

No. 07-60756

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**Ned Comer, et al.,
Plaintiffs-Appellants**

v.

**Murphy Oil U.S.A., et al.,
Defendants-Appellees**

**On Appeal from the United States District Court for
the Southern District of Mississippi**

**BRIEF OF *AMICI CURIAE* THE AMERICAN FARM BUREAU
FEDERATION AND THE AFFORDABLE POWER ALLIANCE IN
SUPPORT OF DEFENDANTS-APPELLEES UPON REHEARING *EN
BANC***

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CERTIFICATE OF INTERESTED PARTIES.....	iii
INTEREST OF AMICI.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. The Complaint Presents Political Questions that Are Not Appropriate for Judicial Resolution.....	3
A. Legal Context.....	3
B. Policy Context	6
1. Multiplicity of Emitters Worldwide.....	6
2. The Benefits of Using Fossil Fuels.....	13
3. Who Suffers if Fossil Fuel Usage Is Penalized?.....	17
4. The Future Matters.....	20
C. Conclusion	23

TABLE OF AUTHORITIES

CASES

Baker v. Carr, 369 U.S. 186 (1962).....	3
California v. GMC, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007)	7
Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009).....	3, 4
Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc., 521 So. 2d 857 (Miss. 1988).....	4
Connecticut v. American Electric Power, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).....	5
Whitman v. America Trucking Ass'ns, 531 U.S. 457 (2001).....	13

LEGISLATIVE MATERIALS

Hearings Before the Senate Comm. On Energy and Natural Resources, 106 th Cong. (March 25, 1999).....	8
154 CONG. REC. S 4247 (May 15, 2008) (Senate Roll Call Vote 132).....	11

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rules 27.4 and 28.2.1, counsel for Amici certifies that the following persons and entities are interested in the outcome of this case. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

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The following entities were named as Defendants in a proposed fourth amended complaint annexed to Plaintiffs' motion for leave to amend filed in the district court, which leave was denied as moot in the District Court's dismissal order dated August 30, 2007.

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Shell Oil Company
Chevron U.S.A. Inc.
ExxonMobil Corporation
BP p.l.c. d/b/a BP Amoco Chemical Company and BP Energy Company
BP America Production Company
BP Products North America Inc.
Superior Energy Services, Inc.
Placid Oil Company
Kerr-McGee Oil & Gas Corporation
Total PetroChemicals USA, Inc.
ConocoPhillips Company
Atlantic Richfield Company
Pioneer Natural Resources USA, Inc.
Devon Energy Production Company, L.P.

Marathon Petroleum Company LLC
Occidental Crude Sales, Inc.
Occidental Energy Marketing, Inc.
Total Gas & Power North America, Inc.
Hess Corporation
Anadarko Petroleum Corporation
Apache Corporation
Burlington Resources Offshore Inc.
American Petroleum Institute
Oil and Refining Entities 1-100
AEP Generating Company
Columbus Southern Power Company
Ohio Power Company, d/b/a/ AEP Ohio
Southwestern Public Service Co.
AEP Texas Central Company
AEP Texas North Company
Appalachian Power Company
Indiana Michigan Power Company
Kentucky Power Company
Public Service Company of Oklahoma
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Southern Power Company
Tennessee Valley Authority
Xcel Energy Inc.
Northern States Power Company
Northern States Power Company
Public Service Company of Colorado
Southwestern Public Service Co.
TXU Energy Solutions Company, LP
TXU Big Brown Company LP
TXU Generation Development Company LLC
TXU Generation Development Company II LLC
TXU Gas Company, LP
TXU Energy Company LLC
TXU Energy Retail Company LP
TXU Portfolio Management Company LP
TXU Generation Company LP
TXU Generation Management LLC

TXU Enterprise Holdings Company, LLC
Cinergy Corp.
Duke Energy Ohio, Inc.
Duke Energy Carolinas, LLC
Duke Energy Kentucky, Inc.
Duke Energy Gas Services, LLC
Duke Energy Indiana, Inc.
Duke Energy Operating Company, LLC
Duke Energy Merchants, LLC
Duke Energy Fossil-Hydro, LLC
The Union, Heat and Power Company Reliant Energy Inc.
Southern California Edison Company
Edison Mission Energy
Edison Mission Energy Petroleum
Edison Mission Energy Services, Inc.
Edison Mission Energy Fuel
Edison Capital
Edison International
LG&E Energy Inc.
LG&E Power Inc.
Kentucky Utilities Company
Western Kentucky Energy Corp.
Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.
Florida Power Corporation d/b/a Progress Energy Florida, Inc.
Ameren Energy Generating Company
Union Electric Company, d/b/a AmerenUE
Ameren Energy Resources Company
Ameren Energy Fuels And Services Company
Central Illinois Public Service Company, d/b/a AmerenCIPS
Central Illinois Light Company, d/b/a AmerenCILCO
Illinois Power Company, d/b/a AmerenIP
Ameren Energy Generating Company
Ameren Energy Marketing Company
Entergy Louisiana, LLC
Entergy Mississippi, Inc.
Entergy Power & Light Company
Entergy Arkansas, Inc.
System Energy Resources, Inc.
Allegheny Power Service Corporation
Allegheny Energy Supply Company LLC
West Penn Power Company

