# "COMPLAINTS" ABOUT THE WEATHER: WHY THE FIFTH CIRCUIT'S PANEL DECISION IN *COMER V. MURPHY OIL* REPRESENTS THE WRONG APPROACH TO THE CHALLENGE OF CLIMATE CHANGE

By

David B. Rivkin, Jr.
Carlos Ramos-Mrosovsky
Matthew S. Raymer

*The Federalist Society*
*for Law and Public Policy Studies*

## "Complaints" About The Weather: Why The Fifth Circuit's Panel Decision In *Comer v. Murphy Oil* Represents The Wrong Approach To The Challenge Of Climate Change

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## I. Introduction

Common law "nuisance" litigation has emerged as the strategy of choice for climate change activists and plaintiffs' lawyers seeking to limit in a piecemeal fashion U.S. greenhouse gas ("GHG") emissions.[2] The recent decision by a panel of the United States Court of Appeals for the Fifth Circuit in *Comer v. Murphy Oil U.S.A.*, 585 F.3d 855 (5th Cir. 2009), takes this trend to a new level. For the first time, and what some maintain is contrary to established precedent, a United States Court of Appeals has allowed private parties to bring common law nuisance claims in federal court on the theory that particular GHG emissions from defendants' sources injured plaintiffs and their property by exacerbating specific weather events.

An important debate has ensued about whether the *Comer* decision represents an example of judicial activism in the service of an agenda advanced by an alliance of plaintiffs' lawyers and environmental activists who are "litigating the weather." First, does *Comer* open the courts to a flood of unmanageable litigation, a common-law-tort war of all against all, in which all persons participating in carbon-based economic life are equally able to appear as plaintiffs or defendants? Second, does *Comer* vest with federal judges the power to fundamentally reorder American economic life, placing the judiciary at the center of a policy debate over how (if at all) GHG emissions should be regulated. These are questions that must be considered as the case is taken up by the Fifth Circuit *en banc* or by the Supreme Court.[3] Otherwise, the United States' ability to function economically and articulate a coherent GHG policy—regardless of its content—will be severely impaired.

## II. The *Comer* Litigation

On September 20, 2005, plaintiffs' lawyers filed a class action suit against an assortment of named and unnamed energy companies on behalf of "residents of and/or property owners in the state of Mississippi who suffered loss and harm as a result of Hurricane Katrina," the massive storm that devastated large areas of the U.S. Gulf Coast in 2005.[4] The complaint

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[1] David B. Rivkin, Jr., Partner, Baker & Hostetler, LLP; Carlos Ramos-Mrosovsky, Associate, Baker & Hostetler, LLP; Matthew S. Raymer, Associate, Baker & Hostetler, LLP. The authors practice extensively in the area of climate change law, with a particular emphasis on its constitutional, administrative, and international aspects. Mr. Rivkin co-authored an amicus brief in support of petitions for rehearing in *Comer*.

[2] *See e.g.*, *Kivalina v. ExxonMobil Corp.*, No: 08-1138, 2009 U.S. Dist. LEXIS 99563 (N.D. Cal. Sept. 30, 2009); *San Francisco Chapter of A. Philip Randolph Inst. v. EPA*, No. 07-04936, 2008 U.S. Dist. LEXIS 27794 (N.D. Cal. Mar. 28, 2008); *California v. General Motors Corp.*, No. C06-05755, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007); *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009).

[3] The *Comer* defendants have petitioned for *en banc* review by the complete Fifth Circuit. *See* Appellees' Petitions for Rehearing En Banc, *Comer, et al., v . Murphy Oil USA, et al*., No. 07-60756 (5th Cir. Nov. 27-30, 2009) (four petitions, all by multiple defendant-petitioners).

[4] *See* Complaint, *Comer, et al. v. Murphy Oil USA, et al.*, No. 1:05-cv-00436 (S.D. Miss. Filed Sept. 20, 2005). The named defendants include Murphy Oil USA, Inc., Universal Oil Products Company ("UOP"),

sought both compensatory and punitive damages for the torts of public and private nuisance, as well as trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.

According to the *Comer* plaintiffs' complaint, "[d]efendants emit substantial quantities of . . . 'greenhouse gases'" which, in combination with other emissions since "the outset of the Industrial Revolution," have contributed to "a perilous increase" in "concentrations of greenhouse gases in the atmosphere."[5] This increase in atmospheric concentrations of GHGs over the past centuries has, the plaintiffs alleged, "increase[d] the amount of solar energy trapped" in the atmosphere, which has in turn "result[ed] in warmer air and water temperatures" including in "the Atlantic Ocean, Caribbean Sea, and the Gulf of Mexico."[6] The *Comer* plaintiffs further alleged that these warmer temperatures not only caused "rapid sea level rise," but also specifically caused Hurricane Katrina to "develop[] into a cyclonic storm of unprecedented strength and destruction."[7] Finally, they alleged that Hurricane Katrina was "a *direct and proximate* result of the defendants' greenhouse gas emissions."[8]

Declaring that there is "a dearth of meaningful political action in the United States to address Global Warming" and that "the political process has failed," the *Comer* plaintiffs called upon the courts to exercise their "Constitutional mandate" to solve the problem of Global Warming.[9]

