IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60756

NED COMER, et al.,
Plaintiffs-Appellants,

v.

MURPHY OIL USA, et al.,
Defendants-Appellees.

On Appeal From The United States District Court
For the Southern District of Mississippi (No. 1:05-CV-436)
The Honorable Louis Guirola, Jr., U.S. District Judge

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the above-referenced organizations request permission to file the accompanying *amici curiae* brief in support of Defendants-Appellees.[1]

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 600,000

[1] Several days prior to the filing of this Motion, the undersigned counsel sent an email to counsel of the numerous parties requesting their consent to the filing of the accompanying brief. Many parties have consented to the filing of this *amicus* brief and we are not aware of any parties rejecting such consent. However, a response either accepting or rejecting consent was not obtained from each of the parties in this matter, and for that reason, *amici* seek leave from the court to file the accompanying brief.

members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

As associations of a wide range of large and small businesses, in Mississippi and throughout the United States, *amici* have a substantial interest in ensuring that Federal courts and Mississippi law follow traditional constitutional and tort law principles and reflect sound public policy. As this Court should appreciate, the nature of the case at bar extends far beyond Mississippi, taking on national and international implications for affecting a major change in U.S. environmental policy. *Amici*'s members would be adversely affected should the Fifth Circuit, sitting *en banc*, affirm the three judge panel decision holding that individual utilities and other businesses engaged in lawful conduct can be subject to liability for weather-related events.

Amici seek to assist the Court by utilizing their broad perspective to bring important legal and policy matters to the Court's attention. *Amici's* brief would first show, through an analysis of the history and development of public nuisance law, how this lawsuit represents the latest in a decades-long pursuit to circumvent the Legislative and Executive branches and affect environmental policy. The brief would examine the political questions that this Court would have to address to adjudicate Plaintiffs' claims, which permeate the core elements of public nuisance. It would then address the failure by Plaintiffs' to state any viable claim in tort law. Finally, *amici's* brief would examine the wide-ranging adverse policy affects of allowing Plaintiffs' claims to proceed through the courts.

For these reasons, we respectfully request that the Court grant our Motion.

Respectfully submitted,

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Dated: May 7, 2010

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2010, I electronically filed the foregoing Motion and accompanying proposed brief as *amici curiae* with the United States Court of Appeals for the Fifth Circuit via the Court's Electronic Case Filing System.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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DISCLOSURE STATEMENT PURSUANT TO RULE 26.1 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that the associations represented on this brief have no parent corporations and have issued no stock.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities, as described in Local Rule 28.2.1, have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualifications or recusals.

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IDENTITY AND INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE

The National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, and American Tort Reform Association ("*Amici*") are associations of large and small businesses in Mississippi and throughout the United States. They have a substantial interest in ensuring that Federal courts and Mississippi law follow constitutional and traditional tort law principles. The nature of this case extends far beyond Mississippi, taking on national and international implications for affecting major changes in U.S. policy. *Amici's* members would be adversely affected should the Fifth Circuit affirm the panel's decision that individual utilities and other businesses engaged in lawful conduct can be subject to liability for weather-related events. *Amici* submit this brief to bring to the Court's attention the highly political context into which this case purports to state Mississippi tort law claims, and explain how this lawsuit represents an effort to circumvent the legislative and executive branches on environmental policy issues.

Co-author of the brief, James A. Henderson, Jr., the Frank B. Ingersoll Professor of Law at Cornell Law School, has not accepted any remuneration for his work on this brief. A leading tort law scholar and reporter of the Restatement Third: Products Liability, Professor Henderson volunteered to assist with this brief because of his concern that this case would allow a court, under the guise of tort

law, to usurp congressional and executive responsibilities. It would also undermine Mississippi law by giving rise to a line of lawless, mass tort cases inconsistent with traditional bounds of tort law anywhere in the United States.

STATEMENT OF THE CASE

Amici adopt Defendants-Appellees Statement of the Case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents the culmination of a forty-year effort by environmental leaders and personal injury lawyers to turn the tort of public nuisance into a powerful tool for advancing private political agendas. Their goal for this and other similar suits is not to seek compensation from an actual tortfeasor, but to impose through the courts "regulations" not achieved through the political process. Labor Secretary Robert Reich, who served under President Clinton in the 1990s, called such lawsuits "regulation through litigation." Robert B. Reich, *Don't Democrats Believe in Democracy?,* Wall St. J., Jan. 12, 2000, at A22. He appreciated that these cases were usurpations of the political process, calling them "faux legislation, which sacrifices democracy." *Id.*

The tort of public nuisance has been the centerpiece of these political cases. Since the drafting of the Restatement (Second) of Torts (1979), plaintiffs have tried to take advantage of the amorphous nature of the word "nuisance" and the fact that the tort had not been used much in the post-industrialized era, meaning that many

courts did not have a hardened view of how to apply the historic tort in modern times. *See* W. Page Keeton *et al*., *Prosser & Keeton on Torts* 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people . . . ."); Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 541 (2006). As demonstrated herein, these efforts have not succeeded; federal and state judges schooled in rules and policies behind public nuisance law have rejected these suits.

