# 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, STATE OF IOWA, STATE OF NEW JERSEY, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WISCONSIN, and CITY OF NEW YORK,

*Plaintiffs-Appellants*,

—against—

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

*Defendants-Appellees*.

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

## BRIEF FOR DEFENDANTS-APPELLEES AMERICAN ELECTRIC POWER COMPANY, INC. AMERICAN ELECTRIC POWER SERVICE CORPORATION AND SOUTHERN COMPANY

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Dated: February 20, 2006

## CORPORATE DISCLOSURE STATEMENT

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

American Electric Power Company, Inc. has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

American Electric Power Service Corporation is a wholly owned subsidiary of American Electric Power Company, Inc.

In addition, the following companies are also subsidiaries of American Electric Power Company, Inc. Each is registered with the Securities and Exchange Commission, in light of some publicly owned preferred stock. The common stock of each is not publicly held.

1. Appalachian Power Company
2. AEP Texas Central Company fka Central Power and Light Company
3. AEP Texas North Company fka West Texas Utilities Company
4. Indiana Michigan Power Company
5. Ohio Power Company
6. Public Service Company of Oklahoma; and
7. Southwestern Electric Power Company

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

## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

### CASES

**CONSTITUTION, STATUTES AND REGULATIONS**

## LEGISLATIVE HISTORY

## SCHOLARLY AUTHORITIES



## OTHER AUTHORITIES

## PRELIMINARY STATEMENT

This appeal arises from an order dismissing two essentially identical lawsuits—one filed by eight States and New York City, the other filed by three private land trusts—that seek to abate the alleged public nuisance of global climate change. Through these actions, plaintiffs ask the federal courts to usurp the authority and responsibilities of the political branches and establish a piecemeal response to a global phenomenon with sweeping implications for the nation's economy, security, and foreign relations. The District Court correctly ruled that separation-of-powers principles mandate dismissal of these extraordinary lawsuits.

As the U.S. Environmental Protection Agency ("EPA") has observed, no environmental issue has "greater 'economic and political significance' than regulation of activities that might lead to global climate change." 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003). Recognizing that such regulation entails a complex balancing of competing societal and international interests—including allocating the costs of any mandatory carbon dioxide emission reductions—Congress has enacted a series of laws mandating research and study of global climate change and of possible responses to it. Congress has consistently chosen, however, *not* to impose mandatory limits on carbon dioxide emissions. Meanwhile, three consecutive Administrations have undertaken diplomatic efforts to establish a multilateral framework for addressing this global issue. Evidently dissatisfied with

the results of the democratic process, the plaintiff States and City asked the court below to establish mandatory carbon dioxide emissions limits that the political branches have repeatedly declined to adopt.

As the District Court properly held, this suit raises non-justiciable political questions. Plaintiffs' claims raise complex, inter-related and far-reaching policy questions about the causes of global climate change and the most appropriate response to it. The Constitution assigns such issues to Congress, not the courts, which lack discoverable and meaningful standards for resolving them. Moreover, judicial attempts to address such complex issues would interfere with the multilateral negotiating strategy that Congress and the President have established to address the very same issues.

This Court can also affirm the decision below on several other closely-related grounds. Separation-of-powers principles plainly foreclose use of the courts' extremely limited federal common law-making authority to provide a remedy for global climate change. The Supreme Court has recognized only a narrow federal common law cause of action to permit States to abate interstate nuisances of "simple type." The extraordinary "nuisance" plaintiffs allege does not remotely fall within the scope of this cause of action. Recognition of their claim, moreover, would impermissibly compel federal courts to make policy

choices that the Supreme Court has repeatedly held courts cannot make when exercising their limited federal common law-making powers.

In addition, any federal common law cause of action that could have conceivably encompassed plaintiffs' extraordinary claim has been displaced. Congress has repeatedly legislated on the subject of carbon dioxide emissions and global climate change. It has chosen each time to mandate further study, technology development and international negotiations rather than unilateral, mandatory emissions controls. This legislation more than suffices to displace plaintiffs' asserted cause of action. By insisting that Congress can displace federal common law only by providing a substitute remedy, plaintiffs improperly ask the courts to act as co-equal policy-makers, and to override Congress' judgment that the issue calls for further study and international negotiations, not mandatory emissions controls.

Ultimately, plaintiffs seek relief in the wrong forum. Congress can craft a national response to the issue of global climate change, and the President can negotiate treaties establishing an international response. Indeed, just last year, Congress debated various proposals, and the President conducted multilateral negotiations on climate change. Plaintiffs cannot short-circuit the democratic process and ask federal courts to create emissions standards that they are unable to persuade Congress to enact.

Defendants Cinergy Corporation and Xcel Energy, Inc. separately demonstrate that plaintiffs lack standing and that their state-law nuisance claim is preempted. We incorporate those arguments by reference. To understand fully why the States lack standing here, it is essential to understand the flaws underlying their federal common law claim and the reasons why that claim is displaced. *See* Brief For Defendants-Appellees Cinergy and Xcel Energy at 3-4. Accordingly, we invite the Court to read this brief first.

In addition, we note that, although they successfully opposed consolidation of their appeal with that of the land trusts in No. 05-5119, the States incorporate the land trusts' arguments by reference. *See* States Br. at 1 n.1. We therefore address in this brief the relevant arguments advanced by the private plaintiffs. For the Court's convenience, we note that, as a result, the arguments in this brief are duplicative of our arguments in No. 05-5119, except the arguments in Sections I.A.5 in each brief, which explain why the non-State parties in each case cannot invoke a federal common law cause of action. The Statement of the Case is also different in each brief, addressing the relevant complaint.

## STATEMENT OF APPELLATE JURISDICTION

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

## STATEMENT OF ISSUES

1. Whether a federal common law cause of action to permit States to abate nuisances of "simple type" can be used to sue five entities allegedly responsible for less than 2.5% of man-made carbon dioxide emissions worldwide, and thereby dictate the operations of power plants in 20 States to abate an alleged nuisance of global proportions.

2. Whether municipalities can invoke a federal common law cause of action created to compensate States for the loss of their sovereign war-making powers.

3. Whether any federal common law cause of action that could have encompassed such claims has been displaced by numerous statutes addressing carbon dioxide emissions and global climate change and directing the Executive Branch to implement nonregulatory polices and negotiate a multi-national response.

4. Whether the political question doctrine bars adjudication of plaintiffs' claims.

## STATEMENT OF THE CASE

Plaintiffs are the States of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin and the City of New York. In their complaint, they purport to bring claims under federal common law, or,

alternatively state nuisance law, to abate the "public nuisance" of "global warming." A63 (Compl. ¶ 1).

**1. Global Warming and the Federal Government's Response.**

Global warming, or global climate change, is an alleged increase in global near-surface temperatures. *E.g.*, A84 (Compl. ¶ 81). Plaintiffs allege that there is a consensus that global warming has begun and is caused by emissions of greenhouse gases, primarily carbon dioxide from fossil fuel combustion. A84 (Compl. ¶ 79). Significantly, in this "global process," A106 (Compl. ¶ 155), such emissions "rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon dioxide *worldwide*." *Id.* (emphasis added). Because carbon dioxide mixes in "relatively homogenous concentrations around the world," it is "extremely difficult to evaluate the extent over time to which *effects in the U.S.* would be related to [man-made] *emissions in the U.S.*" 68 Fed. Reg. at 52927 (emphases added).[1]

Although they allege current *effects* of global climate change, such as increased ocean water temperatures, *e.g.*, A85 (Compl. ¶¶ 83-84), plaintiffs do not allege any current *injuries*. Instead, they allege only harms that global climate

[1] On review of a dismissal under Rule 12(b), this Court can consider formal pronouncements by federal agencies and officials. *Feathercombs, Inc. v. Solo Prods. Corp.*, 306 F.2d 251, 253. n.1 (2d Cir. 1962) (department reports); *United States v. Eagleboy*, 200 F.3d 1137, 1140 (8th Cir. 1999) (agency statements); *see also* 1 *Weinstein's Federal Evidence* § 201.12[13], at 201-50 to -51 (2d ed. 2004) (regulations and decisions).

change "will," "is expected to," or "threatens" to cause "in the next 100 years." *See, e.g.*, A91-97 (Compl. ¶¶ 107, 110, 121). According to plaintiffs, a "low-end scientific *projection* of a 2.5 degree Fahrenheit increase in global average temperature *in the next 100 years*" will cause future increases in "heat deaths," "asthma and other respiratory diseases," and the "likelihood of drought," and future damage to water supplies, forests and ecosystems. A87-88 (Compl. ¶ 95) (emphases added). Similarly, plaintiffs allege that a "high-end scientific *projection* of a 10.4 degree Fahrenheit increase in global average temperature *in the next 100 years* would greatly magnify all of these consequences." A88 (Compl. ¶ 96) (emphases added).

