political branches is an exercise in reading the tea leaves. Compare AEP at 59 ("U.S. policy is manifestly not to engage in unilateral reductions of domestic

emissions"), with U.S. Dep't of State, U.S. Climate Action Report-2002 51 (2002)[5] (United States is "currently pursuing a broad range of strategies to reduce net emissions of greenhouse gases.").

Moreover, the proposition that a court should presume that the Executive's bargaining power in international negotiations will be undermined by any legal constraints on domestic actors has no articulable bounds and unacceptable consequences. No court has ever so held, and for good reason. States at 33-34. The fact that international negotiations may be occurring regarding, say, human trafficking should not foreclose adjudication of tort claims by victims of human trafficking within the United States. Even if domestic inaction might increase the nation's bargaining power in multilateral negotiations on the subject, that would not be grounds for denying victims relief under domestic law.

Thus, while this litigation may be occurring within the context of a larger political discussion concerning climate change, it is not a nonjusticiable political question. A court can resolve it under established decisional criteria without unduly interfering with other branches.

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

POINT III

PLAINTIFFS HAVE STANDING

Defendants' attack on Plaintiffs' standing is without merit. Plaintiffs' allegations of harm to their residents and resources easily satisfy the requirements for parens patriae standing. The States are acting to protect fundamental state interests in the health and welfare of their residents and the quality of their natural resources, and Defendants' emissions exacerbate and accelerate Plaintiffs' current and future injuries.

A. Plaintiff States Have Parens Patriae Standing.

Defendants do not contest that Plaintiffs have adequately alleged the three elements of parens patriae standing identified in Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) ("Snapp"). However, Defendants suggest that satisfaction of the Snapp test has no significance for Plaintiffs' ability to establish the traditional standing requirements of injury, traceability and redressability, and explicitly argue that the States must demonstrate that the citizens they seek to protect independently meet Article III standing requirements. See Brief of Cinergy Corp. et al. ("Cinergy at __") at 9-14. Defendants ignore, however, Snapp's clear recognition that the quasi-sovereign interests States may sue to protect are more expansive than the interests of private

parties.[6] This fact fundamentally alters the inquiry into traditional standing requirements.

With respect to the particular contention that States have standing only when individual citizens could show standing, Defendants simply misread the case law.[7] Parens patriae standing is traditionally found when a significant portion of a States' populace is harmed by the defendants' conduct, but no individuals can themselves bring suit. Thus, in New York v. 11 Cornwell Co., this Court noted that "[p]arens patriae standing . . . requires a finding that individuals could not obtain complete relief through a private suit" and held that New York established parens patriae standing on behalf of its mentally retarded residents because "it is highly unlikely" that any specific mentally retarded citizens could establish "personal harm and tangible benefit from the court's intervention." 695 F.2d 34, 40 (2d Cir. 1982), vacated on other grounds, 718 F.2d 22 (2d Cir. 1983).[8] Likewise, in

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[6] While Defendants cut and paste from Snapp, attempting to create the impression that parens patriae standing requires that the injury to the public be "graphic and direct," Cinergy at 10, the Court actually stated that "parens patriae interests extend well beyond" preventing such "graphic and direct" injuries. Snapp, 458 U.S. at 604-05.

[7] Defendants' argument would equate the three-prong test for parens patriae standing with the test for associational standing, which expressly requires the association to show that its members would have standing in their own right. See, e.g., N.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316 (2d Cir. 2003) ("NYPIRG").

[8] Defendants misread Maryland People's Counsel v. FERC, 760 (continued...)

Snapp, the Court upheld Puerto Rico's standing based on the "harmful effects of discrimination," 458 U.S. at 609, without considering whether any individual Puerto Rico residents could establish standing on the ground that they were denied one of the 787 job opportunities at stake or would get one of those jobs if the Court ordered the requested relief. Nor do Defendants establish that citizens whom the States sought to protect in Tennessee Copper, North Dakota v. Minnesota, Missouri I, or New Jersey v. New York, 283 U.S. 473 (1931), would have met the requirements for standing. See Cinergy at 10. The quasi-sovereign injuries in those cases – harm to agriculture, water supplies, property and public health, id. – are the same ones at issue in this case (J.A. 92-96, 99 [Compl. ¶¶ 108-111, 114-15, 117, 118-20, 128-31]). And, as in those cases, whether or not private plaintiffs can establish standing to protect particular parcels of land, water rights, or individual health is irrelevant in an action by States to mitigate harms to the broader public interest.