Courts, including the district court judge at bar, have wisely understood that allowing politically-oriented public nuisance claims to proceed would create a "super tort" that, by overcoming all pre-existing bounds of tort law, could be used by plaintiffs and lawyers to enforce private political agendas. *See Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (calling the result a "monster that would devour in one gulp the entire law of tort."). Once past a motion to dismiss, plaintiffs can use the threat of massive liability to leverage companies to accept changes to business practices or products, no matter how invalid or unpopular with policy-makers or the public at-large. Such litigation, unlike with regulation or legislation, does not broadly consider the importance of the conduct or product at question, whether policy changes sought

are unnecessary, and consequences of those policy changes, including whether consumers can afford to ultimately bear the costs of the changes.

As this brief will show, "global warming" claims seeking to subject select private interests to liability for weather-related injuries from Hurricane Katrina are, for closely related reasons, both constitutionally barred from federal courts under the Article III political question doctrine and fail to state any recognized cause of action under Mississippi law. The trial judge, in dismissing the claims, properly observed that the case raises inherently political questions that are the province of legislatures and executive agencies, not the judiciary: "Adjudication of Plaintiffs' claims in this case would necessitate the formulation of standards dictating, for example, the amount of greenhouse emissions that would be excessive and the scientific and policy reasons behind those standards." *Comer v. Murphy Oil Co.*, 585 F.3d 855, 860 n. 2 (5th Cir. 2009) (courts are "ill-equipped or unequipped with the power that it has to address these issues"). With no constitutional authority to adjudicate these political questions, and with no anchor under any conceptual or practical doctrine of Mississippi tort law, this lawsuit must be dismissed.

ARGUMENT

I. THIS LAWSUIT REPRESENTS AN UNPRECEDENTED STEP IN THE DECADES-LONG PURSUIT TO USE THE TORT OF PUBLIC NUISANCE TO CIRCUMVENT THE POLITICAL PROCESS

A. Environmental Advocates Have Been Attempting to Recast Public Nuisance into a Tort for Advancing Their Political Agenda

The tort of public nuisance has centuries of jurisprudence defining its purpose, elements and boundaries. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003). The four time-honored elements of public nuisance theory are: (1) the existence of a "public right"; (2) unreasonable conduct by the alleged tortfeasor in interfering with that public right; (3) control of the nuisance either at the time of creation or abatement; and (4) proximate cause between defendant's unreasonable conduct and the public nuisance, as well as any alleged injury. *See* Schwartz & Goldberg, *supra*, at 562-71; *see also Comet Delta, Inc. v. Pate Stevedore Co.*, 521 So. 2d 857, 860 (Miss. 1988) (defining public nuisance under Mississippi law).

The purpose of public nuisance theory has always been to give governments the ability to use the tort system to stop a private party from engaging in quasi-criminal behavior that invaded a public right, and, when appropriate, require that party to abate the nuisance it created. *See* Restatement (Second), *supra*, § 821B cmt. a. A private plaintiff has standing to bring public nuisance claims only if he

or she has a special injury from the public nuisance, which is a "harm different in kind, rather than in degree, than that suffered by the public at large." *McKay v. Boyd Construction Co.*, 571 So. 2d 916, 921 (Miss. 1990). Thus, a private plaintiff must first prove all four elements of the tort – just as a government plaintiff must – and prove that he or she suffered a special injury from that public nuisance. Traditionally, a private plaintiff can receive money compensation only for his or her special injury. Remedies of injunctive relief and abatement are reserved for government plaintiffs. *See* Restatement (Second), *supra*, § 821B cmt. a.

In the 1970s, environmental interest group leaders started a legal public policy campaign to transform public nuisance from a restrained government law-enforcement tort into a tool for advancing private political agendas. Public nuisance doctrine had not been included in the first Restatement, and when William Prosser and John Wade sought to capture public nuisance doctrine in the Restatement (Second), *supra*, § 821B, these environmental interest group leaders pursued changes to the tort that, according to a former Sierra Club attorney, would have "[broken] the bounds of traditional public nuisance." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). Three changes pursued are embodied by this case.

First, they tried to remove the quasi-criminal conduct requirement so that claims could be brought even for lawful conduct permitted by federal, state, or

local regulations – just as defendants' emissions are today. *See id.* Second, they sought to give private plaintiffs, including interest groups, standing to bring claims for more than just special injuries to themselves. *See id*. This case seeks damages for alleged harms to both private and public property. Finally, they sought the ability for public nuisance claims, such as this case, to be brought as class actions, which contradicts the purpose and nature of the special injury rule. *See id*.