These risks of future harm have prompted various actions by Congress and the Executive Branch. As early as 1978, Congress established a "national climate program" to improve understanding of global climate change. *See* National Climate Program Act of 1978, 15 U.S.C. §§ 2901 *et seq*. Two years later, Congress called for a study of the "projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion, coal-conversion and related synthetic fuels activities." Energy Security Act, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75 (1980). In 1990, Congress established a 10-year research program for global climate issues, and provided for scientific assessments every four years that

"analyze[] current trends in global change," Global Change Research Act, 15 U.S.C. §§ 2932, 2933, 2936(3).

In 1992, Congress directed the Secretary of Energy to conduct several assessments related to greenhouse gases and report to Congress. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1604, 106 Stat. 2776, 3002. Last year, it debated, but ultimately rejected, mandatory caps on greenhouse gas emissions, *see* 151 Cong. Rec. S6892, 6894 (daily ed. June 21, 2005). The Senate also adopted a resolution expressing its sense that *Congress* should enact a "comprehensive," "national program" that "will not significantly harm the United States economy." 151 Cong. Rec. S7033 (daily ed. June 22, 2005).

On the international side, in 1987, Congress directed the Secretary of State to coordinate U.S. negotiations concerning global climate change. *See* 15 U.S.C. § 2901 note; *see also id.* § 2952(a). Thereafter, President George H. W. Bush signed, and the Senate approved, the United Nations Framework Convention on Climate Change ("UNFCCC"), which established a coalition to develop a coordinated approach to climate change. *See* UNFCCC Homepage, http://unfccc.int (last visited Feb. 2, 2006). Following ratification of the UNFCCC, member nations negotiated the Kyoto Protocol, which called for mandatory reductions in greenhouse gas emissions by developed nations. *See* UNFCCC, *Kyoto Protocol* (Dec. 11, 1997), http://unfccc.int/resource/docs/convkp/kpeng.pdf.

Although President Clinton signed the Protocol, it was not presented to the Senate, which unanimously urged him not to sign any agreement that would result in serious harm to the economy or that did not include provisions limiting emissions by developing nations. S. Res. 98, 105th Cong. (1997). President George W. Bush opposes the Protocol for these reasons as well. *See* Transcript, *President Bush Discusses Global Climate Change* (Jun. 11, 2001), http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html. Instead, the current administration "emphasizes international cooperation" to address global climate change. 68 Fed. Reg. at 52933. In July 2005, President Bush reached an agreement with leaders of the "G8" nations to "speed the development and deployment of clean energy technologies to . . . address[ ] climate change." White House Fact Sheet, Action on Climate Change, Energy and Sustainable Development (July 8, 2005). That same month, he announced that the United States was joining with two other developed nations (Japan and Australia) and three developing nations (China, India and South Korea) to "achieve practical results" through programs "addressing the long-term challenge of climate change." White House Fact Sheet, President Bush and the Asia-Pacific Partnership on Clean Development (July 27, 2005).

**2. Plaintiffs' Suit.** Unhappy with the results of the political process, plaintiffs sued five electric utilities seeking a judicially mandated

reduction in carbon dioxide emissions from their plants. According to the complaint, defendants "are the five largest emitters of carbon dioxide in the United States," whose emissions "constitute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions." A88 (Compl. ¶ 98). Because, according to the complaints, U.S. electric power plants are responsible for "ten percent of worldwide carbon dioxide emissions from human activities," A89 (Compl. ¶ 100), defendants are collectively responsible, in plaintiffs' view, for 2.5% of worldwide carbon dioxide emissions from human activities (*i.e.*, 25% of 10%).

Based on defendants' alleged contribution, plaintiffs "seek an order (i) holding each of the defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming, and (ii) enjoining each of the defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade." A64 (Compl. ¶ 6, Prayer for Relief). Plaintiffs do not specify what percentage reduction they seek, or what factors are to guide a Court in setting that percentage.

According to plaintiffs, these unspecified emissions reductions "will *contribute* to a reduction in the risk and threat of injury to the plaintiffs and their citizens and residents from global warming." A104 (Compl. ¶ 148) (emphasis

added). Plaintiffs allege that, "by reducing emissions by approximately three percent annually over the next decade, the defendants would achieve *their share of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of warming*." A104 (Compl. ¶ 148) (emphasis added).

**3. The Decision Below.** All defendants moved to dismiss the complaint, as well as a parallel complaint filed by three land trusts. Defendants argued that separation-of-powers principles foreclosed recognition of any federal common law cause of action to abate global climate change, that any cause of action that might have encompassed such claims has been displaced, that the plaintiffs lack standing, and that any state law-based claims are preempted.[2] At the hearing below, defendants also argued that separation-of-powers principles demonstrated that the claims in both suits raise non-justiciable political questions. Tr. at 59-60; 62-63.

The District Court concluded that defendants' various separation-of-powers arguments raised a threshold question of justiciability and dismissed both suits in a single order. The District Court noted that the claims in both cases raised issues of great economic and political significance that courts cannot resolve without initial policy determinations by the political branches. A58. Because resolution of these issues "requires identification and balancing of economic,

[2] Several of the defendants also raised, and reserve, personal jurisdiction defenses.

environmental, foreign policy, and national security interests" and demands a "single-voiced statement of the Government's views," A60-61 (internal quotation marks and citation omitted), they raised non-justiciable political questions.

## STANDARD OF REVIEW

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

## SUMMARY OF ARGUMENT

Justiciability under the political question doctrine can be a threshold question, *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994), and the District Court properly dismissed the complaint on that basis. Plaintiffs now argue that the political question doctrine never applies in cases arising under federal common law, and, indeed, that the Supreme Court has ruled that the doctrine does not apply where States invoke federal common law to seek redress for injuries to their quasi-sovereign interests. These arguments are groundless. To understand why, it is necessary to explain, first, the nature of the federal common law cause of action plaintiffs purport to invoke, why their claims fall entirely beyond its scope, and why expansion of that cause of action is constitutionally impermissible. Moreover, an understanding of the statutes that have displaced any federal

common law in this area is essential to an informed analysis under the political question doctrine. Accordingly, defendants address the "cause of action" and displacement issues first.

I.A. Despite the very different, and far grander, conceptions of federal common law that held sway at the time, the Supreme Court carefully limited the causes of action it created for certain controversies between States. In the case of interstate nuisances, the Court did not recognize a cause of action that allows States to seek redress for every matter that might be actionable between private parties in a state-law nuisance claim. It limited the cause of action to nuisances of "simple type," *i.e.*, those involving immediately noxious or harmful substances that cause severe localized harm directly traceable to an out-of-state source.

These limitations reflect the extraordinary origins of this federal common law cause of action, which the Court created as a constitutionally necessary compensation for the States' surrender of the right to abate external nuisances through war. Adherence to these restrictive standards is compelled by the Court's subsequent rulings that federal courts cannot use their limited federal common law-making powers to decide questions of high policy, and that Congress possesses broad power to enact health and safety laws. Although the Court re-affirmed a federal common law cause of action to abate "simple type" interstate

nuisances in *Illinois v. Milwaukee*, 406 U.S. 91 (1971) ("*Milwaukee I*"), these fundamental changes in the relative authority of courts and Congress to address societal problems underscore the extremely narrow scope of the federal common law cause of action, which does not remotely encompass the extraordinary claims plaintiffs assert. The origins of this federal common law cause of action also make clear it is not available to cities, which never possessed and therefore never surrendered any sovereign power to wage war.

I.B. To the extent any such cause of action could have embraced plaintiffs' claims, it has been displaced. Congress has repeatedly "legislated on the subject" of carbon dioxide emissions and global climate change, which is enough to displace federal common law in the area. *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). Congress need not enact a "comprehensive regulatory" regime or a substitute remedy. Acceptance of plaintiffs' arguments would negate the presumption *in favor of* displacement that this Court has recognized, and would impermissibly confer co-equal policy-making authority on federal courts.

Plaintiffs' asserted cause of action is also displaced because adjudication of their claims would undermine the nation's foreign policy on global climate change. At the direction of Congress, the President is seeking a multilateral response that does not require developed nations alone to shoulder the burden of emissions reductions. Recognition of plaintiffs' claims would lead to

judicially-imposed unilateral reductions, thereby leaving the President with less bargaining leverage than Congress intended.

II. Finally, as the District Court correctly ruled, the political question doctrine bars this suit. The proper inquiry under that doctrine is not the nature of the suit itself, but the nature of the *issues* raised. This lawsuit raises fundamental scientific and policy questions about global climate change and how best to respond to it. The Constitution assigns these questions to Congress, not to courts, which lack any meaningful standards for resolving them. In particular, as the District Court ruled, plaintiffs' claims cannot be decided without an initial policy determination by the political branches as to whether there should be mandatory limits on carbon dioxide emissions and, if so, who should bear the costs of such limits.

