

No. 07-60756

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ned Comer, et al.,

Plaintiffs-Appellants

v.

Murphy Oil USA, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

**PETITION FOR REHEARING *EN BANC* OF DEFENDANTS-APPELLEES
THE AES CORPORATION, DOW CHEMICAL COMPANY,
HONEYWELL INTERNATIONAL, INC.,
AND UNIVERSAL OIL PRODUCTS.**

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CERTIFICATE OF INTERESTED PARTIES

Ned Comer, et al. v. Murphy Oil USA, et al.
No. 07-60756

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Defendants-Appellees

Murphy Oil USA, Inc.
Universal Oil Products
Shell Oil Company
ExxonMobil Corp.
AES Corp.
Allegheny Energy Inc.
Alliance Resource Partners, L.P.
Alpha Natural Resources, Inc.
Arch Coal, Inc.
BP America Production Company
Cinergy Corp.
ConocoPhillips Company
Consol Energy Inc.
The Dow Chemical Company
Duke Energy Corp.
BP Products North America Inc.
Eon Ag
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Entergy Corp.
Firstenergy Corp.
FPL Group Inc.
Honeywell International Inc.
International Coal Group, Inc.
Massey Energy Company
Natural Resource Partners L.P.

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Reliant Energy Inc.
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In addition, the following entities were named as defendants in a proposed fourth amended complaint that was attached to a motion to amend submitted by the plaintiffs in the district court but was never filed as an operative pleading in light of the district court's dismissal of the motion by order dated August 30, 2007.

Murphy Oil USA
Universal Oil Products Company (UOP)
Shell Oil Company
Chevron U.S.A. Inc.
ExxonMobil Corporation
BP p.l.c. d/b/a BP Amoco Chemical Company and BP Energy Company
BP America Production Company
BP Products North America Inc.
Superior Energy Services, Inc.
Placid Oil Company
Kerr-McGee Oil & Gas Corporation
Total PetroChemicals USA, Inc.
ConocoPhillips Company
Atlantic Richfield Company
Pioneer Natural Resources USA, Inc.
Devon Energy Production Company, L.P.
Marathon Petroleum Company LLC
Occidental Crude Sales, Inc.
Occidental Energy Marketing, Inc.
Total Gas & Power North America, Inc.
Hess Corporation
Anadarko Petroleum Corporation
Apache Corporation
Burlington Resources Offshore Inc.
American Petroleum Institute
Oil and Refining Entities 1-100
AEP Generating Company
Columbus Southern Power Company
Ohio Power Company, d/b/a/ AEP Ohio
AEP Texas Central Company
AEP Texas North Company
Appalachian Power Company

Indiana Michigan Power Company
Kentucky Power Company
Public Service Company of Oklahoma
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Southern Power Company
Tennessee Valley Authority
Xcel Energy Inc.
Northern States Power Company
Northern States Power Company
Public Service Company of Colorado
Southwestern Public Service Co.
TXU Energy Solutions Company, LP
TXU Big Brown Company LP
TXU Generation Development Company LLC
TXU Generation Development Company II LLC
TXU Gas Company, LP
TXU Energy Company LLC
TXU Energy Retail Company LP
TXU Portfolio Management Company LP
TXU Generation Company LP
TXU Generation Management LLC
TXU Enterprise Holdings Company, LLC
Cinergy Corp.
Duke Energy Ohio, Inc.
Duke Energy Carolinas, LLC
Duke Energy Kentucky, Inc.
Duke Energy Gas Services, LLC
Duke Energy Indiana, Inc.
Duke Energy Operating Company, LLC
Duke Energy Merchants, LLC
Duke Energy Fossil-Hydro, LLC
The Union, Heat and Power Company Reliant Energy Inc.
Southern California Edison Company
Edison Mission Energy
Edison Mission Energy Petroleum
Edison Mission Energy Services, Inc.
Edison Mission Energy Fuel

