
LITIGATION

ARE NUISANCE LAWSUITS TO ADDRESS CLIMATE CHANGE JUSTICIABLE IN THE FEDERAL COURTS? GLOBAL WARMING AT THE SUPREME COURT

By Megan L. Brown*

Note from the Editor:

This article examines *American Electric Power Co. v. Connecticut*, a U.S. Supreme Court case whose oral arguments were held on April 19, 2011, relating to the standing of plaintiffs to challenge the greenhouse gas emissions of various companies. The piece was originally published online in April 2011, and since publication the case was heard by the Court and submitted. A decision is expected by the end of the Term.

In an effort to generate discussion on the important issues related to the case, we have provided along with this article links to briefs in support of both the respondents and the petitioners in the case. As always, The Federalist Society welcomes your responses to these materials. To join the debate, you can e-mail us at info@fed-soc.org.

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Related Links:

Brief for the Petitioners (American Electric Power Co. et al.): <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/03/AEP-et-al-v-Connecticut-et-al-No-10-174-US-Brief-for-Petitioners.pdf>

Brief for Respondents Connecticut, New York, California, Iowa, Rhode Island, Vermont, and the City of New York: http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-174_respondent_connecticut_authcheckdam.pdf

Amicus Brief of the U.S. Chamber of Commerce in support of petitioners: http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/10_174_brief_updates/10-174_PetitionerAmCuChamberofCommerce.authcheckdam.pdf

Brief for Respondents Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire: http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-174_respondent_amcu_openspaceinstitute.authcheckdam.pdf

This spring, the Supreme Court will hear and decide *American Electric Power Co. v. Connecticut* (“AEP”),¹ a nationally important case concerning global warming and the appropriate judicial response thereto. At its core, this and other cases like it test the limits of federal courts’ authority to enact sweeping changes to the nation’s environmental, industrial, and economic policy. Since *Massachusetts v. EPA*, the Supreme Court’s last foray into climate change, federal courts—including two federal appeals courts—have been wrestling with lawsuits that would assign federal judges a pivotal role in setting national climate change policy. But, as each district court to have confronted these cases has concluded, these cases present a task for which the federal courts are institutionally and constitutionally ill-suited. In granting certiorari, the Court has signaled its intent to clarify the proper role of federal courts in addressing global climate change.

In three federal cases, various plaintiffs have sought to impose direct emissions limits or enormous damages on particular alleged contributors to global climate change. In

AEP, the case presently before the Supreme Court, several states and private land trusts have asked a federal court to create and impose specific emissions caps and mandatory reductions on five energy companies with national operations; they seek, in essence, judicial abatement of the defendants’ alleged contributions to global warming. In *Comer v. Murphy Oil, USA*,² a class of Mississippi residents sued more than thirty energy companies for damages from Hurricane Katrina, which allegedly was intensified by global warming. Finally, in *Native Village of Kivalina v. ExxonMobil Corp.*,³ a village sued dozens of oil, energy, and utility companies for \$400 million in damages for coastal erosion in Alaska allegedly caused by global warming.

In all three cases, the district courts concluded that the cases were nonjusticiable because the plaintiffs lacked standing or the cases presented political questions.⁴ In *AEP* and *Comer*, panels of the Courts of Appeals for the Second and Fifth Circuits, respectively, entered opinions that rejected these arguments and would permit the cases to proceed. In *AEP*, after rehearing was denied by the Second Circuit, certiorari was granted. The Fifth Circuit in *Comer* agreed to rehearing en banc and vacated the panel opinion, but subsequently dismissed the appeal for lack of quorum. That decision was left undisturbed because the Supreme Court recently denied a petition for mandamus filed by the plaintiffs, leaving the district court

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dismissal in place. The Ninth Circuit has yet to hear argument in *Kivalina*, and it likely will have the benefit of the Supreme Court's guidance in *AEP* on the question of whether cases seeking to affix responsibility for and limit or recover damages from global warming are properly pressed in federal court.

