

Case No. 07-60756

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NED COMER; BRENDA COMER; ERIC HAYGOOD, HUSBAND OF BRENDA HAYGOOD; BRENDA HAYGOOD; LARRY HUNTER, husband of Sandra L. Hunter; SANDRA L. HUNTER; MITCHELL KISIELWESKI, husband of Johanna Kisielweski; JOHANNA KISIELWESKI; ELLIOTT ROUMAIN, husband of Rosemary Roumain; ROSEMARY ROUMAIN; JUDY OLSON; DAVID LAIN

Plaintiffs- Appellants

V.

MURPHY OIL USA; UNIVERSAL OIL PRODUCTS (UOP); SHELL OIL COMPANY; EXXONMOBIL CORP; AES CORP; ALLEGHENY ENERGY INC; ALLIANCE RESOURCE PARTNERS LP; ALPHA NATURAL RESOURCES INC; ARCH COAL INC; BP AMERICA PRODUCTION COMPANY; BP PRODUCTS NORTH AMERICA INC; CINERGY CORP; CONOCOPHILLIPS COMPANY; CONSOL ENERGY INC; THE DOW CHEMICAL COMPANY; DUKE ENERGY CORP; EON AG; E I DUPONT DE NEMOURS & CO; ENTERGY CORP; FIRSTENERGY CORP; FOUNDATION COAL HOLDINGS INC; FPL GROUP INC; HONEYWELL INTERNATIONAL INC; INTERNATIONAL COAL GROUP INC; MASSEY ENERGY CO; NATURAL RESOURCE PARTNERS LP; PEABODY ENERGY CORP; RELIANT ENERGY INC; TENNESSEE VALLEY AUTHORITY; WESTMORELAND COAL CO; XCEL ENERGY INC; CHEVRON USA INC; THE AMERICAN PETROLEUM INSTITUTE

Defendants-Appellees

Appeal from the United States District Court for Southern District of Mississippi, Southern Division (No.1:05-cv-0436- LG-RHW)

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL

BRIEF ON REHEARING EN BANC

Submitted by counsel for Plaintiffs-Appellants:

F. Gerald Maples, P.A.

F. Gerald Maples, LC (MS #1860)

Carlos A. Zelaya, II (PHV #44645)

Carl D. "Todd" Campbell (MS #102856)

Machelle Lee Hall (LA #31498)

365 Canal Street; Suite 2650

New Orleans, LA 70130

Telephone: (504) 569-8732

Facsimile: (504) 525-6932

federal@geraldmaples.com

czelaya@fgmapleslaw.com

tcampbell@fgmapleslaw.com

mhall@fgmapleslaw.com

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities, as described in Local Rule 28.2.1, have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualifications or recusals.

Plaintiffs

Ned Comer
Brenda Comer
Eric Haygood
Brenda Haygood
Larry Hunter
Sandra L Hunter
Mitchell Kisielweski
Johanna Kisielweski
Elliott Roumain
Rosemary Roumain
Judy Olson
David Lain

Counsel for Plaintiffs

F. Gerald Maples, P.A.
F. Gerald Maples
Carlos A. Zelaya, II
Carl D. "Todd" Campbell
Machelle Lee Hall
Porter & Malouf
Timothy W. Porter
Mumphrey Law Firm, LLC
J. Wayne Mumphrey
Wayne B. Mumphrey
Clayton Connors

Defendants

Murphy Oil USA
Universal Oil Products
Shell Oil Company
ExxonMobil Corp.
AES Corp.
Allegheny Energy Inc.
Alliance Resource Partners LP
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
E. I. Dupont De Nemours & Co.
Entergy Corp.
Firstenergy Corp.
Foundation Coal Holdings Inc.
FPL Group Inc.
Honeywell International Inc.
International Coal Group Inc.
Massey Energy Co.

Natural Resource Partners LP.
Peabody Energy Corp.
Reliant Energy Inc.
Tennessee Valley Authority

Westmoreland Coal Co.
Xcel Energy Inc.
Chevron USA Inc.
The American Petroleum Institute

Counsel for Defendants

Cotton, Schmidt & Abbott

Lawrence E. Abbott
Charles H. Abbott

Covington & Burling, LLP

Robert A. Long

Arnold & Porter, LLP

Michael B. Gerrard
Nancy G. Milburn
Yue-Han Chow

Crowell & Moring LLP

Scott L. Winkelman
Daniel W. Wolff
Tracy A. Roman
Kathleen Taylor Sooy

Baker & Botts

J. Gregory Copeland
Samuel Cooper

Dupont Legal Department

Raymond M. Ripple
Donna L. Goodman

Brown, Buchanan & Sessoms, PA

Raymond L. Brown

Forman, Perry, Watkins, Krutz & Tardy

Richard L. Forman

Brunini, Grantham, Grower & Hewes, PLLC

William L. Watt
Christopher R. Fontan

Franke & Salloum, PLLC

Shellye V. McDonald
Richard P. Salloum

Butler, Snow, O'Mara, Stevens & Cannada

Kenneth W. Barton
Benjamin McRae Watson

Frilot, LLC

Kerry J. Miller
Paul C. Thibodeaux
Benjamin M. Castoriano

Carr, Allison, Pugh, Howard, Oliver & Sisson, PC

Thomas L. Carpenter, Jr.

