

05-5119-cv

United States Court of Appeals
for the
Second Circuit

OPEN SPACE INSTITUTE, INC., OPEN SPACE CONSERVANCY, INC.,
and AUDUBON SOCIETY OF NEW HAMPSHIRE,

Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR *AMICI CURIAE* THE ALLIANCE OF
AUTOMOBILE MANUFACTURERS, THE AMERICAN
PETROLEUM INSTITUTE, THE ASSOCIATION OF
INTERNATIONAL AUTOMOBILE MANUFACTURERS,
THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN
FOREST & PAPER ASSOCIATION, THE AMERICAN ROAD
& TRANSPORTATION BUILDERS ASSOCIATION, THE
CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, THE EDISON ELECTRIC INSTITUTE,
THE NATIONAL ASSOCIATION OF MANUFACTURERS,
THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION, and
THE NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
ON BEHALF OF DEFENDANTS-APPELLEES**

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STATEMENT OF *AMICUS* INTEREST

The Alliance of Automobile Manufacturers is a not-for-profit trade association representing car and light truck manufacturers. The Association of International Automobile Manufacturers is a not-for-profit trade association representing international manufacturers and distributors of motor vehicles in the United States. Together, their member companies employ more than 1.3 million people at more than 60 vehicle assembly plants throughout the United States.

The American Petroleum Institute (“API”) is a nationwide trade association representing over 400 member companies engaged in all aspects of the oil and natural gas industries, including exploration, production, refining, transportation and marketing. API’s members produce, among other things, fuels that are used for transportation, manufacturing, heating, power generation and other purposes.

The American Chemistry Council is a non-profit trade association representing the leading companies engaged in the business of chemistry. The business of chemistry is a \$520 billion enterprise and a key element of the United States economy.

American Forest & Paper Association (“AF&PA”) is the national trade association of the forest, paper and wood products industry. AF&PA members are engaged in growing, harvesting and processing wood and wood fiber; manufacturing pulp, paper and paperboard products from both virgin and recycled

fiber; and producing engineered and traditional wood products. These activities require the burning of organic fuels to supply steam, hot water, thermal oil, hot air, and other forms of energy, which is used to dry wood and paper, “cook” wood chips to make pulp, press wood panels, recover post-consumer fiber, recover used pulping chemicals, and the like. Energy is one of the most important inputs to the manufacture of AF&PA members’ products. The forest products industry is one of the largest consumers of electricity, but it generates more than half of that electricity itself, largely by burning waste wood and bark and spent pulping liquor produced in the pulping of wood.

The American Road & Transportation Builders Association is made up of more than 5,000 member organizations in the transportation construction industry, including construction contractors, professional engineering firms, federal, state and local transportation administrators, heavy equipment manufacturers, and materials suppliers.

The Chamber of Commerce of the United States of America (the “Chamber”) is the nation’s largest federation of businesses, representing an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. One important function of the Chamber is to represent the interests of its members in court on environmental issues of national concern to American

business. While virtually all of the nation's largest companies are Chamber members, more than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 71 percent of which have 10 or fewer employees. The Chamber is concerned about the impact of global warming public nuisance suits on both large and small producers and consumers of energy from fossil fuels.

The Edison Electric Institute ("EEI") is the association of U.S. investor-owned electric utilities and international affiliates and associates worldwide. EEI represents 97 percent of the investor-owned utilities in the U.S., and EEI members comprise more than 70 percent of the U.S. electric power industry.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Automobile Dealers Association ("NADA") represents 20,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair and parts sales. Together they employ in excess of 1,300,000 people nationwide, yet a significant number are small businesses as

defined by the Small Business Administration. NADA has an interest in this case because global warming nuisance suits could stifle the manufacture, distribution, sale and use of light, medium and heavy-duty motor vehicles.

National Petrochemical & Refiners Association (“NPRA”) is a national trade association of more than 450 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. NPRA’s members supply consumers with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants and the chemicals that serve as “building blocks” in making diverse products, such as plastics, clothing, medicine and computers.

Amici industries conduct operations that result in carbon dioxide (“CO₂”) emissions, primarily from the burning of fossil fuel to heat boilers and furnaces, and for other uses. In addition, the members of the *amici* automobile manufacturers’ associations produce motor vehicles that utilize fuel that contributes to CO₂ emissions. Several *amici* members also operate fleets of motor vehicles.

