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## Global Warming & Common Law Tort Claims: Did the Fifth Circuit Open up Pandora's Box. *Comer v. Murphy Oil USA*

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## Global Warming & Common Law Tort Claims: Did The Fifth Circuit Open Up Pandora's Box

*Comer v. Murphy Oil USA*<sup>1</sup>

### NOTE FROM THE AUTHOR

The Note that follows examines the Fifth Circuit's decision in *Comer v. Murphy Oil USA*.<sup>1</sup> However, on February 26, 2010, the United States Court of Appeals for the Fifth Circuit vacated that decision by granting a rehearing en banc.<sup>ii</sup> Soon thereafter, a last-minute recusal by a judge on the 16-judge panel caused the court to lose its quorum to decide the case.<sup>iii</sup> On May 28, 2010, the court ruled that the *vacatur* of the three-judge panel decision was to remain in place.<sup>iv</sup> The court also held that the loss of the quorum left the court with no choice but to dismiss the appeal.<sup>v</sup>

The dismissal means that the district court's decision — which held that the plaintiffs did not have standing and that their claims constituted a “political question”<sup>vi</sup> — stands as good law. So, for now, plaintiffs in the Fifth Circuit cannot pursue state-law tort claims for damages resulting from an increase in global warming. Still, the parties were left with the ability to appeal directly to the Supreme Court of the United States.<sup>vii</sup>

While the Fifth Circuit's original decision is no longer good law, the Note's analysis of the court's opinion and the discussion thereof provides an interesting view on the issues of standing and the political question doctrine in global warming tort cases. Furthermore, the Note stands in contrast to another Note in this edition of the Missouri Environmental Law & Policy Review, which examines the case of *Native*

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<sup>1</sup> 585 F.3d 855 (5th Cir. 2009).

<sup>i</sup> 585 F.3d 855 (5th Cir. 2009).

<sup>ii</sup> *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010); *see also* 5TH CIR. R. 41.3.

<sup>iii</sup> *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1053-54 (5th Cir. 2010).

<sup>iv</sup> *Id.* at 1055.

<sup>v</sup> *Id.*

<sup>vi</sup> *Comer v. Murphy Oil USA*, No. CIV.A.1:05:CV-436-LG-RHW, 2007 WL 6942285, \*1 (S.D. Miss. Aug. 30, 2007).

<sup>vii</sup> *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1055 (5th Cir. 2010).

*Village of Kivalina v. Exxon Mobil Corp.*,<sup>viii</sup> and addresses the same legal issues found in *Comer v. Murphy Oil USA*.<sup>ix</sup> For this reason, the editors of the Missouri Environmental Law & Policy Review felt strongly that this Note should remain in this edition.

## I. INTRODUCTION

The devastation wrought by Hurricane Katrina took the lives of 1836 people, making it the third deadliest hurricane in our nation's history.<sup>2</sup> Along with the distressing loss of life, the hurricane also cost the nation \$110 billion in damage, the most of any hurricane ever to hit the United States.<sup>3</sup> With such an overwhelming amount of destruction, many people were left without homes, and those homes that still stood were severely damaged. It would be understandable for those who lost so much to want restitution from someone. Who better to give it to them than the energy companies that are making huge profits while contributing to the effects of global warming, thereby increasing the intensity of storms like Hurricane Katrina?

That is exactly what the plaintiffs thought in *Comer v. Murphy Oil USA*.<sup>4</sup> The Fifth Circuit's decision in this case presents a growing trend among the federal courts of appeals in cases involving the effects of global warming. Not only are plaintiffs in these types of cases found to have standing, but their claims are also found not to be political questions, thus allowing the courts to decide the cases. This Note will examine the Fifth Circuit's analysis of the doctrines of standing and political question, and why the court ruled as it did. The Note will also discuss the implications of the court's decision and the possible outcomes now that the case has proceeded beyond the pleadings.

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<sup>viii</sup> 663 F. Supp. 2d 863 (N.D. Cal. 2009).

<sup>ix</sup> 585 F.3d 855 (5th Cir. 2009).

<sup>2</sup> <http://www.hurricanekatrinarelieff.com/faqs.html> (follow "What is the death toll of Hurricane Katrina?" hyperlink).

<sup>3</sup> <http://www.hurricanekatrinarelieff.com/faqs.html> (follow "What was the total cost of Hurricane Katrina?" hyperlink).

<sup>4</sup> 585 F.3d 855 (5th Cir. 2009).

## II. FACTS AND HOLDING

Following the devastation of Hurricane Katrina, a large group of residents and landowners along Mississippi's Gulf Coast filed a putative class action lawsuit against several corporations for their contribution to global warming.<sup>5</sup> All of the named Defendants held their principal places of business in states other than Mississippi, but conducted business in the state.<sup>6</sup> The plaintiffs alleged that the operation of defendants' various businesses, which include chemical, energy, and fossil fuel production, caused the release of greenhouse gases into the atmosphere, thereby adding to global warming.<sup>7</sup> As a result of this alleged increase, the plaintiffs claimed that sea levels rose, "and added to the ferocity of Hurricane Katrina, which combined to destroy plaintiffs' private property, as well as public property useful to them."<sup>8</sup>

For these reasons the plaintiffs sought both compensatory and punitive damages.<sup>9</sup> They brought six different actions against the Defendants under Mississippi common law, which included nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.<sup>10</sup> None of the plaintiffs' claims involved federal law, but the case was brought in federal court by invoking the court's subject matter jurisdiction based on diversity of citizenship.<sup>11</sup>

In the District Court for the Southern District of Mississippi, the defendants moved to dismiss the plaintiffs' claims for lack of standing and

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<sup>5</sup> *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009).

<sup>6</sup> *Id.* The complete list of Defendants includes: Murphy Oil, USA; Universal Oil Products and Honeywell Int'l., Inc.; Shell Oil Co.; Exxon-Mobil Corp.; AES Corp.; Allegheny Energy, Inc.; Reliant Energy, Inc.; Alliance Resource Partners, LP; Alpha Natural Resources, Inc.; Arch Coal, Inc.; Consol Energy, Inc. Foundation Coal Holdings, Inc.; Int'l. Coal Group, Inc.; Massey Energy Co.; Peabody Energy Corp.; Westmoreland Coal Co.; BP American Production Co.; BP Products North America, Inc.; Cinergy Corp.; Duke Energy Corp.; ConocoPhillips Co.; Dow Chemical Co.; EI Dupont De Nemours & Co.; Entergy Corp.; TVA; Xcel Energy, Inc.; Chevron USA, Inc.; and, American Petroleum Institute. *Id.* at 858-59.