Gholson, Burson, Entrekin & Orr, PLLC

Robert D. Gholson
Craig N. Orr
Noel A. Rogers
Daniel D. Wallace

Corlew Munford & Smith PLLC

John G. Corlew
Katherine K. Smith

Holcomb Dunbar

Jack F. Dunbar

**Hortman, Harlow, Martindale,
Bassi, Robinson & McDaniel,
PLLC**

Norman G. Hortman, Jr.
David L. Martindale

Jenner & Block LLP

Rick Richmond
Kenneth K. Lee
Kelly M. Morrison
Brent L. Caslin

Johnson Gray McNamara, LLC

Mary S. Johnson
Thomas M. McNamara

Jones Day

Thomas E. Fennell
Kevin P. Holewinski
Michael L. Rice

Kean Miller Hawhorne D'armond

Michael Phillips
Anthony Williams
Louis Grossman

King & Spalding, LLP

Paul D. Clement
Robert E. Meadows
Jonathan L. Marsh
Tracie J. Renfroe

Mayer Brown LLP

Herbert L. Zarov
Timothy S. Bishop
Richard F. Bulger
Charles S. Kelley

Mitchell, McNutt & Sams

John G. Wheeler

Munger, Tolles & Olson LLP

Daniel P. Collins

O'Melveny & Myers, LLP

Jonathan D. Hacker
John F. Daum

**Page, Mannino, Peresich &
McDermott, PLLC**

Ronald G. Peresich
Michael E. Whitehead

Sidley Austin, LLP

Peter D. Keisler
Quin M. Sorenson

Tennessee Valley Authority

Edwin W. Small

Wise, Carter, Child & Caraway

James Earl Graves, III
William B. Lovett, Jr.
Charles Evans Ross

/Carlos A. Zelaya, II/

Attorney of Record for Plaintiffs-
Appellants

STATEMENT REGARDING ORAL ARGUMENT

The Order of this Court filed February 26, 2010, directed this case be reheard *en banc* with oral argument.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over these matters pursuant to 28 U.S.C. § 1291 because this is an appeal of a final decision of a United States District Court. The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because it involves questions of federal common law nuisance.

This rehearing *en banc* arises from the panel's reversal of the 30 August 2007 judgment dismissing Plaintiffs-Appellants' (hereinafter "plaintiffs") claims against Defendants-Appellees (hereinafter "defendants"). Plaintiffs' notice of appeal was timely filed on 17 September 2007.¹

ISSUES PRESENTED

1. Whether these plaintiffs have standing to bring suit against these defendants for tort damages arising from defendants' emissions of greenhouse gases.
2. Whether cases and controversies involving tort damages for global climate change are non-justiciable political questions.

STATEMENT OF THE CASE

Plaintiffs filed a class action lawsuit against numerous defendants for damages arising from the defendants' emissions of greenhouse gases.² Certain

¹ Rec. Doc. 370.

² Greenhouse gases are components of the atmosphere that contribute to the greenhouse effect by absorbing long wave heat radiation reflected from the Earth's surface more readily than short wave radiation generated by the Sun. In effect,

defendants engaged in the coal-mining business moved to dismiss plaintiffs' claims for lack of standing and for lack of subject matter jurisdiction because, the coal company defendants argued, plaintiffs' claims presented non-justiciable political questions.³ Judge Guirola granted the coal company defendants' Rule 12 Motion to Dismiss on 30 August 2007. Judge Guirola also dismissed the remaining defendants *sua sponte* to "place this case in a procedural posture in which all of the parties, plaintiffs and defendants, can have this matter reviewed."⁴ Plaintiffs timely filed a notice of appeal on 17 September 2007.⁵ The panel reversed the District Court decision on 16 October 2009, and defendants requested rehearing and rehearing *en banc*.

STATEMENT OF THE FACTS

Plaintiffs are property owners in Coastal Mississippi whose properties were decimated as a result of Hurricane Katrina's increased fury, directly attributable to global warming and the attendant increase in sea surface temperatures in the Gulf of Mexico.⁶ Plaintiffs' homeowner's insurance premiums have dramatically

these gases allow radiation to reach the Earth's surface, but prevent a portion of that radiation from escaping into space.

³ See *Baker v. Carr*, 369 U.S. 186, 216-17 (1962).

⁴ Rec. Doc. 373 at 41.

⁵ Rec. Doc. 370.

