

## WHY TRIAL COURTS HAVE BEEN QUICK TO COOL “GLOBAL WARMING” SUITS

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In the 1970s, environmental lawyers began efforts to develop the tort of public nuisance into a catch-all tort for stopping or abating private sector activities that they believed harmed the environment.<sup>1</sup> They first sought to expand the scope of public nuisance doctrine as part of the *Restatement (Second) of Torts*.<sup>2</sup> They then brought claims under expansive public nuisance theories against businesses for either contributing to environmental harms, such as smog, or for manufacturing certain products, such as asbestos or lead paint, that they wanted removed from buildings.<sup>3</sup> These lawsuits failed, by and large; judges schooled in the character and elements of the 700-year-old tort rejected these expansive public nuisance theories and adhered to the centuries-old moorings of the tort.<sup>4</sup> In 2009, however, two federal courts of appeals breathed significant new life into this decades old attempt to revise the tort of public nuisance. Within weeks of each other, panels for the Second and Fifth Circuit Court of Appeals issued rulings that allowed public nuisance claims to proceed against American businesses for the twenty-first century’s highest profile environmental allegations: that manmade emissions have caused global climate change<sup>5</sup> and, in turn, specific weather-related harms.<sup>6</sup>

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1. See *infra* Part I; Part II.A.
2. See *infra* Part II.A.
3. *Id.*
4. See *infra* Part I.B.
5. The authors use the term, global climate change, colloquially to refer to allegations

To date, four major global climate change cases have been filed against the nation's largest utility, energy, and automobile companies.<sup>7</sup> In general, these suits claim that the companies engaged in operations or made products that contributed to the buildup of certain gases, often referred to as "greenhouse gases" or "GHGs," in the atmosphere. The trapped GHGs, according to the allegations, have caused the earth to warm, thereby creating a public nuisance. The first case, *Connecticut v. American Electric Power Co.*,<sup>8</sup> was brought by several state attorneys general,<sup>9</sup> who sued to enjoin the defendant-companies<sup>10</sup> to reduce their emissions of GHGs. In *California v. General Motors Corp.*,<sup>11</sup> the attorney general of California sought to subject car manufacturers to liability for making cars that allegedly contribute to global climate change through vehicle exhaust.<sup>12</sup> Finally, two cases, *Comer v. Murphy Oil USA, Inc.*<sup>13</sup> and *Native Village of Kivalina v. ExxonMobil Corp.*,<sup>14</sup> were filed by private individuals who sought to recover damages caused by weather-related events, such as Hurricane Katrina.<sup>15</sup>

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that the earth's climate has increased in temperature due to the release of certain gases, including carbon dioxide and methane. It is beyond the scope of this article to weigh into the factual, scientific debate as to whether global warming has actually occurred.

6. See *infra* Part I.C.

7. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp.2d 863 (N.D. Cal. 2009); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); *Comer v. Murphy Oil USA, Inc.*, 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009); *Connecticut v. Am. Elec. Power Co. (AEP)*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009).

8. *Am. Elec. Power Co. (AEP)*, 406 F. Supp. 2d at 266, *vacated* 582 F.3d 309 (2d Cir. 2009).

9. Petitioners included the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin; the City of New York; various non-profit land trusts, including the Open Space Institute, Inc., the Open Space Conservancy, Inc., and the Audubon Society of New Hampshire, filed a separate complaint. *Id.* at 265, 267.

10. The petitioners named American Electric Power Company, Inc., American Electric Power Service Corporation (together, "AEP"), the Southern Company, Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corporation as defendants. *Id.*

11. *Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 at \*1.

12. *Id.* at \*1.

13. *Comer v. Murphy Oil USA, Inc.*, 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009).

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

15. See *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009); *Kivalina*, 663 F. Supp. 2d at 868. Under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the following six gases have been categorized as GHGs: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, annex A, Dec. 11, 1997, 2303 U.N.T.S. 148.

Federal trial judges in each case dismissed the claims as nonjusticiable.<sup>16</sup> They concluded that deciding which United States companies that emit GHGs should be subject to liability for global changes in weather patterns required courts to determine whether each company's emission levels were appropriate. In recognition that they would be, in essence, regulating emissions levels for each defendant, they reasoned that this responsibility was an inherently political—not judicial—function; it would require delicate policy judgments reserved for federal legislators and regulators through laws, rule-making, and treaties.<sup>17</sup>

Notwithstanding the trial courts' consensus, the Second Circuit Court of Appeals in *AEP* and, initially, the Fifth Circuit Court of Appeals in *Comer* disagreed. Both courts overturned the lower court dismissals and allowed the cases to proceed, though the Fifth Circuit has since vacated its panel ruling. In both cases, parties are seeking intervention from the United States Supreme Court.<sup>18</sup> The main issues on appeal are whether plaintiffs' claims are constitutionally barred as being political, nonjusticiable, questions, and whether plaintiffs have standing to bring such claims.

The focus of this article is on tort law, looking ahead in these cases and arguing that notwithstanding whether the defendants have met the standards for having claims dismissed on constitutional grounds, the lawsuits should be dismissed for failure to state any claims. Defendants, in lawfully emitting carbon dioxide, methane, and other gases, have not engaged in any objectively wrongful conduct that gives rise to tort liability. Indeed, the plaintiffs' attorneys have generally acknowledged that suing private companies to establish emission caps for GHGs might not be the most traditional use of the courts.<sup>19</sup> Yet, they contend that the litigation is

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16. See *Kivalina*, 663 F. Supp. 2d at 883; *Gen. Motors*, 2007 WL 2726871, at \*16; *Comer*, 2007 WL 6942285, at \*1; *Connecticut v. Am. Elec. Power Co. (AEP)*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated* 582 F.3d 309 (2d Cir. 2009).

17. *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 n.2 (5th Cir. 2009) (summarizing trial judge's ruling from the bench); *Kivalina*, 663 F. Supp. 2d at 871, 876–77; *Gen. Motors*, 2007 WL 2726871, at \*6–\*8; *Comer*, 2007 WL 6942285, at \*1; *Am. Elec. Power Co. (AEP)*, 406 F. Supp. 2d at 272.

18. See *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010); *Comer v. Murphy Oil USA, Inc.* 598 F.3d 208, 210 (5th Cir. 2010); *Comer*, 585 F.3d 855, 860; *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 315 (2d Cir. 2009). As this article was going to print, the United States Supreme Court granted certiorari in *AEP*. See Order List, 12/6/10 (No. 10-174), *available at* <http://www.supremecourt.gov/orders/courtorders/120610zor.pdf>.

19. Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L., 335, 339 (2005) [hereinafter *Role of State Attorneys General*] (quoting Connecticut Attorney General Richard Blumenthal as stating that *Connecticut v. AEP* "began with a lump in the throat, a gut feeling, emotion, that CO<sub>2</sub> pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. . . . [We were] brainstorming about what could be done."); Mark Schleifstein,

worthwhile because the litigation and the threat of massive liability might force the companies to work with Congress and the EPA to accept caps on emissions.<sup>20</sup> In other words, the litigation gives them a powerful tool for advancing their political agenda.

Given these dynamics and the far-reaching precedent these cases could establish, the issue of whether public nuisance theory can be used to “regulate” emission levels of certain gases through the courts will likely be part of the United States Supreme Court rulings in these cases or similar lawsuits brought in the future.

Part I of this article provides a history of major cases alleging global climate change injuries and summarizes the trial and appellate court decisions of those cases. Part II tracks the campaign begun in the 1970s to develop public nuisance law into a catch-all environmental tort. Part III explains why public nuisance theory does not provide a basis for liability in global climate change litigation. This part also discusses the untenable consequences of allowing such claims to proceed. Part IV explains why plaintiffs’ negligence claims must fail. The article concludes that, even if courts do not find plaintiffs’ claims to be barred under constitutional law, they should nevertheless dismiss the tort claims and yield to Congress and the Executive Branch to set emissions levels for GHGs.<sup>21</sup>

## I. DEVELOPMENT OF GLOBAL CLIMATE CHANGE LITIGATION

Congress and several presidential administrations have a long history of considering when, whether, and how to regulate emissions of carbon dioxide, methane, and other gases categorized as GHGs. The early stages—dating back to the late 1970s—were focused on understanding the scientific underpinnings behind global climate change allegations. In 1978, Congress established a “national climate change program” intended to increase the general knowledge about how both human activities and natural processes impact climate change,<sup>22</sup> and in 1980, Congress also commissioned a study

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*Global Warming Suit Gets Go-Ahead*, TIMES-PICAYUNE, Oct. 17, 2009, [www.nola.com/news/t-p/capital/index.ssf?/base/news-7/125575741392340.xml&coll=1](http://www.nola.com/news/t-p/capital/index.ssf?/base/news-7/125575741392340.xml&coll=1) (quoting Mr. Gerald Maples, a lead plaintiffs’ attorney, stating that the “primary goal [of the lawsuit] was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol”).

20. See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328–29 (2008) (explaining that tort duties “directly regulate” conduct).

21. This article focuses solely on the public policy implications of using traditional tort law and novel legal theories to advance a political agenda of seeking limits on the emission of GHGs or damages for the harms allegedly caused by global warming. The merits of the science underlying the global warming debate is beyond the scope of this Article. For the purposes of this legal analysis, though, the article must assume the allegations as true.

22. National Climate Program Act of 1978, 15 U.S.C. §§ 2901–2908 (2006).

to look at the impact that GHG emissions were having on the earth’s atmosphere.<sup>23</sup>

In the 1990s, the United States started to engage the world community on taking concrete steps to address climate change as a global issue.<sup>24</sup> In 1992, President George H.W. Bush signed a nonbinding agreement with 154 nations to reduce atmospheric concentrations of GHGs because of concerns about their interference with the earth’s climate.<sup>25</sup> President Clinton, in the 1990s, negotiated and signed the Kyoto Protocol, a treaty whose goal was to reduce GHG emissions in developed nations,<sup>26</sup> but the Protocol was never ratified by the Senate.<sup>27</sup> Environmental leaders may have appreciated the progress, but global climate change had yet to take on the imperative nature that they sought in defining environmental policies of the United States.

In the early 2000s, former Vice President Al Gore led efforts to make global climate change claims a populist focal point for the environmental movement. His movie, *An Inconvenient Truth*, won an Academy Award, and he received the Nobel Peace Prize for raising the world’s awareness about potential causes and impacts of global climate change.<sup>28</sup> His assertion—and the mantra of other environmental leaders<sup>29</sup>—was that the scientific debate was over and that the United States should lead the industrialized and developing countries in regulating and controlling GHG emissions.<sup>30</sup> At the same time, however, the George W. Bush Administration denied a petition to regulate GHG emissions as part of the Clean Air Act<sup>31</sup> and later opposed the Kyoto Protocol, asserting that the treaty would have a negative economic impact on the United States.<sup>32</sup>

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23. See Energy Independence and Security Act, 42 U.S.C. § 8911 (2006).

24. See, e.g., 15 U.S.C. § 2931 (2006) (constituting the United States Global Change Research Program to “provide for development and coordination of a comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change”).

25. United Nations Framework Convention on Climate Change, May 9, 1992, 102.38 U.S.T. 1 [hereinafter *UN Framework*].

26. *Id.*

27. S. Res. 98, 105th Cong. (1997) (enacted).

28. Alan Zarembo & Johanna Neuman, *Peace Prize for Gore Stirs Hope and Speculation*, L.A. TIMES, Oct. 13, 2007, at A1.

29. See, e.g., *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at \*1 (N.D. Cal. Sept. 17, 2007) (“According to [p]laintiff, the ‘[s]cientific debate is over’ and ‘there is a clear scientific consensus that global warming has begun.’”).

30. Al Gore, *We Can’t Wish Away Climate Change*, N.Y. TIMES, Feb. 28, 2010, at 11.

31. Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (Sept. 8, 2003).

32. See *Gen. Motors*, 2007 WL 2726871, at \*5 (noting the Bush Administration’s stance on the Kyoto Protocol).

This perceived reluctance to curb emissions that allegedly contribute to global climate change, the absence of their desired congressional action, or the combination thereof, caused environmental advocates to turn to the next available venue to pursue their cause: the courts. A cottage industry of litigation over weather-related events soon developed, which Business Week called “an ambitious legal war on oil, electric power, auto, and other companies.”<sup>33</sup> A 2009 American Bar Association publication identified this trend, noting that “as recently as four years ago, the issue had no significant legal footprint in the United States.”<sup>34</sup> However, since that time, “the issue has exploded onto the legal scene, resulting in enormous social and economic shockwaves.”<sup>35</sup> Environmental advocates began the litigation by suing the Bush Administration to require it to respond to a rulemaking petition that asked it to consider whether GHG emissions from certain light duty vehicles “endanger public health or welfare” and should be regulated under the Clean Air Act. The four aforementioned climate change lawsuits against private-sector interests followed soon thereafter.<sup>36</sup>

With surprising candor, the lawyers bringing the private sector litigation acknowledged that their lawsuits sought regulatory policy changes and that the targets of their lawsuits against the private companies were really Congress and regulators, not the companies themselves.<sup>37</sup> John Echeverria, executive director of Georgetown University’s Environmental Law & Policy Institute, conceded that “[t]his boomlet in global warming litigation represents frustration with the White House’s and Congress’[s] failure to come to grips with the issue, . . . [s]o the courts, for better or worse, are taking the lead.”<sup>38</sup> Connecticut Attorney General Richard Blumenthal, the lead attorney general in *AEP*, said:

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33. John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, BUS. WK., Oct. 30, 2006, at 34; see also ROBERT MELTZ, CONG. RESEARCH SERV., RL 32764, CLIMATE CHANGE LITIGATION: A GROWING PHENOMENON 1 (2008) (“[M]ore than two dozen cases pursuing multiple legal theories are now pending.”).

34. James L. Arnone et al., *Global Climate Change Litigation*, in ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 1 (Cary R. Perlman, ed., 2009).

35. *Id.*

36. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp.2d 863 (N.D. Cal. 2009); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); *Comer v. Murphy Oil USA, Inc.*, 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009).

37. See, e.g., MELTZ, *supra* note 33, at 35 (“Many proponents of litigation or unilateral state action freely concede that such initiatives are make-do efforts that, while making only a small contribution to mitigating climate change, are also aimed at prodding the national government to act.”).