The Potomac Edison Company
Monongahela Power Company
Allegheny Energy Inc.
Duke Energy Corp.
FirstEnergy Corp.
Ohio Edison Company
The Cleveland Electric Illuminating Company
The Toledo Edison Company
Pennsylvania Power Company
Jersey Central Power & Light Company
Metropolitan Edison Company
Pennsylvania Electric Company
Virginia Electric and Power Company
Consolidated Natural Gas Company
Dominion Energy, Inc.
Virginia Power Energy Marketing, Inc.
Michigan Consolidated Gas Company
The Detroit Edison Company
MichCon Gathering Company
Michcon Fuel Services Company
MichCon Enterprises, Inc.
Florida Power & Light Company
FPL Energy, LLC
FPL Group Capital, Inc.
AES Corp.
Indianapolis Power & Light Company
NRG Energy, Inc.
Texas Genco, Inc.
Texas Genco, LLC
NRG Thermal LLC
Arch Coal, Inc.
International Coal Group, Inc.
Alliance Resource Partners LP
Alpha Natural Resources Inc.
CONSOL Energy Inc.
Foundation Coal Holdings Inc.
Massey Energy Co.
Westmoreland Coal Co.
Peabody Energy Corp.
Natural Resource Partners LP
Western Fuels Association, Inc.

Rio Tinto Energy America Inc.
The North American Coal Corporation
Ohio Valley Coal Co.
Peter Kiewit Sons', Inc.
BHP Minerals International Inc.

Dated: May 7, 2010

/s/ Douglas A. Henderson
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INTEREST OF AMICI

Amici respectfully ask that the Court affirm the decision below. Amici are representatives of minority, senior citizen, and farming constituencies. Amici's members will be harmed by the higher energy prices that will result if the Court allows this case to proceed and if Plaintiffs are successful in their claim that emitting greenhouse gases ("GHGs") constitutes an actionable tort. Specifically, Amici are:

- The American Farm Bureau Federation, the largest non-profit general farm organization in the United States, representing more than 6 million member families in all fifty states and Puerto Rico;
- The Affordable Power Alliance, an *ad hoc* coalition of civil rights, African American, Latino, small business, senior citizens and faith-based advocacy organizations. Its members include:

§ The Congress of Racial Equality, which was founded in 1942 and is the third oldest and one of the "Big Four" Civil Rights groups in the United States;

§ The High Impact Leadership Coalition, a national coalition of faith-based leaders, ministers and churches;

§ The National Hispanic Christian Leadership Conference, the largest Latino Christian organization in America, with 16-million Latino evangelical members and 24,000 member churches;

§ The 60-Plus Association, a multi-million member non-profit senior citizens advocacy group.

SUMMARY OF ARGUMENT

The Panel erred in finding that the Complaint does not seek judicial resolution of a political question that is barred from judicial resolution by principles of separation of powers. Contrary to the Panel's finding, the Complaint raises fundamental issues of American energy, economic, environmental, and international policy. These issues are inescapable because Plaintiffs' lawsuit asks a jury to determine, for purposes of Mississippi nuisance law, the reasonableness of the level of Defendants' GHG emissions. Since GHGs are the inevitable by-product of combusting fossil fuel, and since Plaintiffs have sued most of the major fossil-fuel energy companies in this country, Plaintiffs are seeking to resolve the appropriate level of American fossil fuel usage in a Mississippi courthouse.

The briefs of the Defendants and other Amici provide an exhaustive discussion of the political question doctrine. Amici's brief will not duplicate that discussion but will instead provide more general context for why the climate change issues set forth in the Complaint constitute a "nonjusticiable" political question.

ARGUMENT

I. The Complaint Presents Political Questions that Are Not Appropriate for Judicial Resolution

A. Legal Context

The Complaint asserts a “political question” because of “the inappropriateness of the subject matter for judicial consideration.”¹ The Complaint does not assert a “duty [that] can be judicially identified and its breach judicially determined,” nor can “protection for the right asserted . . . be judicially molded.”² The Complaint implicates three of the *Baker v. Carr* factors for determining the presence of a political question: (1) no judicially workable standards to determine liability and fashion relief, (2) an unavoidable need to make a fundamental policy decision as a predicate to resolving the case, and (3) an intrusion on legislative prerogatives that any adjudication of a plaintiff’s claims would entail.³

The Panel’s conclusion that the climate change issues underlying the Complaint do not present a political question was based largely on the Panel’s rejection of Defendants’ argument that these issues could not be resolved without rendering fundamentally legislative determinations as to energy, environmental, economic and foreign policy.⁴ The Panel’s dismissal of the need to make policy determinations in resolving Plaintiffs’ nuisance claims, however, is belied by the Panel’s own citation of

¹ *Baker v. Carr*, 369 U.S. 186, 187 (1962).