⁶ See, e.g., Kevin E. Trenberth and Dennis J. Shea, *Atlantic hurricanes and natural variability in 2005*, 33 Geophysical Research Letters L12704 (2006) (attached as Exhibit 1 to Rec. Doc. 261) (noting that sea surface temperatures were at record

increased as a result of global climate change.⁷ Plaintiffs filed a class action against the companies in the United States that are most responsible for global warming: the fossil fuels and chemicals industries.

Plaintiffs' complaint alleges that defendants are responsible for a significant portion of the greenhouse gas emissions that caused the unusually high sea surface temperatures during the 2005 hurricane season in the Atlantic Ocean and Gulf of Mexico, and that these elevated sea surface temperatures intensified Hurricane Katrina's destructive winds and storm surge. Moreover, plaintiffs allege that defendants' greenhouse gas emissions increase the risk of damage to plaintiffs' coastal property via sea level rise and more frequent intense tropical cyclonic storm activity.⁸

This appeal addresses two key issues in the debate over the proper role of the Federal Courts with respect to global warming-related issues. The first is whether these plaintiffs should be allowed access to Federal Courts to resolve a dispute that involves harm-inducing global climate change. If plaintiffs' injuries are "fairly traceable" to the defendants' emissions of greenhouse gases, this provides plaintiffs with standing to sue. *See Lujan v. Defenders of Wildlife*, 504

highs during the 2005 Atlantic hurricane season, approximately 0.9° C above normal).

⁷ *See* Association of British Insurers, Summary Report: Financial Risks of Climate Change at 4-8 (June 2005) (attached as Exhibit 4 to Rec. Doc. 267).

⁸ *See id.*

U.S. 555, 560 (1992). The District Court impermissibly conflated the principles of standing and proximate cause, and committed clear legal error in denying these plaintiffs access to the court.

The District Court highlighted this legal error in its oral opinion that the plaintiffs' injuries were not "fairly traceable" to the defendants' conduct because the "injuries...are attributable to a larger group" of potential defendants that were not named in the suit.⁹ In other words, the District Court **found** that, because (in its opinion) there are so many people and companies contributing to global warming, and because the individual contributions of each to the problem are so relatively inconsequential, it is impossible for these plaintiffs to hold *any* group of defendants accountable for global warming-related injuries.¹⁰

The panel fully analyzed the ruling *de novo*, taking into consideration the United States Supreme Court's recent decision in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1468-69 (2007). The panel found that the plaintiffs had alleged injuries that met the standards for fair traceability under a standing analysis, and that plaintiffs could ask the courts to resolve this dispute.

⁹ August 30, 2007 Tr. of Hearing on Defendants' Motions to Dismiss (hereinafter "Rec. Doc. 373") at 36.

¹⁰ It is important to note that this case arises in the context of a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure, and that fact finding is impermissible at this stage of the proceedings. *Thomas v. Smith*, 897 F.2d 154, 156 (5th Cir. 1989). The District Court ignored this longstanding principle and issued a ruling based on its own interpretation of the facts.

The second issue this Court must determine is whether Cases and Controversies that arise as a result of global climate change are, by their very nature, non-justiciable. The District Court ruled without basis that the widespread nature of the causes and effects of global warming require redress **exclusively** by Congress, not the Courts, and that the potential for Court judgments to interfere with the political process necessarily renders the Federal Courts powerless to hear any claims related to global climate change.¹¹ But the Supreme Court's decision in *Massachusetts v. EPA* held that global warming litigation is not barred by the political question doctrine, and the Courts have a constitutionally legitimate role in resolving Cases and Controversies involving global climate change issues.

Defendants have asserted that this case is an attempt to thwart some inchoate United States climate change policy, and that plaintiffs seek to use the Federal Courts as tools of policy creation in the first instance.¹² The correct legal issue before this Court is not whether the plaintiffs will ultimately succeed, nor whether their success or failure will have political ramifications. The only relevant question is whether the courts are powerless to consider cases involving global climate change. The panel correctly found that the constitutional structure of the U.S. Government does not render courts powerless to resolve such disputes.

¹¹ See Rec. Doc. 373 at 40.

¹² But see *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007).

SUMMARY OF APPELLANTS' ARGUMENT

The District Court in this matter erroneously dismissed the plaintiffs' complaint on two premises: that plaintiffs lack standing and that the case presents a nonjusticiable political question. Plaintiffs' arguments on these issues are set forth at length in their original brief on the merits, their reply brief and their opposition to the Application for Rehearing *En Banc*. Plaintiffs hereby adopt all arguments contained in those briefs by reference.

On appeal, a panel of this Court reversed the District Court, holding that plaintiffs have standing to pursue this tort lawsuit among private litigants and that the case does not involve a nonjusticiable political question. The defendants sought rehearing *en banc* arguing that the panel erred in two fundamental respects:

- 1) Disregarding well settled legal principles in conducting the constitutional standing analysis; and
- 2) Not analyzing all six *Baker* factors in concluding this case is justiciable.