If courts were to adopt these changes for when and how public nuisance claims could be brought, public nuisance theory would become a catch-all tort for forcing potentially non-culpable private interests to clean up and pay for a wide-range of perceived environmental harms, with few, if any, defenses. *See id*. at 838. (changes would give "plaintiffs the opportunity to obtain damages and injunctive relief, [which] lacks laches and other common tort defenses, is immune to administrative law defenses such as exhaustion, avoids the private nuisance requirement that the plaintiff be a landowner/occupier of affected land, eliminates a fault requirement, and circumvents any pre-suit notice requirement.").

B. Courts Have Long Rejected Efforts to Transform Public Nuisance Into a Catch-All Tort to Effectuate Policy Reform

The tort of public nuisance has proven not to be so malleable. The first test case for expanding public nuisance theory to advance an environmental political agenda was *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971), which is remarkably similar to this case. It was a purported class action against

1,200 corporations for emitting gases that, when mixed together, allegedly contributed to smog in Los Angeles. The plaintiffs, who were private individuals, sued the businesses for billions of dollars in compensatory and punitive damages.

In dismissing the claims, the court fully appreciated the political nature of the issues, the potentially sweeping environmental policy effects, and the proper role of the legislature, not the judiciary, in making decisions as to potential liability. As the court explained, plaintiffs were "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the court." *Id.* at 645. The court further explained that public nuisance theory's special injury rule is ill-suited for class actions and that granting relief would "halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent." *Id*. at 644.

Undeterred, environmental leaders and personal injury lawyers actively sought courts willing to overlook the political questions and allow one of these public nuisance claims to survive a motion to dismiss. The mere threat of liability could force the defendant to change business practices or facilitate regulatory or legislative changes. There has been an occasional limited or trial court success, the most prominent early example occurring in 1983 when a New York court allowed a public nuisance action for pollution of a waterway to continue against a

defendant that did not contribute to the pollution and never owned or controlled the land where the pollution occurred. *See State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971 (Sup. Ct. 1983). The court candidly stated that the determination of who should bear the expense of abating the nuisance "is essentially a political question to be decided in the legislative arena," but permitted the claim to proceed because, in its opinion, "[s]omeone must pay to correct the problem." *Id.* at 977.

All similar major attempts to morph public nuisance theory into the tort *du jour* for politically-motivated, high-stakes lawsuits have failed. The first effort was in asbestos litigation, with courts rejecting cases from municipalities, school districts and others asserting public nuisance claims against manufacturers to abate asbestos from public and private properties. *See, e.g.*, *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (public nuisance would "give rise to a cause of action . . . regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories."). Next was state attorney general litigation against tobacco manufacturers, where the only court to address the public nuisance claim rejected it. *See Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997); *see also* Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 Def. Couns. J. 484 (2000).

Since then, public nuisance theory has been alleged in various mass tort litigations, including for harms caused by guns, lead paint, and drunk driving, in an effort to make public nuisance a catch-all tort for environmental and social harms.[1] In all states with final determinations of law on these expansive public nuisance claims, such attempts have been rejected. *See*, *e.g.*, *City of Chicago*, 821 N.E.2d at 1148 (reforms "must be the work of the legislature, brought about by the political process, not the work of the courts.").[2]

C. Climate Change Litigation Represents the Latest Attempt to Use Courts to Usurp the Legislature's Responsibility

In the early 2000s, environmental advocates, including former Vice-President Al Gore, focused significant policy efforts on their "global warming" agenda. Mr. Gore's movie "An Inconvenient Truth" won an Academy Award, and he was awarded the Nobel Peace Prize for these efforts. The allegations were that man-made emissions of CO_2, methane and other such gases – collectively termed "greenhouse gases" or "GHGs" – caused climate changes and that those climate changes had serious long-term consequences for the environment. Their short-

[1] *See e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1112 (Ill. 2004); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2009); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *Goodwin v. Anheuser-Busch, Inc.*, No. BC310105, 2005 WL 280330, at *8 (Cal. Super. Ct. order Jan. 28, 2005).

[2] *See also St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); Ohio Rev. Code Ann. § 2307.71(13)(c) (2006).

term political goal was to restrict emissions of man-made GHGs, but their efforts did not immediately define environmental policy in the United States.

The U.S. Government's perceived reluctance to curb such emissions caused environmental interest group leaders to turn to another venue to pursue their cause – the courts. *See* Environmental Litigation: Law and Strategy 1 (Cary R. Perlman, ed. 2009) ("[F]our years ago, the issue had no significant legal footprint in the United States. Since then, however, the issue has exploded onto the legal scene, resulting in enormous social and economic shockwaves."). Environmental groups, joined by state government allies, began with a lawsuit requiring the Bush Administration to revisit its denial of rulemaking on GHG emissions under the Clean Air Act. *See Massachusetts v. U.S. Environmental Protection Agency*, 549 U.S. 497 (2007). That case was followed by four "global warming" lawsuits, including this case, against private sector interests associated with producing and using energy products. John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, Bus. Week, Oct. 30, 2006, at 34 (observing this "ambitious legal war on oil, electric power, auto, and other companies").