² *Id.* at 198.

³ *Id.* at 217.

⁴ *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 (5th Cir. 2009).

the elements of a nuisance under Mississippi (and general) law as including an “intentional and unreasonable” invasion of another’s private enjoyment or use of land.⁵ As Plaintiffs frankly conceded, this element of nuisance law will require the trier of fact to determine not just whether it was reasonable for the Defendants to have emitted GHGs at all, but also what level of GHGs it would have been reasonable for them to emit. Plaintiffs stated on brief that it would be “the jury’s job to determine whether the quantity of greenhouse gases actually emitted by the Defendants was a reasonable quantity to emit given the Defendants’ particular facts and circumstances.”⁶

The potential reasonableness or unreasonableness of the levels of GHGs emitted by Defendants, however, cannot be determined without reference to the types of policy decisions that, in our system of government, should be made by the Executive and Legislative Branches. This is because GHG emissions are the inevitable consequence of producing and using fossil fuels—hence, at base, the nuisance that Defendants are alleged to have committed is nothing more than producing and using fossil fuels, a resource that generates approximately 85 percent of the energy used in America.⁷ Thus, to hold that the production and use of fossil fuels is a legal wrong punishable in damages—and to attempt to fashion a damages remedy

⁵ *Id.* at 868 (citing *Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc.*, 521 So. 2d 857, 859 (Miss. 1988), in turn quoting Restatement (Second) of Torts § 822).

⁶ Pl. Opening Br. at 37.

⁷ Energy Information Administration, AEO 2010 Reference Case, Table A1, *available at* <http://www.eia.doe.gov/oiaf/aeo/>.

in a specific case—will inevitably entail making judgments as to the reasonableness of the way society uses and produces energy and whether the use of alternative, more expensive forms of energy would be more reasonable or even feasible.⁸

The legislative nature of Plaintiffs' case is underscored by the fact that Plaintiffs have sued much of the fossil fuel energy industry, including all of the major oil and coal companies and a large number of electric utilities. For each company, Plaintiffs seek a resolution of “whether the quantity of greenhouse gases actually emitted by [each] was a reasonable quantity to emit....”⁹ This is an open invitation to the court to arbitrate American energy, economic, environmental, and foreign policy. Worse, because they seek the imposition of damages on all of these companies, and because any damages would be passed through to consumers in the form of higher energy prices, they are seeking judicial imposition of a potentially massive energy tax on the American economy.

The fact that Plaintiffs have sued in damages for past conduct—as opposed to seeking equitable relief to govern future conduct—does not eliminate the policy questions that undergird Plaintiffs' theories. Determining what *was* a reasonable level of GHG emissions by these Defendants entails the same policy considerations, albeit retroactively, as would obtain if the suit were in equity and sought a determination of the reasonable level of Defendants' current and future emissions. Indeed, since GHG

⁸ See *Connecticut v. American Electric Power*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005) (referring to the “transcendently legislative nature of this litigation”).

⁹ Pl. Opening Br. at 37.

emissions are very long-lived in the atmosphere¹⁰ and many, if not all, of the Defendants have emitted GHGs for a very long period of time, the Complaint seeks a judicial reconstruction of what American energy policy should have been going back several decades and even longer. Moreover, it would be disingenuous to suggest that the massive damages remedy Plaintiffs seek would not have a powerful effect on how the country uses energy in the future.

It should go without saying that fundamental questions of American policy are not appropriate for judicial resolution. As representatives of minority, senior citizen, and farming constituencies that will be directly affected by GHG emission restrictions, Amici have strong views on the types of energy to which Americans should have access—but these views should be advanced before the political branches of government, not the courts.

B. Policy Context

Some of the fundamentally legislative issues that the jury would be required to address if this case is allowed to proceed are set forth below.

1. Multiplicity of Emitters Worldwide

In adjudicating the reasonableness of Defendants' GHG emissions, the jury would be forced to examine those emissions in their global context. Because GHGs mix in the global atmosphere, a ton of GHGs emitted in Mississippi has the same

¹⁰ International Panel on Climate Change, Fourth Assessment Report: CLIMATE CHANGE 2007: WORKING GROUP I: THE PHYSICAL SCIENCE BASIS, CH. 2 (Cambridge University Press 2007).

effect on overall global concentrations of GHGs—and therefore the climate effects of which Plaintiffs complain—as a ton emitted in China or India. Moreover, the jury would need to consider natural background levels of GHGs in the atmosphere and the numerous natural sources of GHG emissions and the numerous natural processes (“sinks”) that remove GHGs from the atmosphere. As the District Court for the Northern District of California stated in *California v. GMC*, a determination would need to be made of “what is an unreasonable contribution to the sum of carbon dioxide in the Earth’s atmosphere.”¹¹

The determination of what is a “reasonable” amount of GHGs for U.S. sources to emit as compared to international sources has bedeviled international negotiations since the beginning of international climate change negotiations as far back as 1979, when the first conference of the World Meteorological Organization, the United Nations Environment Program and the International Council of Scientific Unions was held. Despite more or less continuous negotiations since then, the U.S. has never committed itself to binding emission reductions. Although the United States entered into the 1992 Framework Convention on Climate Change,¹² that treaty did not establish binding emission reduction targets for any countries. The 1997 Kyoto Protocol to the Framework Convention did establish reduction targets, but it was

¹¹ *California v. GMC*, 2007 U.S. Dist. LEXIS 68547 at 46 (N.D. Cal. Sept. 17, 2007).