A. The District Court's Dismissal Of The *Comer* Plaintiffs' Claims

The *Comer* plaintiffs fared poorly before the district court that would have been responsible for attempting to administer plaintiffs' remedy. On August 30, 2007, the United States District Court for the Southern District of Mississippi dismissed their suit on the grounds that it presented a nonjusticiable political question. The district court reasoned that hearing the case would exceed its constitutional authority and invade the proper roles of the Legislative and Executive branches. It reasoned that the judiciary could not be dragged into policy-making on climate change issues.[10] The district court also suggested that there were no objective legal standards by which it could evaluate the plaintiffs' claims or, in hearing a nuisance action, decide what a "reasonable" level of GHG emissions might be:

> [T]he problem [in this case] is one in which this court is simply ill-equipped or unequipped with the power that it has to address these issues . . . [global warming] is a debate which simply has no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this court can measure

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Shell Oil Company, ChevronTexaco Corp., ExxonMobil Corporation, BP p.l.c. d/b/a BP Amoco Chemical Company and BP Energy Company, ConocoPhillips Company, and the American Petroleum Institute ("API"), as well as "Oil and Refining Entities 1-100, companies whose names are not currently known but were authorized to do and doing business in the State of Mississippi." *See* Third Amended Complaint, *Comer, et al. v. Murphy Oil USA, et al.*, No. 1:05-cv-00436 (S.D. Miss. Filed Apr. 18, 2006) ["Complaint"]. *See also* "Global Warming: Here Come the Lawyers," BusinessWeek (Oct. 30, 2006), *available at*: http://www.businessweek.com/magazine/content/06_44/b4007044.htm.

[5] Complaint, at ¶¶ 3, 4, 9.

[6] *Id.* at ¶¶ 4, 15.

[7] *Id.* at ¶ 15.

[8] *Id.* at ¶¶ 5, 15 (emphasis added).

[9] Complaint, at ¶ 20.

[10] *See Comer*, 585 F.3d at 860 n. 2 (describing the district court's ruling from the bench).

> conduct . . . and develops standards by which . . . juries can adjudicate facts and apply the law . . . Under the circumstances, I think that the plaintiffs are asking the court to develop those standards, and it is something that this court simply is not empowered to do.[11]

The district court concluded that entertaining the *Comer* plaintiffs' suit would be contrary to the teaching of *Baker v. Carr*, 369 U.S. 186 (1962), the foundational case of the Supreme Court's political question jurisprudence:

> [The plaintiffs ask] this court to do what *Baker v. Carr* told me not to do, and that is to balance economic, environmental, foreign policy, and national security interests and make an initial policy determination of a kind which is simply nonjudicial. Adjudication of Plaintiffs' claims in this case would necessitate the formulation of standards dictating, for example, the amount of greenhouse gas emissions that would be excessive and the scientific and policy reasons behind those standards. These policy decisions are best left to the executive and legislative branches of the government, who are not only in the best position to make those decisions but are constitutionally empowered to do so.[12]

In addition to dismissing on political question grounds, the district court also ruled that the *Comer* plaintiffs lacked standing to bring their suit, because their alleged injuries from global warming were "not injuries which are fairly attributable to these individual defendants" given that "all of us are responsible for the emission of $CO_2$."[13] The plaintiffs' injuries were therefore "attributable to a larger group that are not before this Court, not only within this nation but outside of our jurisdictional boundaries as well."[14] Accordingly, the district court ruled, the "traceability" element of standing – the requirement that a plaintiff's injury be "fairly traceable" to a defendant's tortious conduct – could not be satisfied.[15]

B. The Court of Appeals' Reversal

On appeal, a panel of the Fifth Circuit reversed the district court, ruling not only that the *Comer* plaintiffs had standing to bring their state common law nuisance claims in federal court, but also that those claims did not present a political question. The panel was able to reach these conclusions only by misreading the Supreme Court's standing and political question jurisprudence.

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[11] *Id.*

[12] *Id.* The *Comer* district court's ruling that climate change tort actions are non-justiciable under the political question doctrine is consistent with the decisions of three other district courts confronting the same essential question. *See American Electric Power Co.*, 406 F. Supp. 2d at 265; *General Motors Corp.*, 2007 U.S. Dist. LEXIS 68547; *Kivalina*, 2009 U.S. Dist. LEXIS 94100.

[13] Transcript Of Hearing On Defendants' Motion To Dismiss, *Comer, et al. v. Murphy Oil USA, et al.*, No. 1:05-cv-00436 (S.D. Miss. Aug. 30, 2007) ["Transcript"] at 36.

[14] Transcript at 36. Note that plaintiffs cannot dispute this point, given that their Complaint pinpoints the "industrial revolution" as the initial trigger for the events for which they seek to hold American industry responsible. *See* Complaint, at ¶ 9.

[15] *See id.*

### 1. The *Comer* Decision Announces A New "Traceability Standard.

The *Comer* panel first held that the plaintiffs had standing to bring their claims—that is, that the plaintiffs were entitled to raise and have the court adjudicate their case.

#### a. The *Comer* Decision Gives Any Plaintiff Standing To Sue *Any* GHG Emitter Who "Contributes To" Global Warming.

After briefly concluding that Mississippi's "liberal standing requirements" did not bar the plaintiffs' suit,[16] the *Comer* panel turned to whether standing existed under federal law. Despite acknowledging that "more rigorous standards apply" to the standing inquiry under federal law, the panel nevertheless found that the plaintiffs' claims satisfied the requirement, articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), that a plaintiff's alleged injury be "fairly traceable" to the defendant's alleged action in order to establish standing. The panel rejected the argument that the plaintiffs' theory of causation was simply too attenuated to make their injuries "fairly traceable" to the defendants' GHG emissions, finding it sufficient that the plaintiffs alleged that defendants' GHG emissions had made "contributions to" global warming in general.[17]

Accepting for its decision the link between man-made GHGs and global warming, the *Comer* panel then took an even broader step, finding that the plaintiffs' complaint, "relying on scientific reports, allege[d] a chain of causation between *defendants'* substantial emissions and *plaintiffs'* injuries."[18] In other words, the panel found plausible not only that the defendants' GHG emissions contributed to global warming *generally*, but that the defendants' specific emissions could be causally linked to specific climate events which injured the defendants.