## ARGUMENT

### I. PLAINTIFFS CANNOT STATE A VALID FEDERAL CLAIM FOR RELIEF.

The Supreme Court has repeatedly emphasized that federal common law cannot be used to make far-reaching policy decisions that are properly made by the political branches. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981). Undaunted, plaintiffs contend that these restrictions on judicial law-making are wholly inapplicable to the cause of action the Supreme Court created a century ago

to permit States to abate interstate nuisances. Plaintiffs claim they can use this cause of action to sue five entities allegedly responsible for less than 2.5% of man-made carbon dioxide emissions worldwide, and thereby dictate the operations of power plants in 20 States in order to abate an alleged nuisance of global proportions. According to plaintiffs, well-settled principles applicable in such actions permit them to sue any contributor to this alleged nuisance, even if its contributions "amount to little or nothing." OSI Br. at 28 (internal quotation marks omitted). Moreover, they claim that, to resolve such cases, courts can make fundamental policy decisions about which segments of society should bear the burdens of redressing an alleged nuisance of global scope. Plaintiffs' attempts to portray this lawsuit as the straightforward application of "a long-established common law theory," States Br. at 47, are profoundly mistaken.

### A. A Federal Common Law Cause Of Action Exists Only For States To Abate Interstate Nuisances Of "Simple Type."

#### 1. Federal Common Law Causes of Action for Resolving Disputes Between States Were Justified, and Limited, by Principles of Constitutional Necessity.

The federal common law cause of action plaintiffs purport to invoke traces its origins to Article III's grant of federal judicial power over all "Controversies between two or more States" and its grant of original jurisdiction to the Supreme Court in "all Cases . . . in which a State shall be Party." U.S. Const., art. III, § 2, cls. 1 & 2. It was from these jurisdictional grants that the Court

created certain "causes of action" for States.[3] In doing so, however, the Court did not recognize a broad right of action that allows States to seek redress for any and all "injuries from out-of-state sources to their quasi-sovereign interests." States Br. at 48.

In *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838), the Court created a judicial remedy for boundary disputes because, following adoption of the Constitution, "there remained no power in the contending states to settle a controverted boundary between themselves . . . or in any department of the government, if it was not in [the Supreme Court]." *Id.* at 724. By joining the Union, the States had surrendered their sovereign rights to enter into treaties or engage in war. *Id.* at 724-25. And Congress had no authority to adjust boundaries because it "is limited in express terms to assent or dissent, where a compact or agreement is referred to [it] by the states." *Id.* at 726. Because "a resort to the judicial power is the *only* means left for legally adjusting . . . a controverted boundary," the Court found it necessary to provide a remedy. *Id.* at 726-27 (emphasis added).

Similarly, when it recognized a cause of action for water apportionment disputes, the Court noted that Congress' power to protect navigable

[3] Although the phrase "cause of action" did not come into vogue until the mid-1800s, *Davis v. Passman*, 422 U.S. 228, 236 (1979), "the distinction between jurisdiction and a cause of action" was understood by lawyers in the founding generation. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004).

waterways did not extend to a dispute between Kansas and Colorado because the relevant portion of the Arkansas River was not navigable. *Kansas v. Colorado*, 206 U.S. 46, 86 (1907). Congress likewise could not control apportionment based on a power to reclaim arid lands, because the Court held no such power existed. *Id.* at 87-92. Consequently, "[a]s Congress cannot make compacts between states, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal" to the Court. *Id.* at 97.

These same principles of constitutional necessity undergird—and limit—the cause of action the Court created for transboundary nuisance disputes between States. In *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*"), the Court recognized a claim by Missouri to enjoin the discharge of "contagious and typhoidal diseases" into interstate waterways. *Id.* at 241. The Court explained that it had to provide a remedy because the State's "[d]iplomatic powers and the right to make war [had] been surrendered to the general government." *Id.*; *see also Missouri v. Illinois*, 200 U.S. 496, 518 (1906) ("*Missouri II*"). In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) ("*Tennessee Copper I*"), the Court extended this cause of action to interstate discharges of noxious gas. Noting the "caution with which demands of this sort, on the part of a state, for relief from injuries analogous to torts, must be examined," the Court held that "some such

demands must be recognized, if the grounds alleged are proved. When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done." *Id.* at 237.[4]

Although the Court did not dwell on the lack of congressional power to provide a remedy, this prong of the necessity rationale was equally applicable. Six years before *Missouri I*, the Court had held "that Congress could not regulate activities such as 'production,' 'manufacturing,' and 'mining.'" *United States v. Lopez*, 514 U.S. 549, 554 (1995) (citing *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)). Indeed, prior to 1937, the Court repeatedly used "formalistic notions of 'commerce' to invalidate federal social and economic legislation." *Id.* at 605 (Souter, J., dissenting). Congress, therefore, was clearly understood to lack the power to regulate such intra-state activities as emissions from the smelting plant in *Tennessee Copper* and the sewage discharges in *Missouri*.

Thus, even in the era before *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court felt constrained to justify, as acts of constitutional necessity, the creation of causes of action for disputes between States. This circumspect approach reflects "the delicacy of interstate relationships and the inherent limitations upon th[e] Court's ability to deal with multifarious local problems."

[4] The Court's references to the surrender of state war-making powers was not hyperbole. Numerous disputes involved actual or threatened violence between state-appointed patrols or troops. *See* Charles Warren, *The Supreme Court and Sovereign States* at 39, 41-44 (1924).

*West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951). Far from creating a broad cause of action that States can invoke whenever they believe quasi-sovereign interests of serious magnitude are injured by out-of-state sources, *see* States Br. at 51 (suggesting courts owe deference to such state judgments), the Court examined demands for a judicial remedy for "injuries analogous to torts" with great "caution," *Tennessee Copper I*, 206 U.S. at 237, and adopted "*exacting standards* of judicial intervention." *West Virginia*, 341 U.S. at 27 (emphasis added).

### 2. The Court Created a Federal Common Law Cause of Action Only for "Simple Type" Nuisances Involving Substances That Cause Immediate, Localized Harms Directly Traceable to Out-of-State Sources.

In the interstate pollution context, these principles of caution and necessity led the Court to *decline* to create a judicial remedy for "every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction." *Missouri II*, 200 U.S. at 520-21; *see also Tennessee Copper I*, 206 U.S. at 237 (the Court must recognize "*some* . . . demands" to abate alleged nuisances, not all such demands) (emphasis added). The Court did not hold that, like private citizens, States could sue one another to abate nuisances that, standing alone, might prove to be only a "very slight[] . . . source of annoyance." OSI Br. at 28 (internal quotation marks omitted). Instead, it held that it is only "a public nuisance of *simple type* for which a state may *properly* ask an injunction." *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) (emphases added).

The Court's cases make clear that a nuisance of "simple type" is one where immediately noxious or harmful substances invade a State and cause severe localized harms that can be directly traced to an out-of-state source. The Court recognized claims to abate discharges of "noxious gas" that led to the direct "destruction of forests, orchards and crops," *Tennessee Copper I*, 206 U.S. at 236; of "poisonous filth" into waterways used for drinking, agriculture and manufacturing, *Missouri II*, 200 U.S. at 517; of "noxious, offensive and injurious materials . . . into the ocean," which were "cast upon the beaches . . . causing great and irreparable injury," *New Jersey v. New York*, 283 U.S. 473, 476 (1931); and of waters that flooded farms, destroying crops and arable land. *North Dakota*, 263 U.S. at 371-72. These "simple type" nuisances, the Court explained, entitled an injured State to "stand[] upon her extreme rights," regardless of the "possible disaster to those outside the state." *Tennessee Copper I*, 206 U.S. at 239.

To state a claim for relief under these "exacting standards," therefore, a State must allege a nuisance from substances so immediately and severely harmful and so readily traced to an out-of-state source that they would have justified war at the time of the founding, and now justify injunctive relief that could inflict extreme hardship on parties in the source State. These "exacting standards" ensured that the Court would not "take[] the place of a legislature" and decide far-reaching questions of high policy to resolve inter-State nuisance claims.

*Missouri II*, 200 U.S. at 519. Indeed, while plaintiffs argue that the necessity of balancing equities has no bearing on their ability to state a claim for relief, States Br. at 54, the Court plainly contemplated that an actionable nuisance of simple type would not entail such balancing. *See Tennessee Copper I*, 206 U.S. at 239 (because "[t]he possible disaster to those outside the [complaining] state *must be accepted* as a consequence of [Georgia's] standing upon her extreme rights," "[i]f Georgia adheres to its determination, there is *no alternative to issuing an injunction*") (emphases added).[5]

These "exacting standards" also ensure that States could not obtain, through a federal lawsuit, regulatory power over out-of-state activities that they never possessed prior to joining the Union, and did not acquire by ratifying the Constitution. The Court has repeatedly held that the Commerce Clause bars States from regulating "commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) (internal quotation marks and citation omitted). Thus, a century ago, States could not have enacted laws requiring out-of-state electric power plants to "chang[e] fuels, improv[e] generation efficiency, increas[e] generation from zero- or low-carbon energy sources, captur[e] carbon emissions,

[5] Indeed, in that case, one defendant was compelled to operate under draconian limitations despite its expenditures of "large sums" to minimize its harmful emissions. *Georgia v. Tennessee Copper*, 237 U.S. 474, 476, 478 (1915) ("*Tennessee Copper II*").

employ[] demand-side management techniques, [or] alter[] the dispatch order of their plants." States Br. at 10-11. It is inconceivable that they could have obtained such extraterritorial regulatory powers by showing that out-of-state power plants contributed, along with millions of other sources, to a world-wide nuisance, particularly where the plants' individual contributions "might amount to little or nothing," and the alleged harms were "not traceable" to the plants' emissions. OSI Br. at 28-29 (internal quotation marks and citations omitted).