38. Carey & Woellert, *supra* note 33, at 34–35 (internal quotation marks omitted).

[T]his lawsuit began with a lump in the throat, a gut feeling, emotion, that CO<sub>2</sub> pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. . . . [We were] brainstorming about what could be done.<sup>39</sup>

Maine Attorney General Stephen Rowe echoed Mr. Blumenthal, saying “I’m outraged by the federal government’s refusal to list CO<sub>2</sub> as a pollutant. . . . [I]t’s a shame that we’re here, here we are trying to sue polluters who are polluting because the federal government is being inactive.”<sup>40</sup> Also, Gerald Maples, a lead plaintiffs’ attorney in *Comer*, said that his “primary goal was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol.”<sup>41</sup> Even Second Circuit Judge Peter Hall, who authored the Second Circuit opinion allowing the case to continue, has since conceded that “[y]ou really don’t want a district judge supervising your relief in all of this stuff” but “[t]o the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense.”<sup>42</sup> Such endgames may entice those sympathetic to a particular political agenda, but they do not give rise to liability.

#### A. *Massachusetts v. EPA*

The first major global climate change case was *Massachusetts v. EPA*, which sought to force the political branches of government—namely the Bush Administration—to regulate GHG emissions.<sup>43</sup> A group of twelve states, local governments, and trade associations petitioned<sup>44</sup> for a review of the Environmental Protection Agency’s (“EPA”) 2003 denial of a rulemaking request to regulate GHG emissions from motor vehicles.<sup>45</sup> The

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39. *Role of State Attorneys General*, *supra* note 19, at 339. General Blumenthal led the first joint climate-change action. *See Am. Elec. Power Co.*, 406 F. Supp. at 267.

40. *Role of State Attorneys General*, *supra* note 19, at 342–43.

41. Schleifstein, *supra* note 19.

42. *Key Judge Downplays Prospects for Successful Climate Change Suits*, 21 CLEAN AIR REP., no. 5, Mar. 2, 2010.

43. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

44. The Petitioners included the states of California, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; the cities of New York, Baltimore, and Washington, D.C.; the territory of American Samoa; the organizations of the Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group. *Id.* at 505, nn. 2–4.

45. *Id.* Section 202(a)(1) of the Clean Air Act provides the EPA Administrator authority to:

EPA denied the request on grounds that the Agency did not have the authority to regulate the emissions.<sup>46</sup> Even if it did have the authority to do so, the EPA found that it would be unwise to regulate vehicle emissions because regulating them would be a piecemeal approach that would conflict with the President's more comprehensive approach to addressing climate change.<sup>47</sup> The plaintiffs argued that the EPA abdicated its responsibility to regulate the emission of four GHGs under the Clean Air Act, and that the Agency's refusal to do so was inconsistent with its statutory obligation.<sup>48</sup>

The United States Supreme Court ruled that the GHGs fit within Congress's definition of pollutants, thereby giving the EPA the statutory authority to regulate emission of those GHGs under the Clean Air Act.<sup>49</sup> The Act defines "air pollutant" as "any air pollution agent . . . including any physical [or] chemical . . . substance . . . emitted into . . . the ambient air."<sup>50</sup> The Court emphasized that the Act's language encompasses carbon dioxide and other GHGs.<sup>51</sup>

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[P]rescribe (and from time to time revise) in accordance with the provisions of this section, 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.

42 U.S.C. § 7521(a)(1) (2006).

On September 8, 2003, the EPA denied the rulemaking petition for several reasons, namely that the Agency lacked the authority to issue such a rulemaking and that, even if it did, it would refuse to do so on the grounds that such a policy would interfere with the President's comprehensive approach to global warming. *See Control of Emissions From New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 52925 (Sept. 8, 2003); *see also Massachusetts v. EPA*, 549 U.S. at 511.

46. *Massachusetts v. EPA*, 549 U.S. at 528.

47. *Id.*

48. *Id.* at 505.

49. *Id.* The Clean Air Act empowers the EPA to set National Ambient Air Quality Standards ("NAAQS") to protect public health and the environment. *See Arnone et al., supra* note 34, at 11–12. Notably, only two published cases involve actions against the energy industry under the Clean Air Act, the most logical statute under which to bring claims related to GHG emissions. *See Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007) (concerning whether an energy company violated the Clean Water Act when it modified its coal power plants without first obtaining a permit); *Nw. Env'tl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Or. 2006) (alleging a violation of the Clean Air Act for constructing a GHG-producing facility without a permit). "The dearth of cases discussing Clear Air Act violations related to global climate change reflects the fact that the fight still centers on federal and state GHG regulation, not enforcement." Arnone et al., *supra* note 34, at 12.

50. 42 U.S.C. § 7602(g) (2006).

51. *Massachusetts v. EPA*, 549 U.S. at 532. The Court rejected the argument that the EPA could not regulate motor vehicle carbon dioxide emissions because doing so would

[U]nder the clear terms of the [Act], EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.<sup>52</sup>

*Massachusetts v. EPA*, therefore, settled an issue of *administrative law*: whether the EPA’s denial of a petition for a regulatory rulemaking was “arbitrary, capricious . . . or otherwise not in accordance with [statutory] law.”<sup>53</sup> Review of administrative procedure and statutory interpretation are firmly within the province of the judiciary.<sup>54</sup> Yet, some saw the Supreme Court’s ruling as legitimizing climate-change litigation that sought to directly limit GHG emissions and subject private-sector interests to liability for contributing to those emissions, both of which present entirely distinct legal issues.<sup>55</sup>

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require tightening mileage requirements, the responsibility of which Congress assigned to the U.S. Department of Transportation (“DOT”). *Id.* The Court responded that the DOT’s establishment of mileage standards “in no way licenses the EPA to shirk its environmental responsibilities” and found that the EPA’s statutory obligation to protect the public health and welfare is “wholly independent of DOT’s mandate to promote energy efficiency.” *Id.* That the two regulatory obligations overlap, the Court found, does not provide “reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.” *Id.*

52. *Id.* at 533. *Massachusetts v. EPA* also presented a threshold issue of whether the plaintiffs had standing under Article III to challenge the EPA’s decision not to regulate the GHG emissions of motor vehicles. *Id.* at 516. Citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), the Court found that Article III standing requires that a claimant “demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress the injury.” *Id.* at 517. The Court gave particular attention to the “special position and interest of Massachusetts” as a litigant, stating that “[i]t is of considerable relevance that the party seeking review here is a sovereign [s]tate and not . . . a private individual.” *Id.* The Court reasoned that states are not “normal litigants” for purposes of invoking federal jurisdiction, having interests “independent of and behind the titles of its citizens, in all the earth and air within its domain.” *Id.* at 518–19. When states entered the Union, they surrendered “certain sovereign prerogatives” to the federal government. *Id.* at 519. In return, they receive certain protections—in this case, a congressional order that the EPA protect states from air pollution by setting motor vehicle emission standards under the Clean Air Act. *Id.* The Court held that states are entitled to “special solitude” in its standing analysis, and that, “[w]ith that in mind, it is clear that petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process.” *Id.* at 520–21.

53. 42 U.S.C. § 7607(d)(9)(A) (2006); see *Massachusetts v. EPA*, 549 U.S. at 527.

54. 42 U.S.C. § 7607(d)(9)(A) (2006).

55. Arnone et al., *supra* note 34, at 8 (footnote omitted) (“Although the case is remarkable in itself, it was only the beginning of a wave of climate change litigation that the [United States] is now experiencing.”).

*B. The Four Global Climate Change Lawsuits Against the Private Sector*

As indicated above, four cases were filed against private sector companies in an effort to address global climate change.

Two of the global climate change lawsuits, *AEP* and *General Motors*, were filed by state attorneys general. In *AEP*, eight attorneys general joined three nonprofit land trusts to sue six utility companies for injunctive relief and abatement of the alleged public nuisance.<sup>56</sup> They primarily sought for each defendant to reduce GHG emissions from its operations by a specific percentage a year for a minimum of ten years.<sup>57</sup> The second case, *General Motors*, differed from *AEP* in two key ways.<sup>58</sup> First, instead of seeking liability for emissions from stationary source operations, California sought to hold automakers liable for weather-related harms for selling products, namely cars, that emit GHGs through normal exhaust.<sup>59</sup> Second, the California attorney general sought monetary damages to reimburse the State for its expenses in studying, planning for, and responding to the impacts of global climate change.<sup>60</sup>

In the other two cases, personal injury lawyers brought claims pursuant to specific weather-related events. In *Comer*, fourteen Mississippi residents filed a purported class action against 121 oil, energy, and chemical companies alleging that the defendant companies were liable for the damage that Hurricane Katrina caused to their properties.<sup>61</sup> Specifically, plaintiffs argued that defendants, in willfully emitting GHGs, contributed to GHG buildup in the atmosphere, which caused global temperatures to rise and warm global waters, and that warmer waters in the Gulf of Mexico added to Hurricane Katrina's strength, which exacerbated their property damage.<sup>62</sup> The theories in *Kivalina* are similar to those in *Comer*.<sup>63</sup> Residents of the small Alaskan village of Kivalina, which sits on a small piece of land in the Arctic Ocean, sued twenty-four oil, energy, and utility

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56. *Am. Elec. Power Co. (AEP)*, 406 F. Supp. 2d at 265, 268 (S.D.N.Y. 2005) ("The State Plaintiffs, claiming to represent the interests of more than 77 million people and their related environments, natural resources, and economies, and the Private Plaintiffs, non-profit land trusts, bring these federal common law public nuisance actions to abate what they allege to be Defendants' contributions to the phenomenon commonly known as global warming.").

57. *Id.* at 270.

58. *Gen. Motors.*, 2007 WL 2726871, at \*1 (suing auto manufacturers "for creating, and contributing to, an alleged public nuisance—global warming.").

59. *Id.* at \*2.

60. *Id.*

61. *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05 CV 436 LTD RHW, 2006 WL 1066645, at \*1 (S.D. Miss. Feb. 23, 2006).

62. See Third Amended Class Action Complaint at 15, *Comer v. Murphy Oil USA, Inc.*, (S.D. Miss. Apr. 18, 2009) (No. 1:05-CV-436 LG RHW).

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

companies for allegedly contributing to global climate change, which stopped the formation of Arctic sea ice that historically protected the village from winter storms, leaving Kivalina susceptible to flooding.<sup>64</sup>

Notwithstanding these permutations on public nuisance theories, each of the four federal trial judges presented with one of the cases dismissed it on the grounds that either adjudicating the claim would involve a non-justiciable, political question, which is barred from the courts' jurisdiction under the United States Constitution, or that plaintiffs lacked the requisite standing to bring the claims.<sup>65</sup>

As the *AEP* trial court stated, "The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation."<sup>66</sup> In order to adjudicate the claims, the trial courts concluded that they would have to cap defendants' emissions "by judicial fiat,"<sup>67</sup> which would require a judicial determination of the appropriate levels of GHG emissions, whether liability should rest with only a small segment of industry, and the economic and national security implications of curtailing these emissions.<sup>68</sup> The *AEP* court also stated that, "[b]ecause resolution of the issues presented here requires identification and balancing of environmental, foreign policy, and national security interests, 'an initial policy determination of a kind clearly for non-judicial discretion' is required."<sup>69</sup> Such weighing of interests, the *General Motors* court reasoned, is "consigned to the political branches, and not the judiciary."<sup>70</sup> Otherwise, the courts would be "exposing automakers, utility companies, and other industries to damages flowing from a new judicially created tort for doing nothing more than lawfully engaging in their respective spheres of commerce within those States."<sup>71</sup>

Even though *Comer* and the *Kivalina* were brought by private lawyers, not state attorneys general, the trial judges viewed the lawsuits in the same light. In his statement from the bench, the judge in *Comer* said that the claims were embodiments of the ongoing "debate" over global climate change policy that "simply has no place in the court" until Congress sets standards that judges and juries can apply to decide cases: "These policy

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64. *Id.* at 868–69.

65. The political question doctrine is often misunderstood. It does not mean that an issue is too controversial or partisan to be decided in court. Rather, it recognizes that an issue may be beyond the proper reach of the judiciary if, among other things, it lacks "judicially discoverable and manageable standards for resolving it" or is committed to a political department, the Executive or Legislative Branches. *Vieth v. Juberlirer*, 541 U.S. 267, 277–78 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

66. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

67. *Id.* at 274.

68. *Id.*

69. *Id.* (citation omitted).

70. *Id.*

71. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at \*13 (N.D. Cal. Sept. 17, 2007) (citation omitted).

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.<sup>72</sup> The *Kivalina* trial court ruling came just weeks after the Second Circuit reinstated *AEP*, and the judge specifically and directly took issue with the Second Circuit's ruling, explaining that the plaintiffs provided no judicially discoverable and manageable standards that would allow courts to "render[] a decision that is principled, rational, and based upon reasoned distinctions."<sup>73</sup>

From a public nuisance perspective, the trial courts also distinguished speculative climate change and weather-related claims from traditional public nuisance cases, where plaintiffs have successfully established liability for discrete, identifiable sources of pollution.<sup>74</sup> With the global climate change cases, as the trial judge in *General Motors* stated, there are "multiple worldwide sources of atmospheric warming across myriad industries and multiple countries," and courts lack any "manageable method of discerning the entities that are creating and contributing to the alleged nuisance."<sup>75</sup> The near limitless number of potential defendants here, the *Kivalina* judge explained, demonstrated plaintiffs' "political judgment that the two dozen Defendants . . . should be the only ones to bear the cost of contributing to global warming;" there is "no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group [sic] at any particular point in time," or at any particular place.<sup>76</sup> This situation, the *Comer* judge continued, created "daunting evidentiary problems" of showing that any individual defendant's GHG emissions "affected the weather system that produced Hurricane Katrina."<sup>77</sup> In short, the significant trial management challenges these cases presented were judicially insurmountable.<sup>78</sup>

Thus, these four federal district court judges, who sat in geographically diverse districts, agreed that suits against private companies to achieve the plaintiffs' own political agendas are not Article III cases or controversies, and therefore, do not belong in the federal judicial system.

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72. *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 n.2 (5th Cir. 2009).

73. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009) (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005)).

74. *Gen. Motors*, 2007 WL 2726871, at \*15.

75. *Id.*

76. *Kivalina*, 663 F. Supp. 2d at 877, 880.