The Snapp factors themselves clearly encompass concepts of injury, traceability and redressability in that the State must

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[8] (...continued) F.2d 318 (D.C. Cir. 1985). The portion of the decision upon which Defendants rely, Cinergy at 12, discusses the circumstances under which Congress can authorize a parens patriae suit against the federal government. The court held that this is permissible when the Snapp criteria are met and the citizens represented would have standing themselves. Id. at 322.

demonstrate that quasi-sovereign state interests are being "adversely affected by the challenged behavior." 458 U.S. at 607. But the collective nature of the interests a State protects often makes such inquiries far easier, indeed usually uncontroversial, in a parens patriae case, although an individual attempting to trace individual harms to individual defendants might face significant hurdles. For example, with regard to redressability, the Snapp Court concluded that Puerto Rico had standing to sue a particular group of allegedly discriminatory employers to vindicate its citizens rights to be free of the "sting" of discrimination. Id. at 609. Unlike a private plaintiff, who might have had difficulty showing that she would benefit from an order ending the defendants' discrimination, Puerto Rico had only to show that discrimination generally would be reduced, and so causation and redressability barely merited mention. Likewise, this Court in 11 Cornwell found no need to address traceability and redressability in a parens patriae suit alleging discriminatory refusal to sell real estate to a buyer intending to establish a home for the mentally retarded, finding it clear that injunctive relief against the defendants, whether or not it could be shown to benefit any particular mentally retarded individual, would decrease discrimination in the State

and thus "redress" the State's quasi-sovereign injury. 695 F.2d at 39.[9]

Similarly, in this case, Plaintiffs will obtain any "redress" necessary with an order reducing Defendants' offending emissions.[10] Given Plaintiffs' broad quasi-sovereign interests in preserving their essential resources and protecting public health, establishing standing here is not difficult.

B. The Complaint's Allegations of Injury Are Sufficient.

Under any theory, the Complaint's allegations of current injuries, certain future injuries and increased risk of harm are sufficient to confer standing. States at 40-43. Defendants' responses are unavailing.

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[9] Consistent with Snapp and 11 Cornwell, district courts in this circuit have not inquired into traceability or redressability in parens patriae cases, even when they did so with respect to a State's ability to sue in its proprietary capacity. See Abrams v. Heckler, 582 F. Supp. 1155, 1159-63 (S.D.N.Y. 1984); City of New York v. Heckler, 578 F. Supp. 1109, 1120-23 (E.D.N.Y. 1984), aff'd, 742 F.2d 729 (2d Cir. 1984), aff'd, 476 U.S. 467 (1986).

[10] The cases Defendants cite are not to the contrary. See Cinergy at 11-12. In Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc., 256 F.3d 879, 885 (9th Cir. 2001), the plaintiff tribes were unable to allege any injury, let alone an "injury to a sufficiently substantial segment of its population," as required by Snapp, 458 U.S. at 607. In New York v. Microsoft Corp., 209 F. Supp. 2d 132, 149-50 (D.D.C. 2002), the district court held that satisfying the Snapp test for parens patriae standing "satisfied Article III's standing requirement."

Current injuries. First, Defendants argue that the current reduction in the Sierra Nevada snowpack is not a current injury to California because no water shortages have yet resulted. Cinergy at 15. However, water is undeniably a scarce resource in California and a reduction injures California. No principle of standing requires a State to wait until water rationing is required to take action to forestall shortages. See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000) (plaintiff "need not wait until his lake becomes barren and sterile or assumes an unpleasant odor and smell" to sue); Missouri I, 180 U.S. at 244 (a public nuisance remedy is intended to "restrain[] the illegal acts before any mischief is done") (internal quotation marks omitted).