In short, each element of an interstate nuisance of "simple type"—an immediately harmful substance, severe localized harms, and direct traceability to an out-of-state source—is essential to the cause of action plaintiffs purport to invoke. These elements justified recognition of that cause of action, and providing a remedy only for this type of nuisance ensured that the Court neither exceeded its limited ability to deal with multi-faceted problems nor enlarged the States' circumscribed regulatory powers.

### 3. The Narrow Scope of the Cause of Action to Abate "Simple Type" Nuisances Is Confirmed by Subsequent Legal Developments.

Subsequent sweeping changes in the Supreme Court's understanding of the relative authority of the judicial and political branches to address problems of transboundary pollution underscore the narrow scope of the federal common law

cause of action and the necessity of adhering to the "exacting standards" that mark its boundaries.

First, in 1937, the Court "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress." *United States v. Lopez*, 514 U.S. at 556. Today, Congress is understood to possess plenary authority to regulate intrastate activities that affect interstate air and water quality. Most notably, the Court has recognized that Congress possesses precisely the power that plaintiffs mistakenly ascribe to federal courts to address small contributions to larger societal ills. *See id.* (citing *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)); *see also Gonzales v. Raich*, 125 S. Ct. 2195, 2206-07 (2005).

Second, in deciding *Erie*, the Court fundamentally changed the understanding of federal common law and the ability of federal courts to make it. Federal courts are now understood to have only a "limited" and "restricted" authority to formulate federal common law, *Texas Indus., Inc.*, 451 U.S. at 640, typically in "havens of specialty" or "limited enclaves," *Sosa*, 542 U.S. 726, 729. The Court has stressed that federal courts may not use federal common law to make significant policy decisions that are properly made by the political branches.

For example, in *Texas Industries*, the Court ruled that federal courts lack authority to create a federal common law right to contribution in antitrust

actions. 451 U.S. 646-47. Noting that recognition of such a right raised "far-reaching" policy questions, the Court concluded that:

> "[t]he choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives."

451 U.S. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)).

The Court relied on these principles to reject creation of federal common law tort standards for professionals advising federally insured financial institutions: creating such standards required weighing and appraising a host of considerations, which are tasks '"for those who write the laws, rather than for those who interpret them.'" *O'Melveny & Myers*, 512 U.S. at 89 (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 n.41 (1981)). Most recently, the Court declined to recognize a federal common law cause of action for violations of certain universally recognized international legal norms, even though Congress had authorized such judicial lawmaking in the Alien Tort Statute. "[A] decision to create a private right of action," the Court emphasized, "is one better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 727.

These profound changes in the legal landscape undermine the rationale for recognizing any federal common law cause of action for interstate

nuisances. To be sure, the Court re-affirmed in *Milwaukee I* that "'a state may *properly* ask an injunction'" to abate "'a public nuisance of *simple type.*'" 406 U.S. at 107 n.8 (quoting *North Dakota v. Minnesota*, 263 U.S. at 374) (emphases added).[6] But the dramatic change in the relative authority of courts and Congress to address complex social problems requires that this cause of action remain limited to "simple type" nuisances involving immediately noxious or harmful substances that cause severe localized harms directly traceable to out-of-state sources.[7] These limitations are essential to ensure that federal courts do not make far-reaching policy decisions that they lack the institutional competence and constitutional authority to make.

[6] Illinois alleged a classic "simple type" nuisance: discharges of millions of gallons of raw or inadequately treated sewage, 406 U.S. at 93, containing "substantial quantities" of "viruses" and "pathogenic bacteria" that were infecting waters used for drinking and swimming. *Illinois v. Milwaukee*, 599 F.2d 151, 167, 169 (7th Cir. 1979), *rev'd on other grounds*, 451 U.S. 304 (1981).

[7] In fact, there is a strong argument that *Milwaukee I*'s affirmation of a federal common law cause of action to abate even simple type nuisances is no longer good law. That decision is predicated on the theory that statutory remedies "are not necessarily the only federal remedies available." *Milwaukee I*, 406 U.S. at 103. The Court has since flatly repudiated that theory. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (over the past 25 years, the Court "abandoned th[e] understanding" that courts may supplement statutory remedies). The Court's 1981 determination that amendments to the Clean Water Act displaced the cause of action at issue in *Milwaukee I*, *see Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), obviated any need for the Court to consider the continuing vitality of that cause of action.

### 4. Plaintiffs Have Not Alleged a Nuisance of "Simple Type."

Plaintiffs have failed to state a valid claim for abatement of a nuisance of "simple type." Indeed, the "nuisance" they allege differs in fundamental, and legally dispositive, respects from every nuisance the Supreme Court has deemed actionable under federal common law.

Carbon dioxide is not "poisonous" or "noxious." It is a ubiquitous, naturally-occurring gas produced by a host of activities, including human respiration, combustion, and the natural breakdown of biological materials. *See Webster's II New Riverside University Dictionary* at 229 (1988). Carbon dioxide emissions from defendants' plants do not immediately harm anyone (as contagions and pathogenic bacteria do), or destroy forests, crops and farms (as sulphuric gases and floodwaters do).

Instead, plaintiffs claim that defendants' emissions of less than 2.5 percent of man-made carbon dioxide worldwide mix in the atmosphere with other greenhouse gases from innumerable sources across the planet and "contribute" to a "global process" that will allegedly cause a variety of future harms. A106. Plaintiffs nowhere claim that any alleged future harm can be directly traced to defendants' emissions, nor could they. As EPA has explained, because carbon dioxide mixes in "relatively homogenous concentrations around the world," it is "extremely difficult to evaluate the extent over time to which *effects in the U.S.*

would be related to [man-made] *emissions in the U.S.*" 68 Fed. Reg. at 52927 (emphases added).

Plaintiffs try to brush aside these fundamental differences, arguing that the defendants in *Tennessee Copper* and *New Jersey v. New York* were merely one of "many potential sources" "contributing" to the alleged harms. State Br. at 55-57. This is both untrue and irrelevant. The amount of ocean waste not attributable to New York "was negligible," *New Jersey*, 283 U.S. at 481, and in *Tennessee Copper*, the Court nowhere stated that any forest destruction was attributable to other pollution—as opposed, for example, to other activities such as logging. More fundamentally, the States in these cases did not affirmatively allege complex causation theories in which massive contributions by non-parties were *essential* to their claims of harm. Rather, they alleged direct and immediate harm from the defendants' activities, and the defendants argued that other factors caused the alleged harms. *See New Jersey*, 283 U.S. at 477; *see also North Dakota*, 263 U.S. at 371 (Minnesota defeated claim by showing that unusual rains, not activities within its borders, caused the flooding). Nothing in these cases suggests that a valid claim for relief is stated by allegations that out-of-state conduct contributes, along with countless other activities, to a global process.

Nor does federal common law impose liability on joint contributors to a nuisance in the same manner as state common law. States Br. at 55; OSI Br. at

27. A 1973 district court case that was later vacated, *see* States Br. at 56, cannot override the Supreme Court's express *refusal* to create a remedy for "every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction." *Missouri II*, 200 U.S. at 520-21; *see also Tennessee Copper I*, 206 U.S. at 237 (recognizing only "*some* . . . demands" to abate nuisances) (emphasis added). The Court has never entertained a suit in which a State alleged that the challenged conduct, standing alone, "would only, very slightly, if at all, prove a source of annoyance," or where the harms were "not traceable perhaps to any particular" defendant. OSI Br. at 28-29 (internal quotation marks and citations omitted). To the contrary, in stating actionable claims, States *alleged* that the defendants' conduct *alone* caused "*great and irreparable* injury," *New Jersey*, 283 U.S. at 476 (emphasis added), or damage "on *so considerable a scale* to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case within the requirements of *Missouri [I]*." *Tennessee Copper I*, 206 U.S. at 238-39 (emphasis added).

In alleging that defendants are "contributing" to a problem caused by countless activities in *every sovereign State on the planet*, and that poses the same alleged threat to *every* sovereign, plaintiffs have plainly not alleged a "simple type" nuisance that entitles them to stand on their extreme rights and insist on relief regardless of the disasters to those outside their borders. Here, such relief—

forcing power plants in 20 States to cease emissions of carbon dioxide "contributing" to global climate change—is unthinkable. In fact, these plaintiffs do not seek a remedy that can be viewed as a *quid pro quo* for the surrender of any sovereign right, but rather an extra-territorial *regulatory* authority that States never possessed. The Commerce Clause bars States from regulating wholly out-of-state conduct in order to prevent the economic Balkanization that would result "if not one, but many or every, State adopted similar" efforts to regulate conduct in other jurisdictions. *Healy*, 491 U.S. at 336. Yet, plaintiffs' suit poses precisely these dangers. Under their theory, each State can seek to abate greenhouse gas emissions outside its borders, claiming the same risks of future harms, and relying on the same contribution theory. Each State can seek its own solution to global climate change by imposing costs on industries, consumers, or residents in other States. The Commerce Clause bars state laws that lead to such chaos, and the federal common law actions the Supreme Court recognized a century ago would never have resulted in such disruption.

