No. 12-60291

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NED COMER; BRENDA COMER; ERIC HAYGOOD;
BRENDA HAYGOOD; LARRY HUNTER; SANDRA L. HUNTER;
MITCHELL KISIELEWSKI; JOHANNA KISIELEWSKI;
ROSEMARY ROMAIN; JUDY OLSON; DAVID LAIN,
Plaintiffs-Appellants,

v.

MURPHY OIL USA, INC.; SHELL OIL COMPANY;
CHEVRON U.S.A. INC.; EXXONMOBIL CORPORATION;
BP AMOCO CHEMICAL COMPANY, ET AL.,
Defendants-Appellees.

On Appeal from the Judgment of the United States District Court for the Southern District of Mississippi, Southern Division (No. 1:11-cv-00220-LG-RHW)

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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DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, counsel for *amici curiae*, the National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, and American Tort Reform Association, hereby state that each *amici* has no parent corporation and has issued no stock.

Pursuant to Fed. R. App. P. 29(c)(5) and Circuit Rule 29.2, counsel for *amici curiae* state that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person – other than *amici*, their members, or their counsel – contributed money that was intended to fund preparing or submitting the brief.

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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 impacted should the Fifth Circuit reverse the decision below and find that individual businesses engaged in lawful conduct can be subject to liability for weather-related events. *Amici* submit this brief to provide the Court with a broad understanding of the evolution of climate change tort litigation nationally, and its rejection by courts at every level of the federal judiciary. *Amici* also will explain that, in addition to issues of *res judicata*, standing, nonjusticiable political questions, and preemption supporting dismissal of the case, Plaintiffs fail to state a claim recognized under Mississippi tort law.

STATEMENT OF THE CASE

Amici adopt Defendants-Appellees Statement of the Case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under all legal theories, state and federal, there is no common law cause of action against private actors for harms caused by hurricanes, or any other weather event, allegedly caused by global climate change.

Common law causes of action over harms allegedly caused by global climate change have now been asserted in four high-profile cases. Collectively, they targeted many of the largest private-sector entities that produce or use energy, namely the nation's utilities, as well as oil, gas, coal and automobile companies. The first of these cases, *Connecticut v. American Electric Power Co.* ("*AEP*"), was brought by several state attorneys general to require utilities to reduce emissions of carbon dioxide, methane and other gases referred to as greenhouse gases ("GHGs"). *See* 131 S. Ct. 2527 (2011). In the second case, *California v. General Motors Corp.*, the California attorney general sought to subject car manufacturers to liability for making cars that emit GHGs through vehicle exhaust. *See* No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). Third is *Native Vill. of Kivalina v. ExxonMobil Corp.*, No. 09–17490, 2012 WL 4215921, at *1 (9th Cir. Sep. 21, 2012) ("*Kivalina*"), where, as here, plaintiffs sought damages for harms caused by weather-related events. The final case is the one at bar.

At every level of the federal judiciary courts have now dismissed these claims. *See*, *e.g.*, *AEP*, 131 S. Ct. at 2527; *Kivalina*, 2012 WL 4215921, at *1;

Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012) ("*Comer II*"). The common theme through all these rulings is a recognition that in order to adjudicate these claims under any tort, courts would need to set emissions policy for individual defendants named in the suits. It does not matter whether cases seek injunctive relief or monetary damages, are brought by state attorneys general or individuals, or are brought under state or federal law. The courts have broadly concluded that the judiciary is not the place for making such policy judgments.

The courts have explained that litigation, unlike regulation or legislation, cannot broadly consider the importance of the conduct or product, whether policy changes are necessary, and consequences of the policy changes, including whether consumers can afford to bear the costs of the changes. Prominent scholar Robert Reich, who served as Secretary of Labor under President Clinton, termed lawsuits with such an impact "regulation through litigation." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J. Jan. 12, 2000, at A22. He initially favored such litigation for advancing regulatory agendas, but realized their danger, concluding they amount to "faux legislation, which sacrifices democracy." *Id.*

The Supreme Court of the United States, in hearing and deciding *AEP*, voiced these exact concerns, issuing a broad warning against climate change tort litigation. In that case, the specific issue before the Court was whether federal common law could be the basis for the litigation. In a unanimous ruling authored

by Justice Ginsberg, the Court dismissed the claim. It held that Congress displaced all federal common law claims in enacting the Clean Air Act ("CAA") and delegating to the Environmental Protection Agency ("EPA") the authority to regulate GHG emissions. *See* 131 S. Ct. at 2538-39. Importantly for this case, the Supreme Court did not explain its ruling on displacement of federal common law claims alone.

