



National Association  
*of* Attorneys General

Second Circuit's September 21, 2009 decision in  
Connecticut v. American Electric Power Company,  
Inc., Nos. 05-5104-cv, 05-5119-cv.

**AUTHOR**

Sarah Bertozzi, NAAG Visiting Counsel

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In 2004, eight States,<sup>1</sup> New York City, and three land trusts<sup>2</sup> (collectively “Plaintiffs”) sued<sup>3</sup> six electric power corporations<sup>4</sup> that own and operate fossil-fuel power plants in twenty states (collectively “Defendants”), seeking to abate Defendants’ ongoing contribution to global warming, which, Plaintiffs allege, constitutes a nuisance under the federal common law or, alternatively, state common law.

Defendants moved to dismiss Plaintiffs claims on multiple grounds, including that: (1) the claims raised non-justiciable political questions; (2) Plaintiffs lacked standing; (3) Plaintiffs failed to state a claim under the federal common law of nuisance; (4) even if Plaintiffs stated a federal common law claim, federal legislation displaced it; and (5) one Defendant was immune from suit under the discretionary function exception.

The United States District Court for the Southern District of New York (S.D.N.Y.) dismissed Plaintiffs claims because they raised non-justiciable political questions. On September 21, 2009, Judges McLaughlin and Hall<sup>5</sup> of the Second Circuit vacated the S.D.N.Y. decision, rejected Defendants-Appellees’ other grounds for dismissing Plaintiffs-Appellants’ complaint, and remanded to the District Court to consider Plaintiffs’ claims on the merits.

What follows is a summary of the panel’s September 21 opinion and a discussion of its ramifications, beginning, as the court did, with background on Plaintiffs’ complaints and the District Court’s Opinion and Order.

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<sup>1</sup> Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin.

<sup>2</sup> Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire.

<sup>3</sup> The eight states and New York City initiated one lawsuit, while the three land trusts together independently sued the same defendants. The District Court consolidated these suits.

<sup>4</sup> American Electric Power Company, Inc., American Electric Power Service Corporation, Southern Company, Tennessee Valley Authority, XCEL Energy, Inc., and Cinergy Corporation.

<sup>5</sup> Now-Justice Sotomayor was originally a member of the panel. Because the two other judges were in agreement, they determined the matter. Opinion at 2 n.\*.

## Background

### (1) **States' Complaint**<sup>6</sup>

The States single out Defendants because their annual emissions constitute approximately one quarter of the U.S. power sector's carbon dioxide emissions and ten percent of all emissions from human activities in the U.S. Additionally, emissions from the power sector are expected to increase faster than emissions from the economy as a whole until 2025, and Defendants can reduce their emissions without significantly increasing the cost of electricity for their customers. Opinion at 7.

The States point to reports by the Intergovernmental Panel on Climate Change and the U.S. National Academy of Sciences to prove that carbon dioxide emissions cause global warming and its attendant injuries. *Id.* at 7–8. Some States' climates have already been altered, the States allege, citing as an example the reduction in California's mountain snowpack—California's largest fresh water source. *Id.* at 8–9. And in the next ten to a hundred years, the States will suffer a range of ecologic, economic and public health injuries, including increased heat-related illness and death; increased smog and, with it, increased respiratory problems; beach erosion; higher sea levels and, with it, inundation of coastal land; lowered Great Lake water levels; more droughts and floods; increased wildfires; salinization of marshes and water supplies; and widespread disruption of ecosystems, which would harm forests and reduce biodiversity. *Id.* at 9.

To prevent these injuries, the States seek injunctive relief. Specifically, they seek to cap each Defendant's carbon dioxide emissions and to reduce them by a specified percentage each year for at least ten years. *Id.* at 9–10.

### (2) **Land Trusts' Complaint**

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<sup>6</sup> Includes the City of New York.

In many respects, the Trusts' complaint mirrors that of the States. *Id.* at 10–11. The principal difference is the nature of the injury alleged—the Trusts allege that their property interests would be harmed by unabated global warming, which would “diminish or destroy the particular ecological and aesthetic values that caused [them] to acquire, and cause them to maintain, the properties they hold in trust” and “interfere[] with their efforts to preserve ecologically significant and sensitive land for scientific and educational purposes, and for human use and enjoyment.” *Id.* at 11 (quoting Trusts).

### (3) District Court's Amended Opinion and Order

The S.D.N.Y. dismissed both complaints because they raised political questions. The court relied on the third [Baker v. Carr](#), 369 U.S. 186, 217 (1962) factor, concluding that Plaintiffs' claims were impossible to resolve without the court making an initial policy determination ““of a kind clearly for nonjudicial discretion”” because the court would have to balance interests in pollution control with interests in economic development in order to fashion an injunction. Opinion at 12–13 (quoting *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272–73 (S.D.N.Y. 2005) quoting [Vieth v. Jubelirer](#), 541 U.S. 267, 278 (2004)). The S.D.N.Y. also distinguished this case from other public nuisance cases because it ““touche[s] on so many areas of national and international policy”” and thus is legislative in scope. Opinion at 13 (quoting [Am. Elec. Power Co.](#) 406 F. Supp. 2d at 272).

## Discussion

### (1) Standard of Review.

The panel reviewed *de novo* the district court's grant of a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim on which relief can be

granted, accepting as true all Plaintiffs' allegations and drawing all reasonable inferences in their favor. Opinion at 14–15.

(2) **Political Question Doctrine.**

To determine whether the questions raised by Plaintiffs' claims are in their nature political and submitted to the executive or legislature by the U.S. Constitution and laws, *id.* at 15 (citing [Marbury v. Madison](#), 5 U.S. 137, 170–71 (1803)), the Second Circuit applied the six-factor [Baker v. Carr](#) test, which counsels that a question is non-justiciable if (1) there is “‘a textually demonstrable constitutional commitment of the issue to a coordinate political [branch];” (2) there are no “‘judicially discoverable and manageable standards for resolving [it];” (3) it is “‘impossibl[e] [to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion;” (4) it is “‘impossibil[e] [for] a court[] [to] undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government;” (5) there is “‘an unusual need for unquestioning adherence to a political decision already made;” or (6) there is “‘the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”” Opinion at 15–16 (quoting 369 U.S. at 217). The panel analyzed all six factors to conclude that the S.D.N.Y. wrongly invoked the political question doctrine but paid particular attention to the first three, consistent with Supreme Court dicta that the [Baker](#) factors “‘are probably listed in descending order of both importance and certainty.”” Opinion at 16 (quoting [Jubelirer](#), 541 U.S. at 278).

- a. Baker factor #1: Is there a textually demonstrable constitutional commitment of the issue to coordinate political branch?

The Second Circuit first rejected Defendants' argument that the issue of whether carbon dioxide emissions should be capped and/or reduced is textually committed to

Congress by the Commerce Clause as a matter of “high policy.” Defendants failed to explain how the emissions issue is so textually committed and because the issue was “insufficiently argued,” the court “consider[ed] it waived.” Opinion at 21.

Next, the Second Circuit rejected Defendants’ alternative argument that using a common law of nuisance cause of action to reduce domestic emissions would interfere with the President’s authority over foreign relations—specifically, his efforts to induce other countries to reduce their emissions and to solve the global warming problem through diplomatic means. The court was irritated by Defendants’ “conclusory statements,” *id.*, but rejected this argument on its merits because it misstated the issues Plaintiffs raised: Plaintiffs do not “ask the court to fashion a comprehensive and far reaching solution to global climate change,” *id.* at 22; rather, the relief they seek “applies in only the most tangential and attenuated way to the expansive domestic policy issues raised by Defendants,” *id.* at 23. “A decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national* or *international* emissions policy.” *Id.* at 23. Thus, the panel concluded, a common law of nuisance action is constitutionally committed to the judiciary, even in the environmental context. *Id.*

b. Baker factor #2: Is there a lack of judicially-discoverable and manageable standards for resolving this case?

