STATE OF CONNECTICUT, STATE OF NEW YORK, PEOPLE OF THE STATE OF CALIFORNIA et al.
v.
AMERICAN ELECTRIC POWER COMPANY INC. et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
582 F.3d 309
September 21, 2009, Decided

PRIOR HISTORY: Appeal from a judgment of the United States District Court for the Southern District of New York (Preska, J.) dismissing Plaintiffs-Appellants' federal common law of nuisance claims as non-justiciable under the political question doctrine. We hold that: (1) Plaintiffs-Appellants' claims do not present non-justiciable political questions; (2) Plaintiffs-Appellants have standing to bring their claims; (3) Plaintiffs-Appellants state claims under the federal common law of nuisance; (4) Plaintiffs-Appellants' claims are not displaced; and (5) the discretionary function exception does not provide Defendant-Appellee Tennessee Valley Authority with immunity from suit. Accordingly, we VACATE the judgment of the district court and REMAND for further proceedings. Conn. v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y., 2005)

DISPOSITION: Judgment of the district court vacated and matter remanded for further proceedings.

OPINION BY: PETER W. HALL

OPINION

[*314] PETER W. HALL, Circuit Judge:
In 2004, two groups of Plaintiffs, one consisting of eight States and New York City, and the other consisting of three land trusts (collectively "Plaintiffs"), separately sued the same six electric power corporations that own and operate fossil-fuel-fired power plants in twenty states (collectively "Defendants"), seeking abatement of Defendants' ongoing contributions to the public nuisance of global warming. Plaintiffs claim that . . . Defendants [cause] and will continue to cause serious harms affecting human health and natural resources. * * *. . . ., Plaintiffs predict that it "will accelerate over the coming decades unless action is taken to reduce emissions of carbon dioxide."

Plaintiffs brought these actions under the federal common law of nuisance or, in the alternative, state nuisance law, to force Defendants to cap and then reduce their carbon dioxide emissions. Defendants moved to dismiss on a number of grounds. The district court held that Plaintiffs' claims presented a non-justiciable political question and dismissed the complaints. * * *.

On appeal, Plaintiffs argue that the political question doctrine does not bar adjudication of their claims; that they have standing to assert their claims; that they have properly stated claims under the federal common law of nuisance; and that their claims are not displaced by federal statutes. Defendants respond that the district court's judgment should be upheld, either because the complaints present non-justiciable political questions or on a number of alternate grounds: lack of standing; [*315] failure to state a claim; and displacement of federal common law. In addition, Defendant Tennessee Valley Authority ("TVA") asserts that the complaints should be dismissed against it on the basis of the discretionary function exception.

We hold that the district court erred in

dismissing the complaints on political question grounds; that all of Plaintiffs have standing; that the federal common law of nuisance governs their claims; that Plaintiffs have stated claims under the federal common law of nuisance; that their claims are not displaced; and that TVA's alternate grounds for dismissal are without merit. We therefore vacate the judgment of the district court and remand for further proceedings.

[*316]

BACKGROUND

I. The States' Complaint

In July 2004, eight States--California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin--and the City of New York (generally, hereinafter, "the States") filed a complaint against Defendants American Electric Power Company Inc., American Electric Power Service Corporation,[1] Soughtern Company, TVA, Xcel Enrgy, and Cinergy Corporation. The complaint sought "abatement of defendants' ongoing contributions to a public nuisance" under federal common law, or in the alternative, under state law. . . .,[T]he States assert that Defendants are "substantial contributors to elevated levels of carbon dioxide and global warming," as their annual emissions comprise "approximately one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately ten percent of all carbon dioxide emissions from human activities in the United States." . . . [*317]. At the same time, the States contend that Defendants have "practical, feasible and economically viable options for reducing emissions without significantly increasing the cost of electricity for their customers."

* * *.

[*318]

Seeking equitable relief, the States seek to hold Defendants jointly and severally liable for creating, contributing to, or maintaining a public nuisance. They also seek permanently to enjoin each Defendant to abate that nuisance first by capping carbon dioxide emissions and then by reducing emissions by a specified percentage each year for at least ten years.