I. *AEP* is One of Several Novel Cases Seeking to Use Common Law to Address Global Warming

AEP v. Connecticut. In *AEP*, several states and land trusts allege that the five named companies' greenhouse gas emissions constitute a public nuisance under federal common law. Of the three major cases presently in federal court, this case is perhaps the most notable because of the remarkable remedy sought. Rather than damages, the plaintiffs ask a single federal judge to order five national energy companies with operations in twenty states to "abate" their alleged "contribution[s]" to global warming "by requiring [them] to cap [their] carbon dioxide emissions and then reduce them by a specific percentage each year for at least a decade."⁵

The district court held that the plaintiffs' claims presented a non-justiciable political question under *Baker v. Carr*,⁶ because their resolution would "require[] identification and balancing of economic, environmental, foreign policy, and national security interests."⁷ The court accordingly dismissed the complaint. The plaintiffs sought review in the Second Circuit, and the appeal was argued in June 2006. More than three years later, a two-judge panel reversed the district court.⁸ The panel found that the plaintiffs' case, which it characterized as an "ordinary tort suit," was well within the competence of federal courts and was not barred by the political question doctrine. The panel went on to consider alternative grounds for affirmance urged by the defendants-appellees and concluded that the plaintiffs had standing, that the federal common law of nuisance governed the claims, that the plaintiffs stated a claim under federal common law, and that the claims were not displaced by federal statute or on foreign policy grounds.

Applying a relaxed standing standard for the pleading stage, the panel found both that the states had *parens patriae* standing on behalf of their citizens and that all plaintiffs had traditional standing under *Lujan v. Defenders of the Wildlife*.⁹ The court determined that plaintiffs satisfied the *Lujan* factors, reasoning that (1) the court in *Massachusetts* recognized that alleged future injuries, such as damage from rising sea levels, were actionable; (2) causation is established as long as defendants release a pollutant that "contributes to the kind of injuries alleged by plaintiffs"; and (3) redressability only requires that the relief requested would lead to some slowing of global warming, not complete cessation. In reversing the district court's conclusion that the case raised a political question, the panel minimized the difficulty of the issues presented, declaring that courts can rely on the familiar tort law doctrine of nuisance for justiciable standards. Accordingly, while the district court relied heavily upon the third *Baker* factor, the need for an initial policy determination, the panel discounted the importance of this factor where, as here, federal common law can fill any regulatory gaps. Justiciability questions aside, the panel determined that neither congressional nor EPA actions displaced common law because they did not speak "directly"

to the "particular issues" presented by the plaintiffs. Absent a comprehensive remedial scheme or a specific action to address the plaintiffs' problems, the panel held that courts may apply federal common law. The Second Circuit denied a petition for en banc rehearing, and the defendants sought a writ of certiorari from the Supreme Court.

The *AEP* petition presented three questions: (1) whether states and private parties "have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources"; (2) whether a cause of action to cap carbon dioxide emissions can be implied under federal common law; and (3) whether "claims seeking to cap defendants' carbon dioxide emissions at 'reasonable' levels" are proscribed by the political question doctrine because they would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion."

The petitioners received substantial amicus support, including that of twelve states, who noted, among other things, that they own power plants and could be sued in future similar actions.¹⁰ The Obama Administration took a position in this case because the Tennessee Valley Authority ("TVA") is a named defendant. At the certiorari stage, the United States supported what it characterized as "limited intervention by the Court"¹¹ in part because of the effect of the Second Circuit decision on additional and future litigation, which the government indicated would be encouraged by the panel's analysis of the threshold justiciability questions. The United States urged remand for consideration of the case under the prudential standing doctrine and to evaluate whether subsequent regulatory action by the Environmental Protection Agency displaced the claims. By recasting the petitioners' Article III standing and political question arguments as possible prudential standing problems, the Administration did not squarely attack the Second Circuit's analysis, and seemed to subtly encourage the Supreme Court to stay its hand on the merits.¹²

The Supreme Court granted certiorari on December 6, with Justice Sotomayor not participating,¹³ and a decision is expected by the end of the Court's term in June. The petitioners' briefs, including one by the Acting Solicitor General, were filed in January, and they received substantial amicus support from, among others, the American Farm Bureau Federation, the Association of Global Automakers, the U.S. Chamber of Commerce, the Chairman of the House Energy and Commerce Committee and two other congressional leaders on environmental issues, and twenty-four states.