Indeed, the "every-contribution-counts" theory at the heart of plaintiffs' case would force federal courts to engage in the very judicial policymaking that is impermissible when they exercise federal common law-making powers, and that was unnecessary when they adjudicated nuisances of "simple type." Given the ubiquity of carbon dioxide emissions and their collective

agency in allegedly contributing to global climate change, regulation of such emissions raises a host of policy questions: Should the costs of reducing such emissions be borne by a segment of the electricity-generating industry and their industrial and other consumers? Should those costs be spread across the entire electricity-generating industry? Should the automobile industry and its consumers bear a share of those costs? Other industries? How are the effects of such choices on the nation's energy independence and, by extension, its national security to be balanced? As EPA has aptly stated, "[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change." 68 Fed. Reg. at 52928.

If plaintiffs can prosecute these claims, federal courts cannot escape deciding such questions. The very decision to permit this suit is a major policy choice: it would confer on States the authority to choose which industries should be regulated to forestall the alleged harms of global climate change. And fashioning the equitable relief plaintiffs seek will inevitably entail other policy choices: should an injunction force defendants to change fuels or take steps that increase electricity costs for countless industries, with unknowable downstream economic and energy independence consequences? *See* Memorandum from Robert E. Fabricant, EPA Gen. Counsel, to Marianne L. Horinko, Acting

Administrator 9 (Aug. 28, 2003) (if "significant reductions in U.S. [carbon dioxide] emissions were mandated . . . , power generation . . . would have to undergo widespread and wholesale transformations, affecting every sector of the nation's economy and threatening its overall economic health").

These are plainly not decisions that federal courts, armed only with "vague and indeterminate nuisance concepts and maxims of equity jurisprudence," *Milwaukee II*, 451 U.S. at 317, are competent to make. *Id.* at 325 (pollution is "particularly unsuited to the approach inevitable under a regime of federal common law"); *West Virginia*, 341 U.S. at 27 (noting "inherent limitations upon [the courts'] ability to deal with multifarious local problems"). Nor are federal courts constitutionally authorized to make such decisions. These policy choices require "the balancing of competing values and interests, which in our democratic system is the business of elected representatives." *Texas Indus., Inc.*, 451 U.S. at 647 (internal quotation marks omitted); *see also O'Melveny & Myers*, 512 U.S. at 89; *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) ("[t]he responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches'") (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)); *New York v. FERC*, 535 U.S. 1, 24 (2002) (energy policy is "properly addressed to the [FERC] or to

the Congress, not to th[e] Court[s]"). The fact that adjudication of plaintiffs' claims would necessitate such improper judicial policymaking underscores that plaintiffs have not alleged a nuisance of "simple type," and that the federal common law cause of action they have invoked cannot simply "evolve[] on a case-by-case basis" to encompass the unprecedented claim they assert. Pls. Omnibus Br. at 12.[8]

### 5. No Federal Common Law Cause of Action to Abate Interstate Nuisance Is Available for Municipalities.

The federal claim asserted by New York City also fails because only States can bring a federal common law claim to abate nuisances of simple type. The contrary holding in *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979)—a case cited by the private plaintiffs below, *see* Tr. at 125—is wrong, and in all events fatal to the City's claim here.

In *Evansville*, the Seventh Circuit assumed that *Milwaukee I* "firmly established the existence of a federal common law of nuisance governing interstate water pollution," and that its reasoning left "little doubt" that cities could invoke that cause of action. 604 F.2d at 1017-18. But *Milwaukee I* re-affirmed a federal common law cause of action that was "firmly established" in *Missouri* and

[8] Plaintiffs suggested below that the restrictions on judicial policymaking apply only when litigants seek to supplement a "comprehensive remedial scheme." Pls. Omnibus Br. at 18. But balancing competing societal values and interests is an inherently political task, and the Constitution vests responsibility for that task with the political branches regardless of whether comprehensive legislation exists.

*Tennessee Copper*. Those cases did not recognize a cause of action because States "were required to spend public funds," *Evansville*, 604 F.2d at 1018, but because States, unlike cities, surrendered sovereign war-making powers in exchange for a judicial remedy, and are the beneficiaries of the jurisdictional grants from which the Court fashioned that remedy. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450-51 (1945) (Article III's original jurisdiction grant is a "mighty instrument[]" "for the peaceful settlement of disputes between *States* and between a *State* and citizens of another State") (citing *Missouri I*; emphases added). This rationale leaves no doubt that the federal common law cause of action is *not* available to cities.

Indeed, it explains why the Supreme Court has never entertained a federal common law suit brought by a non-sovereign party. The Court has held that individuals joined unwillingly as parties in a suit between States lack "standing to litigate on [their] own behalf the merits of [the] controversy which, properly viewed, lies solely between the states." *Kentucky v. Indiana*, 281 U.S. 163, 174 (1930). Similarly, the Court refused to allow cities to intervene in a suit between States, explaining that, as a matter "of sovereign dignity, as well as . . . good judicial administration," a State "'must be deemed to represent all its citizens,'" and to decide matters of state policy for all of its subjects. *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) (quoting *Kentucky*, 281 U.S. at 173-74).

The Seventh Circuit apparently read *New Jersey* to hold only that States are presumptively *adequate* representatives of their citizens and political subdivisions—a reading that implies that cities can sue when States do not. The court drew this inference from the Supreme Court's statement that an intervenor must show some "compelling interest in his own right, . . . which interest is not properly represented by the state." *Evansville*, 604 F.2d at 1018 (quoting *New Jersey*, 345 U.S. at 373). But when a State asserts claims for injuries to quasi-sovereign interests (as Pennsylvania did as an intervenor-party in *New Jersey*), it always "*properly* represent[s]" the interests of its citizens and subdivisions. Accordingly, the separate and "compelling interest" a municipality must identify is a "separate individual right to contest in such a suit the position taken by the state itself," *Kentucky*, 281 U.S. at 173—*i.e.*, a separate cause of action. This is confirmed by *Arizona v. California*, 460 U.S. 605 (1983). There, the Court permitted Indian tribes to intervene in a water apportionment dispute not because the United States had failed to represent the tribes' interests adequately, but because tribes are themselves sovereign entities "entitled to take their place as independent qualified members of the modern body politic." *Id.* at 615 (internal quotation marks and citations omitted).

In all events, even if *Evansville* were correct, it permits municipalities to bring a federal common law claim only if their State is not a party. Because the

State of New York has sued here, *Evansville* provides no basis for the City's independent federal claim.

### B. Any Federal Common Law Cause Of Action To Abate Global Climate Change Has Been Displaced.

Even if any federal common law nuisance cause of action could have encompassed the extraordinary claims plaintiffs raise, it has been displaced.[9]

#### 1. Congress Has Displaced any Federal Common Law Cause of Action to Abate the Alleged Nuisance of Global Climate Change.

Although plaintiffs concede that Congress has legislated repeatedly on the subject of greenhouse gases, carbon dioxide emissions and global climate change, they argue that Congress can displace a federal common law cause of action only by providing an alternative remedy or by limiting carbon dioxide emissions. States Br. at 58-60; OSI Br. 55-56. This is not the law. Under plaintiffs' misguided approach, federal courts become co-equal policy-makers with Congress: a judge-made cause of action to abate global climate change is available until Congress fashions a response that, in the opinion of the unelected judiciary, is a satisfactory substitute for plaintiffs' purported federal common law remedy. None of plaintiffs' authorities compels this inversion of lawmaking responsibilities.

[9] Defendants refer to "displacement" of federal common law to avoid confusion with the distinct concept of "preemption" of state law.

### a. To displace a federal common law cause of action, Congress needs only to "legislate on the subject."

Because "it is for Congress, not federal courts to articulate the appropriate standards to be applied as a matter of federal law," courts should approach the question of displacement with a "*willingness* to find congressional displacement of federal common law" whenever "Congress addresses [a] problem formerly governed by federal common law." *Milwaukee II*, 451 U.S. at 317 & n.9, 315 n.8 (emphasis added and deleted). "The lesson of *Milwaukee II* is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution" or "holding that the solution Congress chose is not adequate." *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982). Accordingly, this Court has repeatedly held that "separation of powers concerns create a presumption *in favor of [displacement] of federal common law* whenever it can be said that Congress has *legislated on the subject*." *United States v. Oswego Barge Corp. (In re Oswego Barge Corp.)*, 664 F.2d 327, 335 (2d Cir. 1981) (emphases added); *Senator Linie GmbH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145, 166 (2d Cir. 2002) (same). Congress has plainly legislated on the subjects of air pollution and carbon dioxide emissions in the context of global climate change.

