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Katherine A. Guarino
GUARINKB@BC.EDU

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THE POWER OF ONE: CITIZEN SUITS IN THE FIGHT AGAINST GLOBAL WARMING

KATHERINE A. GUARINO*

Abstract: Plaintiffs seeking compensation from the effects of global warming have encountered challenging legal barriers. Until 2009, courts consistently dismissed global warming suits as political questions or for lack of standing. In *Comer v. Murphy Oil USA*, property owners along the Mississippi Gulf coast sued oil and energy companies in nuisance for emitting greenhouse gases that contributed to global warming and added to the intensity of Hurricane Katrina, which damaged their property. In 2009, the Fifth Circuit surprisingly held that a class of private citizens could satisfy both standing and the political question doctrine in a global warming suit. However, after winding through a complex procedural pathway, that decision was ultimately vacated the following year following the denial of a writ of mandamus by the Supreme Court. *Comer’s* companion case in the Second Circuit, *American Electric Power, Co.*, has been granted certiorari by the Supreme Court. That case should resolve the primary issues from *Comer*, namely standing and justiciability. It also marks the first opportunity for the Supreme Court to rule on the legitimacy of public nuisance claims against greenhouse-gas-emitting companies for injury from global warming. It is likely that the plaintiffs will be unable to prove causation, even if they succeed on the contentious issues of standing and justiciability.

Introduction

In 2005, the spectre of global warming descended incarnate upon the city of New Orleans.1 Beneath the wrath of a category four hurricane, the end of the world came.2 Death and destruction took hold as

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* Executive Editor, Boston College Environmental Affairs Law Review, 2010–11.

1 See Joseph B. Treaster & N.R. Kleinfeld, New Orleans Is Now Off Limits; Pentagon Joins in Relief Effort, N.Y. Times, Aug. 31, 2005, at A1 (“Offering up howling winds of as much as 145 miles an hour, the hurricane hit land in eastern Louisiana just after 6 a.m. Monday as a Category 4 storm, the second-highest rating, qualifying it as one of the strongest to strike the United States.”).

floodwaters surged, converting the city into a veritable waterworld. The Pentagon sent in the Navy to fight the invisible enemy, but even military force was no match for the devastation caused by 145 mile-per-hour winds, two-story-high waves, and breached levies. The view from above captured the true extent of the damage: a “community of houseboats,” fires lighting up deserted buildings, highways rearranged into awkward formations, bridges broken in half, buildings with 600 windows blown out, and bodies floating down canal streets. “It looks like Hiroshima,” a local governor said. This is the face of global warming. In one merciless display, the United States witnessed all of the most terrifying consequences of a warmer world.

According to the Intergovernmental Panel on Climate Change (IPCC), warming of our climate is “unequivocal.” Evidence of such warming is largely observational and includes increases in average global air and water temperatures, melting of snow and ice, and rising sea levels. Commonly known as “global warming” or “climate change,” this phenomenon has escalated within the last fifteen years. The IPCC cites an increase in greenhouse gases (GHGs) in the atmosphere as the primary cause of global warming. GHGs are atmospheric gases that absorb and give off radiation emitted by the Earth’s surface, the atmos-

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4 Treaster & Kleinfeld, supra note 1.

5 Id.

6 Id.


8 See Real Media Videorecording: From Science to Time to Vanity Fair: Global Warming Becomes a Hot Topic (The Center for Advanced Study, University of Illinois at Urbana-Champaign Feb. 8, 2007), available at http://willmedia.will.uiuc.edu/ramgen/CAS/cas2007–02–08.rv (identifying Hurricane Katrina as the single event that spurred the mainstream climate change movement).

9 IPCC Summary, supra note 7, at 2.

10 See id. at 2–3, 3 fig. SPM.1.

11 See id. at 2 (“Eleven of the last twelve years (1995–2006) rank among the twelve warmest years in the instrumental record of global surface temperature (since 1850.”).

12 See id. at 5.
Sphere, and clouds.\textsuperscript{13} Their ability to trap heat within the Earth’s surface is called the “greenhouse effect.”\textsuperscript{14} An increase in GHGs enhances the greenhouse effect, causing the Earth’s temperature to increase.\textsuperscript{15} Notably, the past decade replaced the 1990s as the warmest on record.\textsuperscript{16} The IPCC is highly confident that the cumulative effect of human industrial activities since 1750 has been global warming.\textsuperscript{17}

In September of 2005, a group of Hurricane Katrina victims seized upon the link between greenhouse gas emissions, global warming, and increased storm intensity, and sought revenge.\textsuperscript{18} In a class action suit that sought to change the course of environmental law, these plaintiffs sued 150 energy and oil companies in common law tort for emitting greenhouse gases that contributed to global warming, and in turn, increased the ferocity of Hurricane Katrina, damaging their property.\textsuperscript{19} The case, \textit{Comer v. Murphy Oil USA}, gained immediate attention as the first to solicit money damages under a tort cause of action for storm damage attributed to global warming.\textsuperscript{20}

The focus of this Note is on the obstacles to global warming suits, most of which the \textit{Comer v. Murphy Oil} plaintiffs overcame before the Fifth Circuit panel,\textsuperscript{21} and the potential for success of this type of global warming case before the Supreme Court. Part I introduces the two primary barriers to global warming suits, the political question doctrine, and standing, and demonstrates how these barriers have been overturned in some appellate courts.\textsuperscript{22} Part II explains how global warming plaintiffs have used common law tort causes of action to bol-


\textsuperscript{14} \textit{Id.} at 81–82.

\textsuperscript{15} \textit{Id.} The main GHGs are water vapor (H\textsubscript{2}O), carbon dioxide (CO\textsubscript{2}), nitrous oxide (N\textsubscript{2}O), methane (CH\textsubscript{4}), and ozone (O\textsubscript{3}). \textit{Id.} at 82.

\textsuperscript{16} Gerard Wynn, 2009 \textit{Set to Be Fifth Warmest Year on Record}, \textit{Reuters}, Dec. 8, 2009, \url{http://www.reuters.com/article/idUSTRE5B71SO20091208}.

\textsuperscript{17} \textit{See IPCC Summary, supra note} 7, at 5.

\textsuperscript{18} \textit{See generally Third Amended Complaint, Comer v. Murphy Oil USA, 2007 WL 6942285 (S.D. Miss. 2007) (No. 1:05-cv-00436-LTS-RHW), 2006 WL 1474089}.

\textsuperscript{19} \textit{Id.} at 859.


\textsuperscript{21} \textit{See Comer v. Murphy Oil USA, 585 F.3d 855, vacated, 607 F.3d 1049 (5th Cir. 2011) (holding that the Court of Appeals lacked a quorum due to recusal of judges and that the panel opinion had properly been vacated).}

\textsuperscript{22} \textit{See infra Part I}.
ster the validity of their claims. Part III analyses *Comer v. Murphy Oil USA*, the case that knocked down more barriers than had any previous global warming case, but ultimately succumbed to a procedural technicality. Finally, Part IV addresses the potential problems a global warming case of this type will encounter with proving the issue of causation before the Supreme Court.

**I. The Justiciability and Standing Barriers**

Since their inception, global warming suits have faced challenging legal barriers. The most significant barriers have been justiciability of a global warming claim and standing to sue for a crisis affecting millions.

A. *The Political Question Doctrine*

One of the most challenging obstacles facing global warming plaintiffs is justiciability, or the political question doctrine. Under Article III of the Constitution, the federal courts only have jurisdiction over questions, issues, cases, and controversies that are "justiciable." A matter is "justiciable’ when it is constitutionally capable of being decided by a federal court." Conversely, "nonjusticiability" or a "political question" exists when a matter has been committed exclusively to the political branches by the Constitution or by federal law. In that case, a federal court would not have jurisdiction over the matter. When a matter is justiciable, however, a federal court has an obligation to exer-

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23 See infra Part II.
24 See infra Part III.
25 See infra Part IV.
27 See Am. Bar Ass’n, supra note 26, at 183; Drabick, supra note 26, at 507, 510; Merrill, supra note 26, at 294–99, 319–28.
29 U.S. Const. art. III, § 2; Comer, 585 F.3d at 869.
30 Comer v. Murphy Oil USA, 585 F.3d 855, 869 (5th Cir. 2009).
31 Id.
32 Id.
cise jurisdiction over it.\textsuperscript{33} The policy behind this duty is to prevent a court from dismissing an action because it has political implications.\textsuperscript{34} In practice, dismissal for nonjusticiability has been rare; since \textit{Baker v. Carr} in 1962, discussed below, the Supreme Court has only dismissed two cases as political questions.\textsuperscript{35} The Court has yet to rule explicitly on the justiciability of a global warming claim.\textsuperscript{36}

1. The \textit{Baker} Factors

Until the 1960s, determining which matters were better left to other branches of the government was a confusing and disorderly task.\textsuperscript{37} \textit{Baker v. Carr} rescued the doctrine of justiciability from irregular application by proposing a list of six “formulations” that describe a political question:\textsuperscript{38}

\[
[(1)] \text{a textually demonstrable constitutional commitment of the issue to a coordinate political department; or} \quad [(2)] \text{a lack of judicially discoverable and manageable standards for resolv- ing it; or} \quad [(3)] \text{the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or} \quad [(4)] \text{the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or} \quad [(5)] \text{an unusual need for unquestioning adherence to a political decision already made; or} \quad [(6)] \text{the potentiality of embarrassment from multifarious pronouncements by various departments on one question.}
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\textsuperscript{33} Id. at 874–75.

