

GLOBAL WARMING IN THE COURTS

An Overview of Current Litigation
and Common Legal Issues



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THE JUDICIARY'S ROLE IN THE GLOBAL WARMING DEBATE

On November 29, 2006, the U.S. Supreme Court will hear oral argument in *Massachusetts v. EPA*, addressing, for the first time, one of the most pressing and controversial environmental issues of our time — global warming. While undoubtedly important, the *Massachusetts* case is only the most visible in a large and growing group of lawsuits in the state and federal courts dealing with global warming. This report provides an overview of global warming litigation, discussing the question of the judiciary's proper role in addressing this issue, identifying the cross-cutting legal topics raised by the pending litigation, and describing the specific cases before the Supreme Court and lower courts across the country.

Increasing Judicial Involvement

Over a dozen different lawsuits involving global warming issues currently sit on the dockets of our federal and state courts.¹ This “boomlet” in global warming cases partly reflects the increasing scientific evidence that global warming is a serious environmental, economic, and social problem. It also reflects the growing public awareness of the global warming issue,² and the tendency of interest groups in our country to enlist the courts to help resolve public controversies within the existing legal framework.³

But the current spate of global warming litigation is also the product of a failure by national political institutions to come to grips with global warming. In general, U.S. political institutions are remarkably bad at dealing with long-term problems,⁴ and this appears to have been the case with global warming. While the Bush Administration has officially acknowledged the existence of global warming,⁵ it has opposed any mandatory reductions in greenhouse gas emissions⁶ and refused to support the Kyoto Protocol.⁷ Instead, the Administration has chosen to encourage voluntary efforts to reduce emissions and support increased research in lieu of action.⁸ Similarly, Congress has failed to take concrete steps to address global warming.⁹ Frustrated by the inaction of the political branches, environmentalists and others have turned to the judicial branch, hoping the courts will

provide timely resolution of the issues presented to them.

In some ways, global warming litigation represents familiar legal territory. Many of the cases ask the courts to interpret statutes, resolve jurisdictional conflicts between the states and the federal government, and where parties are threatened with injuries, fill gaps in the nation's laws using traditional common law doctrines. However, global warming also poses profound challenges. It involves threats of widespread injuries that are uncertain in timing, scope, and intensity. It inculcates corporations, individual citizens, and governments from all countries, and results from human activities fundamental to modern society.

Varieties of Global Warming Litigation

Current global warming litigation in the federal and state courts falls into four basic categories.

Clean Air Act Litigation. This first category of cases involves disputes about whether the federal Clean Air Act, as currently written, applies to greenhouse gas emissions. This type of litigation currently holds the limelight because the Supreme Court's global warming case, *Massachusetts v. EPA*, involves such a dispute.¹⁰ In brief, plaintiffs in these cases argue that greenhouse gases are a type of air pollutant susceptible to regulation by the Environmental Protection Agency (“EPA”) on the same basis as any other air pollutant.

NEPA Litigation. This second category of cases involves claims under the National Environmental Policy Act (“NEPA”), or state “little NEPAs,” that government agencies have failed to adequately analyze and/or disclose information about the consequences of their projects or programs with implications for global warming. These cases require courts to decide whether agencies have taken a sufficiently “hard look” at the potential environmental consequences of their contributions to global warming.

Nuisance Litigation. This third category of cases involves claims by a variety of different types of parties (states, land trusts, individual citizens) that public or private actions contributing to global warming represent a “nuisance” under common law tort doctrine. To date, these lawsuits, which have been based on both federal and state law, have been filed against companies owning major

power plants or oil refineries, motor vehicle manufacturers, and government entities.

Preemption Litigation. This fourth category of cases involves lawsuits claiming that federal authority bars states from regulating greenhouse gas emissions. So far, the cases have focused on state efforts to curb emissions from motor vehicles. However, future preemption lawsuits might well challenge other types of programs. These cases ask the courts to determine whether the federal government has exclusive authority over some (or all) aspects of global warming, and whether there is some direct conflict between federal and state regulatory policies.

Other Potential Litigation. A wide range of other types of lawsuits relating to global warming might be brought in the future. Environmental advocates might invoke other common law doctrines, such as negligence or trespass, or sue under various federal environmental statutes, such as the Endangered Species Act, in an attempt to force action to control greenhouse gases. In academic circles, there has been discussion about the potential liability of corporations or their boards of directors for failing to recognize how global warming might affect a company's operations and profitability.¹¹ Robust public debate over global warming might also lead to liti-

Scientific Backdrop*

The scientific community has reached a consensus that global warming is real and it is being caused, at least in part, by human activity. Data from weather stations and ship-based observers indicate that, during the 20th Century, the average air temperature increased by between 0.7 °F and 1.5 °F. The Intergovernmental Panel on Climate Change, established by the United Nations and World Meteorological Organization, estimates that by the end of this century the Earth could be 2.5 °F to 10.4° F warmer than it was in 1990.

These increases could have a profound impact on natural ecosystems, human health, and the economy. For instance, global warming may increase sea level and lead to more frequent, more severe storms, disrupting the lives of the fifty-three percent of Americans living in the coastal zone. The economy of western states may suffer because reduced annual snow pack will increase water scarcity. Also, higher temperatures may increase heat-induced health problems and change the distribution of vectors of infectious disease, like rodents and mosquitoes.

While both human and non-human sources contribute to global warming, the National Research Council has stated that human activities "will greatly exceed" the impact of natural events. Humans contribute to global warming by generating greenhouse gases, like carbon dioxide (CO₂) and methane (CH₄). Since CO₂, once released, can remain in the atmosphere for hundreds of

years, it has been the primary focus of both politicians and scientists. CH₄ can also warm our climate, but has an atmospheric life span measured in decades rather than centuries.

Atmospheric greenhouse gas concentration is not the end of the story. As the climate becomes warmer, other parts of the environment change. For instance, increased temperatures may cause the polar ice caps to give way to open ocean. This in turn may exacerbate global warming because exposed water absorbs more solar radiation than ice. Global warming may also impact cloud cover. Some scientists believe that increased cloud cover may provide a counterbalance to increased atmospheric greenhouse gas concentrations. While difficult to predict, on balance, these feedback effects are believed to magnify the impact of increasing greenhouse gas concentrations.

* This discussion of the science underlying global warming draws upon three National Research Council reports: UNDERSTANDING CLIMATE CHANGE FEEDBACKS (2003), ABRUPT CLIMATE CHANGE: INEVITABLE SURPRISES (2002), and CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEYS QUESTIONS (2001). The National Research Council is made up of representatives of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine.

gation. Already, in 1999, the Western Fuels Association brought an unsuccessful defamation suit against environmental groups for running an ad in *The New York Times* highlighting the dangers posed by global warming.¹²

Cross-Cutting Themes

While each global warming case raises different legal and factual questions, there are a handful of cross-cutting themes.

Standing. One commonly recurring question in global warming suits is whether the plaintiffs have “standing” to bring the litigation. This issue arises from the requirement of Article III of the U.S. Constitution that the federal judiciary only hear actual “cases and controversies.” Under the Supreme Court’s standing doctrine, to get a foot in the courtroom door, a litigant must demonstrate three things:

(1) she has suffered a particularized injury, (2) the injury is fairly traceable to the defendant’s actions, and (3) the court has the ability to award relief that will redress the plaintiff’s injury.

Standing is generally not an obstacle for industry plaintiffs claiming that an improper or unauthorized regulatory restriction has caused them economic harm. On the other hand, plaintiffs seeking to redress environmental injuries associated with global warming have repeatedly faced challenges to their standing. To the extent that standing restrictions might block one side of the debate from the courts, they threaten to undermine our nation’s ability to address global warming in an even-handed way.¹³

Environmentalists have faced standing challenges under each part of the Supreme Court’s 3-part test. Plaintiffs may have the least difficulty satisfying the injury

State Legislation Addressing Global Warming

Across the country, states have acted to fill the gap left by the federal government. Some have adopted strategies tailored to their parochial interests, for instance, increasing ethanol reliance in corn-growing states. Others have implemented emissions reductions in the hope that their regulatory strategies will catch on elsewhere.

Of all the states, California has probably tackled greenhouse gas emissions most aggressively, regulating both motor vehicles and stationary sources. In August 2006, California enacted the Global Warming Act, A.B. 32, which authorizes a tradable greenhouse gas emission system with the goal of eliminating one-quarter of the emissions of electrical utilities, oil refiners, cement makers, and other large polluters by 2020. In 2002, California enacted A.B. 1493 to curtail tailpipe emissions from passenger vehicles and light duty trucks. While Clean Air Act Section 209(a) generally prevents states from enacting motor vehicle emission requirements, Section 209(b) allows California, with federal approval, to promulgate its own rules. EPA has not yet determined whether to grant California permission to enforce A.B. 1493. If permission is granted, the Clean Air Act permits other states to utilize the California standard.