The first private sector case, *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), was brought by a few state attorneys general to require specific reductions in GHG emissions per year for ten years. A second public lawsuit, *California v. General*

Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), was filed by the California attorney general against car-makers for making cars that produced vehicle exhaust and, therefore, allegedly contribute to global warming. Finally, two cases, the instant case and *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.2d 863 (N.D. Cal. 2009), seek recovery for specific injuries from weather events allegedly made worse by global warming.

With surprising candor, advocates of the litigation acknowledged that the real targets of these private sector lawsuits were Congress and regulators and that they were really seeking regulatory changes. *See* Robert Meltz, Cong. Research Serv. Rep. for Cong., Climate Change Litig.: A Growing Phenomenon 33 (2008) ("Many proponents of litigation or unilateral state action freely concede that such initiatives are make-do efforts that . . . may prod the national government to act.").

John Echeverria, the Executive Director of Georgetown University's Environmental Law & Policy Institute, said "this boomlet in global warming litigation represents frustration with the White House's and Congress' failure to come to grips with the issue . . . [s]o the courts, for better or worse, are taking the lead." *See* Carey & Woellert at 34. Connecticut Attorney General Richard Blumenthal, the lead attorney general in *AEP*, stated:

> [T]his lawsuit began with a lump in the throat, a gut feeling, emotion, that CO_2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind

> of action, and it wasn't coming from the federal government. . . . [We were] brainstorming about what could be done.

Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, 30 Colum. J. Envtl. L. 335, 339 (2005) (also quoting Maine Attorney General Rowe: " [I]t's a shame that we're here . . . trying to sue [companies] . . . because the federal government is being inactive.").

Mr. Gerald Maples, a lead plaintiffs' attorney in the instant case, has also freely acknowledged that his "primary goal was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol." Mark Schleifstein, *Global Warming Suit Gets Go-Ahead*, Times-Picayune, Oct. 17, 2009, at 3, *available at* 2009 WLNR 20528599; *see* Chris Joyner, *Lawsuits Place Global Warming on More Dockets*, USA Today, Nov. 23, 2009, at 5A, *available at* 2009 WLNR 23599365 (reporting Mr. Maples as conceding the legality of Defendants' conduct in the instant case).

While such end-games may entice those sympathetic to the environmental groups' political agenda, they are not theories for liability based on any objective measure of wrongful conduct. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923 (2009).

II. THE COURT WOULD HAVE TO ADDRESS COMPLEX POLITICAL QUESTIONS TO DETERMINE WHETHER THE ELEMENTS OF PUBLIC NUISANCE ARE SATISFIED

The Federal judiciary, under Article III of the Constitution, has no authority to settle the national policy "'debate' about global warming" presented by Plaintiffs. *Comer*, 585 F.3d at 860 n. 2. Contrary to the panel's holding, politically-motivated plaintiffs cannot get around the political question doctrine by merely formulating political agendas in the form of state law claims against private parties. *See id.* at 873 ("litigation between private citizens based on state common law" generally do not present nonjusticiable questions). This simplistic, facial view of constitutionality has been rejected in other contexts and should be rejected here; the Supreme Court has long-recognized that constitutional assessment requires courts to look behind the veneer to fully grasp the scope and implications of the issues. *See Hunter v. Erikson*, 393 U.S. 385 (1969) (requiring consideration of "impact" and "purpose" of the matter); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (requiring inquiry into "posture of the particular [claims]"); *cf. Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) ("recasting" political questions "in tort terms does not provide standards for making or reviewing [such] judgments").

As indicated above, the posture of the claims in this case is to derive actual or *de facto* regulations. All four federal trial courts responding to the "global warming" claims looked behind the false façade of the pleadings and dismissed the

claims as political questions. *See Comer*, 585 F.3d at 860 n.2 (citing the district court's ruling that the global debate "has no place in the court"); *Kivalina*, 663 F. Supp. 2d at 877 ("allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch"); *General Motors*, 2007 WL 2726871 at *13 (allowing claim to proceed would "expos[e] automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce"); *AEP*, 406 F. Supp. 2d at 274 ("Because resolution of the issues presented here requires identification and balancing of environmental, foreign policy, and national security interests, an initial policy determination of a kind clearly for non-judicial discretion is required.") (internal citation omitted).

These knowledgeable Federal district court judges from diverse jurisdictions recognized the inherently political nature of the issues presented to the court and determinations the court would have to make to adjudicate the claims. Notwithstanding the masking of political questions in state common law causes of action, trying to subject private interests to liability for weather events allegedly connected to "global warming" is not an Article III case or controversy.