For this factor, Defendants argued that the ““vague and indeterminate nuisance concepts and maxims of equality,”” *id.* at 24 (quoting Defendants quoting [City of Milwaukee v. Illinois](#), 451 U.S. 304, 317 (1981) (“*Milwaukee II*”)), gleaned from public nuisance cases or the Restatement (Second) of Torts provide no guidance on how to

answer such questions as “How fast should emissions be reduced?; Should power plants or automobiles be required to reduce emissions?; Who bears the cost of reduction?; and How are impacts on jobs, the economy, and the nation’s security to be balanced against the risks of future harm?,” Opinion at 24. The Second Circuit rejected this argument by pointing to the century-long history of federal courts successfully adjudicating complex common law public nuisance cases, including the Supreme Court’s decree in [Georgia v. Tennessee Copper Co.](#), 240 U.S. 650, 650–51 (1916) (“Tenn. Copper Co. II”), which set emissions limits, imposed monitoring requirements, and apportioned costs between the defendants. Opinion 24–27. The panel also pointed to nine opinions by the Supreme Court and the Circuit Courts using the Restatement (Second) of Torts to develop standards in tort cases. See id. at 27–28. Lastly, the panel pointed to a wrongful death action where an American was killed by a Palestinian Liberation Organization as an example of a politically charged case adjudicated as an ordinary tort suit. Id. at 29 (citing [Klinghoffer v. S.N.C. Achille Lauro](#), 937 F.2d 44 (2d Cir. 1991)).

Turning to the case at hand, the Second Circuit again called Defendants’ arguments “overstated” and characterized Plaintiffs’ complaint as raising “discrete” issues, not as evoking “overarching policy questions.” Opinion at 30. One sentence in the States’ brief stood out for the panel as hitting the nail on the head: “[t]hat Plaintiffs’ injuries are part of a worldwide problem does not mean Defendants’ contribution to that problem cannot be addressed through principled adjudication.” Id. (quoting States).

- c. Baker factor #3: Is it impossible to decide this case without an initial policy determination of a kind clearly for non-judicial discretion?

The district court relied on the third Baker factor in dismissing Plaintiffs’ complaint, finding it significant that the political branches had refused to regulate carbon

dioxide emissions and thus deliberately failed to supply an initial policy decision. *Id.* at 31 (citing *Am Elec. Power Co.*, 406 F. Supp. 2d at 273–74). The Second Circuit rejected this emphasis on Congress's refusal to legislate as inapposite to a case making a federal common law claim because the Supreme Court has stated that in the context of such cases, “Congress's mere refusal to legislate . . . falls far short of an expression of legislative intent to supplant the existing common law in that area.” Opinion at 31–32 (quoting *United States v. Texas*, 507 U.S. 529, 535 (1993) (internal citations omitted)). The panel also cited *Illinois v. City of Milwaukee*, 406 U.S. 91, 101–03 (1972) (“*Milwaukee I*”), a common law of nuisance action seeking pollution abatement, for the related proposition that if extant statutes don't cover a plaintiff's claim, that plaintiff may assert a federal common law cause of action and need not wait for the legislature to fashion a comprehensive scheme. Opinion at 32. Lastly, the panel noted that to the extent there has been any political action in this area, neither Congress nor the President has indicated a preference for *increasing* greenhouse gases. To the contrary, Congress has passed laws that call for the study of climate change and research into technologies that will reduce emissions. *Id.* at 33.

- d. Baker factors #4-6: Will adjudication of this case demonstrate lack of respect for the political branches, contravene an unusual need for unquestioning adherence to a political decision already made, or embarrass the country as a result of multifarious pronouncements by various departments?

Like Defendants, the Second Circuit grouped these three factors together. According to the court, these factors are only relevant where (1) judicial resolution of a case would contradict prior decisions taken by a political branch, and (2) such contradictions would “seriously interfere with important governmental interests.” *Id.* at

34 (citing and quoting [Kadic v. Karadzic](#), 70 F.3d 232, 249 (2d Cir. 1995)). Because there is no unified policy on greenhouse gas emissions, the panel concluded, no outcome of this case would contravene a prior policy decision. And because (1) is not a problem, (2) cannot be a problem. Opinion at 34. The panel cited Defendants' own "variegated pronouncements" of what the United States's policy is on greenhouse gases as evidence that no such policy exists. *Id.* The court also noted that the nature of federal common law, particularly, makes [Baker](#) factors #4-6 of little concern because to the extent that the court's ultimate decision interferes with governmental interests or results in a contradictory pronouncement, Congress has a remedy: It can simply displace the common law with its own statutory or regulatory standards and thus override any decision made by the court. *Id.* at 35–36.

### (3) **Standing**

Because the district court did not address Defendants' standing arguments, opting to dismiss the case on solely political question grounds, the panel recognized that it had an obligation *sua sponte* to make sure that the Plaintiffs had standing before considering the merits of their claims. *Id.* at 36 (citing [Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.](#), 528 U.S. 167, 180 (2000)). To do so, the panel said it would apply the relatively lenient standard the Supreme Court has articulated for standing analyses at the pleading stage: Courts should find sufficient "general factual allegations of injury resulting from the defendant's conduct," [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 561 (1992) ("[Lujan](#)"), and presume that these general allegations "embrace those specific facts that are necessary to support the claim," [Lujan v. Nat'l Wildlife Fed'n](#), 497 U.S. 871, 889 (1990). Opinion at 37. Accordingly, the panel did not require

Plaintiffs to present scientific evidence to prove injury, causation, or redressability. *Id.*

a. States' *parens patrie* standing

The States sued, in part, in their *parens patrie* capacities—that is, they sued to protect their quasi-sovereign interests in preserving their natural resources and the health of their citizens, who individually may not be able to protect themselves. *Id.* at 38–40 (citing as support for the States' ability to sue in this capacity: [Snapp v. Puerto Rico ex rel. Barez](#), 458 U.S. 592, 600–07 (1982); [Georgia v. Tennessee Copper Co.](#), 206 U.S. 230 (1907) (“*Tenn. Copper Co. I*”); [Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States](#), 136 U.S. 1, 57 (1890); [Pennsylvania ex rel. Shapp v. Kleppe](#), 533 F.2d 668, 673–74 (D.C. Cir. 1976)). The role the States take as litigants is relevant to the standing analysis. Because a state's *parens patrie* interest in the welfare of its citizens would be too vague to withstand the normal Article III requirements, the Supreme Court in *Snapp* articulated a separate standing test for *parens patrie* standing: A state (1) “‘must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party;” (2) “‘must express a quasi-sovereign interest;” and (3) “‘must have ‘alleged injury to a sufficiently substantial segment of its population.’” Opinion at 41 (quoting *Snapp*, 458 U.S. at 607). The Second Circuit has added another requirement for states suing *parens patrie*: the court must find that “‘individuals [upon whose behalf the state is suing] could not obtain complete relief through a private suit.’” Opinion at 42 (quoting [People of the State of New York by Abrams v. 11 Cornwell Co.](#), 695 F.2d 34, 40 (2d Cir. 1982), *vacated in part on other grounds*, [718 F.2d 22](#) (2d Cir. 1983) (en banc)).