¹² S. Treaty Doc. No. 38, 102d Cong., 2d Sess. (1992).

never submitted to the United States Senate for confirmation.¹³ Most recently, last year's Copenhagen conference yielded only weak and vague language on this subject and, again, no binding reduction commitments.¹⁴

The problem successive Congresses and Presidents and various countries have had in determining reasonable levels of emissions is that, as the Intergovernmental Panel on Climate Change ("IPCC")—a source on which Plaintiffs rely in their Complaint—has noted, "[e]missions of GHGs are associated with an extraordinary array of human activities."¹⁵ The United States Energy Information Administration ("EIA") reached the same conclusion: "there are a vast number of entities that emit carbon—homes, factories, vehicles, commercial facilities, and agricultural resources...."¹⁶ According to EPA, "[v]irtually every sector of the U.S. economy is either directly or indirectly a source of GHG emissions."¹⁷

Because the use of fossil fuels is so fundamental to the U.S. and global economies, the IPCC has concluded that "[t]he global nature of the problem . . .

¹³ The Kyoto Protocol is available at http://unfccc.int/kyoto_protocol/items/2830.php.

¹⁴ See Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, *available at* <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=3>.

¹⁵ IPCC Third Assessment Report, CLIMATE CHANGE 2001: MITIGATION 608 (Cambridge University Press 2001) ("IPCC 2001"), *available at* http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm.

¹⁶ *Hearings Before the Senate Comm. on Energy and Natural Resources*, 106th Cong. (March 25, 1999) (testimony of Jay Hakes, EIA Administrator).

¹⁷ Proposed Consent Decree, Clean Air Act Citizen Suit, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

implies that the full breadth of human social structures is encompassed.”¹⁸ The IPCC

notes:

A combination of several features lends the climate problem its uniqueness. They include public good issues arising from the concentration of GHGs in the atmosphere that requires collective global action, the multiplicity of decision makers ranging from global down to the micro level of firms and individuals, and the heterogeneity of emissions and their consequences around the world. Moreover, the long-term nature of climate change originates from the fact that it is the concentration of GHGs that matters rather than their annual emissions and this feature raises the thorny issues of intergenerational transfers of wealth and environmental goods and bads. Next, human activities associated with climate change are widespread, which makes narrowly defined technological solutions impossible, and the interactions of climate policy with other broad socioeconomic policies are strong. Finally large uncertainties or in some areas even ignorance characterize many aspects of the problem and require a risk management approach to be adopted in all [decisionmaking frameworks] that deal with climate change.¹⁹

Given the foregoing, the latest IPCC report recommends that all of the many sectors that produce GHGs must be addressed as part of a coordinated approach. According to the IPCC, “No one sector or technology can address the entire mitigation challenge. This suggests that a diversified portfolio is required based on a variety of criteria. All the main sectors contribute to the total.”²⁰ This includes energy

¹⁸ IPCC 2001 at 607.

¹⁹ *Id* at 66.

²⁰ IPCC Fourth Assessment Report: CLIMATE CHANGE 2007: WORKING GROUP III: MITIGATION OF CLIMATE CHANGE 621 (Cambridge University Press 2007).

supply, transport and its infrastructure, residential and commercial buildings, industry, agriculture, forestry and waste management.²¹

The global nature of GHG emissions also means that the jury, in assessing the reasonableness of the Defendants' GHG emissions, must consider the fact that had Defendants reduced their GHG emissions to whatever level it is that Plaintiffs think is reasonable, those emission reductions may have been replaced by offshore emissions (referred to as "leakage"). This leakage issue was examined in depth by the Congressional Research Service, which described the problem as involving both the leakage of emissions and the associated leakage of jobs in the industries that produce those emissions:

The risks accompanying establishment of carbon control policies, in the absence of similar policies among competing nations, have been central to debates on whether the United States should enact greenhouse gas legislation. Specifically, concerns have been raised that if the United States adopts a carbon control policy, industries that must control their emissions or that find their feedstock or energy bills rising because of costs passed-through by suppliers may be less competitive and may lose global market share (and jobs) to competitors in countries lacking comparable carbon policies. In addition, this potential shift in production could result in some of the U.S. carbon reductions being diluted by increased production in more carbon intensive countries (commonly known as "carbon leakage").²²

The concern that GHG emissions cannot be reduced domestically without causing job losses and concomitant increases in GHG emissions abroad caused the

²¹ *Id.*, Chs. 4-10.