The petitioners argue that the case is non-justiciable for several reasons, and the United States generally agrees, though the points of departure are noteworthy. With respect to standing, the petitioners renew their argument that the respondents lack constitutional standing and adopt the main line of attack in the United States' brief on certiorari, which was that prudential standing principles bar the claims. On the constitutional aspect of standing, the petitioners highlight the traceability and redressability prongs of constitutional standing, and argue that they are not met here because the "complaints assert that these

defendants have contributed to climate change *generally* through their emissions, and that climate change contributes *generally* to increased risks of injuries.¹⁴ The petitioners spend quite a bit of time distinguishing *Massachusetts*, which is important because of the United States' curious position on Article III standing. In his brief, the Acting Solicitor General argues that "although the question is not free from doubt, the allegations advanced by the coastal States in their capacity as sovereign landowners are sufficient to survive a motion to dismiss under this Court's recent decision in *Massachusetts v. EPA*."¹⁵ As discussed below, the question of the scope and meaning of *Massachusetts* is critical here.

The petitioners next argue that nuisance suits for contributions to climate change are not cognizable under federal common law, and in any event have been displaced by the actions of the EPA. Petitioners note the infrequency with which federal common law has been created by the courts, and its particularly rare use in the creation of causes of action. "[A] decision to create a private right of action" the Court has explained, "is one better left to legislative judgment in the great majority of cases."¹⁶ The United States does not take a position on the first part of the common law analysis, writing that "the Court need not determine whether federal common law should, absent displacement, provide a cause of action for public nuisance against persons and entities that contributed to climate change."¹⁷ The United States does agree that any common law claims have been displaced by regulations under the Clean Air Act.¹⁸

Finally, the petitioners argue that the case presents non-justiciable political questions unsuitable for the judiciary. While the United States does not *urge* the use of this doctrine, it states that the Court "could properly rely on the political-question doctrine to direct dismissal of this case."¹⁹ And the strong language of its brief certainly supports such action. On the nature of the injuries, the United States tells the Court that the "effects of climate change . . . will also be felt by individuals, corporations, and governmental entities through the Nation and around the world."²⁰ On the suitability for judicial resolution, the United States notes that "the myriad questions associated with developing a judgment about reasonable levels of greenhouse-gas emissions from defendants and the broader industry of which they are a part are more properly answered by EPA."²¹ Indeed, in explaining that the "separation of powers" is implicated by the case, and acknowledging that "concerns" are raised under *Baker v. Carr*, the United States notes that "[p]laintiffs' theory of liability could provide virtually every person . . . with a claim against virtually every other person . . . , presenting unique and difficult challenges for the federal courts."²²

The Court will hear argument on April 19, 2011, and a decision by the Court is expected by the end of the Term.

Comer v. Murphy Oil USA. In *Comer*, a purported class of Mississippi residents harmed by Hurricane Katrina sought money damages under various state common law theories of liability. *Comer* has a more complicated procedural history than *AEP*, and the case recently ended with the Supreme Court denying a petition for writ of mandamus.

In *Comer*, the plaintiffs sued dozens of oil and gas companies for their alleged contributions to climate change, which, they asserted, has had various effects on the global environment, including a rise in sea levels and an increase in the intensity of Hurricane Katrina. The plaintiffs sought compensatory and punitive damages based on Mississippi common law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.