Second, Defendants claim that the increased heat without increased mortality is not a current injury. Cinergy at 16 n.8. However, Plaintiffs allege that summer heat waves currently kill more Americans than all other weather events combined (J.A. 92 [Compl. ¶ 109]), and that the current increased temperatures increase summertime smog. Of course, heat itself can be an injury even without deaths; a demonstration of standing does not require a body count.

Third, Defendants argue that what Plaintiffs call current injuries (such as rising sea levels) are just "effects," not "injuries." However, they cite no cases that accord this rhetorical difference any legal significance. Indeed, for many

events such as heat, variations in magnitude, timing, and location make any categorical distinction meaningless.

Taken together or separately, these current injuries greatly exceed the "identifiable trifle" required. LaFleur v. Whitman, 300 F.3d 256, 270-71 (2d Cir. 2002).

Future injuries. Defendants rely on Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), to claim that future injuries cannot support standing. Cinergy at 16-17. Yet the injuries in Lujan were wholly speculative, whereas here they are certain to occur given the laws of physics and chemistry. Moreover, in Lujan, the future injury depended upon actions the plaintiffs might or might not undertake, and the Court noted that where "the acts necessary to make the injury happen are at least partly within the plaintiff's own control," a "high degree of immediacy" is required "to reduce the possibility of deciding a case in which no injury would have occurred at all." 504 U.S. at 564. See also McConnell v. FEC, 540 U.S. 93, 226 (2003) (rejecting standing based on Senator's intention to run advertisements critical of his adversary if and when he runs for reelection in five years). Here, by contrast, the injuries are not in Plaintiffs' control.

Defendants' reliance on Shain v. Veneman, 376 F.3d 815 (8th Cir. 2004), cert. denied, 543 U.S. 1090 (2005), is particularly misplaced. There, the plaintiffs did not show that defendants' activities would increase the probability of a 100-year flood.

Id. at 819. Here, by contrast, Plaintiffs do allege that global warming increases the frequency of 100-year floods (J.A. 93 [Compl. ¶ 114]). Furthermore, the States, which act parens patriae to protect their resources for future generations, are plainly situated differently than the individual plaintiffs in Shain, who did not show that they would own the property — or even still be alive — when such a flood might occur. 376 F.3d at 818.

Increased risk of harm. Defendants argue that increased risk of harm can underlie standing only when there is a statutory program to reduce that risk. Cinergy at 18-22. Yet this Court squarely held in Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003), that "increased risk of future injury may serve as injury-in-fact," id. at 633,[11] and relied on cases expressly rejecting the Defendants' argument. See, e.g., Central Delta Water Agency v. United States, 306 F.3d 938, 949 (9th Cir. 2002) ("The reasoning in the cases does not require that a statutory violation have occurred in order for standing to exist to challenge threatened environmental harm.") (cited in Baur, 352 F.3d at 633). Indeed, public nuisance is intended to protect against threatened, as well as actual, harm. Shore Realty, 759 F.2d at 1051 (corroded drums of chemicals pose a public nuisance).

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[11] The language the Defendants quote to narrow the scope of Baur is actually from the court's parenthetical description of a Wisconsin district court decision, Stauber v. Shalala, 895 F. Supp. 1178 (W.D. Wis. 1995).

Nor do LaFleur or NYPIRG support Defendants' contention that increased risk of harm constitutes an actionable injury only where a statute is violated. At most, Defendants' cases support an argument that injury may be presumed where there are statutory violations, see Cinergy at 21-22, but Plaintiffs have no need of a presumption given the Complaint's allegations of serious injuries. See States at 9-10.

Perhaps most fundamentally, Defendants ignore this Court's view that the "probability of harm which a plaintiff must demonstrate in order to allege a cognizable injury-in-fact logically varies with the severity of the probable harm." Baur, 352 F.3d at 637. Here, the alleged severe harms to Plaintiffs' quasi-sovereign interests — including extensive deaths during heat waves, flooding of heavily populated urban areas, and, more generally, the wholesale transformation of the climate in the Plaintiff States — are substantially more severe and more certain than the remote risk of mad cow disease found sufficient in Baur.