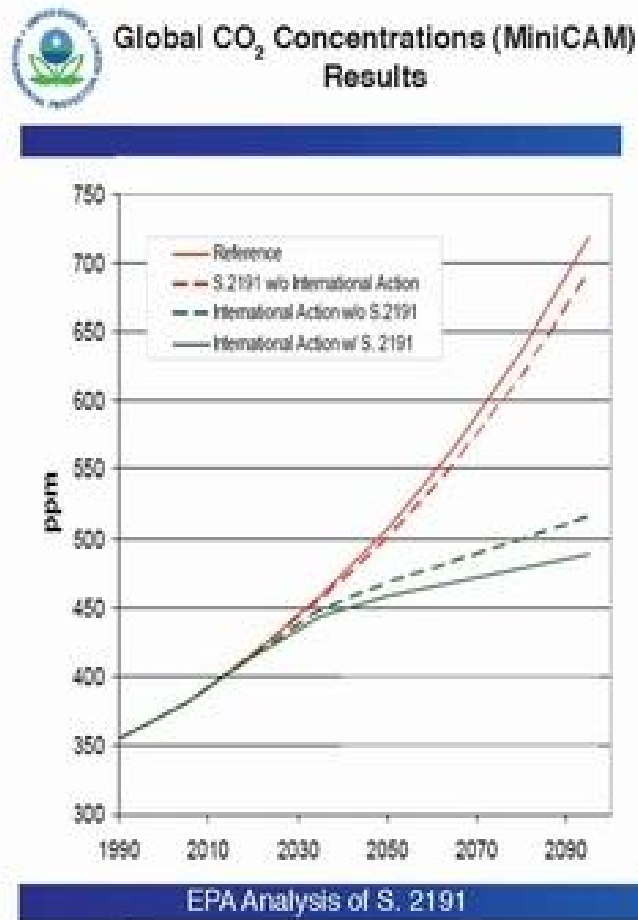
²² Larry Parker and John Blodgett, "CARBON LEAKAGE" AND TRADE: ISSUES AND APPROACHES (Congressional Research Service 2008), *available at* <http://www.fas.org/sgp/crs/misc/R40100.pdf>.

U.S. Senate, during deliberations on the Fiscal Year 2009 Budget Resolution (S.Con.Res. 70), to instruct conferees “that no legislation providing for new mandates on greenhouse gas emissions should be enacted until it effectively addresses imports from China, India, and other nations that have no similar emissions programs.”²³

Finally, in assessing the reasonableness of Defendants’ GHG emissions in the context of international emissions, the jury would also need to consider that, even if Defendants had reduced their GHG emissions and those emissions had not leaked offshore, there would still not have been a meaningful impact on the global climate conditions that Plaintiffs assert to be the cause of Hurricane Katrina. For instance, the U.S. EPA produced an analysis in 2008 of the effect on global GHG concentrations over a 100-year period if S. 2191, the Lieberman-Warner climate change legislation that was reported by the Senate Committee on Environment and Public Works in 2008, were enacted into law. The Lieberman-Warner bill did what Plaintiffs want the jury effectively to do here—it set an amount of GHG emissions that fossil fuel industries could legally produce (in the bill this was called a “cap”). The analysis is reproduced below and shows that, without legally binding international action, U.S. efforts at reducing GHG emissions will have almost no impact on overall GHG concentrations.²⁴

²³ 154 CONG. REC. S 4247 (May 15, 2008) (Senate Roll Call Vote 132).

²⁴ See EPA ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2008, S. 2191 IN 110TH CONGRESS (March 14, 2008) at 192, *available at* http://www.epa.gov/climatechange/downloads/s2191_EPA_Analysis.pdf. The solid red line in the graph assumes the legislation is not



In sum, because GHGs are emitted by a very large and diverse number of sources globally, arriving at a “reasonable” amount of GHG emissions for the American fossil fuel industry involves fundamentally legislative policy decisions. These policy choices belong with Congress, not a jury.

enacted; the dotted red line assumes that the legislation is enacted. Both red lines assume the rest of the world does not take action to significantly reduce its GHG emissions as compared with efforts they are already undertaking. As can be seen, at the end of the 100-year period 1990-2090, the bill would result in only a six-year delay of the GHG levels predicted without the bill. The green lines show that the rest of the world must reduce GHG emissions if overall atmospheric concentrations are to be meaningfully reduced.