77. *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05 CV 436 LTD RHW, 2006 WL 1066645, at \*4 (S.D. Miss. Feb. 23, 2006).

78. See *Kivalina*, 663 F. Supp. 2d at 883; *Gen. Motors*, 2007 WL 2726871, at \*16; *Nationwide Mut.*, 2006 WL 1066645, at \*3; *Connecticut v. Am. Elec. Power Co. (AEP)*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

*C. The Appellate Court Reversals*

Exposing a potential rift with trial judges, the Second and Fifth Circuit panels, within weeks of each other, reinstated the public nuisance claims in *AEP*<sup>79</sup> and *Comer*,<sup>80</sup> respectively, though the Fifth Circuit later vacated the three-judge panel decision.<sup>81</sup>

The Second Circuit ruling, in particular, provided a major appellate victory for the use of public nuisance theory as a catch-all tort for alleged environmental harms. Citing the “high bar” for finding a non-justiciable political question, the Second Circuit stated that “simply because an issue may have political implications does not make it non-justiciable.”<sup>82</sup> Congress’s decisions not to enact additional restrictions do not displace the federal common law of public nuisance.<sup>83</sup> Rather, until federal laws and regulations address global climate change, “‘federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance’ by greenhouse gases.”<sup>84</sup>

The court also determined that plaintiffs stated viable public nuisance actions.<sup>85</sup> The Second Circuit stated that it relied on the federal common law of public nuisance<sup>86</sup> and applied the *Restatement (Second) Torts* § 821B to provide a “workable standard for assessing whether the parties have stated a claim under the federal common law.”<sup>87</sup> The court further stated that it would not impose “a requirement upon all federal common law of nuisance cases that the challenged pollution must be ‘directly traced’ or that plaintiffs must sue all sources of the pollution complained of in order to state an actionable claim.”<sup>88</sup>

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79. *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 329 (2d Cir. 2009). Additionally, the *AEP* court stated:

[T]he fact that this case is governed by recognized judicial standards under the federal common law of nuisance “obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion” and “further undermines the claim that such suits relate to matters that are constitutionally committed to another branch.”

*Id.* at 329–30 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)).

80. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh’g en banc granted*, 598 F.3d 208 (5th Cir. 2010).

81. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010).

82. *Am. Elec. Power Co. (AEP)*, 582 F.3d at 321, 323.

83. *Id.* at 387.

84. *Id.* at 392–93 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 106 (1972)).

85. *Id.* at 315.

86. *Id.* at 326 (noting that “federal courts have successfully adjudicated complex common law public nuisance cases for over a century”).

87. *Id.* at 352.

88. *Id.* at 356.

The Fifth Circuit's three-judge panel also concluded that plaintiffs had standing to bring the public nuisance actions, as well as private nuisance, negligence, and trespass claims.<sup>89</sup> The panel held that notwithstanding the plaintiffs' political motivations, the case was formulated as a state law claim against private parties, and "litigation between private citizens based on state common law" generally does not present non-justiciable questions.<sup>90</sup> For purposes of standing, the panel looked to *Massachusetts v. EPA* for accepting "as plausible the link between man-made greenhouse gas emissions and global warming . . . as well as the nexus of warmer climate and rising ocean temperatures with the strength of hurricanes."<sup>91</sup> The court stated that "[b]ecause the injury can be traced to the defendants' contributions, the plaintiffs' first set of claims satisfies the traceability requirement and the standing inquiry."<sup>92</sup> The court also reserved consideration of proximate causation for summary judgment, choosing not to address causation at the "threshold standing state of the litigation."<sup>93</sup>

In early 2010, the Fifth Circuit vacated the panel's ruling to hear the appeal en banc.<sup>94</sup> But, due to recusals, the number of judges eligible to hear the case fell below the quorum threshold.<sup>95</sup> In May 2010, the court stated that it could take no further action—meaning that the panel decision remained vacated—and invited the plaintiffs to seek United States Supreme Court review.<sup>96</sup> With regard to the other cases, the Ninth Circuit is still in the process of hearing the plaintiffs' appeal in *Kivalina*. Rather than appeal the trial court dismissal in *General Motors*, the California attorney general voluntarily withdrew the claim.<sup>97</sup>

Many individuals in the business and legal community, including those perceived as "liberal leaders" such as Harvard Law School's Laurence Tribe, criticized the Second and Fifth Circuit panel rulings as "reflect[ing] a deep misunderstanding of the political question doctrine and its foundations."<sup>98</sup> He and his coauthors wrote that global climate change's "very identification as a judicially redressable source of injury cries out for

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89. *Comer v. Murphy Oil USA*, 585 F.3d 855, 876 n.15 ("Although we arrived at our own decision independently, the Second Circuit's reasoning is fully consistent with ours, particularly in its careful analysis of whether the case requires the court to address any specific issue that is constitutionally committed to another branch of the government.").

90. *See id.* at 873.

91. *Id.* at 865 (citing *Massachusetts v. EPA*, 549 U.S. 497, 521–24 (2007)).

92. *Id.* at 867.

93. *Id.* at 864.

94. *Comer v. Murphy Oil USA, Inc.*, 598 F.3d 208, 210 (5th Cir. 2010).

95. *See Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010).

96. *Id.*

97. Amanda Bronstad, *California's Global Warming Suit Melts Away*, LAW.COM. (June 26, 2009), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202431782836>.

98. *See* Laurence H. Tribe, et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13 (Wash. Legal Found., Critical Legal Issues Working Paper No. 169, 2010).

the response that the plaintiffs have taken their 'petition for redress of grievances' to the wrong institution altogether," as courts are "institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope."<sup>99</sup>

## II. THE PUBLIC NUISANCE CLAIMS

As these cases move forward, courts will need to decide whether state attorneys general and private individuals, including land trusts, can state a viable tort claim against private-sector actors for harms allegedly caused by the weather, including changes in climates. The primary tort in these cases is public nuisance, a centuries-old tort with distinct character and elements. Despite this history, there has been a forty-year campaign to make it the chameleon of torts. As Professor W. Page Keeton observed in a principal hornbook on the law of torts in the 1980s, the common usage of the word nuisance leaves the tort ripe for such a campaign: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people."<sup>100</sup>

### A. *Origins and Nature of the Tort of Public Nuisance*

Originating in twelfth-century English common law, public nuisance enabled the King to enjoin infringement upon the Crown's land and force the offender to repair any damages.<sup>101</sup> Since that time, and including more than 200 years of United States common law, the tort has been applied to a very narrow set of circumstances, namely a class of common law crimes, and has developed a set of well-defined elements.<sup>102</sup> A public nuisance is an unreasonable injury to a public right, which includes, for example, the right to travel on a public road, to have unpolluted public waterways, or "to be free from the spreading of infectious diseases."<sup>103</sup> Public nuisance has also

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99. *Id.* at 12, 21.

100. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 86, at 616 (W. Page Keeton ed., 5th ed. 1984); *see also* F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949) (calling public nuisance a tort of "mongrel origins" for being "intractable to definition" and stating that "[t]he prime cause of this difficulty is that the boundaries of the tort of nuisance are blurred").

101. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979); Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 767 (2001).

102. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979) (If defendant's conduct "does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard."); *see also* KEETON ET AL., *supra* note 100, § 86, at 618 (explaining that the tort of public nuisance encompasses "a species of catch-all criminal offense[s]").

103. Joseph W. Cleary, *Municipalities Versus Gun Manufacturers: Why Public*

been used to break up protests, gang activities and vagrancy; over the past century, local governments have enacted statutes and ordinances categorizing certain conduct as public nuisance activity.<sup>104</sup> Because governments could not create criminal law for every offense, public nuisance theory became a “catch-all” means of holding people accountable for low-level crimes against the public.<sup>105</sup>

Over the years, states have applied the tort in slightly different ways, as is customary with common law torts, but the essence of public nuisance liability has remained constant. Four elements must be shown in order to subject one to public nuisance liability: (1) the existence of a public right; (2) unreasonable conduct by the tortfeasor in interfering with that public right; (3) control of the public nuisance either at the time of creation or abatement, depending on the jurisdiction; and (4) defendant’s conduct must be the proximate cause of the public nuisance.<sup>106</sup>

For example, if a person blocked a public road for a reasonable purpose, such as landing a distressed plane, there is no liability. According to the *Restatement (Second) of Torts*, “[i]f the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it.”<sup>107</sup> But, if a person unreasonably interfered with travel on a public road, for example, as part of an unauthorized protest, the government can enjoin the person from blocking the road and require them to abate any damage caused to the road.

Governments, namely states and municipalities, are the principal plaintiffs in public nuisance suits.<sup>108</sup> It is a “time-honored” element of public nuisance law that remedies for government officials, including attorneys general, are limited to injunctive relief and abatement.<sup>109</sup> “[T]here is no right either historically, or through the *Restatement (Second) of Tort’s* formulation, for the public entity to seek to collect money damages in general.”<sup>110</sup> In the above example, therefore, a government entity can sue the offending party to stop blocking the public road and to remediate whatever damage they caused to the road, but not for monetary damages.

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*Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 277, 290 (2002).

104. See Antolini, *supra* note 101, at 768.

105. See Donald G. Gifford, *Public Nuisance as Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 743 (2003) (quoting William A. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966)).

106. See Gifford, *supra* note 105, at 774–78, 791–94; Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN. L.J. 541, 562–71 (2006); see also *State v. Lead Indus. Ass’n*, 951 A.2d 428, 446 (R.I. 2008) (citing RESTATEMENT (SECOND) OF TORTS § 821B (1979)).

107. RESTATEMENT (SECOND) OF TORTS § 821A cmt c (1979).

108. See *In re Lead Paint Litig.*, 924 A.2d 484, 498–99 (N.J. 2007).

109. *Id.* at 499 (citing RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979)).

110. *Id.* at 498–99 (citing RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979)).

By contrast, private plaintiffs generally cannot bring public nuisance claims. The exception is when a plaintiff is injured from the public nuisance in a way "different [in] kind from that suffered by other persons exercising the same public right."<sup>111</sup> If a private plaintiff can prove the tort's four elements and an injury that is different in kind, a public nuisance claim can be brought for only those special damages. Private plaintiffs cannot seek an injunction or abatement in public nuisance law.<sup>112</sup> Extending the above example, individuals sitting in traffic caused by a blockade, regardless of length or consequences, do not have public nuisance claims. A person specially injured by crashing into the blockade can bring a public nuisance claim, but only for the correlated special damages.

Courts have adhered to these traditional bounds because, when allowed, public nuisance is a very powerful tort for which there are few, if any, affirmative defenses.<sup>113</sup> The tort starts with an injury to the public right and works backward to determine if a responsible party exists. If the elements can be proved, liability can be unbounded.<sup>114</sup> The responsible party must cease or abate the nuisance, or in a private suit, pay for the particularized damages.<sup>115</sup>

#### *B. Public Nuisance: A Catch-All Environmental Tort?*

In the 1960s and 1970s, environmentalists sensed the potential power of public nuisance law and tried to transform the cause of action from a catch-all common law crimes tort into a catch-all environmental tort.<sup>116</sup> The environmental leaders were aided by the fact because the tort had rarely been used in the post-industrial era, the courts did not have a hardened view of how to apply the historic tort to modern times.<sup>117</sup> When Dean William

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111. RESTATEMENT (SECOND) OF TORTS § 821C cmt. b (1979) ("It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree.").

112. RESTATEMENT (SECOND) OF TORTS § 821C cmt. j (1979); *see also In re Lead Paint Litig.*, 924 A.2d at 429. Reciting the development of public nuisance law, the New Jersey Supreme Court stated:

The significance, then, of the evolution of public nuisance law is threefold. . . . Second, a private party who has suffered special injury may seek to recover damages to the extent of the special injury and, by extension, may also seek to abate. Third, a public entity which proceeds against one in control of the nuisance may only seek to abate, at the expense of the one in control of the nuisance.

*Id.* at 429.

113. Antolini, *supra* note 101, at 774–75.

114. *See id.* at 773 (noting that "nuisance is also unusual . . . because of the potential for broad judicial discretion and control over remedies").

115. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (1979).

116. *See* Schwartz & Goldberg, *supra* note 106, at 547–48.

117. *See id.* at 546.

Prosser—and later Dean John Wade—codified the doctrine in the *Restatement (Second) of Torts*,<sup>118</sup> environmental leaders pursued three changes to the tort of public nuisance that, according to one scholar and former attorney for the Sierra Club, could have “[broken] the bounds of traditional public nuisance.”<sup>119</sup>

First, environmentalists sought to expand the type of conduct that would give rise to a public nuisance action.<sup>120</sup> Dean Prosser characterized the relevant conduct by explaining that “[a] public or ‘common’ nuisance is always a crime . . . a species of catch-all, low-grade criminal offense, consisting of interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming house or indecent exposure.”<sup>121</sup> Environmentalists vigorously opposed this quasi-criminal characterization for the exact reasons that they are pursuing global climate change litigation today—they hoped to use public nuisance to combat environmental harms by allowing courts to set standards when federal, state, and local regulations permit the underlying conduct.<sup>122</sup> A fundamental principle of public nuisance law, however, is that conduct “fully authorized by statute, ordinance or administrative regulation [would] not subject the actor to tort liability.”<sup>123</sup> The drafters of the *Restatement (Second) of Torts* settled on the terminology “unreasonably interfere” with a public right and clarified that when the conduct “does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard.”<sup>124</sup>

118. See RESTATEMENT (SECOND) OF TORTS § 821B (1979). For a more complete discussion of the history of public nuisance law and on the attempted expansion of the tort, see Schwartz & Goldberg, *supra* note 106, and Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. (forthcoming 2010).

119. Antolini, *supra* note 101, at 838 (quoting *Presentation of Restatement of Law, Tentative Draft No. 16*, 47 A.L.I. PROC. 487, 300 (1970) (remarks of John P. Frank)).