Edison Capital
Edison International
LG&E Energy Inc.
LG&E Power Inc.
Kentucky Utilities Company
Western Kentucky Energy Corp.
Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.
Florida Power Corporation d/b/a Progress Energy Florida, Inc.
Ameren Energy Generating Company
Union Electric Company, d/b/a AmerenUE
Ameren Energy Resources Company
Ameren Energy Fuels And Services Company
Central Illinois Public Service Company, d/b/a AmerenCIPS
Central Illinois Light Company, d/b/a AmerenCILCO
Illinois Power Company, d/b/a AmerenIP
Ameren Energy Generating Company
Ameren Energy Marketing Company
Entergy Louisiana, LLC
Entergy Mississippi, Inc.
Entergy Power & Light Company
Entergy Arkansas, Inc.
System Energy Resources, Inc.
Allegheny Power Service Corporation
Allegheny Energy Supply Company LLC
West Penn Power Company
The Potomac Edison Company
Monongahela Power Company
Allegheny Energy Inc.
Duke Energy Corp.
Firstenergy Corp.
Ohio Edison Company
The Cleveland Electric Illuminating Company
The Toledo Edison Company
Pennsylvania Power Company
Jersey Central Power & Light Company
Metropolitan Edison Company
Pennsylvania Electric Company
Virginia Electric and Power Company
Consolidated Natural Gas Company
Dominion Energy, Inc.

Virginia Power Energy Marketing, Inc.
Michigan Consolidated Gas Company
The Detroit Edison Company
MichCon Gathering Company
Michcon Fuel Services Company
MichCon Enterprises, Inc.
Florida Power & Light Company
FPL Energy, LLC
FPL Group Capital, Inc.
AES Corp.
Indianapolis Power & Light Company
NRG Energy, Inc.
Texas Genco, Inc.
Texas Genco, LLC
NRG Thermal LLC
Arch Coal, Inc.
International Coal Group, Inc.
Alliance Resource Partners LP
Alpha Natural Resources Inc.
CONSOL Energy Inc.
Foundation Coal Holdings Inc.
Massey Energy Co.
Westmoreland Coal Co.
Peabody Energy Corp.
Natural Resource Partners LP
Western Fuels Association, Inc.
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The North American Coal Corporation
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RULE 35(b)(1) STATEMENT REGARDING *EN BANC* REVIEW

The panel's extraordinary opinion holds that private plaintiffs may pursue a tort lawsuit against a select handful of companies whose carbon dioxide and other greenhouse gas emissions supposedly contributed to the alleged phenomenon of global warming, which in turn allegedly caused or exacerbated Hurricane Katrina's impact. The panel opinion warrants *en banc* reconsideration because it both raises issues of exceptional importance and conflicts with precedent of the Supreme Court and other circuits. The opinion is a stark departure from well-established jurisprudence that sets jurisdictional limits on the kinds of controversies that are appropriately resolved by the federal courts. Indeed, the panel opinion requires judges to create a national regulatory policy on greenhouse gas emissions through *ad hoc* tort law, even as the political branches address the issue of global warming.

If left unreviewed by the Court *en banc*, the panel opinion will contravene the political question doctrine set forth in *Baker v. Carr*, 369 U.S. 186 (1962), and will conflict with the Article III standing requirements articulated in other Supreme Court decisions and the decisions of other circuits, such as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *Allen v. Wright*, 468 U.S. 737 (1984), *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009), *Habecker v. Town of Estes Park*, 518 F.3d 1217 (10th Cir. 2008), and *In re African-American Slave Descendants Litigation*, 471 F.3d 754 (7th Cir. 2006).