Whether greenhouse gas or CO₂ emissions should be regulated in some fashion is, as the District Court concluded, a political question for the legislative and executive branches. Many of the member companies represented by *amici* are engaged in voluntary programs to reduce greenhouse gas emissions intensity or

develop technological and other medium- and long-term, cost-effective responses to the issue of global climate change.¹ However, if plaintiffs' theory of the case were sustained, the routine operations of the industries and businesses represented by *amici* likely would be the target of future nuisance suits seeking to control greenhouse gas emissions. *Amici* strongly oppose regulation on a case-by-case basis through nuisance suits. Because man-made CO₂ emissions result primarily from fossil fuel combustion, mandatory regulation of such emissions through nuisance suits would require the courts to make fundamental threshold policy determinations concerning fossil fuel production, supply and usage, energy efficiency, and selection and use of other fuels. These issues raise complex, far-reaching, difficult and contentious international and national policy questions about the causes and impacts of global climate change and the most appropriate response thereto that the District Court correctly determined are "political questions" beyond the judiciary's powers and capacity. Allowing these suits would produce a patchwork system of uncertain and potentially inconsistent rulings and requirements for the affected economic sectors and the members thereof; would likely create competitive and other disadvantages to the detriment of *amici* industries and their customers; would adversely affect the public and

¹ Descriptions of these programs can be found at Climate VISION, *Private Sector Initiatives*, <http://www.climatevision.gov/initiatives.html> (last visited Feb. 28, 2006).

society as a whole; and would interfere with the international negotiating strategy that Congress and the President have established to address these very same issues.

The source of authority to file this brief is Rule 29(a), Federal Rules of Appellate Procedure.

ARGUMENT²

THE PROPOSED USE OF NUISANCE SUITS TO ADDRESS GLOBAL WARMING WOULD INVOLVE THE COURTS IN DECIDING POLITICAL QUESTIONS BEYOND THEIR JURISDICTION.

Summary

Plaintiffs allege that emissions of CO₂ contribute to global warming. CO₂ is emitted principally from the combustion of fossil fuel to produce energy. Thus, if global warming nuisance suits were allowed, any human activity that involves combustion of fossil fuel would become a potential target of nuisance suits. Moreover, under plaintiffs' theory, it would not matter where the emissions occur, because CO₂ emissions from any location allegedly mix in the upper atmosphere with other CO₂ emissions and allegedly contribute to warming worldwide. The result of plaintiffs' theory would be that any person or organization alleging damage from global warming would be able bring a nuisance suit against any person, company, municipality or other entity, wherever located, that plaintiffs

² The argument in this brief is the same argument the *amici* have made in the companion case, *State of Connecticut, et al. v. American Electric Power Company, Inc., et al.*, No. 05-5104-cv (2d Cir.).

believe is using energy in an inefficient or excessive manner, or that plaintiffs believe to be capable of using a less carbon-intensive fuel or of reducing CO₂ emissions in some other manner. The range of possible litigation targets is virtually endless, because combustion of fossil fuels, for both personal and business purposes, pervades American life.

Basically, what plaintiffs seek is nothing less than to have the judiciary decide how fossil fuel energy should be used in this country—a venture that would draw the judiciary deeply into difficult and contentious issues of national and international energy policy. The District Court correctly held that these issues of energy policy are political questions beyond the jurisdiction of the judiciary—questions that should be decided only after the kind of full debate and public participation that the political, legislative and administrative processes can provide. Congress and the President have recognized that global warming and energy policy are inextricably intertwined and should be addressed on a national and international basis. To address these issues in case-by-case litigation of nuisance suits can only lead to an unworkable patchwork of inconsistent and uncertain results, where no user of fossil fuel could be assured that its operation, even though compliant with existing law, could continue given the ever-present threat of a lawsuit—or perhaps multiple suits—seeking to control emissions.