120. See Lauren F. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484, 485–86 (2000).

121. William A. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997, 999 (1966).

122. See Antolini, *supra* note 101, at 834; see also Schwartz & Goldberg, *supra* note 106, at 547–48.

123. RESTATEMENT (SECOND) OF TORTS § 821B cmt. f (1979).

124. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979). Under the Restatement, the following factors determine whether an activity unreasonably interferes with a public right:

- (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) [W]hether the conduct is proscribed by a statute, ordinance, or administrative regulation, or

Second, environmentalists sought sweeping changes in the requirements for standing to permit private citizens to bring lawsuits seeking to enjoin or abate the source of a nuisance, mirroring the types of suits permitted by state attorneys general and regulatory authorities.<sup>125</sup> Authorizing “private attorney general” suits was a marked departure from the remedy traditionally permitted for private plaintiffs and, if followed, would have broadly expanded nuisance claims.<sup>126</sup> The *Restatement (Second) of Torts* raised this point in its comment section, stating that courts may consider granting a private plaintiff standing if the individual brought suit “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,” though courts have generally not allowed such actions.<sup>127</sup>

Finally, environmentalists sought to eliminate the “different in kind” injury requirement that private plaintiffs must show to have standing to bring public nuisance claims.<sup>128</sup> This change would have greatly expanded standing so that anyone or any advocacy group affected by the nuisance could bring a claim.<sup>129</sup> In 1982, the Supreme Court of Hawaii in *Akau v. Olohana Corp.* adopted a broad “injury in fact” test, rather than require an injury different in kind,<sup>130</sup> but this ruling has not been followed in other states.<sup>131</sup> In part, this might be because the court did not base its decision on public nuisance theory, but rather, on the developing trend it perceived of relaxing the standing requirement in other contexts, including taxpayer suits for improper use of public funds, challenges to administrative decisions, and for harm to public trust property.<sup>132</sup>

The first test for the environmental leaders’ new theories was *Diamond v. General Motors Corp.*, a public nuisance case in the 1970s that was filed as a class action against 1,200 corporations for allegedly contributing to the air pollution in Los Angeles.<sup>133</sup> The plaintiffs, private individuals, sued the

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(c) [W]hether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

*Id.* § 821B(2).

125. See Antolini, *supra* note 101, at 829–35.

126. See *id.*

127. RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (1979).

128. See Schwartz & Goldberg, *supra* note 106, at 548

129. See *id.*

130. *Akau v. Olohana Corp.*, 655 P.2d 1130, 1134 (Haw. 1982).

131. See Antolini, *supra* note 101, at 786, 856; Schwartz & Goldberg, *supra* note 106, at 550.

132. See *Akau* 655 P.2d at 1133–35; see also Antolini, *supra* note 101, at 786.

133. *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 639 (Cal. Ct. App. 1971). The complaints against the individual defendants included the following:

[T]he automobile manufacturers are charged with negligently producing and

businesses for injunctive relief and billions of dollars in compensatory and punitive damages for contributing to the public nuisance of smog.<sup>134</sup> In dismissing the claims, the court fully appreciated that the plaintiffs were “simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court.”<sup>135</sup> The court further explained that public nuisance theory is ill-suited for class actions<sup>136</sup> and that the effect of granting injunctive relief “would be to halt the supply of goods and services essential to the life and comfort to the persons whom plaintiff seeks to represent.”<sup>137</sup>

Some courts, as with many common law causes of actions, occasionally break from the orthodoxy of a tort. Sometimes, as with the Supreme Court of Hawaii in *Akau*, they try to evolve the tort in a new direction. Other times, courts have twisted the tort to reach a desired result.<sup>138</sup> A prominent example of the latter situation occurred when a New York court allowed a 1980s public nuisance action for pollution of a waterway to continue against a defendant that did not contribute to the pollution and never owned nor controlled the land where the pollution occurred.<sup>139</sup> The court candidly stated that the determination of who should bear the expense of abating the nuisance “is essentially a political question to be decided in the legislative arena,”<sup>140</sup> but permitted the claim to proceed because, in its opinion, “[s]omeone must pay to correct the problem.”<sup>141</sup> These various mutations of public nuisance theory have not been broadly followed by other courts.<sup>142</sup>

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distributing machines which are defective in that they emit harmful substances into the atmosphere; petroleum refiners are charged with manufacturing and distributing motor fuel which, in its intended use, pollutes the atmosphere; owners of industrial plants, steam generating plants, gasoline filling stations and airports are charged with unnecessarily discharging harmful substances and odors into the air.

*Id.* at 641.

134. *Id.*

135. *Id.* at 645.

136. *Id.* at 643. The court found a massive class action, representing more than seven million Los Angeles residents, was inappropriate for the public nuisance cause of action because each plaintiff would have to show particularized damages different from those suffered by the general public. *Id.* The court explained that “[r]equiring plaintiff to state separately the seven million causes of action, and to plead factually the damage to each, would in and of itself constitute a practical bar to this action.” *Id.*

137. *Id.* at 644.

138. *See* *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 976 (Sup. Ct. 1983) (applying an expansive definition of “nuisance” to allow the claim to proceed).

139. *Id.* at 974.

140. *Id.* at 977.

141. *Id.*

142. *See* Schwartz & Goldberg, *supra* note 106, at 552–61.

*C. Public Nuisance: A Catch-All Tort for Social and Product-Based Harms?*

During the 1980s and 1990s, several attorneys general and personal injury lawyers attempted to morph public nuisance theory into the catch-all tort for high-stakes, high-publicity lawsuits when no other tort would work.

The first effort to use this tort for social and product-based harm was in asbestos litigation.<sup>143</sup> Several municipalities and school districts asserted claims of public nuisance against manufacturers to remove asbestos from their properties.<sup>144</sup> By and large, courts rejected these cases.<sup>145</sup> The next high profile use of public nuisance theory was in the state attorney general-sponsored litigation against tobacco manufacturers for reimbursement of state medical expenditures for smokers.<sup>146</sup> While the only court to address the public nuisance claim rejected it as being outside of the realm of public nuisance theory, the tort became part of the tobacco lore when the parties signed the Master Settlement Agreement (MSA) for \$246 billion.<sup>147</sup> As a result, plaintiffs’ attorneys began alleging public nuisance theory in all types of mass tort litigation.<sup>148</sup> Soon, multiple public nuisance lawsuits were pending against gun manufacturers for the costs associated with gun violence,<sup>149</sup> former lead paint manufacturers for costs associated with removing deteriorating lead paint from private and public buildings,<sup>150</sup> alcoholic beverage manufacturers for the costs of drunk driving and underage drinking, and more.<sup>151</sup>

Some of these cases had short-term or lower court victories.<sup>152</sup> On the whole, however, the effort to expand public nuisance theory into the tort du

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143. See Handler & Erway, *supra* note 120, at 485–86.

144. See Gifford, *supra* note 105, at 751; Schwartz & Goldberg, *supra* note 106, at 553.

145. See, e.g., *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (ruling that “manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injury caused by [a product] defect,” and that “all courts that have considered the question have rejected nuisance as a theory of recovery for asbestos contamination”).

146. See Schwartz & Goldberg, *supra* note 106, at 554 (quoting Handler & Erway, *supra* note 120, at 487).

147. See *id.* at 554–55.

148. See Handler & Erway, *supra* note 120, at 492.

149. See, e.g., *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002); *Camden Cnty. Bd. Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004).

150. See, e.g., *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *State v. Lead Indus. Ass’n*, 951 A.2d 428 (R.I. 2008).

151. See Schwartz & Goldberg, *supra* note 106, at 581.

152. See *id.* at 552–61.

jour for stopping or abating social and product-based ills failed.<sup>153</sup> In five of the states where there has been a final determination of law on this issue, this type of expansive public nuisance liability has been expressly rejected as not fitting within the character and elements of public nuisance law.<sup>154</sup> The high courts in Illinois, Missouri, New Jersey, and Rhode Island all rejected the application of public nuisance principles against manufacturers of guns or lead paint and pigment,<sup>155</sup> and the Ohio legislature quickly overturned a state high court opinion that would have allowed such liability.<sup>156</sup> As the Illinois Supreme Court recognized, the suggested expansion of tort duties was of such a magnitude that “it must be the work of the legislature, brought about by the political process, not the work of the courts.”<sup>157</sup> Otherwise, as other courts observed, public nuisance theory would become a “monster that would devour in one gulp the entire law of tort.”<sup>158</sup>

*D. Second Circuit’s Use of Federal Common Law Public Nuisance Theory*

Given the rejection of expanded public nuisance theories in the states, plaintiffs’ lawyers in *AEP* and *Kivalina* filed their claims under federal common law, where public nuisance case law was far less developed. They found a receptive court in the Second Circuit, whose expanded view of federal public nuisance claims, as expressed in *AEP*, is that “if regulatory gaps exist, [federal common law can fill] those interstices.”<sup>159</sup> This notion of a robust federal common law for gap-filling federal statutes is misguided. Even the very notion of federal common law is controversial; the United States Supreme Court held in its seminal case, *Erie Railroad Co. v. Tompkins*, “[t]here is no federal general common law.”<sup>160</sup>

Notwithstanding *Erie*, courts have identified a handful of arenas in which federal common law can develop—namely admiralty and maritime cases, interstate disputes, proceedings raising matters of international

153. *Id.*

154. *Id.*

155. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1099 (Ill. 2004); *Benjamin Moore & Co.*, 226 S.W.3d at 110; *In re Lead Paint Litig.*, 924 A.2d at 484; *Lead Indus.*, 951 A.2d at 428.

156. *See Cincinnati v. Beretta U.S.A. Corp.*, 769 N.E.2d 1136 (Ohio 2002); 2006 Ohio Am. Sub. S.B. 117 (codified as amended at OHIO REV. CODE ANN. § 2307.71(13)(c)).

157. *Beretta U.S.A.*, 821 N.E.2d at 1148.

158. *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (citing *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)).

159. *Connecticut v. Am. Elect. Power Co., Inc. (AEP)*, 582 F.3d 309, 330 (2d Cir. 2009).

160. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). “Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State.” *Id.*

relations, actions involving gaps in federal statutory provisions, and cases concerning the United States' legal relations and proprietary interests.<sup>161</sup> In these areas, it is inappropriate to apply state tort law or, in the instance of interstate disputes, unfair to apply one state's law over the other.<sup>162</sup>

Indeed, when federal courts have occasionally applied federal common law public nuisance theory in the post-*Erie* era, the cases involved litigation between states over interstate pollution.<sup>163</sup> Most federal common law public nuisance cases involving claims against private parties were decided pre-*Erie*, when applying federal common law was more common.<sup>164</sup> As a result, precedent for current applications of the federal common law of public nuisance, while still based on the Section 821B of the *Restatement (Second) of Torts*, is razor thin, at best. "Federal common law," though, does provide federal courts with maximum and unprecedented flexibility, including the avoidance of choice of law and rules, in deciding whether to expand the public nuisance tort to assign global climate change liability to American companies.<sup>165</sup> Nevertheless, precedent suggests that such claims should be based on state law instead.

### III. APPLICATION OF PUBLIC NUISANCE LAW IN THE GLOBAL CLIMATE CHANGE CONTEXT

Whether under state or federal law, if courts apply the core principles of public nuisance law, the global climate change and weather-related claims discussed in this article will not be able to overcome several immovable hurdles. With respect to the core elements of the tort, public nuisance

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161. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 223 (1985).

162. See Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NW .U. L. REV. 551, 562–63 (2008). The United States Supreme Court has original jurisdiction over cases between two or more states for a similar reason, which is to bring a neutral forum in which to decide such disputes. See U.S. CONST. art. III, § 2. Having a federal common law of public nuisance and deciding such cases in a federal forum helps avoid a war between the states. See Epstein, *supra* at 563 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

163. See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 104 (1972) (ruling that federal common law, pursuant to statutory authority, governed a case in which Illinois sought an order requiring four Wisconsin cities to abate a public nuisance in the interstate navigable waters of Lake Michigan, stemming from discharge of raw or inadequately treated sewage); see also Epstein, *supra* note 162, at 562–63 (explaining that federal common law is used if it is inappropriate to apply one state's law over another).

164. See, e.g., *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907) (involving a suit in which the state of Georgia brought an original action in the United States Supreme Court alleging that the operations of private Tennessee companies had caused damage to public and private lands in Georgia).

165. 8 FEDERAL PROCEDURE, LAWYER'S EDITION § 20:568, at 617 (2005) ("Where federal law governs but there is no congressional guidance on the subject, it is for the federal courts to fashion the governing rule of law according to their own standards.").

theory does not provide courts with the tools or standards for determining whether a defendant's emissions "unreasonably interfered" with any public right, or that the defendant's emissions proximately caused any of the alleged injuries.

*A. Does Emitting GHGs Constitute Unreasonable Conduct Giving Rise to Liability?*

As discussed earlier, public nuisance law requires an "unreasonable interference" with a right of the public at large.<sup>166</sup> Such conduct is objectively wrong. Whether a defendant's conduct is unreasonable is based not on whether the plaintiff finds the invasion unreasonable, but "whether reasonable persons [in] general, *looking at the whole situation* impartially and objectively, would consider it unreasonable."<sup>167</sup> This objectivity, just as the "unreasonable person" standard in negligence law, gives actors actual or constructive notice that their actions could lead to liability.

Where the public nuisance claims were allowed to proceed, the courts and the plaintiffs attempted to skirt the unreasonable conduct requirement. The Second Circuit, in defining "unreasonable" interference, concluded that any known, continuing conduct of a significant or long-lasting impact on a public right is *de facto* unreasonable.<sup>168</sup> Under the Second Circuit's ruling, there would be no consideration whatsoever of the wrongfulness, acceptability, or utility of the defendant's conduct. The same is true with the plaintiffs' allegations in *Kivalina*, as the plaintiffs argued in their briefs the reasonableness or unreasonableness of a defendant's emissions should be immaterial to the tort. What should matter, the plaintiffs continued, is only whether *their injury* was unreasonable: *Kivalina* sustained injuries that it ought not have to bear even if the defendants' conduct was merited and lawful.<sup>169</sup> Either way, removing any wrongful conduct requirement essentially nullifies the unreasonable interference element of the tort; it also runs counter to the general tort law requirement that a defendant can only

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166. See *supra* Part II.A.

167. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 605 (Cal. Ct. App. 1997) (emphasis added) (citations omitted) (internal quotation marks omitted); see also *Fla. E. Coast Props., Inc. v. Metro Dade Cnty.*, 572 F.3d 1108, 1112 (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.").