2. The Benefits of Using Fossil Fuels

Another factor the jury would need to consider is the benefits society derives from fossil fuels, benefits that would have been jeopardized had Defendants not engaged in their allegedly unreasonable conduct of using and producing fossil fuels. Indeed, because the production and use of fossil fuels and the attendant GHG emissions are so closely tied with all facets of modern life, a finding that using fossil fuels and emitting GHGs constitute a nuisance is akin to saying that modern life constitutes a nuisance. That may be true in some sense, but the necessary rejoinder is: compared to what? Certainly not as compared with pre-industrial society with pre-industrial levels of atmospheric GHG concentrations. As Justice Breyer stated in his concurring opinion in *Whitman v. Am. Trucking Ass'ns*, in the context of air pollution regulations designed to protect the public health, “[p]reindustrial society was not a very healthy society; hence a standard demanding the return of the Stone Age would not prove ‘requisite to protect the public health.’”²⁵

Thus, although energy production results in GHG emissions, it also yields significant benefits for the health and welfare of all Americans. The benefits to the United States in fossil fuels usage can be seen by comparing energy usage in the developed world with energy usage in the developing world. The disparity and its consequences are alarming. The average consumer in the United States, for example, uses 13,652 kWh of power each year. The average Indian uses just 542 kWh. In the

²⁵ 531 U.S 457, 496 (2001).

United States, virtually no household lacks access to electricity.²⁶ In India, more than 400 million people have no electricity, 600 million cook with wood or dung and more than 900 million have no refrigeration.²⁷

The human and economic consequences of these differences in access to electricity are stark indeed. In the United States, the per capita Gross National Income is \$46,400. In India, it is \$950. In the United States, a new baby can expect to live 78 years, in India only 63. In the United States, there is virtually no serious child malnourishment. In India, about half the children are malnourished and tens of millions are classified as “stunted.”²⁸

Indeed, energy usage, and in particular electricity usage, is the *sine qua non* of modern society. The National Academy of Engineering has identified societal electrification as the “most significant engineering achievement” of the twentieth century—a century that saw population growth of more than four billion people, the rise of the metropolis, dramatic improvements in diet and health, and the emergence of a vast system of electronic communication.²⁹ In 1930, *The New York Times* stated,

²⁶ World Bank Indicators, *available at* <http://data.worldbank.org/country/united-states> (2007 data).

²⁷ International Energy Agency, WORLD ENERGY OUTLOOK 482 (2007), *available at* http://www.iea.org/textbase/nppdf/free/2007/weo_2007.pdf.

²⁸ World Bank Data, *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,menuPK:295589~pagePK:141159~piPK:141110~theSitePK:295584,00.html>.

²⁹ See Neil A. Armstrong, *The Engineered Century*, BRIDGE, Spring 2000, at 18, *available at* <http://www.nae.edu/Publications/TheBridge/Archives/V30-1TheVertiginousMarchofTechnology/TheEngineeredCentury.aspx>.

“Nothing in modern life so raises the standard of living of high and low income groups as the use of electricity.”³⁰

Energy is a key factor in economic development, transforming agrarian societies to modern industrial ones. This societal transformation driven by the accumulation of income and wealth eliminates many contagious diseases, reduces child mortality, and lengthens adult life expectancy. This virtuous cycle has been demonstrated over the past two centuries in dozens of countries around the world. The emergence from poverty begins as countries develop transportation networks using petroleum and electricity networks, often based upon coal. These systems are capable of achieving massive economies of scale that provide large amounts of energy at low cost. These abundant and reliable supplies of energy spur technological change, productivity growth, and rising living standards.³¹

It is no coincidence then that the world energy complex is built upon fossil fuels. Consumers prefer reliable power at a reasonable cost. And producers who provide these services prosper. The fact that the U.S. economy currently derives 85 percent of its total energy from coal, oil, and natural gas is a testament to the competitive and reliability advantages of fossil fuels. These fuels have empowered modern industrial societies to raise living standards for billions of people.

³⁰ N.Y. TIMES, Sept. 6, 1936, p. E7.

³¹ Sam H. Schurr, *Electricity in the American Economy, Agent of Technological Progress*, Greenwood Press, 1990.

The benefits of energy usage can be demonstrated graphically in the following satellite picture of the Korean peninsula at night. One part of the peninsula is a modern country and the other part is one of the most underdeveloped countries in the world: the difference is access to electricity and the energy from which the electricity is produced.³²

Electricity Makes the Difference: Korea



South Korean preschool children average 3 inches taller and 7 pounds heavier than North Korean Children

The Infant Mortality Rate in North Korea is 12 times higher than South Korea

South Korea ranks 49th in GDP/capita. North Korea Ranks 188th

Only 20% of North Koreans have access to electric power. South Korean access approaches 100%

³² See <http://www.globalsecurity.org/military/world/dprk/dprk-dark.htm>. The statistics in the above graphic are taken from Daniel Schwegendieka and Sunyoung Pak, *Recent growth of children in the two Koreas: A meta-analysis*, 7 ECON. & HUMAN BIOLOGY 109 (2009); Central Intelligence Agency, THE WORLD FACTBOOK 2009 (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/index.html> and ACCESS TO ELECTRICITY AND WATER FOR DOMESTIC USE (UNESCO 2009), available at <http://www.unesco.org/water/wwap/wwdr/indicators/>.