II. The Land Trusts' Complaint

* * *.

The Trusts also base their claims on the federal common law of nuisance or, in the alternative, "the statutory and/or common law of private and public nuisance of each of the states where [Defendants] own, manage, direct, and/or operate fossil fuel-fired electric generating facilities." They [*319] assert that reductions in Defendants' "massive carbon dioxide emissions will reduce all injuries and risks of injuries to the public, and all special injuries to Plaintiffs, from global warming." Accordingly, the Trusts seek to abate Defendants' "ongoing contributions to global warming."

In many ways, the Trusts' complaint mirrors that of the States. It explains the heat-trapping effects of carbon dioxide, identifies the significant emissions by Defendants, outlines the current and projected impact of global warming, and posits that a reduction of emissions would prevent, diminish, or delay the harmful effects of global warming. The principal difference between the complaints lies in the nature of the injury alleged, as the Trusts' complaint details the special injuries to their property interests that would occur as a result of global

[1] [Footnote Omitted.]

warming. The Trusts predict that global warming would "diminish or destroy the particular ecological and aesthetic values that caused [them] to acquire, and cause them to maintain, the properties they hold in trust" and would "interfer[e] with their efforts to preserve ecologically significant and sensitive land for scientific and educational purposes, and for human use and enjoyment."

III. The District Court's Amended Opinion and Order

* * *.

. . ., [T]he district court dismissed the complaints, interpreting Defendants' argument that "separation-of-powers principles foreclosed recognition of the unprecedented 'nuisance' action plaintiffs assert" as an argument that the case raised a non-justiciable political question. * * *. The court based its conclusion that the case was non-justiciable solely on that third Baker factor, finding that Plaintiffs' causes of action were "'impossib[le] [to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion.'" * * *. In the court's view, this factor counseled in favor of dismissal because it would not be able to balance those "interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs" against "interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs." . . . [*320] . . .. The district court concluded that balancing those interests required an "'initial policy determination' first having been made by the elected branches to which our system commits such policy decisions, viz., Congress and the President." * * *.

In addition, the district court rejected Plaintiffs' arguments that they were presenting "simple nuisance claim[s] of the kind courts have adjudicated in the past," observing that none of the other public nuisance cases involving pollution "touched on so many areas of national and international policy." * * *.

Judgment entered on September 19, 2005, and both groups of Plaintiffs timely appealed. Amici have submitted briefs as well, but most of them are untimely and we will therefore not consider them.[2]

DISCUSSION

I. Standard of Review

* * *. [*321] * * *.

II. The Political Question Doctrine

A. Overview of the Political Question Doctrine

* * *.

In sum, [t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.' * * *. Nevertheless, "[t]he political question doctrine must be cautiously invoked," . . ., and simply because an issue may have political implications does not make it non-justiciable, ... * * *.

B. Application of the Baker Factors

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[2] {Footnote Omitted.]

* * *.

1. The First Baker Factor: Is There a Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department?

This Court has described the first Baker factor as the "dominant consideration in any political question inquiry." * * *. The first factor "recognizes that, under the separation of powers, certain decisions have been exclusively committed to the legislative and executive branches of the federal government, and are therefore not subject to judicial review." * * *.

* * *.

. . ., Defendants argue that "permitting these and other plaintiffs to use an asserted federal common law nuisance cause of action to reduce domestic carbon dioxide emissions will impermissibly interfere with the President's authority to manage foreign relations"; that "unilateral reductions of U.S. carbon dioxide emissions would interfere with the President's efforts to induce other nations to reduce their emissions"; and the court's interjection in this arena would usurp the President's authority to "resolve fundamental policy questions" that he is seeking to solve through diplomatic means. * * *.