Many other states have enacted policies relating to climate change. For example, ten states* have adopted the California tailpipe emissions standards. Seven states** have created a regional tradable emissions permit program, the Regional Greenhouse Gas Initiative, designed to stabilize emissions in 2009 and reduce them by ten percent by 2019. Other state laws relating to agricultural practices, tax subsidies, and energy regulation address different aspects of the global warming issue.***

* The states that have adopted the California standard include Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.

** The participating states include Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont.

*** The Pew Center on Global Climate Change’s website contains a detailed list of state efforts to address climate change. This resource can be accessed at www.pewclimate.org/what_s_being_done/in_the_states.

requirement. While climate science cannot predict with certainty the localized effects of global warming, certain individuals are particularly vulnerable. For instance, property owners in low-lying coastal areas will almost certainly suffer from inundation and heightened storm surges if, as predicted, global warming causes sea level rise. Because many environmentalists own, use, or enjoy resources that are threatened by global warming, they should be able to assemble coalitions of plaintiffs who can show sufficient specific injuries.

Nonetheless, some judges have concluded that plaintiffs cannot satisfy the injury prong, focusing on the “global” nature of global warming to support the conclusion that plaintiffs’ injuries are too generalized to support standing. For example, Judge David Sentelle adopted this position in his concurring opinion in *Massachusetts v. EPA*, when the case was before the U.S. Court of Appeals for the D.C. Circuit. Similarly, in 2002, in a case involving claims that federal agencies failed to purchase the number of alternative-fuel vehicles mandated by the Energy Policy Act, a federal District Court opined in dicta that the concerns the environmental plaintiffs “presented regarding global warming are too general, too unsubstantiated, too unlikely to be caused by defendants conduct, and/or too unlikely to be redressed by the relief sought to confer standing.”¹⁴

The closely related causation and redressability prongs are also potential obstacles to environmentalists’ standing in global warming cases. The analysis of causation and redressability often overlap; a court can usually fashion a remedy where a defendant has “caused” an injury. In the global warming context, courts may be concerned that no particular defendant is responsible for all, or even the bulk of, the greenhouse gas emissions allegedly causing plaintiffs’ injuries. Thus, a court may question whether it can provide effective redress by restricting the emissions of the particular defendant before the court.

This concern led a federal District Court in 1992 to dismiss a suit by a nonprofit advocacy organization alleging that federal agencies had improperly failed to analyze the contribution of forty-two different actions to global warming.¹⁵ The Court found that the causal relationship between the federal actions and the alleged harm to beaches

used by the organization’s members was too attenuated to support standing. The Court stated that, “[n]otwithstanding the seriousness of the phenomenon, there is no ‘global warming’ exception to the standing requirement.”

Despite these rulings, other courts have found that environmentalists do have standing to bring global warming cases. In 2005, a federal District Court rejected the government’s argument that the plaintiffs lacked standing to sue federal agencies for failing to analyze under NEPA the potential impact that funding overseas fossil fuel development could have on global warming.¹⁶ In 2006, another District Court found that environmental groups had standing to sue a company for unauthorized release of a hydrochlorofluorocarbon, a gas that both contributes to global warming and depletes the ozone layer.¹⁷

Judicial Authority. Some of the complex questions raised by global warming suits call into question the constitutional authority of the courts. In part, this concern derives from the so-called counter-majoritarian difficulty, the notion that federal judges, having not been elected directly by the people, should err on the side of leaving to the political branches the resolution of difficult policy problems. The same basic concern underlies the “political question” doctrine, a set of rules developed by the Supreme Court authorizing the courts to decline to decide a case otherwise in their jurisdiction so that the issue can be decided by the political branches. In determining whether this doctrine applies, the courts are supposed to consider, among other things, whether there are “judicially discoverable and manageable standards” for resolving the case, and whether the case calls for “an initial policy determination of a kind clearly for nonjudicial discretion.”¹⁸

The concern about judicial authority plays out somewhat differently depending upon the type of global warming litigation involved. The NEPA cases are arguably the least problematic because they are designed to force executive branch officials to comply with a statute previously approved by both elected branches. Further, NEPA litigation does not dictate a particular substantive outcome. Instead it seeks to hold agencies accountable for their obligation to thoroughly research the likely environmental effects of their actions and fully disclose such effects to

the public. The Clean Air Act cases also raise few counter-majoritarian concerns because they require the courts to discern what a statute really says, and by extension what Congress intended when it originally enacted the law. Thus, from one perspective, these cases simply ask the courts to enforce the law as decreed by Congress and the President. On the other hand, to the extent this type of litigation seeks to force the Administration to take a step it has declined to take, it asks the courts to overrule a decision by one of the elected branches.

Preemption suits, on the other hand, raise relatively serious counter-majoritarian concerns. The courts are being asked to invalidate properly enacted state laws, directly supplanting the will of the people in the various states involved. In some instances, plaintiffs in preemption suits can point to clear, direct conflicts between federal and state legislative enactments. In these cases, courts are essentially arbitrating between democratic institutions, ensuring that the federal government enjoys supremacy within our federal system. However, in some pending suits related to global warming, the claim of preemption is based on relatively vague assertions of federal intent to occupy the field and foreign policy considerations. In these cases, it is more debatable whether a judicial finding of preemption, which would obstruct the policies of democratically-elected state legislatures, would implement the will of Congress.

Nuisance suits are potentially anti-majoritarian in the sense that advocates are enlisting the courts to use the common law to fill gaps arguably created by existing legislation. Thus, rather than effectuating the will of elected representatives, courts are being asked, in effect, to make up for their inaction. On the other hand, the common law is an important and traditional source of legal rights and, unless expressly superseded by legislation, remains available to litigants seeking to address injuries, including those related to global warming. Moreover, successful common law nuisance suits can spur legislative action. For example, a good deal of the modern federal environmental law adopted in the 1970s was enacted in response to rulings in common law suits brought to redress environmental injuries.¹⁹ Today's global warming nuisance suits could have the effect of encouraging Congress to adopt more

comprehensive legislative solutions a few years from now.

At least one court has expressly invoked the political question doctrine in a global warming case. Recently, a federal District Court in New York applied the doctrine to dismiss a common law nuisance suit brought against the nation's five largest emitters of greenhouse gases. The Court cited "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."²⁰ The Court believed that no judicial resolution of the nuisance suit was possible until Congress provided some guidance on how to balance the interests at stake in the global warming debate.²¹

Judicial Competence. Global warming cases may also raise certain questions that are beyond the competence of the courts to resolve, or at least resolve well. The federal judiciary is well equipped to decide legal questions arising under our nation's Constitution, statutes, and common law. Most judges have significant legal training prior to taking the bench, either as practicing attorneys or academics. On the other hand, judges often lack the specialized skills necessary to analyze highly technical scientific and economic information about global warming. Even if judges have these skills, expert administrative agencies or Congressional committees are arguably in a better position to consider the ramifications of different strategies for addressing global warming.

Of course, in the global warming context, as in other legal areas, policy, science, and law may bleed together. Even the resolution of basic legal threshold issues, such as standing, requires some understanding of climate science. Court decisions may still have major effects on environmental and economic policy even if judges take pains to focus on narrow issues of statutory construction.

Courts may be at their most competent in resolving Clean Air Act and NEPA litigation. In these cases, the courts must engage in traditional statutory interpretation to determine the proper meaning of the Clean Air Act and to enforce NEPA or state equivalents. In future cases, courts may have to assess the factual predicates for agency decisions under deferential principles of administrative law. This could require limited engagement with the science and economics of global warming to ensure

that agencies are not acting in an arbitrary and capricious fashion. But this is inevitable in any type of judicial review of administrative action in a complex field. The principle of judicial deference is designed to keep the courts within their proper sphere of expertise.

Judicial competence to resolve the existing preemption cases is somewhat more suspect. On the one hand, express preemption and conflict preemption are well established and thoroughly elaborated legal doctrines. On the other hand, to the extent preemption arguments rely on the theory of “field preemption” or foreign affairs considerations, they may call upon the courts to exercise considerable discretion and policy judgment. Under field preemption, courts must assess the probable results of state law and determine whether they significantly impede federal purposes. Courts may be at their least competent when asked to nullify state legislation based on their assessment of inchoate foreign policy objectives.

Judicial competence also may be questioned in the context of certain nuisance suits. While judicial enforcement of the common law of nuisance is centuries old, global warming may require substantial judicial innovation. Global warming does not dovetail neatly with the existing doctrine because it is caused by numerous, diverse sources. Unlike parties bringing traditional nuisance suits, plaintiffs in these suits will themselves contribute to global warming, even if their contributions are relatively insignificant. Furthermore, courts will be faced with the difficult task of determining how many tons of greenhouse gas can be emitted before a defendant causes a nuisance. Courts may also find it particularly difficult to craft appropriate relief. Unlike in other nuisance cases, injunctive relief might require the fashioning of complex orders to reduce emissions over extended periods of time. While courts have broad equitable discretion to fashion remedies in nuisance suits, it is debatable whether they have the competence to determine optimum greenhouse gas emission reductions for various industrial sectors.