The Clean Air Act ("CAA") is a "comprehensive legislative scheme," *Weiler v. Chatham Forest Prods. Inc.*, 392 F.3d 532, 534 (2nd Cir. 2004). *See also New England Legal Found. v. Costle*, 666 F.2d 30, 32 n.2 (2d Cir. 1981) (noting "similarities between the [Clean Water Act], which was the subject of *City of Milwaukee [II]*, and the [CAA]"). Against the backdrop of this "comprehensive scheme," Congress has legislated repeatedly on the subjects of carbon dioxide emissions and global climate change. In 1990 amendments to the CAA itself, Congress directed EPA "to develop, evaluate, and demonstrate nonregulatory strategies and technologies for air pollution prevention" that would address several substances, including carbon dioxide. 42 U.S.C. § 7403(g). In an uncodified provision, it required electric utilities to monitor and report annually "carbon dioxide emissions." Pub. L. No. 101-549, § 821(a), 104 Stat. 2399, 2699 (1990).

Congress has enacted no fewer than five other statutes that address global climate change and carbon dioxide emissions. The National Climate Program Act requires the President to establish a national climate program, including "appropriate . . . recommendations for action," 15 U.S.C. §§ 2902, 2904(a), (b)(1), (d)(1), (9), so that the nation can "respond more effectively to climate-induced problems," S. Rep. No. 95-740, at 13, 14 (1978), 1978 U.S.C.C.A.N. 1398, 1399. The Global Climate Protection Act states that research is "crucial to the development of an effective United States response" to global

climate change and declares that U.S. policy is to "identify technologies and activities to limit mankind's adverse effect on the global climate . . . and . . . *work toward multilateral [international] agreements*." Pub. L. No. 100-204, tit. XI, §§ 1102(3), 1103(a), 101 Stat. 1407, 1408 (1987) (emphasis added) (codified at 15 U.S.C. § 2901 note). The Global Change Research Act directs that research findings be made available to EPA so it can formulate "a coordinated national policy on global climate change." 15 U.S.C. § 2938(b)(1).

Similarly, the Energy Policy Act of 1992 directs the Secretary of Energy to report to Congress on "*the feasibility and economic, energy, social, environmental, and competitive implications, including implications for jobs*," of stabilizing and reducing carbon dioxide levels. 42 U.S.C. § 13381 (emphasis added). That Act requires the Executive Branch to develop a National Energy Policy Plan "designed to achieve *to the maximum extent practicable* and *at least-cost to the Nation* . . . the stabilization and eventual reduction in the generation of greenhouse gases." *Id.* § 13382(a), (g) (emphases added). The Act also directs the Department of Energy to assess "alternative policy mechanisms for reducing the generation of greenhouse gases" and to examine the "costs and benefits" of concepts such as emissions "caps" and "trading programs," "efficiency standards for power plants," and "voluntary incentives programs." *Id.* § 13384. Plainly, Congress' strategy is to "analyze the important technical and policy issues that will

enable us to make wiser decisions on more dramatic and possibly higher cost actions which should be undertaken only in the context of concerted international action." H.R. Rep. No. 102-474, pt. 1, at 152 (1992), 1992 U.S.C.C.A.N. 1953, 1975. Its most recent enactments confirm that this is still Congress' strategy. *See* 42 U.S.C. § 13389 (added by Energy Policy Act of 2005; calling for "*national strategy* to promote the deployment and commercialization" of technologies to reduce greenhouse gas intensity).

Thus, Congress has not "'refus[ed] to legislate'" in the area of carbon dioxide and global climate change. States Br. at 58 (quoting *United States v. Texas*, 507 U.S. 529, 535 (1993)); OSI Br. at 54 (same). It has repeatedly enacted legislation requiring study of the phenomenon and cost/benefit analyses of potential responses so that *it* can make an informed policy choice. Because Congress has "legislated on the subject," *Oswego Barge*, 664 F.2d at 335, any federal common law cause of action is displaced.

### b. Legislative enactment of an alternative remedy is not a prerequisite to displacement.

Contrary to plaintiffs' claims, Congress need not adopt an alternative remedy or mandate carbon dioxide emissions limits in order to displace federal common law.

The States argue that current federal air pollution laws are "on all fours" with the type of statutory provisions that *Milwaukee I* deemed insufficient to displace federal common law. States Br. at 60-61. But the Court did not undertake a detailed displacement analysis in *Milwaukee I.* The federal statute there expressly stated that "'[s]tate and interstate action to abate pollution of interstate or navigable waters shall be *encouraged* and *shall not be displaced by Federal enforcement action*.'" 406 U.S. at 104 (quoting statute) (emphasis added).

Nor does *Milwaukee II* hold that displacement requires a "comprehensive and effective" remedial scheme, States Br. at 63, that "leaves no room for federal common law." OSI Br. at 57. These arguments confuse what Congress did in the 1972 water pollution amendments with what it *must* do to displace federal common law. The Supreme Court could have made "comprehensiveness" or "complete occupation of the field" the touchstones of displacement. But such standards are flatly inconsistent with its "willingness to find congressional displacement," *Milwaukee II*, 451 U.S. at 317 & n.9. Comprehensiveness and occupation of the field are standards used to determine

preemption of state law,[10] where there is a general presumption "*against* finding pre-emption" in areas of traditional state concern. *Milwaukee II*, 451 U.S. at 316-17 & n.9 (emphasis added). As this Court has explained, however, there is a "presumption *in favor of*" displacement, *Oswego Barge*, 664 F.2d at 335 (emphasis added). A comprehensive scheme, while plainly sufficient, cannot be *necessary* for displacement, otherwise the distinction between preemption of state law and displacement of federal common law (and the presumption in favor of the latter) would be destroyed.[11]

Similarly, Congress need not provide substitute remedies to displace a judicially-created one. Like plaintiffs here, the plaintiffs in *Outboard Marine* asked the court "to find that Congress has not 'addressed the question' because it has not enacted *a remedy* against polluters." 680 F.2d at 478 (emphasis added). The Seventh Circuit rejected this argument: "Adopting this distinction . . . would be no different from holding that the solution Congress chose is not adequate. This [a court] cannot do." *Id.* Instead, the court found that "Congress has 'addressed

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[10] *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987).

[11] *Oswego Barge* also involved a statute that was comprehensive, but this Court did not make "comprehensiveness" a requirement for displacement; it required only that Congress "legislate[] on the subject." 664 F.2d at 335. Indeed, both *Oswego Barge* and *Sunaway Line* involved maritime law, where courts have "more expansive" lawmaking powers and where, as a result, comprehensiveness may be relevant, because the presumption in favor of displacement "applies to judge-made maritime law . . . less forcefully than it applies to non-maritime federal common law." *Oswego Barge*, 664 F.2d at 335-36, 338.

the question', since it has addressed the broader problem of pre-1972 pollution, *even if it has not done so by means of remedies against the polluters themselves.*" *Id.* at 477 (emphasis added). That Congress "considered the problem . . . and enacted *some* solution," *id.*, was enough to displace federal common law.

Plaintiffs are likewise wrong in contending that, in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), the Court held "that a federal statute cannot preempt a federal common law action unless it provides a remedy." States Br. at 59. The statute there was designed "to protect the rights of Indians to their properties" by codifying a common law rule that those rights could not be extinguished without the consent of the United States. *Oneida*, 470 U.S. at 239-40 (internal quotation marks and citation omitted). Moreover, Congress' subsequent enactment "contemplated suits by Indians asserting their property rights." *Id.* at 239. Thus, the singular purpose of the statute dictated the Court's focus on remedies: it was inconceivable that, in a statute expressly designed to *protect* Indian property rights, Congress would displace a common law action to enforce those rights without providing a substitute remedy.[12]

[12] *United States v. Texas* illustrates this same principle. The Court concluded that Congress' decision to mandate interest payments to the government by private debtors could not be understood to *relieve* States of their federal common law duty to pay pre-judgment interest. Because the purpose of the law was "to *enhance* the Government's debt collection efforts," it was illogical to conclude that, "because Congress did not tighten the screws on the States, it therefore intended that the screws be entirely removed." 507 U.S. 529, 537-38 (1993) (emphasis added).

That rationale is inapplicable here. When enacting environmental laws, Congress does not act solely to protect the environment, but balances competing considerations. There is thus no reason to assume that Congress would displace a federal common law cause of action only if it provided an alternative remedy or imposed mandatory emissions controls.

The laws it has enacted addressing global climate change make clear that Congress believes it needs more information and analysis to decide what, if any, controls are appropriate. Although Congress need not "affirmatively proscribe[] the use of federal common law" to displace it, *Milwaukee II*, 451 U.S. at 315, this legislation operates as such a proscription. If Congress, with its investigative capabilities and constitutional duties, is not convinced that mandatory limits are an appropriate and cost-effective response to this multi-dimensional international issue, federal courts should not use the blunderbuss of a federal common law remedy for "simple type" nuisances to impose such limits.

**2. Any Cause of Action That Could Have Encompassed Plaintiffs' Claims Has Been Displaced by the President's Conduct of Foreign Affairs.**

Plaintiffs' purported federal common law cause of action is displaced for a second reason: plaintiffs' claims undermine the foreign policy approach to global climate change that Congress established and the Executive Branch is implementing.