[*325] It cannot be gainsaid that global warming poses serious economic and ecological problems that have an impact on both domestic politics and international relations. Nevertheless, Defendants' characterization of this lawsuit as implicating "complex, inter-related and far-reaching policy questions about the causes of global climate change and the most appropriate response to it" magnifies to the outer limits the discrete domestic nuisance issues actually presented. [The] result . . . is to misstate the issues Plaintiffs seek to litigate. Nowhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches.[3] Instead, they seek to limit emissions from six domestic coal-fired electricity plants on the ground that such emissions constitute a public nuisance that they allege has caused, is causing, and will continue to cause them injury. A decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a national or international emissions policy (assuming that emissions caps are even put into place). [4] [5]5

In this common law nuisance case, "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own--the Judiciary." * * *.

* * *.

[*326] 2. The Second Baker Factor: Is There a Lack of Judicially-Discoverable and Manageable Standards for Resolving This Case?

* * *.[6] [7]

[*327]

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[3] [Footnote Omitted.]

[4] [Footnote Omitted.]

[5] [Footnote Omitted.]

[6] [Footnote Omitted.]

[7] [Footnote Omitted.]

* * *.[8]

[*328]

* * * [*329]

[*330]

Defendants are not entitled to dismissal based on the second Baker factor.

3. The Third Baker Factor: Is It Impossible to Decide this Case Without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion

* * * [*331]

4. The Fourth, Fifth, and Sixth Baker Factors: Will Adjudication of This Case Demonstrate "Lack of Respect" for the Political Branches, Contravene "An Unusual Need for Unquestioning Adherence to a Political Decision Already Made," or "Embarrass" the Nation as a Result of "Multifarious Pronouncements by Various Departments"

[*332][9]

In sum, we hold that the district court erred when it dismissed the complaints on the ground that they presented non-justiciable political questions.

III. Standing

The district court explicitly declined to address Defendants' standing arguments, reasoning in a footnote that "because the issue of Plaintiffs' standing is so intertwined with the merits and because the federal courts lack jurisdiction over this patently political question, I do not address the question of Plaintiffs' standing." * * *. In Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, . . . (2000), [*333] the Supreme Court held that when a lower court dismisses a case without deciding whether standing exists and the basis for the dismissal was found to be error, the Court has an obligation sua sponte to assure itself that the plaintiffs have Article III standing before delving into the merits. * * *. Because we hold that the complaints should not have been dismissed on the ground that they presented non-justiciable political questions, we must explore whether Plaintiffs have standing. The parties in this appeal have fully briefed the issue of standing.

* * *.
* * * [*334].

In Connecticut v. Cahill, . . ., this Court enumerated three capacities in which States may bring suit in federal court: "(1) proprietary suits in which the State sues much like a private party suffering a direct, tangible injury; (2) sovereignty suits requesting adjudication of boundary disputes or water rights; or (3) parens patriae suits in which States litigate to protect 'quasi-sovereign' interests." * * *. Here, the States are suing in both their proprietary and parens patriae capacities, and New York City and the Trusts are suing in their proprietary capacities. We analyze the States' parens patriae standing first, followed by an analysis of New York City's, the States', and the Trusts' proprietary standing.

A. The States' Parens Patriae Standing

1. Background

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[8] [Footnote Omitted.]

[9] [Footnote Omitted.]

Parens patriae is an ancient common law prerogative which "is inherent in the supreme power of every state . . . [and is] often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." * * *. The Supreme Court, in Missouri I, articulated the rationale behind parens patriae standing in common law nuisance cases when it allowed Missouri to sue Illinois to enjoin it from dumping sewage that poisoned Missouri's water supply. The Court stated that:

> [A]n adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.

Missouri I, 180 U.S. at 241. A few years later, the Court drew upon Missouri I's principles and extended this approach to a state's suit against a private party--once again in a common law nuisance suit. In Georgia v. Tennessee Copper Co., 206 U.S. 230 . . . (1907), the Supreme Court's first major air pollution case, Georgia sought to enjoin Tennessee Copper from discharging noxious gases that, it claimed, injured its citizens and its land. Although the Court referred to Georgia's proprietary claims as a "makeweight," it allowed the state to sue "for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether . . . its inhabitants shall breathe pure air." * * *. The Tennessee Copper Court, citing Missouri II, explained that when the states joined the union, "they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court." Id. These cases demonstrate that a state's interests in protecting both its natural resources [*335] and the health of its citizens have been recognized as legitimate quasi-sovereign interests since the turn of the last century. * * *.[10]