The panel suggested that it had authority for this approach under the Supreme Court's decision of *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, the Supreme Court had allowed Massachusetts and other states to bring suit to compel the Environmental Protection Agency ("EPA") to take steps to regulate GHGs as a "pollutant" within the scope of the Clean Air Act ("CAA"). The Fifth Circuit panel in *Comer* maintained that the *Massachusetts* court had accepted a causal chain virtually identical to that alleged by plaintiffs as a basis for standing, specifically, "that because the EPA did not regulate greenhouse gas emissions, motor vehicles emitted more greenhouse gases than they otherwise would have, thus *contributing to* global warming, which injured Massachusetts' lands through sea level rise and increased storm ferocity."[19]

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[16] Because the case involved a state common-law action brought in federal court, the panel first looked to Mississippi's standing requirements before analyzing the federal standing requirements. *See Comer*, 585 F.3d at 861-62. The panel found that Mississippi's "liberal standing requirements" posed no obstacle to the complaint, because the plaintiffs could, in its view, "assert a colorable interest in the subject matter of the litigation or experience an adverse effect *from the conduct of the defendant*, or as otherwise provided by law." *Id.* at 862 (quoting *State v. Quitman County*, 807 So.2d 401, 405 (Miss. 2001)) (emphasis added). Accordingly, the panel found that "plaintiffs clearly allege that their interests in their lands and property have been damaged by the adverse effects of defendants' greenhouse gas emissions [and therefore] have standing to assert all of their claims under Mississippi law." *Id.* Although Mississippi's standing requirements are not the focus of this white paper, the panel's conclusion that Mississippi law gave plaintiffs standing suffers from many of the same defects as its federal standing analysis.

[17] *Comer*, 585 F.3d at 867.

[18] *Id.* at 864 (emphasis added).

[19] *Id.* at 865 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

Based on its reading of this language from *Massachusetts*, the *Comer* panel announced that "injuries may be fairly traceable to actions that *contribute to, rather than solely or materially cause*, greenhouse gas emissions and global warming."[20] Applying this standard, the panel ruled that because the plaintiffs alleged that the defendants' GHG emissions had "contributed to" greenhouse gas emissions and global warming, their injuries could be "traced to the defendants' contributions" and "satisfie[d] the traceability requirement and the standing inquiry."[21] It is not clear whether the panel comprehends the full implications of its "contribute to" standard, which makes *any* emissions that "contribute to" atmospheric concentrations of GHGs, no matter how minute, "fairly traceable" to injuries alleged to be the result of global warming. *All* GHG emitters become potential defendants in nuisance actions based upon this standard.

b. *Massachusetts v. EPA* Does Not Support The *Comer* Panel's "Contribute To" Standard For Standing In Global Warming-Related Common Law Nuisance Actions.

The *Comer* panel based its "contribute to" standard for determining whether the plaintiffs' alleged injuries were "fairly traceable" to the defendants' emission of GHGs upon a novel reading of the Supreme Court's decision in *Massachusetts*. In reviewing the Fifth Circuit panel's *Comer* opinion, one key issue will be whether the Supreme Court in *Massachusetts* came close to ruling that alleged global warming-related injuries may be "fairly traceable" to specific GHG emission sources which, however slightly, "contribute to" global warming.

The "contribute to" language in *Massachusetts* comes directly from the text of the CAA.[22] As enacted by Congress, the CAA establishes certain thresholds for EPA regulation and is irrelevant to the issue of standing in a private common law nuisance suit. The relevant issue in *Massachusetts* was whether Massachusetts had standing to bring a suit to compel EPA to regulate GHG emissions from new automobile sources under Section 202 of the Clean Air Act. Section 202 states that: "The [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, *or contribute to*, air pollution which may reasonably be anticipated to endanger public health or welfare . . ."[23]

The Supreme Court's standing analysis in *Massachusetts* was uniquely rooted in the provisions of the CAA. The Supreme Court does not appear to suggest that EPA bore any form of common law tort liability for Massachusetts' alleged global-warming related injuries, but rather considered whether such injuries authorized Massachusetts to bring an action to enforce provisions of the CAA that potentially required EPA to regulate GHGs as "air pollutants." The alleged injury that the Supreme Court found to afford Massachusetts a specific administrative law remedy under the CAA was different in kind from the individual injuries alleged in *Comer* as the basis for a common law tort claim. In addition, *Massachusetts* was one of a long line of "procedural standing" cases, allowing parties to obtain judicial review of administrative agency actions. The standing doctrines arising in such a context are fundamentally different from those concerning a private plaintiff's ability to bring a tort claim against private defendants for an allegedly concrete injury.

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[20] *Id.* at 866 (emphasis added).
[21] *Comer*, 585 F.3d at 865-67.
[22] *See* 42 U.S.C. §§ 7401-7671q.
[23] *See Massachusetts*, 549 U.S. at 505-06 (quoting CAA § 202(a)(1); 42 U.S.C. § 7521(a)(1)) (emphasis added).