A. The Determination of Reasonable Versus Unreasonable Conduct Requires the Court to Establish Emission Standards

In a claim for public nuisance, all plaintiffs – both government plaintiffs, as in *AEP* and *General Motors*, and private plaintiffs in *Kivalina* and the instant case – must prove that a public nuisance exists and the defendant engaged in *unreasonable* conduct that proximately caused the nuisance. The constitutional difficulty with trying these cases, as the trial courts recognized, is that there are no "judicially discoverable and manageable standards" for assessing unreasonableness of a defendant's conduct with respect to emissions of GHGs. *See Baker*, 369 U.S. at 217 (identifying standards for when a case presents a political question).

GHGs, presuming *arguendo* that they affect climate, have been released for centuries from sources – both natural and man-made – around the world. The trial court, in this case, would have to determine that, for each Defendant, emissions above a certain level *unreasonably* contributed to strengthening Hurricane Katrina and Plaintiffs' alleged injuries, while emissions below that amount were *reasonable*, even if allegedly contributing to the injuries. Such a court-created threshold for massive liability would be the *de facto* cap on emissions for each Defendant, but have no effect on any other source of GHGs, in this country or around the world. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328-29 (2008) ("tort duties of care" under state law "directly regulate" a defendant's conduct).

Determining whether emissions should be reduced, by how much, and for which industries is exactly the kind of policy determination alluded to in *Baker* as being of "non-judicial discretion" and the province of Congress and federal regulators. First, the activities underlying these lawsuits involve public utilities and other energy sources necessary to modern ways of life. The public relies on these products for turning on lights, heating their homes, having electricity to run everyday appliances, and meeting their most basic transportation needs. Second, costs and benefits of reducing emissions are uncertain, highly speculative, and have proven extraordinarily controversial. *See*, *e.g.*, Andrew C. Revkin, *Hacked E-mail is New Fodder for Climate Dispute*, N.Y. Times, Nov. 20, 2009. Third, "[a]ny potential benefit of [GHG] regulation could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emissions reductions." EPA, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52931 (Sept. 8, 2003). Finally, in accordance with Mississippi law, the court would have to allocate fault among all sources of CO_2, methane and other so-called GHGs. *See* Miss. Code. Ann. § 85-5-1(2).

Such global political decisions should not be decided in courts on limited information provided by lawyers on each side of a case – even as large as this case. Rather, weighing the cost, benefits and social value of producing and using essential resources, namely utilities and energy products, and factoring in any

adverse effects of their production and use is part of the delicate balancing in which only Congress and administrative agencies can engage. They can conduct hearings, commission research, engage in meaningful discourse with foreign nations, and consider the interests of all stakeholders. Thus, these branches of government, unlike the Judiciary, have the authority and the competent tools at their disposal for investigating facts and setting emissions policy.

B. The Determination of Causation Necessarily Involves Political Questions Given the Global Sources of GHGs

The Rube Goldberg[3] causation allegations associated with these claims give rise to three distinct grounds for dismissal: (1) constitutional political question, as discussed below; (2) constitutional standing, as Plaintiffs' alleged harms cannot be traced to an individual defendant; and (3) failure to state a claim in tort law, as Defendants' emissions did not proximately cause Hurricane Katrina-related injuries. The focus here is that given the "multiple worldwide sources of [GHGs] across myriad industries and multiple countries," Plaintiffs made a *political* decision to sue companies associated with the energy industry. *General Motors*, 2007 WL 2726871, at *15.

The release of GHGs is not particular to any defendant or industry, as CO_2, methane and other so-called GHGs are released through numerous man-made and

[3] A Rube Goldberg machine is "a comically involved, complicated invention, [that is] laboriously contrived." Webster's New World Dictionary.

natural activities. The United States accounts for 17% of global man-made emissions of GHGs. Defendants count for just a subset of that amount. GHGs are released through fossil fuel combustion, power plants, manufacturing, and auto and airplane exhaust throughout the world. *See* CRS Report for Congress, China's Greenhouse Gas Emissions and Mitigation Policies, Sept. 10, 2008, at 8. Natural sources include volcanic outgassing, animal releases of gas (particularly from livestock), and the respiration processes of living aerobic organisms (breathing).[4] When mixed in the Earth's atmosphere, CO_2 from any one of these sources cannot be distinguished from CO_2 of the many other sources.

Therefore, demonstrating the difference between a case or controversy and a political suit, Plaintiffs could have named innumerable sources from all around the world as allegedly causing their Hurricane Katrina-related harms. Plaintiffs chose perceived "deep pocket" American companies associated with the energy industry and not sources in China, India and elsewhere that have made more significant contributions to the emissions of the gases at issue in these cases.