2. Parens Patriae as a Species of Article III Standing

State standing is not monolithic and depends on the role a state takes when it litigates in a particular case. * * *. In . . ., the seminal modern-day parens patriae standing case, the Supreme Court explained how the capacity in which a state sues has an impact on the standing analysis. After discussing a state's sovereign interests, the Court drew a distinction between a state's proprietary and quasi-sovereign interests:

> Not all that a State does, however, is based on its sovereign character. Two kinds of nonsovereign interests are to be distinguished. First, like other associations and private parties, a State is bound to have a variety of proprietary

[10] [Footnote Omitted.]

> interests. A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court. Second, a State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. . . .
>
> Quasi-sovereign interests stand apart from . . . the above: They are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace. Formulated so broadly, the concept risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant. The vagueness of this concept can only be filled in by turning to individual cases.

Snapp, 458 U.S. at 601-02 (emphases added).

[The] test for parens patriae standing [is that a] state: (1) "must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party"; (2) "must express a quasi-sovereign interest"[11] ; and (3) must [*336] have "alleged injury to a sufficiently substantial segment of its population."[12] * * *.

[11] [Footnote Omitted.]

[12] [Footnote Omitted.]

* * *.[13]

3. Effect of Massachusetts v. EPA

In April 2007, the Supreme Court decided Massachusetts, ruling that the plaintiffs (ten states and six trade associations) could challenge: (1) a decision by the Environmental Protection Agency ("EPA") not to regulate greenhouse gas emissions from new motor vehicles under the CAA; and (2) EPA's stated reasons for refusing to regulate those emissions. See id. Prior to its merits assessment, the Supreme Court focused on the contentious issue of standing, given that each member of the D.C. Circuit panel had written a separate opinion and had come to a different conclusion about whether the States had standing to bring the action. The Court summarized the circuit court opinions as follows: [*337] "Judge Randolph avoided a definitive ruling as to petitioners' standing, reasoning that it was permissible to proceed to the merits because the standing and the merits inquiries overlapped"; "Judge Sentelle wrote separately because he believed petitioners failed to demonstrate the elements of injury necessary to establish standing under Article III"; and Judge Tatel dissented, concluding "that at least Massachusetts had satisfied each element of Article III standing--injury, causation, and redressability."[14] * * *

The Supreme Court ruled that Massachusetts had Article III standing. The Court introduced the standing section by citing the three-part Lujan test, focusing in its initial analysis on the States' proprietary interests as property owners. This approach is consistent with Snapp's distinction between a state suing as parens patriae and a state

[13] [Footnote Omitted.]

[14]

suing in a capacity similar to that of an individual landowner. The Court observed that Congress had explicitly authorized a procedural right to challenge EPA actions under the CAA, . . ., reaffirming Congress's power to "'define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" * * *. This procedural right was "of critical importance to the standing inquiry" and permitted the States a short cut in the Lujan standing analysis, as they were not obliged to "'meet[] all the normal standards for redressability and immediacy.'" * * *.[15]

But the Massachusetts Court then added another layer to its analysis – one which arguably muddled state proprietary and parens patriae standing. The majority noted that it was "of considerable relevance that the party seeking review here is a sovereign State and not, as it was in Lujan, a private individual." * * *. The majority also quoted language from . . ., which defined injury to a state "in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens . . .." * * *. The Massachusetts Court likened Massachusetts' injury to Georgia's injury in Tennessee Copper: "Just as Georgia's 'independent interest . . . in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today." * * *.[16]

[*338] In the midst of invoking language that hearkened to a state's quasi-sovereign interests, the Massachusetts Court mentioned proprietary injury to the State as a landowner, commenting: "That Massachusetts does in fact own a great deal of the territory alleged to be affected only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." * * *. This sentence appears to conflate, to an extent, state parens patriae standing and proprietary standing. The Court seemed to find that injury to a state as a quasi-sovereign is a sufficiently concrete injury to be cognizable under Article III, and its finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land. The Court concluded this section of its standing analysis by opining: "Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis." * * *.