Indeed, the *Massachusetts* Court carefully distinguished the issue of standing in the unique administrative law case before it from the operation of ordinary standing principles, noting that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[24] Pursuant to its legislative authority, Congress in the CAA "accorded a procedural right . . . to challenge agency action unlawfully withheld," and as a result, a "litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[25]

That Congress created a cause of action in the CAA, which may compel EPA to respond to a petition to regulate a substance emitted from mobile sources, does not establish standing for state common law nuisance claims where, *Massachusetts* acknowledges, ordinary standing requirements such as traceability need to be satisfied. Simply put, Congress has not established, and the Supreme Court has not recognized, a *de minimis* "contribution to" an injury's possible indirect cause as satisfying the standing prerequisite that a plaintiff's injury be "fairly traceable" to a defendant in a nuisance or other common law tort claim. Except for the *Comer* decision, it is well-settled that standing requires a much closer connection between a defendant's conduct and a plaintiff's injury in fact.[26]

The *Comer* panel made much of the *Massachusetts* Court's rejection of the argument that Massachusetts lacked standing because EPA's decision not to regulate GHG emissions from new motor vehicles would have had only a *de minimis* effect on global warming. The Supreme Court disagreed, stating that EPA's argument "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."[27] In language overlooked by the *Comer* panel, however, the very next sentence in the Supreme Court's *Massachusetts* opinion makes clear that its reasoning on this point was firmly rooted in the functional requirements of *administrative law* and has no relation whatsoever to state common law nuisance doctrine: "Yet accepting that premise would doom most challenges to *regulatory action*. Agencies, like legislatures, do not generally resolve massive problems in one fell *regulatory* swoop. That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law."[28] For these reasons, the *Comer* panel's reliance upon the Massachusetts Court's "contribute to" language in holding that injuries from weather events were "fairly traceable" under state common law nuisance doctrine was misplaced.

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[24] *Id.* at 516 (*quoting Lujan*, 504 U.S. at 580).

[25] *Id.* at 517-18 (emphasis added and internal quotations omitted). On the merits in *Massachusetts*, EPA had argued that GHGs were not "air pollutants" under the Clean Air Act and that it therefore did not have authority to regulate GHG emissions from new automobile sources.[25] The Supreme Court ultimately found that the Clean Air Act's "sweeping definition" of the term "air pollutant" included GHGs.

[26] *See e.g.*, *Pitt News v. Fisher*, 215 F.3d 354, 360-61 (3d Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001) (applying a "but for" causation test in finding that traceability element of standing was satisfied) (citing *Bennett v. Spear*, 520 U.S. 154, 169 (1997)); *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) ("Although the 'traceability' of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation, Article III does require proof of *a substantial likelihood* that the defendant's conduct caused plaintiff's injury in fact.") (emphasis added).

[27] *Massachusetts*, 549 U.S. at 524.

[28], *Id.* (emphasis added and internal quotations omitted).

c. Can A Specific Defendant's GHG Emissions Be Traceable To A Plaintiff's Weather-Related Injuries?

Even if one assumes arguendo that an expansive "traceability" standard could be applied, the panel failed to consider the full chain of causation alleged by the plaintiffs. In finding that plaintiffs' alleged injuries were "fairly traceable" to the defendants' GHG emissions, it appears the court in fact only considered the first link in the long chain of causation alleged by the plaintiffs—that the defendants' GHG emissions "contributed to" atmospheric concentrations of GHGs to some degree, however minimal.

The Fifth Circuit panel essentially did not consider the rest of the chain of causation alleged by the *Comer* plaintiffs: that defendants' "contribution to" global atmospheric concentrations of GHGs (as distinct from all other natural and anthropogenic contributions "since the outset of the Industrial Revolution"[29]) caused warming of the atmosphere and oceans, and that the portion of any warming attributable to this contribution caused Hurricane Katrina to be more powerful than it otherwise would have been as well as some undefined increment of sea level rise, and, in turn, some portion of the plaintiffs' injuries. The panel did not seem to address these leaps from one conclusion to the next.

Nor did the panel consider that the plaintiffs had failed to allege facts from which it would be possible for a court to infer defendants' causation of plaintiffs' injuries. Given the near-infinite number of emitters over the centuries, no court could find a substantial likelihood that any defendant, even a major GHG-emitting industry, caused the plaintiffs' alleged global warming-related injuries to any quantifiable extent. Injuries caused by global warming are therefore unsuited as a basis for standing to sue particular GHG emitters under settled law requiring a much tighter link between a plaintiff's injury and a defendant's conduct to meet the traceability prerequisite for standing.[30] Each emitter's contribution to total GHG concentrations is so intermingled with and diluted by every other emitter's contribution that "tracing" plaintiffs' injuries from one wisp of cloud to another becomes a fantastic exercise.[31]

Indeed, a federal district court considering nearly-identical global-warming related nuisance claims in *Kivalina v. ExxonMobil Corp.* concluded that "the extremely attenuated causation scenario alleged" made it "entirely irrelevant whether any defendant 'contributed' to the harm because a discharge, standing alone, is insufficient to establish injury."[32] As the *Kivalina* court explained:

> [T]here is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time . . . it is not plausible to state which emissions—emitted by whom and at what

[29] Complaint, at ¶ 9.
[30] *See Pitt News*, 215 F.3d at 360-61; *Habecker*, 518 F.3d at 1217.
[31] *See* Michael B. Gerrard, *Global Climate Change and U.S. Law* (2008) at 5 (explaining that "[t]wo physical characteristics of all . . . GHGs are especially important. First, once emitted into the atmosphere, they travel around the globe; thus a ton of carbon dioxide that is emitted over New York has the same effect on global warming as a ton emitted over Paris, Shanghai or Honolulu. Second, most types of GHGs circling the globe remain in the atmosphere for many decades; thus their emissions have a cumulative impact. This is unlike many other air pollutants, which have primarily local or regional effects, and which degrade or are washed back to earth within weeks or months.").
[32] *Kivalina*, 2009 U.S. Dist. LEXIS 99563 at *41 (citing *Tex. Indep. Producers and Royalty Owners Ass'n v. EPA,* 410 F.3d 964, 974 (5th Cir. 2005) ("Establishing a discharge does not also establish an injury.")).