In McConnell, the Supreme Court explained that the showing required to establish standing "often turns on the nature and source of the claim asserted." 540 U.S. at 227. Here, the effects that will occur in the future are serious and certain now, much as a miner trapped in a collapsed mine shaft with limited air is injured when the collapse occurs, not just when the air supply finally runs out. In light of the "nature" of the

claim asserted, the allegations of current and future injuries and threats of harm are plainly sufficient.

C. The Complaint's Allegations That Defendants' Emissions Increase the Speed and Magnitude of Warming and That Reductions in Their Emissions Will Reduce the Magnitude of Plaintiffs' Injuries Are Sufficient.

Defendants argue that without a "presumption" of traceability created by a statutory violation, Plaintiffs cannot trace their injuries to Defendants' emissions. Cinergy at 24. First, the many multiple-polluter cases holding that a plaintiff need only show that defendants contribute to plaintiff's injuries, not that they are the sole cause of plaintiff's injuries, make no mention of a requirement of a statutory violation. States at 43-44. Second, even if there were such a presumption, Plaintiffs have no need for it here, where the Complaint alleges sufficiently that Defendants' emissions contribute to the speed and magnitude of global warming (J.A. 88, 106 [e.g. Compl. ¶¶ 97, 98, 163]), exacerbating the injuries to Plaintiffs' quasi-sovereign interests.

Defendants' redressability argument boils down to the erroneous belief that redressability cannot be established if warming continues due to the emissions of other parties, even if the emissions of these Defendants are reduced. However, the Supreme Court has never required that a remedy prevent all harm.

If penalties against one violator – that might deter but would not absolutely prevent future violations – are sufficient redress, Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167, 185-86 (2000), here, the remedy Plaintiffs seek, requiring reduction in each Defendant's emissions, is certainly adequate redress. Indeed, because the ambient air contains air pollution from innumerable sources, an air pollution case can only redress the enhanced injury attributable to the particular Defendants' emissions. See, e.g., NYPIRG, 321 F.3d at 325-26 (upholding standing based on contribution to pollution).

Moreover, while other sources of carbon dioxide emissions indisputably contribute to Plaintiffs' injuries, the Complaint alleges that reductions of Defendants' emissions will substantially alleviate their contribution to Plaintiffs' injuries.[12] Defendants do not and cannot allege that other persons' emissions are an intervening or sole cause. Thus, their reliance on EPA ex rel. McKeown v. Port Authority, 162 F. Supp. 2d 173 (S.D.N.Y.), aff'd, 23 Fed. Appx. 81 (2d Cir. 2001), is misplaced. There, the defendants' toll booths emitted none of

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[12] Defendants cite to Fulani v. League for Women Voters Educational Fund, 882 F.2d 621, 628 n.6 (2d Cir. 1989), to argue that the States must allege a "substantial ameliorative effect." But there this Court warned against "rais[ing] the requirement of redressability too high." Id. at 628 n.6. It held that the plaintiff, a mayoral candidate seeking to participate in debates, need not show that the remedy would level the electoral playing field, but only that the remedy would eliminate defendants' contribution to her weakness as a candidate.

the pollution at issue. Instead, all the emissions were attributable to motor vehicle drivers, none of whom was before the court. Nor is there any basis for Defendants' speculation that any reductions achieved by this case may be offset by increased emissions in other parts of the world. Cinergy at 27. Even if emissions increase elsewhere, the magnitude of Plaintiffs' injuries will be less if Defendants' emissions are reduced than they would be without a remedy (J.A. 88, 104 [Compl. ¶¶ 97, 148]); States at 44-46.

Finally, Defendants misread Lujan in attempting to establish a minimum actionable amount of Defendants' contribution to global warming. There, petitioners could not establish that the allegedly injurious projects would not proceed in the absence of the challenged ten percent subsidy. 504 U.S. at 571. In contrast to that all-or-nothing scenario, Plaintiffs here allege that, because of the cumulative and incremental nature of the harm caused by global warming emissions, a reduction in the emissions of these five Defendants — the five largest carbon dioxide emitters in the nation — will reduce the magnitude and speed of warming, reducing injuries and allowing States more time to adapt and take precautionary actions. For States acting parens patriae, and all plaintiffs in their proprietary capacity, an order requiring reductions in Defendants' emissions unquestionably redresses the Plaintiffs' injuries.