The panel opinion is well-reasoned and supported by established precedent. Plaintiffs' claims present issues that can and should be adjudicated by the courts. This Court, sitting *en banc*, should not mistakenly conflate "fair traceability" standards for an Article III standing analysis with proximate cause standards necessary to prevail on the merits. Nor should it ignore the panel's careful

constitutional evaluation of whether this tort case presents a nonjusticiable political question.

ARGUMENT

I. The District Court's decision should be reviewed de novo.

A District Court's decision to grant a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure is reviewed *de novo*, applying the same standards as the District Court. *Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, 477 (5th Cir. 2002). Thus in reviewing the parties' arguments, "[a]ll questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor." *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001). In addition, this Court must "[c]onstru[e] the complaint liberally, ...giving appellant the 'benefit of all inferences that can be derived from the facts alleged.'" *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (quoting *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)).

II. The Panel's decision is directly supported by the jurisprudence on these two constitutional issues.

A three judge panel of this Court, consisting of Judges Davis, Stewart and Dennis, analyzed the issues raised by plaintiffs-appellants on appeal and determined that the District Court erred in dismissing the complaint. In so doing, the panel considered and correctly applied the factors necessary to establish Article III standing as articulated and explained in *Lujan v. Defenders of Wildlife*, 504 U.S.

555 (1992). In conducting its political question analysis, the panel reviewed, analyzed and considered not only *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny, but also the antecedent cases reviewed by the *Baker* Court.

Defendants applied for rehearing and rehearing *en banc* contending that the panel mistakenly ignored existing precedent in conducting its standing analysis, thereby lowering constitutional standing requirements, and disregarded Fifth Circuit and other Circuit Court precedent interpreting the political question doctrine.

The constitutional issues before this Court present two fundamental questions about the relationship between U.S. citizens and the judiciary. Do U.S. citizens have a right to ask courts to resolve private disputes that may involve the science of global climate change? And do U.S. courts have the authority to consider such disputes? The panel found that the answer to both questions is yes.

A. *The Panels' decision on standing properly focuses on whether the plaintiffs have standing, not on whether they have proven their claims.*

The elements of Article III standing are simple and longstanding:

First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the Court. Third, it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. at 560 (internal quotations omitted). In this tort case between private litigants, the first and third elements of the standing test are not subject to serious debate as plaintiffs have alleged that they suffered damage to their private property and seek compensatory damages.

Rather, the defendants have focused on the “fair traceability” aspect of the standing analysis to argue that plaintiffs lack standing to seek redress in this Court for the injuries they have sustained. In raising this challenge, the defendants conflate the notion of fair traceability with the elements needed to establish proximate cause on the merits. But the panel correctly rejected this argument because when “evaluating Article III’s causation (or ‘traceability’) requirement, we are concerned with something less than the concept of ‘proximate cause.’ ... ‘[N]o authority even remotely suggests that proximate causation applies to the doctrine of standing.’”¹³

¹³ *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003) (quoting *Loggerhead Turtle v. City Council*, 148 F.3d 1231 (11th Cir. 1998)); see also *Toll Bros., Inc. v. Twp. Of Readington*, 555 F.3d 131, 142 (3d Cir. N.J. 2009) (“This causal connection need not be as close as the proximate causation needed to succeed on the merits of a tort claim.”); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161-62 (4th Cir. 2000) (“Thus, the ‘fairly traceable’ standard is ‘not equivalent to a requirement of tort causation.’”) (quoting *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974 (4th Cir. 1992)); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) (quoting *Focus on the Family*, 344 F.3d at 1273).

Further, at this point in the litigation, plaintiffs' factual allegations must be taken as true. As the Supreme Court noted in *Lujan*, "at the pleading stage, general factual allegations of injury resulting from the Defendants' conduct may suffice, for on a Motion to Dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). Here, plaintiffs have made more than general allegations of harm; they have pled specific facts contending that the defendants' contributions to greenhouse gas emissions caused the harm plaintiffs suffered.

It is also irrelevant that the defendants are among a larger set of persons who contributed to the ultimate harm. As Judge Richard Posner, writing for the *en banc* Seventh Circuit, recently summarized:

Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them had created a nuisance (the common law basis for treating pollution as a tort), "pollution of a stream to even a slight extent becomes unreasonable [and therefore a nuisance] when similar pollution by others makes the condition of the stream approach the danger point. The single act itself becomes wrongful because it is done in the context of what others are doing." KEETON, *et al.*, *supra*, § 52, p. 354. . . . If "each [defendant] bears a like relationship to the event" and "each seeks to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group, thus leaving the plaintiff without a remedy," the attempt at escape fails; each is liable. *Id.*, § 41, p. 268.¹⁴