Judicial Decision-Making and Dynamic Change.

Finally, pending global warming litigation raises fundamental questions about whether and how the courts should

apply existing legal doctrines to new circumstances. As scientific understanding expands and social attitudes change, the law must keep pace. But what is the responsibility of the courts — as opposed to that of the elected branches — in managing the necessary legal evolution?

The common law is by definition a constantly evolving body of law. However, the common law has generally evolved at a slow and measured pace. Global warming may present the need for such radical legal innovations that it may test the limits of common law adjudication.

In contrast to the common law, a statute must be interpreted in accordance with its language and (in the view of many) evidence of Congress’s actual intention in drafting the text. However, this general approach does not answer the question of whether Congress drafted legislation to address a discrete list of known problems, or whether, instead, Congress delegated responsibility to the agencies to address new and possibly unforeseen problems. This is one of the questions at the heart of *Massachusetts v. EPA* before the Supreme Court.

MASSACHUSETTS V. EPA

Overview of the Case

In *Massachusetts v. EPA*, the U.S. Supreme Court will review an EPA decision not to regulate greenhouse gas emissions from cars and trucks under the Clean Air Act. The lawsuit focuses on section 202 of the Clean Air Act, which governs emissions from motor vehicles. However, the outcome of the case will indirectly affect future decisions about the regulation of greenhouse gas emissions from power plants and other stationary sources.

The case requires the Court to resolve relatively narrow legal issues: (1) whether the Clean Air Act grants the EPA authority to regulate greenhouse gases; and (2) if EPA does possess this authority, whether it properly exercised its lawful discretion in deciding not to promulgate regulations. The Court will also have to satisfy itself that petitioners have standing. If the Court sides with the government, the decision could prohibit EPA from restricting greenhouse gas emissions without new Congressional

legislation. If the Court sides with Massachusetts and the other petitioners, it will not force EPA to mandate reductions of greenhouse gas emission. Rather, the Court would likely direct the Agency, in accordance with the Court's reading of the Clean Air Act, to reconsider whether to issue regulations. It is undisputed that, even if the government loses the case, the Clean Air Act provides EPA with considerable discretion in carrying out its regulatory obligations.

Administrative Background

Massachusetts v. EPA has its origins in a 1999 petition filed by seventeen non-profit organizations,²² two trade associations,²³ and one business,²⁴ asking EPA to regulate motor vehicle emission of greenhouse gases, including CO₂, under the Clean Air Act. The petition did not write on a blank slate. In 1998, at the request of former Congressman Tom Delay, EPA's General Counsel had prepared a memorandum assessing the Agency's authority to regulate certain air pollutants, including CO₂. The General Counsel concluded that the Clean Air Act granted the EPA such authority, but emphasized that the EPA had "made no determination . . . to exercise [its] authority" under the Act.²⁵ The 1999 petition essentially asked EPA to exercise the regulatory authority the General Counsel's memorandum stated the Agency possessed.

The 1999 petition lay dormant until 2001, when in the last days of the Clinton Administration, EPA put out a request for public comment.²⁶ More than 50,000 public comments were filed, but EPA took no further action. In 2002, the International Center for Technology Assessment, Sierra Club, and Greenpeace sued EPA to compel them to respond to the petition.²⁷ In 2003, EPA formally denied the petition, finding that, contrary to the analysis in the 1998 General Counsel's memorandum, EPA had no authority to regulate CO₂. The Agency further stated that even if it had such authority, it refused to exercise it, "disagree[ing] with the regulatory approach urged by petitioners."²⁸ The Agency identified several factors that influenced its decision, including scientific uncertainty, unavailability of emission control technology, potential interference with foreign policy, and the belief that regu-

lation under Section 202 would address global warming in an inefficient, piecemeal fashion.

D.C. Circuit Decision

Twelve states,²⁹ three cities,³⁰ one territory,³¹ and thirteen organizations³² (collectively "petitioners") asked the U.S. Court of Appeals for the D.C. Circuit to review EPA's denial. On April 18, 2005, a deeply divided Court dismissed the case.

Judge A. Raymond Randolph issued the opinion of the Court but, in an unusual twist, he was the only member of the three-judge panel to join in the opinion. Judge Randolph ruled for the government on the ground that EPA had properly exercised its discretion in deciding not to promul-

Relevant Provisions of the Clean Air Act

§ 202(a): "[EPA] shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any pollutants from any class or classes of new motor vehicles or new motor vehicle engines, which in [its] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

§ 302(g): "The term 'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and by product material) substance or matter which is emitted into or otherwise enters the ambient air."

§ 302(h): "All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants."

gate regulations. He said that EPA could make “the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area.” Judge Randolph assumed for the sake of argument that the Clean Air Act provided EPA with authority to regulate vehicular emissions of greenhouse gases. He declined to resolve the issues of petitioners’ standing because he believed that it was inextricably linked to the merits for the case.

Judge David Sentelle issued a separate opinion concurring in the judgment, forming the two-judge majority in favor of the government’s position. He concluded that petitioners lacked standing to bring the case and would have ruled that they failed to assert a particularized injury because global warming imposes generalized impacts “harmful to humanity at large.”³³ However, he accepted the position embraced by the other two judges on the panel (Judge Randolph in the majority and Judge Tatel in dissent) that the Court should decide the merits of the case. Proceeding from that premise, he wrote “I join Judge Randolph in the issuance of a judgment closest to that which I myself would issue.”³⁴

Judge David Tatel issued a vigorous dissent. First, Judge Tatel concluded that petitioners had standing to bring the case. Second, he believed that the Clean Air Act gave EPA authority to regulate greenhouse gases. Finally, he concluded that EPA had improperly considered factors outside of those enumerated in Section 202 in declining to regulate.

On December 2, 2005, the Court of Appeals for the D.C. Circuit sitting *en banc* denied a petition to rehear the case by a vote of four to three, leaving the panel decision in place. Judge Tatel, joined by Judge Judith Rogers, wrote a dissenting opinion reiterating his position at the panel stage.³⁵ Judge Thomas Griffith also dissented without opinion.

The U.S. Supreme Court granted the petition for *certiorari* filed by Massachusetts and the other petitioners on June 26, 2006.

EPA Authority to Regulate

In the Supreme Court, petitioners attack the legal bases for EPA’s denial of the 1999 petition. Petitioners argue that EPA ignored the unambiguous language of the Clean

Air Act in concluding that greenhouse gases are not “air pollutants” within the meaning of Clean Air Act Section 302(g).³⁶ They assert that greenhouse gases are air pollutants because, in the language of Section 302(g), they are “chemical . . . substance[s]” emitted into the ambient air. They also emphasize that the statute states that air pollutants are “any air pollution agent . . . including any . . . chemical . . . substance,” indicating that chemical substances, as a class, are included within the category of air pollution agents. According to petitioners, the logic of the statute thus requires air pollutants, as defined in Section 302(g), to include greenhouse gases.

In response, EPA argues that the Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*³⁷ established a requirement that statutes speak with particular clarity to authorize regulations that could have significant economic or political ramifications. In *Brown & Williamson*, the Supreme Court declined to construe broadly-worded authority in the Food, Drug and Cosmetics Act over “drugs” and “devices” to grant the FDA the power to regulate tobacco. The Court justified this ruling on the grounds that recognizing FDA jurisdiction would necessarily have led to a ban on tobacco products, severely disrupted a major industry, and overridden several tobacco-specific laws that were, in the Courts view, inconsistent with the idea that federal law supported a ban on tobacco products.

EPA argues that, because the regulation of greenhouse gases could have significant economic impacts, *Brown & Williamson* governs interpretation of Section 302(g) of the Clean Air Act. In EPA’s view, the language in Section 302(g) is not sufficiently specific to show that Congress intended to authorize the regulation of greenhouse gases. Furthermore, EPA argues that the National Ambient Air Quality Standards program governing stationary sources cannot be applied coherently to greenhouse gases, suggesting that they do not fall under the Clean Air Act. Lastly, EPA argues that failed efforts in Congress to enact legislation regulating greenhouse gases reinforce the conclusion that Congress did not intend for greenhouse gases to fall within the ambit of the Clean Air Act. Given that Congress did not intend for the Clean Air Act to cover green-

house gases, EPA concludes that such gases are not “air pollution agents” within the meaning of Section 302(g).

Petitioners respond that *Brown & Williamson* does not authorize a deviation from the literal meaning of the Clean Air Act because regulation of greenhouse gases would not directly conflict with other federal law. Petitioners also note that the Clean Air Act requires EPA to take cost into account before mandating control technologies for regulated pollutants. Thus, they contend, unlike in the *Brown & Williamson* case, assertion of federal regulatory authority over global warming would not necessarily lead to significant economic disruptions.