The defendants argued that the case was nonjusticiable because the plaintiffs lack standing and the case presents questions suitable for resolution only by the political branches. After the trial court dismissed the case, the plaintiffs prevailed before the Fifth Circuit, a panel of which disagreed that standing and the political question doctrine barred the case. In analyzing Article III's familiar standing requirements—that plaintiffs allege an "injury-in-fact" that is "fairly traceable" to the defendants' actions and which can be "redressed by a favorable decision"—the panel focused on causation. The panel concluded "that alleged contribution to the harm is sufficient for traceability purposes." Relying in part on its interpretation of the Supreme Court's standing analysis in *Massachusetts v. EPA*, the court concluded that "injuries may be fairly traceable to actions that contribute to, rather than solely or materially cause, greenhouse gas emissions and global warming." The panel rejected the defendants' argument that the Supreme Court in *Massachusetts* did not redefine Article III standing, but simply confronted a circumstance in which Congress, in defining a legal injury, had identified a chain of causation that could animate a particular and defined legal claim. As the petitioners explained in *AEP*, *Massachusetts* involved "the particular context of a challenge to EPA's decision not to regulate greenhouse gas emissions, and when the [Clean Air Act] granted an express right of judicial review, the plaintiff had standing to bring that challenge in federal court."²³ The panel disagreed and relied on *Massachusetts* to let the *Comer* plaintiffs proceed.

A petition for rehearing was filed and the en banc court, diminished in size by the remarkable recusal of seven of sixteen judges, granted the petition, vacated the panel opinion, and set the case for argument. In the midst of briefing, however, an eighth judge recused herself, thereby depriving the en banc court of a quorum. After entertaining additional briefing on its ability to proceed, the diminished en banc court dismissed the appeal. Because the en banc court had been properly constituted when the panel opinion was vacated, the court indicated that the panel opinion remained vacated and the district court's decision stood.

The *Comer* plaintiffs sought a writ of mandamus from the Supreme Court compelling the Court of Appeals to reinstate the appeal. They wanted the Fifth Circuit, if it still lacked a quorum, to return the case to the panel and reinstate the panel's opinion. Three briefs in opposition were filed: two by the private defendants and one by the Solicitor General (on behalf of TVA). The respondents opposed the writ of mandamus, arguing among other things that the Court should not relieve petitioners of their own strategic choice. Similarly, the United States pointed out that the petitioners before the Fifth Circuit argued against several of the options they urged the Supreme

Court to exercise: “Petitioners cannot plausibly claim that they now have a ‘clear and indisputable’ right to an order compelling the court of appeals to do something they previously argued it should not do.”

The Supreme Court denied the petition for mandamus on January 10, 2011, effectively terminating the case and leaving the district court disposition intact.

Kivalina v. ExxonMobil. Kivalina, an Alaskan coastal town, sued dozens of oil, energy, and utility companies in the Northern District of California on the theory that their greenhouse gas emissions contributed to the public nuisance of global warming, which is causing sea levels to rise and threatening the existence of the town. A federal judge dismissed the case, concluding that the plaintiffs lacked standing and the political question doctrine barred the case. In particular, the court found that the global warming public nuisance theory provides no judicially manageable standards, one of the critical factors under *Baker v. Carr*: “Plaintiffs . . . fail to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions.”²⁴

The town appealed the dismissal to the Ninth Circuit, and briefing has concluded. No argument date has yet been set, and the Ninth Circuit often takes months to set an argument date, so a decision in this case may be a many months away. En banc proceedings would likely follow any decision, so the prospect of this case reaching the Supreme Court anytime soon is remote, and certainly will not happen before the Court provides some guidance in its handling of the *AEP* case.