\textsuperscript{34} Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 230 (1986) (”[U]nder the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”).


\textsuperscript{36} \textit{See generally} Massachusetts v. EPA, 549 U.S. 497 (2007) (global warming case that did not raise justiciability as an issue).

\textsuperscript{37} Baker v. Carr, 369 U.S. 186, 210 (1962) (recognizing that the attributes of the political question doctrine “in various settings, diverge, combine, appear, and disappear in seeming disorderliness”).

\textsuperscript{38} Id. at 217 (establishing six justiciability factors).

\textsuperscript{39} Id.
The *Baker* Court ensured that these factors would not be used to block legitimate cases from federal court by setting a high standard for non-justiciability. The effect has been rare assertion of the political question doctrine in most cases, including common law tort claims. However, the political question doctrine has presented a challenge for plaintiffs in the nascent area of global warming.

The Supreme Court later added a threshold requirement to the *Baker* analysis: “whether and to what extent the issue is textually committed” to a political branch. In *Nixon v. United States*, the Court set out a two-pronged test for determining whether this threshold was met: (1) identification of the issues that the plaintiff’s claims pose and (2) interpreting the constitutional text in question to determine the extent to which the issues are “textually committed” to a political branch.

2. Global Warming Claims are Held Justiciable

The first global warming case to apply the *Baker* factors was *Connecticut v. American Electric Power Co.* (*AEP*). When *AEP* was brought before the District Court for the Southern District of New York, the court conservatively chose to view the global warming issue as too complex and too entwined with politics to be justiciable. However, by the time the case reached the Second Circuit on appeal, the first global warming case, *Massachusetts v. EPA*, had been handed down by the Su-

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40 Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 321 (2d Cir. 2009), cert. granted, 79 U.S.L.W. 3542 (U.S. Dec. 6, 2010) (No. 10–174) (“Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question’s presence.” (quoting *Baker*, 369 U.S. at 217)).
42 Comer v. Murphy Oil USA, 585 F.3d 855, 873 (5th Cir. 2009).
44 Nixon, 506 U.S. at 228.
45 See id.; see also Comer, 585 F.3d at 875.
47 *Am. Elec. Power Co.*, 406 F. Supp. 2d at 271 n.6, 273–74 (“Because the issue of Plaintiffs’ standing is so intertwined with the merits and because the federal courts lack jurisdiction over this patently political question, I do not address the question of Plaintiffs’ standing.”); see also *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (holding that Inupiat Eskimos’ public nuisance claims against energy companies for their contribution to global warming, which caused erosion on plaintiffs’ property, constituted a nonjusticiable political question).
Although that case did not explicitly address the justiciability issue, it stands for the principle that federal courts have jurisdiction to hear cases alleging global warming as an injury.49 By upholding a state’s standing to sue for injury deriving from the EPA’s failure to regulate greenhouse gas emissions, the Supreme Court had endorsed, for the first time, global warming suits in general.50

In the wake of Massachusetts v. EPA’s recognition of global warming as an adequate injury for standing—and in effect, nonjusticiability51—the Second Circuit reversed.52 Applying the Baker factors, the Second Circuit in AEP rejected the power companies’ argument that the plaintiffs’ use of a federal common law nuisance cause of action to reduce domestic carbon dioxide emissions would “impermissibly interfere with the President’s authority to manage foreign relations.”53 The court countered that the plaintiffs were not asking the court “to fashion a comprehensive and far-reaching solution to global climate change.”54 Instead, they were seeking to limit the emissions of only the six defendant plants based upon their contention that these defendants are causing them injury.55 Assessing the second Baker factor, the court reasoned that complex federal public nuisance cases have been commonplace during the past century of legal history,56 and that “well-settled principles of tort and public nuisance law” have frequently been used to analyze a variety of new and complex problems.57

48 See generally Massachusetts v. EPA, 549 U.S. 497 (2007) (holding that a global warming-based claim was justiciable).
49 See id. at 498 (recognizing that the EPA’s refusal to regulate greenhouse gases resulted in real risk of harm to Massachusetts); Massachusetts v. EPA, 415 F.3d 50, 60 (D.C. Cir. 2005).
51 See Massachusetts v. EPA, 549 U.S. at 526; see supra note 50 (“Court cases around the country had been held up to await the decision in this case.”); see also Howard Shapiro et al., Second Circuit Reinstates Lawsuit Claiming GHG Emissions from Six Utilities Constitute Nuisance Under Federal Common Law, Van Ness Feldman (Sept. 24 2009), http://www.vnf.com/assets/attachments/529.pdf (discussing the Second Circuit’s heavy reliance on Massachusetts v. EPA in AEP).
53 Id. at 324.
54 Id. at 325.
55 Id.
56 Id. at 326–27.
57 Id. at 326–28.
As to the third Baker factor, defendants argued that the complexities surrounding global warming give way to “unmanageable policy questions a court would then have to confront” in deciding the case. The court disagreed, holding that a federal court deciding a common law nuisance cause of action, “brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a national or international emissions policy.” The court added that the plaintiffs “need not await an ‘initial policy determination’ in order to proceed on this . . . claim,” and that Congress’s hesitancy to pass a law regulating greenhouse gas emissions does not equal an intent “to supplant the existing common law in that area.”

In assessing the final three Baker factors, the court recognized that the United States does not have a “unified” global warming policy. Thus, by deciding this case, it is impossible for the court to “demonstrate any lack of respect for the political branches, contravene a relevant political decision already made, or result in multifarious pronouncements that would embarrass the nation.” The defendants themselves cited legislation indicating that the United States intends to create legislation in the future, which will reduce the emission of greenhouse gases. In sum, the court held that the district court erred in its dismissal of the plaintiffs’ claim on justiciability grounds.

B. Standing

Another hurdle for global warming plaintiffs is standing. This prerequisite to suit limits the jurisdiction of federal courts to certain delineated “Cases” and “Controversies” under Article III, Section 2 of the U.S. Constitution. There are two basic forms of standing: state—

58 Am. Elec. Power Co., 582 F.3d at 326.
59 Id. at 325.
60 Id. at 331.
61 Id. at 330.
62 Id. at 332.
63 Id.
64 Am. Elec. Power Co., 582 F.3d at 332.
66 See Drabick, supra note 26, at 531–32; Merrill, supra note 26, at 294–99.
or *parens patriae*—standing and individual standing. As *parens patriae*, or “parent of the country,” a state asserts a “quasi-sovereign interest” in protecting the health and well-being of its citizens, as well as its own “interest independent of and behind the titles of its citizens, in all the earth and air within its domain.” The Supreme Court has allowed states a lowered bar, or special solicitude, for standing given their unique status. An individual, in contrast, sues for his or her own personal injury without the benefit of a lowered bar to standing. In the case of global warming plaintiffs, standing is problematic in three ways: (1) the uncertainty of the injury; (2) the sufficiency of scientific evidence linking global warming with its effects; and (3) the redressability of a world-wide problem.

1. Modern Standing: The *Lujan* Cases

In the 1980s, the Reagan Administration’s policies to stem the flow of citizen suits and limit the EPA’s enforcement capabilities narrowed the standing doctrine. These policies resulted in two landmark standing decisions, both written by Justice Scalia: *Lujan v. National Wildlife Federation* (*Lujan I*) and *Lujan v. Defenders of Wildlife* (*Lujan II*). The *Lujan* cases turned the modern standing doctrine into a strict test.

a. The Modern Standing Test

In *Lujan I*, decided in 1990, the Supreme Court identified two requirements that an individual must establish in order to bring suit: (1) require a plaintiff to have standing to file suit, but in practice, that is what Article III, Section 2 has been interpreted to require. Am. Bar Ass’n, supra note 26, at 184.


71 See id. at 240 (Harlan, J., concurring) (“The opinion . . . proceeds largely upon the ground that this court . . . owes some special duty to Georgia as a state, . . . while, under the same facts, it would not owe any such duty to the plaintiff if an individual.”).


73 Am. Bar Ass’n, supra note 26, at 185.

74 Hodas, supra note 69, at 461.

75 For Justice Antonin Scalia’s strict view of individualized harm in the standing doctrine as an “essential element” of separation of powers, see Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983), and Hodas, supra note 69, at 456.

some specific harm caused by the defendant; and (2) either a “legal wrong” caused by the challenged action, or that the plaintiff is “adversely affected or aggrieved . . . within the meaning of a relevant statute.” In that case, the plaintiffs’ claim failed to satisfy the standing test due to lack of specificity and certainty of injury.