<sup>7</sup> *Id.* at 859.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 859-60.

<sup>11</sup> *Id.* at 860.

nonjusticiable political questions.<sup>12</sup> The district court granted this motion and dismissed the claims, stating that the court did not have the ability to address the issues involved with global warming, and also that such policy decisions are best left to the executive and legislative branches.<sup>13</sup>

On appeal, the U.S. Court of Appeals for the Fifth Circuit held that the plaintiffs did in fact have standing to assert their claims of negligence, nuisance and trespass, and also held that none of those claims involved a nonjusticiable political question. However, the court also found that the plaintiffs lacked standing to bring claims for civil conspiracy, unjust enrichment, and fraudulent misrepresentation.<sup>14</sup>

### III. LEGAL BACKGROUND

#### A. *Standing*

Two different types of standing must be satisfied for a court to exercise its jurisdiction over a particular case.<sup>15</sup> The first is constitutional standing, or Article III standing, which imposes the “case or controversy” requirement of Article III of the Constitution.<sup>16</sup> The second is labeled “prudential standing,” and involves limits on the exercise of federal jurisdiction put in place by the judiciary itself.<sup>17</sup> Both types of standing will now be discussed in turn.

#### 1. Constitutional Standing

Constitutional standing, or Article III standing, is embodied in the U.S. Constitution under Article III, which confines federal court jurisdiction to “cases” and “controversies.”<sup>18</sup> These two words “limit the

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* The district court’s ruling was issued from the bench without a written opinion, so the Court of Appeals for the Fifth Circuit used the hearing transcripts to ascertain the district court’s reasoning behind its decision. *Id.* at 860 n.2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 868.

<sup>16</sup> *Id.*; U.S. CONST. art. III, § 2, cl. 1.

<sup>17</sup> *Comer*, 585 F.3d at 868.

<sup>18</sup> U.S. CONST. art. III, § 2, cl. 1.

business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.”<sup>19</sup> Accordingly, past case law has developed an “irreducible constitutional minimum of standing” that contains three elements, enunciated by the Court in *Lujan v. Defenders of Wildlife*.<sup>20</sup>

At a minimum, a plaintiff must first establish that it has suffered an “injury in fact.”<sup>21</sup> An “injury in fact” is “an invasion of a legally protected interest which is” both “concrete and particularized,” as well as “actual or imminent.”<sup>22</sup> Hypothetical or conjectural injuries will not suffice.<sup>23</sup> Second, a plaintiff must be able to show “a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.’”<sup>24</sup> The final element laid out by *Lujan* is that a plaintiff must show that a favorable decision by the court is likely to redress the injury.<sup>25</sup> As with the “injury in fact” element, the redressability of the plaintiff’s injury cannot be merely speculative.<sup>26</sup>

Along with the preceding elements, another aspect of constitutional standing is that the plaintiff has the burden of showing standing.<sup>27</sup> The burden of proof for such a showing will be the same as any other matter the plaintiff must prove at that particular point.<sup>28</sup> As a result, the consideration of standing at the pleading stage requires the court to accept all of the allegations of the complaint as true.<sup>29</sup>

The elements of constitutional standing enunciated by the Court in *Lujan* were applied in *Massachusetts v. EPA*, which involved a suit by several state and local governments, as well as some private organizations,

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<sup>19</sup> *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

<sup>20</sup> 504 U.S. 555, 560 (1992).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

<sup>25</sup> *Lujan*, 504 U.S. at 561.

<sup>26</sup> *Id.* (quoting *Simon*, 426 U.S. at 38).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

challenging the EPA's denial of a petition to begin regulating greenhouse gas emissions under the Clean Air Act.<sup>30</sup> Applying the three-part test for constitutional standing, the Court held that the state of Massachusetts had standing to bring its claims.<sup>31</sup> First, it found that the rise in sea levels caused by global warming had begun to swallow up the coast of Massachusetts, and would continue to do so, thereby presenting a concrete injury to the state.<sup>32</sup> Second, the Court said that while the EPA's regulation of greenhouse gas emissions from new vehicles would not significantly contribute to global warming, it still would play some part, and thus causation existed.<sup>33</sup> Finally, the Court found that regulating greenhouse gas emissions from new vehicles would redress the injury in some way, and it did not matter if the plaintiffs' injuries would not be fully relieved.<sup>34</sup>

## 2. Prudential Standing

The doctrine of prudential standing was best articulated in *Allen v. Wright*,<sup>35</sup> which stated that the doctrine involves "several judicially self-imposed limits on the exercise of federal jurisdiction."<sup>36</sup> The reasoning behind the limitations of prudential standing is that such claims, if decided by the courts, would require them to rule on "abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."<sup>37</sup>

Although these limits have not been fully defined, *Allen* does provide some examples of when a case will not meet the standards of prudential standing.<sup>38</sup> These limitations include: instances in which a litigant raises the legal rights of another; the plaintiff's complaint does not

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<sup>30</sup> *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

<sup>31</sup> *Id.* at 526.

<sup>32</sup> *Id.* at 522.

<sup>33</sup> *Id.* at 523-25.

<sup>34</sup> *Id.* at 525.

<sup>35</sup> 468 U.S. 737 (1984).

<sup>36</sup> *Id.* at 751.

<sup>37</sup> *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

<sup>38</sup> *See Comer v. Murphy Oil USA*, 585 F.3d 855, 868 (5th Cir. 2009).

“fall within the zone of interests protected by the law invoked”; and “generalized grievances more appropriately addressed in the representative branches.”<sup>39</sup> Additionally, the Supreme Court has held that “when the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”<sup>40</sup> Furthermore, a plaintiff has to assert her own legal rights and interests, rather than rest her claim on the legal rights of others.<sup>41</sup>

### B. *The Political Question Doctrine*

The political question doctrine is part of a larger concept known as justiciability.<sup>42</sup> As the Fifth Circuit put it, “[a] question, issue, case or controversy is ‘justiciable’ when it is constitutionally capable of being decided by a federal court.”<sup>43</sup> As such, the concept of justiciability depends largely on the separation of powers embodied in the Constitution.<sup>44</sup> A case will be nonjusticiable if the Constitution has committed the subject matter involved exclusively to either the legislative or executive branches, rather than the courts.<sup>45</sup> A political question is a form of a nonjusticiable issue.<sup>46</sup> It is labeled as such because it has been committed by the Constitution exclusively to the political branches of the federal government.<sup>47</sup>

In *Baker v. Carr*, the Supreme Court laid out several factors to consider in determining whether an issue is a political question.<sup>48</sup> One factor is a constitutional provision that expressly commits the issue to a political branch.<sup>49</sup> Another factor is “a lack of judicially discoverable and

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<sup>39</sup> *Allen v. Wright*, 468 U.S. 737, 751 (1984).