168. See *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d at 352–353.

169. See Appellants' Opening Brief, *Native Vill. of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir. Mar. 10, 2010) ("The question of unreasonableness in a damages action is therefore not one of whether the defendant's conduct is reasonable or unreasonable but rather one of who should bear the cost of that conduct.").

be subject to liability for *wrongfully* causing someone’s injury. Wrongdoing is the linchpin for liability in tort law.<sup>170</sup>

Once the reasonableness of the defendant’s conduct has to be assessed, the trial judges in *Comer* and *Kivalina* appreciated, the trial courts must determine, in accordance with the allegations, that emissions above a certain level unreasonably contributed to changes in the earth’s weather, including climates, and the alleged injuries, while emissions below that level were reasonable, even if those emissions still allegedly contributed to the injuries.<sup>171</sup> In *AEP*, the attorneys general were asking the court to call unreasonable anything short of the annual reduction of emissions for ten years that they sought.<sup>172</sup> There is nothing objectively reasonable or unreasonable, though, about being on the “right” or “wrong” side of that percentage. It was simply the number the state attorneys general derived in bringing the claim.

Complicating matters is that if the courts were to engage in drawing these arbitrary lines, they would have to apply the limitations retroactively, as common law decisions suggest that the law always required what their holdings dictate.<sup>173</sup> As a further indication of the lack of any objective standard here, the defendants, even to this day, have no idea what emissions level could or should lead to liability, and, consequently, no idea what emission reductions would avoid liability. Providing people with fair notice of what is considered wrongful conduct and what “corrective” action could be taken to avoid liability is not only a core purpose of tort law, it is a constitutional requirement.<sup>174</sup>

Consider the implications of allowing such claims to proceed. State attorneys general, for example, could declare, consistent with the logic of the global-warming public nuisance theory, that driving over forty-five miles per hour on a highway is a public nuisance or that a certain level of

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170. See Victor E. Schwartz, Phil Goldberg, & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 923 (2009). This specific mutation of public nuisance law was attempted in the Rhode Island lead paint case, which the Supreme Court of Rhode Island specifically rejected. See *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 452–55 (R.I. 2008).

171. See *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 n.2 (5th Cir. 2009); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 873–77 (N.D. Cal. 2009).

172. *AEP*, 582 F.3d at 318 (seeking to “permanently enjoin each Defendant to abate that nuisance first by capping carbon dioxide emissions and then by reducing emissions by a specified percentage each year for at least ten years”).

173. See, e.g., *Soule v. Massachusetts Elec. Co.*, 390 N.E.2d 716 (Mass. 1979) (applying retroactively new common law rule imposing on property owners duty of reasonable care to child trespassers); see also *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) (“The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.”).

174. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O’Connor, J., dissenting) (vagueness doctrine applies to common law liability).

fat content in peanut butter or calories over a certain threshold in soda are public nuisances. This would subject to liability drivers for exceeding the speed limit and companies for making products that exceeded those levels, even though the drivers and manufacturers had no idea that they were engaging in tortious conduct when driving or making those products.

### 1. Balancing the Utility of the Conduct

In prototypical public nuisance cases, determining whether the defendant's conduct is "reasonable" or "unreasonable" is rarely controversial because public nuisances generally have little to no public benefit.<sup>175</sup> Historically, conduct that could give rise to public nuisance liability included threatening public health, such as keeping diseased animals or storing explosives in a city; violating public morals, such as keeping houses of prostitution; blocking public roads and waterways; and violating the peace, such as through excessive noise or bad odors.<sup>176</sup> These activities are "malicious, illegal, or contrary to common standards of decency," which is why they lack social value and may be considered a public nuisance.<sup>177</sup>

By contrast, the activities underlying global climate change lawsuits involve producing energy necessary to modern life. The public relies on these products for turning on lights, heating their homes, having electricity to run everyday appliances, and meeting their most basic transportation needs. Proponents of this litigation might suggest that the cost of the end product, such as electricity and home heating oil, should incorporate these external costs so that the customers bear the product's "true cost." This concept may sound simple, but it is not a theory for liability based on wrongdoing, and courts are ill-suited for assessing if and how to build such costs into a product, particularly given the limited information that lawyers on each side of the litigation can provide. Such increases in costs must also be balanced against the fact that energy is a necessary and beneficial product that, if made significantly more expensive, may become unfeasible for the masses or have other adverse communal effects.

In particular, if the price of utilities were forced to include "costs" of weather-related injuries, the average American's utility bills—whether for home heating oil, gasoline, or electricity—could skyrocket.<sup>178</sup> Balancing such utilities' cost with any adverse effects of producing them is part of the delicate balancing in which Congress and administrative agencies engage

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175. See RESTATEMENT (SECOND) OF TORTS § 828 cmt. e (1979).

176. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979).

177. *Id.* § 828 cmt. e.

178. See AFFORDABLE POWER ALLIANCE, POTENTIAL IMPACT OF EPA ENDANGERMENT FINDING ON LOW INCOME GROUPS AND MINORITIES, at 92 (Mar. 2010), available at <http://www.affordablepoweralliance.org/LinkClick.aspx?fileticket=yXQwPRYFUF8%3D&t abid=40> [hereinafter *Potential Impact of EPA Endangerment Finding*].

when determining appropriate regulations. When gasoline soared past \$4 per gallon in 2008, the personal and economic impact was dramatic; many people could not afford to drive to work, those in the transportation industry—including independent truck and taxi drivers—lost considerable income, and companies laid off workers to manage their energy costs.<sup>179</sup>

Advocates for the poor and elderly have joined together under an umbrella group, Affordable Power Alliance, to highlight the impact that regulating emissions can have on them.<sup>180</sup> The Alliance’s March 2010 report on potential EPA emissions restrictions found that, among other things, the regulations could cause gasoline and residential electricity prices to increase by fifty percent and industry electricity and natural gas prices to go up by seventy-five percent by 2030.<sup>181</sup> The report further explains that “[l]ower-income families are forced to allocate larger shares of the family budget for energy expenditures, and minority families are significantly more likely to be found among the lower-income brackets,” meaning that decisions made about global climate change “disproportionately” impact these populations.<sup>182</sup> Such representatives for the poor and elderly would have no voice before the courts if courts “regulated” emissions decisions through these cases.

There also would be an impact on government assistance programs, such as the Low Income Home Energy Assistance Program, which would need to be increased significantly if home heating oil prices had to incorporate costs allegedly related to global climate change.<sup>183</sup> These public policy judgments, which require delicate and complex social utility balancing, are best left to Congress and administrative agencies. In addition to determining the right balance, legislators and regulators can set the rules prospectively and phase in reforms so that affected stakeholders can adjust to new rules and develop technologies to enhance efficiencies.<sup>184</sup>

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179. See generally CONGRESSIONAL BUDGET OFFICE, 110TH CONG., EFFECTS OF GASOLINE PRICES ON DRIVING BEHAVIOR AND VEHICLE MARKETS (2008) (discussing the effects of gasoline prices on people’s driving).

180. See *About Us*, AFFORDABLE POWER ALLIANCE, <http://www.affordablepoweralliance.org/Aboutus.aspx> (last visited Aug. 26, 2010).

181. See *Potential Impact of EPA Endangerment Finding*, *supra* note 178, at 92.

182. *Id.*

183. Jad Mouawad, *Baby, It’s Going to Be Cold Outside*, N.Y. TIMES, Aug. 6, 2008, at C1, C6.

184. The federal “cap and trade” legislation that the United States House of Representatives passed in 2009 to cap carbon emissions and create a market for trading emission licenses was modeled on this phased-in approach. See American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009); Glen Anderson, *Climate for Change*, ST. LEGISLATURES, Dec. 2009, at 20.

## 2. Existing Congressional and Regulatory Activities on GHGs

Another key aspect of determining whether conduct is “reasonable” or “unreasonable” for public nuisance liability is how the allegedly offending conduct fits within the overall regulatory and legislative structure.<sup>185</sup> Conduct permitted by a regulatory framework, for example, is per se reasonable because it reflects the public policy judgment of the legislatures and regulators.<sup>186</sup> For instance, claims filed against railroads for noise and air pollution affecting the communities near the tracks often failed for this reason.<sup>187</sup> “Where the operation of the railroad was pursuant to a legislative charter or license and the operation of the railroad was in accordance with the expectations of the legislature,” there was no unreasonable conflict with a public right.<sup>188</sup>

Congress and federal administrations have long histories of considering whether and how much to regulate gases categorized as GHGs. Specifically, for the past three decades, the United States and the international community have actively engaged in balancing production and consumption of utilities and other energy sources with the alleged relationship they may have with global climate change. Below are examples of key actions taken:

1978: Congress established a “national climate program” intended to increase the general knowledge about the global climate “through research, data collection, assessments, information dissemination, and international cooperation.”<sup>189</sup>

1980: Through the Energy Security Act, Congress commissioned a study by the National Academy of Sciences to analyze the “projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion, coal-conversion and related synthetic fuels activities.”<sup>190</sup>

1987: Congress enacted the Global Climate Protection Act in which it found that “manmade [sic] pollution . . . may be producing a long-term and substantial increase in the average temperature on Earth” and directed the EPA to propose to Congress a “coordinated national policy on global climate change.”<sup>191</sup>

1990: Intergovernmental Panel on Climate Change (“IPCC”), under the United Nations, published its first report on potential man-made

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185. Schwartz & Goldberg, *supra* note 106, at 566–67.

186. *Id.* at 574.

187. Gifford, *supra* note 105, at 803.

188. *Id.* On the other hand, conduct “proscribed by a statute, ordinance or administrative regulation” may be deemed an unreasonable interference with a public right. *See* RESTATEMENT (SECOND) OF TORTS § 821B(2)(b) (1979).

189. National Climate Program Act of 1978, 15 U.S.C. §§ 2901–2908 (2006).

190. *See* Energy Independence and Security Act, 42 U.S.C. § 8911 (2006).

191. Global Climate Protection Act of 1987, Pub. L. 100-204, 101 Stat. 1407 (1987) (codified as amended at 15 U.S.C. § 2901 (2006)).

contributions to climate change. "Drawing on expert opinions from across the globe, the IPCC concluded that 'emissions resulting from human activities are substantially increasing the atmospheric concentration of greenhouse gases [which] will enhance the greenhouse effect, resulting on average in additional warming of the Earth's surface.'"<sup>192</sup>

1990: Congress enacted the Global Change Research Act, which established a ten-year research program for global climate issues.<sup>193</sup>

1992: President George H. W. Bush signed the United Nations Framework Convention on Climate Change ("UNFCCC"), a nonbinding agreement of 154 nations to reduce atmospheric concentrations of carbon dioxide and other GHGs to "prevent dangerous anthropogenic . . . interference with the [earth's] climate system."<sup>194</sup>

1997: UNFCCC member nations negotiated the Kyoto Protocol, which called for mandatory reductions of GHG emissions from developed nations.<sup>195</sup>

1997: President Bill Clinton signed the Kyoto Protocol but did not present it to the Senate for ratification after the Senate expressed concern that the economic burdens of reducing carbon dioxide emissions would fall on industrialized nations.<sup>196</sup>

2003: In denying a petition to regulate gases categorized as GHGs from motor vehicles under the Clean Air Act, the EPA emphasized the "economic and political significance" of regulating activities that might lead to global climate change, the continuing debate and negotiation in international bodies and Congress, how unilateral regulation of carbon dioxide emissions in the United States could weaken its efforts to persuade key developing countries to reduce the greenhouse gases, the foreign policy issues involved, and the direct or indirect impact such regulation would have on "[v]irtually every sector of the U.S. economy."<sup>197</sup>

2007: President George W. Bush opposed the Kyoto Protocol because it exempted developing nations, did not include two major types of pollutants, and would have a negative economic impact on the United States.<sup>198</sup>

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192. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at \*4 (N.D. Cal. 2007) (quoting INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE IPCC 1990 AND 1992 ASSESSMENTS, xi (1992)).

193. Global Change Research Act of 1990, 15 U.S.C. §§ 2931–2939 (2006).

194. *UN Framework*, *supra* note 25, at art. 2.

195. See David Hunter, *Implications of the Copenhagen Accord for Global Climate Governance*, 10 SUSTAINABLE DEV. L. & POL'Y 4, 4–5 (2010).

196. See S. Res. 98, 105th Cong. (1997) (enacted) (resolving that the President should not sign any agreement that did not address the emissions of developing nations).

197. Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52928, 52931 (Sept. 8, 2003).

198. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at \*4 (N.D. Cal. 2007) (citing Transcript, President Bush Discusses Global Climate Change (June 11, 2001)); Letter from President George W. Bush to Senators Hagel, Helms, Craig & Roberts (Mar. 13, 2001), available at <http://georgewbushwhitehouse.archives.gov/>

2009: The Copenhagen Climate Conference considered renewing the Kyoto Protocol, which is set to expire in 2012, and encouraged all nations to reduce emissions of GHGs; the conference resulted in a limited, non-binding agreement called the Copenhagen Accord.<sup>199</sup>

Further, President Obama's Administration has taken an active role in determining appropriate regulation of the emissions targeted in these lawsuits.<sup>200</sup> On April 24, 2009, the EPA issued two significant findings, endangerment of certain emissions and cause or contribution under Section 202(a) of the Clean Air Act, which triggered a sixty-day public comment period that concluded on June 23, 2009.<sup>201</sup> On June 30, 2009, the EPA reversed a Bush Administration ruling and granted a Clean Air Act waiver to California for the state's emission standards for motor vehicles.<sup>202</sup> In September and October 2009, the EPA proposed a new program to reduce certain emissions and improve fuel economy for all new cars and trucks,<sup>203</sup> issued final regulations requiring annual reporting of emissions from industrial sources,<sup>204</sup> and proposed rules for when permits would be required for industrial sources emitting more than 25,000 tons of certain gases each year.<sup>205</sup> Most recently, in December 2009, the EPA issued final "endangerment findings," which concluded that six gases identified as GHGs pose a danger to the environment and the public health and indicated that the agency would begin drafting regulations to curb emission of those gases.<sup>206</sup> Also, Congress is considering several pieces of legislation related

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news/releases/2001/03/20010314.html).

199. See Hunter, *supra* note 195, at 4 (giving detailed background of the Kyoto Protocol and Copenhagen Accord).

200. See David B. Spence, *The Political Barriers to a National RPS*, 42 CONN. L. REV. 1451, 1468 (2010).

201. See Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886, 18886 (Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

202. See Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32744 (July 8, 2009).

203. See Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49453 (Sept. 28, 2009) (to be codified at 49 C.F.R. pts. 531, 533, 537, 538).