The Supreme Court, demonstrating an appreciation that climate change tort claims could come in various forms, spent a considerable part of its ruling to provide a road map for this and other courts to follow in other such cases. The Court clearly and concisely affirmed that regulating GHG emissions was "undoubtedly an area within *national legislative* power," and that "Congress designated an expert agency, here EPA, as best suited to serve as primary regulator of greenhouse gas emissions." *Id.* at 2535 (emphasis added). The Court also unambiguously observed that "[t]he expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case" decisions. *Id.* at 2539. Finally, it cautioned lower courts that there is "no room for a parallel track" of tort litigation. *Id.* As Justice Ginsburg said in oral argument, the broad issue here is the inappropriateness of entertaining claims that "set up a district judge . . . as a kind of super EPA." Transcript of Oral Argument at 37–38, AEP v. Connecticut, 131 S. Ct. 2527 (2011).

These Supreme Court determinations are not specific to any tort or court. Last week, on the day Defendants-Appellees' filed briefs in this matter, the Ninth Circuit followed this rationale, dismissing the climate change tort claim for money damages in *Kivalina.* *See* 2012 WL 4215921, at *1. The Ninth Circuit, properly applying *AEP*, held that while the "case presents the question in a slightly different context" – "Kivalina does not seek abatement of emissions; rather, Kivalina seeks damages for harm caused by past emissions" – "the Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." *Id.* at *5. The court continued that "[i]f a federal common law cause of action has been extinguished by Congressional displacement, it would be incongruous to allow it to be revived in another form." *Id.*

As this Court can appreciate, the legal landscape is now clearer since a Fifth Circuit panel ruled on the first iteration of this case. *See Comer v. Murphy Oil USA*, 585 F.3d 855 (2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). Whereas before, the panel ruling came weeks after the Court of Appeals for the Second Circuit allowed *AEP* to proceed under a broad gap-filling role for the judiciary, the Supreme Court has now struck down that ruling and the other global climate change tort cases have been either dismissed or withdrawn. This brief urges the Court to follow the Supreme Court's clearly articulated public policy, as the Ninth Circuit did, and not sanction an unsound leap in tort law at the federal or

state level. As this brief will show, the distinctions Plaintiffs assert exist between their case and *AEP* do not lead to a different outcome, and Plaintiffs have failed to state a cause of action under Mississippi tort law. The suit must be dismissed.

ARGUMENT

I. PLAINTIFFS' GLOBAL CLIMATE CHANGE TORT CLAIMS ARE NOT JUSTICIABLE

A. This Court Should Heed the U.S. Supreme Court's Warning Against Climate Change Tort Litigation

The Supreme Court did not simply issue a holding in *AEP*; it went to significant lengths to express the reasons it is ill-advised to empower the judiciary to regulate GHG emissions. In doing so, it echoed concerns that each district court had raised when dismissing the claims before it, largely that assessing liability for harms allegedly caused by global climate change represent nonjusticiable political questions. *See Connecticut v. AEP*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011); *General Motors*, 2007 WL 2726871; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 2012 WL 4215921 (9th Cir. Sep. 21, 2012); *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) ("*Comer I*"). As the district court in this case explained, the factual and jurisdictional deficiencies with these suits make them unsuitable under several legal doctrines fundamental to the civil justice system. *See Comer II*, 839 F. Supp.

2d at 858-62, 865 (addressing these doctrines in addition to dismissing claims on *res judicata* grounds).

All of these lawsuits, including the one at bar, base their claims on a common theory: the companies named in their lawsuits engaged in operations or made products that contributed to the build-up of GHGs in the atmosphere; the accumulation of GHGs over the past 150 years has caused the earth to warm; and this, in turn, has caused or will cause a weather event or a change in weather patterns that has or will harm the plaintiffs. These allegations are not particular to any defendant or industry. CO_2, methane, and other GHGs are released through numerous natural and artificial activities, including, but not limited to, the modern use of energy around the world since the Industrial Revolution.[1] At some point, practically any group of individuals could claim they have been or will be harmed by a hurricane, drought or other weather event. Also, when mixed in the atmosphere, emissions from any one source are indistinguishable from the others. Thus, there is no limiting principle for determining who can sue or be sued.