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIESi

RULE 35(b)(1) STATEMENT REGARDING EN BANC REVIEWx

TABLE OF AUTHORITIES xii

ISSUES PRESENTED.....1

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS.....1

ARGUMENT2

I. The Panel Erred In Holding That A Tort Lawsuit For Injuries
Allegedly Caused By Global Warming Is A Justiciable Claim2

 A. The Panel Failed To Properly Apply The *Baker v. Carr* Standard
 For Identifying Non-Justiciable Political Questions3

 B. The Panel Opinion Requires Courts To Decide Complex
 Policy Issues Without Proper Legal Standards4

II. The Panel Erred In Conferring Standing Upon Private Litigants
To Sue For Harms Allegedly Caused By Global Warming9

 A. The Panel’s Holding Erodes Article III Standing Requirements
 In Violation Of Supreme Court And Circuit Court Decisions.....9

 B. Private Litigants Pursuing Torts Claims Are Not Entitled To
 “Special Solitude” And Relaxed Standing Requirements.....12

CONCLUSION.....15

TABLE OF AUTHORITIES

CASES	<u>Page</u>
<i>In re African-American Slave Descendants Litigation</i> , 471 F.3d 754 (7th Cir. 2006)	10, 11
<i>Aktepe v. USA</i> , 105 F.3d 1400 (11th Cir. 1991)	4, 7
<i>Allen v. Wright</i> , 468 U.S. 737 (1984).....	10
<i>Alperin v. Vatican Bank</i> , 410 F.3d 532 (9th Cir. 2005)	3, 4, 8
<i>Ashcroft v. Iqbal</i> , 129 S.Ct. 1937 (2009)	10
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	<i>passim</i>
<i>California v. General Motors Corp.</i> , No. 06-5755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).....	6, 8
<i>Carpenter v. Nobile</i> , 620 So. 2d 961 (Miss. 1993)	5
<i>Center for Biological Diversity v. United States Department of the Interior</i> , 563 F.3d 466 (D.C. Cir. 2009)	11, 14, 15
<i>Comet Delta, Inc. v. Pate Stevedore Co.</i> , 521 So. 2d 857 (Miss. 1988).....	5, 6
<i>Connecticut v. American Electric Power Co.</i> , 582 F.3d 309 (2d Cir. 2009).....	6
<i>Cornerstone Christian Schools v. University Interscholastic League</i> , 563 F.3d 127 (5th Cir. 2009)	10

<i>Florida Audubon Society v. Bentsen</i> , 94 F.3d 658 (D.C. Cir. 1996)	10
<i>Florida East Coast Properties, Inc. v. Metropolitan Dade County</i> , 572 F.2d 1108 (5th Cir. 1978)	6
<i>Friends of the Earth, Inc. v. Crown Central Petroleum Corp.</i> , 95 F.3d 358 (5th Cir. 1996)	12, 14
<i>Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.</i> , 204 F.3d 149 (4th Cir. 2000)	12
<i>Habecker v. Town of Estes Park</i> , 518 F.3d 1217 (10th Cir. 2008)	9
<i>Japan Whaling Association v. American Cetacean Society</i> , 478 U.S. 221 (1986).....	8
<i>Kivalina v. ExxonMobil Corp.</i> , --- F. Supp. 2d ----, 2009 WL 3326113 (N.D. Cal. Sept. 30, 2009)	<i>passim</i>
<i>Lane v. Halliburton</i> , 529 F.3d 548 (5th Cir. 2008)	4
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	9, 11
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	13, 14
<i>Nova Health Systems v. Gandy</i> , 416 F.3d 1149 (10th Cir. 2005)	11
<i>Public Interest Research Group v. Powell Duffryn Terminals Inc.</i> , 913 F.2d 64 (3d Cir. 1990).....	12
<i>Sierra Club v. Cedar Point Oil Co.</i> , 73 F.3d 546 (5th Cir. 1996)	12

<i>Simon v. Eastern Kentucky Welfare Rights Organization</i> , 426 U.S. 26 (1976).....	11
<i>Texas Independent Producers & Royalty Owners Association v. EPA</i> , 410 F.3d 964 (7th Cir. 2005)	13, 14
<i>Vieth v. Jubelirer</i> , 541 U.S. 267 (2004) (plurality).....	3, 4, 15
<i>United States v. Cannon</i> , 642 F.2d 1373 (D.C. Cir. 1981)	4