If there was any question that *Lujan I* had altered the standing doctrine, Justice Scalia affirmed that the doctrine was indeed narrowed two years later in *Lujan II*. In his plurality opinion, Justice Scalia synthesized a three-part “irreducible constitutional minimum of standing” from past cases: (1) injury in fact, which is (a) “concrete and particularized” and (b) “actual or imminent”; (2) “a causal connection between the injury and the conduct complained of”; and (3) “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” The Court held that a nebulous future intent to observe endangered species in a foreign country did not constitute actual or imminent injury. Also, redressability could not be obtained because even if the Court granted the “injunction requiring the Secretary to publish [the plaintiffs’] desired regulation,” it would not be binding on the agencies and thus ineffective in producing the desired result. In his concurrence, Justice Kennedy foreshadowed the global warming cases of the new millennium with a broad proclamation: “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”

b. Burden of Proof for Standing and the Merits

Another important part of the *Lujan II* decision is its discussion of the requisite burden of proof of standing for each stage in the litigation. When a plaintiff seeks to assert standing at the pleading stage, “general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to

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77 *Lujan I*, 497 U.S. at 882–83.
78 *See id.* at 899–900.
79 *Hodas*, supra note 69, at 463. *See Lujan II*, 504 U.S. 555, 560 (setting out a new, strict test for standing, which Justice Scalia interpreted especially stringently where the plaintiff is not the direct object of government action or inaction).
80 *Lujan II*, 504 U.S. at 560–61.
81 *Id.* at 563–64.
82 *Id.* at 569–70.
83 *Id.* at 580 (Kennedy, J., concurring); *see Hodas*, supra note 69, at 466–67.
84 *Lujan II*, 504 U.S. at 561.
support the claim.”\textsuperscript{85} Summary judgment, on the other hand, requires an assertion of specific facts.\textsuperscript{86} Finally, when proving a claim on the merits, the facts must be adequately supported by the evidence.\textsuperscript{87} At this point in the litigation, the burden of proof is a preponderance of the evidence.\textsuperscript{88} Thus, proof of standing at the pleading stage requires a lower burden than proof on the merits.\textsuperscript{89}

2. Global Warming Suits

\textit{a. The Broadening of the Standing Doctrine for Global Warming Plaintiffs}

The first global warming case to be decided by the Supreme Court, \textit{Massachusetts v. EPA}, changed the course of the standing doctrine, broadening it to allow more plaintiffs standing to sue under a cause of action based on global warming.\textsuperscript{90} The case is considered a landmark decision in environmental law because of its bold grant of standing for a seemingly untraceable and unparticularized injury.\textsuperscript{91} Massachusetts sought review of the EPA’s decision not to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act.\textsuperscript{92} In its capacity as \textit{pars pro tetro}, the Commonwealth claimed both present and future injuries, such as loss of coastline due to rising sea levels and more intense storm events, “severe and irreversible changes to natural ecosystems,” and an increase in the spread of disease.\textsuperscript{93} The Court could have

\textsuperscript{85} Id. (citing \textit{Lujan I}, 497 U.S. 871, 889 (1990)).
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 269 (5th ed. 1984).
\textsuperscript{89} See \textit{Lujan II}, 504 U.S. at 561.
\textsuperscript{92} Compare \textit{Massachusetts v. EPA}, 549 U.S. at 521–26 (granting standing based on future and present harm from global warming), \textit{with Korinsky v. EPA}, 192 Fed. Appx. 71, 71 (2d Cir. 2006) (dismissing public nuisance action for lack of standing because future injury due to global warming was “too speculative”).
\textsuperscript{93} \textit{Massachusetts v. EPA}, 549 U.S. at 521–22.
followed *Lujan II* and rejected the claim of injury for lack of particularity, imminence, or traceability.\(^94\) Instead, the Court reached back to turn-of-the-century precedent, *Georgia v. Tennessee Copper Co.*, for the notion that states deserve “special solicitude” in the standing analysis when invoking a quasi-sovereign interest.\(^95\) In a 5–4 decision, the Court held that Massachusetts had alleged: (1) particularized injury, because of its ownership of substantial property that had already been swallowed by rising seas;\(^96\) (2) causation, because defendants had contributed significantly to the plaintiff’s injuries by refusing to regulate greenhouse gas emissions;\(^97\) and (3) redressability, because even an incremental improvement in the plaintiff’s harm would help redress the injury.\(^98\)

*Massachusetts v. EPA* gave plaintiffs with pending global warming cases new hope by opening up the courts to their claims for the first time.\(^99\) However, the decision on standing was surprising to the legal community, as evidenced by Chief Justice Roberts’s vigorous dissent.\(^100\) The dissent accused the majority of using “the dire nature of global warming . . . as a bootstrap for causation and redressability.”\(^101\) It further argued that the plaintiff’s alleged injury was neither imminent nor actual, but “pure conjecture,” going so far as to deny that global warming could ever constitute a particularized injury.\(^102\) In spite of these concerns, the majority of the Supreme Court placed its imprimatur on global warming suits in general,\(^103\) giving future global warming litigants positive authority to cite in their arguments.\(^104\)

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94 *Lujan II*, 504 U.S. at 560.

95 *Massachusetts v. EPA*, 549 U.S. at 518, 520 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)) (“It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”). The Court “adopt[ed] a new theory of Article III standing for States,” even though no party or lower court judge had cited *Tenn. Copper Co.* in its brief. Id. at 539–40 (Roberts, C.J., dissenting).


97 Id. at 523–25.

98 Id. at 525–26.


101 Id. at 543.

102 Id. at 542.


104 See, e.g., *Comer v. Murphy Oil USA*, 585 F.3d 855, 865 (5th Cir. 2009).
b. The Second Circuit Grants Non-State Entities Standing for Global Warming

AEP, a public nuisance action for global warming injury brought by a group of states, land trusts, and a city, solidified the new broader standing analysis of *Massachusetts v. EPA* and extended it to non-state parties. In that case, the plaintiffs sued electric power plants for injuries arising from defendants’ contribution to global warming by burning fossil fuels. The states and city asserted a litany of present and future injuries, including temperature increase leading to a decrease in mountain snowpack used for drinking water, earlier spring melting, flooding, and sea level rise, which had already begun to inundate their coastal property and would continue without abatement. The trusts claimed the following “special” future injuries: a decrease in the ecological value of their properties, permanent inundation of some of their property, and destruction of wildlife habitat from smog and salinization. At the district court level, the plaintiffs’ claims were dismissed as nonjusticiable. The district court judge refused to analyze the issue of standing because it “would involve an analysis of the merits of Plaintiffs’ claims.”

However, on appeal, the Second Circuit vacated the lower court’s decision, holding that the state plaintiffs had asserted concrete, particularized, and redressable injury that was “fairly traceable” to the actions of defendants, thus meeting the standing test under *Lujan II*. For the first time, non-state plaintiffs—New York City and the land trusts—were also granted standing for asserting similar injuries. Since the court vacated and remanded back to the district court, it never addressed the merits of the case. In December of 2010, the Supreme Court granted certiorari to *American Electric Power Co.* This will be the first opportunity for the Supreme Court to rule on the legitimacy of public nuisance

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107 Id. at 317–18.

108 Id. at 318.


110 Id. at 271 n.6.


112 Id. at 371.

113 Id. at 393.

claims against greenhouse-gas-emitting companies for global warming injuries.\textsuperscript{115}

II. Tort Concepts in Citizen Suits Against Global Warming

Although in pre-Industrial Revolution England global warming was merely a glimmer of unknowable future, the English common law claim of public nuisance\textsuperscript{116} provided the key to future global warming suits.\textsuperscript{117} Its broad applicability to communal annoyances of all types and its ability to adapt to unforeseen causes of action makes public nuisance the perfect tool for plaintiffs affected by global warming.\textsuperscript{118} It is also an effective vehicle for overcoming the justiciability barrier because “[c]ommon-law tort claims are rarely thought to present nonjusticiable political questions.”\textsuperscript{119}

A. Public Nuisance

Public nuisance is defined as “an unreasonable interference with a right common to the general public.”\textsuperscript{120} An interference may be deemed unreasonable if: (1) it “involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience”; (2) “the conduct is proscribed by a statute, ordinance or administrative regulation”; or (3) “the conduct is of a continuing nature or has produced a permanent or long-lasting


\textsuperscript{116} Public nuisance originated in English common law in the early 1600s, was later adopted by the American colonies, and entered the realm of civil common law around the turn of the twentieth century. See Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 350 (2d Cir. 2009), cert. granted, 131 S. Ct. 813 (2010); Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755, 790 (2001).