204. See Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56260 (Oct. 30, 2009) (to be codified in 40 C.F.R. pts. 86, 87, 89, 90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1051, 1054, 1065).

205. See U.S. ENV'T'L PROTECTION AGENCY, FACT SHEET—PROPOSED RULE: PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE GAS TAILORING RULE (Sept. 30, 2009), available at <http://www.epa.gov/NSR/fs20090930action.html>.

206. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1).

to carbon emissions,<sup>207</sup> including “cap-and-trade” legislation, which would phase the program in over several years and gradually reduce available allowances each year.<sup>208</sup>

Allowing the *Comer*, *Kivalina*, and *AEP* cases to proceed would not, therefore, be stepping into an unregulated area as the Second Circuit suggested in saying current federal regulations do not displace the plaintiffs’ public nuisance claim.<sup>209</sup> In the past, public nuisance theory has served as an interim measure when criminal or land-use laws were not updated to account for environmental changes.<sup>210</sup> When states and localities enacted statutes and ordinances defining public nuisances and empowered government to terminate the prescribed conduct, the common law claims subsided.<sup>211</sup> With litigation over global climate change claims, just the opposite is true. Given all of the legislative and regulatory time, attention, and resources given to this very issue, the courts, in determining whether a particular level of emissions is unreasonable, would be imposing requirements that elected representatives and environmental regulators have already considered and declined to impose for over thirty years.<sup>212</sup>

In addition, the Executive and Legislative Branches have better, more competent tools at their disposal for investigating the facts surrounding the allegations and setting emissions policy than does the judiciary. The factual debate about the causes and extent of global climate change continues to fester. For example, the EPA’s endangerment finding supports the notion that the scientific debate is over,<sup>213</sup> but in a recent controversy, e-mail messages “attributed to prominent American and British climate researchers” were leaked to the public stating that there are “gaps in understanding of recent variations in temperatures.”<sup>214</sup> In 2010, additional information surfaced that called into question the conclusion of the United

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207. See American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

208. *Id.*

209. See *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 381 (2d Cir. 2009) (“We express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the [Clean Air Act] by EPA, if and when such regulation should come to pass, would displace Plaintiffs’ cause of action under the federal common law.”).

210. See Gifford, *supra* note 105, at 804.

211. See Schwartz, Goldberg, & Schaecher, *supra* note 118, at 4.

212. See discussion, *supra* Part III.A.2.

213. See Petition for Reconsideration by Peabody Energy Co., Docket No. EPA-HQ-OAR-2009-0171 (Feb. 11, 2010) (seeking reconsideration by the EPA of its Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (proposed Dec. 15, 2009) (to be codified at 40 C.F.R. ch.1) on the basis of the release of the e-mails discussed *infra*).

214. Andrew C. Revkin, *Hacked E-mail is New Fodder for Climate Dispute*, N.Y. TIMES, Nov. 21, 2009, at A1.

Nation's Intergovernmental Panel on Climate Change regarding the melting of the Himalayan glaciers.<sup>215</sup>

Congress and administrative agencies have the staff, resources, and time to explore the potential impact of emissions regulations. They can conduct hearings, commission research reports and financial impact statements, engage in meaningful discourse with foreign nations, and consider the interests of all stakeholders—not just those before the court. Congress, in conjunction with the President, can consider the implications of emissions standards in this area on the environment, domestic economy, global trade, and foreign relations. The more intricate the balancing needed, the more the courts should defer to legislatures and regulatory agencies to draw the lines between reasonable and unreasonable activities.

The Obama Administration underscored this point when the Acting Solicitor General submitted a brief to the United States Supreme Court to urge the Court to grant *certiorari* in *AEP*. The brief explained that the Court should dismiss the suit because the “regulatory approach is preferable to what would result if multiple district courts—acting without the benefit of even the most basic statutory guidance—could use common-law [tort] claims to sit as arbiters of scientific and technology-related disputes and de facto regulators of power plants and other sources of pollution.”<sup>216</sup>

#### *B. No Defendant Can Be Deemed a “Cause” of Weather-Related Injuries*

As in all of tort law, a bedrock principle of public nuisance theory is causation. There can be no common law liability without “some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.”<sup>217</sup> A plaintiff must be able to show both factual and proximate causation; a defendant’s emissions must be the actual cause of global climate change and the specific injury alleged, and the plaintiff’s injury, e.g., the hurricane damage, must be one that a reasonable person would see as a likely result of the specific use or production of energy alleged.<sup>218</sup>

The plaintiffs’ factual causation allegations must be broken down into two parts. First, the plaintiffs allege that each defendant released GHGs,

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215. These criticisms of the Intergovernmental Panel on Climate Change came soon after it retracted claims presented in a 2007 report that the Himalayan glaciers “would be largely melted” in the next twenty years. Jonathan Leake, *UN Climate Panel Blunders Again*, SUNDAY TIMES (London), Jan. 24, 2010.

216. Brief for the Tennessee Valley in Support of Petitioners at 16, *Connecticut v. Am. Elec. Power Co.*, No. 10-174 (Aug. 24, 2010).

217. KEETON ET AL., *supra* note 100, § 41, at 263.

218. Schwartz & Goldberg, *supra* note 106, at 569; *see also* FOWLER V. HARPER, ET AL., THE LAW OF TORTS §20.2 (1986) (“Through all the diverse theories of proximate cause runs a common thread; almost all agree that defendant’s wrongful conduct must be a cause in fact of plaintiff’s injury before there is liability.”); KEETON ET AL., *supra* note 100, § 41, at 263.

those GHGs combined with the many other sources of GHGs around the world and accumulated in the earth’s atmosphere, the accumulation formed a barrier that trapped in the sun’s heat, and, as a result, the earth’s air and water temperatures increased, thereby causing global climate change.<sup>219</sup> Second, each plaintiff then alleges that this global climate change caused environmental and weather events—for example, the melting of polar ice caps, rising sea levels, and intensifying hurricanes—that caused the specific personal, property, or other such harms for which they are seeking abatement, injunctive relief, or particularized damages.<sup>220</sup>

The principal GHG at issue in these public nuisance cases is carbon dioxide, though plaintiffs also allege that other GHGs, including methane, also contribute to global climate change.<sup>221</sup> As previously indicated, the release of these gases is not particular to any specific company or even industry, as numerous human activities and natural occurrences release carbon dioxide, methane, and other GHGs. Among human operations, carbon dioxide is released through fossil fuel combustion at factories, power plants, and other manufacturing facilities around the world as well as through auto and airplane exhaust.<sup>222</sup> Natural sources include volcanic eruptions, ocean-atmosphere exchange (where the ocean absorbs and releases carbon dioxide), and, of course, the respiration processes of living, aerobic organisms (i.e. breathing).<sup>223</sup> When mixed in the earth’s atmosphere, carbon dioxide from one source cannot be distinguished from others.<sup>224</sup> In addition, there are currently fewer trees than in the past to absorb carbon dioxide before it enters the atmosphere due to deforestation to accommodate the human population’s housing and logging needs.<sup>225</sup>

### 1. No Defendant Is a Cause in Fact of the Alleged Harms

Unlike traditional tort cases, lawsuits alleging global climate change harms do not seek recompense from a discrete, identifiable group of tortfeasors for contributing to a discrete, identifiable harm. These cases seek, in large part, to change the way the world makes and consumes

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219. See, e.g., *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 314 (2d Cir. 2009); Brief of Plaintiff-Appellants at 14, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) (No. 07-60756); Brief of Defendant-Appellee Coal Companies at 5–6, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) (No. 07-60756).

220. See *id.*

221. See Brief of Plaintiff-Appellants, *supra* note 219, at 15–16 n.2.

222. See *Human-Related Sources and Sinks of Carbon Dioxide*, U.S. ENVTL. PROT. AGENCY, [http://www.epa.gov/climatechange/emissions/co2\\_human.html](http://www.epa.gov/climatechange/emissions/co2_human.html) [hereinafter *Human-Related Sources*].

223. See *Natural Sources and Sinks of Carbon Dioxide*, U.S. ENVTL. PROT. AGENCY, [http://www.epa.gov/climatechange/emissions/co2\\_natural.html](http://www.epa.gov/climatechange/emissions/co2_natural.html).

224. See *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 345 (2d Cir. 2009).

225. See *Human-Related Sources*, *supra* note 222 (noting also that “[d]eforestation is a significant source of carbon dioxide emissions globally, but a minor source in the U.S.”).

energy.<sup>226</sup> Given the millions, or potentially billions, of sources for the gases at issue in these lawsuits, no defendant, or even handful of defendants, can be deemed the factual cause of the alleged harms.

Normally, a defendant must be the “but-for” cause of a harm to be subject to liability for that injury; in other words, but for the emissions of a specific defendant, plaintiffs would not have sustained the particular injuries alleged.<sup>227</sup> Because of the pervasive production of carbon dioxide, methane, and other GHGs around the world from a multitude of sources, no reasonable factfinder could conclude that the but-for causation test can be satisfied with respect to any defendant in these cases. No one source, or even a handful of sources, could directly impact the earth’s weather or its climate. As the *Kivalina* court explained, all persons, entities, and industries “which use[] or consume[] such fuels bear[] at least some responsibility” for any harms that man-made emissions allegedly cause.<sup>228</sup>

When but-for causation cannot be established because there are multiple tortfeasors, courts have experimented with alternative causation theories. The most widely accepted of these alternative theories is the “substantial factor” test, which states that “the fact-finder [can] decide that factual cause existed when there were [multiple sufficient] causes—each of two separate causal chains [were] sufficient to bring about the plaintiff’s harm, thereby rendering neither a but-for cause.”<sup>229</sup> This test was established for cases in which application of the but-for rule allowed each defendant to escape liability because the conduct of one defendant would have been sufficient to produce the same result.<sup>230</sup>

The *Restatement (Third) of Torts* warns against “confus[ed]” or “misused” applications of the substantial factor test “to provide a more lenient standard” for factual causation.<sup>231</sup> It states that “[t]he element that must be established” to prove cause-in-fact “is the but-for or necessary-condition standard.”<sup>232</sup> As previously indicated, individual actors could not have caused weather-related injuries on their own, meaning that no rational court evaluating actual proof could find that one defendant’s, or even a

226. See *Role of State Attorneys General*, *supra* note 19, at 339.

227. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 cmt. b (Proposed Final Draft No. 1, 2005).

228. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 n.4 (N.D. Cal. 2009).

229. RESTATEMENT OF THE LAW (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 cmt. j (Proposed Final Draft No. 1, 2010); *E.g.*, *Michie v. Great Lakes Steel Div., Nat’l Steel Corp.*, 495 F.2d 213, 216 (6th Cir. 1974) (“Like most jurisdictions, Michigan has had great difficulty with the problems posed in tort cases by multiple causes for single or indivisible injuries.”); *accord Vincent v. Fairbanks Mem’l Hosp.*, 862 P.2d 847 (Alaska 1993); *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991).

230. KEETON ET AL., *supra* note 100, § 41, at 268.

231. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 cmt. j (Proposed Final Draft No. 1, 2005).

232. *Id.*

handful of defendants’ emissions, were sufficient or necessary conditions for bringing about the alleged injuries.

Accordingly, plaintiffs have turned to other theories of causation, particularly the single indivisible injury rule and a new theory based on merely contributing to the risk of global climate change.<sup>233</sup> These theories may have some surface level appeal. For example, courts have used the single indivisible injury theory when two or more actors join to produce an indivisible injury.<sup>234</sup> Under the single or indivisible injury rule, “[w]hen the plaintiff presents evidence that she suffered a single indivisible injury at the hands of two or more tortfeasors, the burden is shifted to the tortfeasors to show that the plaintiff suffered separable injuries and that they can be apportioned and attributed separately to the different tortfeasors.”<sup>235</sup> Where damages cannot be apportioned, the wrongdoers are held jointly and severally liable for the entire harm.<sup>236</sup>

This theory, however, has very limited application. It was developed for cases, such as *Landers v. East Texas Salt Water Disposal Co.*, in which a discrete, identifiable number of independent actors caused a discrete, identifiable harm.<sup>237</sup> In *Landers*, defendants acting independently both caused large quantities of salt water to flood the plaintiff’s lake, thereby killing his fish.<sup>238</sup> In this situation, the plaintiffs were permitted to name

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233. See *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 356 (“[T]he fact that other persons contribute to a nuisance is not a bar to the defendant’s liability for his own contribution.”) (quoting RESTATEMENT (SECOND) OF TORTS § 840E); DAN B. DOBBS, *THE LAW OF TORTS* § 174, at 423 (West Grp. 2000).

234. DOBBS, *supra* note 233.

235. See *id.*

236. See *Landers v. E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952). Dobbs also explains:

When no one polluter independently releases enough hazardous material into the environment to cause harm, but the entire group of polluters, each acting independently, collectively release an amount sufficient to cause harm, courts may treat each as causal. One of four grounds may be available, depending on the exact facts. These include: (a) the substantial factor approach, (b) the single indivisible injury rule . . . ; (c) but-for causation, which will yield a finding of causation if the entire group of polluters collectively contributes exactly the number of units of pollution to cause harm, since in that case any one polluter would have avoided the harm by withholding his pollution; and (d) the argument that the group of singly insufficient causes is a variation of the duplicative cause or two fire cases where the total pollution is more than enough to cause harm, the extra pollution being compared to the “extra” fire. By statute, a number of persons may be liable for any given “release” of hazardous materials. See, e.g., the Superfund statute, 42 U.S.C. § 9607.

DOBBS, *supra* note 233 § 171, at 415 n.6.

237. DOBBS, *supra* note 233 § 171, at 415 n.6.

238. *Landers*, 248 S.W.2d at 732.

only one or some, but not all, of the potential defendants.<sup>239</sup> To avoid unfair liability, the named defendants were permitted “by proper cross action under the governing rules [to] bring in those omitted.”<sup>240</sup> Similarly, in *Michie v. Great Lakes Steel Division, National Steel Corp.*, the Sixth Circuit allowed a public nuisance action by thirty-seven Canadian residents against three United States corporations for emitting pollutants into the air that caused damage to plaintiff’s property.<sup>241</sup> The court stated that the effect of the single indivisible injury rule “is to shift the burden of proof as to which one was responsible and to what degree from the injured party to the wrongdoers.”<sup>242</sup> The concept of burden shifting is that in these types of narrow circumstances, defendants are better positioned to exculpate themselves or minimize their liability than plaintiffs are to determine which tortfeasor caused how much harm.