OTHER AUTHORITIES

40 C.F.R. §§ 86 <i>et al</i>	9
74 Fed. Reg. 18886 (April 24, 2009).....	8
74 Fed. Reg. 55292 (September 30, 2009)	9
American Clean Energy and Security Act, H.R. 2454, 111th Cong. § 1 (2009).....	8
Senate Resolution 1733, 111th Cong. § 1 (2009).....	9

ISSUES PRESENTED

1. Whether the panel opinion contravenes the political question doctrine as set forth in *Baker v. Carr*, 369 U.S. 186 (1962), by requiring judges to decide whether and how to assign liability to a small handful of companies for damages allegedly caused by global warming, despite the lack of judicially manageable standards to make such complex policy decisions.
2. Whether the panel opinion improperly extends Article III standing to private litigants who sued a handful of companies based on speculative allegations that the harm caused by Hurricane Katrina is “fairly traceable” to the companies’ greenhouse gas emissions, and not those of millions of other emitters not before this Court.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Plaintiffs filed this lawsuit based on Mississippi tort claims against 32 companies and the Tennessee Valley Authority, alleging that they are liable for Hurricane Katrina-related damages as a result of their greenhouse gas (“GHG”) emissions. Each Defendant provides critical goods or services, such as electricity to power homes, hospitals, and schools. Plaintiffs seek to impose liability on Defendants premised on conclusory and speculative allegations: Defendants’ GHG emissions over decades, along with the emissions of millions of other actors around the world, contributed to global warming, which in turn increased ocean

temperatures, which in turn raised the possibility of hurricanes forming with increased ferocity, which in turn contributed to Hurricane Katrina's strength, which in turn harmed Plaintiffs. The District Court dismissed the complaint, holding that Plaintiffs lacked standing and that their complaint presented non-justiciable political questions. This Court reversed in part, concluding that "plaintiffs have standing to assert their public and private nuisance, trespass, and negligence claims," which do not "present non-justiciable political questions." Opinion ("Op.") at 3.

ARGUMENT

The panel opinion contravenes the core constitutional tenet that federal courts are courts of limited jurisdiction. The panel opinion requires federal judges to address piecemeal the intrinsically political question of whether and how companies should be held liable for their GHG emissions. It also stretches the limits of Article III standing because the alleged harm (damage from Hurricane Katrina) cannot be fairly traced to Defendants' conduct (GHG emissions).

I. The Panel Erred In Holding That A Tort Lawsuit For Injuries Allegedly Caused By Global Warming Is A Justiciable Claim.

The panel opinion stands in direct conflict with the principle articulated in *Baker v. Carr* that federal courts avoid deciding political questions. *See* 369 U.S. at 211. It also compels judges to decide complex policy issues without judicially manageable standards.

A. The Panel Failed To Properly Apply The *Baker v. Carr* Standard For Identifying Non-Justiciable Political Questions.

The political question doctrine reflects the separation of powers principle that sometimes “the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches.” *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality). In *Baker v. Carr*, the Supreme Court set forth six independent factors, any one of which may indicate a non-justiciable political question.¹ 369 U.S. at 211, 217. The “common underlying inquiry” of the *Baker* factors is “whether the very nature of the question is one that can properly be decided by the judiciary.” *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005).

The panel fundamentally misconstrued the political question doctrine by essentially analyzing only the first *Baker* factor: whether the issue is plainly committed to a coordinate political department. After holding that it could identify no constitutional provision or federal law that “commits a material issue in the case exclusively to a political branch,” the panel briefly recited but did not analyze any

¹ A political question exists where any of the following *Baker* factors is satisfied: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of deciding the issue without expressing lack of respect due to the other branches; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from different pronouncements by various departments on one question. *See Vieth*, 541 U.S. at 277-78 (invoking political question doctrine in gerrymandering case without regard to congressional action/inaction).