\textsuperscript{117} See, e.g., Massachusetts v. EPA, 549 U.S. 497 (2007); Georgia v. Tenn. Copper Co., 206 U.S 230, 236 (1907); Missouri v. Illinois, 180 U.S. 208, 214 (1901); Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009); Am. Elec. Power Co., 582 F.3d at 350.

\textsuperscript{118} See, e.g., Massachusetts v. EPA, 549 U.S. 497 (property damage from global warming); Tenn. Copper Co., 206 U.S. at 236 (cross-border air pollution); Missouri v. Illinois, 180 U.S. at 214 (cross-border water pollution); Comer, 585 F.3d at 859 (property damage from intensified effects of Hurricane Katrina caused by defendants’ contributions to global warming); Am. Elec. Power Co., 582 F.3d at 350 (harm to human health and natural resources from global warming).

\textsuperscript{119} Comer, 585 F.3d at 873.

\textsuperscript{120} Restatement (Second) of Torts § 821B (1979). This right has traditionally been afforded broad construction. Am. Elec. Power Co., 582 F.3d at 328. Unlike private nuisance, which protects an individual’s right to enjoyment of his own property, public nuisance protects the collective right of a considerable number of persons to enjoy public property. Id.
effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.”  The elements that must be proven are that (1) a nuisance exists, (2) defendant’s actions caused the nuisance, and (3) plaintiff suffered injury or damage proximately resulting from the nuisance. A proximate cause “directly produces an event,” and without that cause, the event would not have occurred. It places a limit on the liability of an individual for his actions. If the chain of causation alleged to prove proximate cause is too attenuated, courts will usually dismiss the claim.

1. Early State Claims of Public Nuisance

Following the Supreme Court’s model in Massachusetts v. EPA, plaintiffs have taken to citing early public nuisance cases to support their global warming claims. The earliest public nuisance claims tried by the Supreme Court involved cross-border pollution. These turn-of-the-twentieth-century suits were brought by states in their capacity as parens patriae to protect the health and well-being of their citizens, as well as to uphold the states’ own quasi-sovereign interest “in all the earth and air within its domain.” In Missouri v. Illinois, the Supreme Court recognized a nuisance claim for pollution of a river by a neighboring state. The Court noted that “an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence,” and that the risk of injury must be real and immediate. Based on the undisputed facts and state water rights precedent, the Court granted the plaintiff’s injunction. Similarly, in 1907, Georgia v. Tennessee Copper Co. demonstrated that a

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121 Restatement (Second) of Torts § 821B (1979).
124 Id.
126 See supra Part I.B.2.a.
131 Id. at 248.
132 Id. at 248–49.
state could successfully prevent a company in a neighboring state from “discharging noxious gas” from its factories into the plaintiff’s own territory, causing the destruction of forests and crops. In recognizing this release of “noxious gas” as a public nuisance, the Court explained the history behind the cause of action:

When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

The Court held that Georgia had presented sufficient proof that the “noxious gas” injured Georgia’s territory so as to satisfy the standard set out in Missouri v. Illinois, and granted the plaintiff’s injunction.

2. Public Nuisance Claims to Combat Global Warming

Public nuisance claims have been used to combat pollution and statutory injuries since the sixteenth century. However, not until 2009, in the wake of a new environmental movement, did two groundbreaking cases use a public nuisance claim to combat global warming. The first public nuisance climate change case, American Electric Power Co. (AEP), demonstrated that both states and non-state entities had standing to bring suit for abatement of the nuisance. It also expanded on Massachusetts v. EPA’s recognition of the connection between global warming cases and cross-border pollution cases. Applying the Restatement definition of public nuisance, the Second Circuit held that the defendants’ contribution to global warming through emission of GHGs constituted a “substantial and unreasonable inter-

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133 Tenn. Copper Co., 206 U.S. at 236.
134 See id. at 239.
135 Id. at 237 (citing Missouri v. Illinois, 180 U.S. at 241).
136 Id. at 238–39.
137 Antolini, supra note 116, at 790.
139 See Am. Elec. Power Co., 582 F.3d at 358, 369.
140 See id. at 344.
ference with public rights in the plaintiffs’ jurisdictions” under Restatement section 821B(2)(a). The defendants also knew their emissions would cause a permanent or long-lasting effect. In deciding that the states had stated a claim under the common law of nuisance, the court emphasized the fact that the nuisance caused by climate change is of a “serious magnitude.”

Because the Supreme Court had only granted state plaintiffs standing to sue for global warming in *Massachusetts v. EPA*, the Second Circuit spent a full thirteen pages of its opinion addressing the standing of the non-state plaintiffs—municipalities and land trusts. The court recognized that the reasoning from pollution cases could easily be applied to the global warming cases at hand. After conducting an analysis of the Supreme Court public nuisance case *Illinois v. City of Milwaukee*, relying on the decisions of other circuits, and applying the Restatement sections 821B and C, the Second Circuit held that common law nuisance suits are available to private plaintiffs.

When the Second Circuit finally made the connection between pollution cases and global warming cases in *AEP*, the doors of the courthouse opened to citizen plaintiffs. By treating this global warming suit no differently than a common law public nuisance suit for abatement of pollution, the court recognized that this “new” cause of action is anything but novel. While in the past nuisance claims for pollution tended to be of a simple type, no case had ever held that the

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141 Id. at 352, 358, 369; Restatement (Second) of Torts § 821B (1979).
142 Id. at 353.
143 Id. at 358.
144 Id. at 358–71.
146 Id. at 363, 366 (citing *Illinois v. City of Milwaukee*, 451 U.S. 304, 317 (1981), Nat’l Sea Clammers Ass’n v. City of New York, 616 F.2d 1222 (3d Cir. 1980), and *City of Evansville v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979)).
147 Id. at 369.
complexity of a public nuisance claim could bar its use. The public nuisance of global warming fits the mold of past pollution cases simply because nothing in those cases required that the gas be “noxious” or the harm be immediate.

B. Trespass

Trespass actions are another viable way for environmental plaintiffs to combat global warming. Although quite similar to nuisance, trespass requires actual entry onto the land of another. Historically, trespass was a strict liability offense that could be triggered by merely tossing a rock into a neighbor’s yard. However, with the progress of late-twentieth century science, courts were forced to recognize that the invasion of invisible radioactivity or toxic gas was indeed “physical.” If the intrusion is invisible, the plaintiff has the added burden of proving sufficient damage to the property or persons involved. Since monetary damages are hard to approximate in trespass cases, the remedy given for trespass is an injunction. Recently, in *Comer v. Murphy Oil USA*, a class of plaintiffs sought damages for global warming injury by suing for trespass, in addition to other tort claims like nuisance and negligence.

III. *Comer v. Murphy Oil USA*: A Lesson in Breaking Down Barriers to Global Warming Suits

The perfect storm—and the perfect test case—struck the Fifth Circuit in 2009, giving legs to a burgeoning global warming suit move-

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150 Id.
151 Id. at 357.
152 Cutting & Cahoon, supra note 28, at 154.
153 Restatement (Second) of Torts § 158 (1965).
154 Cutting & Cahoon, supra note 28, at 155 (citing Robert H. Cutting & Lawrence B. Cahoon, *Thinking Outside the Box: Property Rights as a Key to Environmental Protection*, 22 *Pace Envtl. L. Rev.* 55, 61 (2005)). Later courts recognized that this view was in conflict with Industrial Revolution principles that airspace and water were “free goods” for waste disposal. Id.
155 Id. at 156; see also Restatement (Second) of Torts §§ 158–159 (1965). The Alabama Supreme Court in *Borland v. Sanders Lead Co.* stated: “[W]e may define trespass as an intrusion which invades the possessor’s protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.” 369 So. 2d 523, 528 (Ala. 1979).
156 Cutting & Cahoon, supra note 28, at 156; see also Borland, 369 So. 2d at 529 (holding that “substantial damage to the Res” is required to recover for trespass).
157 Cutting & Cahoon, supra note 28, at 159.
158 See *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009).
Two months after American Electric Power Co. (AEP) was handed down, Comer v. Murphy Oil USA became the first case to hold that a class of purely private citizens could satisfy both standing and the political question doctrine in a tort suit against greenhouse-gas-emitting energy companies. It was also the first case to solicit money damages for global warming injury. Despite its success before the Fifth Circuit panel, the case fell into a procedural abyss and met its definitive end upon the denial of a writ of mandamus to reinstate the favorable Fifth Circuit panel decision.