Before determining whether the States in this case met those four requirements,

the panel discussed the impact of Massachusetts v. E.P.A., 549 U.S. 497 (2007), which they believe calls into question the Snapp test's validity as a gate keeper for Article III cases or controversies. Opinion at 42. The Mass. v. EPA Court held that ten states could challenge an E.P.A. decision not to regulate greenhouse gas emissions from new cars under the Clean Air Act and E.P.A.'s stated reasons for refusing to do so. The Second Circuit found Mass. v. EPA's standing analysis puzzling because it seemed to conflate the States' *parens patrie* interests with their interests as proprietors. Summarizing the Court's decision in that case, the panel noted how first the majority focused its analysis on the States' interests as property owners applying a relaxed version of the Lujan test (see supra Part (3)b.) because Congress in the Clean Air Act had explicitly authorized citizens to challenge E.P.A. decisions. Opinion at 43–44; see also Mass., 549 U.S. at 516–17. But then the Court found particularly relevant that the plaintiffs were sovereign States, not private individuals like in Lujan, quoted language from Tenn. Copper Co. I about the States' quasi-sovereign interests, and compared Massachusetts's injury to Georgia's *parens patrie* injury in that case. Opinion at 44–45 (citing Mass., 549 U.S. at 518–19). And then, to make things muddier, the Court reinforced its ostensible *parens patrie* analysis by stressing that “Massachusetts does in fact *own a great deal of . . . territory.*” Opinion at 45 (quoting Mass., 549 U.S. at 519 (internal citations omitted)). Thus, Mass. v. EPA left the Second Circuit uncertain about the case's impact on the analysis of *parens patrie* standing—must a state asserting *parens patrie* standing satisfy both the Snapp and Lujan tests? Opinion at 45–46. The panel, however, left this question unanswered because, even assuming a state asserting *parens patrie* standing needed to pass Lujan, the States do in this case (see supra Part (3)b.). Id. at 46.

After its detour into the significance of Mass v. E.P.A., the panel turned back to the Second Circuit's enhanced Snapp test—making the assumption, by doing so, that the test is still relevant—and concluded that the States satisfy its requirements. The States' "interest in safeguarding the public health and their resources is an interest apart from any interest held by individual private entities," the panel said, and "it is doubtful that individual plaintiffs filing a private suit could achieve complete relief." Id. at 46. The panel rejected Defendants' argument that in order for the States to have *parens patrie* standing, the citizens that the States seek to protect must themselves satisfy Article III's requirements because it incorrectly imports the requirements for organizational standing articulated in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) into the *parens patrie* analysis. In fact, the panel explained, the enhanced Snapp test requires the opposite of the organizational standing test: it requires the State to show an interest *apart from* the interests of its citizens and that those citizens could *not* obtain relief through private suit. Opinion at 46–47 (citing 458 U.S. at 607); see also 11 Cornwell Co., 695 F.2d at 40.

b. The States', New York City's and the Trusts' proprietary standing

The States (and New York City) also sued in their capacities as property owners. The Trusts did the same, suing on their own behalf, not on behalf of their members.<sup>7</sup> Opinion at 48. The standing test for plaintiffs asserting non-*parens patrie* interests was set out in Lujan, 504 U.S. at 560–61: (1) "[T]he plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) "there must be a causal

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<sup>7</sup> The court noted that even if the Open Space Institute is not asserting injury as a property owner, so long as either Open Space Conservancy or Audobon has standing, that will suffice to give OSI standing. Opinion at 48 n.18 (citing Rumsfeld v. Forum for Academic & Inst'l Rights, 547 U.S. 47, 52 n.2 (2006)).

connection between the injury and the conduct complained of—the injury has to be fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;” and (3) ““it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”” Opinion at 48 (internal citations omitted). Applying the Lujan test, the Second Circuit concluded that all the Plaintiffs have standing as proprietors.

### 1. Injury-in-fact

With regard to the first Lujan factor, Defendants contend that no Plaintiff has sufficiently alleged a current injury, that the future harms alleged are not “imminent” enough, and that the increased risks of harm Plaintiffs allege are not cognizable because enhanced risk is only an injury when Congress has enacted a statute to prevent that very increased risk. Opinion at 50–51. The Second Circuit rejected Defendants’ arguments in turn, starting with Plaintiffs’ current injury.

#### a. Current injury

To counter Defendants’ contention that Plaintiffs have failed to allege *any* current injury, the panel pointed to California’s reduced snowpack. The panel analogized this harm to the coastal erosion alleged in Mass. v. E.P.A., which the Court found to be a particularized injury and harbinger of injury to come. Id. at 51 (citing 549 U.S. at 522–23). Because the reduction of the snowpack is property damage, it’s concrete, the panel said; and because it’s already occurred, it’s actual, not hypothetical. Opinion at 51 (citing Public Citizen, Inc. v. Nat’l Highway Traffic Safety Admin’n, 489 F.3d 1279, 1292 (D.C. Cir. 2007) for proposition that property damage is “plainly concrete”).

#### b. Future injury

Defendants dismiss the long list of harms that will allegedly befall Plaintiffs in the next ten to a hundred years as a result of global warming, see supra at 2–3; Opinion at 52–53, as not imminent, claiming “[t]here must be a close temporal proximity between the complained-of-conduct and the alleged harm.” Id. at 53 (citing Defendants). According to the Second Circuit, “Defendants’ analysis misses the mark” because imminence is not necessarily a temporal requirement; rather, it requires that an injury be ““*certainly* impending.”” Id. at 53–54 (quoting Lujan, 504 U.S. at 564 n.2 quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (internal citations omitted) (emphasis added)). And the injury for purposes of judging imminence may be exposure to a sufficiently serious risk of harm, not the anticipated harm itself. Opinion at 55 (citing Baur v. Veneman, 352 F.3d 625, 641 (2d Cir. 2003)). Because Defendants are currently emitting large amounts of carbon dioxide and will continue to do so, the panel said, Plaintiffs’ future injuries—particularly defined as exposure to a serious risk of harm—are certainly impending. Opinion at 55.

Another concern of the imminence requirement, the panel noted, is that the alleged injury not be contingent on a plaintiff acting in a particular way in the future. Opinion at 54 (citing McConnell v. F.E.C., 540 U.S. 93, 228 (2003); Lujan, 504 U.S. at 564 n.2.; Whitmore, 495 U.S. at 158). The future harms Plaintiffs allege are not contingent on Plaintiffs’ action or inaction. Opinion at 56. Lastly, the panel highlighted two elements of the Mass. v. E.P.A. decision in support of its conclusion that Plaintiffs alleged future injury-in-fact: (1) the majority’s suggestion that incremental injury (e.g. a receding coast line) is injury-in-fact, 549 U.S. at 523 n.21; and (2) their statement that “[t]he risk of catastrophic harm, though remote, is nevertheless real,” id. at 526.

Opinion at 56.