of the other *Baker* factors. *Op.* at 22, 28. But courts are required to undertake a “discriminating inquiry” into each of the six *Baker* factors to determine whether a political question exists. *Baker*, 369 U.S. at 217; *see also Vieth*, 541 U.S. at 278 (relying on the second factor in finding case presented political question); *Lane v. Halliburton*, 529 F.3d 548, 559-63 (5th Cir. 2008) (noting second factor was “most critical factor in the political question analysis” in that case); *Aktepe v. USA*, 105 F.3d 1400, 1402 (11th Cir. 1991) (“The justiciability of a controversy depends not upon the existence of a federal statute, but upon whether judicial resolution of that controversy would be consonant with the separation of powers”); *U.S. v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981) (political question existed despite absence of “textually demonstrable commitment” of issue to another branch). The panel analyzed only one *Baker* factor, then substantively ignored others that would indicate that this case is non-justiciable.

B. The Panel Opinion Requires Courts To Decide Complex Policy Issues Without Proper Legal Standards.

If the panel had applied the second and third *Baker* factors, it would have become clear that this case presents a non-justiciable political question.

There Exist No Judicially Manageable Standards To Resolve Plaintiffs’ Claims. The second *Baker* factor requires a court to conduct a “discriminating inquiry” into whether it has the “legal tools” to “reach a ruling that is principled, rational, and based upon reasoned distinctions.” *Alperin*, 410 F.3d at 552. A

political question exists if there is “a lack of judicially discoverable and manageable standards for resolving it.” *Baker*, 369 U.S. at 217.

Here, there are no “judicially discoverable and manageable standards” to enable a court to decide if Defendants should be held tortiously liable for the alleged impact of their GHG emissions. Under Mississippi tort law, Plaintiffs would have to prove that Defendants’ actions were “unreasonable.” *See Carpenter v. Nobile*, 620 So. 2d 961, 964 (Miss. 1993) (negligence); *Comet Delta, Inc. v. Pate Stevedore Co.*, 521 So. 2d 857, 859-60 (Miss. 1988) (nuisance).

The “reasonable man” standard provides no meaningful guidance for assessing liability where millions, if not billions, of actors across the world emitted GHG over decades, causing global warming, which in turn allegedly caused or exacerbated Hurricane Katrina. There is no principled legal standard by which to measure whether Defendants’ GHG emissions were “unreasonable.” There are no federal laws barring or even limiting carbon dioxide emissions. If Defendants had emitted 25% or 50% less carbon dioxide, it is not clear how a court would assess whether that conduct was “reasonable” under Mississippi law. Nor is there a legal method to decide what level of GHG emissions is “unreasonable,” given that Defendants’ emissions are infinitesimal relative to the total global output.

Two district courts in the Ninth Circuit dismissed similar lawsuits based on alleged harms caused by global warming, in part because there is no “guidance as

to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims.” *Kivalina v. ExxonMobil Corp.*, --- F. Supp. 2d ----, 2009 WL 3326113, at *9 (N.D. Cal. Sept. 30, 2009); *Cal. v. Gen. Motors Corp.*, No. 06-5755, 2007 WL 2726871, at *15 (N.D. Cal. Sept. 17, 2007) (court has no “guidance in determining what is an unreasonable contribution to the sum of carbon dioxide” or “who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe”).²

Nuisance law also requires a court to balance the severity of the harm against the utility and benefit of the defendant’s activities. *See Fla. E. Coast Props., Inc. v. Metro. Dade County*, 572 F.2d 1108, 1112 (5th Cir. 1978); *Comet Delta*, 521 So. 2d at 859-60. As the *Kivalina* court explained, evaluating Plaintiffs’ nuisance claims would require a court to weigh “the energy producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business.” 2009 WL 3326113, at *7. The judge would “then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases” would increase the risk of a hurricane off the Gulf Coast. *See id.*

² *But see Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309 (2d Cir. 2009) (reversing dismissal of “global warming” lawsuit filed by states and land trusts). The *Kivalina* court correctly rejected the faulty reasoning in *AEP*. 2009 WL 3326113, at *8-9.