Petitioners also dispute EPA’s reconstruction of Congressional intent. First, they note that Congress included climate in its definition of “welfare” in Section 302(h) of the Clean Air Act. Second, they dispute EPA’s reliance on failed global warming legislation, arguing that subsequent legislative debates do not illuminate Congressional intent in adopting the Clean Air Act. Because they regard *Brown & Williamson* as distinguishable, petitioners contend that EPA has no basis to disregard a clear Congressional command expressed in the language of the Clean Air Act.

One of the fundamental disputes in this case is whether Congress, in crafting the Clean Air Act, intended to address a relatively narrow, closed list of air pollution issues or intended to provide a dynamic vehicle for addressing new and emerging problems. No party contends that the Clean Air Act was enacted with the primary purpose of combating global warming. However, petitioners believe that, in the Clean Air Act, Congress created a sufficiently flexible statutory scheme to address global warming. EPA, on the other hand, believes that Congress could not have intended to create such adaptability because of the unpredictable consequences of such an approach.

EPA Discretion to Decide Whether or How to Regulate

Petitioners also challenge EPA’s argument that, even if the Agency has authority over greenhouse gases, it properly exercised its lawful discretion in declining to issue regulations governing motor vehicles. Petitioners do not dispute that the Act grants EPA some discretion in mak-

ing decisions under Section 202. However, the parties do not agree on the scope of that discretion.

Petitioners contend that the Act mandates that EPA exercise its discretion based exclusively on whether emissions “may reasonably be anticipated to endanger public health or welfare.” Petitioners argue that the agency failed to address this criterion and, instead, relied on other factors it was not authorized to consider. Moreover, petitioners argue that, while EPA must assess scientific uncertainty, it must utilize the standard set out in the statute, that is, whether a pollutant “*may reasonably* be expected to endanger public health or welfare.” Petitioners contend that nowhere in EPA’s decision, nor in its subsequent court filings, did EPA apply this standard.

EPA argues that petitioners mischaracterize the petition denial. In EPA’s view, the Agency exercised its inherent discretion to decline to analyze the danger posed by greenhouse gases, and thus avoided triggering Section 202. Furthermore, the agency believes that its mandate to exercise “judgment” authorizes it to consider all relevant policy issues in making its decision.

Should it be accepted, EPA’s argument could greatly expand agencies’ power by allowing them to consider a broad range of policy factors when exercising discretion delegated to them by statute. If the Supreme Court adopts this position, it may have ramifications for a wide variety of other statutory schemes that give agencies some degree of discretion to trigger regulatory requirements.

Petitioners’ Standing

While the Supreme Court did not expressly grant *certiorari* on standing, EPA argues that petitioners’ lack of standing provides an alternative basis for affirming dismissal of the case. In any event, a court has an independent responsibility to assure itself that the plaintiffs have standing before proceeding with consideration of the merits of the case.³⁸

EPA states that petitioners cannot satisfy either the causation or redressability standing inquiries. The Agency argues that petitioners cannot establish causation because, given the plethora of other domestic and foreign sources, they cannot demonstrate that emissions from new vehicles

materially contribute to global warming. Further, EPA argues that petitioners cannot satisfy redressability because no possible regulation it could promulgate would have an appreciable impact on global warming. While the government does not directly challenge petitioners' ability to satisfy the injury inquiry, the Court will have to consider this issue as well. As noted previously, in his opinion in the Court of Appeals, Judge Sentelle would have found that petitioners did not allege a particularized injury because of the widespread impacts of global warming.

Petitioners dispute each of these arguments. They assert that they have amply alleged that global warming

will cause them individual harms: for example, coastal states face inundation from rising sea level and western states face water shortages as annual snow packs decrease. Petitioners argue that increased greenhouse gases attributable to EPA's failure to regulate vehicular emissions will exacerbate these injuries, thus satisfying the causation requirement. They also contend that, should the Court find that EPA erred in its decision-making process, EPA would have to consider adopting regulations that would reduce greenhouse gas emissions, mitigating these harms. Moreover, if the Court finds that the Clean Air Act covers vehicular greenhouse gas emissions, EPA would arguably be in

Some *Amici* Supporting Petitioners in *Massachusetts v. EPA*

Aspen Skiing Company — The owner and operator of four major ski resorts in Colorado, employing 3,400 people during the winter season. The Company is concerned that business-as-usual greenhouse gas emissions could shorten the Colorado ski season and make some resorts economically unviable by 2050.

Entergy & Calpine — Two of the ten biggest energy companies in the country, producing power through coal, gas, oil, nuclear, hydroelectric, and wind power facilities. The companies argue that the Clean Air Act can provide more regulatory certainty than potential international agreements and that EPA regulation could provide incentives for industry to make investments that will allow the United States to remain a leader in energy production technology.

Alaska Inter-Tribal Council — A tribally governed, non-profit organization advocating on behalf of tribal governments throughout Alaska. The Council expresses grave concern over the impact of global warming on Alaska's natural resources upon which the Tribes rely for their subsistence. Additionally, reduced ice flows have endangered the physical safety of Alaskan Native hunters and increased sea level and severe weather endanger many communities; several Alaskan Native villages have already begun the process of relocating to escape these dangers.

United State Conference of Mayors — A national organization representing 1,100 cities with populations over 30,000 people. The Conference argues that the federal government's failure to regulate greenhouse gases to reduce the severity of global warming will force local governments to bear the cost of responding to a changing climate.

National Council of the Churches of Christ in the U.S.A. — An organization representing 35 Protestant, Orthodox, and Anglican denominations with 140,000 congregations nationwide. The Council's concern about global warming stems from its tenets of stewardship for the natural world and solicitude for the most vulnerable members of the human community.

Dr. Madeline Albright — The former U.S. Secretary of State. Dr. Albright objects to EPA's consideration of foreign policy in declining to fulfill the mandate of domestic legislation.

18 Climate Scientists — Scientific researchers, including scientists that participated in conducting a National Academy of Sciences/National Research Council review of existing science. The scientists argue that EPA has misrepresented climate science and in particular the findings of a report some of them helped write for the NAS/NRC.

a stronger position to regulate stationary sources, like power plants, providing an additional indirect remedy to petitioners.

California asserts an alternative basis for standing based on an alleged injury to state sovereignty. The State points out that, in a case discussed below, the motor vehicle industry is arguing that EPA's decision that the Clean Air Act does not cover greenhouse gases precludes California from regulating vehicle emissions. The State asserts that this threatened interference with its sovereign power to enforce its laws constitutes an injury sufficient to establish its standing in *Massachusetts v. EPA*.

A ruling on standing in *Massachusetts v. EPA* can be expected to reverberate through other cases related to global warming and environmental law generally. Because standing is a predicate for federal court jurisdiction, an adverse decision could significantly reduce the ability of litigants to bring claims. If, for instance, the court found that petitioners failed to meet the injury prong, despite extensive evidence that global warming may have unique impacts on the states individually, future litigants would be hard pressed to overcome this obstacle. A finding that petitioners could not fulfill the causation requirement could also impact future cases in which plaintiffs sue polluters who contribute to, but are not solely responsible for, environmental degradation.

OTHER CASES UNDER THE CLEAN AIR ACT

The Supreme Court's *Duke Energy* Case

A second case before the Supreme Court this term, *Environmental Defense v. Duke Energy*, also involves the Clean Air Act, and peripherally bears on the issue of global warming. The Court is reviewing a ruling by the U.S. Court of Appeals for the Fourth Circuit that EPA lacked the authority to require a power company to obtain a permit under the Act before undertaking modifications of coal-fired power plants. The case arose from an EPA enforcement action against the company for proceeding with the modifications without permits. One of

the air pollutants at issue, NO_x, is a greenhouse gas.

The issue in the case is whether the EPA's Prevention of Significant Deterioration Program mandated a permit. The EPA contends that a permit is required when a modification leads to longer hours of operation. The appeals court, ruling in favor of the company, concluded that permits are only required where a modification leads to an increased hourly rate of emission. The Federal Courts of Appeal for the D.C. Circuit and Seventh Circuit have reached a contrary conclusion from the Fourth Circuit on this question. The Supreme Court's decision in the case could resolve this split between the circuits.

The case was argued in the Supreme Court on November 1, 2006.

New Source Performance Standards for Greenhouse Gases

Three environmental groups,³⁹ ten states,⁴⁰ and two cities⁴¹ have filed a lawsuit in the U.S. Court of Appeals for the D.C. Circuit, *Coke Oven Environmental Taskforce v. EPA*, challenging EPA's 2006 New Source Performance Standards for certain utility and industrial power plants. New Source Performance Standards establish the maximum amount of pollution a new stationary source may emit. During the comment period, petitioners asked EPA to promulgate standards for greenhouse gas emissions. EPA declined, reiterating its position that the Clean Air Act does not grant regulatory authority over greenhouse gases.

The case is currently stayed pending the Supreme Court's resolution of *Massachusetts v. EPA*.