## 2. Causation

Defendants argue that Plaintiffs fail the causation prong of the Lujan test because they cannot isolate which of the alleged harms are attributable to Defendants' emissions nor prove that those emissions alone will cause the future harm Plaintiffs allege. Id. at 57. The Second Circuit rejected Defendants' arguments because they are based on a faulty interpretation of the law, which only requires Plaintiffs to show that Defendants' facilities contribute (and will continue to contribute) to the pollution that threatens Plaintiffs' interests. Id. at 58 (citing Nader v. Democratic Nat'l Comm., 555 F. Supp. 2d 137, 150 (D.D.C. 2008); Northwest Envtl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp. 2d 957, 967–68 (D. Or. 2006)). According to the panel, the traceability standard should accord with the liability standard for contributors to an indivisible harm in a common law public nuisance action—so long as the defendant contributes to the nuisance, it doesn't matter that other persons contribute as well. Opinion at 58 (citing as examples of the contributor liability standard: Cox v. City of Dallas, 256 F.3d 281, 292 n.19 (5th Cir. 2001); Restatement (Second) of Torts §§ 840E; 875). Moreover, at the pleading stage (and even at summary judgment or after a bench trial), the “fairly traceable” standard is not equivalent to that for tort causation. Opinion at 58–59 (citing Barbour v. Haley, 471 F.3d 1222, 1226 (11th Cir. 2006); Natural Res. Def. Council v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992); Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d. Cir. 1990)). Whether (as Defendants allege) their emissions alone are too insignificant to cause future injuries is not a threshold question for constitutional standing and is “best left to the rigors of evidentiary

proof at a future stage of the proceeding.” Opinion at 61 (noting that the Mass v. E.P.A. Court found this argument irrelevant to its causation analysis, see 549 U.S. at 523–24).

The panel also discussed the relevance of the Powell Duffryn three-part test for determining when an injury is fairly traceable under the Clean Water Act:<sup>8</sup> Defendants’ reliance on the first prong of the test—whether Defendants discharged pollutants in concentrations greater than allowed by their permits, 913 F.2d at 72—is misplaced, the panel said; that prong is inapplicable because there is no statute governing carbon dioxide emissions. Opinion at 59–60. Rather, the third prong—whether the pollutant causes or contributes to the kind of injuries alleged by the plaintiffs, 913 F.2d at 72—is the relevant one. Opinion at 60. To satisfy the third prong, “plaintiffs need not sue *every* discharger . . . since the pollution of any one may be shown to cause some part of the injury suffered.” Id. at 60 (citing Powell Duffryn, 913 F.2d at 72 n.8 citing United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973)).

### 3. Redressability

A party need only demonstrate that it would receive “some” relief from a favorable decision to establish redressability. Opinion at 62 (citing Tozzi v. U.S. Dep’t of Health & Human Servs., 271 F.3d 301, 310 (D.C. Cir. 2001)). Defendants make two related arguments about this prong: (1) “Plaintiffs’ injuries are not redressable because Plaintiffs do not and cannot allege that capping and reducing emissions by an unidentified percentage ‘would or could remediate the alleged future harms they seek to forestall;’” and (2) “the harms of global warming can only be redressed by reaching the actions of third party emitters.” Opinion at 62 (citing and quoting Defendants).

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<sup>8</sup> Both Plaintiffs and Defendants rely on cases that apply that test: Friends of the Earth, Inc. v. Gaston Copper, 204 F.3d 149, 161–62 (4th Cir. 2000); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996); Watkins, 954 F.2d 974, 980.

The Second Circuit addressed (and rejected) those arguments in reverse order: Defendants' second argument is based on [Simon v. Eastern Ky. Welfare Rights Org.](#), 426 U.S. 26 (1976), which, according to the panel, is inapposite to this case because Plaintiffs sued the parties who they allege are *directly* causing their injuries, unlike the plaintiffs in [Simon](#) who sued the I.R.S. when they were denied hospital services (alleging that an IRS policy giving tax incentives to hospitals that provided emergency rooms services to indigents was responsible), not the hospitals themselves. Opinion at 62–63 (citing 426 U.S. at 40–42). The panel rejected Defendants' first argument because [Mass v. E.P.A.](#) made clear that an injury is redressable even though relief would not “by itself *reverse* global warming;” all that is required is that the requested remedy will “*slow or reduce* it,” regardless of whether third party emitters increase their emissions. Opinion at 63–64 (quoting 549 U.S. at 525 (emphasis added)).

#### (4) **Stating a Claim under the Federal Common Law of Nuisance**

The district court did not reach the issue of whether Plaintiffs had stated a claim, but the panel exercised its discretion to address that issue in the interest of judicial economy. Opinion at 65 (citing [Singleton v. Wulff](#), 428 U.S. 106, 121 (1976)). The court accepted all factual allegations in Plaintiffs' complaints as true and drew all inferences in their favor. Opinion at 65.

The panel began its analysis with a historical discussion of how courts have imported the Restatement (Second) of Torts' public nuisance standard into the federal common law of nuisance cause of action. Opinion at 65–69. Like those courts before it, the panel relied on the Restatement's definition of public nuisance to flesh out the federal common law. [Id.](#) at 69. That definition has two elements: (1) an “unreasonable

interference;” and (2) ““a right common to the general public.”” *Id.* at 69 (quoting § 821B(1)). § 821B(2) lists factors relevant to whether an interference is unreasonable:

- (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) whether the conduct is of a continuing nature or has produced a permanent and long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Opinion at 69–70.

After articulating its standard, the panel proceeded to conclude first that the State Plaintiffs and second that the non-state Plaintiffs (New York City and the trusts) could and did state a claim under the federal common law of nuisance.

a. Application of the public nuisance definition to States

According to the panel, the States alleged an unreasonable interference with public rights within the meaning of § 821B(2) because they allege harm to the ““right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world.”” Opinion at 70 (quoting States) (citing *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 848 (N.D. Ill. 2002) for the proposition that § 821B(1) defines “public right” broadly). The States also assert that the emissions constitute continuing conduct that may produce a long-lasting effect and that Defendants have reason to know their emissions have a significant effect on a public right. Opinion at 70.

Defendants’ arguments about the States are not about whether their allegations are sufficient for § 821B(1) purposes, however. Rather, Defendants argue that (1) ““principles of constitutional necessity limit the scope of the [federal common law of

nuisance] cause of action for transboundary disputes between states;” and (2) the federal common law of nuisance is available only to abate simple nuisances that are “so immediately and severely harmful and so readily traced to an out-of-state source that they would have justified war at the time of the founding.” *Id.* at 71 (quoting Defendants). Like the rest of Defendants’ arguments, the panel found these ones unpersuasive.

#### 1. Constitutional necessity

Defendants base their constitutional necessity argument on principles the Supreme Court has applied to limit its original jurisdiction over state action in nuisance disputes. Opinion at 71. Defendants interpret the Court in *Tenn. Copper Co. I* as saying that demands for tort remedies should be examined cautiously, but what the Court is really discussing, the panel explained, is the purview of its original jurisdiction and is only counseling caution in that context. *Id.* at 72–74 (see 206 U.S. at 237–38). In this case, the panel pointed out, the States do not seek to invoke the Supreme Court’s original jurisdiction—they brought suit in federal court pursuant to 28 U.S.C. § 1331—so the *Tenn. Copper Co. I* discussion is irrelevant. Opinion at 72. Moreover, this case involves States as parties on only one side of the dispute. In that context, the Court has said that States raising quasi-sovereign interests (which Plaintiffs are) are “somewhat more certainly entitled to specific relief than a private party might be.” Opinion at 74 (quoting *Tenn. Copper Co. I*, 206 U.S. at 237; citing *Mass. v. E.P.A.*, 549 U.S. at 519–20).

#### 2. Character of the alleged nuisance

Defendants base their simple-nuisance argument on [N. Dakota v. Minnesota](#), 263 U.S. 365 (1923) in which the Supreme Court said that “[i]t is the creation of a public nuisance of [a] simple type for which a State may properly ask an injunction.” Opinion

at 74 (quoting 263 U.S. at 374). Defendants come up with their own definition of a “simple type”: one that involves “‘immediately noxious or harmful substances [that] cause severe localized harms that can be directly traced to an out-of-state source,’” and conclude that carbon dioxide falls outside of this definition. Opinion at 75 (quoting Defendants). To determine what the N. Dakota Court meant by “simple type” the panel looked to Missouri v. Illinois, 200 U.S. 496 (1906) (“Missouri II”) and concluded that the Court meant a nuisance that could be detected by the “‘unassisted senses,’” the only type that was actionable in the mid-1850s. Opinion at 76 (quoting 200 U.S. at 522). Moreover, the Missouri II Court used the term only to point out how nuisance law had evolved, not to divide nuisances into two types so as to “cull out the latter.” Opinion at 76.