Giving Plaintiffs the opportunity to make the "political judgment that the two dozen Defendants . . . should be the only ones to bear the cost of contributing to global warming" violates the *Baker* standard that federal trial courts have "a

[4] *See* Natural Sources and Sinks of Carbon Dioxide, Environmental Protection Agency, Climate Change – Greenhouse Gas Emissions, at http://www.epa.gov/climatechange/emissions/co2_natural.html.

manageable method of discerning the entities that are creating and contributing to the alleged nuisance." *Kivalina*, 663 F. Supp. 2d at 874 (plaintiffs cannot show that "any particular emissions by any specific person, entity, group [*sic*] at any particular point in time" caused "any particular alleged effect of global warming") (internal citations and footnotes omitted); *General Motors*, 2007 WL 2726871, at *15. Thus, under Article III of the Constitution, federal courts do not have constitutional authority to subject a sector of the American economy to liability for harms caused by Hurricane Katrina.

III. PLAINTIFFS CANNOT STATE A VIABLE TORT CLAIM

Neither Mississippi tort law, nor the tort law of any other state, recognizes a cause of action for holding private parties liable for injuries caused by weather-related events, including Hurricane Katrina. The panel misapplied Mississippi law, as Plaintiffs' claims do not sound in public nuisance theory, negligence or trespass. *See* 585 F.3d at 860 (dismissing all other claims). As Judge Davis wisely concluded in his concurring opinion, this case should be dismissed for failure "to state a claim under common law." *Id.* at 880.

A. Plaintiffs' Claims Do Not Sound in Any of the Torts Alleged

1. Public Nuisance: Emitting GHGs Does Not Give Rise to a Claim for Public Nuisance

As discussed above, the tort of public nuisance, in Mississippi and other states, targets quasi-criminal offenses that interfere with the rights of the public at-

large. *See* William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966). These "common law crimes" included threatening public health, such as by keeping diseased animals or explosives in a city; violating public morals, including vagrancy; blocking public roads and waterways; and violating the peace, such as through excessive noise or bad odors. *See* Restatement (Second), *supra*, §821B cmt. b; *Covington County v. Collins*, 45 So. 854 (Miss. 1908) (continuous running of a traction engine on a highway); *Vicksburg & M. R. Co. v. Alexander*, 62 Miss. 496 (Miss. 1885) (blocking a public highway).[5]

Each of these activities is objectively wrong, as public nuisances have little or no public benefit. *See* Restatement (Second), *supra*, § 828 cmt. e. (describing public nuisances as lacking any social value and being "contrary to common standards of decency"). This objective standard gives actors notice that such actions could lead to public nuisance liability. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to court-made law, such as tort liability, enforced by civil courts and juries).

By contrast, the gases at issue in this case are necessary by-products of public utilities and other societal staples, such as electricity, gasoline and home heating oil (to name a few of the activities subject to this lawsuit). Emitting such

[5] Codified Mississippi public nuisances include Miss. Code Ann. § 17-17-17 (unauthorized dumping of waste); Miss. Code Ann. § 49-23-19 (unlawful advertising); Miss. Code Ann. § 49-19-25 (uncontrolled fires).

gases, to produce affordable energy products, are not quasi-criminal or objectively wrongful acts. These energy products are necessary to modern ways of life. Also, Congress and administrative agencies have assiduously studied and debated the very issues at play in this litigation, and have never imposed caps on emissions or suggested that emissions above a certain amount would be unlawful or lead to massive liability. Defendants, some of whom have worked with the government for thirty years on these issues, therefore would have no reason to believe that current, lawful emissions give rise to liability.

Thus, Defendants have not engaged in any activity that gives rise to public nuisance liability. Incidentally, this remains true even if the Court determines that "global warming" is a public nuisance in Mississippi. The Restatement (Second) explains: "If the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it." Restatement (Second), *supra*, at §821A, cmt. c. As most federal and state courts have responded in rejecting new, speculative public nuisance suits, eliminating the wrongful conduct requirement would allow plaintiffs to "deliberately frame[] [their] case as a public nuisance action" to get around constraints of the American legal system. *Chicago v. American Cyanamid*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003).

2. Negligence: Emitting GHGs Does Not Give Rise to a Claim for Negligence

The panel also misapplied the duty element of Mississippi negligence law, wrongfully concluding Defendants "have a duty to conduct their business so as to avoid unreasonably endangering the environment, public health, public and private property, and the citizens of Mississippi" in general. *Comer*, 585 F.3d at 861.

In Mississippi, duty is a relational concept between defendant's wrongful act and an injury to an identifiable class of plaintiffs. Whether a duty exists starts with the "question of whether the defendant is under any obligation for the benefit of the *particular plaintiff*." Keeton, *supra*, § 53, 356; *Scafide v. Bazzone*, 962 So. 2d 585 (Miss. Ct. App. 2006) (duty is grounded in a legal obligation being owed to a specific party), *cert. denied*, 962 So. 2d 38 (Miss. 2007). Plaintiffs must show "*the existence of a duty 'to conform to a specific standard for the protection of others against the unreasonable risk of injury.'" Enterprise Leasing Co. South Cent., Inc. v. Bardin*, 8 So. 3d 866 (Miss. 2009) (quoting *Burnham v. Tabb*, 508 So. 2d 1072, 1074 (Miss. 1987) (emphasis in original)). As discussed in this brief, no "specific standard" exists with regard to GHG emissions.