Congress specifically directed the Secretary of State to coordinate U.S. negotiations on global climate change to effectuate the congressionally-established U.S. policy of "work[ing] toward multilateral [international] agreements." 15 U.S.C. § 2901 note; *see also* H.R. Rep. No. 102-474, pt. 1, at 152 (1992), 1992 U.S.C.C.A.N. at 1975 (mandatory measures should be undertaken "only in the context of concerted international action"). Three Presidents have actively implemented this strategy, under which the nation is committed to working "within the United Nations framework and elsewhere to develop . . . an effective and science-based response to the issue of global warming." *See President Bush Discusses Global Climate Change*, *supra* at 9 (citing federal statutes instructing the executive branch to take coordinated international action on global warming). Congress has likewise made clear that the United States should not reduce carbon dioxide emissions unilaterally or shoulder burdens that developing nations do not bear. Not only did the Senate resolution criticize the Kyoto Protocol on this ground, *see supra* at 9, but until President Bush announced his opposition to it, Congress enacted a series of appropriations barring EPA from implementing the Protocol. *See* Pub. L. No. 105-276, tit. III, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, tit. III, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, app. A, 114 Stat. 1441, 1441A-41 (2000).

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

This undermines Congress' strategy in two ways. First, it reduces the bargaining leverage the President needs to implement a multilateral strategy by giving him less to offer in exchange for reductions by other nations. Congress has concluded that any response to global climate change "will require vigorous efforts to achieve international cooperation." Pub. L. No. 100-204, tit. XI, § 1102(5), 101 Stat. at 1408. Yet, as EPA has explained, unilateral reductions could "weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies." 68 Fed. Reg. at 52931. In analogous circumstances, the Supreme Court has held that state law is preempted when it gives the President "less to offer" other countries, and thus "less . . . diplomatic leverage," than

Congress intended him to have. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 377 (2002). Because displacement of federal common law is more readily found than preemption of state law, *see supra* at 37, a federal common law cause of action that undermines the President's ability to implement Congress' chosen multilateral approach to addressing global climate change is necessarily displaced.[13]

Second, unilateral reductions could prove counter-productive. Reductions could impose significant costs on U.S. businesses and consumers, yet "[a]ny potential benefit . . . could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emission reductions." 68 Fed. Reg. at 52931. EPA pointed out that this occurred when the United States unilaterally reduced gases that deplete stratospheric ozone. *Id.* at 52931 n.5. These are precisely the dangers Congress seeks to avoid by insisting on least-cost responses developed as part of a multilateral approach. Because the federal common law cause of action plaintiffs seek to assert "'stands as an obstacle to the

[13] The federal common law cause of action would be displaced even if the President alone decided on the foregoing multilateral strategy. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (state law preempted solely by the President's conduct of foreign affairs). Although the typical basis for displacing common law is that Congress is responsible for "develop[ing] national policy" in areas of federal concern, *Milwaukee II*, 451 U.S. at 319, here, the President has principal constitutional responsibility for conducting foreign policy, and his policy choices should be sufficient to displace a federal common law cause of action that directly undermines those choices. This Court need not reach the issue, however, given Congress' clear policy.

accomplishment and execution of the full purposes and objectives of Congress,'" *Crosby*, 530 U.S. at 377 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), it is displaced.

## II. PLAINTIFFS' CLAIMS RAISE NON-JUSTICIABLE POLITICAL QUESTIONS.

As the District Court properly recognized, another well-established doctrine derived from separation-of-powers principles, the political question doctrine, also bars plaintiffs' claims. Plaintiffs attack the District Court's ruling on the basis of sweeping generalizations, most of which are wrong and all of which are irrelevant. The relevant inquiry is not whether this case involves torts, federal common law or international sovereign right, but whether the *questions* or *issues* that must be addressed to resolve *this* tort suit raise non-justiciable political questions. The answer to that inquiry is plainly yes.

### A. The Political Question Doctrine Focuses On The Nature Of The Issues To Be Resolved.

"In determining whether a case presents a non-justiciable political question, the court must first make a 'discriminating inquiry into the precise facts and posture of the particular case.'" *Planned Parenthood Fed'n, Inc. v. AID*, 838 F.2d 649, 655-56 (2d Cir. 1988) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Because the doctrine "is one of 'political questions,' not one of 'political cases,'" *Baker*, 369 U.S. at 217, this discriminating inquiry must focus on the

nature of the *issues* or *questions* to be resolved, not on the generic nature of the case. *See Planned Parenthood*, 838 F.2d at 655-56 (examining "precise issue" to be resolved). That is why courts must consider, for example, whether there is "a textually demonstrable constitutional commitment *of the issue*"—not the type of case—"to a coordinate political department," and whether there are "judicially discoverable and manageable standards for resolving it [*i.e.*, the issue]." *Baker*, 369 U.S. at 217 (emphasis added).

This Court's decisions illustrate the proper focus of the political question inquiry, and the fallacy of plaintiffs' generalizations. In *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), the Court was asked to decide whether military operations were legally authorized. Two years earlier, the Court had resolved the same type of claims, ruling that military operations in Vietnam were authorized by the Tonkin Gulf Resolution and subsequent appropriations, *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), and that the repeal of the Resolution did not remove that authorization. *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971). In *Holtzman*, however, the question of authorization turned on whether the bombing of Cambodia constituted a "basic change" in the war. 484 F.2d at 1310. This new issue raised a political question, because it could not be resolved without "military and diplomatic expertise not vested in the judiciary." *Id.* This trio of decisions

thus illustrates that the *very same type of claim* can raise a non-justiciable political question in one case, but not in another.[14]

Accordingly, the fact that plaintiffs purport to bring a tort claim under federal common law is not dispositive of whether this suit raises non-justiciable political questions. Contrary to plaintiffs' claims, State Br. at 27; OSI Br. at 42, 46, this Court's decision in *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991), does not state otherwise. *Klinghoffer* held only that the breach of duty issue in an "*ordinary* tort suit" raised no political question. *Id.* at 49 (emphasis added). Indeed, this Court has upheld dismissals of other tort claims on political questions grounds. *Greenham Women against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985); *Zuckerbraun v. General Dynamics Corp.*, 755 F. Supp. 1134, 1141-42 (D. Conn. 1990), *aff'd*, 935 F.2d 544 (2d Cir. 1991).

This case is no "ordinary tort suit" raising simple issues of duty or liability. As noted above, it raises a litany of fundamental policy questions. *See Supra* at 31. Contrary to plaintiffs' claim, States Br. at 23-25, the Supreme Court's boundary dispute and interstate nuisance cases have no bearing on whether any of

[14] *Holtzman* also belies plaintiffs' sweeping categorization of political question rulings. There, the Court found a political question even though the case raised no issues of "international sovereign right," and a ruling that a war had been illegally escalated created "no danger of the judiciary monopolizing powers that" belonged to the other branches. States Br. at 19, 17.

*these* extraordinary issues are justiciable.[15] Those cases, therefore, cannot obviate the analysis required under *Baker*.

### B. Under The *Baker* Factors, This Case Raises Several Political Questions.

Political questions involve one or more of the following factors:

> [1] [a] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. Although plaintiffs claim that primacy must be given to the first, States Br. at 26-27, any one factor is sufficient to establish a political question. *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72 (2d Cir. 2005) (declining to examine all six factors, "for it is clear that this case meets the fourth test"); *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (relying on second factor);

[15] The "political" question raised in the boundary disputes was whether a claim for "restitution of sovereignty" was a case of a "civil nature" under Article III. *Rhode Island*, 37 U.S. at 685; *see also id.* at 753 (a suit "for rights of sovereignty and jurisdiction," rather than property, is not cognizable) (Taney, J., dissenting). Moreover, as discussed earlier, the Court concluded that resolution of boundary disputes was committed, by necessary implication, to courts. No such implied commitment exists here.

*Holtzman*, 484 F.2d at 1310 (relying on second and third factors). Here, the District Court recognized that several of these factors, especially the third, apply in this case.

### 1. The Issues Raised in This Case Are Constitutionally Committed to Congress and the President.

Predictably, plaintiffs attempt to apply the first factor at a very high level of generality. They argue that "interstate pollution cases," OSI Br. at 40, or State demands for relief from injuries to quasi-sovereign interests, States Br. at 27, are committed to the courts, not the political branches. This simply begs the relevant question. The issue is whether carbon dioxide emissions that, according to plaintiffs, account for 2.5% of all man-made carbon dioxide emissions, and that allegedly will cause injuries only through interaction with emissions from countless sources around the world, should be subject to mandatory limits and/or reductions. Resolution of these issues is textually committed to Congress by the Commerce Clause, and to the President under his foreign affairs powers.