Even if the “simple type” characterization had doctrinal significance, Defendants’ enumeration of what is required for a nuisance to be of the “simple type” is without base. The Second Circuit came to this conclusion for each element of Defendants’ definition: That the alleged harm must be *directly traceable* to an out-of-state source has no basis in the case law. Opinion at 77. In fact, the panel pointed out, the Restatement (Second) of Torts makes clear that “‘the fact that other persons contribute to a nuisance is not a bar to the defendant’s liability for his own contribution.’” Id. (quoting § 840E) (noting that Comment a. says this principle applies to public nuisance). Same goes for Defendants’ *noxious* requirement, the panel said. Opinion at 78. There is no case law that supports it. Rather, the Supreme Court in North Dakota said that *potable* water could be a nuisance, for example when it floods farm land. Id. (citing 263 U.S. at 374). Likewise, for Defendants’ *immediate harm* requirement—even threatened harm can be actionable, as the court already discussed as part of its injury-in-fact standing analysis (see supra Part

(3)b.1). Opinion at 78 (citing [Mugler v. Kansas](#), 123 U.S. 623, 673 (1887); [United States v. Bushey & Sons](#), 346 F. Supp. 145, 150 (D. Vt. 1972); [Texas v. Pankey](#), 441 F.2d 236, 242 (10th Cir. 1971); 7 Stuart M. Speiser, Charles K. Krause & Alfred W. Gans, *The American Law of Torts* § 20.19 (Thomas West 2003); Andrew H. Sharp, Comment, [An Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine](#), 15 B.C. Envtl. Aff. L. Rev. 627, 633–36 (1988)). Lastly, Defendants' *localized harm* requirement is at odds with “the touchstone of a common law public nuisance action . . . that the harm is widespread, unreasonably interfering with a right common to the general public.” Opinion at 79 (citing [Tenn. Copper Co. I](#), 206 U.S. at 238–39; [Missouri v. Illinois](#), 180 U.S. 208, 241 (1901) (“[Missouri I](#)”).

According to the Second Circuit, the *only* qualification the Supreme Court has placed on a state bringing a nuisance action is the one the panel already discussed—that the Court when exercising its *original jurisdiction* should be cautious in granting tort relief. Opinion at 79 (citing [Missouri II](#), 200 U.S. at 521). Even if the Court intended caution to be used more widely, the panel hypothesized, the Court in [Missouri II](#) concluded that the nuisance caused by climate change is of “serious magnitude,” deserving of relief. Opinion at 80 (citing 200 U.S. at 520–21).

- b. [Application of the public nuisance definition to non-state Plaintiffs](#)
  1. May non-state Plaintiffs state their claim?

Defendants argue that only the states may assert a federal common law of nuisance cause of action because non-states “surrendered no sovereign rights in exchange for a remedy, and are not beneficiaries of the Article III jurisdictional grant under which the Court fashioned that remedy.” Opinion at 80 (quoting Defendants). The Second

Circuit responded to this argument by examining first the federal nuisance cases that have addressed the issue and then Restatement § 821C, which concerns whether private parties may sue for public nuisance. Opinion at 80–81.<sup>9</sup>

The scant case law about whether non-states may bring federal common law of nuisance claims is based on district courts' interpretation of the Supreme Court's

Milwaukee I opinion, particularly footnote 6, which reads:

Thus, it is *not only the character of the parties* that requires us to apply federal law. See *Tennessee Copper Co.*, 206 U.S. at 237; cf. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888); The Federalist No. 80 (A. Hamilton). As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421–27 (1964), where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law . . . . Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States.

406 U.S. at 105 n.6 (panel added emphasis and modified citations). Because the Second Circuit had not previously addressed this issue, the panel looked outside of the Circuit for guidance. Opinion at 82–83. The Seventh Circuit in [City of Evansville v. Ky. Liquid Recycling, Inc.](#), 604 F.2d 1008, 1018 (7th Cir. 1979) and the U.S. District Court for the District of New Jersey in [Township of Long Beach v. City of New York](#), 445 F. Supp. 1203, 1214 (D.N.J. 1978) have permitted *municipal* plaintiffs to assert federal common law of nuisance causes of action because cities are subdivisions of the state that must expend state resources to combat nuisances. Consequently, the city's interests are the state's interests. Opinion at 83, 83 n.33. Defendants claim Evansville was wrong because non-states did not surrender sovereign powers upon entering the Union and so did not

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<sup>9</sup> The panel noted that the concepts of who may state a claim and who has standing to bring an action are entangled. Opinion at 81 n.32 (citing [Raines v. Byrd](#), 521 U.S. 811, 818 (1997); Restatement § 821C). The panel opted to treat the issue of whether a non-state may maintain an action under the federal common law of nuisance as a question of whether the non-state Plaintiffs have stated a claim. Opinion at 81 n.32.

receive a federal common law remedy, citing [New Jersey v. New York](#), 345 U.S. 369 (1953) as support. Opinion at 84. Defendants are wrong, however, the panel said, because the Supreme Court used the fact that cities did not exchange sovereign powers for a remedy to justify not expanding its original jurisdiction to include suits between cities and states, not to prevent municipal plaintiffs from maintaining federal common law of nuisance actions in district court. Id. at 84–85 (citing [New Jersey](#), 345 U.S. at 372–74). Thus, [Evansville](#) is good law that the panel found persuasive. Opinion at 85.

The case law permitting *private* plaintiffs to make federal common law of nuisance claims is thin—the panel cited only one case holding that private plaintiffs could do that, [Nat'l Sea Clammers Ass'n v. City of New York](#), 616 F.2d 1222 (3d Cir. 1980), which interpreted [Milwaukee I](#) footnote 6 as authorizing a uniform federal standard in all cases dealing with interstate pollution, regardless of the parties. Opinion at 89 (citing 616 F.2d at 1233–34). The Supreme Court vacated the Third Circuit's decision on other grounds but explicitly declined to address its holding about private plaintiffs' eligibility to bring federal common law of nuisance suits. Opinion at 90 (citing [Middlesex County Sewerage Authority v. Nat'l Sea Clammers Ass'n](#), 453 U.S. 1, 11 n.17 (1981)).