> time in the last several centuries and at what place in the world—'caused' Plaintiffs' alleged global warming related injuries . . . the source of the greenhouse gases are undifferentiated and cannot be traced to any particular source, let alone defendant, given that they rapidly mix in the atmosphere and inevitably merge with the accumulation of emissions in . . . the rest of the world.[33]

Simply put, then, the "contribute to" standard does not work, and appears to be the result of a misreading of the Supreme Court's decision in *Massachusetts*. Private plaintiffs cannot establish that their injuries are "fairly traceable" to any set of defendants' GHG emissions. And, if the courts find that is so, private plaintiffs do not have standing to bring tort claims based on such emissions against individual or groups of GHG emitters.

2. The Fifth Circuit Panel's Application Of The Political Question Doctrine Was In Error.

The Fifth Circuit's *Comer* panel next proceeded to reverse the district court's political question analysis. It held that the plaintiffs' nuisance claims were in fact justiciable—that is, "constitutionally capable of being judicially decided" by the courts—because the plaintiffs' common law nuisance claims "plainly have not been committed by the Constitution or federal laws or regulations to Congress or the president."[34] The panel was at pains to note that neither Congress nor any federal agency has yet enacted a comprehensive program for the regulation of greenhouse gas emissions, whether by statute or regulation. Accordingly, the panel reasoned, "[u]ntil Congress, the president, or a federal agency so acts . . . the Mississippi common law tort . . . questions posed by the present case are justiciable, not political, because there is no commitment of those issues exclusively to the political branches of the federal government by the Constitution itself or by federal statutes or regulations."[35]

The question for en banc review will be whether the panel's conclusion was rooted in the misapprehension of Supreme Court precedent, here the political question doctrine as articulated in *Baker v. Carr*.[36] In *Baker*, the Supreme Court explained that the political question doctrine is grounded in the separation of powers at the federal level, and its purpose "is to prevent judicial interference with the exercise of powers committed to the political branches."[37] The doctrine renders a case nonjusticiable when a federal court would have to decide a question that has been "committed by the Constitution to another branch of government."[38] A court determining

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[33] *Id.* at * 43 (internal citations omitted).
[34] *Comer*, 585 F.3d at 869-870.
[35] *Id.* at 870. The *Comer* panel's basing its political question analysis on the political branches' not having chosen to regulate GHG emissions is ironic in light of the panel's simultaneous and near-exclusive reliance on *Massachusetts* as the foundation of its standing analysis. The *Massachusetts* decision led directly to EPA's initiating administrative action to regulate GHGs under the CAA. *See* "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 74 Fed. Reg. 55,292 (Oct. 27, 2009) (in which EPA proposes to adapt or "tailor" CAA permitting regimes to GHG emissions in order to comply with the Supreme Court's mandate in *Massachusetts*). EPA's proposed rule is the very sort of policymaking by a politically-accountable branch of government that the political question doctrine serves to protect from meddling by the judiciary.
[36] 369 U.S. 186 (1962) (Brennan, J.).
[37] *See Comer*, 585 F.3d at 871 (citing *Baker*, 369 U.S. at 217).
[38] *Baker*, 369 U.S. at 211.

whether the Constitution makes such a commitment must "analyze representative cases and . . . infer from them the analytical threads that make up the political question doctrine."[39]

*Baker* identified several "formulations" setting forth criteria to aid a court in determining whether a case would violate the political question doctrine:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise *may describe a political question*, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; *or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion*; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncement by various departments on one question.
>
> Unless *one of these formulations* is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.[40]

The *Comer* panel announced that a threshold inquiry in identifying a political question was whether there exists "a constitutional provision or federal law that arguably commits a material issue in the case exclusively to a political branch."[41] Absent such a provision, the *Comer* panel declared, an "issue is clearly justiciable" and a court need not even test the case against the *Baker* formulations.[42] On this basis, the panel found that the political question doctrine did not apply, because claims brought under Mississippi common law are not constitutionally committed to the federal Legislative or Executive branches. "In this case the only 'issues' are those inherent in the adjudication of plaintiffs' Mississippi common law tort claims for damages. There is no federal constitutional or statutory provision committing any of those issues exclusively to a federal political branch."[43]

The *Comer* panel misread the very Supreme Court precedent it cited in its decision. *Baker* states that finding any "one of these formulations . . . inextricable from the case at bar" would implicate the political question doctrine, but the panel dismissed the *Baker* formulations as "not necessary or properly useful in this case," because just *one* of them – "a textual commitment" to a coordinate branch – was not met.[44] Unlike the Fifth Circuit, the *Supreme*

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[39] *Comer*, 585 F.3d at 871 (quoting *Baker*, 369 U.S. at 210-17) (internal quotations and citations omitted)).
[40] *Baker*, 369 U.S. at 217 (emphases added).
[41] *Comer*, 585 F.3d at 872.
[42] *Id.*
[43] *Id*. at 875.
[44] *See id*. The panel conceded that future congressional action regarding greenhouse gas emissions could render such lawsuits nonjusticiable: "[t]he most that the defendants legitimately could argue is that