The joinder and burden-shifting aspects of the single indivisible injury rule, which are integral to the rule’s fair application, only work, as the *Restatement (Second) of Torts* recognizes, when the litigation only involves “a small number of tortfeasors, such as two or three.”<sup>243</sup> Otherwise, “there may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule may cause disproportionate hardship to defendants.”<sup>244</sup> The Restatement then suggests that even a hundred potential sources are too great for the single injury rule to function properly:

[I]f a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable for the entire damage because he cannot show the amount of his contribution may perhaps be unjust. Such cases have not arisen, possibly because in such cases some evidence limiting the liability always has been in fact available.<sup>245</sup>

In the context of these global climate change claims, there are billions of potential human and natural sources for carbon dioxide, methane, and other GHGs that, over decades, allegedly cause global climate change, making joinder and burden shifting an impossible assignment for any handful of defendants named in a case. Ironically, plaintiffs acknowledge this very fact in arguing why *they* cannot meet their causation burden, saying that tracing emissions back to individual defendants is an “impossible burden.”<sup>246</sup> As a result, plaintiffs want to be able to choose

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239. *Id.*

240. *Id.*

241. *Michie v. Great Lakes Steel Div., Nat’l Steel Corp.*, 495 F.2d 213, 215 (6th Cir. 1974).

242. *Id.* at 218.

243. RESTATEMENT (SECOND) OF TORTS § 433B cmt. e (1965).

244. *Id.*

245. *Id.*

246. Appellants’ Opening Brief, *supra* note 169.

which businesses to name in their lawsuits and, through joint and several liability, have those defendants deemed the cause of all the damage that plaintiffs allege resulted from global climate change.<sup>247</sup> Not surprisingly, plaintiffs have chosen "deep pocket" American companies over whom the courts may have jurisdiction and not sources in China, India, and other countries that, together, have also made significant contributions to the emissions at issue in these cases.<sup>248</sup>

Plaintiffs' contribution of the risk theory is similarly unsupported by tort law and, according to a recent federal district court opinion, unconstitutional.<sup>249</sup> Other experimental theories of causation, including market-share liability and enterprise liability, often raised in industry-wide, speculative mass tort suits also fail. Under market-share rules, liability is apportioned based on each defendant's share of the market for its harmful product or service.<sup>250</sup> Its goal is not to create industry-wide liability, but, as with the single indivisible injury rule, to reverse the burden of proof under the belief that, in the limited context where the foreseeability of the defect in a totally fungible, discreet product that a limited number of manufacturers produce (i.e. where a reasonable estimate of market share could be determined) is absolute, only the defendants are in the position to determine which of them is culpable.<sup>251</sup> Five or six states have adopted this theory, with most courts rejecting "the idea of liability based upon statistical rather than literal causation."<sup>252</sup>

Occasionally, enterprise liability has been applied in toxic tort and products liability cases to hold manufacturers of fungible and virtually identical products jointly liable when it cannot be established whose

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247. The plaintiffs in *Kivalina*, for example, suggested that "in a multiple polluter case sounding in public nuisance, it is not necessary to trace molecules. Rather, each polluter who contributes to the nuisance is liable." Plaintiffs' Consolidated Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) at 37, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 864 (N.D. Cal. 2009) (No. 4:08-cv-01138-SBA).

248. See JANE A. LEGGETT ET AL., CONG. RESEARCH SERV., RL 34659, CHINA'S GREENHOUSE GAS EMISSIONS AND MITIGATION POLICIES 8, fig. 2 (2008).

249. *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031, 2010 WL 2465498 (E.D. Wis. 2010) (holding that risk contribution violates due process).

250. DOBBS, *supra* note 233, § 176, at 430; see also *Tex. Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 668 (E.D. Tex. 1998) (In industry suits, "the nexus between cause and effect [for each defendant] is too attenuated to justify liability.").

251. See *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245 (Mo. 1984) ("This theory requires that plaintiffs join as defendants a number of . . . manufacturers sufficient to constitute a substantial share of the market. The burden then shifts to each defendant to exonerate itself or to join, by third party petition, other . . . producers not named by plaintiff"); see also *Sindell v. Abbott Labs.*, 607 P.2d 924, 935 (Cal. 1980).

252. DOBBS, *supra* note 233, § 176, at 431 (citing *Smith v. Eli Lilly & Co.* 560 N.E.2d 324 (Ill. 1990); *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991)).

product caused the harm.<sup>253</sup> Enterprise liability, however, hinges on some joint control of the risk among the defendants and a concurrent breach of a duty of care by those defendants.<sup>254</sup> Courts have fully appreciated this theory's unfairness for a large industry: "What would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers."<sup>255</sup> Thus, where courts have accepted enterprise liability, they generally require that a plaintiff first show that "the injury-causing product was manufactured by one of a *small* number of defendants in an industry."<sup>256</sup>

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253. See *Hall v. E.I. DuPont DeNemours & Co.*, 345 F. Supp. 353, 377–78 (E.D.N.Y. 1972).

254. Enterprise liability stems from the textbook case *Hall v. E.I. DuPont DeNemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), where a group of children were injured when the blasting caps with which they were playing detonated. *Id.* at 358. The explosions destroyed the blasting caps, thereby making it impossible to identify the manufacturer. *Id.* Despite this, the court denied the defendants' motion to dismiss, holding that the plaintiffs' allegations of joint knowledge and failure to provide a warning sufficed to defeat it. *Id.* at 386. The court explained that, "[w]here courts perceive a clear joint control of risk . . . the issue of who 'caused' the injury is distinctly secondary to the fact that the group engaged in joint hazardous conduct." *Id.* at 372. The court continued stating that "[j]oint control may be shown . . . [by] evidence that defendants, acting independently, adhered to an industry-wide standard or custom with regard to the safety features of blasting caps." *Id.* at 373–74. The court explained that the *Hall* plaintiffs alleged that defendants were aware that the blasting caps frequently injured children, that an industry organization kept statistics of such injuries, and that the defendants jointly lobbied against legislation requiring labels on the caps. *Id.* at 359. The court adopted a burden-shifting approach and concluded:

If plaintiffs can establish by a preponderance of the evidence that the injury-causing caps were the product of some unknown one of the named defendants, that each named defendant breached a duty of care owed to plaintiffs and that these breaches were substantially concurrent in time and of a similar nature, they will be entitled to a shift of the burden of proof on the issue of causation.

*Id.* at 380. The court in *Hall*, though, recognized the unfairness that could result in applying the theory to a large industry. *Id.* at 378. In part for this reason, courts rejected applying enterprise liability in the DES litigation. See *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 821 (E.D.N.Y. 1984); *Sindell*, 607 P.2d at 935.

255. *Hall*, 345 F. Supp. at 378.

256. *Hurt v. Philadelphia Hous. Auth.*, 806 F. Supp. 515, 532 (E.D. Pa. 1992) (refusing to apply enterprise liability for injuries stemming from lead-based paint when all possible tortfeasors were not sued). In *Hurt*, the court stated:

To prevail under the theory of enterprise liability a plaintiff must show that: (1) the injury-causing product was manufactured by one of a *small* number of defendants in an industry; (2) the defendants had joint knowledge of the risks inherent in the product and possessed a joint capacity to reduce those risks; and (3) each of them failed to take steps to reduce the risk but, rather, delegated this responsibility to a

Thus, the plaintiffs cannot satisfy any cause-in-fact theory, be it but-for, substantial factor, single indivisible injury rule, contribution of the risk, or some alternate theory.

## 2. Proximate or Legal Causation

Emitting gases as part of producing and using energy also is not of the type of conduct that gives rise to liability, thus making proximate cause an insurmountable obstacle in global climate change cases. Proximate cause raises “the question [of] whether the defendant *should be legally responsible* for the [alleged] injury.”<sup>257</sup> In this context, proximate cause is a question of law, not a fact issue to be left for summary judgment.<sup>258</sup> As a leading torts treatise recognizes, “[p]roximate cause . . . is not about causation at all but about the significance of the defendant’s conduct or the appropriate scope of liability, an issue that entails heavy elements of moral and policy judgment about the very particular facts of the case.”<sup>259</sup> Proximate cause is “based ‘upon mixed considerations of logic, common sense, justice, policy and precedent.’”<sup>260</sup>

The reason for this proximate cause limitation is that without it, liability “would go on forever, one harm leading endlessly to others,”<sup>261</sup> just like the domino effect of hitting the first lever in a Rube Goldberg machine.<sup>262</sup> As the United States Supreme Court explained:

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trade association.

*Id.* (quoting *Burnside v. Abbott Labs.*, 505 A.2d 973, 984 (Pa. Super. Ct. 1985)).

257. *KEETON ET AL.*, *supra* note 100, § 42, at 273 (emphasis added).

258. *Id.* § 41, at 273.

259. *DOBBS*, *supra* note 233, § 167, at 408. For example:

[S]uppose that a surgeon negligent performs a vasectomy. Because the surgery was negligently performed, the patient fathers a child. The child, at the age of 13, sets fire to the plaintiff’s barn. Is the surgeon liable for the loss of the barn? He was negligent in performing the vasectomy, and his negligence is a cause in fact of the fire and the loss of the barn. . . . Courts are likely in such a case to say that the surgeon’s negligence [is] not a proximate cause of the harm done.

*Id.* §180, at 444.

260. *Zaza v. Marquess and Nell, Inc.*, 675 A.2d 620, 635 (N.J. 1996) (quoting *Powers v. Standard Oil Co.*, 119 A. 273 (N.J. Super. Ct. 1923)).

261. *DOBBS*, *supra* note 233, § 181, at 445.

262. A Rube Goldberg machine, named for Pulitzer Prize winning cartoonist, sculptor, and author of the same name, is a comically involved, complicated invention, “laboriously contrived to perform a simple operation.” *WEBSTER’S NEW WORLD DICTIONARY* 1243 (2d ed. 1980).

In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation.<sup>263</sup>

In these global climate change cases, as in other speculative, industry-wide suits, “the nexus between cause and effect is too attenuated to justify liability” for each defendant.<sup>264</sup> Plaintiffs’ alleged harms are simply too remote from any one company’s or group of companies’ emissions.<sup>265</sup> These global climate change cases require too many links for a chain of causation to be established. Here, causation would start with one company’s operations and require the following unbroken, scientifically verifiable links: lawful emissions of GHGs; mixing with others’ GHGs in the atmosphere; materially increasing earth’s air and water temperatures, measurably affecting sea levels, polar ice, and other climate-related events; causing more frequent and intense weather events; and injuring plaintiffs beyond what would have occurred if the defendants’ conduct had not affected the earth’s climate.<sup>266</sup>

In addition, others’ GHG emissions, in mixing in the earth’s atmosphere, intervene and supersede any direct chain of causation.<sup>267</sup> Sources originating outside the United States emit an estimated 83% of the world’s carbon dioxide, not including naturally occurring sources—such as

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263. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992) (quoting *KEETON ET AL.*, *supra* note 100, § 41, at 264) (internal quotation marks omitted).

264. *Texas Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 668 (E.D. Tex. 1998).

265. Under the doctrine of remoteness, plaintiffs alleging “harm flowing merely from the misfortunes visited upon a third person by the defendant’s acts [are] generally said to stand at too remote a distance to recover.” *Holmes*, 503 U.S. at 268–69. “Remoteness is an aspect of the proximate cause analysis, in that an injury that is too remote from its causal agent fails to satisfy tort law’s proximate cause requirement.” *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 921 (3d Cir. 1999).

266. See *Comer v. Murphy Oil USA*, 585 F.3d 855, 860–61 (5th Cir. 2009); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009). In the *AEP* case, plaintiffs’ generally assert that these climate changes are adverse and seek damages without even attempting to tie the alleged effect to any specific event or set of injuries. See *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 314 (2d Cir. 2009).

267. JOHN L. DIAMOND, *CASES AND MATERIALS ON TORTS* 256 (West Grp., 1st ed. 2001) (“An intervening force is one which joins with the defendant’s conduct to cause the injury. Such a force, whether it be human, animal, mechanical, or natural is considered intervening because it occurs after the defendant’s conduct. An intervening force will only act to cut off proximate cause if it is characterized as superseding. . . . [W]hile courts are quick to find negligence of a third party foreseeable and hence not superseding, criminal acts are often characterized as extraordinarily unforeseeable and hence superseding.”). Generally, a party is not liable unless it “increase[s] an unreasonable risk of harm through its intervention.” *KEETON ET AL.*, *supra* note 100, at 305.

volcanoes and other significant releasers of carbon dioxide—methane, or other gases categorized as GHGs.<sup>268</sup> As a result, injuries that weather events allegedly cause, including climate change, are not among the harms a reasonable United States business would have foreseen as a consequence of operating utility companies or producing home heating oil or other energy products such that any of the defendants would have anticipated liability or, on their own, should have avoided the injury by acting more carefully. Acting on one’s own to avoid any theoretical liability for climate change or weather events, particularly given the economic disadvantages of doing so, would have been irrational and unreasonable.

If these lawsuits are allowed to proceed, this same group of companies will face lawsuits for every “harm” that a plaintiff can connect to global climate change. For example, every hurricane or flood will spawn lawsuits for property damage. Extended droughts and higher temperatures, which cause cash crops to wither in a particular region, will lead to lawsuits. Rises in sea levels that reduce access to beaches will lead to litigation. Hurricane Katrina, the erosion of Kivalina, and the concerns of the attorneys general in *AEP*, while significant, are not unique to those communities. In short, every weather-related event, including climate change, will give rise to a public nuisance lawsuit against the same handful of American companies.

### 3. As a Result, There is No Causation as a Matter of Law

Because cause-in-fact and proximate cause cannot be established in these weather-related cases, regardless of discovery, these lawsuits should be dismissed as a matter of law. A significant shortcoming of the Second Circuit’s ruling to allow the claims in *AEP* to proceed is that the courts fail to address the important causation issues, perfunctorily putting off consideration of causation until summary judgment.<sup>269</sup> The same is true with the initial Fifth Circuit panel decision.<sup>270</sup> They adhere to the traditional tort case tenet that the merits of a causation analysis may be elucidated during discovery.