Further, there can be no duty to the world in general, which is epitomized by the "global" warming claim at bar. *See Satchfield v. R.R. Morrison & Son, Inc.*, 872 So. 2d 661, 666 (Miss. 2004) ("There must be some limit to foreseeability."); *see also Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 100 (N.Y. 1928)

(defendant owes a duty only to individuals in a defined "zone of foreseeable risk"). With respect to Plaintiffs' allegations against Defendants' emissions, Plaintiffs are not within any specific zone of reasonably foreseeable risk other than just being part of the world in general. *See Williamson v. Daniels*, 748 So. 2d 754, 759 (Miss. 1999) (plaintiff's injury must be "a reasonably foreseeable consequence" of defendant's conduct). Because Defendants did not have a duty to protect Mississippi residents from Hurricane Katrina, Plaintiffs' negligence claim fails.

3. Trespass: Emitting GHGs Does Not Give Rise to a Claim for Trespass

Plaintiffs also fail to make out a claim for trespass under Mississippi law, which requires the intent to physically be upon a particular piece of land. *See Blue v. Charles F. Hayes & Assocs., Inc.*, 215 So. 2d 426, 429 (Miss. 1968); *Sacier v. Biloxi Reg'l Med. Ctr.*, 708 So. 2d 1351, 1357 (Miss. 1998) (defining trespasser as one who enters another's premises "without license, invitation, or other right, and intrudes for some definite purpose of his own, or at his convenience, or merely as an idler with no apparent purpose, other than, perhaps, to satisfy his curiosity").[6]

The Mississippi Supreme Court has further required that "the intent necessary for a trespass is for one 'to be at the place on the land where the trespass

[6] Criminal trespass is a lesser included offense of burglary, designed to address the conduct of entering another's property without permission or remaining on his or her property after being told to leave. *See* Miss. Code Ann. § 97-17-87; *Harper v. State*, 478 So. 2d 1017 (Miss. 1985).

allegedly occurred.'" *Alexander v. Brown*, 793 So. 2d 601, 605 (Miss. 2001) (quoting Keeton, *supra*, at § 13, 73). Again, as with the duty in negligence law, this element is plaintiff or property specific. Causation issues aside for the moment, Plaintiffs have not shown and cannot show that Defendants intended to cause a "trespass" onto Plaintiffs' property.

B. Proximate Cause Between Defendants' Emissions and Plaintiffs' Alleged Injuries Cannot Be Established

Common to all torts is the bedrock requirement that a defendant *cause* a plaintiff's alleged injuries. *See* Keeton, *supra*, at § 41, 263 ("there [must be] some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered."). As Judge Davis concluded, "plaintiffs failed to allege facts that could establish that the defendants' actions were a proximate cause of the plaintiffs' alleged injuries." *Comer*, 585 F.3d at 880.

The causation analysis for public nuisance theory is the same for negligence, trespass and all other areas of tort law. *See, e.g., Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648, 663 (Miss. 1995) (rejecting public nuisance claim because evidence did not show sludge from the specific defendant's paper mill caused the alleged nuisance). Plaintiffs must be able to show both "direct" (factual) and "foreseeable" (legal) causation; *i.e.*, but-for Defendants' emissions Plaintiffs' injuries would not have occurred, and that these injuries are closely related such that a reasonable person would see it as a likely result of his or her

conduct. *See Owens Corning v. R.J. Reynolds Tobacco Co.*, 868 So. 2d 331, 341 (Miss. 2004); *cf.* Fowler V. Harper, et al., The Law of Torts §20.2 (1986). Plaintiffs cannot meet either burden, and there is no information dependent on discovery that will change these dynamics.

Given the billions of sources of GHGs and circuitous route of Plaintiffs' causation allegations, no Defendant is a direct cause of the alleged harms. Plaintiffs cannot meet Mississippi's causation requirement that their alleged Hurricane Katrina-related harms "could have been avoided in the absence" of any defendant's emissions. *Pargas of Taylorsville, Inc. v. Craft*, 249 So. 2d 403, 407 (Miss. 1971) (adopting "but for" test in 38 Am.Jur. Negligence, section 54 (1941)).