NEPA CASES

Several lawsuits have challenged decisions made by the federal government under the National Environmental Policy Act, which requires analysis of the environmental impacts of major federal actions. In those states that have adopted "little NEPAs," similar actions may be brought based on state and local government actions. At root, claimants argue that the government needs to consider the potential contribution its actions may make to global warming.

Mexican Power Plants

In *Border Power Plant Working Group v. Department of Energy*, decided in May 2003, the Border Power Plant Working Group challenged a Department of Energy decision to grant rights-of-way for transmission lines to connect new power plants in Mexico to the U.S. power grid.⁴² Plaintiffs challenged the Department's failure to prepare an Environmental Impact Statement ("EIS") and in particular its failure to analyze the environmental impacts of the new plants' CO₂ emissions. The government argued that the power plants would operate without the transmission lines and therefore the plants' operations and emissions were not foreseeable consequences of the right-of-way grants, and thus not within the scope of NEPA.

The U.S. District Court for the Southern District of California found that some of the turbines at the power plants were intended to produce power for export to the United States and could not operate without the transmission lines. As a result, the Court determined that the Department needed to analyze the emissions from these plants under NEPA.

The government complied with the Court's order in its December 2004 Final EIS. The EIS included three paragraphs on CO₂ emissions, noting that the project would increase global greenhouse gas emissions by .023 percent. With little additional discussion, the Agency concluded that the project's impact on global warming would be "negligible."⁴³ Despite the Agency's cursory analysis, Border Power Plant Working Group represents an important legal development because it is the first judicial decision concluding that NEPA requires analysis of the global warming implications of federal actions.

Updated Fuel Efficiency Standards

In *Center for Biological Diversity v. National Highway Traffic Safety Administration*,⁴⁴ ten states,⁴⁵ New York City, Washington, D.C., and five environmental groups⁴⁶ have challenged a rulemaking process resulting in new federal fuel efficiency standards on the ground that the Agency failed to comply with NEPA. Petitioners claim that the government should have analyzed, among other things, the global warming implications of the new rule

An Overview of NEPA

One of our oldest and most venerated environmental statutes, NEPA requires the federal government to evaluate and publicly disclose the environmental consequences of its actions. The government must first conduct an environmental assessment to determine if a proposed action threatens to cause significant environmental impacts. If so, the agency must then prepare an environmental impact statement fully analyzing these impacts. An environmental impact statement must also respond to public comments and analyze project alternatives. NEPA does not apply to state or local government activities.

in an EIS. The challenge is before the U.S. Court of Appeals for the Ninth Circuit.

The case arises from the National Highway Traffic Safety Administration's release of updated Corporate Average Fuel Economy ("CAFE") Standards for light trucks in April 2006. The Agency concluded that the new standards would have no significant environmental impact and did not warrant preparation of an EIS. In 1987, in connection with the release of a prior version of the CAFE standards, the Agency had completed an EIS. The Agency justified its finding that the new rule would have no significant environmental impact on the ground that the new rule increased the stringency of the fuel efficiency requirements and therefore would have net positive environmental benefits.

Petitioners argue that an EIS is necessary because increased information about global warming gained since the preparation of the 1987 EIS requires a new, comprehensive analysis of the impacts of the CAFE regime, along with a fresh consideration of the need for alternative, stricter standards. Petitioners also argue that a methodological change in the new CAFE rule may result in increased greenhouse gas emissions because it may provide an incentive for manufacturers to build larger, less fuel-efficient vehicles.

Overseas Fossil Fuel Projects

In *Friends of the Earth v. Mosbacher*, Friends of the Earth, Greenpeace, and the City of Boulder, Colorado, are suing two government agencies, the Export Import Bank (“EIB”) and the Overseas Private Investment Corporation (“OPIC”), for providing financing to overseas fossil fuel projects without conducting an environmental analysis under NEPA. Plaintiffs argue that NEPA compels the agencies to analyze the potential global warming impacts that their projects could have within the United States.

Plaintiffs allege that the actions of both the EIB and OPIC have environmental impacts that require, at the least, the agencies to complete an environmental assessment. The EIB provides financial support for United States exports and, between 1990 and 2001, provided more than \$25 billion in loans and financial guarantees to overseas energy projects that produce 204 million tons of CO₂ emissions annually. OPIC provides loan guarantees and direct loans to foreign projects and, between 1990 and 2000, supported overseas power projects that emit more than 56 million tons of CO₂ annually. Plaintiffs argue that, by its clear terms, NEPA requires the agencies to analyze the impact that these projects have on global warming.

Defendants argue that NEPA does not apply to projects outside of the United States that impose only generalized environmental harms, like global warming. They also argue that there is insufficient scientific certainty about the local impacts of global warming, and the individual contributions of funded projects, to make meaningful environmental analysis possible.

In August 2005, the U.S. District Court for the Northern District of California denied EIB and OPIC’s motion for summary judgment, finding that plaintiffs have standing because they alleged that global warming threatened land they use and own.⁴⁷ In its decision, the court accepted that, while the extent of plaintiffs’ injuries was uncertain, plaintiffs had adequately demonstrated that global warming would have significant consequences.⁴⁸

The Court is currently considering cross-motions for summary judgment on the applicability of NEPA to the OPIC and EIB actions at issue.

Powder River Basin Coal

In *Mayo Foundation v. Surface Transportation Board*,⁴⁹ the Sierra Club and Mid-States Coalition for Progress have brought a challenge in the U.S. Court of Appeals for the Eighth Circuit to the Surface Transportation Board’s approval of a new rail line to transport coal from mines in the Powder River basin to power plants in the Midwest. This suit is the second round of litigation over this rail project. In 2003, in response to a suit brought by the same plaintiffs, the Eighth Circuit held that the Board had violated NEPA by, among other things, failing to analyze the impact of the project on global warming.⁵⁰ The Court rejected an argument by the Board that Powder River Basin coal would merely provide a substitute source for coal, lead to no net increase in coal consumption, and thus cause no increase in greenhouse gas emissions.

In response to the 2003 decision, the Board published a supplemental EIS (“SEIS”) in 2005. The SEIS used a model of national and regional coal supply and demand to conclude that the project would only lead to a minor increase in coal consumption and, thus, little net increase in emissions. Based on this conclusion, the Board determined that emissions related to the project would have no significant environmental impact.⁵¹

Plaintiffs raise several arguments. First, they argue that the SEIS’s coal-consumption model essentially revives the Agency’s substitution theory previously rejected by the Eighth Circuit. Second, they argue that even the minor increase estimated by the model would translate into three million more tons of coal being consumed each year. Petitioners contend that this amount of coal would, itself, cause significant environmental impacts. Third, they challenge the Board’s failure to identify a threshold of significance for global warming impacts and note that the SEIS discussion is “less an analysis of air pollution impacts than a rationalization for not performing the required analysis.”⁵²

The outcome in *Mayo Foundation* may have important implications for other global warming NEPA litigation. Other cases ask courts to determine the preliminary question of whether NEPA requires agencies to consider the impacts of their actions on global warming at all. Here,

plaintiffs ask the Court to examine whether the government's analysis is adequate. If the Court upholds the Board's cursory treatment of global warming, agencies may be able to satisfy NEPA in the global warming context by paying only lip service to their environmental review and disclosure obligations.

San Joaquin Delta Development

Four environmental organizations⁵³ have filed suit in California Superior Court against the California Reclamation Board for its approval of a residential development that would require the construction of new levees in the San Joaquin Delta of California. The suit, *Natural Resources Defense Council v. Reclamation Board*, invokes the California Environmental Quality Act — a state “little NEPA.” Plaintiffs seek a court order setting aside the Board's approval of the development, which would convert 4,905 acres of agricultural land on an island in the Delta into a residential subdivision containing 11,000 houses and 5 million square feet of commercial and retail space.

Plaintiffs argue that the Environmental Impact Report prepared by the Board is inadequate because it assesses the project's impact on the Delta in its current condition without considering whether global warming is likely to alter the Delta ecosystem in the future. Plaintiffs allege that global warming will reshape the Delta environment and, in turn, the project's environmental consequences, significantly increasing its negative impacts. According to plaintiffs' novel argument, the Board has a legal obligation under California's version of NEPA to consider how global warming may exacerbate the negative environmental consequences of development projects over time.

LITIGATION OVER PREEMPTION OF STATE REGULATION

Vehicle Emissions Standards

In *Central Valley Chrysler-Jeep v. Witherspoon*,⁵⁴ motor vehicle manufacturers and dealers⁵⁵ (“the industry”) have sued the California Air Resources Control Board to prevent the enforcement of a state regulation to reduce greenhouse

gas emissions from motor vehicles. The regulations, promulgated under California statute A.B. 1493, require manufacturers to begin reducing emission rates for cars starting in 2009. The industry argues that A.B. 1493 is preempted by the Energy Policy and Conservation Act (“EPCA”), which authorizes CAFE Standards, and by the foreign affairs power of the Federal Government.