Consider, for example, Plaintiffs' decision whom to name in this lawsuit. Given the "multiple worldwide sources of [GHGs] across myriad industries and

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[1] Man-made sources of GHGs include fossil fuel combustion, power plants, manufacturing, and auto and airplane exhaust. *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 of living aerobic organisms (breathing).

multiple countries," *General Motors*, 2007 WL 2726871, at *15, they could have named innumerable sources from all around the world as allegedly causing their Hurricane Katrina-related harms, including sources in China, India, and elsewhere that have made significantly greater contributions to the GHG emissions at issue in this case. Instead, Plaintiffs chose perceived "deep pocket" American companies associated with the energy industry. This lawsuit, therefore, could impact the winners and losers in the evolving national discussion over U.S. energy priorities.[2]

This is why, regardless of the specific doctrine courts used for dismissing these torts claims – displacement, political question, standing, failure to state a claim, or other – all of the courts have concluded that there are no manageable standards for adjudicating the claims in a fair, predictable way. This is also true regardless of the particular legal theory upon which liability is sought. Here, as in the other cases, Plaintiffs' claims primarily sound in public nuisance law, though they also include other common law torts such as negligence and trespass. As discussed in detail below, the doctrinal requirements for each of these torts,

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[2] Plaintiffs' counsel, Mr. Maples, has indicated an awareness of the political nature of this decision, suggesting that the lawsuit's "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).

including causation which is common to all tort liability, make it impossible to assign liability in these cases in a legally principled, judicious manner.

As the Supreme Court, Ninth Circuit, and district courts all explained, any trial court trying to adjudicate such a claim would end up regulating defendants' emissions "by judicial decree." *AEP*, 131 S. Ct. at 2539. The court would need to determine what it deems to be the "reasonable" level of GHG emissions for each defendant and whether a company should be liable based on whether its emissions were above or below that level. Further, the Supreme Court stated, this analysis would need to be done in ignorance of the economic and national security implications of curtailing GHG emissions, and other factors fundamental to establishing America's energy policy including the effectiveness of any such reductions on global climate change. *See id.*; *see also* EPA, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52931 (Sept. 8, 2003) ("[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.").

Weighing costs, benefits, and social value of producing and using essential resources 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. *See AEP*, 131 S. Ct. at 2540 ("The judgments the plaintiffs would commit

[to the courts]… cannot be reconciled with the decisionmaking scheme Congress enacted."). Otherwise, as the district court in *General Motors* appreciated, courts would be "exposing 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 within those States." 2007 WL 2726871, at *14 (citation omitted).

B. Any Differences Between this Case and *AEP* Do Not Allow for a Different Legal Outcome; Plaintiffs' Claims Must Be Dismissed

Despite Plaintiffs' arguments to the contrary, the core deficiencies in global climate change tort litigation are not cured based on the parties bringing the case, the relief sought, or whether the claims are alleged under state or federal law. Moving the deck chairs in this litigation does not change the legal outcome.

1. Seeking a Different Type of Relief Does Not Change the Outcome

Plaintiffs allege that the key difference between this case and *AEP* is that their claim is for monetary, not injunctive, relief. Plaintiffs' rhetorically ask, "How can such accountability be non-justiciable?"

The Ninth Circuit answered that question last week in *Kivalina*: "the type of remedy asserted is not relevant." 2012 WL 4215921, at *5. The *Kivalina* plaintiffs, mirroring arguments made in the instant case, tried to limit *AEP* by arguing that it precludes only actions seeking to directly regulate emission levels,

namely injunctive relief and abatement, not money damages. As in this case, they argued they were seeking only compensation for their global climate change harms and that, even if current levels of GHG emissions are appropriate, individuals injured by such emissions should be able to seek damages for their injuries. *See* Brief for Appellant at 25, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) ("The question of unreasonableness in a damages action is… not one of whether the defendant's conduct is reasonable or unreasonable but rather one of who should bear the cost of that conduct."). This argument may sound appealing, but it is not consistent with the law.