In Comer, the plaintiffs brought suit for compensatory and punitive damages under Mississippi common law of public and private nuisance, trespass, and negligence. The novelty of this case was readily apparent in its convoluted chain of causation: property owners along the Mississippi Gulf Coast sued oil and energy companies for emitting greenhouse gases that contributed to global warming, which in turn caused a rise in sea levels and added to the intensity of Hurricane Katrina, which damaged their property. The plaintiffs claimed that the defendants committed public and private nuisance by “intentionally and unreasonably us[ing] their property so as to produce massive...
amounts of greenhouse gases" causing injury to both the general public and the plaintiffs.\textsuperscript{165} Their negligence claim was that the defendants had a duty of care to avoid unreasonably endangering the environment and the public, and that the defendants breached that duty by emitting greenhouse gases, which caused damage.\textsuperscript{166} Finally, the plaintiffs alleged that the "defendants’ greenhouse gas emissions caused saltwater, debris, sediment, hazardous substances, and other materials to enter, remain on, and damage plaintiffs’ property," thus creating a trespass.\textsuperscript{167}

The District Court for the Southern District of Mississippi granted defendants’ motion to dismiss, dismissing \textit{Comer} for lack of standing and because the plaintiffs’ claims were nonjusticiable.\textsuperscript{168} The plaintiffs appealed to the Fifth Circuit, and prevailed on the issues of standing and justiciability.\textsuperscript{169} On February 26, 2010, the Fifth Circuit granted the a rehearing en banc.\textsuperscript{170} But it was not to be; one of the nine judges who had initially agreed to rehear the case recused himself.\textsuperscript{171} On May 28, 2010, five Fifth Circuit judges issued an order dismissing \textit{Comer}, not on the merits, but for the procedural reason of lack of a quorum.\textsuperscript{172} The order explained that the original grant of rehearing en banc had the effect of vacating the 2009 panel decision.\textsuperscript{173} In other words, the district court’s opinion dismissing the case had been reinstated.\textsuperscript{174} The \textit{Comer} plaintiffs responded by petitioning for an extraordinary writ of mandamus from the Supreme Court that would compel the Fifth Circuit to reinstate at least the appeal, and if a quorum was still lacking, the panel’s opinion.\textsuperscript{175} That petition was denied without comment on January 10, 2011.\textsuperscript{176}

The three judges who had signed the 2009 panel opinion filed two vigorous dissents.\textsuperscript{177} Judge Dennis called the vacation of the panel deci-

\begin{itemize}
\item \textsuperscript{165} \textit{Comer}, 585 F.3d at 860–61.
\item \textsuperscript{166} \textit{Id.} at 861.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} See \textit{Comer v. Murphy Oil USA}, 2007 WL 6942285 (S.D. Miss. 2007) (dismissing the case).
\item \textsuperscript{169} \textit{Id.} at 860, 879–80.
\item \textsuperscript{170} \textit{Comer v. Murphy Oil USA}, 585 F.3d 208 (5th Cir. 2010).
\item \textsuperscript{171} \textit{Id.} at 1049, 1055 (5th Cir. 2010); see also Stephen Patrick, \textit{Lack of Quorum Prompts Fifth Circuit to Dismiss Appeal of Climate-Related Lawsuit}, 41 \textit{Env’t Rep.} (BNA) 1235 (June 4, 2010).
\item \textsuperscript{172} \textit{Comer}, 607 F.3d at 1055; Patrick, \textit{supra} note 171.
\item \textsuperscript{173} \textit{Id.} at 1054.
\item \textsuperscript{174} See Schleifstein, \textit{supra} note 162; Wood, \textit{supra} note 162.
\item \textsuperscript{176} \textit{In re Comer}, 131 S. Ct. 902 (2011) (mem.).
\item \textsuperscript{177} \textit{Comer}, 607 F.3d at 1055–66.
\end{itemize}
sion and dismissal of the appeal “shockingly unwarranted” and “man-
ifestly contrary to law and Supreme Court precedents.”178 Both dissents
argued that a lost quorum did not warrant overturning the panel’s de-
cision, and that it robbed the plaintiffs of their right to appeal.179 How-
ever, the majority’s order did not completely foreclose the plaintiffs’
path to relief. In the final line of the order, the Fifth Circuit recognized
the plaintiffs’ right to petition the Supreme Court for certiorari.180 It is
unclear why the Comer plaintiffs chose to petition for a writ of manda-
mus over the conventional certiorari,181 but in doing so, they effectively
removed the merits of their case from Supreme Court adjudication.182
Although no longer good law in the Fifth Circuit,183 the “lost” panel
opinion is a valuable resource for other global warming plaintiffs at the
Supreme Court level.

A. Justiciability Ruled Not to Be a Barrier to Global Warming
Suits by Fifth Circuit Panel

The Comer plaintiffs were able to meet the justiciability require-
ments due to the Fifth Circuit panel’s total reliance on one of the six
Baker factors.184 Citing Nixon v. United States, the Fifth Circuit recognized
the factors as “open-textured, interpretative guides” that should not be
applied until the party moving to dismiss identifies a constitutional pro-
vision or federal law that commits a material issue exclusively to a po-
litical branch.185 Since the defendant energy companies failed to iden-
tify any such “textual commitment . . . to a federal political branch,”186
the court held that the issue was “clearly justiciable.”187 In other words,
because the only issues in the case were rooted in Mississippi common
law tort claims for damages, the court deemed an analysis of the Baker
factors unnecessary.188 The Comer defendants relied on the Southern

178 Id. at 1056.
179 Id. at 1055–66; see Patrick, supra note 171 at 1235.
180 Comer, 607 F.3d at 1055.
181 See Wood, supra note 162 (opining that the Comer plaintiffs had no choice but to pe-
tition for a writ of mandamus in order to keep the case alive).
182 See Schleifstein, supra note 162.
183 See id.
184 Comer v. Murphy Oil USA, 585 F.3d 855, 872, 875 (5th Cir. 2009).
185 Id. at 872.
186 Id. at 875.
187 Id. at 872.
188 Id. at 875. The court went on to clarify that statutes like the Clean Air Act and
Clean Water Act have never been held to preempt states from public nuisance actions
based in global warming issues. Id. at 878–79.
District of New York holding of nonjusticiability in *American Electric Power Co. (AEP)*, which was reversed on appeal just two weeks before this case was decided.\(^{189}\) The Fifth Circuit panel disagreed with the *AEP* district court decision because it failed to hold that a "specific issue . . . had been exclusively committed to a political branch by a federal constitutional or statutory provision."\(^{190}\) If the threshold requirement of textual commitment is not met, the issue is automatically justiciable.\(^{191}\)

As in *AEP*, the *Comer* defendants also argued for nonjusticiability by assuming the plaintiffs’ claims would “require the district court to fix and impose future emission standards upon defendants and all other emitters[, which] would be ‘impossible’ for a court to perform” because of its political nature.\(^{192}\) The Fifth Circuit held that defendants’ arguments, and the *AEP* district court’s reasoning, were flawed because state tort law provides “long-established standards for adjudicating the nuisance, trespass and negligence claims at issue.”\(^{193}\) In sum, since there was no constitutional provision or federal law that limited the plaintiffs’ state tort claim and because state tort law provided applicable standards by which the court could decide the issue, the plaintiffs’ tort claims were held to be justiciable.\(^{194}\)

**B. Massachusetts v. EPA as a Vehicle for Overturning the Standing Barrier**

The *Comer* plaintiffs were able to break through the standing barrier at the panel level because of two conditions: (1) the lowered bar to standing at the pleading stage;\(^ {195}\) and (2) reliance on *Massachusetts v. EPA*, the only global warming case the Supreme Court has yet addressed.\(^ {196}\) First, the plaintiffs were not required to prove any specific

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\(^{189}\) *Comer*, 585 F.3d at 876–77, 879.


\(^{191}\) Id. at 873.

\(^{192}\) Id. at 879.

\(^{193}\) Id. at 875.

\(^{194}\) Id. at 879–80.


\(^{196}\) *Comer*, 585 F.3d at 865 (comparing the defendants failed arguments in *Massachusetts v. EPA* with those of the *Comer* defendants); see Jackson, supra note 20 (“[T]he Fifth Circuit clearly felt constrained by the Supreme Court’s decision in *Massachusetts v. EPA*, which
The court simply assumed that the scientific reports "alleg[ing] a chain of causation between defendants' substantial emissions and plaintiffs' injuries" were true at this point in the litigation.\footnote{198} If the plaintiffs had been forced to defend their standing on the merits, they probably would not have succeeded.\footnote{199}

The second way in which the plaintiffs were able to meet this preliminary standing requirement was by standing on the shoulders of \textit{Massachusetts v. EPA}.\footnote{200} The Fifth Circuit panel explicitly relied on \textit{Massachusetts v. EPA} in \textit{Comer}, noting the similarity between the defendant oil and energy companies' argument that "traceability is lacking because their emissions contributed only minimally to plaintiffs' injuries" and that of the EPA in \textit{Massachusetts v. EPA}.\footnote{201} Since the Supreme Court in that case had concluded that contribution of emissions is enough to satisfy the fairly traceable standard, the defendants' argument in \textit{Comer} had to fail.\footnote{202}