<sup>40</sup> *Warth*, 422 U.S. at 499.

<sup>41</sup> *Id.*

<sup>42</sup> *See Comer*, 585 F.3d at 869.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See id.*

<sup>47</sup> *Id.*

<sup>48</sup> 369 U.S. 186, 217 (1962).

<sup>49</sup> *Id.*

manageable standards for resolving” the particular question.<sup>50</sup> Also, a case could be a political question if it is impossible to decide without first making a policy determination that would involve non-judicial discretion.<sup>51</sup> An additional factor would be the potential for multiple decrees from several departments involving the issue that could lead to embarrassment.<sup>52</sup> The final two factors under *Baker v. Carr* involve “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made.”<sup>53</sup>

The Supreme Court in *Nixon v. United States*<sup>54</sup> developed the political question doctrine even further. In that case, the Court articulated a method to be used when determining whether an issue has been committed to the political branches by the Constitution.<sup>55</sup> The Court said that the first step is to interpret the constitutional text at issue.<sup>56</sup> Following that, the second step is to “determine whether and to what extent the issue is textually committed” to one of the political branches.<sup>57</sup>

1. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>58</sup>

The Fifth Circuit reviewed *Chevron* in its decision and stated that the Defendants had erroneously relied on its interpretation in two other cases, *California v. General Motors Corp.* and *Connecticut v. American Electric Power Co.* In *Chevron*, the EPA defended its interpretation of the statutory term “stationary source,” which allowed states to classify all pollution-emitting devices within the same industrial grouping, or

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> 506 U.S. 224 (1993).

<sup>55</sup> *Id.* at 228.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 467 U.S. 837 (1984).

“bubble.”<sup>59</sup> The issue in the case was whether such an interpretation of the statutory term was reasonable.<sup>60</sup>

In deciding this, the Court looked at the legislative history of the statute in question, and stated:

As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus.<sup>61</sup>

The Court went on to discuss the deference that should be given to an agency's decision, and noted that judges are not experts in the particular fields involved in many cases, but may, “in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences.”<sup>62</sup> Furthermore, it stated that “[t]he responsibilities for assessing the wisdom of...policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”<sup>63</sup> Ultimately the Court held that the EPA's interpretation of the term “source” was a reasonable construction of the statute.<sup>64</sup>

## 2. *California v. General Motors Corp.*<sup>65</sup>

*California v. General Motors Corp.*, involved a suit brought by the state of California against multiple automotive manufactures seeking damages for their contribution to an alleged public nuisance caused by

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<sup>59</sup> *Id.* at 840.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 847.

<sup>62</sup> *Id.* at 865.

<sup>63</sup> *Id.* at 866.

<sup>64</sup> *Id.*

<sup>65</sup> No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

global warming.<sup>66</sup> The plaintiff's alleged injuries included the erosion of the state's coastline, increased flooding due to earlier melting of mountain snow packs, damages caused by increased frequency of extreme heat that leads to wildfires, and the expenditure of state funds used to respond to all of these occurrences.<sup>67</sup> The defendants moved to dismiss the suit on the ground that it presented nonjusticiable political questions, claiming, "Global warming and its causes are issues of public and foreign policy fraught with scientific complexity, as well as political, social, and economic consequences."<sup>68</sup>

The district court, using the *Baker* formulations, held that it could not "adjudicate Plaintiff's federal common law global warming nuisance tort claim without making an initial policy determination of a kind clearly for non-judicial discretion."<sup>69</sup> In doing so, the court noted that global warming policy determinations are complex, and must be made by the political branches before the plaintiff's claim could be properly adjudicated.<sup>70</sup> The court also looked at *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* and said that "to resolve typical air pollution cases, courts must strike a balance 'between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs.'"<sup>71</sup> It then went on to say that balancing those interests in this case would be impossible without the political branches making an initial policy determination.<sup>72</sup>

### 3. *Connecticut v. American Electric Power Co.*<sup>73</sup>

Several states and private land trusts brought suit against utility companies for the public nuisance of global warming in *Connecticut v.*

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<sup>66</sup> *Id.* at \*1.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*2, \*5.

<sup>69</sup> *Id.* at \*12.

<sup>70</sup> *Id.* at \*6.

<sup>71</sup> *Id.* at \*7 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847 (1984)).

<sup>72</sup> *Id.* at \*7.

<sup>73</sup> 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

*American Electric Power Co.*<sup>74</sup> The plaintiffs sought damages for their claim against the defendants, and an injunction requiring the defendants to cap their emissions of greenhouse gases.<sup>75</sup> The defendants moved to dismiss the claim, alleging that it presented a nonjusticiable political question, the court lacked jurisdiction, and the plaintiffs lacked standing.<sup>76</sup> Similar to *California v. General Motors Corp.*, the district court focused on one *Baker* formulation in reaching its decision, "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."<sup>77</sup>

In determining whether the issue could be decided without an initial policy determination by the political branches, the court relied on *Chevron*, and stated that "to resolve typical air pollution cases, courts must strike a balance 'between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs.'"<sup>78</sup> The court went on to say that the issue in the case was impossible to decide without an initial policy determination by the political branches.<sup>79</sup> It held that "these actions present nonjusticiable political questions that are consigned to the political branches, not the Judiciary."<sup>80</sup>

#### 4. *Ohio v. Wyandotte Chemicals Corp.*<sup>81</sup>

*Ohio v. Wyandotte Chemicals Corp.* involved a suit brought by the State of Ohio against several chemical companies, including one from Canada, alleging that each dumped mercury into streams that found their way into Lake Erie, thereby polluting the water.<sup>82</sup> The plaintiffs sought

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<sup>74</sup> *Id.* at 267.

<sup>75</sup> *Id.* at 270.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 271-72 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>78</sup> *Id.* at 272 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847 (1984)).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 274.

<sup>81</sup> 401 U.S. 493 (1971).