Other than [Sea Clammers](#), the panel drew from strands in unfriendly or off-point decisions for support: [Committee for the Consideration of the Jones Falls Sewage System v. Train](#), 375 F. Supp. 1148, 1153–54 (D. Md. 1974) (holding that private plaintiffs could not bring federal common law of nuisance claims but noting that [Milwaukee I](#) footnote 6 could be read to say that considerations other than who the parties are could require application of federal law); *affirmed in* [539 F.2d 1006](#), 1009 n.8 (4th Cir. 1976) (en banc) (not squarely holding that states are the only proper parties and observing that “[it] is not

essential that one or more states be formal parties if the interests of the state are sufficiently implicated”); *id.* at 1014 (Butzner, J., dissenting) (interpreting footnote 6 as a caution against “confusing parties with subject matter in determining whether to apply federal common law”); *id.* at 1010 (Butzner, J., dissenting) (interpreting the federal common law of nuisance as a way to “fill statutory interstices and to provide uniform rules”); *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1281 (D. Conn. 1976) (noting that “there is some justification for limiting any right of action under [*Milwaukee I*] to private parties seeking injunctive relief”); *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 627 (7th Cir. 1980) (noting that *Milwaukee I* does not suggest that the predicate for its decision is one *state* adversely affecting another state); *United States v. Solvents Recovery Serv. of New England*, 496 F. Supp. 1127, 1135–36, 1141 (D. Conn. 1980) (noting that the federal common law of nuisance does not require interstate effect); *Illinois v. Milwaukee*, 731 F.2d 403, 407 (7th Cir. 1984) (last of the decisions in the *Milwaukee I* and *II* chronology) (“It is clear . . . that the federal nature of the problem, and the basic interests of federalism do not depend on the case being a state versus state case.”). Opinion at 85–90.<sup>10</sup>

After exhausting the case law, the Second Circuit interpreted footnote 6 for itself, concluding that non-state plaintiffs may raise federal common law of nuisance claims. *Id.* at 90–93. The panel first dissected the footnote’s sentence structure—the *Milwaukee I* Court set out two factors that bear on whether a party may raise such a claim, each in a separate sentence: (1) the nature of the parties; and (2) the federal interest in the need for a uniform federal rule of decision or a controversy raising federalism concerns. *Id.* at 91–92. The Court could easily have made clear that both factors are required for a party to

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<sup>10</sup> The cases are listed in the order the panel discussed them.

state a federal common law of nuisance claim, but it did not do so—the panel thought intentionally. Instead, the Court chose to note that certain federal interests could serve as *alternate*, dispositive, bases for applying federal common law. *Id.* at 92. Second, the panel found the Milwaukee I Court's citation to [Banco Nacional de Cuba v. Sabbatino](#), 376 U.S. 398 (1964) significant—the Court was highlighting that in other areas of federal common law involving a federal interest in the need for a uniform federal rule, the Court has held that private plaintiffs may bring actions. Opinion at 93. According to the panel, “[i]t would make no sense to carve out the federal common law of nuisance from other areas of the federal common law as the one area that permits states, and only states, to bring actions.” *Id.* Suits involving non-states and private plaintiffs may as strongly implicate an interest in a uniform federal rule or federalism concerns. *Id.*

Lastly, the Second Circuit looked to the Restatement (Second) of Torts for guidance on whether non-state entities may bring claims for public nuisance, concluding that both New York City and the Trusts can. Section 821C provides:

- (1) In order to recover damages in an individual action for public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference.
- (2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must
  - (a) have the right to recover damages, as indicated in Subsection (1), or
  - (b) have the authority as a public official or public agency to represent the state or a political subdivision in the matter, or
  - (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

*Id.* at 94.

New York City may bring a public nuisance suit under § 821C, the panel concluded, because it alleges interference with rights common the general

public—the right not to die from heat-related causes and the right to enjoy the City's natural resources undamaged by rising sea levels. *Id.* at 94–95. Cities are also political subdivisions of states, and New York City may bring actions to restrain public nuisances under New York State law. *Id.* at 95 (citing [N.Y. State Nat'l Org. for Women v. Terry](#), 886 F.2d 1339, 1362 (2d Cir. 1989)).

The Second Circuit devoted more words to whether the Trusts may bring a public nuisance suit under § 821C. To do so, the Trusts must have “the right to recover damages,” § 821C(2)(a), which in turn requires that the Trusts “allege that they have suffered a harm different from that suffered by other members of the public, and that they suffered that harm when exercising a public right with which Defendants interfered,” Opinion at 95 (citing § 821C(1)). The panel considered the second requirement first and concluded that the Trusts alleged an interference with a public right because public nuisance cases traditionally define public rights broadly, Opinion at 95–96 (citing [In re Starlink Corn Prods. Liab. Litig.](#), 212 F. Supp. 2d at 848), and included in that definition is a right to the protection of natural resources—the right Trusts allege was interfered with, Opinion at 96 (citing [Nat'l Adver. Co. v. City & County of Denver](#), 912 F.2d 405, 409 (10th Cir. 1990); [Phila. Elec. Co. v. Hercules, Inc.](#), 762 F.2d 303, 316 (3d Cir. 1985); [Celanese Corp. v. Coastal Water Auth.](#), 475 F. Supp. 2d 623, 639 (S.D. Tex. 2007); [Graham Oil Co. v. BP Oil Co.](#), 885 F. Supp. 716, 723 (W.D. Pa. 1994)).

The panel then considered whether the harm to the right to enjoy natural resources that the Trusts suffered is of a kind different from the harm suffered by the general public. Comments b and c on § 821C indicate that a difference in

degree of interference is not enough, on its own, to create a difference in kind, but that a difference in degree may be one factor that leads to a difference in kind. Opinion at 96–97 (citing § 821C, comments b and c). The magnitude of the Trusts' land ownership is different in degree from the holding of the typical individual land owner, the panel noted, putting a thumb on the scale for a difference in kind. Opinion at 98. The fact that the Trusts are quasi-public entities—they open their land to the public, and their mission is to preserve the land for public use and enjoyment—the panel then said, tips the scale the rest of the way. *Id.* The panel deliberately neglected to “demarcate the [Subsection's] outer limits” because according to the court, the Trusts' harms were well within the defined bounds of § 821C(1). *Id.*

2. Do non-state Plaintiffs state their claim?

After determining that New York City and Trusts *can* make a public nuisance claim, the Second Circuit circled back to its discussion of the substantive contours of the federal common law cause of action to determine whether those parties *do* state such a claim. *Id.* at 99. To do so, the panel looked again to Restatement § 821B's definition of public nuisance, which courts have imported into the federal common law action (see *supra* at 17). Opinion at 99–102. The panel already concluded that the non-state Plaintiffs alleged interference with rights common to the general public as part of its analysis of whether the non-state Plaintiffs *could* assert a claim, so the only remaining question for the panel to answer was whether the alleged interference was unreasonable under any of the prongs of § 821B(2), *id.* at 100 (citing cmt. e for proposition that any of the three tests in § 821B “may warrant a holding of unreasonableness”)—the panel answered this

question in the affirmative.

New York City has alleged significant interference with public health, public safety, and public comfort and convenience resulting from increased temperatures and rising sea levels, which satisfies the § 821B(2)(a) test for unreasonable interference, the panel determined. *Id.* at 100–101. Alternatively, New York City also satisfies the § 821B(2)(c) test because it alleges that Defendants' plants continue to operate and that Defendants' know or should know that their emissions contribute to global warming. *Id.* at 101. Similarly, the Trusts satisfy both the § 821B(2)(a) and the § 821B(2)(c) tests for unreasonable interference with a right common to the general public, the panel concluded—they have alleged significant interference with the public right to be free from widespread harm to the environment and natural resources ((2)(a)) and have alleged continuing harm and actual or constructive knowledge by Defendants ((2)(c)). *Id.* Therefore, the panel concluded, both the City and Trusts have stated a claim under the federal common law of nuisance.