*Court* never gave this "formulation" of a political question priority over any of the others, each of which takes federal courts beyond their constitutional role and imperil the separation of powers. The panel nevertheless hastened to note without any analysis that there was neither an absence of judicially discoverable or manageable standards with which to decide the case, nor a need for an initial policy determination: "Mississippi and other states' common law tort rules provide long-established standards for adjudicating the nuisance, trespass and negligence claims at issue. The policy determinations underlying those common law tort rules present no need for nonjudicial policy determinations to adjudicate this case."[45]

The *Comer* panel's political question analysis reflects the Fifth Circuit's assumption that "nuisance claims" based on GHG emissions' putative contributions to global warming are no different from any other air pollution claim. For instance, the *Comer* panel cursorily rejected the defendants' argument that it would have to make an initial policy determination of a nonjudicial character in order to adjudicate global-warming claims. It declared that no "Supreme Court decision requires federal courts to imitate the functions of legislative or regulatory bodies in *typical air pollution cases*."[46] The panel also found support for its holding in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), a Supreme Court decision holding that a public nuisance action by the state of Ohio to enjoin discharges from other states and Canada into Lake Erie did not implicate the political question doctrine.[47] *Wyandotte*, the *Comer* panel announced, addressed the "*analogous issue* of transboundary water quality control."[48]

The Fifth Circuit sitting en banc will need to decide whether the panel improperly failed to grasp how different the *Comer* plaintiffs' allegations were from a "typical" air or water pollution case. That "common law tort rules provide long-established standards" for typical cases is therefore beside the point. No court can properly weigh the claims advanced in *Comer* – and, in particular, determine, as a matter of the common law of nuisance, whether the defendants' GHG emissions were "reasonable" – without formulating standards in a manner that is properly within the realm of the political branches. That setting GHG emissions policy is a matter for the Executive and Legislative branches is abundantly demonstrated by the Executive's participation in international climate talks and ongoing GHG-related rulemaking under the CAA, and the Legislative branch's extended and ongoing consideration of "cap-and-trade" legislation.[49]

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in the future Congress may enact laws, or federal agencies may adopt regulations, so as to comprehensively govern greenhouse gas emissions and that such laws or regulations might preempt certain aspects of state common law tort claims. *Until Congress, the president, or a federal agency so acts, however, the Mississippi common law tort rules questions posed by the present case are justiciable, not political, because there is no commitment of those issues exclusively to the political branches of the federal government by the Constitution itself or by federal statutes or regulations*." *Comer*, 585 F.3d at 870 (emphasis added). The panel appears to have confused the doctrine of federal "preemption" with the question of whether a case presents an inappropriately "political question." The *Comer* court failed to appreciate that in thus far declining to enact unilateral "climate change" legislation without corresponding commitments from foreign nations, the Executive and Legislative branches have not left a vacuum within which courts may apply state common law, but have in fact made a significant political choice. This choice merits protection from judicial intrusion under the political question doctrine.

[45] *Id.* at 875.

[46] *Id.* at 877 (emphasis added and internal citations omitted).

[47] *Id.*

[48] *Comer*, 585 F.3d at 878.

[49] *See generally* Clean Energy Jobs and American Power Act, S. 1733 (introduced Sept. 30, 2009); Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, *supra* n. 35; Darren Samuelsohn, "Obama Negotiates 'Copenhagen Accord' With Senate Climate Fight in Mind," *The New York Times* (Dec. 21, 2009), *available at*: http://www.nytimes.com/cwire/2009/12/21/21climatewire-obama-negotiates-copenhagen-accord-with-senat-6121.html.

Setting GHG policy will potentially require the making of important tradeoffs between the environment and the economy, between present and future generations, and between the developed and developing world, all on the basis of scientific theories about profoundly complex phenomena that are imperfectly understood at best. These are not legal questions. They are economic and policy judgments in which the courts have no proper role. Absent the setting of GHG policy by a politically-accountable branch of the government, there can be no objective legal criteria by which to judge the appropriateness of a particular emission.

The *Comer* court properly acknowledged that "the lack of satisfactory criteria for a judicial determination" is a "dominant consideration" in political question analysis.[50] Such an inability to fashion satisfactory criteria satisfactory criteria should have led the Fifth Circuit to affirm the district court's dismissal of the *Comer* plaintiffs' case as one presenting nonjusticiable political questions.

a. The Alternate Approach: *Kivalina v. ExxonMobil Corp.*

The strikingly similar and contemporaneous *Kivalina* case demonstrates how a different court approached a case fundamentally identical to *Comer*. The *Kivalina* court held that the political question doctrine barred federal and state common law nuisance claims brought against oil companies by a village of Inupiat Eskimos alleging that the defendants' GHG emissions had caused global warming which had harmed the plaintiffs by melting Arctic sea ice. Noting that "[a]ny one of the *Baker* factors may be dispositive," the *Kivalina* court found that the claims were barred under the political question doctrine due to the lack of judicially discoverable and manageable standards and because the court would be required to make an initial policy determination regarding "what would have been an acceptable limit on the level of greenhouse gases emitted" in order to resolve the claims.[51]

(i) Judicially Manageable Standards

As in *Comer*, the plaintiffs in *Kivalina* argued that such concerns were unwarranted because "[t]he judicially discoverable and manageable standards here are the same as they are in all nuisance cases," where a court must decide whether a defendant's conduct was "reasonable."[52] Unlike the *Comer* panel, the *Kivalina* court recognized that it was dealing with no ordinary nuisance action. It explained: "the flaw in Plaintiffs' argument is that it overlooks that the evaluation of a nuisance claim is not focused entirely on the unreasonableness of the harm. Rather, the factfinder must also balance the utility and benefit of the alleged nuisance against the harm caused."[53] In other words, a court would have to impose its own subjective view of what GHG emissions policy *ought* to be.