The industry argues that the regulation is preempted because the only feasible way to meet its dictates is by improving fuel efficiency, making the state regime the functional equivalent of a fuel efficiency standard. EPCA expressly prohibits states from enacting “law[s] or regulation[s] related to fuel economy standards . . . for automobiles covered by [CAFE].”⁵⁶ The State argues that Congress told the National Highway Traffic Safety Administration to consider “other motor vehicle standards of the Government on fuel economy”⁵⁷ in formulating the CAFE Standards, suggesting that Congress did not intend for EPCA to preempt California regulations of motor vehicle emissions under Clean Air Act Section 209(b). California also argues that its statute does not facially regulate fuel efficiency and that the purposes of EPCA do not extend to greenhouse gas reductions. In California's view, increases in fuel efficiency caused by the State regulation are mere side effects of reduced emissions.

Second, plaintiffs argue that the California law must be invalidated because it interferes with the President's foreign affairs power to conduct international negotiations about global warming. The plaintiffs are not contending that there is an actual conflict between the State regulation and any international agreement to which the U.S. is a party. But the Supreme Court has recognized limited, implied foreign affairs preemption where state law is invalid even in the absence of a specific conflict with federal policy. While the contours of this doctrine remain murky, the Supreme Court has suggested that it could apply where a state stakes out a position on foreign policy “with no serious claim to be addressing a traditional state responsibility.”⁵⁸ In other words, state action involving a traditional state responsibility would not be preempted, absent a direct conflict with federal policy.⁵⁹

The State argues that foreign affairs preemption does

not apply. First, it contends, A.B. 1493 comports with the United Nations Framework Convention on Climate Change, which the United States ratified in 1992. Second, it contends that because California is seeking to regulate the sale of consumer products within its borders, which is a traditional role of the state government, preemption should not be implied.

The State also argues that the preemption doctrine is wholly inapplicable because of California's special status under the Clean Air Act. Section 209(a) of the Act broadly preempts states from restricting motor vehicle emissions. However, section 209(b) contains a provision allowing California to seek a waiver. The State argues that if it obtains a waiver, then EPA has imbued the California law with a federal character. In other words, for the purposes of preemption, it is as if EPA itself promulgated the regulation — and the preemption doctrine does not apply to the federal government.

In September 2006, the U.S. District Court for the Eastern District of California denied the government's motion for judgment on the pleadings, finding that plaintiffs had stated a claim for preemption under both EPCA and the foreign affairs doctrine. While this ruling does not dispose of the case, it suggests that the District Court has reservations about the legal viability of the California statute.

Overview of Preemption

The Supremacy Clause of the United States Constitution makes federal law the supreme law of the land. Under the preemption doctrine, courts will invalidate state or local laws that conflict with "supreme" federal law. A federal law preempts state law if:

- 1) it contains a provision that expressly forbids state regulation,
- 2) it is sufficiently comprehensive that intent to preempt state law can be inferred, or,
- 3) if the state law directly conflicts with or frustrates the purpose of the federal law.

To date, ten states⁶⁰ have taken advantage of Section 177 of the Clean Air Act⁶¹ to adopt California's green house gas emission standard for motor vehicles. Thus, if the California statute is struck down, these other state regulations will fall as well. The automobile industry has also filed lawsuits in federal court against the states of Rhode Island and Vermont. State court cases filed against New York and Maine have been dismissed.⁶² A state court action filed in California has been stayed pending the resolution of the federal lawsuit.

Policy Position on Preemption in CAFE Standards

Some of the petitioners⁶³ in *Center for Biological Diversity v. National Highway Transportation Safety Administration* have challenged a section of the new CAFE standards relating to preemption. (This is a second facet of the NEPA challenge to the CAFE standards, discussed above.) The new CAFE rule contains a sixteen-page analysis of potential state regulation of motor vehicle greenhouse gas emissions, concluding that such regulation would require manufacturers to improve fuel efficiency. Because states are not permitted to promulgate fuel efficiency standards, the rule suggests that such limitations would be preempted by the EPCA. This argument largely parallels that pursued by the industry in *Central Valley Chrysler-Jeep v. Witherspoon*. The petitioners challenge both the legal reasoning and appropriateness of the preemption analysis.

PRIVATE NUISANCE SUITS

Power Companies

Eight states,⁶⁴ the city of New York, and three land trusts⁶⁵ have filed nuisance suits against the five largest CO₂ emitters in the United States, all companies operating power plants.⁶⁶ Defendants in the suit, *Connecticut v. American Electric Power*,⁶⁷ operate 174 power plants using fossil fuels, emitting approximately 650 million tons of CO₂ annually.

Plaintiffs argue that defendants' operations constitute

a public nuisance because they contribute to global warming. Plaintiffs argue, in part, that this public nuisance will harm their real property. The land trusts identify nine properties held for public education and recreation purposes at particular risk from heightened sea level, which will inundate land and destroy marsh ecosystems by contaminating them with salt water. The government plaintiffs seek to protect public property, the property of their citizens, and public health. Collectively, the plaintiffs ask the court to issue an abatement order to require that defendants reduce their emissions.⁶⁸

In September 2005, the U.S. District Court for the Southern District of New York issued an order dismissing the case, finding that the issue of global warming raised questions that were inherently legislative. Invoking the political question doctrine, the court found that until an “initial policy determination” had been made by the political branches of government, the court had no means of balancing the economic, environmental, foreign policy, and national security interests involved.

Plaintiffs have appealed the decision to the U.S. Court of Appeals for the Second Circuit.

Automakers

On September 20, 2006, California filed a nuisance suit, *California v. General Motors*,⁶⁹ in the U.S. District Court for the Northern District of California against six manufacturers of motor vehicles for contributing to global warming.⁷⁰ California alleges that motor vehicles produced by defendants release 289 million metric tons of CO₂ each year within the United States, accounting for thirty percent of emissions within California, and that these emissions injure California’s coastline, water supply, and treasury.⁷¹ In its suit, California invokes the public nuisance doctrine under both federal and California common law.

Unlike the suit against power companies, California’s suit does not seek a court order to force defendants to curtail emissions. Rather, California seeks damages, including compensation for the State’s expenditures for planning, monitoring, and infrastructure changes associated with global warming. California also seeks a declaration that the defendants are liable

for all future damages arising from greenhouse gases emitted by their products.

Oil and Coal Industry

Fourteen individuals have filed a class action suit in the U.S. District Court for the Southern District of Mississippi in *Comer v. Nationwide Mutual Insurance*⁷² against eight named oil companies, one hundred unnamed oil and refining entities, and thirty-one coal companies for damages sustained to their property as a result of Hurricane Katrina. Defendants’ industrial operations emit CH₄ and CO₂. Plaintiffs allege that these emissions contributed to global warming, increasing the ferocity of Hurricane Katrina, and the extent of the resulting damage. They argue that defendants’ behavior constituted a nuisance because defendants “conducted their business . . . in such a way as to produce massive amounts of greenhouse gases.”⁷³

Plaintiffs also attempted to include class action claims unrelated to global warming against insurance companies and mortgage lenders active in Mississippi. In February 2006, the Court dismissed those claims without prejudice, concluding that these class action claims were inappropriate because of the individual nature of the relationship between property owners and insurance and mortgage providers.

Government

In 2005, New York resident Gersh Korsinsky sued New York City, New York State, and the U.S. EPA in *Korinsky v. EPA*⁷⁴ alleging that their greenhouse gas emissions have contributed to global warming. Ironically, Korsinsky, who is representing himself in the case, copied much of the factual allegations in his complaint from the complaint filed by New York and other states against American Electric Power. Korsinsky claims that he is particularly susceptible to diseases that may become more prevalent due to global warming and also that his knowledge of the dangers of pollution has caused him mental harm. Korinsky seeks a court order both preventing defendants from further contributing to global warming and requiring the utilization of a technology he

invented to “eliminate carbon dioxide emissions.”⁷⁵

The U.S. District Court for the Southern District of New York dismissed the case on standing grounds, finding that Korsinsky could not satisfy the injury in fact and redressability requirements. The plaintiff has appealed the case to the U.S. Court of Appeals for the Second Circuit.

LIST OF PENDING GLOBAL WARMING LAWSUITS

Clean Air Act Cases

1. *Coke Oven Environmental Task Force v. EPA*, No. 06-1131 (D.C. Cir. filed Apr. 7, 2006) (challenge to Clean Air Act regulation of certain power plants for failing to regulate greenhouse gas; currently stayed pending the resolution of *Massachusetts v. EPA*.)
2. *Environmental Defense v. Duke Energy*, 126 S. Ct. 2019 (2006), *granting cert.* *United States v. Duke Energy*, 411 F.3d 539 (4th Cir. 2005) (Clean Air Act enforcement suit against power company for failing to obtain permit under Prevention of Significant Deterioration program that requires emission limitation for a pollutant that is also a greenhouse gas.)
3. *Massachusetts v. EPA*, 126 S.Ct. 2960 (2006), *granting cert.* 415 F.3d 50 (D.C. Cir. 2005) (petition for review of EPA decision to decline to regulate greenhouse gases under the Clean Air Act; the Circuit Court denied plaintiffs’ petition, and the Supreme Court has granted *certiorari*.)
4. *Northwest Environmental Defense Center v. Owens Corning Corp.*, 434 F.Supp.2d 957 (D.Or. 2006) (Clean Air Act enforcement suit against corporation for failing to obtain preconstruction permit for facility that would emit gas that is both a greenhouse gas and an ozone depleting substance; the District Court denied defendant’s motion to dismiss, finding that plaintiffs have standing to proceed.)