The question is whether Massachusetts' discussion of state standing has an impact on the analysis of parens patriae standing, ... That is, what is the role of Article III parens patriae standing in relation to the test set out in Lujan? Must a state asserting parens patriae standing satisfy both the Snapp and Lujan tests? However, we need not answer these questions because as discussed in Part III.B, [below], all of the plaintiffs have met the Lujan test for standing. Thus, even assuming that a state asserting parens patriae standing must meet the Lujan requirements, here, those requirements have been met.

4. States' Allegations Satisfy the Snapp Test

The States have adequately alleged the requirements for parens patriae standing pursuant to the Snapp-11 Cornwell Co. standards. They are more than "nominal parties." Their interest in safeguarding the public health and their resources is an interest apart from any interest held by individual private entities. Their quasi-

[15] [Footnote Omitted.]

[16] [Footnote Omitted.]

sovereign interests involving their concern for the "health and well-being--both physical and economic – of [their] residents in general," Snapp, 458 U.S. at 607, are classic examples of a state's quasi-sovereign interest. The States have alleged that the injuries resulting from carbon dioxide emissions will affect virtually their entire populations. Moreover, it is doubtful that individual plaintiffs filing a private suit could achieve complete relief. * * *.

Defendants argue that in order for states to sue in their parens patriae capacity, the citizens that the states seek to [*339] protect must themselves satisfy Article III's core requirements. In so arguing, Defendants attempt to import into parens patriae standing the Article III requirements for organizational standing set out in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 . . . (1977). In Hunt, the Supreme Court stated:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

* * *. Snapp did not require states suing as parens patriae to meet the test for organizational standing. In fact, it required the opposite, i.e., that the individuals with adversely affected interests could not obtain relief via a private suit; that the interest asserted by the state must be apart from the interests of the individual citizens on behalf of whom it was suing; and that the injury must affect a substantial segment of the population, not one individual. * * *.

Standing is "gauged by the specific common-law, statutory or constitutional claims that a party presents." * * *. For over a century, states have been accorded standing in common law nuisance causes of action when suing as parens patriae. In this case, the States have satisfied the Snapp-11 Cornwell Co. test.[17]

B. The States' and the Trusts' Article III Proprietary Standing

In Lujan, the Supreme Court explained that standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." * * *. The plaintiff environmental organizations in Lujan sued the U.S. Secretary of the Interior. They sought a declaratory judgment that a newly-promulgated regulation, which offered less protection for endangered species, was in error as to the scope of the statute. They also sought to restore the interpretation embodied in the initial regulation. In holding that the plaintiff organizations lacked standing, the Court set out the well-known three-part test:

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

* * *. "In essence the question of standing is

[17] [Footnote Omitted.]

whether [*340] the litigant is entitled to have the court decide the merits of the dispute or of particular issues." * * *.

The States and New York City have sued in their proprietary capacity as property owners. The Trusts' complaint does not state whether the Open Space Institute ("OSI"), the Open Space Conservancy ("OSC"), and the Audubon Society of New Hampshire ("Audubon") are membership organizations; rather, it describes the Trusts as not-for-profit corporations. The allegations in the complaint indicate that each organization is suing on its own behalf, in its proprietary capacity as an owner of particular pieces of property dedicated to conservation uses.[18] * * *. The Trusts must "meet[ ] the same standing test that applies to individuals [and] must show actual or threatened injury in fact that is fairly traceable . . . and likely to be redressed by a favorable court decision." * * *.

1. Have Plaintiffs Sufficiently Alleged Injury-in-Fact

* * *.
[*341]

The States claim current injury as a result of the increase in carbon dioxide levels that has already caused the temperature to rise and change their climates; devastating future injury to their property from the continuing, incremental increases in temperature projected over the next 10 to 100 years; and increased risk of harm from global warming, including an abrupt and catastrophic change in climate when a "tipping point of radiative forcing is reached." The Trusts do not allege any current injury. But like the States, they allege a multitude of future injuries and an increased risk of harm resulting from global warming, and assert that these future injuries constitute "special injuries" to their property interests--injuries different in kind and degree from the injuries suffered by the general public.