The Supreme Court has consistently held and repeatedly affirmed that tort damages "regulate" conduct the same way as legislation and regulations. The Court has explained that state "positive" law and state tort law in this context are equivalent because a person subject to liability for certain conduct will have to change that conduct to avoid future liability in the same way it would change conduct to comply with statutes and regulations. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008) ("tort duties of care" under state law "directly regulate" a defendant's conduct). As in *AEP*, the Supreme Court has cautioned against problems with tort "regulations," *i.e.*, they do not go through legislative or regulatory hearings and have the potential to have a far greater, unfair, and inconsistent regulatory effect than statutes or regulations. *See Bates v. Dow*

Agrosciences LLC, 544 U.S. 431 (2005) (holding common law actions were preempted because a finding for monetary liability would impose state law requirements for labeling or packaging in addition to or different from those required under the applicable federal laws); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871 (2000) ("rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts").

Here, the district judge properly applied this law, concluding that whether a lawsuit seeks damage for individuals or injunctive relief for state attorneys general, both require a court to make "similar determinations regarding the reasonableness of the defendant's emissions." *Comer II*, 839 F. Supp. 2d at 865. To adjudicate Plaintiffs' claims, the district court would have had to determine, for each Defendant, that emissions above a certain level *unreasonably* contributed to strengthening Hurricane Katrina and Plaintiffs' alleged injuries, while emissions below that amount were *reasonable*, regardless of whether they allegedly contributed to the injuries. As discussed above, this court-created threshold for liability would become the *de facto* cap on emissions for each Defendant.

Finally, as discussed in more detail below, this argument has particular shortcomings within the tort of public nuisance. Public nuisance theory has specific rules as to when it can be used, and seeking monetary damages based

solely on severe harms from a public nuisance is not one of them. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 552-61 (2006).

2. Filing Claims Under State Law Does Not Change the Outcome

Plaintiffs' other main argument for being outside the reach of *AEP* is their assertion that "state causes of action (such as nuisance) were left untouched by the Supreme Court" and remain fully viable for regulating GHG emissions. Brief of Plaintiff-Appellants at 20. This argument is based on the fact that *AEP* held that Congress displaced only the *federal* common law claim before it. Plaintiffs' conclusion, though, is inconsistent with the rationale of the *AEP* ruling.

The Supreme Court in *AEP* explained that it did not address state common law claims related to alleged climate change injuries because those claims were not before the Court. *See* 131 S. Ct. at 2540 (noting that plaintiffs had also "sought relief under state law, in particular, the law of each State where the defendants operate power plants"). Before the Supreme Court received the case, the Second Circuit had held that federal common law governed the case and, therefore, did not reach the state law claims, which were largely the same as those attempted in the instant case. *See id.* Because the parties had not "addressed the availability of a claim under state nuisance law," the Supreme Court left "the matter open for consideration on remand" in light of its ruling. *Id.* The Supreme Court's lack of

opportunity to squarely address state claims, though, should not be confused with allowing them.

Throughout its opinion and in oral argument, the Supreme Court sent strong messages relevant to the inappropriateness of allowing these claims under state law. Most clearly, it stated that the public policy at issue in global climate change tort cases is "of special federal interest" and "undoubtedly an area within national legislative power." *Id.* at 2535, 2537. Underscoring this point, the Supreme Court explicitly stated that "here, borrowing the law of a particular State would be inappropriate." *Id.* at 2536. Further, in oral argument, Justice Kennedy identified the legal awkwardness of having only a federal cause of action before them, saying that "[i]t would be very odd" or illogical for state courts to set national caps on GHG emissions when federal courts are barred from doing so. Transcript of Oral Argument at 32.

This is because judges applying state tort law are no better situated with respect to regulating emission caps than judges applying federal tort law. They both "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *AEP*, 131 S. Ct. at 2539-40. They both "are confined by a record comprising the evidence the parties present," and "may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested

person, or seek the counsel of regulators in the States where the defendants are located." *Id.* at 2540. Also, they both cannot weigh any "environmental benefit potentially achievable [against] our Nation's energy needs and the possibility of economic disruption." *Id.* at 2539. Thus, for the same reason there is "no room for a parallel track" of litigation based in federal tort law, there too is no room for a parallel track of litigation in state tort law. *Id.* at 2538.

3. Private Plaintiffs Do Not Have Standing to Bring Climate Change Tort Claims

For the arguments above, Plaintiffs attempt to distinguish their claims from state attorneys general seeking to regulate GHG emissions. But, when it comes to standing, Plaintiffs try to take advantage of the "special" standing the Supreme Court, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), gave to state attorneys general to challenge the EPA's decisions with respect to regulating GHGs. *See* Brief of Plaintiffs-Appellants at 27.