II. Plaintiffs Seek to Achieve Policy Goals Through Litigation

The plaintiffs in *AEP*, like those in the other global warming nuisance suits, aim to achieve through judicial decree what advocates, commentators, and academics are increasingly convinced may be unachievable through the political process: transformative regulatory mandates concerning the nation’s economic, environmental, and industrial policy to slow or stop global warming. The plaintiffs have been candid in their motives. The *Comer* complaint states that the plaintiffs felt forced to turn to federal court because “the political process has failed” to adequately respond to climate change: “[S]tate and Federal Governments . . . [have] refused to regulate greenhouse gas emissions” or have “tak[en] the wrong actions in those instances where they have acted.” As academics (including those filing amicus briefs in some of these cases) have explained, “[d]esperate times call for desperate measures. In light of the climate change crisis . . . there is a need for heroic litigation to go beyond the bounds of traditional doctrine and try to promote public good through creative use of common law theories.”²⁵

The judge who authored the opinion in *AEP* has also identified the salutary (in his view) role that this sort of novel litigation could play in pushing the political branches to act. He told an environmental law conference: “To the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense” by providing an “impetus” for legislative or regulatory action.²⁶ Such a view, while surprising coming from a federal judge

hearing that type of case, is of a piece with the view of activists that “climate change litigation fills a niche created by the . . . absence of federal action” and “opens up the possibility of a quid pro quo: industry accepts federal mandatory emissions limits in exchange for immunity from liability.”²⁷ If this type of case is permitted in the federal courts, advocates will be encouraged to use the burdens and risks of the judicial process to demand political concessions not otherwise attainable.

III. The Stakes Are High

AEP and similar climate change cases are intended to redirect the nation’s economic and industrial policies by having judges craft and impose major changes in the way energy is produced, regulated, and sold. Indeed, the states’ complaint in *AEP* notes the desirability of having companies implement “practical” options such as “changing fuels” and “increasing generation from . . . wind, solar,” and other sources that they predict will “reduc[e] carbon dioxide emissions without significantly increasing the cost of electricity.”²⁸ The plaintiffs candidly acknowledge their true enterprise: a costly and consequential set of restraints on and penalties for greenhouse gas emissions and the activities that produce them, crafted and imposed by judges and juries.

This litigation tests the limits of familiar justiciability doctrines long deemed essential to maintaining the proper and properly limited role of courts in our system of government. If allowed to proceed, these cases will open federal courts to litigants and policy advocates seeking to have judges, rather than elected or democratically accountable officials, set national emissions standards free from the vagaries and constraints of the political process.²⁹ Because of the seemingly boundless chains of causation at issue in affixing responsibility for global climate change, the possibilities for future litigation are staggering: any emitter of greenhouse gases can be haled before a court by any party allegedly harmed by the consequences of this decidedly global, natural, and imperfectly understood phenomenon.

Under the Second Circuit’s approach, judicial determinations of policy are bound to increase. In particular, the court concluded that federal common law is properly exercised and not displaced where the regulation does not speak “directly” to the “particular issues” presented by the plaintiffs. This effectively creates a one-way ratchet in favor of federal common law, which will expand to permit judges to fill any “gaps” not actively and precisely filled by regulation.

IV. What Will Happen?

The Supreme Court will wrestle with these issues and provide guidance to courts confronted with pending and future global warming cases. In particular, *AEP* provides the Court an opportunity to reckon with the effects and limitations of *Massachusetts v. EPA*.

In terms of predicting the outcome, reference to the alignment of justices in *Massachusetts* is instructive but may not be a perfect predictor. Given that Justice Sotomayor (who replaced Justice Souter) has recused herself, only eight Justices’ votes are in play. It is likely that the four dissenters from *Massachusetts v. EPA* (Justices Roberts, Scalia, Thomas, and Alito) will oppose the Second Circuit’s extension of standing

to include private parties and states allegedly injured by, and seeking judicial abatement of, global warming. As they said in *Massachusetts*, “the Court’s self-professed relaxation of those Article III requirements has caused us to transgress the proper—and properly limited—role of the courts in a democratic society.” This case is a step beyond *Massachusetts* in both its theory and the relief requested.