It is surprising that the Fifth Circuit panel felt bound by \textit{Massachusetts v. EPA} because the star plaintiff in \textit{Massachusetts v. EPA} was a sovereign state, acting in its capacity of \textit{parens patriae}, whereas the plaintiffs in \textit{Comer} were private citizens.\footnote{203} The Supreme Court awarded Massachusetts "special solicitude" in the standing analysis based on the 100-year-old public nuisance case \textit{Georgia v. Tennessee Copper Co.}.\footnote{204} In contrast, the plaintiffs in \textit{Comer} were all private citizens who deserved no leniency in the determination of standing.\footnote{205} The Fifth Circuit may have fixated on the separate \textit{Lujan} standing analysis conducted by the Supreme Court to evaluate the Commonwealth's claims as a property owner.\footnote{206} In that analysis, the Supreme Court seemed to be loosening the once strict

\begin{thebibliography}{99}
  \bibitem{197} \textit{Comer}, 585 F.3d at 864.
  \bibitem{198} \textit{Id.}
  \bibitem{200} \textit{Comer}, 585 F.3d at 865.
  \bibitem{201} \textit{Id.} at 866 (citing Massachusetts v. EPA, 549 U.S. 497, 523 (2007)).
  \bibitem{202} \textit{See id.} at 865–66.
  \bibitem{203} \textit{Massachusetts v. EPA}, 549 U.S. at 518.
  \bibitem{204} \textit{Id.} at 518.
  \bibitem{205} Loria, \textit{supra} note 72.
  \bibitem{206} \textit{Massachusetts v. EPA}, 549 U.S. at 521–26.
\end{thebibliography}
standing requirements set out in Lujan. These parallel analyses made Massachusetts v. EPA confusing and easy to misinterpret. One plausible reading of the case is that it lengthened the chain of causation for standing in general. However, the Fifth Circuit reasoned that since the chain of causation in this case is one step shorter than in Massachusetts v. EPA, the plaintiffs had no need for special solicitude.

IV. Comer v. Murphy Oil USA: A Test Case For Future Global Warming Plaintiffs

In the words of T.S. Eliot, the end of Comer v. Murphy Oil USA came, “[n]ot with a bang, but with a whimper.” In the wake of the startling dismissal of Comer based on a procedural technicality and the subsequent denial of the unorthodox writ of mandamus, the Supreme Court has granted its sister case, American Electric Power Co. (AEP), certiorari. Because the Comer plaintiffs opted for a procedural resolution to their case instead of the usual certiorari, they essentially relegated the merits to the earlier-filed American Electric Power, Co. That case will answer the same questions posed by Comer, namely whether parties injured by the effects of global warming have standing and whether global warming issues are justiciable.

As the Supreme Court examines, for the first time, the merits of a public nuisance suit against greenhouse-gas-emitting companies, it will likely be influenced by the developing trend in lower courts toward acceptance of public nuisance as a vessel for litigating global warming tort suits. The fate of cases like AEP may be read through the lens of Com-

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207 See id. at 521–26.
209 Comer v. Murphy Oil USA, 585 F.3d 855, 865 (5th Cir. 2009); Massey, supra note 207, at 260. See generally Scalia, supra note 75.
210 Comer, 585 F.3d at 865 n.5.
214 Id.
215 Cook, supra note 35.
ex.216 Global warming plaintiffs should turn to the “lost” Fifth Circuit panel decision in *Comer* in forming their arguments. However, a complete victory on the merits for such global warming plaintiffs is dubious. Part IV.A, below, predicts that the Supreme Court, in *AEP*, will probably follow the Fifth Circuit panel’s original holding in *Comer* on the issues of standing, justiciability, and use of tort causes of action. As support for this decision, the Court will look to public nuisance pollution precedent and *Massachusetts v. EPA*.217 Part IV.B foresees difficulty on the issue of causation when the merits are finally decided.218 The chain of causation from injury to greenhouse gas emissions by individual defendants is simply too attenuated to satisfy proximate cause.219

A. In Future Global Warming Tort Suits, the Supreme Court Will Likely Resurrect the Lost Fifth Circuit Panel Decision on the Issues of Standing, Justiciability, and Tort Causes of Action

The only global warming case the Supreme Court has litigated is *Massachusetts v. EPA*.220 Although in that case the Supreme Court addressed a different claim—the ability of a state to challenge a rulemaking decision by the EPA—that case is pivotal in predicting how the Court will rule in *AEP*.221

The Court also has an interest in deciding this issue before it results in a flood of climate change suits.222 Even though no plaintiff has actually recovered for global warming injury, recent appellate decisions allowing such plaintiffs to have their day in court has opened a door that was once closed. Private citizens can now choose an energy plant at random to blame for storm damage or flooding in their coastal home.223 In light of this new judicial tolerance of global warming suits, it is likely that many plaintiffs will initiate such suits until the Supreme Court rules on the issue.224

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216 Donald, *supra* note 198 (suggesting the possibility of “read[ing] the tea leaves in Connecticut through the *Comer* lens”).

217 See Schleifstein, *supra* note 162 (summarizing *Massachusetts v. EPA* in connection with *Comer* for the recognition by the Supreme Court of global as a redressable injury).

218 Donald, *supra* note 198.

219 Id.

220 See id.

221 See id.

222 Rivkin, Jr. et al., *supra* note 148, at 14–15 (“In light of the scientific theory of how GHG emissions may drive global warming, the *Comer* decision’s ‘contribute to’ standard could open the courts to a flood of lawsuits seeking damages for weather-related events.”).

223 Id.

224 Am. Bar Ass’n, *supra* note 26, at 184.
1. Justiciability

Based on its own interpretations of the political question doctrine, the Supreme Court will likely uphold the justiciability of a state tort claim like the one in AEP. Since Massachusetts v. EPA did not deal directly with justiciability, global warming plaintiffs will have to rely on the political question standard as set out in Baker v. Carr and Nixon v. United States. The Fifth Circuit failed to apply the Baker factors at all because it found that the defendants had not proven that the plaintiffs’ state tort claim was textually committed to a political branch of government. The Court may find that the Fifth Circuit misread its political question doctrine precedent. Since Baker states that finding any one of its factors “inextricable from the case at bar” would implicate the political question doctrine, the Supreme Court may have implied that the factors should be analyzed as a whole.

However, the stronger argument seems to be that the 1993 case, Nixon, clarified the Supreme Court’s intent as to the 1962 Baker factors. In Nixon, the Supreme Court recognized that before the Baker factors could be applied, a preliminary assessment of whether the issue was textually committed to a political branch was necessary. This is a logical interpretation of Baker because the policy behind the Baker factors is in favor of upholding justiciability. This purpose is strengthened by the fact that, since Baker, the Supreme Court has only dismissed two cases for nonjusticiability, one of which was Nixon.

The Fifth Circuit panel in Comer cited extensive precedent for the notion that federal courts may not abstain from deciding a case once they have jurisdiction, and that the political question doctrine is a limited exception to that rule. The Supreme Court has held that a federal court cannot avoid its responsibility to decide a case merely because

\[\text{See generally} \quad \text{Nixon v. United States, 506 U.S. 224 (1993); Baker v. Carr, 369 U.S. 186 (1962).}\]
\[\text{See generally} \quad \text{Nixon, 506 U.S. at 224 (holding that the Baker factors are only triggered by the moving party’s identification of a constitutional provision or federal law that commits a material issue exclusively to a political branch); Baker, 369 U.S. at 217 (listing the factors for determining justiciability).}\]
\[\text{Comer v. Murphy Oil, USA, 585 F.3d 855, 875, 879 (5th Cir. 2009).}\]
\[\text{Rivkin, J.R. et al., supra note 148, at 9.}\]
\[\text{Id. at 10–11.}\]
\[\text{Nixon, 506 U.S. at 228.}\]
\[\text{Baker, 369 U.S. at 217 (“Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.”).}\]
\[\text{Comer, 585 F.3d at 873.}\]
\[\text{Id. at 872.}\]
it has political implications,\textsuperscript{234} lies outside the scope of a federal judge’s expertise, or because it is difficult, complex, novel, or esoteric.\textsuperscript{235} Global warming certainly has political implications because the government is currently deciding whether to pass legislation regarding greenhouse gas emissions.\textsuperscript{236} Tort recovery for injury from global warming is novel and possibly complex, but both of those qualities do not make it nonjusticiable.\textsuperscript{237} Therefore, in evaluating the justicability of the \textit{AEP} claims, the Supreme Court will likely agree with the Fifth Circuit’s panel opinion in \textit{Comer} that the state tort claim for injury from global warming is justiciable because there is no constitutional or statutory provision committing the issue to a political branch.\textsuperscript{238}