* * *.

a. Current Injury

One current harm that the States mention is the reduced size of the California snowpack. "This process of reduced mountain snowpack, earlier melting and associated flooding, and reduced summer streamflows already has begun." The current declining water supplies and the flooding occurring as a result of the snowpack's earlier melting obviously injure property owned by the State of California. In Massachusetts, the State alleged that coastal erosion caused by global warming constituted a current injury to its property. The Court held that this erosion sufficed as an allegation of "particularized injury in [Massachusetts'] capacity as a landowner," and served as a harbinger of injuries to come: "The severity of that injury will only increase over the course of the next century." * * *. Similarly, the destruction of California property wrought by the flooding associated with the earlier-melting snowpack qualifies as a current injury-in-fact for Article III purposes. Such an injury is "concrete," as property damage is "plainly [a] concrete harm[] under Supreme [*342] Court precedents," . . ., "particularized," as California is harmed in a distinct way, and "actual or imminent," "not 'conjectural' or 'hypothetical,'" as the injury is occurring now and is not speculative. * * *. Moreover, the injuries to California far exceed the "identifiable trifle" required by Article III. * * *. We thus reject Defendants' argument that the Plaintiff States do not allege any current injury.

[18] [Footnote Omitted.]

b. Future Injury

The bulk of the States' allegations concern future injury. For example, those Plaintiff States with ocean coastlines, including New York City, charge that a rise in sea level induced by global warming will cause more frequent and severe flooding, harm coastal infrastructure including airports, subway stations, tunnels, tunnel vent shafts, storm sewers, wastewater treatment plants, and bridges, and cause hundreds of billions of dollars of damage. * * *. Global warming threatens Plaintiff States bordering the Great Lakes with substantial injury by lowering the water levels of the Great Lakes, which would disrupt hydropower production. Warmer temperatures would threaten agriculture in Iowa and Wisconsin and increase the frequency and duration of summer heat waves with concomitant crop risk. Global warming will also disrupt ecosystems by negatively affecting State-owned hardwood forests and fish habitats, and substantially increase the damage in California due to wildfires. Plaintiff States predict these injuries will come to pass in the next 10 to 100 years.

* * *.

Defendants challenge Plaintiffs' contentions of future injury by arguing that injuries occurring at "some unspecified future date" are not the kind of "imminent" injury referred to in Lujan and therefore neither the States nor the Trusts have properly [*343] alleged injury-in-fact. They claim that "[t]here must be a close temporal proximity between the complained-of conduct and the alleged harm," . . .. Defendants' analysis misses the mark.

In Lujan, the Court elaborated upon what it meant by "imminent" in the context of the standing inquiry. The Court wrote:

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes--that the injury is "certainly impending," * * *. It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. * * *.

Lujan, 504 U.S. at 564 . . .. In describing imminence, the Court was not imposing a strict temporal requirement that a future injury occur within a particular time period following the filing of the complaint. Instead, the Court focused on the certainty of that injury occurring in the future, seeking to ensure that the injury was not speculative. * * *. The Court also expressed wariness that if the future injury was contingent, at least to some extent, on a plaintiff acting in a particular way in the future, that plaintiff would have within its control whether the future injury would actually occur at all. If the plaintiff did not act in such a way as to incur the injury, a court would be left with a hypothetical injury – an insufficient basis upon which to confer standing.[19] * * *.

* * * [*344] * * *. . . ., [W]hat makes Plaintiffs' future injury claims more compelling here is that Defendants are currently emitting large amounts of carbon dioxide and will continue to do so in the future. Due to Plaintiffs' exposure to the

[19] [Footnote Omitted.]

emissions, the future injuries complained of are "certainly impending" and are more concrete than those in Baur because the processes producing them have already begun.[20] As a result, according to Plaintiffs, the future injuries they predict are anything but speculation and conjecture: "Rather, they are certain to occur because of the consequences, based on the laws of physics and chemistry, of the documented increased carbon dioxide in the atmosphere." There is no probability involved. * * *. These emissions, which allegedly contribute to global warming, will continue to exacerbate the injuries Plaintiffs are currently experiencing. Moreover, the future injuries that Plaintiffs allege are not in any way contingent on Plaintiffs' actions or inactions.