I. Plaintiffs' Position Would Open the Door to Nuisance Suits Targeting Any Activity That Uses Fossil Fuel For Energy.

Although this suit is aimed at five electric utilities, the principles that plaintiffs advocate, if accepted, would confer on the judiciary the authority to review energy use practices throughout the United States. That is because most man-made CO₂ emissions come from combustion of fossil fuel to produce energy. As the U.S. Environmental Protection Agency (“EPA”) has noted, “[t]he most abundant anthropogenic [greenhouse gas], CO₂, is emitted whenever fossil fuels such as coal, oil, and natural gas are used to produce energy.” Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).³ As EPA has also noted, “[t]he production and use of fossil fuel-based energy undergirds almost every aspect of the U.S. economy.” *Id.* Thus, mandatory control of CO₂ emissions is tied inextricably to regulation of energy usage throughout American life. Nuisance suits based on global warming would offer a vehicle for any state, person or group claiming damage from that phenomenon to obtain judicial review of the energy usage practices of virtually any company or source. Such global warming nuisance suits almost certainly

³ “Within the United States, fuel combustion accounted for 95 percent of CO₂ emissions in 2003” and such “combustion has accounted for a nearly constant 80 percent of global warming potential (GWP) weighted emissions since 1990.” EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2003*, EPA 430-R-05-003 (“EPA Inventory”), at ES-5-ES-6, 21 (Apr. 2005), available at <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ResourceCenterPublicationsGHGEmissionsUSEmissionsInventory2005.html> (last modified Aug. 2, 2005).

would draw the judiciary into reviewing industrial energy usage on a piecemeal but broad scale and interfere with comprehensive, national energy policies.

The broad impact of global warming nuisance suits would be exacerbated by the special nature of CO₂'s alleged contribution to global warming. According to plaintiffs' complaints, it does not matter where the source of CO₂ is located. Under their theory, any source of CO₂ emissions contributes to global warming (and to plaintiffs' claimed injuries), whether it is located two miles from plaintiffs' location, 2000 miles, or on the other side of the globe. That is because, as the State plaintiffs in No. 05-5104 admit, CO₂ emissions "rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon dioxide *worldwide*." *Connecticut v. Am. Elec. Power Co.*, No. 04-cv-05669, Compl. ¶ 155, filed July 21, 2004 (S.D.N.Y.) (A106 in No. 05-5104) (emphasis added). Accordingly, to the extent that such CO₂ emissions might make a contribution to global warming, that contribution is unrelated to the state or country in which the emissions occurred. In other words, "a ton of greenhouse gases emitted in the United States has the same impact as a ton emitted in Malaysia."⁴ Thus, under plaintiffs' theory of the case, any person or group that can allege damage from global warming may sue

⁴ Nordhaus and Danish, *Designing a Mandatory Greenhouse Gas Reduction Program for the U.S.*, Pew Center on Global Climate Change (May 2003), at 2, available at http://www.pewclimate.org/global-warming-in-depth/all_reports/mandatory_ghg_reduction_prgm/index.cfm (last visited Feb. 28, 2006).

any company or source that uses fossil fuel as a source of energy, no matter where its operations are located.⁵

Finally, under plaintiffs' theory of standing, any source with emissions deemed to make a contribution to global warming, wherever located and no matter how small, may be the target of a nuisance suit, as long as it makes some contribution to an overall problem that is alleged to be substantial. *See* Br. for Pl.-Appellants ("States' Brief"), No. 05-5104, at 43-44. If this theory were adopted, nothing would prevent other plaintiffs, or these same plaintiffs, from bringing subsequent nuisance suits targeting any industry, any public body, or any source wherever located, allegedly responsible for using fossil fuel energy or otherwise emitting CO₂ to the atmosphere.⁶

⁵ While CO₂ is allegedly the principal gas responsible for global warming—outside of water vapor—other gases, including methane, are allegedly implicated. EPA has stated that "greenhouse gases include water vapor, carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), and ozone (O₃)," as well as "[s]everal classes of halogenated substances that contain fluorine, chlorine, or bromine," including hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). EPA Inventory, *supra*, at ES-1 to ES-2.

⁶ Contrary to their current attempt to narrow the implications of their position, the state and municipal plaintiffs (collectively referred to as "States") in No. 05-5104 were more forthcoming at the commencement of their suit regarding their broader, long-term litigation strategy. Their press announcements stated that these suits were only a "first step," and that one of their goals was to force a switch "from coal to cleaner-burning fuels; greater use of biomass energy . . . and use of clean energy sources like wind and solar power. Office of New York State Attorney General Eliot Spitzer, Press Release, *Eight States & NYC Sue Top Five U.S. Global Warming Polluters*, July 21, 2004, available at http://www.oag.state.ny.us/press/2004/jul/jul21a_04.html (last visited Feb. 28,

If plaintiffs' theory succeeds, in addition to the electric utility industry, other industries and sectors of the economy that rely on fossil fuels are likely to draw the attention of future plaintiffs, which in turn would draw the federal courts further into the regulation of fossil fuel energy use in this nation.