¹⁴ *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696-97 (7th Cir. 2008) (*en banc*); accord RESTATEMENT (SECOND) OF TORTS § 881 cmt. d (1979) ("It is also immaterial that the act of one of them by itself would not constitute a

Further, the panel properly ignored baseless arguments that liability must extend to everyone on earth. U.S. Courts have already developed tort law tools to separate major industrial emitters from ordinary citizens.¹⁵

tort if the actor knows or should know of the contributing acts of the others.”) *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1457-58 (2007); *Michie v. Great Lakes Steel Div. Nat’l Steel Corp.*, 495 F.2d 213, 215-18 (6th Cir. 1974); *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003) (“[W]here there are multiple tortfeasors and the separate and independent acts of codefendants ‘concur, commingled and combined’ to produce a single indivisible injury for which damages are sought, each defendant may be liable even though his/her acts alone might not have been a sufficient cause of the injury.”), *vacated by settlement*, 2003 U.S. Dist. LEXIS 23416 (N.D. Okla. July 16, 2003); *Velsicol Chem. Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976); *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952); *Warren v. Parkhurst*, 92 N.Y.S. 725, 727 (N.Y. Sup. Ct. 1904) (where “the act of one defendant would not so contaminate the stream that the plaintiff could complain of him” each is liable because “while each defendant acts separately, he is acting at the same time in the same manner as the other defendants, knowing that the contributions by himself and the others acting in the same way will result necessarily in the destruction of the plaintiff’s property.”), *aff’d*, 93 N.Y.S. 1009 (App. Div. 1905), *aff’d*, 78 N.E. 579 (N.Y. 1906); *see also In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 823 (E.D.N.Y. 1984) (“In the pollution and multiple crash cases, the degree to which the individual defendant’s actions contributed to an individual plaintiff’s injuries is unknown and generally unascertainable,” yet “all defendants have been held liable”); *Illinois v. City of Milwaukee*, 1973 U.S. Dist. LEXIS 15607, at *20-21 (N.D. Ill. 1973), *aff’d in relevant part and rev’d in part on other grounds*, 599 F.2d 151 (7th Cir. 1979), *vacated on other grounds*, *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

¹⁵ *Cf. United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (contributor whose “pollutants did not contribute more than background contamination and also cannot concentrate” may defeat CERCLA liability). *See also Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (“It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.”); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 36 (2005).

Because this case is based on diversity jurisdiction and involves state and federal common law rights of action, the *Comer* panel separated its standing inquiry into two parts to determine whether plaintiffs met both state and federal standing requirements. Finding that the plaintiffs' claims "easily satisfy Mississippi's liberal standing requirements," *Comer v. Murphy Oil USA*, 585 F.3d 862 (5th Cir. 2009), the panel went on to conduct a more restrictive federal standing inquiry. Under the latter analysis, the panel divided plaintiffs' claims into two sets:

- 1) Public and private nuisance, trespass, and negligence claims; and
- 2) Unjust enrichment, civil conspiracy and fraudulent misrepresentation claims.¹⁶

The Court noted that litigation between private litigants rarely, if ever, raises standing concerns as "[t]he law of standing is almost exclusively concerned with public-law questions involving determinations of constitutionality and review of administrative or other governmental action." (*Comer* 585 F.3d 855, n. 3 (quoting CHARLES A. WRIGHT AND MARY K. LANE, LAW OF FEDERAL COURTS 69 (6th Ed. 2002))).

¹⁶ The panel dismissed the second set of claims on prudential standing grounds.

In rejecting the defendants' assertion that plaintiffs' alleged causation chain is too attenuated to provide standing,¹⁷ the panel recognized the difference between constitutional standing and proximate cause:

Defendants contend that the plaintiffs' theory tracing their injuries to defendants' actions is too attenuated. However, this argument, which essentially calls upon us to evaluate the merits of plaintiffs' causes of action, is misplaced at this threshold standing stage of the litigation. It is firmly established that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case.

585 F.3d at 864 (internal quotations omitted). The panel noted that plaintiffs' allegations will have to be substantiated and supported by adequate proof at a later stage in the litigation, but determined that the allegations as pled sufficiently established Article III standing.¹⁸ Accordingly, the panel held that the plaintiffs had standing to assert their causes of action. Similarly, as the Second Circuit held in *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009),

¹⁷ See Appellants' Original Brief at pp. 19-26; Appellants' Reply Brief at pp. 10-13, 16-19.

¹⁸ In their petition for rehearing *en banc*, the coal company defendants, citing two Fifth Circuit decisions, *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358 (1996) and *Sierra Club v. Cedar Point Oil Co. Inc.*, 73 F.3d 546 (1996), asserted that the panel erred in reversing the dismissal of the trial court as plaintiffs have allegedly not shown a "geographic nexus" between defendants discharges and plaintiffs' harm. Defendants' reliance on *Friends of the Earth* and *Sierra Club* is inapposite as the Fifth Circuit decided both those cases on a Rule 56 motion for summary judgment. The panel correctly recognized that the proceedings here are at the 12(b)(6) preliminary stage and the defendants' attempt to shoehorn plaintiffs into a Rule 56 summary judgment motion on the merits is premature. *Comer*, 585 F.3d at 864.

discussed *infra*, it is sufficient for plaintiffs to allege that the defendants' emissions contributed to their injuries.