The Massachusetts majority alluded to the fact that incremental injury suffices for injury-in-fact. It rejected the dissent's view that Massachusetts' injury was "conjectural" because the land loss that the State expected could not be quantified, stating:

> Yet the likelihood that Massachusetts' coastline will recede has nothing to do with whether petitioners have determined the precise metes and bounds of their soon-to-be-flooded land. Petitioners maintain that the seas are rising and will continue to rise, and have alleged that such a rise will lead to the loss of Massachusetts' sovereign territory. No one, save perhaps the dissenters, disputes those allegations. Our cases require nothing more.

549 U.S. at 523 . . .. The Massachusetts Court concluded its standing discussion by stating that "[t]he risk of catastrophic harm, though remote, is nevertheless real." * * *. That statement applies to these cases as well.

We find that Plaintiffs have sufficiently alleged future injury. Given the current injury alleged by the States, and the future injuries alleged by all Plaintiffs, we hold that Plaintiffs have alleged injury-in-fact.[21] 21

[*345] 2. Causation

To satisfy the causation requirement, the alleged injury must be "fairly traceable to the actions of the defendant." * * *. This requirement "ensures that there is a genuine nexus between a plaintiff's injury and a defendant's alleged . . . conduct," . . ., and "is in large part designed to ensure that the injury complained of is 'not the result of the independent action of some third party not before the court,'" . . ..

Plaintiffs allege that Defendants are the "five largest emitters of carbon dioxide in the United States," . . ., and that Defendants' emissions directly and proximately

[20] Whether such injuries are properly viewed as current injuries or future injuries may be a distinction without a difference in the standing analysis. The actual onset of property destruction is alleged to have already begun, although the full deleterious effects have not fully materialized because the effect of carbon dioxide emissions is cumulative. The future injuries complained of are "certainly impending," given that they are already in process as a result of the ongoing emissions by Defendants that contribute to increasing temperatures.

[21] Plaintiffs have also alleged that Defendants' continued emissions will increase their risk of future injury because "unrestrained and ever-increasing emissions of greenhouse gases from fossil fuel combustion increases the risk of an abrupt and catastrophic change in the Earth's climate when a certain, unknown, tipping point of radiative forcing is reached." In Baur, 352 F.3d at 633, this Court held that an increased risk of future harm constituted injury-in-fact. Because we find that all Plaintiffs have alleged future injury sufficient to constitute Article III injury-in-fact, we do not reach the question of whether Plaintiffs' allegations of increased risk of harm also suffices for Article III injury-in-fact.

contribute to their injuries and threatened injuries. Defendants respond that Plaintiffs can neither isolate which alleged harms will be caused by Defendants' emissions, nor can Plaintiffs allege that such emissions would alone cause any future harms. In particular, Defendants claim that Plaintiffs' use of the words "contribute to" is not sufficient to allege causation, that the multiple polluter cases relied upon by Plaintiffs are inapposite because causation was presumed by contributions of a harmful pollutant in amounts that exceeded federally prescribed limits, and that, in any event, carbon dioxide is not inherently harmful[22] but mixes with worldwide emissions that collectively contribute to global warming.[23]

Defendants' arguments are unavailing and we find that Plaintiffs have sufficiently alleged that their injuries are "fairly traceable" to the actions of Defendants. Plaintiffs assert that Defendants' continued emissions of carbon dioxide contribute to global warming, which harms them now and will harm them in the future in specific ways. * * *. Defendants' [*346] attempts to argue the insufficiency of Plaintiffs' allegations of traceability must be evaluated in accordance with the standard by which a common law public nuisance action imposes liability on contributors to an indivisible harm. * * *. Moreover, the cases are clear that, particularly at the pleading stage, the "fairly traceable" standard is not equivalent to a requirement of tort causation. * * *.