Plaintiffs claim that there is no *exclusive* textual constitutional commitment in this case, because courts have authority to resolve some interstate environmental issues. OSI Br. at 45. But while the Supreme Court has relied on exclusive grants of authority in finding certain cases non-justiciable, *see, e.g.*, *United States v. Nixon*, 506 U.S. 224 (1992), it has never held that exclusivity is essential. To the contrary, it has recognized that the political question doctrine

"excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).[16]

Nor does *Oneida* show that Congress' plenary power over an area is insufficient to demonstrate textual commitment. OSI Br. at 45. The precise issue raised in that case was "whether certain federal enactments were intended to and still protect the Oneidas' Indian title from unauthorized extinguishments." *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1082 (2d Cir. 1982). Congress had plenary authority to override those earlier enactments. But until it did so, the issues raised in that case—the meaning of federal enactments—were "the very types of questions that have always been for resolution by the courts." *Id.* (internal quotation marks and citations omitted).

Plaintiffs' claims do not call for interpretation of "federal enactments." The whole point of their suit is that Congress has declined to enact mandatory limits on carbon dioxide emissions, and that federal courts should

[16] Even if exclusivity is required, it exists here. This case raises questions of high policy that can be resolved *only* by the political branches. *See Texas Indus., Inc.*, 451 U.S. at 647; *Chevron*, 467 U.S. at 866 (assessing the wisdom of policy choice is "not [a] judicial" task); *Japan Whaling*, 478 U.S. at 230 ("courts are fundamentally underequipped to formulate national policies") (internal quotation marks and citation omitted); *New York v. FERC*, 535 U.S. at 24; *Lamont v. Woods*, 948 F.2d 825, 832 (2d Cir. 1991) ("[C]ourts are not competent to formulate national policy").

impose such limits using federal common law. But the very question whether there should be such limits is a matter of high policy committed to Congress under the Commerce Clause.

Finally, unilateral reductions of U.S. carbon dioxide emissions would interfere with the President's efforts to induce other nations to reduce their emissions. *See supra* at 44-48. This case raises a political question not because it "touches foreign relations" or is "a matter of intense worldwide concern," OSI Br. at 40-42 (internal quotation marks and citation omitted), but because permitting these and other plaintiffs to use an asserted federal common law nuisance cause of action to reduce domestic carbon dioxide emissions will impermissibly interfere with the President's authority to manage foreign relations. Such interference may be permissible where a court is obligated to perform its constitutional duty to interpret a statute, *see Japan Whaling*, 478 U.S. at 230; *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (Alien Tort Statute was a "legislative mandate" to resolve case involving foreign relations), or where the Executive Branch has advised a court that adjudication will not interfere with the conduct of foreign relations. *See Klinghoffer*, 937 F.2d at 49-50. But it is impermissible where courts use their very limited federal common law-making powers to arrogate the authority to resolve fundamental policy questions that the President is seeking to solve through diplomatic means.

### 2. There Are no Judicially Discoverable and Manageable Standards for Resolving This Case.

Contrary to plaintiffs' facile assurances, OSI Br. at 46; States Br. at 29, there are also no judicially discoverable and manageable standards for resolving the policy questions this case raises.

The Supreme Court has noted that, even in "simple type" nuisances, questions of "pollution control" are often "complex." *Milwaukee II*, 451 U.S. at 326; *cf. Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 504 (1971) ("even the simplest sort of interstate pollution case is an extremely awkward vehicle to manage"). The complexities in those cases pale in comparison to those presented here. There is "considerable uncertainty in [our] current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases," 68 Fed. Reg. at 52930; *see also Massachusetts v. EPA*, 415 F.3d 50, 57 (D.C. Cir. 2005) (noting uncertainty). This is one reason why EPA, an agency with scientific expertise no court possesses, chose not to impose limits by rulemaking, 68 Fed. Reg. at 52931, and why Congress has called for further studies.

These scientific uncertainties, moreover, are mere preludes to the unmanageable policy questions a court would then have to confront. How fast should emissions be reduced? Should power plants or automobiles be required to reduce emissions? Who should bear the costs of reductions? How are the impacts

on jobs, the economy and the nation's security to be balanced against the risks of future harms?

These questions cannot be resolved using "vague and indeterminate nuisance concepts and maxims of equity." *Milwaukee II*, 451 U.S. at 317. A public nuisance is an "unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1977). Conduct is unreasonable if it involves a "significant interference" with public health, safety, or convenience. *Id*. These general standards provide no guidance for resolving any of the foregoing issues, particularly where countless sources around the world contribute to the same alleged "interference."[17]

Finally, nothing in *Oneida* demonstrates that the issues raised by this case are manageable. States Br. at 29-30. In *Oneida*, the right to relief turned on the meaning of federal enactments, something courts traditionally determine. 691 F.2d at 1082. The relief could have led to serious disruptions, but that was because, if the plaintiffs were correct, they were the victims of a very great wrong. *Id.* at 1083. Here, the very questions of whether there is any "wrong," and if so which of the millions of sources around the world should bear responsibility for it,

[17] Nor can these issues be assumed away based on allegations that there are "practical and efficient" options for reducing emissions. OSI Br. at 53. These are not "facts" but bald legal or policy conclusions. Indeed, Congress itself has noted that limiting carbon dioxide emissions raises critical implications for the nation's economy. *See* 42 U.S.C. § 13381.

inescapably raise complex questions of science and policy. Courts lack discoverable and manageable standards to resolve such questions; nothing in *Oneida* suggests otherwise.

### 3. This Case Cannot be Resolved Without an Initial Policy Determination by the Political Branches.

As the District Court properly ruled, this case cannot be resolved without initial policy determinations by the political branches. Plaintiffs claim that the relevant policy decision is whether to abate an interstate nuisance, and that this policy issue was resolved by *Milwaukee I*, OSI Br. at 48, or by the States' ratification of the Constitution. States Br. at 31. As we have shown, however, the Constitution does not vest plenary authority in the courts to regulate all matters that could give rise to interstate disputes. *See supra* at 16-20. No principle of constitutional necessity requires federal courts to resolve the alleged problems of global climate change, and federal courts lack the authority to resolve the policy questions that such problems raise.

More fundamentally, authorization to resolve controversies between States is not the "initial policy decision" needed to render this case justiciable—any more than 28 U.S.C. § 1331 is a "policy decision" that renders all questions arising under the Constitution justiciable. The missing policy decision is whether to impose mandatory greenhouse gas emissions limits and, if so, on whom, in what manner and at what cost. No such decision can be found in statutes in which

Congress has called for additional study but *declined* to impose such limits. OSI Br. at 48.[18]

Finally, plaintiffs make the spurious claim that they seek no "comprehensive solution" to global climate change, only a determination of whether defendants are "contributing to" their alleged injuries. States Br. at 32. But the very nature of this phenomenon requires a comprehensive response. Because it is the collective action of greenhouse gases from millions of sources around the world that allegedly cause temperature increases, 68 Fed. Reg. at 52927, a reduction in defendants' emissions would be meaningless if offset by continuing increases in emissions elsewhere. *Id.* at 52931. Thus, any effective reductions of greenhouse gas emissions must be undertaken on a comprehensive basis, and imposition of comprehensive limits inescapably raises the complex policy questions identified above. This case cannot be made justiciable by ignoring the need for these initial policy decisions.

[18] Congress has made clear that the very statutes plaintiffs cite do *not* authorize regulation of such emissions. *See* 42 U.S.C. § 7403(g) ("[n]othing" in subsection 103(g) "shall be construed to authorize the imposition on any person of air pollution control requirements"); H.R. Conf. Rep. No. 100-475, at 171 (1987), 1987 U.S.C.C.A.N. 2370, 2432 ("[n]othing" in the Global Climate Protection Act "should be construed . . . as authorizing or requiring the adoption of any regulatory or control measures").

### 4. The Final Three *Baker* Factors Are Present.

Finally, adjudication of plaintiffs' claims would demonstrate a "lack of respect" for the political branches, contravene a "political decision already made," and create the potential for "embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. In arguing to the contrary, plaintiffs once again assert that U.S. policy is to reduce carbon dioxide emissions, States Br. at 37, and thus that they are in effect implementing a national policy that Congress and the President have neglected. But, as the numerous statutes we have discussed above show, and as EPA has explained, U.S. policy is manifestly *not* to engage in unilateral reductions of domestic emissions. *Supra* at 45-46. Instead, Congress has decided to study the issue further and to eschew mandatory limits at present, and the President, at Congress' directive, is seeking multilateral agreements concerning emission limits. Thus, a decision to permit States and private parties to enjoin domestic emissions through federal common law nuisance actions would demonstrate a lack of respect for, and contravene, both of these judgments by the political departments.

## CONCLUSION

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


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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), counsel for Defendants-Appellees certify that this brief contains 13,846 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared using Microsoft Word in a proportionally spaced 14-point Times New Roman typeface.

_____

Joseph R. Guerra

**ANTI-VIRUS CERTIFICATION**

Case Name: State of Connecticut, et al., v. American Electric Power Company, Inc., et al.

Docket Number: 05-5104-cv

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

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**AFFIDAVIT OF SERVICE**

Howard Daniels, being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 20, day of February 2006 deponent served 2 copy(s) of the within

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**Case Name:** State of Connecticut v. American

**Docket/Case No.** 05-5104-cv