The panel provides no guidance on how to determine or assign liability under these circumstances, beyond its view that “Mississippi and other states’ common law tort rules provide long-established standards for adjudicating the nuisance, trespass and negligence claims at issue.” Op. at 28. But this case is not amenable to the simple application of tort law due to the vast number of factors and actors worldwide that have allegedly contributed over decades to global warming. See Compl., ¶¶ 3, 38-39 (“general public” responsible for GHG). Indeed, each actor could conceivably be joined as a co-defendant and could probably allege their own harms caused by global warming under Plaintiffs’ untenable theory. The lack of proper legal standards for resolving Plaintiffs’ claims renders this case non-justiciable. See *Aktepe*, 105 F.3d at 1404 (no judicially discoverable standard where court has to engage in “complex, subtle balancing” test such as “trade-off between safety and greater combat effectiveness”).

Resolving This Case Would Require An Initial Policy Decision. Since there are no “judicially manageable or discoverable standards,” an “initial policy determination” by the political branches is necessary to provide proper guidance for courts. *Baker*, 369 U.S. at 217. That is the third *Baker* factor, which the panel ignores. The political question doctrine “excludes from judicial review those controversies which revolve around policy choices and value determinations

constitutionally committed for resolution” to Congress or the Executive Branch, because courts are “fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

Resolution of Plaintiffs’ claims would require a policy determination about which of the millions of GHG emitters should be potentially liable for the alleged damages, and who should bear the costs of global warming going forward. The court would thus have to weigh Plaintiffs’ alleged injuries against the benefits of Defendants’ conduct, which touch upon every sector of the U.S. economy. These are classic policy choices that belong to the political branches. *See Alperin*, 410 F.3d at 562 (claims requiring court to “undertake the complex calculus of assigning fault” involve “policy choices and value determinations” for the political branches); *Kivalina*, 2009 WL 3326113, at *10 (allocating the “fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch”); *Gen. Motors*, 2007 WL 2726871, at *8.

Indeed, recent legislative and executive actions show that those branches should be responsible for making the policy decisions relating to GHG emissions:

- On April 24, 2009, the EPA issued a proposed endangerment finding for GHG emissions under the Clean Air Act. 74 Fed. Reg. 18886.
- On June 26, 2009, the House passed the American Clean Energy and Security Act of 2009 which contemplates a cap and trade program to reduce GHG emissions. H.R. 2454, 111th Cong. § 1 (2009).

- On September 22, 2009, the EPA released regulations requiring certain facilities to report their CO₂ emissions. 40 C.F.R. §§ 86 *et al.*
- On September 30, 2009, the Senate introduced a bill which would reduce GHG emissions. S. Res. 1733, 111th Cong. § 1 (2009). The EPA also proposed a rule to limit GHG emissions of station sources such as power plants. 74 Fed. Reg. 55292.
- In December 2009, the United States will participate in the United Nations Climate Change Conference in Copenhagen.

This case presents the quintessential example of a political question to be resolved by the political branches, not a jury.

II. The Panel Erred In Conferring Standing Upon Private Litigants To Sue For Harms Allegedly Caused By Global Warming.

Article III standing requirements compel courts to identify “disputes which are appropriately resolved through the judicial process.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To that end, a plaintiff must establish that: (i) it suffered injury in fact, (ii) there is a causal connection between plaintiff’s injury and defendant’s conduct, and (iii) plaintiff’s injury will be redressed by a favorable ruling. *Id.* at 560-61. The panel’s analysis of Article III’s causation requirement is fundamentally flawed and conflicts with longstanding precedent.

A. The Panel’s Holding Erodes Article III Standing Requirements In Violation Of Supreme Court And Circuit Court Decisions.

The panel opinion eliminates the “traceability” requirement of Article III standing. A federal court may hear a case only if plaintiff’s injury is “fairly traceable to the challenged action of the defendant, and not the result of the

independent action of some third party.” *Lujan*, 504 U.S. at 560. This requires facts showing “a substantial likelihood that the defendant’s conduct caused plaintiff’s injury.” *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1225 (10th Cir. 2008).