The mere "contribution" test Plaintiffs seek is unfounded in Mississippi law. *See Illinois Cent. R. Co. v. Watkins*, 671 So. 2d 59 (Miss. 1996) (requiring, at minimum, defendant to be a "substantial contributing cause of the damages"). In Mississippi and elsewhere, causation requires more than taking "a bucket of water and dump[ing] it in the ocean." *Summers v. Certainteed Corp.*, 886 A.2d 240, 244 (Pa. Super. Ct. 2005) (*en banc*) (providing analogy in dismissing speculative causation theories in exposure-based torts). Also, under Mississippi law, the court must consider all persons who are at fault to assure proper allocation. *See* Miss. Code. 85-5-7. As the district court in *Kivalina* appreciated, "[t]o the extent that the combustion of fossil fuels is causing global warming, it is evidence that any

person, entity or industry which uses or consumes such fuels bears at least some responsibility for Plaintiffs' harm." *Kivalina*, 663 F. Supp. 2d at 877 n.4.

Plaintiffs' claims also fail under Mississippi's "reasonable foreseeability" requirement for proximate cause. Keeton, *supra*, at § 42, 273. In speculative, industry-wide suits, such as this case, "the nexus between cause and effect [for each defendant] is too attenuated to justify liability." *Texas Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 668 (E.D. Tex. 1998). None of the Defendants could have reasonably foreseen that, even if true, anything they did could cause Plaintiffs' Hurricane Katrina-related injuries such that, on their own, they "should have avoided the injury" by doing something differently. Dan B. Dobbs, *The Law of Torts* § 180, 444 (2000).

When legal causation can never be shown, years of time-consuming, expensive discovery should be avoided. This was the policy behind the Supreme Court of United States' rulings in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), requiring plausible evidence that a case can succeed even at the motion to dismiss stage.

IV. ALLOWING THIS LAWSUIT TO PROCEED WOULD USHER IN A NEW UNBOUNDED ERA OF CIVIL LITIGATION

A. Reinstating the Case Could Be the Victory Plaintiffs' Seek

As a practical measure, the Court should not, as the panel attempted to do, push key decisions in the case to "later stages in the litigation." *Comer*, 585 F.3d

at 864. In these kinds of politically motivated, industry-wide cases, just getting to discovery can be the victory advocates seek.

Professor Daynard of Northeastern University School of Law explained this point in a comparable suit: "One of the litigation's first benefits is access to industry documents through the discovery process" because discovery "may provide materials that would help change public attitudes towards these cases." Richard A. Daynard, P. Tim Howard and Cara L. Wilking, Private Enforcement: Litigation as a Tool to Prevent Obesity, at 408 (2004); Jeremy Grant, *Food Groups Get Taste of Fear*, Financial Times, Feb. 23, 2005. George Washington School of Law's John Banzhaf echoed this sentiment: "plaintiffs do not have to do much to win. Damage to reputation, or risk of it, may be enough." Kate Zernike, *Lawyers Shift Focus From Big Tobacco to Big Food*, NY Times, Apr. 9, 2004.

B. The Lawsuit Would Give Rise to Endless Liability

Allowing this case to proceed beyond the motion to dismiss stage could subject these Defendants to the same highly speculative, mass tort cases after every harsh weather event. Hurricane Katrina, erosion of Kivalina and concerns of attorneys general in *AEP*, are not unique to these communities. Every hurricane, flood, draught, and heat-related conditions will spawn climate change lawsuits.

Further, speculative uses of public nuisance theory would be revived against private interests for other political purposes, including "to mandate the redesign

of" products and regulate business methods. *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001). The result would be the exact catch-all social and environmental tort courts expressly rejected for decades. *See Spitzer v. Sturm, Ruger & Co.*, 309 A.D. 91, 96 (N.Y. App. Div. 2003) ("All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.").

C. Congress and the Executive Are the Proper Institutions to Assess and Regulate Any Public Risks Associated with Climate Change

"Public risk" cases, such as this one, expose the weakness of the judiciary to administer cases where there is no objective wrongful conduct. As a backwards-looking compensation and enforcement mechanism, "the tort system is ill-equipped to handle" public risks, particularly as in this case, where there is a "need for specialized experience in assessing risks and control measures." 2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991). By contrast, Congress and administrative agencies can fully vet Plaintiffs' scientific claims and engage in thorough risk-benefit analyses for each potential class of plaintiffs and defendants. If the current Administration and Congress enact such measures, liability can complement the regulation regime by requiring

companies to pay compensation should they cause harm by operating outside of duly enacted laws.

CONCLUSION

For these reasons, the Court should affirm the District Court's holding to dismiss these claims as nonjusticiable. In the alternative, the Court should dismiss the case as failing to state a claim under Mississippi law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in Times New Roman, 14 point.

2. The brief also complies with Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(b) because it contains 6,983 words.

/s/ Cary Silverman
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Dated: May 7, 2010

CERTIFICATE OF COMPLIANCE
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Pursuant to the United States Court of Appeals for the Fifth Circuit's ECF Filing Standard (A)(6), I hereby certify that (1) the required privacy redactions have been made to the foregoing Brief; (2) this electronic submission is an exact copy of the paper document; and (3) this submission has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Dated: May 7, 2010