Due to the retirement of Justice Stevens (who wrote the majority opinion in *Massachusetts*) and his replacement by Justice Kagan, the question may be whether one of the remaining justices from the *Massachusetts* majority (Ginsburg, Kennedy, or Breyer), will adopt a different view in this case. It will be instructive to watch Justice Kennedy, who cast the deciding vote in *Massachusetts* and announced the Court’s decision, to see what he makes of the theory of causation and the relief requested in *AEP*. Justice Kennedy could depart from the *Massachusetts* majority coalition if he views the claimed injuries as too speculative or the remedy sought too difficult to administer. Fundamentally, he may be uncomfortable with the apparent extension of the Court’s 2007 decision, which at the time seemed crafted to address unique circumstances and respond to the EPA’s seeming reluctance to act under a federal statute, the Clean Air Act. In other words, the plaintiffs in *Massachusetts* sought judicial ignition of a regulatory judgment arguably put in place by Congress in the Clean Air Act, and they did so using a mechanism for judicial review expressly adopted by Congress. By contrast, the plaintiffs in *AEP* seek judicial determinations of the very policy questions the Court previously instructed the EPA to handle, and cite to no provision authorizing judicial review. The different posture, theory, remedy, and consequences presented in *AEP* may give Justice Kennedy pause about the proper meaning of *Massachusetts* and the role of federal courts generally in addressing global warming. Simply put, for Justice Kennedy, this case may be a bridge too far.

Meanwhile, Justice Breyer, who values regulatory expertise both in his opinions³⁰ and in his external writings,³¹ could depart from the *Massachusetts* coalition if he views the remedy sought here for global warming—a judicial abatement order capping emissions—as a scientific or technical policy question properly addressed by the bureaucracy rather than the judiciary. Framed in this way, a rejection of the Second Circuit’s decision in *AEP* could coexist comfortably with the majority’s decision in *Massachusetts*, which arguably did not seek to conscript federal judges into setting economic and environmental policy, but simply sought to catalyze a regulatory body into action under an existing statute.

In granting certiorari, the Supreme Court has decided to weigh in on the proper role of federal courts in determining the United States’ response to climate change. Based on the divergence between the petitioners’ position and that of the Acting Solicitor General on the applicability and meaning of *Massachusetts*, the Court seems likely to clarify the meaning of its 2007 decision. In doing so, and in addressing the many other issues raised to challenge the justiciability of global warming nuisance suits, the Court will offer guidance about the limits of the judiciary’s institutional and constitutional competence

to fashion and impose years of judicial remedies for harms allegedly caused by global warming.

Conclusion

Judges are charged with interpreting and applying the legal and policy decisions produced by the political process; where no consensus has emerged to produce such decisions, a judge has nothing to apply and the judicial power is not properly invoked. The political branches are presently grappling with the evolving, controversial science and economics of global warming and possible policy responses. The Supreme Court should demand that courts and litigants abide by settled justiciability doctrines to protect the lower courts from being drawn further into policy disputes than Congress has already dictated they be. The Court should reverse the Second Circuit’s decision and close the federal courthouse doors to nuisance suits based on alleged contributions to global warming.

Endnotes

1 *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev’d*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, No. 10-174 (U.S. Dec. 6, 2010).

2 *Comer v. Murphy Oil USA*, No. 05-436 (S.D. Miss. Aug. 30, 2007), *rev’d*, 585 F.3d 855 (5th Cir. 2009), *vacated on grant of reh’g en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011).

3 *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. 2010).

4 A fourth case, in which automakers were sued under nuisance theories, in 2007 met the same fate—dismissal under the political question doctrine. See *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). The appeal was voluntarily dismissed.

5 Complaint, ¶ 186, *Connecticut v. Am. Elec. Power Co.*, No. 04-05669 (S.D.N.Y. July 21, 2004).

6 369 U.S. 186 (1962).

7 The district court considered the six traditional factors for determining whether a case presents a nonjusticiable political question: whether there was

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

Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271-72 (S.D.N.Y. 2005) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004)).

8 Justice Sotomayor was on the panel originally, but was sworn in as an Associate Justice of the Supreme Court on August 8, 2009, approximately six weeks before the Second Circuit issued its opinion.

9 504 U.S. 555 (1992).

10 The states are Arkansas, Hawaii, Indiana, Kansas, Kentucky, Nebraska, North Dakota, Ohio, Pennsylvania, South Carolina, Utah, and Wyoming.