#### **(5) Displacement of Plaintiffs-Appellants' Federal Common Law Claim**

The Second Circuit next dealt with Defendants' argument that even if Plaintiffs did raise a federal common law of nuisance claim, federal legislation has displaced that cause of action. *Id.* at 102. Displacement is a distinct concept from preemption, in which a federal statute supersedes state law, the panel noted. *Id.* at 102 n.37. The test for displacement of a cause of action is whether federal statutory law directly addresses an issue that was previously the subject of federal common law. *Id.* (citing *Milwaukee II*, 451 U.S. at 316). To be displaced, the common law remedy Plaintiffs seek must be “within the precise scope of remedies prescribed by Congress;” Opinion at 105 (quoting

Milwaukee I, 406 U.S. at 103); it is not enough that there is federal legislation “touching” the subject matter of the case. Opinion at 103–06 (citing Milwaukee I, 406 U.S. 91; Milwaukee II, 451 U.S. 304). To help the court determine when there is an overlap between statutory law and the common law, the doctrine provides presumptions, the panel explained, but these presumptions are contradictory: On the one hand, separation of powers creates a presumption in favor of displacement of federal common law when Congress has legislated on the subject matter, Opinion at 108 (citing United States v. Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir. 1981)), but, on the other hand, statutes “which invade the common law” are to be read presumptively to retain common law principles where contrary legislative intent is not evident, Opinion at 108 (quoting United States v. Texas, 507 U.S. 529, 534 (1993)).

After having laid out the doctrine, the Second Circuit applied it and rejected Defendants’ argument that the Clean Air Act (CAA) and five other statutes comprehensively address climate change and carbon dioxide emissions so as to displace the federal common law of nuisance cause of action.

a. The Clean Air Act

The CAA requires the E.P.A. Administrator to identify air pollutants deriving from stationary sources, like power plants, that “in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare” and to set national ambient air quality standards to limit the amount of each of these pollutants to levels “requisite to protect the public health . . . [and] welfare.” Id. at 109–10 (quoting 42 U.S.C. §§ 7408(a)(1)(A); 7409(b)(1)–(2)). The CAA’s definition of “welfare” includes, but is not limited to:

effects on soils, waters, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being

Opinion at 110 n.44 (quoting 42 U.S.C. §7602(h)).

E.P.A. does not currently regulate carbon dioxide as an air pollutant under the CAA, but the Supreme Court in Mass. v. E.P.A. held that E.P.A. *could* regulate emissions if it forms a judgment that such emissions contribute to climate change because “greenhouse gases fit well within the [CAA’s] capacious definition of “air pollutant.””<sup>11</sup> Opinion at 111–12 (quoting 549 U.S. at 532; citing id. at 528). The Court explicitly did not, however, “reach the question whether . . . E.P.A. *must* make [a] finding [that carbon dioxide emissions endanger the public welfare].” Opinion at 112 (quoting 549 U.S. at 534) (emphasis added). In April 2009, in the wake of Mass. v. E.P.A., the E.P.A. issued a proposed rule in which it proposed to find that “greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations” and that these harmful gases include carbon dioxide. Opinion at 112–13 (quoting [Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202\(a\) of the Clean Air Act](#), 74 Fed. Reg. 18886, 18886) (proposed Apr. 24, 2009)).

The Second Circuit began its analysis of the CAA scheme by pointing out that the Supreme Court has never found it to displace federal common law in the area of air pollution, as the Court did with the Federal Water Pollution Control Act (FWPCA, most commonly called the Clean Water Act). Opinion at 114–15 (citing about the FWPCA:

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<sup>11</sup> The Mass. v. E.P.A. Court holding explicitly referenced emissions from new *motor vehicles*, but the Second Circuit assumed that this holding would apply to greenhouse gases from *stationary sources* as well. Opinion at 114; 549 U.S. at 528, 532.

Milwaukee II, 451 U.S. 304, and Sea Clammers, 453 U.S. at 21–22).<sup>12</sup> Two district courts have reached that conclusion with regard to the CAA, but the panel denied that those cases' broad pronouncements apply in this case because they were about regulated, local air pollution, not interstate or unregulated pollution. Opinion at 114 n. 47 (citing Reeger v. Mill Serv., Inc., 593 F. Supp. 360, 361, 363 (W.D. Pa. 1984); United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J. 1982)).

Instead of looking to case law, the Second Circuit compared what the E.P.A. has actually done with the requirements the E.P.A. must meet to regulate carbon dioxide emissions from stationary sources under the CAA and Mass. v. E.P.A.: In order to regulate those emissions, the Administrator must find that (1) they ““cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare”” and (2) result from ““numerous or diverse . . . stationary sources.”” Opinion at 115 (quoting [42 U.S.C. § 7408\(a\)\(1\)\(A\)–\(B\)](#)). E.P.A. has not made any such findings, the panel observed. It has only *proposed* to make them for emissions from *motor vehicles* (see supra at 29–30). A proposed finding, the panels said, “has no effect in law that would affect any rights at issue [in this case].” Opinion at 115–16. After the comment period, E.P.A. could conclude that “its proposed finding is unwarranted or that regulation of greenhouse gases is otherwise inappropriate under the terms of the Act.” Id. at 116.

Additionally, the proposed rule specifically relates to Section 202(a) of the CAA and would only make findings about emissions from motor vehicle engines. Id. (citing [42 U.S.C. § 7521\(a\)](#)). And, according to the E.P.A., “[a]n endangerment finding under one provision of the [Act] would not by itself automatically trigger regulation under the entire

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<sup>12</sup> The panel went on to note that the CAA regulatory scheme is more similar to the FWPCA in place at the time of Milwaukee I, where the Court did not find displacement, than to the amended version of the FWPCA in place at the time of Milwaukee II. Opinion at 117–19.

Act,” Opinion at 116 (quoting [www.epa.gov/climatechange/ endangerment.html](http://www.epa.gov/climatechange/ endangerment.html)). Thus, a particularized finding that greenhouse gases’ presence in the ambient air results from numerous and diverse *stationary sources* would still be required before E.P.A. could regulate emissions from power plants. Opinion at 117.

Lastly, the panel noted that E.P.A. has only proposed findings and would have to go through the rulemaking process before it could *regulate* carbon dioxide emissions. “Until E.P.A. completes the rulemaking process, [the panel] [could] not speculate as to whether the hypothetical regulation of greenhouse gases under the [CAA] would in fact ‘speak[] directly’ to the ‘particular issue’ raised . . . by Plaintiffs, which is otherwise governed by federal common law.” *Id.* (quoting *Milwaukee II*, 451 U.S. at 313–15).

b. Other legislation on the subject of greenhouse gases

Failing displacement by the CAA, Defendants claim that five other federal statutes “touching” on greenhouse gases and climate change sufficiently displace Plaintiffs’ federal common law cause of action. Opinion at 120. These statutes include: (1) the [National Climate Program Act of 1978](#), Pub. L. No. 95-367, 92 Stat. 601 (codified at 15 U.S.C. §§2901–2908), which requires the President to establish a national climate program to research climate change; Opinion at 120–21; (2) the [Global Climate Protection Act of 1987](#), Pub. L. No. 100-204, Title XI, §§ 1101-1106, 101 Stat. 1407, *as amended by* Pub. L. No. 103-199, 107 Stat. 2327, *reprinted as note to* 15 U.S.C. § 2901, which requires the President to recommend to Congress a national policy on global climate change; Opinion at 121–22; (3) the [Global Change Research Act of 1990](#),<sup>13</sup> Pub. L. No. 101-606, § 2, 104 Stat. 3096 (codified at 15 U.S.C. §§ 2921, 2931–2938), which provides for development of a research program to gather the information necessary to

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<sup>13</sup> The panel referred to this Act as the “Global Climate Change Act of 1990.”

make effective climate change policy; Opinion at 122–23; (4) The [Energy Policy Act of 1992](#), Pub. L. No. 102-486, § 2, 102 Stat. 2776 (codified at 42 U.S.C. §§ 13381–13388), which requires the Executive branch to research, assess, monitor, strategize about, and develop technology to combat climate change; Opinion at 124–25; and (5) the [Energy Policy Act of 2005](#), Pub. L. No. 109-58, 119 Stat. 594 (codified at 42 U.S.C. § 13389), which requires the Executive branch to do something similar, not to take any steps actually to combat global warming; Opinion at 125–26.