<sup>82</sup> *Id.* at 494.

damages for the contamination of the lake, as well as an injunction that would require the defendants to refrain from dumping any more mercury into the streams and to remove the mercury already in the lake.<sup>83</sup> The Court declined to decide the case under its grant of original jurisdiction.<sup>84</sup> However, it did emphasize that the action itself did not present a nonjusticiable political question, stating that “this Court has often adjudicated controversies between States ...seeking to abate a nuisance that exists in one State yet produces noxious consequences in another...In short, precedent leads almost ineluctably to the conclusion that we are empowered to resolve this dispute in the first instance.”<sup>85</sup>

### 5. *City of Milwaukee v. Illinois*<sup>86</sup>

In *City of Milwaukee v. Illinois*, the states of Illinois and Michigan brought suit against the City of Milwaukee and various sewage disposal companies for public nuisance.<sup>87</sup> The States claimed that the discharge of sewage by the defendants polluted the water of Lake Michigan and endangered the health of its citizens.<sup>88</sup> When the case was first brought, the Supreme Court declined to exercise its original jurisdiction, but noted, “federal ‘common law’...could give rise to a claim for abatement of a nuisance caused by interstate water pollution.”<sup>89</sup>

Soon after, Congress enacted the Federal Water Pollution Act Amendments of 1972, and the Court agreed to hear the case in order to decide what effect the new legislation had on the federal common law claim.<sup>90</sup> The Court held that the Clean Water Act preempted the federal common law remedy of public nuisance.<sup>91</sup> However, while the Clean Water Act prevented a federal common law action for public nuisance, the Court maintained “that States may adopt more stringent limitations

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<sup>83</sup> *Id.* at 495.

<sup>84</sup> *Id.* at 499.

<sup>85</sup> *Id.* at 496.

<sup>86</sup> 451 U.S. 304 (1981).

<sup>87</sup> *Id.* at 308-09.

<sup>88</sup> *Id.* at 309.

<sup>89</sup> *Id.* at 307, 309 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 (1972)).

<sup>90</sup> *City of Milwaukee*, 451 U.S. at 307-08.

<sup>91</sup> *Id.* at 332.

through state administrative processes, or even...state nuisance law, and apply them to in-state discharges.”<sup>92</sup>

With this legal background, the Fifth Circuit addressed the issues presented in the instant case.

#### IV. INSTANT DECISION

##### A. *Standing*

The Fifth Circuit began its analysis by stating that since the case involved state common law rights of action, the plaintiffs had to satisfy the requirements of both state and federal standing.<sup>93</sup> The court started with the state standing requirements of Mississippi, and said that the plaintiffs easily satisfied these standards.<sup>94</sup> The court noted that Mississippi has traditionally liberal standing requirements because its state constitution does not limit the judiciary to cases or controversies.<sup>95</sup> Instead, the court noted, parties have standing when they “‘assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law.’”<sup>96</sup> The court said that since the plaintiffs alleged harm to their lands and property as a result of the adverse effects of the defendants’ greenhouse gas emissions, they had state standing to assert all of their claims.<sup>97</sup>

The Fifth Circuit went on to analyze the plaintiff’s claims under federal standing requirements, indicating that more rigorous standards apply.<sup>98</sup> The court began this part of its analysis by explaining the various rules regarding standing, specifically that Article III of the U.S. Constitution limits federal court jurisdiction to “cases” and “controversies.”<sup>99</sup> Additionally, the court pointed out the three part standing inquiry, stating that at a minimum the plaintiffs must demonstrate

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<sup>92</sup> *Id.* at 328.

<sup>93</sup> *Comer v. Murphy Oil USA*, 585 F.3d 855, 861 (5th Cir. 2009).

<sup>94</sup> *Id.* at 862.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (quoting *State v. Quitman County*, 807 So. 2d 998, 1003 (Miss. 1995)).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

that “they have suffered an ‘injury in fact’; that the injury is ‘fairly traceable’ to the defendant’s actions; and that the injury will ‘likely...be redressed by a favorable decision.’”<sup>100</sup> The court also noted that when deciding standing at the pleadings stage, the court must accept all of the plaintiff’s allegations as true.<sup>101</sup>

Before applying these rules to the case, the court stated that it would be helpful to divide the plaintiff’s claims into two separate sets and apply the standards to each.<sup>102</sup> First the court combined the claims for negligence, public and private nuisance, and trespass, since all of these claims relied on “a causal link between greenhouse gas emissions, global warming, and the destruction of the plaintiffs’ property by rising sea levels and the added ferocity of Hurricane Katrina.”<sup>103</sup> Second, the court combined the claims for fraudulent misrepresentation, civil conspiracy, and unjust enrichment, since these claims were based on alleged injuries resulting from defendants’ pricing of petroleum products and public relations campaigns.<sup>104</sup>

### 1. Negligence, Nuisance and Trespass

The Fifth Circuit then applied the standing requirements to the first group of claims.<sup>105</sup> It stated that the first and third prong of the constitutional standing requirements were satisfied by the plaintiffs, since they alleged that they sustained actual damages that could be redressed by the damages they seek for those injuries.<sup>106</sup> The court also noted that the defendants did not contest this issue.<sup>107</sup> The court went on to discuss whether plaintiffs had satisfied the second prong of the standing test, that the injury is traceable to the defendants’ actions.<sup>108</sup>

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<sup>100</sup> *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 863.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 863-64.

<sup>108</sup> *Id.* at 864.

The court was not persuaded by the defendants' argument that "plaintiffs' theory tracing their injuries to defendants' actions is too attenuated," because the argument would require the court to evaluate the merits of the claims at the pleadings stage.<sup>109</sup> The court went on to say that the Article III traceability requirement requires only an indirect causal relationship as long as a fairly traceable connection exists between the injury in fact and the defendants' conduct.<sup>110</sup> Since the plaintiffs' complaint alleged "a chain of causation between defendants' substantial emissions and plaintiffs' injuries," the court found the traceability requirement to be satisfied since it was required to assume those assertions were true.<sup>111</sup>

Additionally, the court noted that the defendants' contentions were similar to ones rejected by the Supreme Court in *Massachusetts v. EPA*.<sup>112</sup> Defendants' asserted that the link between their actions and the plaintiffs' injuries was too attenuated, and contributed only minimally to plaintiffs' injuries.<sup>113</sup> The Fifth Circuit explained that the Supreme Court in *Massachusetts* accepted a causal chain almost identical to the one at hand, and acknowledged that mere contribution to the harm suffices for traceability requirements.<sup>114</sup> The court also mentioned that in its own cases it had held that the inquiry in a "fairly traceable test" is whether the pollutant contributes to the plaintiffs' injuries.<sup>115</sup> The court concluded that "[b]ecause the injury can be traced to the defendants' contributions, the plaintiffs' first set of claims satisfies the traceability requirement and the standing inquiry."<sup>116</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 865 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 865-66.

<sup>115</sup> *Id.* at 866.

<sup>116</sup> *Id.* at 867.