POINT IV

NO CONGRESSIONAL OR EXECUTIVE ACTION PREEMPTS PLAINTIFFS' STATE-LAW NUISANCE CLAIMS

Defendants seek an order declaring that the Plaintiffs' pendant state-law nuisance claims are preempted. Cinergy at 30-36. Both because the contention has wider implications regarding the States' efforts to control greenhouse emissions within their boundaries[13] and because the court below did not address the issue, this Court should decline to reach it. See No Spray Coalition, Inc. v. City of New York, 351 F.3d 602, 606 (2d Cir. 2003) (declining to address issue not reached by district court that involved far-reaching questions of environmental law).

In any event, analysis of state-law preemption reiterates that study, pronouncements, and inaction regarding global warming by Congress or the Executive do not preempt. Leaving aside questions of presumptions in the States' favor,[14] "[t]he question whether a certain state action is pre-empted by federal law is one of congressional intent." Gade v. Nat'l Solid Wastes Mgmt.

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[13] For example, such a decision could affect the authority of six northeastern States to enact regulatory programs for reduction of emissions from in-state sources. See Regional Greenhouse Gas Initiative, home page, http:// www.rggi.org.

[14] States do enjoy a presumption against preemption: Supremacy Clause analysis begins with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 432-33 (2002) (internal quotation marks omitted).

Ass'n, 505 U.S. 88, 96 (1992) (internal quotation marks omitted). Here, Defendants have identified no provision expressing an intent to preempt state laws addressing global warming, and no such provision exists.

Absent express preemption, Defendants must argue that "federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or "compliance with both federal and state regulations is a physical impossibility," or "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 98 (internal quotation marks omitted). Absent unmistakable conflict, it is inappropriate to read an implied intent to preempt into legislative or regulatory inaction. As the Court explained in Sprietsma v. Mercury Marine, in holding that the Federal Boat Safety Act did not preempt state safety regulation of recreational boats:

> We first . . . reject[] respondent's reliance on the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats. It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation. The decision in 1990 to accept the subcommittee's recommendation to 'take no regulatory action,' left the law applicable to propeller guards exactly the same as it had been before . . . . Of course, if a state common-law claim directly conflicted with a federal regulation promulgated under the Act, or if it were impossible to comply with any such regulation without incurring liability under state common law, pre-emption would occur. This, however, is not such a case.

537 U.S. 51, 65 (2002) (internal citation omitted). Here, there is no regulatory scheme at all and certainly not a "pervasive" one. Nor would state-law regulation of greenhouse gas emissions create any conflict with or be an obstacle to Congressional study.

Furthermore, while treaties and executive agreements may also preempt state law, there must be intent to preempt, either expressly or impliedly. See Garamendi, 539 U.S. at 419-20. Again, Defendants have not identified any express language in treaty or executive agreement that demonstrates an intent to preempt state regulation of domestic greenhouse gas emissions. Nor does state regulation of such emissions either conflict with, or encroach on any field of regulation occupied by, any treaty or executive agreement.

Finally, to the extent Defendants argue that the simple fact of Executive foreign affairs powers, completely unexercised, preempts state law, there is no support for such a claim regarding the purely domestic obligations of domestic actors. See supra at 26-27.

In sum, there is no evidence whatsoever that Congress or the Executive, either expressly or impliedly, intends to prevent state efforts to reduce greenhouse gas emissions.

CONCLUSION

The district court's order dismissing the Complaint should be reversed.

Dated: New York, New York
March 16, 2006

Respectfully submitted,

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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 10,965 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Oren L. Zeve
Oren L. Zeve
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CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of March, 2006 , I served by regular United States postal mail TWO COPIES of Plaintiffs-Appellants' Reply Brief upon the following named person(s) as lead counsel for Appellees:

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And on the 16th day of March, 2006, I served a Portable Document Format (PDF) copy of the annexed Plaintiffs-Appellants' Reply Brief by electronically mailing a copy to the following individual(s)/attorney(s) at the e-mail address designated for that purpose:

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