One likely target of global warming nuisance suits is the transportation industry.⁷ Indeed, various States and environmental groups—including most of the States involved in Case No. 05-5104—unsuccessfully attempted to persuade the D.C. Circuit to hold that EPA must include limits on CO₂ and other greenhouse gases in its regulation of tailpipe emissions from new motor vehicles under the Clean Air Act. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir.), *reh'g denied*, 433 F.3d 66 (D.C. Cir. 2005). The petitioners in that case asserted that “reductions in CO₂ and other greenhouse gases from vehicles in the United States would alone have a meaningful impact and would ‘delay and moderate many of the adverse impacts of global warming.’” *Id.* at 54 (quoting petitioners' expert witness). EPA

2006) (“Spitzer, Press Release”). Moreover, plaintiff States' opening brief in No. 05-5104 makes clear that this nuisance litigation is an adjunct to other political actions by those States—involving their legislative or executive branches—to control greenhouse gas emissions. States' Brief, No. 05-5104, at 9-10.

⁷ “Transportation activities . . . accounted for 32 percent of CO₂ emissions from fossil fuel combustion in 2003. Virtually all of the energy consumed in this end-use sector came from petroleum products. Over 60 percent of the emissions resulted from gasoline consumption for personal vehicle use. The remaining emissions came from other transportation activities, including the combustion of diesel fuel in heavy-duty vehicles and jet fuel in aircraft.” EPA Inventory, *supra*, at 30 (footnote omitted).

denied a petition for rulemaking seeking such regulatory requirements, and the D.C. Circuit denied petitions for review challenging EPA's decision. *Id.* at 58-59. Given their position in that case, if plaintiffs prevail here, they (or similarly motivated plaintiffs) can be expected to bring nuisance suits against the automobile manufacturers, seeking to have a trial court impose controls that they failed to persuade EPA and the D.C. Circuit were required by law.

In addition, under plaintiffs' arguments, any company or organization (including states and local governments) with a fleet of cars or trucks could be sued for nuisance on the theory that if it used more fuel-efficient vehicles, or maintained them better, or drove them less, it could reduce emissions of CO₂. *Cf.* States' Brief, No. 05-5104, at 10-11 (alleging that defendants could reduce emissions simply by, *inter alia*, switching fuels or improving efficiency). Inevitably, there will be persons who will seek to have the federal courts impose controls of this type if the door is open to global warming nuisance suits.

Industrial usage of fossil fuel energy also necessarily generates CO₂ emissions in this country and may be expected to attract nuisance suits if plaintiffs' theory prevails.⁸ As an indication of the scope of industrial activity involved, the U.S. Department of Energy ("DOE") has identified "the nation's eight most

⁸ "Industrial CO₂ emissions, resulting both directly from the combustion of fossil fuels and indirectly from the generation of electricity [by utilities] that is consumed by industry, accounted for 28 percent of CO₂ from fossil fuel combustion in 2003." EPA Inventory, *supra*, at 30.

energy-intensive industries” as the focus of its effort to develop new technologies and processes that would reduce energy usage and emissions of greenhouse gases.⁹

These eight industries are aluminum, chemicals, forest products, glass, metal casting, mining, petroleum refining and steel.¹⁰ For example, DOE explains that “the aluminum industry uses large amounts of electricity for smelting while the glass industry uses large amounts of natural gas to melt silica in furnaces.”¹¹

Under plaintiffs’ theory, companies in these industries would be subject to nuisance suits in which the court would be required to determine what level of reduction of CO₂ emissions the defendants must achieve, a level of reduction that, as a practical matter, could require changes in fuel usage.

Agriculture is also a source of emissions of CO₂ emissions and other greenhouse gases.¹² For example, the federal government has voluntary programs targeting greenhouse gas emissions from agriculture. These include the “Ruminant Livestock Efficiency Program (RLEP), . . . focused on reducing methane

⁹ U.S. Department of Energy, *Industrial Technologies Program*, <http://www.eere.energy.gov/industry/technologies/> (last updated May 17, 2005).