In sum, the benefits of using fossil fuels have been demonstrated by remarkable socioeconomic progress first in the United States and the developed world and currently in China, India and the rest of the developing world. Plaintiffs' view that fossil fuel usage is nevertheless "unreasonable" thus would require the jury to weigh whether the benefits of fossil fuel usage are outweighed by the asserted detriments. That determination, however, is a quintessentially legislative task.

3. Who Suffers if Fossil Fuel Usage Is Penalized?

The necessary implication of Plaintiffs' assertion that Defendants unreasonably produced and used fossil fuel is that Defendants should have produced and used less fossil fuel to reduce their GHG emissions. But because significantly controlling GHG emissions would entail fundamental changes to our economy and the way we live, a variety of authorities have concluded that the economic and non-economic costs of reducing GHG emissions would be massive. Thus, the trier of fact would have to engage in a kind of cost-benefit analysis to determine whether Defendants' level of emissions was reasonable or whether Defendants should have emitted some other level of GHGs.

To give this issue some context, it is instructive to understand how substantial the cost burden is of reducing GHG emissions. For instance, in the U.S. EPA's March 2008 analysis of the Lieberman-Warner cap-and-trade bill, annual GDP is modeled to be between 0.9 percent (\$238 billion) and 3.8 percent (\$983 billion) lower in 2030 and between 2.4 percent (\$1,012 billion) and 6.9 percent (\$2,856 billion) lower

in 2050 than in the Reference Scenario. Consumption is modeled to be between 0.9 percent (\$180 billion) and 1.4 percent (\$233 billion) lower in 2030 and between 2.1 percent (\$670 billion) and 3.3 percent (\$843 billion) lower in 2050 than in the Reference Scenario. The average annual growth rate of consumption is ~0.08 percentage points lower than the reference case. In 2030, per household average annual consumption is ~\$1,375 lower and gasoline prices increase ~\$0.53 per gallon. In 2050, per household average annual consumption is ~\$4,377 lower and gasoline prices increase ~\$1.40 per gallon.³³ Other studies have showed even higher costs, some much higher.³⁴

Plaintiffs, of course, are not proposing judicial imposition of the Lieberman-Warner bill. But by suing a significant number of fossil fuel producing and using companies on a theory that they acted unreasonably in not lowering their GHG emissions profile, they are essentially asserting that the country should have used different and more expensive sources of energy. The cost of those substitutes would have been passed on to consumers, and these costs would have been substantial

³³ See EPA ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2008, S. 2191 IN 110TH CONGRESS (March 14, 2008), *available at* http://www.epa.gov/climatechange/downloads/s2191_EPA_Analysis.pdf.

³⁴ See, e.g., CRA International, ECONOMIC ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2007 USING CRA'S NRA-NEEM MODEL (April 2008), *available at* http://www.nma.org/pdf/040808_crai_presentation.pdf. (4 million jobs will be lost in 2015 alone, and growing on a year-by-year basis to more than 7 million jobs lost in 2050; overall cost of the bill to the average household of 2.6 persons will exceed \$2,300 annually in 2015, which approximates the amount households now spend annually on healthcare; large year-over-year losses in GDP accumulating to \$5.3 trillion (present value 2007\$).

because it is demonstrably not possible to achieve significant GHG emission reductions without incurring significant costs.

Moreover, these costs would fall disproportionately on the poor. According to a recent study by one of the Amici, GHG regulation:

...will impact low income groups, the elderly, and minorities disproportionately, both because they have lower incomes to begin with, but also because they have to spend proportionately more of their incomes on energy, and rising energy costs inflict great harm on minority families. Lower-incomes families are forced to allocate larger shares of the family budget for energy expenditures, and minority families are significantly more likely to be found among the lower-income brackets.

This disparity between racial groups means that rising energy costs have a disproportionately negative effect on the ability of minority families to acquire other necessities such as food, housing, childcare, or healthcare.³⁵

Agriculture is also particularly vulnerable to attempts to restrict GHG emissions. Plaintiffs' complaint targets methane emissions from coal mining,³⁶ but animal agriculture is also a significant source of methane emissions. Nitrous oxide, another GHG, is also produced in animal agriculture operations. Most farms typically have both stationary and mobile engines that are a source of CO₂, and the economics of farming are highly sensitive to the cost of fuel and fertilizer.

³⁵ Management Information Services, Inc., POTENTIAL IMPACT OF THE EPA ENDANGERMENT FINDING ON LOW INCOME GROUPS AND MINORITIES (March 2010) at iv-v, *available at* <http://www.affordablepoweralliance.org/Home.aspx>.

³⁶ Pl. Compl., ¶ 8.

In sum, the reasonableness of the Defendants' conduct here can be determined only in the context of what the costs of alternative action would have been. But, again, fashioning a standard or rule on how to properly balance across society the costs of action or inaction on GHG emissions is a legislative function, not a judicial one.