Taken together, these statutes prescribe research, monitoring and technological development but do not actually regulate emissions in a way that addresses the nuisance Plaintiffs allege. *Id.* at 126. Defendants are wrong that the standard for displacement is “‘legislat[ing] on the subject,’” the panel said—that is the standard for when the presumption in favor of displacement should be employed. *Id.* at 127 (quoting and citing *Oswego Barge*, 664 F.2d at 335). Rather, the standard for displacement, itself, is whether the federal statute speaks directly to the issue Plaintiffs raise, *id.* (citing *Milwaukee II*, 451 U.S. at 315), which none of these statutes do because, according to the panel, “[t]he linchpin in the displacement analysis [is] whether the legislation *actually regulates* the nuisance at issue. Study is not enough.” *Id.* at 128–29 (discussing how the FWPCA amendments, which *Milwaukee II* found to displace the common law, actually regulated water pollution, while the laws touching interstate waters in *Milwaukee I* did not).

c. Displacement on foreign policy grounds

Defendants’ last displacement argument seeks to import state-law-preemption-doctrine—which preempts state law when it interferes with the President’s conduct of foreign affairs—into federal-common-law-displacement-doctrine, particularly because

courts find displacement more readily than they do preemption. Opinion at 130–31. This argument reiterates Defendants' political question argument, the Second Circuit said, and must be rejected for the same reasons that argument was. *Id.* at 131.

**(6) Defendant Tennessee Valley Authority's Separate Arguments**

Defendant TVA separately argues that Plaintiffs' complaints against it be dismissed because of TVA's special status as a quasi-governmental entity. Congress created TVA for national defense and agricultural purposes and empowered it to dispose of surplus power generated as an incident to navigation and flood control. *Id.* at 131. TVA's power generation, use, and sale functions, however, are purely non-governmental and may subject TVA to liability.<sup>14</sup> *Id.* at 132–33 (citing *Grant v. TVA*, 49 F. Supp. 564, 566 (E.D. Tenn. 1942); *Latch v. TVA*, 312 F. Supp. 1069, 1072 (N.D. Miss. 1970); *Adams v. TVA*, 254 F. Supp. 78, 80 (E.D. Tenn. 1966)). In evaluating TVA's defenses, the Second Circuit looked to the Western District of North Carolina's decision in *North Carolina ex rel. Cooper v. TVA*, 439 F. Supp. 2d 486 (W.D.N.C. 2006) ("*N. Carolina I*"), and the Fourth Circuit's affirmation, [515 F.3d 344](#) (4th Cir. 2008), because of the close parallel between that case and this one—in that one, North Carolina alleged that TVA's emissions constituted a public nuisance under *state* common law. Opinion at 133.

a. Political question argument

TVA argues that the Property Clause of the Constitution (art. IV, § 3, cl. 2), which authorizes Congress to dispose of its land and control its use, constitutes a textually demonstrable constitutional commitment of the emissions issue to the legislative branch because TVA occupies Congress's land. *Id.* at 133–34. The panel denied that TVA has

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<sup>14</sup> Congress withheld from TVA the right to sovereign immunity in the TVA Enabling Act's "sue-and-be-sued" clause. Opinion at 132; [16 U.S.C. § 831c\(b\)](#).

satisfied the first Baker factor because the Supreme Court and other jurisdictions have held that TVA is a ““corporate entity, separate and distinct from the Federal Government itself,”” id. at 134 (quoting Pierce v. United States, 314 U.S. 306, 310 (1941)); citing North Carolina ex rel Cooper v. TVA, 515 F.3d 344, 348–49 (4th Cir. 2008) (“N. Carolina II”), except when it condemns real property, Opinion at 134 (citing TVA v. United States, 13 Cl. Ct. 692, 697–98 (1987)), and TVA has taken positions adverse to the United States in a number of cases, Opinion at 134 (citing as examples TVA v. E.P.A., 278 F.3d 1184 (11th Cir. 2002); TVA v. U.S., 13 Cl. Ct. 692). Because TVA is so removed from the federal government, the Second Circuit ““does not run the same risk of overstepping its bounds and prevent[ing] the [government] from accomplishing its constitutionally assigned functions.”” Opinion at 135 (quoting N. Carolina II, 515 F.3d at 349 (internal citations omitted)). The panel summarily dismissed TVA’s other political question arguments as unpersuasive. Opinion at 135.

b. Discretionary function exception

The discretionary function exception ““insulates the Government from liability if the action challenged . . . involves the permissible exercise of policy judgment.”” Id. (quoting Berkovitz v. United States, 486 U.S. 531, 537 (1988)). TVA contends that because its an executive agency, the “sue-and-be-sued” clause in the TVA Act (see supra note 14) does not apply when it engages in the government functions of its power program. Opinion at 135. Because Congress did not expressly include a discretionary function exemption in the clause, any such exemption would have to be implied. Id. at 135–36 (citing 16 U.S.C. § 831c(b); N. Carolina I, 439 F. Supp. 2d at 490–91).

To determine that no implied limitation on immunity pertains, the panel applied

the [Loeffler v. Frank](#), 486 U.S. 549 (1988) test, requiring TVA to show that (1) this suit is “not consistent with the statutory or constitutional scheme;” (2) “an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function;” or (3) “for other reasons it was plainly the purpose of Congress to use the ‘sue and be sued’ clause in a narrow sense.” Opinion at 136 (quoting 486 U.S. at 554–55). For the first prong, the panel relied on [N. Carolina I](#) which found no inconsistency between a nuisance suit and the statutory scheme. Opinion at 136 (citing 439 F. Supp. 2d at 491). For the second prong, the panel again found [N. Carolina I](#) on point—in that case, the court (1) reasoned that a distinction must be drawn between TVA’s governmental and non-governmental functions where Congress indicated its intent that TVA be subject to suit as if it were privately owned; and (2) held that TVA’s power generation is not a governmental function and would not be interfered with by Plaintiffs’ suit. Opinion at 136 (citing 439 F. Supp. 2d at 491–92). For the last prong, the panel found persuasive the opinion of the courts in [N. Carolina I](#), 439 F. Supp. 2d at 492 and [Queen v. TVA](#), 689 F.2d 80, 85 (6th Cir. 1982) that Congress intended TVA’s waiver of sovereign immunity to be as broad as possible. Opinion at 137–38.

#### (7) **State Law Claims**

As an alternative to federal common law of nuisance claims, Plaintiffs allege *state* common law and/or statutory nuisance claims. Because the panel held that the federal common law of nuisance applies in this case, however, it did not address the Plaintiffs’ alternative claims. *Id.* at 138 (citing [Milwaukee II](#), 451 U.S. at 314 n.7, which says that federal and state nuisance law cannot both apply in the same case).

#### Conclusion

In sum, the panel determined that the district court erred in dismissing Plaintiffs' complaints on political question grounds. The panel additionally held that the States have *parens patrie* and Article III standing, in their quasi-sovereign and proprietary capacities respectively, and that New York City and the Trusts have Article III standing. All Plaintiffs have stated a federal common law nuisance claim, grounded in the Restatement (Second) of Torts' definition of public nuisance. Existing federal legislation has not displaced that cause of action. Also, Plaintiffs' claims against TVA may not be dismissed for political question or discretionary function reasons. Finally, because the panel applied the federal common law of nuisance, it did not reach Plaintiffs' state law claims.