Constitutional standing is a case-by-case assessment, determined anew for the parties, cause of action, and facts in each individual case. In *Massachusetts*, the Supreme Court determined that state attorneys general had constitutional standing to file an administrative law action against the EPA to require the EPA to make decisions regarding GHG emission standards. *See* 549 U.S. at 517–18. In distinguishing state attorneys general from other types of plaintiffs, the Court wrote that "[i]t is of considerable relevance that the party seeking review here is a

sovereign [s]tate and not . . . a private individual." *Id.* at 518. The Supreme Court in *AEP* was split as to whether the special solicitude allowed to state attorneys general to seek administration action would extend to state attorneys general in bringing private tort claims. *See* 131 S. Ct. at 2535.[3]

The key standing issue in a tort claim is whether the specific Plaintiffs can prove that their alleged harm is "fairly . . . trace[able] to the challenged action" of each specific defendant. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs, therefore, need to be able to show, at a minimum, that Hurricane Katrina and their specific injuries are directly traceable to each defendant's particular emissions. As discussed above and addressed in great detail in Defendants' briefs, no such correlation can be made given that Plaintiffs allege that climate change is the result of 150 years of global emissions from all over the world comingling in the atmosphere.

II. PLAINTIFFS' CLAIMS DO NOT SOUND IN TORT LAW

Plaintiffs' regular line of defense against the constitutional and policy arguments above is that this lawsuit is just "an action in tort," saying "how can it be that private citizens cannot sue private companies" over allegations that the

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[3] The four Justices who would find standing stated that *Massachusetts v. EPA* might apply only to "some plaintiffs." *AEP*, 131 S. Ct. at 2535. This suggests that these four Justices had concluded only that the state attorneys general had standing to bring their claims, but that the other plaintiffs in *AEP*, namely the private land trusts, did not have standing to bring the tort suit on their own.

companies caused them damage? Brief of Plaintiff-Appellants at 27. The Supreme Court, the Ninth Circuit, and the federal district court judges refused to be distracted by this red-herring argument. They appreciated that courts must look behind the veneer of pleadings to grasp the scope and implications of a case. *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").

Even if this case were to be adjudged on its tort law pleadings, though, the Court should dismiss it for failure to state a claim. Neither Mississippi tort law, nor the tort law of any other state, recognizes a cause of action, in public nuisance, negligence, trespass or any other tort, for subjecting private parties to liability for injuries caused by Hurricane Katrina.

A. Plaintiffs Cannot Establish Causation for Any Tort Claim

Common to all tort liability is the bedrock requirement that a defendant must have *caused* a plaintiff's alleged injuries. *See* W. Page Keeton *et al.*, *Prosser & Keeton on Torts* § 41, 263 (5th ed. 1984) ("there [must be] some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered"). Here, Plaintiffs do not and cannot allege any facts that

could establish that Defendants' actions of engaging in the production and use of energy were the proximate cause of global climate change, Hurricane Katrina, and Plaintiffs' property damage.

Plaintiffs must be able to show both factual and legal causation. Factual causation requires a showing that "but-for" Defendants' emissions Plaintiffs' injuries would not have occurred. *See Pargas of Taylorsville, Inc. v. Craft*, 249 So. 2d 403, 407 (Miss. 1971) (adopting the "but for" test). Given the billions of sources of GHGs, Plaintiffs cannot prove that their Hurricane Katrina-related harms "could have been avoided in the absence" of Defendants' emissions. *Id.*

Legal causation requires Plaintiffs to prove two distinct elements. First, the damages to Plaintiffs' properties must be closely related to the conduct of emitting GHGs 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). No Defendant could have reasonably foreseen that, even if Plaintiffs' allegations are true, anything it did could cause Plaintiffs' Hurricane Katrina-related injuries such that they "should have avoided the injury" by doing something differently. Dan B. Dobbs, *The Law of Torts* § 180, 444 (2000). Second, Plaintiffs' Hurricane Katrina-related property damage must be the direct result of Defendants' emissions; it cannot be "remote or collateral, or that result from a remote, improbable or

extraordinary occurrence, although such occurrence is within the range of possibilities flowing from Defendant's negligent act." *Dillon v. Greenbriar Digging Serv., Ltd.*, 919 So. 2d 172, 177 (Miss. Ct. App. 2005) (international citations omitted). As the district court correctly concluded, the allegations in this case presents "precisely the type of remote, improbable, and extraordinary occurrence that is excluded from liability." *Comer II*, 839 F. Supp. 2d at 868.