NEPA Cases

1. *Center for Biological Diversity v. NHTSA*, No. 06-71891 (9th Cir. filed Apr. 12, 2006) (suit challeng-

ing failure to consider impacts of 2006 CAFE standards on global warming under NEPA.)

2. *Friends of the Earth v. Mosbacher*, formerly *Friends of the Earth v. Watson*, 2005 WL 2035596 (N.D.Cal. Aug 23, 2005) (challenge to financial support for overseas fossil fuel development provided by the Export Import Bank and the Overseas Private Investment Corporation based on failure to consider impact on global warming under NEPA; the District Court denied defendants’ motion for summary judgment.)
3. *Mayo Foundation v. Surface Transportation Board*, No. 06-2031 (8th Cir. filed Apr. 14, 2006) (challenge of approval of rail extension to carry coal from mines in the Powder River Basin based on allegedly inadequate analysis of global warming impacts under NEPA.)
4. *Natural Resources Defense Council v. Reclamation Board*, No. 06CS01228 (California Superior Court of Sacramento County, filed August 18, 2006) (challenge to California Reclamation Board for approval of a development project without considering the potential impacts of rising sea level caused by global warming under CEQA.)

Preemption Cases

1. *Center for Biological Diversity v. NHTSA* (*see same under NEPA cases*) (challenge to legal basis of non-regulatory preemption analysis included in 2006 CAFE standards.)
2. *Central Valley Chrysler-Jeep v. Witherspoon*, 2006 WL 2734359 (E.D.Cal. 2006) (suit alleging that regulation of motor vehicle greenhouse gas emissions is preempted by the Energy Policy and Conservation Act and under the implied federal foreign affairs power; the District Court denied defendant’s 12(c) motion, finding that plaintiffs had stated a claim.)
3. *Green Mountain Chrysler-Plymouth-Dodge v. Torti*, No. 2:05CV00302 (D.Vt. filed Nov. 18, 2005) (suit alleging that regulation of motor vehicle greenhouse gas emissions is preempted by the Energy Policy and Conservation Act and under the implied federal foreign affairs power.)

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4. *Lincoln Dodge, Inc. v. Sullivan*, No. 1:06CV00070 (D.R.I. filed Feb. 13, 2006) (suit alleging that regulation of motor vehicle greenhouse gas emissions is preempted by the Energy Policy and Conservation Act and under the implied federal foreign affairs power.)

Nuisance Cases

1. *California v. General Motors Corp.*, No. 3:06CV05755 (N.D. Cal. filed Sept. 20, 2006) (nuisance suit against motor vehicle manufacturers.)
2. *Comer v. Murphy Oil*, 2006 WL 1066645 (S.D. Miss. 2006) (nuisance suit against oil and coal companies for contributing to the damage caused by Hurricane Katrina through their greenhouse gas emissions; the District Court dismissed unrelated claims against insurance companies and mortgage providers)
3. *Connecticut v. American Electric Power Company*, 406 F.Supp.2d 265 (S.D.N.Y. 2005) (nuisance suit against power companies; the District Court dismissed the suit under the political question doctrine and plaintiffs have appealed.)
4. *Korsinsky v. U.S. E.P.A.*, 2005 WL 2414744 (S.D.N.Y. 2005) (nuisance claim against EPA, New York State, and New York City for their greenhouse gas emissions; the District Court found that plaintiff lacked standing to bring the case and the plaintiff has appealed.)

INTERNET RESOURCES

www.pewclimate.org — information about a wide range of global warming policy, legislation, and litigation (web-site of the Pew Center on Global Climate Change)

www.climatelawsuit.org — information about *Friends of the Earth v. Mosbacher*, including details of projects sponsored by the Export Import Bank and the Overseas Private Investment Corporation (sponsored by Greenpeace and Friends of the Earth)

www.icta.org/global/index.cfm — information about *Massachusetts v. EPA* and the externalities caused by gasoline use (web-site of the International Center for Technology Assessment)

www.sierraclub.org/environmentallaw/lawsuits/view-Case.asp?id=316 — copies of the amici and party briefs filed in *Massachusetts v. EPA* and links to news coverage (website of the Sierra Club)

www.climatelaw.org/media — information about international litigation involving global warming (website of Climate Justice)

www.calcleancars.org/legal — information about *Central Valley Chrysler-Jeep v. Witherspoon* (web-site of the California Clean Cars Campaign)

www.nrdc.org/globalWarming/depth.asp — reports discussing global warming including Congressional and Presidential efforts and *Massachusetts v. EPA* (web-site of the Natural Resources Defense Council)

www.climatechoices.org — information about efforts in California and the Northeast to address global warming and the potential impacts on those regions (sponsored by the Union of Concerned Scientists)

www.pawalaw.com/links.htm — complaints filed in *Connecticut v. American Electric Power* (website of the Law Offices of Matthew Pawa)

www.nap.edu — catalogue of publications by the National Academies of Science (website of the National Academies Press)

www.cato.org/current/global-warming/index.html — publications arguing against global warming regulation (website of the Cato Institute)

NOTES

1 While the current extent of litigation is unprecedented, global warming made its first judicial cameo appearance in January 1990, in a District Court opinion invalidating an ordinance in East Providence, Rhode Island, that prohibited the commercial use of coal. *Rhode Island Cogeneration Associates v. City of East Providence*, 728 F.Supp. 828 (D.R.I. 1990). The term “global warming” appears in the decision within a quoted statement by the state’s Energy Coordinating Council. *Id.* at 839 n.29.

2 2006 has been a banner year for public attention to global warming. Al Gore’s documentary, *An Inconvenient Truth*, informed Americans across the country about the science behind global warming, grossing over \$20 million in box office proceeds. An upcoming celebrity-narrated documentary, *The Great Warming*, will bring the human side of global warming into movie theaters.

3 People outside of the United States have also utilized litigation to address global warming. In 2003, seventy environmental organizations, lawyers, academics, and individuals from twenty-nine countries banded together to form the Climate Justice Programme, an organization dedicated to litigating global warming cases in courts around the world. That same year, the *Financial Times of London* ran an article suggesting that global warming litigation could become the heir to tobacco and asbestos litigation. Vanessa Houlder, *Climate change could be next legal battlefield*, FINANCIAL TIMES p. 10 (July 14, 2003).

4 Judge Richard Posner has suggested that citizens’ scientific illiteracy and their psychological difficulty in accounting for low-probability catastrophic risks warp the political debate over global warming. RICHARD POSNER, *CATASTROPHE: RISK AND RESPONSE* (2004).

5 The White House, Press Release, Fact Sheet: President Bush is Addressing Climate Change (June 30, 2005).

6 Greenhouse gases are components of the atmosphere that trap solar heat and lead to global warming. Human activity produces a variety of greenhouse gases including carbon dioxide, methane and nitrous oxide.

7 The Kyoto Protocol is an international agreement that establishes binding greenhouse gas emissions limits for its signatories.

8 There is some question as to the sincerity of the Administration’s desire for scientific information to inform the policy debate. In the spring of 2006, controversy erupted amid allegations that Administration officials censored the findings of government scientists. Juliet Eilperin, *Climate Researchers Feeling Heat from White House*, THE WASHINGTON POST, A27 (April 6, 2006); CBS News, *Rewriting the Science* (March 19, 2006). On September 29, 2006, Senate Democrats wrote a letter to the inspector generals for the Department of Commerce and NASA requesting that they investigate the alleged censorship.

9 While legislative proposals related to global warming have experienced explosive growth, Congress has been unable to reach agreement on an approach. Only seven bills related to global warming were introduced into the 105th Congress, from 1997-1998. By August 2005, just six months into the 109th Congress, 56 bills had been introduced. In 2005, the Senate managed to pass an amendment to the Energy Policy Act that expressed the “sense” of the Senate that mandatory emission controls should be created. However this amendment was not included in the final version of the Act. The Senate has yet to effectuate its “sense.” The Pew Center on Global Climate Change provides up-to-date information about legislative proposals at www.pewclimate.org.

10 In addition to *Massachusetts v. EPA*, a second case, *Coke Oven Environmental Taskforce v. EPA*, is currently before the U.S. Court of Appeals for the D.C. Circuit. That case has been stayed pending the Supreme Court’s resolution of *Massachusetts v. EPA*.