## 2. Fraudulent Misrepresentation, Civil Conspiracy and Unjust Enrichment

The Fifth Circuit then moved on to the second set of plaintiffs' claims (fraudulent misrepresentation, civil conspiracy, and unjust enrichment) and applied federal prudential standing requirements.<sup>117</sup> The court began by referring to the Supreme Court's definition of the doctrine of prudential standing, which "essentially encompasses 'the general prohibition on a litigant's raising another person's legal rights, *the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches*, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'"<sup>118</sup> The Fifth Circuit stated that the plaintiffs are not identifying a particular injury that affects them personally, but instead are asserting the interests of all Americans, since they are alleging a massive fraud on the political system.<sup>119</sup> The court concluded that "[s]uch a generalized grievance is better left to the representative branches," and therefore denied standing to the plaintiffs on the second set of claims.<sup>120</sup>

### B. Political Question

After conferring standing for the claims of trespass, nuisance, and negligence, the Fifth Circuit went on to decide whether the claims presented a nonjusticiable political question.<sup>121</sup> The court began by defining the terms "justiciability" and "political question."<sup>122</sup> It said that a case or controversy is "justiciable" when it is "constitutionally capable of being decided by a federal court."<sup>123</sup> The court went on to say that a case is not justiciable when the subject matter has been committed by the Constitution, federal laws or regulations to be in the exclusive dominion of the legislative or executive branches.<sup>124</sup> The court then defined a political

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<sup>117</sup> *Id.* at 867-68.

<sup>118</sup> *Id.* at 868 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasis added)).

<sup>119</sup> *Id.* at 868-69.

<sup>120</sup> *Id.* at 869.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

question as a nonjusticiable issue that has been exclusively entrusted to another branch of the government, the so-called "political" branches.<sup>125</sup> As a result, the court said that in this sense "political" refers not to the political system, but to the branch of government to which the question is specifically delegated.<sup>126</sup>

Following this, the Fifth Circuit asserted that the questions in this case, which involve Mississippi common-law torts, "are justiciable because they plainly have not been committed by the Constitution or federal laws or regulations to Congress or the president."<sup>127</sup> Additionally, the court noted that the defendants did not bring to the court's attention any provision that would have such an effect, and at best could only argue that Congress may some day enact laws that would govern greenhouse gas emissions and preempt state common-law tort claims.<sup>128</sup>

From here the Fifth Circuit articulated the ways in which the political question doctrine has evolved from its original form in *Marbury v. Madison*,<sup>129</sup> to the another standard in *Baker v. Carr*,<sup>130</sup> and to its current form today.<sup>131</sup> The court said that the *Baker* "formulations" were not stand-alone definitions of a political question, but rather guidelines to be used by federal courts in determining whether a case involves a political question.<sup>132</sup> The court went on to say that when deciding whether a case presents a political question, one must bear in mind the principles of jurisdiction in federal courts.<sup>133</sup> It said that these principles are that the judicial branch is supposed to say what the law is, and when a question is properly brought to the courts it has a duty to decide it.<sup>134</sup> Additionally, the court said that the political question doctrine is an exception to those general principles, but "federal courts are not free to invoke the political

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 870.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 870-71; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>130</sup> *Comer*, 585 F.3d at 871-72; *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>131</sup> *Comer*, 585 F.3d at 872.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (internal citations omitted).

question doctrine to abstain from deciding politically charged cases like this one.”<sup>135</sup>

The Fifth Circuit then went on to discuss the history of the political question doctrine’s applicability to common-law tort claims.<sup>136</sup> The court noted that rarely has the doctrine been applied in such cases, and application is almost always overturned on appeal.<sup>137</sup> The court observed that three different Circuits have stated that common-law torts, in regards to political questions, have given the courts clearly defined rules on which to rely.<sup>138</sup> Following this, the court stated that while it may not decide a question that has been exclusively delegated to the political branches, it “may decide a case that merely implicates a matter within the authority of a political branch.”<sup>139</sup> Additionally, the court stated that it may decide whether a question is reserved exclusively to the political branches.<sup>140</sup>

Next, the Fifth Circuit then applied the framework from *Nixon v. U.S.*<sup>141</sup> The court said that the only issues presented “are those inherent in the adjudication of plaintiffs’ Mississippi common law tort claims for damages.”<sup>142</sup> No federal constitutional or statutory authority was presented that would commit any of those issues exclusively to a political branch, so the court said that the district court’s adjudication of the case was within its authority.<sup>143</sup> Additionally, the court stated, since the defendants’ failed to show how any issue presented was within the exclusive control of the political branches, there was no need to apply the *Baker* formulations.<sup>144</sup> The court concluded that the underlying policies of common law tort rules did not present a need for non-judicial policy determinations in order to decide this case, and the district court’s

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<sup>135</sup> *Id.* at 872-73.

<sup>136</sup> *Id.* at 873-74.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 873 (internal quotations omitted).

<sup>139</sup> *Id.* at 873 (internal citations omitted).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 875.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

adjudication of the case would not exhibit “any lack of the respect due to coordinate branches of the federal government.”<sup>145</sup>

The Fifth Circuit then addressed the defendants’ reliance on *California v. General Motors Corp.*<sup>146</sup> and *Connecticut v. American Electric Power Co.*,<sup>147</sup> stating that such reliance was “misplaced” for three reasons.<sup>148</sup> First, both decisions were based on a serious misreading of the Supreme Court’s holding in *Chevron*.<sup>149</sup> The court said that both cases had misinterpreted the holding of *Chevron* to be “that federal courts in air pollution cases must balance social and economic interests like a legislative body.”<sup>150</sup> That language, the court said, was merely describing Congress’s legislative process of balancing interests, and “*Chevron* does not require federal courts to imitate the legislative process.”<sup>151</sup> The court concluded that since both cases used an erroneous reading of *Chevron*, their conclusions as to whether the cases before them involved political questions were also erroneous.<sup>152</sup>

The second reason the court thought the defendants’ reliance on *General Motors* and *American Electric Power* was misplaced was because the application of the political question doctrine in those cases was “at odds with the Supreme Court’s and Congress’s treatment of the analogous issue of transboundary water quality control.”<sup>153</sup> The court pointed to *Ohio v. Wyandotte Chemicals Corp.*<sup>154</sup> and *City of Milwaukee v. Illinois*<sup>155</sup> as the leading support for this argument.<sup>156</sup> Additionally, the court said that the assertion that regulatory statutes like the Clean Water Act and the Clean Air Act preempt states from public nuisance actions has been consistently shot down.<sup>157</sup> In relation to the present case, the court pointed

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<sup>145</sup> *Id.*

<sup>146</sup> No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

<sup>147</sup> 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

<sup>148</sup> *Comer*, 585 F.3d at 876.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 877.