¹⁰ *Id.*

¹¹ *Id.*

¹² Agriculture contributed six percent of total United States greenhouse gas emissions in 2003. EPA Inventory, *supra*, at 37.

emissions.”¹³ Also included among voluntary, non-regulatory federal programs targeting greenhouse gas emissions are programs to “improv[e] the efficiency of fertilizer use” and to “remov[e] environmentally sensitive cropland from production.”¹⁴ Under plaintiffs’ theory, all these activities are the potential targets of nuisance suits by plaintiffs that disagree with the voluntary, non-regulatory approach of research and technology and incentive programs taken by the legislative and executive branches of the federal government and instead want to impose mandatory reductions of greenhouse gas emissions under the guise of abating a nuisance.

In addition, plaintiffs’ theory would allow a challenge to any road-building or other construction project expected to increase traffic, on the theory that the attendant increased CO₂ emissions could contribute to global warming.¹⁵ In the past, citizens challenging such projects on environmental grounds have had to prove that there was inadequate consideration of environmental impacts or

¹³ U.S. Department of State, *U.S. Climate Action Report – 2002*, at 59, available at <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ResourceCenterPublicationsUSClimateActionReport.html> (last visited Feb. 28, 2006). As previously noted, EPA has identified methane as a “greenhouse gas.” *See, supra* note 5.

¹⁴ *Id.*

¹⁵ An additional ground of global warming challenge to any construction project could be based on the fact that production of cement involves emissions of carbon dioxide. *See generally* Climate VISION, *Cement*, available at <http://www.climatevision.gov/sectors/cement/index.html> (last visited Feb. 28, 2006).

violations of specific statutory requirements. *E.g.*, *Coal. Against Columbus Center v. City of New York*, 967 F.2d 764 (2d Cir. 1992); *Citizens for Mass Transit v. Adams*, 630 F.2d 309 (5th Cir. 1980). Under a global warming nuisance theory, however, the plaintiffs could bypass these criteria and simply ask the court to decide that the project should not be built or be built with severe constraints, solely because it allegedly would contribute to global warming.

The plaintiffs in these companion cases have made no secret of their intent to have the District Court explore a broad range of energy usage issues in devising a remedy. The press release that the state and municipal plaintiffs issued upon filing their suit listed “[r]eadily available solutions to reduce carbon dioxide” including “switching from coal to cleaner-burning fuels; greater use of biomass energy derived from plants; investment in energy conservation; and use of clean energy sources like wind and solar power.”¹⁶ The press release also makes it clear that their suit is only a “first step” and that the same broad range of energy usage issues plaintiffs want the District Court to explore in the context of claims against electric utility defendants are likely to arise again in suits against companies in other industries.¹⁷

¹⁶ Spitzer, Press Release, *supra* note 7.

¹⁷ *Id.*, statement of Connecticut Attorney General Richard Blumenthal (“[o]ur lawsuit is a huge, historic first step toward holding companies accountable”); statement of California Attorney General Bill Lockyer (“This lawsuit opens a new legal frontier in the fight against global warming”); statement of Vermont Attorney

II. Global Warming and Energy Usage Are International and National Issues That Are Not Amenable to Solution Through the Case-By-Case, Patchwork Approach of Nuisance Suits.

Congress and the President have recognized the importance of energy production and usage and global warming issues to the nation and have adopted a variety of policies on an international and national basis. With the establishment of the Department of Energy in 1977 and the enactment of the Energy Policy Acts of 1992 and 2005, for example, Congress adopted policies to conserve energy and encourage development and use of alternative fuels and otherwise adopted measures aimed at lessening dependence on foreign energy imports while also supporting coal, nuclear energy and a diversity of fuels.¹⁸ Similarly, as the District Court correctly pointed out, in 1987 Congress directed the Secretary of State to conduct negotiations addressing global warming; and in 1992 the Senate gave advice and consent to ratification by the President of the United Nations

General William H. Sorrell (suit is “an important step”). Mr. Blumenthal has also been quoted as saying that the suit presents an “opportunity to shake up and reshape the way an industry does business.” Dan Fagin, *‘Public Nuisance’ Lawsuit NYC, 8 States sue Power Firms, They say carbon dioxide emissions are ‘health threat’ and seek cuts, but industry says suit frivolous*, NEWSDAY, July 22, 2004, at A18. Mr. Spitzer’s spokesperson acknowledged that “[t]his is a precedent-setting, first-of-its-kind lawsuit.” Mark Johnson, *Cinergy among firms facing suit on climate*, CINCINNATI POST (OH), July 21, 2004, at A1, available at 2004 WLNR 11547071.