11 The brief urged the Court to vacate the panel opinion and remand to the appeals court to consider (a) whether the doctrine of “prudential standing” bars the claims, and (b) whether the common law claims have been displaced by EPA’s actions since the Second Circuit opinion issued.

12 Not surprisingly, this brief drew criticism from advocates for urgent and dramatic action to address global warming. *See, e.g.*, Gabriel Nelson, *Obama Admin Urges Supreme Court to Vacate Greenhouse Gas 'Nuisance' Ruling*, GREENWIRE, Aug. 25, 2010, available at <http://www.nytimes.com/gwire/2010/08/25/25greenwire-obama-admin-urges-supreme-court-to-vacate-gree-42072.html> (noting that environmental activists felt “betrayed” by the government’s brief); Posting of Stephen Power to Washington Wire, <http://blogs.wsj.com/washwire/2010/08/26/obama-stance-on-climate-suits-stuns-allies/> (Aug. 26, 2010, 13:23 EDT) (quoting David Doniger, policy director of the Natural Resources Defense Council’s climate center, as saying, “We are appalled.”).

13 It appears that Justice Kagan will not recuse herself. The acting Solicitor General indicated in his brief at the certiorari stage that “TVA appeared through its own counsel in the district court and court of appeals, and its briefs and oral arguments did not reflect consultation with other Executive Branch agencies, including EPA and the Department of Justice.” This explanation appears intended to clarify that then-Solicitor General Elena Kagan took no part in the case while at the Department of Justice.

14 Brief of Petitioners at 18, *Am. Elec. Power Co. v. Connecticut*, No. 10-174 (U.S. Jan. 31, 2011) (emphasis in original).

15 Brief of United States at 25, *Am. Elec. Power Co. v. Connecticut*, No. 10-174 (U.S.).

16 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004).

17 Brief of United States at 43, *Am. Elec. Power Co. v. Connecticut*, No. 10-174 (U.S.).

18 *Id.* at 44-53.

19 *Id.* at 39.

20 *Id.* at 16.

21 *Id.* at 19.

22 *Id.* at 37.

23 Reply Brief of Petitioner-Appellants at 4, *Am. Elec. Power Co. v. Connecticut*, No. 10-174 (U.S. Nov. 12, 2010).

24 *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009).

25 Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a “Global Warming Solution” in California*, 40 CONN. L. REV. 591, 626-27 (2008).

26 *Key Judge Downplays Prospects for Successful Climate Damages Suits*, Climate Control News, Mar. 8, 2010 (LEXIS).

27 Kristen H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. PA. L. REV. 1563, 1564, 1573 n.29 (2007).

28 Complaint filed by State Plaintiffs, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 0405669) (emphasis added).

29 While the implications of such judicial action proceeding past the motions stage are large, even if the Court permits these cases to continue past the threshold stage, the plaintiffs’ success in securing judicial emissions caps or large damage awards is far from assured. The various plaintiffs will confront difficult and likely insurmountable causation issues, as presaged by the Fifth Circuit. The panel in *Comer* noted that “the worldwide effects of greenhouse gas emissions may, for instance, make it difficult for the plaintiffs to show proximate causation.” Judge Davis, specially concurring in the result reached by the panel, explained that “the defendants argued to the district court that the plaintiffs failed to allege facts that could establish that the defendant’s actions were a proximate cause of the plaintiffs’ alleged injuries.” Interestingly, he observed that “[i]f it were up to me, I would affirm the district court on this alternative ground.”

30 *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J., concurring) (“Congress may well have wanted to make the agency remedy that it provided exclusive—both to achieve the expertise, uniformity, wide-spread consultation, and resulting administrative guidance that can accompany agency decisionmaking and to avoid the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional

inappropriate application of the statute in a private action for damages.”).

31 *See* STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 67 (1997) (“[A] bureaucracy’s use of expertise matches the need for technically related regulatory improvement[.]”).