Plaintiffs’ claims require a piling of inference upon inference to causally connect Defendants’ GHG emissions with damages suffered by Plaintiffs during Hurricane Katrina. This “causal chain is too long and has too many weak links for a court to be able to find that the defendants’ conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation.” *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 759-60 (7th Cir. 2006); *see also Allen v. Wright*, 468 U.S. 737, 757 (1984) (no standing where “line of causation” between defendants’ conduct and plaintiffs’ injury was “attenuated at best”); *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996) (“protracted chain of causation fails” because of the “uncertainty of several individual links” and “the number of speculative links” required to connect “the challenged acts to the asserted particularized injury”). Indeed, the Supreme Court in *Ashcroft v. Iqbal* recently held that conclusory allegations without factual support are insufficient unless they are at least “plausible.” 129 S.Ct. 1937, 1949-50 (2009); *see also Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 133-34 (5th Cir. 2009) (requiring plaintiffs to establish in their complaint “a plausible claim of...standing”).

Plaintiffs also cannot satisfy the “traceability” prong because it would be impossible to determine how much less, if any, damage Plaintiffs would have suffered if Defendants had not engaged in the energy-related industries. *See* Compl., ¶ 2; *Slave Descendants*, 471 F.3d at 759-60 (aggregate effect studies do not show “the effects of particular acts, affecting particular individuals”); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 46 n.25 (1976) (no standing if “injuries might have occurred even in the absence of the [conduct] they challenge”).

The panel’s holding also impermissibly imposes the potential of liability on a select group of Defendants, even though innumerable others are potentially at fault according to Plaintiffs’ own allegations. *See* Compl., ¶¶ 3, 38-39 (Defendants and “general public” release GHG). To satisfy the traceability requirement, Plaintiffs must show that alleged harm was caused by Defendants’ conduct, “and not . . . th[e] result [of] the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560; *see also* *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009); *Nova Health Sys. v. Gandy*, 416 F.3d 1149 (10th Cir. 2005) (no standing when it is “merely speculative whether *these* defendants caused” plaintiff’s injury). Even assuming Plaintiffs’ injuries were caused by Hurricane Katrina, there is no way to determine whether it was Defendants’ GHG emissions or the emissions of some other party not before this Court that caused those injuries. The panel failed to apply these traditional

standing requirements as set forth in *Lujan*, but instead applied relaxed standing requirements that do not apply to Plaintiffs’ tort claims. *See* Op. at 10-12.

B. Private Litigants Pursuing Torts Claims Are Not Entitled To “Special Solicitude” And Relaxed Standing Requirements.

The panel improperly applied a relaxed standard for Article III standing, concluding that it was irrelevant whether Defendants’ actions actually caused Plaintiffs’ injury, so long as Defendants “contribute[d] to” global warming. Op. at 12. In reaching that conclusion, the panel relied upon the *Powell Duffryn* “traceability” test applied in Clean Water Act (“CWA”) cases.³ *Id.* at 13-14. But the Fifth Circuit has never applied that test outside the context of the CWA — and for good reason.⁴ Under the CWA, where a plaintiff shows that a defendant’s discharge exceeds prescribed federal limits, the court is required to *presume* that a substantial likelihood exists that the defendant’s conduct caused the plaintiff’s harm, even if other parties made similar discharges. *See Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 72-73 (4th Cir. 2000); *Sierra Club*,

³ In CWA cases, the traceability test is met if the defendant “(1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.” *Pub. Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990).

⁴ The Fifth Circuit recognizes that the *Powell Duffryn* test is a limited exception to be construed narrowly. *See Friends of the Earth v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360 (5th Cir. 1996) (limiting it to CWA citizen suits); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996) (noting “it may not be an appropriate standard [even] in other CWA cases”).