<sup>153</sup> *Id.*

<sup>154</sup> 401 U.S. 493 (1971).

<sup>155</sup> 451 U.S. 304 (1981).

<sup>156</sup> *Comer*, 585 F.3d at 877-78.

<sup>157</sup> *Id.* at 878 (internal quotations omitted).

out that because the defendants did not assert that any act of Congress had preempted state law in relation to global warming, it would not “employ the political question doctrine in a way that would amount to a *de facto* preemption of state law.”<sup>158</sup>

The final reason the court thought the defendants’ reliance on *General Motors* and *American Electric Power* was misplaced was because neither of those cases involved “diversity suits under state common law between private parties for damages only.”<sup>159</sup> Instead, the Fifth Circuit stated, those cases involved actions that states brought based partly on federal common law and seeking equitable relief.<sup>160</sup> Even with these distinctions, the court said that neither case presented a political question because no specific issue was exclusively committed to one of the political branches by either constitutional or statutory provisions.<sup>161</sup>

Ultimately, the court concluded that the plaintiffs had provided sufficient facts to confer standing for the claims of nuisance, trespass, and negligence; but not for the claims of fraudulent misrepresentation, civil conspiracy, or unjust enrichment.<sup>162</sup> Additionally, the claims that were granted standing did not present political questions and were justiciable.<sup>163</sup>

## V. COMMENT

The questions addressed in *Comer* have important and far-reaching implications. Not only does the case adopt a new approach to standing and the political question doctrine, but it also opens the door for private parties wishing to bring suit against contributors to global warming. The Fifth Circuit has essentially opened up a new avenue for mass tort litigation involving global warming. This comment will focus on the court’s analysis of the causation requirement of the standing doctrine, as well the court’s application of the *Baker* factors in regards to political questions. It will conclude with a brief discussion on the possible implications of the court’s decision.

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<sup>158</sup> *Id.* at 878-79.

<sup>159</sup> *Id.* at 879.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 879-80.

<sup>163</sup> *Id.* at 880.

A. *Standing*

For two reasons, the Fifth Circuit took a new approach to the issue of causation in a standing context. The first is due to the Supreme Court's decision in *Massachusetts v. EPA*.<sup>164</sup> One aspect of that decision that played a role in *Comer* is that the Supreme Court acknowledged global warming as being a legitimate threat to the earth's climate.<sup>165</sup> It stated that "[t]he harms associated with climate change are serious and well recognized."<sup>166</sup> In doing this, the Court recognized an actual injury on the part of the plaintiffs due to the effects of global warming.<sup>167</sup> It legitimized the States' claims that global warming had negatively affected their interests. Moreover, the Supreme Court commented in a footnote that the evidence presented suggested a direct link between global warming and the ferocity of hurricanes, particularly along the coast of Louisiana.<sup>168</sup>

The Supreme Court's recognition of such an injury thereby legitimized the plaintiffs' claim in *Comer*. The plaintiffs' injuries in *Comer* were very similar to those seen in *Massachusetts*. The plaintiffs claimed that global warming increased the intensity of Hurricane Katrina, thus causing more damage to their property.<sup>169</sup> Similarly, the injuries alleged in *Massachusetts* were that global warming brought about increased ferocity in storms and rising sea levels, which were slowly swallowing up coastal lands in the plaintiff states.<sup>170</sup> Both of these injuries have their source in global warming. As such, if the Supreme Court has recognized this type of injury, the Fifth Circuit must also do so.

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<sup>164</sup> 549 U.S. 497 (2007).

<sup>165</sup> *See id.* at 521.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 521-23.

<sup>168</sup> *Id.* at 522 n.18 ("In this regard, MacCracken's 2004 affidavit-drafted more than a year in advance of Hurricane Katrina-was eerily prescient. Immediately after discussing the 'particular concern' that climate change might cause an 'increase in the wind speed and peak rate of precipitation of major tropical cyclones (i.e., hurricanes and typhoons),' MacCracken noted that '[s]oil compaction, sea level rise and recurrent storms are destroying approximately 20-30 square miles of Louisiana wetlands each year. These wetlands serve as a 'shock absorber' for storm surges that could inundate New Orleans, significantly enhancing the risk to a major urban population.'"). *Id.*

<sup>169</sup> *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (2009).

<sup>170</sup> *Massachusetts*, 549 U.S. at 522.

Another aspect of the Court's decision in *Massachusetts* that played a part in the Fifth Circuit's ruling was the recognition of a chain of causation that mirrors the one found in *Comer*. In *Massachusetts*, the chain involved four steps: (1) the EPA did not regulate greenhouse gas emissions from automobiles; (2) more greenhouse gases were emitted from automobiles than otherwise would have been; (3) those greenhouse gases contributed to global warming; and, (4) global warming led to an increase in sea levels and storm ferocity.<sup>171</sup> In *Comer*, however, the chain involved one less step. The plaintiffs claimed that: (1) the operation of defendants' businesses emitted greenhouse gases; (2) those greenhouse gases contributed to the ferocity and intensity of Hurricane Katrina; and, (3) Hurricane Katrina destroyed the plaintiffs' property.<sup>172</sup>

Given the similarities between the alleged injuries in both *Massachusetts* and *Comer*, along with the seemingly identical chains of causation involved, it is not surprising that the Fifth Circuit would adopt such a stance. The court's ruling is strengthened even further by the fact that the chain of causation alleged by plaintiffs involved one less step than that in *Massachusetts*. Indeed, the court acknowledged this fact in the part of its opinion addressing the defendants' argument that the plaintiffs' injuries lacked traceability to the defendants' actions. The court said, "the *Massachusetts* court recognized a causal chain extending one step further...[a]ccordingly, the defendants' contention here is without merit."<sup>173</sup> In *Comer* there was no government agency involved; no failure to regulate that would add another link in the chain. As such, it would seem that the Fifth Circuit's application of the precedent set in *Massachusetts* is right in line with the Supreme Court.

The *Comer* court's decision is even further strengthened by the second reason behind its analysis. *Comer* was brought up on appeal after the plaintiffs' claims were dismissed at the pleading stage.<sup>174</sup> At the pleading stage, the court must take the factual allegations of the plaintiff as true.<sup>175</sup> Furthermore, on a motion to dismiss, the court presumes "that

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<sup>171</sup> *Comer*, 585 F.3d at 865.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 860.

<sup>175</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

general allegations embrace those specific facts that are necessary to support the claim.”<sup>176</sup> When applied to *Comer*, this means that the court had to accept as true all of the material facts laid out in the complaint.