In these global climate change suits, however, discovery will not add to the causation analysis. The plaintiffs can uncover no facts during discovery that can lead to a finding that any single source, or collection of sources, is the cause-in-fact of global climate change and the injuries upon which the lawsuits are based. Unlike traditional product liability litigation, the cases will not hinge on the discovery of a smoking gun document or the dramatic testimony of any witness. In fact, the connection between the emissions and the ultimate harm is so attenuated that a question exists of whether plaintiffs bringing such claims even meet the lower threshold for traceability required

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268. See LEGGETT ET AL., *supra* note 248, at 7.

269. See *AEP*, 582 F.3d at 347.

270. See *Comer*, 585 F.3d at 864.

for Article III standing.<sup>271</sup> As the trial judge in *Kivalina* stated, “[T]he pleadings make[] clear that there is no realistic possibility of tracing any particular alleged effect of global climate change to any particular emissions by any specific person, entity, [or] group at any particular point of time.”<sup>272</sup>

When causation can never be shown, forcing parties to spend years producing time-consuming, expensive discovery requests so that plaintiffs’ can go on fishing expeditions in dry river beds makes no sense. This was the policy behind the rulings of the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*<sup>273</sup> and *Ashcroft v. Iqbal*,<sup>274</sup> which require plausible evidence that a case can succeed even at the motion-to-dismiss stage.<sup>275</sup> In speculative, industry-wide cases, just getting to discovery can be the victory advocates seek. As Professor Richard Daynard of Northeastern University School of Law acknowledged in a comparable public nuisance lawsuit, “[o]ne of the litigation’s first benefits is access to industry documents through the discovery process”<sup>276</sup> because discovery “may provide materials that would help change public attitudes towards these cases.”<sup>277</sup> George Washington School of Law’s John Banzhaf echoed this sentiment, saying that “plaintiffs do not have to do much to win. Damage to reputation, or risk of it, may be enough.”<sup>278</sup>

#### IV. THE LIMITS OF NEGLIGENCE AND TRESPASS

As with most litigation, global climate change cases often include other tort theories, namely negligence and trespass.<sup>279</sup> These theories employ the

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271. *Kivalina*, 663 F. Supp.2d at 882.

272. *Id.* at 880.

273. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

274. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

275. See Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of the Twombly and Iqbal Supreme Court Decisions*, 33 HARV. J.L. & PUB. POL’Y (forthcoming 2010) (discussing the Court’s decisive break from the broad “notice pleading” standard, which evolved out of the Federal Rules of Civil Procedure and became incorporated into of many states’ analogous pleading rules, to the plausibility standard). The Court defined plausibility as “enough fact to raise a reasonable expectation that discovery will reveal evidence” of the wrongful conduct alleged. *Twombly*, 550 U.S. at 545 (emphasis added). In global warming public nuisance cases, no such wrongdoing or causation evidence exists to be “revealed” through discovery.

276. Richard A. Daynard, P. Tim Howard, & Cara L. Wilking, *Private Enforcement: Litigation as a Tool to Prevent Obesity*, 25 J. OF PUB. HEALTH POL’Y 408, 409 (2004).

277. Jeremy Grant, *Food Groups Get Taste of Fear*, FINANCIAL TIMES, Feb. 23, 2005, at 13.

278. Kate Zernike, *Lawyers Shift Focus From Big Tobacco to Big Food*, N.Y. TIMES, Apr. 9, 2004, at A15.

279. See, e.g., *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009).

same causation analysis as discussed above, so the insurmountable causation obstacles facing the public nuisance claims apply equally to them.

An additional challenge for negligence claims is establishing that each defendant owed a duty of care to the specific plaintiffs bringing the suits.<sup>280</sup> Duty is a relational concept between a defendant’s wrongful act and an identifiable plaintiff’s injury.<sup>281</sup> The issue of whether a duty exists, therefore, starts with the “question of whether the defendant is under any obligation for the benefit of the *particular plaintiff*.”<sup>282</sup>

As Dean Prosser has explained, to make that determination, a court must consider “the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.”<sup>283</sup> Thus, similar to the proximate causation analysis, duty “turns largely on public policy considerations.”<sup>284</sup> Such policy considerations often include:

- (1) foreseeability of harm to plaintiff; (2) degree of certainty that plaintiff suffered injury; (3) closeness of connection between defendant’s conduct and injury suffered; (4) moral blame attached to defendant’s conduct; (5) policy of preventing future harm; (6) extent of burden to defendant and the consequences to the community of imposing a duty . . . and (7) availability, cost, and prevalence of insurance for the risk involved.<sup>285</sup>

Whether a duty exists “is entirely a question of law, . . . and it must be determined only by the court.”<sup>286</sup> When the court finds that no duty can exist, only a judgment for the defendant may follow.<sup>287</sup>

Global climate change claims typically assert that defendants owed a general duty not to emit GHGs in a harmful manner—a duty to the world, so to speak.<sup>288</sup> For example, the complaint in *Comer* alleges that “[t]he [d]efendants had and continue to have a duty to conduct their business in such a way as to avoid unreasonably endangering the environment, public health, and public and private property, as well as the citizens of the State of Mississippi.”<sup>289</sup> As many lawyers will remember from Judge Cardozo’s famed decision, *Palsgraf v. Long Island Railroad Co.*, there is no general

280. VICTOR SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ’S TORTS 132 (11th ed. 2005).

281. KEETON ET AL., *supra* note 100, § 53, at 358.

282. *Id.* § 53, at 356 (emphasis added).

283. *Id.* § 53, at 358 (footnote omitted).

284. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1125 (Ill. 2004).

285. *See* KEETON ET AL., *supra* note 100, § 53, at 359 n.24 (citations omitted).

286. *Id.* § 37, at 236.

287. *Id.* (“It is no part of the province of a jury to decide whether a manufacturer of goods is under any obligation for the safety of the ultimate consumer, or whether the Long Island Railroad is required to protect Mrs. Palsgraf from fireworks explosions.”).

288. *See, e.g., Comer v. Murphy Oil USA*, 585 F.3d 855, 861 (5th Cir. 2009).

289. Third Amended Class Action Complaint at ¶ 33, *Comer v. Murphy Oil USA*, No. 1:05-cv-00436-LTS-RHW (S.D. Miss. Apr. 19, 2006).

notion of duty; it is specific to each person.<sup>290</sup> In *Palsgraf*, the New York Court of Appeals held that for a defendant to be liable in negligence, the plaintiff must be within the class of persons whom the defendant's conduct could foreseeably injure.<sup>291</sup> The court found that, while a railroad guard may have been negligent in helping a man carrying a package of explosives to board a train, he did not owe a duty to passengers—including Ms. Palsgraf—who were standing on the platform and not within his act's "orbit of danger" or "range of reasonable apprehension."<sup>292</sup> Today, this concept is generally referred to as the "zone of foreseeable risk."<sup>293</sup>

Courts have rejected attempts to impose a duty that would encompass an indeterminate class, expressing concern that defendants would not be able to foresee liability "to a boundless category of people" and that "imposition of a duty to an indeterminate class would make tort law unmanageable."<sup>294</sup> In *Webb v. Jarvis*, for example, the Supreme Court of Indiana held that a physician who prescribed drugs to a patient was not liable to that patient's victims who were shot as part of the patient's rage that was attributable to the drug's side effects.<sup>295</sup> The court reasoned that "[t]he duty of reasonable care is not, of course, owed to the world at large, but rather to those who might be foreseen as being subject to injury by the breach of the duty."<sup>296</sup> There was no relationship between the physician and injured parties, and imposing such expansive duty gave way to public policy and social consideration of the medication's utility.<sup>297</sup>

In *Gourdine v. Crews*, Maryland's highest court reached a similar conclusion when a diabetic driver suffered an adverse reaction to insulin

290. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

291. *Id.* at 99, 101; see also SCHWARTZ ET AL., *supra* note 280, at 403.

292. *Palsgraf*, 162 N.E. at 100–01.

293. See, e.g., David Hunter & James Salzman, *Responses to Global Warming: The Law, Economics, and Science of Climate Change*, U. PA. L. REV. 1741, 1747–48 (2007). "The risk reasonably perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf*, 162 N.E. at 100 (internal citations omitted). Judge Cardozo continued, "If the harm was not willful, [the plaintiff] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended." *Id.* at 101. Wisconsin, however, has adopted the minority view in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 101 (1928), taking the position that everyone owes a duty to the world at large. See *id.* at 103 (Andrews, J., dissenting). Even Wisconsin courts, however, have held that "the duty owed to the world is not unlimited but rather is restricted to what is reasonable under the circumstances." *Hocking v. City of Dodgeville*, 768 N.W.2d 552, 556 (Wis. 2009) (quoting *Hoida Inc. v. M & I Midstate Bank*, 717 N.W.2d 17, 28–29 (Wis. 2006)).

294. *Gourdine v. Crews*, 955 A.2d 769, 785 (Md. 2008) (citation omitted).

295. *Webb v. Jarvis*, 575 N.E.2d 992, 993 (Ind. 1991).

296. *Id.* at 997 (quoting *Thiele v. Faygo Beverage, Inc.*, 489 N.E.2d 562, 574 (Ind. App. 1986)).

297. *Id.* at 998.

medication and hit another car, killing its driver.<sup>298</sup> The court found that a drug manufacturer owed no duty to any individual a patient injured while using the manufacturer’s medicine.<sup>299</sup> Creating such a “duty to the world,” the court stated, would expand “traditional tort concepts beyond manageable grounds.”<sup>300</sup> Similar lines have been drawn by federal courts to include only “the limited class of people who, it is reasonable to believe, are entitled to expect the actor’s due care to them . . . even though it ‘invariably []cuts off liability to persons who foreseeably might be plaintiffs.’”<sup>301</sup>

No greater epitome of a duty to the world can exist than the allegations in these *global* climate change claims. American utility and energy companies have no duty to protect all Americans—or those in other countries, for that matter—from harms alleged to be associated with global climate change. Further, specific victims of Hurricane Katrina in Mississippi, land erosion in Alaska, or other climate and weather-related events were not within any zone of foreseeable risk by those who mine, produce, and use fossil fuels, whether or not those entities allegedly emit GHGs. Accordingly, the negligence claims must fail.<sup>302</sup>

Finally, trespass is inapplicable to climate change litigation because it requires the intent to physically be upon a particular piece of land.<sup>303</sup> The necessary intent “is for one ‘to be at the place on the land where the trespass allegedly occurred.’”<sup>304</sup> As with the duty in negligence law, this element is plaintiff or property specific.<sup>305</sup> Given the attenuated link between one’s emissions and a weather-related harm somewhere in the world, for anyone to emit gases for the purpose of causing storms to “trespass” on a particular person’s property is metaphysically impossible.

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298. *Gourdine*, 955 A.2d at 773.

299. *Id.* at 786–88.

300. *Id.* at 786.

301. *In re* Sept. 11 Prop. Damage and Bus. Loss Litig., 468 F. Supp. 2d 508, 531–32 (S.D.N.Y. 2006) (quoting 532 Madison Ave. Gourmet Foods, Inc. v. Tishman Constr. Corp., 750 N.E.2d 1097, 1103 (N.Y. 2001)) (brackets in original); *see also* Wilson Auto Enters., Inc. v. Mobil Oil Corp., 778 F. Supp. 101, 103–05 (D. R.I. 1991) (rejecting the plaintiff’s claim that a property owner owes a duty of care to subsequent purchasers to maintain his or her property in a certain condition and explaining that such an argument asserts a duty of care owed “to the world at large,” and “overlooks the fundamental principle of negligence law that liability requires a duty of care owed specifically to the plaintiff”).

302. *See* KEETON ET AL., *supra* note 100, § 53, at 357 (noting that liability for negligence cannot exist without a duty of care).

303. *See* Saucier v. Biloxi Reg’l Med. Ctr., 708 So. 2d 1351, 1357 (Miss. 1998); Blue v. Charles F. Hayes & Assocs., Inc., 215 So. 2d 426, 429 (Miss. 1968).

304. *Alexander v. Brown*, 793 So. 2d 601, 605 (Miss. 2001) (quoting KEETON ET AL., *supra* note 100, § 13, at 73).

305. *See* KEETON ET AL., *supra* note 100, § 13, at 73 (discussing the difference in liability between accidental and intentional entries onto another’s land).

## V. CONCLUSION

Industrial emissions of carbon dioxide, methane, and other gases have been inevitable byproducts of the industrial and post-industrial ages. During this time period, the world's population has increased exponentially, with significant demands on energy, food, and other natural resources.<sup>306</sup> To the extent that world leaders are willing and able to shift the world's economies away from fuels that emit GHGs or take other steps to reduce those emissions—due to allegations of global climate change or otherwise—they are doing so through international treaties and highly nuanced decisions in the political branches of government. They fully recognize that their decisions will have ripple effects throughout the world's economies and will have particular, potentially draconian effects on consumers of utilities and energy products.

It is understandable that environmental leaders might be frustrated at the pace at which the political process—namely the EPA, Congress, and other national leaders—is addressing their global climate change allegations. The same could be said about efforts to solve any perceived problem through the political process. While the courts are America's most democratic of institutions because they are open to everyone, not every lawsuit belongs in the courts. The lawsuit must represent a case or controversy and state a viable cause of action.

As this article has shown, plaintiffs have failed to state a claim in tort law. Treating the lawful production and consumption of utilities and other energy sources as a public nuisance, particularly given those products' immense social utility, would stretch the centuries-old tort beyond all rational moorings. The Rube Goldberg causation arguments asserted make proving cause-in-fact and proximate causation impossible, and companies do not have a duty under public nuisance or negligence law to protect people from weather-related harms. As the trial judges aptly explained in the cases brought to date, tort law does not provide trial courts with the standards for imposing limits on GHG emissions in any principled, rational, or reasoned manner. Thus, the federal courts of appeals should follow the rationale of the trial court judges, dismiss the claims, and defer these important public policy decisions to the political branches of government.

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306. See Jennifer Woodward, *Turning Down the Heat: What United States Laws Can Do to Help Ease Global Warming*, AM. U. L. REV. 203, 203–04 (1989).