73 F.3d at 558. Thus, plaintiffs in CWA cases need not satisfy the traditional standing test under *Lujan* because Congress has relaxed the causal standards.

In contrast, there are no allegations here that the gases at issue exceed any federal limitation, and there is thus no principled basis to apply the *Powell Duffryn* test and presume that Defendants' conduct harmed Plaintiffs. *See Kivalina*, 2009 WL 3326113, at *12. Without that presumption, it is "irrelevant whether any defendant 'contributed' to the harm because a discharge, standing alone, is insufficient to establish injury." *Id.*; *see also Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 974 (7th Cir. 2005) ("Establishing a discharge does not also establish an injury"). Congress can alter the Court's standing analysis in certain cases by exercising its "power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). This is what Congress did in the CWA context when it made certain discharges presumptively actionable. *See Kivalina*, 2009 WL 3326113, at *12 & n.7. But because no federal statute restricts GHG emissions, the *Powell Duffryn* test is inapplicable.

Moreover, even in CWA cases, to satisfy traceability "there must be a distinction between 'the plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to that defendant.'" *Texas*, 410 F.3d at 973. Where, as here, a defendant can point to

millions of other individuals and entities that have released greenhouse gases into the “atmosphere,” the plaintiff cannot establish any “seed of its injury” and the *Powell Duffryn* test, even were it applicable, would not supply standing. *See id.* at 974; *Crown*, 95 F.3d at 361 (traceability prong not met where waterway was “too large to infer causation solely from the use of some portion of it”).

The panel also relied on *Massachusetts v. EPA*’s diluted standing requirement for sovereign States (Op. at 10-12). The Supreme Court stressed “the special position and interest of Massachusetts” and held it to be of “considerable relevance” that the party was “a sovereign State and not, as it was in *Lujan*, a private individual.” 549 U.S. at 518; *see also Biological*, 563 F.3d at 476 (states receive “special solicitude” for standing analysis under *Massachusetts*). It also held that States could sue EPA to consider setting carbon dioxide limits because the Clean Air Act required it to respond to requests to set such limits and granted a “procedural right” to enforce that obligation in federal court. 549 U.S. at 516-21.

Here, there is no statute that creates a “procedural right” for private individuals to sue corporations for the alleged effects of GHG emissions. *See Kivalina*, 2009 WL 3326113, at *13-14. *Massachusetts* thus provides no support for a finding of standing. *See Biological*, 563 F.3d at 478-79. The panel dismissed the significant distinctions between *Massachusetts* and this tort case on the flawed ground that because “the chain of causation at issue here is one step shorter than

the one recognized in *Massachusetts*,” plaintiffs “need no special solicitude.” Op. at 12 n.5. But the panel failed to explain how the “special solicitude” accorded to the States to enforce a congressionally articulated “procedural right” is equivalent to granting one additional “step” in a causal chain. Moreover, the causal chain is in fact more attenuated here because Plaintiffs must show that a specific hurricane was stronger because of Defendants’ actions as compared to the more general showing in *Massachusetts* that Atlantic sea levels are rising. *See id.* at 11.

Because Plaintiffs are not States and there are no Congressionally articulated chains of causation at issue, the panel should have applied the *Lujan* test to determine whether Plaintiffs have standing to pursue this action, including the requirement that Defendants’ challenged acts *caused* Plaintiffs’ injuries. *See Biological*, 563 F.3d at 477 (*Massachusetts* does not govern whether private plaintiffs have standing to pursue a climate change claim); *Kivalina* at *15.

CONCLUSION

If this case is allowed to go forward, it will bring a torrent of tort lawsuits and may establish far-reaching precedent that would present federal courts with a host of unanswerable questions: At what point does a causal chain become “too attenuated,” a defendant’s contribution “too small or remote,” or a plaintiff’s harm “unreasonable” as balanced against the utility of the defendant’s action? The Defendants respectfully request that the Court grant rehearing *en banc*.

Respectfully submitted,

(Signed with permission and on behalf of all the defendants listed below)

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