2. Standing

In a global warming case like \textit{AEP}, the Supreme Court will likely hold that the plaintiffs have standing to sue for tort injury from global warming because of its similar holding for global warming plaintiffs in \textit{Massachusetts v. EPA}.\textsuperscript{239} Although \textit{Massachusetts v. EPA} dealt with a statutory claim under the Clean Air Act, the Court still went through the same Article III standing analysis.\textsuperscript{240} This is because standing is a prerequisite for all suits.\textsuperscript{241} The main difference between \textit{Massachusetts v. EPA} and \textit{AEP} is that in the former case, the plaintiff was a state.\textsuperscript{242} However, the plaintiffs in \textit{AEP} include both states and private land trusts, and thus may cite \textit{Massachusetts v. EPA} as a case in which the Court granted state global warming plaintiffs special solicitude in the standing analysis.\textsuperscript{243}

Justices Scalia, Thomas, and Alito, and Chief Justice Roberts will almost certainly vote to deny standing based on their dissenting opinion in \textit{Massachusetts v. EPA}.\textsuperscript{244} There, Chief Justice Roberts recognized

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\item[235] \textit{Comer}, 585 F.3d at 869.
\item[236] \textit{See H.R. 97, 112th Cong. (2011)} (seeking to amend the Clean Air Act to exclude greenhouse gases).
\item[237] \textit{Comer}, 585 F.3d at 869.
\item[238] \textit{See id. at} 870.
\item[239] \textit{See Massachusetts v. EPA}, 549 U.S. 497, 526 (2007).
\item[240] \textit{Compare Massachusetts v. EPA}, 549 U.S. at 521–26, \textit{with Comer}, 585 F.3d at 862–69.
\item[241] U.S. Const. art. III, § 2.
\item[242] \textit{Massachusetts v. EPA}, 549 U.S. at 518.
\item[243] \textit{See id. at} 520.
\item[244] \textit{See id. at} 535–60. Justices Scalia and Thomas would likely also oppose a broad standing analysis based on their majority opinion in \textit{Defenders of Wildlife, Am. Bar Ass’n, supra note 26, at} 199 (citing \textit{Defenders of Wildlife}, 504 U.S. 555, 559–62 (1992)).
\end{enumerate}
\end{footnotesize}
the catastrophic implications of global warming, but, in the interest of efficiency, would have denied standing because it is a crisis that may ultimately affect “nearly everyone on the planet.”

Private individuals may also achieve standing based on *Massachusetts v. EPA*. The majority opinion contains no holding that says citizen plaintiffs cannot assert injury from global warming for standing purposes. On the contrary, it treats the Commonwealth as an injured property owner. The best argument for individual plaintiffs will be that the *Massachusetts v. EPA* decision granted *parens patriae* standing and proprietary standing concurrently, thus implying that Massachusetts would have achieved standing even if it were not a state. It is true that in making the subsidiary determination of proprietary standing, the Court exceeded its narrow duty of only ruling on the necessary issues. This type of analysis also made *Massachusetts v. EPA* a confusing decision to interpret—it was thoroughly criticized by Chief Justice Roberts’s dis-

\[245\text{ See } \textit{Massachusetts v. EPA}, 549 U.S. at 535 (Roberts, C.J., dissenting).\]
\[246\text{ See Stephanie Francis Ward, } \textit{Warming Up to Standing: In Greenhouse Gases Case, the High Court Broadens States’ Ability to File Claims}, A.B.A. J. E-REP., Apr. 6, 2007, at 1 (“The majority lowered the bar for standing, probably not just for states but for all potential plaintiffs . . . .”).\]
\[247\text{ *Massachusetts v. EPA*}, 549 U.S. at 522 (“Because the Commonwealth ‘owns a substantial portion of the state’s coastal property,’ it has alleged a particularized injury in its capacity as landowner.”).\]
\[248\text{ See } \textit{id. at 518–26}; \textit{see also Robert Meltz, CONG. RESEARCH SERV., RS22665, THE SUPREME COURT’S CLIMATE CHANGE DECISION: MASSACHUSETTS v. EPA 4 (2007)} (“As to the first prong of the black-letter standing test—whether plaintiff has demonstrated actual or imminent ‘injury in fact’ of a concrete and particularized nature—the Court homed in on Massachusetts’s status as owner of much of the commonwealth’s shore land.”).\]
\[249\text{ See } \textit{Meltz, supra note 247, at 4 (“Having described petitioners’ favored position with regard to standing, it was curious that the Court then undertook a fairly traditional standing analysis.”); P. Leigh Bausinger, Note, \textit{Welcome to the (Impenetrable) Jungle: Massachusetts v. EPA, the Clean Air Act, and the Common Law of Public Nuisance}, 53 VILL. L. REV. 527, 559 (2008).}\]
\[250\text{ See } \textit{Zdeb, supra note 99, at 1067 n.54 (recognizing the potential for misinterpretation of Massachusetts v. EPA’s “murky” standing analysis).}\]
sent. However, the message of Massachusetts v. EPA is clear: injury from global warming is a cognizable claim for standing purposes.

Based on the Supreme Court’s acceptance of standing based on global warming injury, global warming plaintiffs will likely satisfy the injury prong of standing. Since the Court already decided in Massachusetts v. EPA that loss of coastline from rising tides brought on by global warming is a “concrete” and “particular” injury under the Lujan test, it would likely agree with the Fifth Circuit that damage from increased storm severity, another effect of global warming, is a sufficiently particularized injury. In fact, the Massachusetts Court specifically recognized the connection between rising ocean temperatures from global warming and an increase in the “ferocity of hurricanes.”

Proving redressability by money damages in a future case may be more difficult. The AEP plaintiffs will not encounter this problem, as they seek an injunction, but money damages were requested in Comer

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251 See Massachusetts v. EPA, 549 U.S. at 539 (Roberts, C.J., dissenting).

The Court asserts that Massachusetts is entitled to “special solicitude” due to its “quasi-sovereign interests,” but then applies our Article III standing test to the asserted injury of the Commonwealth’s loss of coastal property. In the context of parens patriae standing, however, we have characterized state ownership of land as a “nonsovereign interes[1] . . . .” Id.

252 See Ward, supra note 245, at 1 (“I think [Massachusetts v. EPA] will be used as a springboard for further relaxed standards [of standing] in the lower courts.”); Bausinger, supra note 248, at 556, 558–59.


254 Massachusetts v. EPA, 549 U.S. at 522.

255 See Massachusetts v. EPA, 549 U.S. at 521–24 (recognizing the link between warmer ocean temperatures and an increase in storm severity); Comer v. Murphy Oil USA, 585 F.3d 855, 863 (5th Cir. 2009).

256 Massachusetts v. EPA, 549 U.S. at 521–22.

257 See Comer, 585 F.3d at 863, 867.

and could be a part of future climate change cases. Since *Massachusetts v. EPA* granted the Commonwealth merely a procedural remedy—the ability to challenge the EPA’s denial of their rulemaking petition—if future climate change plaintiffs request money damages, the Court may hold that the injury of global warming plaintiffs cannot be redressed by money damages.\(^{259}\) However, for standing purposes, the Court does not need to actually give the plaintiffs money; it simply must decide whether money would alleviate their injury in some way.\(^{260}\) Although, arguably, money will not lessen the effects of global warming, it will allow the plaintiffs the ability to rebuild and restore the property they lost.\(^{261}\) No court has ever granted money damages for injury from global warming. However, the Supreme Court need only look to the whole of tort law for the principle that an award of money damages can and does redress injuries from a myriad of sources.\(^{262}\)

*Massachusetts v. EPA* also stands for the principle that any contribution to global warming through greenhouse gas emissions is sufficient to prove causation in the standing analysis.\(^{263}\) The Fifth Circuit panel in *Comer* relied directly on the Supreme Court’s words in *Massachusetts v. EPA* that the EPA’s “meaningful contribution” to global warming by refusing to regulate greenhouse gases sufficiently proved traceability.\(^{264}\) The defendants’ alternative argument that “the causal link between emissions, sea level rise, and Hurricane Katrina is too attenuated,” was also dismissed because of its similarity to a failed argument in *Massachusetts v. EPA*.\(^{265}\) The Fifth Circuit relied also on the Supreme Court’s acceptance of the link between greenhouse gas emissions and global warming.\(^{266}\) It recognized that not only had the Court accepted “a causal chain virtually identical” to that of the plaintiffs, but it had gone one step further and recognized injury stemming from the EPA, an agency

\(^{259}\) *Massachusetts v. EPA*, 549 U.S. at 525–26. Redressability was not contested by the defendants in *Comer*, so the court held that if the injury was caused by defendants, it could be redressed by compensatory and punitive damages. *Comer*, 585 F.3d at 863–64.


\(^{263}\) *Massachusetts v. EPA*, 549 U.S. at 523–25.

\(^{264}\) *Comer*, 585 F.3d at 865 (citing *Massachusetts v. EPA*, 549 U.S. at 525).