B. The Panel properly determined that the courts have the power to consider this case and are not invading the political branches' constitutional spheres of authority.

Concluding its standing analysis, the panel went on to determine whether the issues raised in plaintiffs' complaint were nonjusticiable under the Political Question Doctrine. The panel reviewed the doctrine's history and cases interpreting it, noting its fundamental premise: a "political question" exists when the relationship between the judiciary, legislative and executive branches of the Federal Government requires that a court refrain from adjudicating a matter presented. The panel's decision specifically recognized that the *Baker* formulations provide a multi-faceted lens through which claims are viewed to determine whether they present a political question. The panel noted that these formulations "were not written as stand-alone definitions of a 'political question,' but are 'open-textured,' interpretative guides to aid federal courts in deciding whether a question is entrusted by the Constitution or federal laws *exclusively* to a federal political branch for its decision." 585 F.3d at 872 (emphasis added). The panel concluded that the tort claims presented in this litigation are justiciable and that further inquiry under each *Baker* formulation was unnecessary.

Nevertheless, the Court stated that even if applied, “the formulations do not make the defendants’ argument for nonjusticiability any more persuasive.” *Id.* at 875. Accordingly, the panel determined that the District Court further erred in holding that the plaintiffs’ case presented nonjusticiable claims pursuant to the political question doctrine. This decision comports with the weight of legal authority, as the Second Circuit also recently found in a decision relevant to this case.

III. The Second Circuit, in *Connecticut v. AEP*, also found that the Constitution does not prevent the Courts from considering another dispute involving similar issues.

The panel’s decision is further supported by the critical analysis provided by the Second Circuit in *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009). There, the Court of Appeals determined that the claims presented by eight states, the City of New York and three private land trusts were justiciable and that those plaintiffs had standing.

In *Connecticut*, the plaintiffs sought injunctive relief capping the defendants’ greenhouse gas emissions and requiring them to reduce those emissions. The District Court dismissed the complaint based on its determination that the case presented a nonjusticiable political question.¹⁹ The Second Circuit reversed the District Court on the Political Question issue and went on to conduct an extensive

¹⁹ In dismissing the case on political question grounds, the District Court did not reach the standing issue.

standing analysis. It reviewed the States' *parens patriae* standing as well as the States' and the Trusts' Article III proprietary standing and concluded that the plaintiffs met both standing requirements.

As part of its analysis, the Second Circuit addressed an argument on "fair traceability" similar to that urged by the defendants here, stating:

Plaintiffs' allegations of traceability must be evaluated in accordance with the standard by which a common law public nuisance action imposes liability on contributors to an indivisible harm. *See, e.g., Cox v. City of Dallas*, 256 F.3d 281, 292 n. 19 (5th Cir. 2001) (declaring that "nuisance liability at common law has been based on actions which 'contribute' to the creation of a nuisance"); RESTATEMENT (SECOND) OF TORTS § 840E ("[T]he fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution."); *id.* § 875 ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."). Moreover, the cases are clear that, particularly at the pleading stage, the "fairly traceable" standard is not equivalent to a requirement of tort causation. *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n. 7 (4th Cir.1992); *see also Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir.2006) (explaining that "for purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause.

Connecticut, 582 F.3d at 346 (citations and internal quotation marks omitted).

The Court held that "[f]or purposes of Article III standing [plaintiffs] are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants'

emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries.” *Id.* at 347.

Like the Fifth Circuit panel in this matter, the Second Circuit carefully focused on the constitutional standing issue – whether the litigants may ask the court to resolve their dispute:

In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.

Id. at 339-40 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

The Second Circuit reasoning also supported this panel’s political question analysis:

The political question doctrine is primarily a function of the separation of powers, designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government, where that other branch is better suited to resolve an issue.

Id. at 321 (internal quotations and citations omitted). The Second Circuit found that the District Court had been incorrect in finding that the elected branches must make an initial policy determination before the courts can adjudicate a global climate change nuisance claim (*Id.* at 323-24), and, after a robust *Baker* analysis, determined that courts were not barred from considering a dispute just because it involves questions of global climate change (*Id.* at 324-32).

Both the Second Circuit panel and this panel carefully analyzed the law on both of these issues, and their findings are similar for good reason. This panel

properly analyzed the long history of U.S. law that gives citizens access to courts to resolve disputes and that empowers the courts to decide these disputes. No part of this dispute is exclusively the domain of another coordinate branch of government. While plaintiffs' claims may be large in scope and rely on complex science, plaintiffs have alleged facts that, if true (as they must be treated at the Rule 12 stage), state a claim that the courts may consider.