¹⁸ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776; Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 567 (1977).

Framework Convention on Climate Change. SPA-25 to SPA-26 (Am. Op. and Order, Sept. 16, 2005, at 6-7). In addition, the policy of the Executive Branch is to “emphasize[] international cooperation and promote[] working with other nations to develop an efficient and coordinated response to global climate change.”

68 Fed. Reg. at 52,933. The United States also recently entered into the Asia-Pacific Partnership on Clean Development and Climate with China, India, Japan, Australia and South Korea, for the purpose of promoting the development and deployment of “existing and emerging cleaner, more efficient technologies and practices that will achieve practical results” and lower greenhouse gas intensities.¹⁹ These are only a few examples of the many policy judgments made by the political branches on energy and climate change.²⁰

The federal government has recognized that global warming is closely tied to national energy policy. In the Energy Policy Act of 1992, Congress enacted Title XVI on Global Climate Change (42 U.S.C. §§ 13381-13388) and directed the Secretary of Energy to conduct several assessments relating to greenhouse gases and report to Congress. Pub. L. No. 102-486, § 1604, 106 Stat. at 3002 (codified at

¹⁹ U.S. Department of State, *Fact Sheet: President Bush and the Asia-Pacific Partnership on Clean Development*, Jan. 6, 2006, available at <http://www.state.gov/g/oes/rls/fs/2006/> (last visited Feb. 28, 2006).

²⁰ For a description of executive and legislative policies and programs as of February 2002, see *Global Climate Change Policy Book*, available at <http://www.whitehouse.gov/news/releases/2002/02/climatechange.html> (last visited Feb. 28, 2006).

42 U.S.C. § 13384). More recently, in the Energy Policy Act of 2005, Congress amended Title XVI of the 1992 Act to address National Climate Change Technology Deployment and amended the Global Environmental Protection Assistance Act of 1989 (Pub. L. No. 101-240) to address Climate Change Technology Deployment in Developing Countries. Pub. L. No. 109-58, tit. XVI, Subtitles A and B, 119 Stat. at 1109-17. Sections 1610 and 1611 of the Energy Policy Act of 2005 provide an international and national policy framework for greenhouse gas intensity-reducing technology strategies in the U.S. and technology deployment in developing countries.²¹

Adjudication of these suits on the merits would require a court to rule on issues that are the legitimate subject of ongoing national policy debate. For example, in 2001 a Presidential Task Force recommended that the nation increase its use of coal, as part of its energy policy to “increase and diversify our nation’s sources [of energy and] . . . to enhance national security.” *National Energy Policy*, Report of the National Energy Policy Development Group, xiii-xiv (May 2001), available at <http://www.whitehouse.gov/energy/> (last visited Feb. 28, 2006); see also *id.* at 1-1, 5-13 to 5-14. Taking a contrary position, the state and municipal plaintiffs, in announcing the filing of their suit, stated that “switching from coal to

²¹ In its consideration of the Energy Policy Act of 2005, Congress rejected an amendment (Amendment No. 826) to regulate U.S. emissions of greenhouse gases by a vote of 38-60. 151 Cong. Rec. S6980, S6997-S7029 (daily ed. June 22, 2005).

cleaner-burning fuels” is one solution to reduce CO₂ emissions.²² However, the use of alternative fuels involves profound questions of national policy. As EPA has pointed out, “[a]ny widespread effort to switch away from fossil fuels [for power generation or transportation] would likewise require a wholesale transformation of our methods for producing power and transporting goods and people” 68 Fed. Reg. at 52,928. The debate and choice between competing views on alternative fuel usage is an important and ongoing aspect of national energy policy at the highest levels of government.