\(^{265}\) *Id.*

\(^{266}\) *Id.* (citing *Massachusetts v. EPA*, 549 U.S. at 521–24).
that did not directly emit the greenhouse gases.\textsuperscript{267} It is clear from this comparison that the Fifth Circuit agreed with the Supreme Court’s treatment of the standing issue for global warming cases.\textsuperscript{268} Because of the stark similarity between the injury and causation alleged in \textit{AEP}, \textit{Comer}, and \textit{Massachusetts v. EPA}, it is likely that the Supreme Court would agree with the Fifth Circuit panel’s 2009 ruling when it hears \textit{AEP}.\textsuperscript{269}

\textbf{B. The Final Barrier: Proof of Causation}

Despite the recent successes of global warming plaintiffs on the preliminary issues of justiciability and standing, they have yet to encounter the most formidable barrier of all: proof on the merits.\textsuperscript{270} The difference between the burden of proof for standing at the pleading stage and the burden for proof on the merits is significant.\textsuperscript{271} At the pleading stage, the plaintiffs only need to make general allegations of harm, as yet unsupported by specific facts.\textsuperscript{272} The plaintiffs in \textit{Comer} succeeded before the Fifth Circuit panel based on this lowered bar to standing.\textsuperscript{273} However, the court stopped short of addressing the merits of the claims, and thus, of awarding damages at this stage.\textsuperscript{274} On the merits, global warming plaintiffs would be forced to support their claims by a preponderance of the evidence.\textsuperscript{275}

Proximate cause would have presented the greatest obstacle to the \textit{Comer} plaintiffs because the chain of causation from defendants’ emission of greenhouse gases, to global warming, to increased storm intensity, to Hurricane Katrina, to damaged property, was extremely attenuated.\textsuperscript{276} In fact, the Fifth Circuit judge in \textit{Comer} intimated that he would

\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} See \textit{Massachusetts v. EPA}, 549 U.S. at 521–25; \textit{Comer}, 585 F.3d at 865.
\textsuperscript{270} Donald, supra note 198; see Am. Bar Ass’n, supra note 26, at 184 (“It is very difficult for a plaintiff to win any type of global warming suit . . . .”).
\textsuperscript{271} \textit{Lujan II}, 504 U.S. 555, 561 (1992).
\textsuperscript{272} Id.
\textsuperscript{273} \textit{Comer}, 585 F.3d at 862–63.
\textsuperscript{274} Id. at 880.
\textsuperscript{275} \textit{Lujan II}, 504 U.S. at 561.

[It’s] important to note that the panel’s opinion mentioned in more than one place that its conclusion that the “fairly traceable” requirement for standing had been met in no way meant that the complaint could survive a proximate cause challenge in a motion to dismiss or motion for summary judgment.

Donald, supra note 198.
\textsuperscript{276} Id.
have affirmed a dismissal on proximate cause grounds.\textsuperscript{277} Similarly, District Court Judge Senter foresaw “daunting evidentiary problems” for the plaintiffs if they sought to prove causation by a preponderance of the evidence.\textsuperscript{278}

The Supreme Court, in addressing proximate cause in the \textit{AEP} case, will likely recognize that the early pollution cases analogized by global warming plaintiffs are in fact quite different when it comes to causation.\textsuperscript{279} In \textit{Georgia v. Tennessee Copper Co.}, for example, the chain of causation extended directly from the defendants’ isolated emission of “noxious gas” to the effect the gas had on the neighboring state.\textsuperscript{280} In contrast, global warming stems from an incalculable number of sources and affects the entire planet in ways that are still not fully understood by scientists. For global warming plaintiffs, the defendants’ emission of greenhouse gases is not the “but-for” cause of the injury-causing effect of global warming.\textsuperscript{281} For example, in \textit{Comer} that was Hurricane Katrina.\textsuperscript{282} Hurricanes are natural processes that would occur even without global warming.\textsuperscript{283} The \textit{Comer} plaintiffs’ contribution argument, while sufficient for standing, would likely be insufficient to prove tort proximate cause.\textsuperscript{284} Since no global warming claim brought under a tort cause of action has yet been litigated on the merits, global warming plaintiffs will be left without a means of supporting their tenuous claims.

\textbf{Conclusion}

Within the span of nine months, the Fifth Circuit flung open and then slammed shut the doors of the court on plaintiffs seeking money damages from contributors to global warming.\textsuperscript{285} But all is not yet lost. As one of the \textit{Comer} plaintiffs mused,

Although the victory was taken away from these citizens in the most unusual and unfortunate of ways, the refusal of the

\begin{itemize}
\item \textsuperscript{277} See \textit{Comer}, 585 F.3d at 864.
\item \textsuperscript{279} See, e.g., \textit{Georgia v. Tenn. Copper Co.}, 206 U.S. 230 (1907); \textit{Missouri v. Illinois}, 180 U.S. 208 (1901).
\item \textsuperscript{280} \textit{Tenn. Copper Co.}, 406 U.S. at 236.
\item \textsuperscript{281} See IPCC Summary, supra note 7, at 5, 8; \textit{Global Warming Basics}, NATURAL RES. DEF. COUNCIL, http://www.nrdc.org/globalWarming/f101.asp (last revised Oct. 18, 2005).
\item \textsuperscript{282} See \textit{Comer v. Murphy Oil}, USA, 585 F.3d 855, 858 (5th Cir. 2009).
\item \textsuperscript{284} See AM. BAR ASS’N, supra note 26, at 184; Donald, supra note 198.
\item \textsuperscript{285} Rivkin, Jr. et al., supra note 148, at 14.
\end{itemize}
United States Supreme Court to take action in no way erases the words so eloquently written by Judge James Dennis, nor does it diminish this first effort as a guide and an inspiration for the future.\textsuperscript{286}

Should the Supreme Court accept the challenge that thirteen Fifth Circuit judges shirked, and choose to resurrect the lost panel decision for \textit{American Electric Power, Co. (AEP)} and its progeny, it could mean a flood of citizen litigation for climate change.\textsuperscript{287}

In the past two decades, the effects of global warming have grown increasingly more bothersome, swallowing coastlines with rising tides, raising temperatures in already arid regions, and creating some of the most ferocious storms in history.\textsuperscript{288} These effects have caused injury to millions of people and their property, and will only continue to wreak further havoc.\textsuperscript{289} Once upon a time, the standing analysis was strict.\textsuperscript{290} Plaintiffs could not gain access to the courts with an attenuated claim of causation.\textsuperscript{291} However, the Supreme Court’s landmark decision in \textit{Massachusetts v. EPA} turned the tables in favor of global warming plaintiffs.\textsuperscript{292} In recognizing a seemingly endless chain of causation as sufficient to confer standing, the Supreme Court gave its imprimatur to future global warming suits.\textsuperscript{293} The problem is, standing does not end the inquiry. Once global warming plaintiffs drag their long chains of causation into a merits battle, their arguments may not have the same force. Under a higher proximate cause standard, “fair traceability” is no longer a viable connection between the defendants’ actions and the plaintiffs’ harm.\textsuperscript{294} The chain will break under the strain of tort causation.\textsuperscript{295}

\textsuperscript{286} Steven D. Cook, \textit{Dismissal of Climate Change Tort Lawsuit Stands as Supreme Court Denies Review}, 42 Env’t Rep. (BNA) 55 (Jan. 14, 2011).

\textsuperscript{287} See id.

\textsuperscript{288} Wynn, supra note 16. \textit{See generally IPCC Summary, supra note 7 at 2–8} (citing scientific findings of the varied effects of global warming on the planet).


\textsuperscript{290} See notes 69–78 and accompanying text.

\textsuperscript{291} See Lujan \textit{v.} Defenders of Wildlife, 504 U.S. 555, 560 (1992) (“there must be a causal connection between the injury and the conduct complained of-the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant ’”) (citing \textit{Simon v. E. Ky. Welfare Rights Org.}, 426 U.S. 26, 41–42 (1976)).

\textsuperscript{292} \textit{See generally} \textit{Massachusetts v. EPA}, 549 U.S. 497 (2007) (accepting injury from global warming as a justiciable claim).

\textsuperscript{293} See Ward, supra note 245, at 1; Bausinger, supra note 248, at 558–59.

\textsuperscript{294} See \textit{Lujan II}, 504 U.S. at 561; \textit{Comer v. Murphy Oil USA}, 585 F.3d 855, 862 (5th Cir. 2009).

\textsuperscript{295} See Donald, supra note 198.
For the meantime, the Supreme Court has not ruled on any tort global warming cases. *AEP* still stands as a triumphant beacon of judicial activism, lighting the way for cases like *Comer* that came closer than ever to victory against global warming contributors.\(^{296}\) The Second Circuit in *AEP* marked a departure from the strict standing test of *Lujan*, as would *Comer*, had the 2009 panel decision been left intact.\(^{297}\) Ultimate resolution of global warming tort suits in favor of the plaintiffs would likely encourage more victims of hurricanes and coastal inundation to bring suit against local greenhouse-gas-emitting villains.\(^{298}\) The time has come for the courts to choose the role they will play in defending the Earth from global warming.

\(^{296}\) Cook, *supra* note 211.


\(^{298}\) Rivkin, Jr. et al., *supra* note 148, at 14.