CONCLUSION

The panel correctly found that the plaintiffs have standing to ask the courts to resolve this tort and nuisance dispute, and that the political question doctrine does not prevent the courts from considering the matter. Appellants request that Judge Guirola's 30 August 2007 Order granting Defendants' Motion to Dismiss (Rec. Doc. 368) and Judgment dismissing plaintiffs' claims (Rec. Doc. 369) be vacated, and that the plaintiffs' cases be remanded to the District Court with instructions to deny defendants' Motions to Dismiss.

Respectfully Submitted:

F. Gerald Maples, P.A.

/Carlos A. Zelaya, II/

F. Gerald Maples (La. #25960)

Carlos A. Zelaya, II (La. #22900)

Carl D. Todd Campbell, III (La. #31084)

Machelle R. Lee Hall (La. #31498)

One Canal Place

365 Canal Street, Suite 2650

New Orleans, Louisiana 70130

Telephone: (504) 569-8732
Facsimile: (504) 525-6932
On Behalf of Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2010, true and correct copies of Plaintiffs-Appellants' Supplemental Brief for Hearing En Banc was delivered by electronic mail in Adobe format (pdf), pursuant to an agreement of the parties, and a copy forwarded by U.S. mail postage paid and addressed to the following :

Lawrence E. Abbott
Charles H. Abbott
COTTEN, SCHMIDT & ABBOTT,
LLP
400 Lafayette St., Suite 200
New Orleans, LA 70130
LAbbott@csa-lawfirm.com
CAbbott@csa-lawfirm.com

Michael B. Gerrard
Nancy G. Milburn
Yue-Han Chow
ARNOLD & PORTER, LLP
399 Park Avenue
New York, NY 10022-4690
Michael.Gerrard@aporter.com
nancy.milburn@aporter.com
Yue-Han_Chow@aporter.com

J.Gregory Copeland
Samuel Cooper
BAKER BOTTS LLP
One Shell Square
910 Louisiana Street
Houston, TX 77002-4995
greg.copeland@bakerbotts.com
samuel.cooper@bakerbotts.com

Raymond L. Brown
BROWN, BUCHANAN &
SESSOMS, PA
P. O. Box 2220
Pascagoula, MS 39569-2220
rlb@brownbuchanan.com

William L. Watt
BRUNINI, GRANTHAM, GROWER
& HEWES, PLLC
P. O. Drawer 119
Jackson, MS 39205-0119
lwatt@brunini.com

Kenneth W. Barton
Benjamin McRae Watson
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA
P. O. Box 22567
Jackson, MS 39225-2567
ken.barton@butlersnow.com
ben.watson@butlersnow.com

Thomas L. Carpenter, Jr.
CARR, ALLISON, PUGH,
HOWARD, OLIVER & SISSON, PC
Suite 2001
14231 Seaway Road, Building
Gulfport, MS 39503

tcarpenter@carrallison.com

John G. Corlew
Katherine K. Smith
CORLEW, MUMFORD & SMITH
PLLC
P. O. Box 16807
Jackson, MS 39236
jcorlew@cmslawyers
ksmith@cmslawyers

Robert A. Long
COVINGTON & BURLING, LLP
1201 Pennsylvania Ave. NW
Washington, DC 20011
rlong@cov.com

Scott L. Winkelman
Tracy A. Roman
Kathleen Taylor Sooy
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
swinkelman@crowell.com
troman@crowell.com
ksooy@crowell.com

Richard L. Forman
FORMAN, PERRY, WATKINS,
KRUTZ & TARDY
P.O. Box 22608
Jackson, MS 39225-2608
rforman@fpwk.com

Shellye V. McDonald
Richard P. Salloum
FRANKE & SALLOUM, PLLC
2605 Fourteenth Street
P.O. Drawer 460
Gulfport, MS 39502

svm@frslaw.com
rps@frslaw.com

Kerry J. Miller
Paul C. Thibodeaux
Benjamin M. Castoriano
FRILLOT, LLC
1100 Poydras Street, Suite 3600
New Orleans, LA 70163-3600
KMiller@frilot.com
pthibodeaux@frilot.com
bcastoriano@frilot.com

Robert D. Gholson
GHOLSON, BURSON, ENTREKIN
& ORR, PLLC
P. O. Box 1289
Laurel, MS 39441-1289
gholson@gbeolaw.com

Jack F. Dunbar
Holcomb Dunbar
1312 University Avenue, East
Oxford, MS 38655
jackd@holcombdunbar.com

Norman G. Hortman, Jr.
David L. Martindale
HORTMAN, HARLOW,
MARTINDALE, BASSI,
ROBINSON & MCDANIEL, PLLC
P.O. Drawer 1409
Laurel, MS 39441-1409
ghortman@hortmanharlow.com
dmartindale@hortmanharlow.com