So, the allegations that the defendants’ business operations emitted greenhouse gases, those greenhouse gases contributed to global warming, global warming increased the ferocity of Hurricane Katrina, and plaintiffs’ property was destroyed as a result, all were accepted as facts supporting the plaintiffs’ claims. The court was not concerned with whether these allegations were indeed true, since the plaintiffs’ would have the burden to prove them at trial (a topic to be discussed later). Instead, the court was deciding whether all of the allegations in the complaint, taken as true, were enough to give the plaintiffs’ standing to sue. Given the fact that the Supreme Court in *Massachusetts* had already said that standing existed in a very similar situation (as previously discussed), it is quite clear that the Fifth Circuit’s reasoning was essentially in line with Supreme Court precedent.

### B. Political Question

*Comer* also presents an interesting application of the political question doctrine. The Fifth Circuit relied heavily on the fact that there was no textually demonstrable commitment of the issue to one of the political branches.<sup>177</sup> While this is true when one views the issues as nothing more than common law tort claims, the fact remains that the issues present such complex questions that they may have been better left to the political branches. The court viewed the issues too narrowly. If it were to hear the case at trial and render a decision, it would be determining that a company’s lawful emissions of greenhouse gases make it liable for any damage that results. In essence, the question then becomes, do the courts have that power, or should that question be decided by the political branches? If one looks more closely at *Massachusetts*, it is clear that the Supreme Court has already hinted at the answer.

While the Court in *Massachusetts* did not directly address this question, its explanation of the EPA’s power to limit automobile

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<sup>176</sup> *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. at 889.

<sup>177</sup> *See Comer*, 585 F.3d at 872.

emissions suggests that greenhouse gas regulation is an issue that should not be decided by the courts. When addressing the question of whether the Clean Air Act authorized the EPA to regulate greenhouse gases from vehicles, the Supreme Court concluded that it did in fact grant such authority.<sup>178</sup> It emphasized that “§ 202(a)(1) [of the Clean Air Act] provides that EPA ‘shall by regulation prescribe...standards applicable to the emission of any air pollutant ... which ... contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.’”<sup>179</sup> The Court further noted that the Clean Air Act gave a broad definition of the term “air pollutant,” which “embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ‘any.’”<sup>180</sup> While the Court was only recognizing the EPA’s authority to regulate greenhouse gas emissions from vehicles under the Clean Air Act, it can also be viewed more broadly as an endorsement of the EPA’s broad discretion in regulating any form of greenhouse gas emissions, even if their source is not a vehicle.

With such an endorsement of authority to regulate emissions, it follows that the Court was in fact validating the grant of power to the EPA through the Clean Air Act. By doing so, the Fifth Circuit was also recognizing that Congress had the power to endow the EPA with such a responsibility. Thus, the issue of which branch should decide how much emissions will subject a party to liability would seem to be a question to be decided by the legislative and executive branches, not the judiciary. Undoubtedly the courts would retain the power to review those decisions for their constitutionality, but it would ultimately be in the discretion of Congress and various executive agencies to put forth any limits on greenhouse gas emissions. So, while the *Massachusetts* Court did not identify any express constitutional provision that would limit this issue to one of the political branches, its analysis allows for the inference that such decisions are to be made by the other branches. In viewing the issues of *Comer* in such a way, it becomes clear that the first and most important *Baker* factor (any material issue committed exclusively to a political

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<sup>178</sup> *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 528-29.

branch by the Constitution or other federal laws) could be decided in a different way.

This interpretation of the Supreme Court's decision in *Massachusetts* can also affect other *Baker* factors. *Comer* mentioned the other *Baker* factors, but dismissed them without much discussion.<sup>181</sup> The court said that the Defendants did not show any absence of judicially manageable and discoverable standards regarding the case, nor did they show that the case would require the court to make initial policy determinations to decide the issues.<sup>182</sup> Furthermore, it said that the resolution of the case would not "imply any lack of the respect due coordinate branches of the federal government," and there was no need for adherence to the decision of a political branch.<sup>183</sup> However, the court's lack of an explanation in its application of the *Baker* factors once again reveals that it may have viewed the issues too narrowly, and thus decided a case that would have been better left to the political branches.

The court narrowed its view of the issues to the plaintiffs' common law tort claims of negligence, trespass and nuisance.<sup>184</sup> While these were the claims presented, the issues involved went beyond those traditional torts, particularly regarding the problems with causation. In order to decide the case once it goes to trial, the court would have to determine if the plaintiffs satisfied their burden of proof on the issue of causation. To do this, it would have to make a determination of what exactly would satisfy that burden of proof. This would present numerous problems for any court. For example, how can someone show that the emissions given off by a particular company contributed to global warming? How would the court determine if those emissions actually contributed to the ferocity of Hurricane Katrina? How much did the emissions contribute? What would have been the damage wrought by the storm if those emissions were never introduced into the atmosphere? These are just of a few of the questions the Fifth Circuit would be forced to determine, and the plaintiffs would be forced to prove, before a decision could be made.

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<sup>181</sup> *Comer*, 585 F.3d at 875-76.

<sup>182</sup> *Id.* at 875.

<sup>183</sup> *Id.* at 875-76.

<sup>184</sup> *See id.* at 875.

Moreover, these questions involve standards and policy determinations that the court is not prepared to make. No judicially discoverable and manageable standards govern these issues. They are best left to the executive agencies that have the expertise in deciding such matters. Going back to *Massachusetts*, it is clear that the Supreme Court felt that such determinations were well within the EPA's power to decide, and that Congress had the authority to grant that power to the EPA. This would make the issues in *Comer* fit squarely into two of the *Baker* factors by presenting a claim that requires non-judicial policy determinations and has an absence of judicially manageable standards.

Additionally, there is the potential for embarrassment from multiple pronouncements by various federal departments on the question. The defendants' actions in this case were lawful; their greenhouse gas emissions did not violate any federal statute or regulation. The EPA's choice not to regulate these emissions, and Congress's choice not to develop legislation addressing the problem, can be viewed as a pronouncement by omission. Their lack of regulation towards the defendants' emissions is a pronouncement that such actions are lawful and will not subject the companies to liability. If the Fifth Circuit were to decide otherwise, not only would it be creating a new form of liability not authorized by Congress, but it would also provide different pronouncements from two federal departments. Thus, when one views the issues involved in *Comer* more broadly than did the Fifth Circuit, the *Baker* factors play a much more important role on the issue of whether the plaintiffs' claims presented non-justiciable political questions.