Presumably in an effort to avoid this black letter law, Plaintiffs offer a creative mere "contribution" test, but that test is unfounded in Mississippi law and elsewhere. *See Illinois Cent. R.R. Co. v. Watkins*, 671 So. 2d 59 (Miss. 1996) (requiring, at minimum, defendant to be a "substantial contributing cause of the damages"). 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).[4]

Given the clarity of this law, there is no information dependent on discovery that will change these dynamics. When legal causation can never be shown, years of time-consuming, expensive discovery should be avoided. This was the policy behind the Supreme Court's rulings in *Bell Atlantic Corp. v. Twombly*, 550 U.S.

[4] Under Mississippi law, to adjudicate a case, the court must be able to consider all persons who are at fault to assure a proper allocation of damages. *See* Miss. Code. 85-5-7. This would include "any person, entity or industry which uses or consumes such fuels" as they all would bear "at least some responsibility" under Plaintiffs allegations. *Kivalina*, 663 F. Supp. 2d at 877 n.4. This would be an infeasible undertaking given that it incorporates practically everyone in the world.

544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), requiring a plausible basis for a claim even at the motion to dismiss stage.

B. Emitting GHGs Does Not Give Rise to a Public Nuisance Claim

The primary tort plaintiffs have relied on for subjecting private companies to liability for harms allegedly caused by global climate change is public nuisance. As *amici* explained in depth in support of the Defendants' petition for re-hearing *en banc* in *Comer I*, public nuisance law is not suited for this type of liability.

While in common parlance the word "nuisance" can have a multicolored rainbow of meanings, 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) of Torts § 821B cmt. a (1979). Private plaintiffs do not have standing to bring public nuisance claims, except 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 Constr. Co.*, 571 So. 2d 916, 921 (Miss. 1990). Thus, Plaintiffs must first prove the elements of the tort – just as a government plaintiff must – namely that global climate change is a public nuisance, that Defendants engaged in unreasonable conduct that caused global climate change, and that global climate change caused their injuries. Plaintiffs must then be able to prove that their property damages are not just a more severe injury than others have sustained from global climate change, but a unique or special injury from that public nuisance. *See* Restatement (Second), *supra*, § 821B cmt. a.

The core reason Plaintiffs have failed to state a public nuisance claim is that Defendants have not engaged in any conduct, namely quasi-criminal or objectively wrongful acts, that give rise to public nuisance liability.[5] Traditionally, the "common law crimes" that can give rise to public nuisance liability include threatening public health, such as by keeping diseased animals or explosives in a

[5] *See* Restatement (Second) of Torts § 821A, cmt. c. (1979) ("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.").

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 (1885) (blocking a public highway).[6] Such objective standards for liability are required because they provide actors with notice that their actions could lead to liability. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (O'Connor, J., dissenting) (explaining that the vagueness doctrine applies to court-made law, such as tort liability).

Here, Defendants are engaging in lawful conduct permitted by federal, state, or local regulations. They produce and use energy, including electricity, gasoline and home heating oil (to name a few of the activities subject to this lawsuit). These energy products are necessary to modern ways of life. Congress and administrative agencies have assiduously studied and debated the very issues at play in this litigation, and have never suggested that emissions above a certain amount are unlawful. Defendants, therefore, would have no reason to believe that current emissions could give rise to liability, and they could not determine what action, if any, they should have taken to avoid liability here.

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[6] 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).

Further, as discussed above with respect to all torts, the public nuisance claim fails because Plaintiffs cannot plausibly assert that these specific Defendants caused global climate change and that global climate change caused their property damage. Finally, because of the special injury rule, public nuisance claims cannot be brought as class actions. The point was explained in *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971), which is remarkably similar to this case. *Diamond* 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.

Diamond is also instructive because it presages the Supreme Court's rationale in *AEP* for why this case is nonjusticiable. As the California court wrote more than forty years ago, a case of this magnitude and nature implicate political issues, potentially sweeping environmental policies, and the role of the judiciary in making these decisions. *See id.* at 645. As here, 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.* The court also explained 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.