The brief for defendants-appellees American Electric Power Company, Inc., *et al.* (at 16-36) correctly points out that an action for interstate nuisance under federal common law has a narrower scope that does not encompass the claims plaintiffs seek to bring here, and thus does not embroil the court in such policy-making. By stark contrast, under plaintiffs’ misguided view the federal courts would decide these issues of national energy policy under the traditional standard of state public nuisance law, which requires the court to decide whether the alleged nuisance is “reasonable” in light of all the circumstances of the particular case.²³

²² Spitzer, Press Release, *supra*.

²³ The Restatement of Torts defines public nuisance as “an *unreasonable* interference with a right common to the general public.” Restatement (Second) of Torts, § 821B(1) (1979) (emphasis added). Addressing New York public nuisance law, the Second Circuit noted that a landowner has “the responsibility of taking *reasonable* measures to remedy conditions on it that are a source of harm to

This “reasonableness” standard involves a location-specific balancing judgment that is not appropriate where global climate, an international and national phenomenon, is the target of the suit. Under the “reasonableness” standard liability depends on a case-by-case balancing judgment, in which the court must determine “whether the gravity of the interference with the public right outweighs the utility of the actor’s conduct.” Restatement (Second) of Torts, § 827 cmt. a. In making this determination, the “character of the locality involved” has been a key element in the court’s balancing judgment. *Id.*

By contrast, as applied to broad international and national policy issues such as energy usage and global warming, the individualized, location-specific, case-by-case resolution of nuisance suits is totally inappropriate. It would produce an unworkable and destructive patchwork pattern of regulation. A particular case may establish the level of emissions that must be met by a particular defendant’s facilities, but the case will leave unsettled what other companies or sources in the same industry or similarly situated industries, which have not been sued, should do, if anything. Those companies or plant operators could not know whether some other court in which the company might be sued would, under the specific circumstances of that case, entertain or dismiss the suit; grant or deny any request for relief; impose emission limits more or less stringent than a different court did in others.” *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051 (2d Cir. 1985) (emphasis added) (quoting Restatement (Second) of Torts, § 839 cmt. d).

a prior case; or even provide some other kind of remedy altogether. Ultimately, an industrial energy user would hesitate to make major investments to modify or expand its operations, purchase new equipment or otherwise significantly affect its energy usage (potentially including even investment in energy conservation programs), given that such investments might be at odds with limits ordered by a court in a subsequent nuisance suit.

In addition, under plaintiffs' theory, suits might be brought against equipment manufacturers alleging that their equipment might be designed in a more energy-efficient manner or in some other way to emit less CO₂. This could lead to conflicts between decisions in nuisance suits against specific sources imposing CO₂ emission limitations and the limitations imposed in nuisance suits against equipment manufacturers.

Moreover, given the very substantial sums of money that may be involved, such a patchwork approach of nuisance suits may well impose significant competitive disadvantages on the company or source that happens to be the target of the suit, as against a company or source that is not sued, or is sued in a different court that requires a different remedy.

While a judicial decision in any global warming suit would bind only the parties before the court, there likely would be a broad range of parties interested in every case, because the court's decision necessarily would be based on broad

issues of fuel usage policy, rather than facts peculiar to the parties and location before the court. The legislative and executive Branches have procedures designed to obtain broad public participation in the consideration of these kinds of issues. By contrast, the courts would have only the *amicus* process as a forum for public participation—hardly a substitute for legislative hearings, debate and other aspects of the political process at the Congressional level, and public notice-and-comment proceedings at the administrative level, in which a broad range of issues can be explored and any interested member of the public can be heard.

EPA has correctly stated that “[i]t is hard to imagine any issue in the environmental area having greater ‘economic and political significance’ than regulation of activities that might lead to global climate change.” 68 Fed. Reg. at 52,928. Assumption of jurisdiction to decide what is “reasonable” for utilization of fossil fuel energy, an activity that pervades American life, would commit the courts, at the instance of almost any plaintiff, to making decisions about national energy policy that are quintessentially “a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.” *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). Arguments regarding energy policy “involve[] the balancing of competing values and interests, which in our

democratic system is the business of elected representatives.” *Id.* (quoting *Diamond*, 447 U.S. at 317). “The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984) (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32(a)(7)(C), counsel for *Amici Curiae* certify that this brief contains 5403 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief has been prepared using Microsoft Word in proportionally spaced 14-point Times New Roman typeface.

Robert V. Zener

STATE OF NEW YORK)
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ss.:

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