### *C. Implications*

While *Comer* presents a new take on the issues of standing and the political question doctrine in an environmental context, it also has other broad and far-reaching implications. To begin with, it is part of the beginning of a possible trend among the federal circuits to grant standing in cases involving common law tort claims for damages caused by global warming, and to find that the claims do not present a nonjusticiable political question.

On Sept. 21, 2009, the Second Circuit issued its decision on remand from *Connecticut v. American Electric Power Co.*,<sup>185</sup> and held that the plaintiffs had standing to bring their nuisance claim.<sup>186</sup> The court also held that the claim did not present a non-judiciable political question.<sup>187</sup> The court's analysis of the political question issue applied the *Baker* factors and concluded that in the absence of federal legislation directly addressing greenhouse gas emissions by private companies, parties are free to bring actions for nuisance.<sup>188</sup> The court also found that the plaintiffs met the test for standing set out in *Lujan*.<sup>189</sup> Less than a month after this decision, the Fifth Circuit issued its ruling in *Comer*; and while the court reached a result similar to that of the Second Circuit, its reasoning was somewhat different. Still, these two cases together represent the beginning of a split in the circuits regarding climate change litigation.

The Ninth Circuit may also join the Second and Fifth soon. Shortly before the Second Circuit's decision in *Connecticut v. American Electric Power Co.*,<sup>190</sup> the Northern District of California decided *Native Village of Kivalina v. ExxonMobil Corp.*<sup>191</sup> In that case, the Village of Kivalina brought suit against multiple energy companies for nuisance.<sup>192</sup> The Village alleged "that as a result of global warming, the Arctic sea ice that protects the Kivalina coast from winter storms has diminished, and that the resulting erosion and destruction will require the relocation of Kivalina's residents."<sup>193</sup> The court concluded that the claim presented was precluded by the second and third *Baker* factors (lack of judicially discoverable and manageable standards, and the need for the court to make an initial policy determination), and thus it was a political question that the court could not decide.<sup>194</sup> It also found that the chain of causation was too

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<sup>185</sup> 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

<sup>186</sup> *Connecticut v. Amer. Elec. Power Co., Inc.*, 583 F.3d 309, 349 (2d Cir. 2009).

<sup>187</sup> *Id.* at 332.

<sup>188</sup> *Id.* at 323-32.

<sup>189</sup> *Id.* at 338.

<sup>190</sup> 583 F.3d 309 (2d Cir. 2009).

<sup>191</sup> 663 F. Supp. 2d 863 (N.D. Cal. 2009).

<sup>192</sup> *Id.* at 868.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 876-77.

attenuated to establish standing for the plaintiffs.<sup>195</sup> Consequently, the court held that the “[p]laintiffs’ federal claim for nuisance is barred by the political question doctrine and for lack of standing under Article III.”<sup>196</sup> While this case comes to the opposite conclusion of *Comer*, it is still important because it will most likely go up on appeal, giving the Ninth Circuit the opportunity to overturn the District Court’s ruling and join the Second and Fifth Circuits in their treatment of this issue.

Another possible implication of *Comer* is that it may open up the door to similar lawsuits. The action in *Comer* was not brought by states or municipalities seeking injunctive relief, but by parties seeking damages in a class action suit. The prospect of lucrative damage awards and contingency fees is sure to entice plaintiffs and lawyers alike to bring more cases like the one in *Comer*.<sup>197</sup> J. Russell Jackson, a Skadden Arps partner who specializes in mass tort litigation, said that “[w]ith this decision, you are now pretty well assured of seeing others file these kinds of claims.”<sup>198</sup> With the potential of seeing many “copy cat” suits to follow *Comer*, climate change litigation may in fact turn out to be the new asbestos litigation of our time.<sup>199</sup> It also has the ability to develop more quickly than asbestos litigation, owing to the increased concern over greenhouse gas emissions and the threat of global warming.<sup>200</sup>

Even if one disregards the potential for similar lawsuits arising from *Comer*, the case may still have another effect on energy companies

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<sup>195</sup> *Id.* at 881.

<sup>196</sup> *Id.* at 883.

<sup>197</sup> J. Russell Jackson, *Fifth Circuit Reverses Dismissal of Climate Change Class Action Brought by Private Plaintiffs Who Blame Hurricane Katrina on Global Warming*, JACKSON ON CONSUMER CLASS ACTION AND MASS TORTS, Oct. 17, 2009, <http://www.consumerclassactionsmasstorts.com/2009/10/articles/standing/fifth-circuit-reverses-dismissal-of-climate-change-class-action-brought-by-private-plaintiffs-who-blame-hurricane-katrina-on-global-warming/>.

<sup>198</sup> Nathan Koppel, *Hurricane Katrina Victims Have Standing To Sue Over Global Warming*, THE WALL STREET JOURNAL LAW BLOG, Oct. 19, 2009, <http://blogs.wsj.com/law/2009/10/19/hurricane-katrina-victims-have-standing-to-sue-over-global-warming/>.

<sup>199</sup> See Ashby Jones, *Is Climate-Change Litigation the New Asbestos?*, THE WALL STREET JOURNAL LAW BLOG, Jan. 27, 2010, <http://blogs.wsj.com/law/2010/01/27/is-climate-change-litigation-the-new-asbestos/>.

<sup>200</sup> *Id.*

operating in the United States. The prospect of paying huge damage awards in multiple class action suits could drive the companies to the negotiating table, whether they are prepared to admit liability or not. It would be a prudent option for these companies to end these lawsuits before they even begin. By settling out of court, or before the suit is even brought, they will be able to stop the prospect of being found liable for their contribution to global warming before the courts even have the chance to rule on the issue. They may also be able to secure a confidentiality agreement, thereby minimizing the amount of similar claims being brought against them. On the other hand, it may in fact be better for these companies in the long run if they furiously litigate the claims now, and bar any possible future suits by securing a favorable ruling from the courts. Either way, climate change lawsuits do not seem to be going away anytime soon. One way or another this issue needs to be resolved, whether it is by the Supreme Court, the Appellate Courts, or the actions of the companies themselves.

## VI. CONCLUSION

The Fifth Circuit's decision that private parties have standing to bring suit against energy companies for their contribution to global warming, and that such a suit does not involve a political question, has the potential to be far-reaching and ripe for Supreme Court review. If the other circuits follow suit, an entirely new avenue of global warming litigation will be opened up, with the possibility of turning into the new equivalent of asbestos litigation. While the court's decision on the issue of standing was directly in line with Supreme Court precedent, its analysis of the issues under the political question doctrine does provide plenty of points for criticism and speculation. Regardless, the effects of the decision now will continue to be felt by major energy companies, and may force them to the negotiating table despite their reluctance to acknowledge liability.

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