Since the 1970s, there have been numerous attempts to transform public nuisance from a restrained government law-enforcement tort into a tool for advancing industry-wide liability. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001) (recounting the campaign to change elements of the tort that, according to the former Sierra Club attorney, would have "[broken] the bounds of traditional public nuisance"). Judges schooled in rules and policies behind public nuisance theory in global climate change and other such claims have rejected attempts to recast the tort. *See* Victor Schwartz, Phil Goldberg & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 Okla. L. Rev. 629, 639-50 (2010).

Courts have broadly recognized that stripping core elements from public nuisance would have the same effect of removing the duty or breach elements from negligence: it would create a super tort that "would devour in one gulp the entire law of tort." *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).[7]

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[7] Plaintiffs also assert private nuisance claims. A private nuisance is an "invasion of another's interest in the use and enjoyment of his property"; it traditionally takes place between neighboring landowners such that "[o]ne landowner may not use his land so as to unreasonably annoy, inconvenience, or harm others." *Bowen v. Flaherty*, 601 So. 2d 860, 862 (Miss. 1992); *see also Biglane v. Under The Hill Corp.*, 949 So. 2d 9, 14 (Miss. 2007) (explaining that the invasion of another's interest in the private use and enjoyment of land must be

C. Emitting GHGs Does Not Give Rise to a Negligence Claim

Plaintiffs' claims do not sound in negligence either; Defendants have never owed a tort law duty to Plaintiffs, individually or collectively, with respect to their GHG emissions or to protect them from Hurricane Katrina.

Mississippi law reflects a fundamental principle of tort law: 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*, at § 53, 356; *Scafide v. Bazzone*, 962 So. 2d 585 (Miss. Ct. App. 2006) (duty is a legal obligation being owed to a specific party), *cert. denied*, 962 So. 2d 38 (Miss. 2007); *Enterprise Leasing Co. S. Cent., Inc. v. Bardin*, 8 So. 3d 866 (Miss. 2009) (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'"). As discussed above, Defendants are under no "obligation" for the benefit of these particular Plaintiffs and there is no "specific standard" for GHG emissions.

"either (a) intentional and unreasonable, or (b) unintentional but otherwise provides the basis for a cause of action for negligent or reckless conduct or for abnormally dangerous conditions or activities"). For the reasons discussed in this brief, Plaintiffs would not be able to satisfy these required elements.

Any finding to the contrary would violate the long-standing tenet of tort law duty that defendants cannot have a duty to the world. *See Satchfield v. R.R. Morrison & Son, Inc.*, 872 So. 2d 661, 666 (Miss. 2004) ("There must be some limit to foreseeability."); *Williamson v. Daniels*, 748 So. 2d 754, 759 (Miss. 1999) (plaintiff's injury must be "a reasonably foreseeable consequence" of defendant's conduct); *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 100 (N.Y. 1928) (defendant owes a duty only to those in a "zone of foreseeable risk").

D. Emitting GHGs Does Not Give Rise to a Trespass Claim

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").

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 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.

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

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, are not unique to these communities. Every hurricane, flood, drought, and heat-related condition would spawn climate change tort suits.

"Public risk" cases, such as this one, expose the weakness of the civil justice system: it offers a backwards-looking compensation and enforcement mechanism and cannot adequately or accurately fill the "need for specialized experience in assessing risks and control measures." 2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991) ("the tort system is ill-equipped to handle" cases involving public risks). Where there is no allegation of objective wrongful conduct and no plausible allegation of proximate causation, the claim is not a case or controversy for the courts.

Consequently, if this Court allows this case to proceed, Mississippi will be the destination of choice for people to advance speculative tort theories and political agendas outside of the checks and balances of the political process. This would likely include, for example, efforts "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). "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 [tort] claim would be conceived and a lawsuit born." *Spitzer v. Sturm, Ruger & Co.*, 309 A.D. 91, 96 (N.Y. App. Div. 2003).

CONCLUSION

For these reasons, the Court should affirm the judgment below.

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 6,881 words.

/s/ Phil Goldberg
Phil Goldberg

Dated: September 28, 2012

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WITH ECF FILING STANDARD (A)(6)

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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Phil Goldberg

Dated: September 28, 2012

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I hereby certify that on September 28, 2012, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which caused a true and correct copy to be electronically served on the participants in the case who are registered CM/ECF users.

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