Nor was the "long, prior history of air and water pollution cases" of any use to the *Kivalina* court in identifying judicially discoverable and manageable standards for adjudicating a

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[50] *See Baker*, 369 U.S. at 210 (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939)).
[51] *Kivalina*, 2009 U.S. Dist. LEXIS 99563, at *17, *30.
[52] *Id.* at *22.
[53] *Id.* at *23. The district court in *Kivalina* defined "public nuisance" as "unreasonable interference with a right common to the general public," 2009 U.S. Dist. LEXIS 99563, at *23 (citing *Restatement (Second) of Torts* § 821(b)(1) (1979)), and noted that "[w]hether the interference is unreasonable turns on weighing 'the gravity of the harm against the utility of the conduct.'" *Id*. *See also Florida East Coast Props., Inc. v. Metropolitan Dade County*, 572 F.2d 1008, 1012 (5th Cir. 1978) ("In every case, the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of harm to the plaintiff must be weighed against the utility of the defendant's conduct.").

case where the alleged nuisance "affects the entire planet and its atmosphere."[54] Unlike the Fifth Circuit panel in *Comer*, the *Kivalina* court saw a fundamental difference between traditional pollution suits—whether advanced under a theory of common law nuisance, or under statutory schemes like the Clean Air Act—and global warming claims. Compared to a water discharge case, for example, *Comer* presents questions that differ on so great a scale as to be altogether inapposite. As the *Kivalina* court explained, "global warming nuisance claim[s] seek to impose liability and damages on a scale unlike any prior environmental pollution case cited by Plaintiffs. Those cases do not provide guidance that would enable the Court to reach a resolution of this case in any 'reasoned' manner."[55]

(ii) Initial Policy Determinations

The *Kivalina* court clearly was of the view that it is impossible to decide a global warming-related nuisance claim without "an initial policy determination of a kind clearly for nonjudicial discretion."[56] The *Kivalina* plaintiffs were calling on the court to "make a policy judgment of a legislative nature" about what kind of GHG emissions limits "should have been imposed," rather than to "resolve the dispute through legal and factual analysis."[57] Defining a reasonable level of GHG emissions that should be permitted is, of course, the same policy determination with which world leaders have grappled unsuccessfully at the Copenhagen Climate Summit and elected representatives have debated on the floor of Congress. It is an inherently *political* question.[58]

The *Kivalina* court also refused to be drawn into the "policy decision about *who* should bear the cost of global warming," a question that it rightly saw as implicit in any adjudication of GHG nuisance claims: "Plaintiffs are asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming . . . the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance."[59] The *Kivalina* court's measured and prudent refusal to embroil the judiciary in making climate policy judgments is the correct approach to follow.

## III. Common Law Nuisance Actions Are Not Appropriate Vehicles Through Which To Address GHG Emissions And Alleged Global Warming Injuries

Whatever the impact of GHG emissions on even the most destructive climate phenomena, common law nuisance actions are not good vehicles through which to address the challenges these emissions may represent.

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[54] *Kivalina*, 2009 U.S. Dist. LEXIS 99563 at *25.
[55] *Id*. at *29.
[56] *Id*. at *29 (quoting *Baker*, 369 U.S. at 217).
[57] *Id*. at *29 (citing *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005)).
[58] As in *Comer*, the *Kivalina* plaintiffs argued that no initial policy determination would have to be made because they sought only damages and not injunctive relief that would require setting GHG emissions limits. The district court was not persuaded: "this argument rests on the same faulty logic discussed above; to wit, that Plaintiffs' nuisance claim can be resolved solely by examining the reasonableness of the harm, while avoiding any consideration of the conduct causing the nuisance . . . Regardless of the relief sought, the resolution of Plaintiffs' nuisance claim requires balancing the social utility of Defendants' conduct with the harm it inflicts. That process, by definition, entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants." 2009 U.S. Dist. LEXIS 99563 at *14.
[59] *Id*. at *31-2.

A. Global Warming Is Fundamentally Unlike Traditional Air And Water Pollution.

Global warming is unlike any other environmental "nuisance" and is fundamentally distinguishable from the environmental causes of action around which the common law of nuisance arose. Traditional or "typical" environmental "nuisances" cause bounded harms. If an industrial plant unreasonably emits harmful toxins into the air which kill nearby forests or crops, or if an upstream city unreasonably dumps sewage into a water source which, in turn, sickens residents of a downstream city, it is possible to determine with reasonable scientific certainty that the actions of one caused the injury to the other and to frame an appropriate, judicially enforceable remedy.