Rick Richmond
Brent L. Caslin
Kenneth K. Lee

Kelly M. Morrison
JENNER & BLOCK, LLP
633 West 5th Street, Suite 3500
Los Angeles, CA 90071-2054
rrichmond@jenner.com
bcaslin@jenner.com
Klee@jenner.com
kmorrison@jenner.com

Mary S. Johnson
Thomas M. McNamara
JOHNSON GRAY MCNAMARA,
LLC
21357 Marion Lane
Suite 300
Mandeville, Louisiana 70471
msj@JGMcLaw.com
tmm@JGMcLaw.com

Thomas E. Fennell
Kevin P. Holewinski
Michael L. Rice
JONES DAY
P. O. Box 660623
Dallas, TX 75266-0623
tefennell@jonesday.com
kpholewinski@jonesday.com
mlrice@jonesday.com

Michael Phillips
Anthony Williams
Louis Grossman
KEAN MILLER HAWTHORNE
D' ARMOND
MCCOWAN & JARMAN, L.L.P.
First Bank and Trust Tower
Suite 1450, 909 Poydras St.
New Orleans, Louisiana 70112
mike.phillips@keanmiller.com
anthony.williams@keanmiller.com

louis.grossman@keanmiller.com

Paul D. Clement
Robert E. Meadows
Tracie J. Renfroe
Jonathan L. Marsh
KING & SPALDING, LLP
1100 Louisiana, Suite 4000
Houston, TX 77002-5213
pclement@kslaw.com
rmeadows@kslaw.com
trenfroe@kslaw.com
jlmarsh@kslaw.com

Herbert L. Zarov
Timothy S. Bishop
Richard F. Bulger
Charles S. Kelley
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
hzarov@mayerbrown.com
tbishop@mayerbrown.com
rbulger@mayerbrown.com
ckelley@mayerbrown.com

John G. Wheeler
MITCHELL, MCNUTT & SAMS
P. O. Box 7120
Tupelo, MS 38802-7120
jwheeler@mitchellmcnutt.com

Daniel P. Collins
MUNGER, TOLLES, OLSON LLP
355 South Grand Avenue, 35th floor
Los Angeles, CA 90071-1560
Daniel.Collins@mto.com

Jonathan D. Hacker
John F. Daum

O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, DC 20006
jhacker@omm.com
jdaum@omm.com

Ronald G. Peresich
Michael E. Whitehead
PAGE, MANNINO, PERECICH &
MCDERMOTT, PLLC
759 Vieuz Marche Mall
P.O. Drawer 289
Biloxi, MS 39533
Ron.Peresich@pmp.org
Michael.Whitehead@pmp.org

Peter D. Keisler
Quin M. Sorenson
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, DC 20005
pkeisler@sidley.com
qsorenson@sidley.com

Edwin W. Small
TENNESSEE VALLEY
AUTHORITY
400 West Summit Hill Dr.
Knoxville, TN 37902-1401
ewsmall@tva.gov

Charles Evans Ross
William B. Lovett, Jr.
WISE, CARTER, CHILD &
CARAWAY
P. O. Box 651

Jackson, MS 39205-0651
cer@wisecarter.com
wbl@wisecarter.com

Raymond M. Ripple
Donna L. Goodman
Dupont Legal
Suite D 7012
1007 Market Street
Wilmington, DE 19898
raymond.m.ripple@usa.dupont.com
donna.l.goodman@usa.dupont.com

I further certify that copies of this pleading, in Adobe and photocopy form, were mailed postage paid this 31st of March, 2010 to the following unrepresented parties by U.S. mail:

EON AG
E On-Platz 1
Dusseldorf, D-40479
Germany

FIRSTENERGY CORP
76 South Main Street
Akron, OH 44308

FPL Group Inc.
700 Universe Boulevard
Juno Beach, FL 33408

/Carlos A. Zelaya, II/
Attorney of Record for Plaintiffs-Appellants

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/Carlos A. Zelaya, II/
Attorney of Record for Plaintiffs-Appellants

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

April 01, 2010

Mr. Carlos A. Zelaya II
F. Gerald Maples, P.A.
365 Canal Street
Canal Place
Suite 2650
New Orleans, LA 70130-0000

No. 07-60756, Ned Comer, et al v. Murphy Oil USA, et al
USDC No. 1:05-CV-436

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LYLE W. CAYCE, Clerk

By: 
Misty L. Fontenot, Deputy Clerk
504-310-7716

cc:

Mr. Lawrence E Abbott	Ms. Nancy Gordon Milburn
Mr. Kerry J Miller	Mr. Kenneth W. Barton
Ms. Kelly Marie Morrison	Mr. Timothy S. Bishop
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Mr. Michael Edward Whitehead	Mr. Thomas M. McNamara
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