11 See, e.g., J. Kevin Healy & Jeffrey M. Tapick, *Climate Change: It’s Not Just a Policy Issue for Corporate Counsel—It’s a Legal Problem*, 29 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 89 (2004).

12 *Western Fuels Association v. Turning Point Project*, Case No. 00-CV-074-D (D.Wy. 2001) (not reported). The Court dismissed the case for lack of personal jurisdiction and improper venue. The case was not refiled.

13 See John Echeverria & Jon T. Zeidler, *BARELY STANDING: THE EROSION OF CITIZEN “STANDING” TO SUE AND ENFORCE ENVIRONMENTAL LAW* (Georgetown Environmental Law & Policy Institute 1999) (discussing the imbalance in access to the courts between industry and environmentalists).

14 *Center for Biological Diversity v. Abraham*, 218 F.Supp.2d 1143 (N.D. Cal. 2002). The court did allow plaintiffs to proceed with their lawsuit, finding that concern about the health risks created by smog supported standing.

15 *Foundation on Economic Trends v. Watkins*, 794 F.Supp. 395 (1992).

16 *Friends of the Earth v. Watson*, 2005 WL 2035596 (N.D. Cal. 2005) (not reported). The case has subsequently been recaptioned as *Friends of the Earth v. Mosbacher*.

17 *Northwest Environmental Defense Center v. Owens Corning Corporation*, 434 F.Supp.2d 957 (D. Or. 2006). Lawsuits addressing ozone depletion, like those targeting global warming, try to address a global problem stemming from a multitude of sources.

18 *Baker v. Carr*, 369 U.S. 186, 217 (1962). *Baker* identifies six types of cases where the political question doctrine might apply: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. Recently, a plurality of the Supreme Court opined that "These tests are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

19 See ROBERT V. PERCIVAL, *ENVIRONMENTAL REGULATION: LAW SCIENCE AND POLICY* 63-87 (5TH ED. 2006) for a discussion of this aspect of the history of environmental law.

20 *Connecticut v. American Electric Power Company*, 406 F.Supp.2d 265 (S.D.N.Y. 2005). The plaintiffs have appealed the case to the U.S. Court of Appeals for the Second Circuit.

21 As discussed below, the Court's ruling is now on appeal to the U.S. Court of Appeals for the Second Circuit.

22 The organizations submitting the original petition included the International Center for Technology Assessment, Alliance for Sustainable Communities, Bio Fuels America, Clements Environmental Corporation, Earth Day Network, Environmental Advocates, Environmental and Energy Study Institute, Friends of the Earth, Full Circle Energy Project, Green Party of Rhode Island, Greenpeace USA, National Environmental Trust, Network for Environmental and Energy Responsibility of the United Church of Christ, New Jersey Environmental Watch, New Mexico Solar Energy Association, Public Citizen, and SUN DAY Campaign.

23 The trade associations are the California Solar Energy Industries Association and the Solar Energy Industries Association.

24 The business is Applied Power Technologies, Inc., which develops natural gas air conditioning technologies.

25 Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998). The text of the memorandum is available on the website of the law offices of Connell Foley at <http://www.connellfoley.com/hselaw/pdf/EPACO2memo1Cannon1998.pdf>.

26 EPA, Control of Emissions from New and In-use Highway Vehicles and Engines, 66 Federal Register 7486 (Jan. 23, 2001).

27 *International Center For Technology Assessment v. Whitman*, Docket No. 02-CV-2376 (D.D.C.).

28 Environmental Protection Agency, Control of Emissions from New Highway Vehicles and Engines, 68 Federal Register 52922, 52929 (Sept. 8, 2003).

29 The states include California, Connecticut, Illinois, Massachusetts, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

30 The cities include Baltimore, New York City and Washington, D.C.

31 The territory is American Samoa.

32 The organizations include Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Counsel, Sierra Club, U.S. Public Interest Research Group, and Union of Concerned Scientists.

33 *Massachusetts v. EPA*, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle J., concurring in the judgment) *cert. granted* 126 S. CT. 2960 (2006).

34 *Id.* at 61.

35 Judge Tatel's dissent also argued that the Court should rehear the case *en banc* because it presented issues of "exceptional importance." 433 F.3d 66, 67 (D.C. Cir. 2005).

36 EPA did not determine whether greenhouse gases would fall within the statutory language absent its determination about Congressional intent.

37 529 U.S. 120 (2000).

38 It is possible, although unlikely, that the Supreme Court, like Judge Randolph, could dismiss the case on the merits without reaching standing.

39 The environmental groups are Environmental Defense and Natural Resources Defense Council.

40 The state plaintiffs include Connecticut, Maine, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, and Wisconsin.

41 The cities are New York City and Washington D.C.

42 Border Power Plant Working Group v. Department of Energy, 260 F.Supp.2d 997 (S.D. Cal. 2003).

43 Final Environmental Impact Statement for the Imperial-Mexicali 230-kV Transmission Lines at p. 4-59 (December 2004). The EIS is available on the Department of Energy website at <http://www.eh.doe.gov/nepa/eis/eis0365/toc.html>.

44 No. 06-71891 (9th Cir.).

45 The state challengers include California, Connecticut, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Vermont.

46 The five environmental groups include the Center for Biological Diversity, Sierra Club, Public Citizen, Environmental Defense, and Natural Resources Defense Council.

47 At the time this order was filed, the case was captioned *Friends of the Earth v. Watson*, 2005 WL 2035596 (N.D. Cal. 2005) (not reported). The name change resulted from a staffing change at OPIC.

48 The Court also found that plaintiffs satisfied the causation and redressability requirements of standing because OPIC and EIB documents revealed that the projects they supported would not proceed without the intervention of the agencies.

49 No. 06-2031 (8th Cir.). The case has been consolidated with other challenges to the Board's approval brought by local governments and other organizations unrelated to global warming.

50 Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520 (8th Cir. 2003).

51 The discussion is included in the Draft Supplemental Environmental Impact Statement, Powder River Basin Expansion Project, Decision ID No. 35730. The Supplemental FEIS affirms the draft's discussion of air quality impacts including greenhouse gas emissions.

52 Reply Brief for Petitioners Sierra Club and Mid-States Coalition for Progress, Mayo Foundation v. Surface Transportation Board, 2006 WL 2788083, 3 (8th Cir., Sept. 6, 2006).

53 The participating environmental organizations are the Natural Resources Defense Council, California Sportfishing Protection Alliance, Deltakeeper Chapter of Baykeeper, and Natural Heritage Institute.

54 2006 WL 2734359 (E.D. Cal. 2005) (the opinion has not yet been printed in the Federal Reporter).

55 The plaintiffs include 13 car dealerships in seven California counties, General Motors and DaimlerChrysler Corporation, Tulare County Farm Bureau, Association of International Automobile Manufacturers, and Alliance of Automobile Manufacturers.

56 49 U.S.C. § 32919 (1994).

57 49 U.S.C. § 32902(f) (1994).

58 American Insurance Association v. Garamendi, 539 U.S. 396, 420 n.11 (2003). In *Garamendi*, the Court addressed a

California law aimed at helping victims of the Holocaust bring claims against their foreign insurance companies. However, the Court did not decide whether the California law carried out, at least nominally, a “traditional state responsibility,” instead relying on executive agreements between the President and several European countries to find conflict preemption.

59 In *Garamendi*, the Court opined that the “clarity or substantiality” of a conflict triggering preemption would vary depending on the strength of the state interest.

60 The states include Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.

61 Section 177 allows other states to opt-in to California motor vehicle regulations in lieu of federal standards.

62 The plaintiffs consented to dismissal without prejudice in both states.

63 These petitioners include California, Connecticut, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington D.C., and New York City.

64 The states include California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin.

65 The land trusts include the Open Space Institute, the Open Space Conservancy, and the Audubon Society of New Hampshire.

66 Defendants include American Electric Power Company and American Electric Power Service Corporation, Southern Company, Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corporation.

67 406 F.Supp.2d 265 (S.D.N.Y. 2005).

68 Matthew Pawa, counsel for the plaintiffs, has made copies of both the states’ and land trusts’ complaints available on his web-site at www.pawalaw.com/links.htm.

69 The manufacturer defendants include Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, Honda North America, Inc., Nissan North America, Inc., and Toyota Motor North America, Inc.

70 The State’s complaint can be found at ag.ca.gov/newsalerts/cms06/06-082_0a.pdf.

71 California alleges that companies responsible for green house gas emissions are partially responsible for the millions of dollars the State has expended on studying, planning for, and responding to global warming.

72 2006 WL 1066645 (S.D. Miss. 2006) (this opinion has not yet been published).

73 Third Amended Complaint, *Comer v. Murphy Oil*, 2006 WL 147089 (S.D. Miss. Apr. 19, 2006).

74 2005 WL 2414744 (S.D.N.Y. 2005) (not reported).

75 *Id.* at 1.



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