4. The Future Matters

Under Plaintiffs' nuisance theory, the jury also would be required to assess the reasonableness of Defendants' GHG emissions in light of the growing disparity between U.S. and international GHG emissions. A jury might reasonably conclude that it was not unreasonable for Defendants to produce and use fossil fuels—and to therefore emit GHGs—in the quantities that they did, given the fact that the rest of the world does the same and will do so in increasing amounts in the future, especially in the developing countries.

In fact, GHGs emitted outside the U.S. are accumulating in the atmosphere in much greater amounts than domestic emissions, and that trend will accelerate in the future. Already, international emissions significantly exceed U.S. emissions, and the emissions of developing countries are currently, and will continue to be, on an upward trajectory regardless of any action the U.S. may take.³⁷ Recent data shows that the emissions from China alone, which is building a coal-fired electric generating station

³⁷ Energy Information Administration, INTERNATIONAL ENERGY OUTLOOK 131 (2009), *available at* [http://www.eia.doe.gov/oiaf/ieo/pdf/0484\(2009\).pdf](http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf).

every week, have surpassed those of the United States, and China's energy usage continues to rise at an ever increasing pace.³⁸ Indeed, although the International Energy Agency had forecast in 2004 (International Energy Outlook 2004) that China's emissions would still be below U.S. emissions in 2025, in fact, China's emissions (International Energy Outlook 2009) exceeded those of the U.S. by 2006.³⁹

China's carbon dioxide emissions are forecast by the EIA to be about 12 billion metric tons by 2030 as compared with U.S. emissions of 6.8 billion metric tons.⁴⁰

China uses fossil fuels for energy for the same reason the United States does, because it balances economic and social development with public health and welfare in ways that policy makers have deemed to be appropriate in their judgments. Thus, the International Energy Agency has indicated that China's use of coal-based electricity to significantly reduce poverty "stands as an example" to the developing world.⁴¹

This trend is likely to continue. Given global development, energy decisions made in the U.S. are increasingly less important to the world's GHG emissions profile. Other nations are rapidly utilizing their fossil fuel resources to expand access to electricity, reduce poverty, and gain economic leverage. 1.6 billion people today

³⁸ *Id*

³⁹ See Energy Information Administration, INTERNATIONAL ENERGY OUTLOOK 172 (2004) *available at* [http://tonto.eia.doe.gov/ftproot/forecasting/0484\(2004\).pdf](http://tonto.eia.doe.gov/ftproot/forecasting/0484(2004).pdf); Energy Information Administration, INTERNATIONAL ENERGY OUTLOOK 131 (2009) *available at* [http://www.eia.doe.gov/oiaf/ieo/pdf/0484\(2009\).pdf](http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf).

⁴⁰ Energy Information Administration, INTERNATIONAL ENERGY OUTLOOK 196 (2009), *available at* [http://www.eia.doe.gov/oiaf/ieo/pdf/0484\(2009\).pdf](http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf).

⁴¹ International Energy Agency, WORLD ENERGY OUTLOOK 282 (2007), *available at* http://www.iea.org/textbase/nppdf/free/2007/weo_2007.pdf.

have no access to electricity.⁴² In other words, electricity deprivation victimizes 12 times the population of the U.S., but this situation will change with development, which will entail increased usage of fossil fuels.

As the current century proceeds, generation of electricity is poised for staggering growth. The EIA predicts a 75 percent increase in the next two decades alone.⁴³ The locus of that incremental growth reflects a major shift in the global situation. From 1980-2000, almost one fourth of the global increase in electric generation came from the United States.⁴⁴ Over the next 20 years, the U.S. will be a relatively minor player in an ever larger drama. According to the EIA, between 2006 and 2030, electricity generation in the U.S. will increase by 1,090 billion kWh, whereas electricity generation will increase by 12,710 billion kWh in the rest of the world.⁴⁵

In short, the reasonableness of Defendants' actions can only be judged against the backdrop of dramatically increasing international emissions, which is, once again, a legislative judgment.

⁴² Robert Priddle, Statement to World Leaders on Sustainable Development at the World Summit in Johannesburg, *available at* http://www.iea.org/press/pressdetail.asp?PRESS_REL_ID=67.

⁴³ Energy Information Administration, INTERNATIONAL ENERGY OUTLOOK 507 (2008), *available at* [http://www.eia.doe.gov/oiaf/archive/ieo08/pdf/0484\(2008\).pdf](http://www.eia.doe.gov/oiaf/archive/ieo08/pdf/0484(2008).pdf).

⁴⁴ EIA International Energy Statistics, *available at* <http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=2&pid=2&aid=12>.

⁴⁵ Energy Information Administration, INTERNATIONAL ENERGY OUTLOOK 196 (2009), *available at* [http://www.eia.doe.gov/oiaf/ieo/pdf/0484\(2009\).pdf](http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf).

C. Conclusion

Plaintiffs seek to entice the judicial system into the climate change policy thicket. The Court should not take the bait. A jury is not the proper forum for determining how America should use energy.

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2010 an electronic copy of the foregoing was served on the following parties through the Court's CM/ECF system to the electronic mail addresses registered in that system.

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