* * *:

. . . [*347] . . .. * * *.

In view of this widely accepted case law, and the procedural posture of the case, Defendants' argument that many others contribute to global warming in a variety of ways, and that therefore Plaintiffs cannot allege traceability, does not defeat the causation requirement.

Defendants also claim that their emissions, which "allegedly account for 2.5% of man-made carbon dioxide emissions" are, in essence, too insignificant to cause future injuries, particularly since only the collective effect of worldwide emissions allegedly causes injury. * * *. . . ., [T]his is an issue best left to the rigors of evidentiary proof at a future stage of the proceedings, rather than dispensed with as a threshold question of constitutional standing. Tellingly, in Massachusetts' discussion of causation, the Court rejected EPA's argument that "its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them." * * *.

Plaintiffs have sufficiently alleged that their current and future injuries are "fairly traceable" to Defendants' conduct. For purposes of Article III standing they are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants' emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries.

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[22] [Footnote Omitted.]

[23] Defendants contend that where "numerous entities contribute to an alleged harm, plaintiffs bear a special burden of linking their injury to defendants' particular emissions," . . .. This assertion mischaracterizes the court's ruling in [the] Texas Independent Producers [case]. The court held that the plaintiffs lacked standing because they did not link the pollution to the defendants' discharges and had not claimed actual injury. * * *. The case established no "special" traceability burden for plaintiffs where multiple polluters contribute to pollution

3. Redressability

Finally, a complaint must sufficiently allege "a substantial likelihood that the requested relief will remedy the alleged injury in fact." * * *. Put another way, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 561 . . .. A party need only demonstrate that it would receive "at least some" relief to establish redressability. * * *.

Plaintiffs assert that, because Defendants are major emitters of carbon dioxide, capping Defendants' emissions and [*348] reducing them by a specified percentage each year for at least a decade "is necessary to avert or reduce the risk of the injuries described above." Defendants insist that Plaintiffs' injuries are not redressable because Plaintiffs do not and cannot allege that capping and reducing emissions by an unidentified percentage "would or could remediate the alleged future harms they seek to forestall." Defendants maintain that the emissions reductions are "merely a part of the overall reductions 'necessary' to slow global warming." In addition, Defendants contend that the harms of global warming can only be redressed by reaching the actions of third party emitters, and cite Supreme Court decisions such as Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, . . . (1976), in support of the proposition that federal courts cannot redress injury "that results from the independent action of some third party not before the court."

Addressing Defendants' last argument first, the holding in Simon is inapposite. * * *.

Defendants' assertions echo their arguments for nonjusticiability under the political question doctrine: because global warming is a world-wide problem, federal courts are not the proper venue for this action, nor could the courts redress the injuries about which Plaintiffs complain because global warming will continue despite any reduction in Defendants' emissions. Massachusetts disposed of this argument. The Court recognized that regulation of motor vehicle emissions would not "by itself reverse global warming," but that it was sufficient for the redressability inquiry to show that the requested remedy would "slow or reduce it." * * *. In other words, that courts could provide some measure of relief would suffice to show redressability, and the proposed remedy need not address or prevent all harm from a variety of other sources. . . . [*349] . . .. * * *.[24] As the States rightly assert: "Even if emissions increase elsewhere, the magnitude of Plaintiffs' injuries will be less if Defendants' emissions are reduced than they would be without a remedy." This perspective has particular resonance in a federal common law of nuisance case involving air pollution, where the ambient air contains pollution from multiple sources and where liability is joint and several. Plaintiffs have adequately alleged redressability.

In conclusion, we hold that all Plaintiffs have standing to maintain their actions.

V. Stating a Claim under the Federal Common Law of Nuisance

[This remainder of this opinion has been removed. It will be excerpted in connection with the discussion of Public Nuisances in this course, later in the semester.]

* * *

[24] [Footnote Omitted.]

The judgment of the district court is VACATED, and the cases are REMANDED for further proceedings.