GHG emissions are an entirely different kind of "pollution." Because carbon dioxide is a GHG, literally every single person on Earth "contributes to" the alleged "nuisance" by simply breathing and going about the tasks of daily life. The distinction between such a paradigm and that concerning a typical pollutant is amply demonstrated by EPA's detailed division of the United States into "attainment" and "non-attainment" areas for pollution-control and regulatory purposes under the Clean Air Act.[60] Such a framework is nonsensical in the case of GHGs. While levels of pollution may vary from one location to another, GHGs can only be thought of as a "pollutant" to the extent that their total concentration in the planet's overall atmosphere over time may have adverse consequences on the Earth's climate. Local concentrations are irrelevant.[61]

To underscore how individuals alleging injuries as a result of global warming cannot have standing to sue individual GHG emitters, the *Kivalina* court drew on the "Zone of Discharge" analysis developed to determine whether the "traceability" element of standing is satisfied in Clean Water Act claims. Clean Water Act jurisprudence distinguishes between 'the plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to that defendant."[62] Such a distinction is useless with respect to global warming, as "there is not an instance in which Plaintiffs' use of their property is negatively impacted by virtue of their proximity to the discharge."[63] The scientific theory of anthropogenic global warming, which is at the core of the *Comer* plaintiffs' claims, was seen by the court in *Kivalina* as incompatible with individual standing to bring a common law nuisance action against selected emitters of GHGs.

B. The *Comer* Decision And Future Wave Of Litigation.

In light of the scientific theory of how GHG emissions may drive global warming, the *Comer* decision's "contribute to" standard could open the courts to a flood of lawsuits seeking damages for weather-related events. If *Lujan*'s "fairly traceable" requirement may be satisfied by mere "contributions to" GHG emissions and global warming, then anyone injured by a climatological event which can somehow be linked to climate change could sue every single jurisdictionally-appropriate person who "contributes to" GHG emissions or global warming.[64] Everyone – from multinational corporations to small businesses, to individuals accused of having an unreasonably large "carbon footprint" (the result, perhaps, of driving to work) – would

[60] *See* 42 U.S.C. § 7407.
[61] *See* Gerrard, *supra* n. 31.
[62] *Kivalina*, 2009 U.S. Dist. LEXIS 99563. at *45 (citing *P.I.R.G. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990)).
[63] *Id.*
[64] Indeed, the "contributes to" standard may be the only standard under which the "fairly traceable" requirement would be satisfied, if only *pro forma*.

be a potential defendant. Every emitter of GHGs could potentially be liable to every person injured whenever a hurricane hits Florida or a wildfire sweeps through California. Nor is there any reason to limit the universe of potential post-*Comer* plaintiffs to the United States. If the Fifth Circuit panel's decision is allowed to stand, United States companies may soon be hailed into court to defend against allegations that they are responsible for "worsening" – or even causing – floods, tsunamis, droughts, and any other disasters around the world which can be at least partly ascribed to global warming.

Managing such litigation would require courts to make countless subjective value judgments as to why some GHG emissions should result in liability while others should not. Courts would need to explain on the merits why, for instance, driving a hybrid is "reasonable," while driving an SUV is not. Judges would have to explain why, or when, owning a construction company, flying a private jet, flying a commercial jet, using spray-paint, burning firewood, leaving the lights on, eating beef, engaging in commercial shipping, or operating power plants, to give but a few other examples, is or is not "unreasonable." Standing requirements exist to avoid such problems, and also to make sure that courts limit themselves to cases and controversies rather than policy-making. The *Comer* panel's "contribute to" standard would have the effect of eliminating standing requirements altogether in GHG-based nuisance cases.

### C. Will Global Warming Nuisance Claims Reorder The Carbon-Based Economy?

The *Comer* decision could inject uncertainty into the modern carbon-based economy. No industry, indeed no individual, would be entirely immune from the chance of exposure to expensive and potentially crushing liability on the basis of everyday GHG emissions. The potential amount of damages that could be awarded through a finding of liability for weather-related injuries would far exceed any damages previously contemplated under common law nuisance actions. By allowing a tort action to go forward against selected GHG emitters on behalf of a class of individuals whose property was damaged in Hurricane Katrina, *Comer* exposes the defendants to liability for *every* injury caused by Hurricane Katrina, a liability that could easily exceed $100 billion.[65] It is difficult to understand how such a rule of law can be consistent with the reality of a carbon-based economy.

If the Fifth Circuit panel's *Comer* decision stands, the result could be competing judicial opinions reflecting each court's own view of the reasonableness of particular GHG emissions. The scale of potential damages that might follow from different courts' rulings as to when and to what extent it is "reasonable" to emit GHGs – a currently unregulated activity – raises non-trivial due process issues. A likely consequence would be a shift towards judicially-imposed emissions limits. The court which imposes the strictest liability upon GHG emitters in nuisance cases would effectively be empowered to reorder the United States' carbon-based economy. No company or individual could be certain that GHGs emitted in, say, California, would not land them in court for global warming's alleged impacts in Maine or Alaska. Industries would accordingly tailor their emissions to avoid being found liable in the eyes of the most activist court. Such a race to the bottom might be desirable to some climate-change activists, but hardly represents a path to a coherent and consistent GHG policy.[66]

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[65] *See* Brig. Gen. David L. Johnson, USAF (Ret.), "Service Assessment: Hurricane Katrina," U.S. Dept. of Commerce, National Oceanic and Atmospheric Administration at 1 (June 2006), *available at:* http://www.weather.gov/om/assessments/pdfs/Katrina.pdf.

[66] It should be remembered that none of these dire consequences would flow from the Executive and Legislative branches' implementation of a comprehensive and uniform climate change and emissions

## IV. Conclusion

The *Comer* decision presents novel and far-reaching conclusions. It is a controversial ruling which overlooks the fact that there are simply no judicially ascertainable standards which the courts can apply to determine whether weather-related injuries of any kind are "fairly traceable" to any particular subset of GHG emissions. As such, it portends a torrent of global warming-related tort litigation. It also would cause the courts to stray from their proper constitutional role.

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policy through domestic legislation and international negotiation. Unless and until such regulation or legislation emerges, however, *Comer* would give the courts free rein.