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CLIMATE CHANGE LITIGATION

Richard O. Faulk, Eric Mayer, Joseph F. Speelman, Jason S. Johnston
Moderator: Henry N. Butler

HENRY N. BUTLER: Today, I think we have a very interesting set of panelists for you. I would characterize some of these as big picture type of issues that we're going to be looking at. The first panel is on climate change litigation. It's kind of hard to get bigger than the world. The next one is a panel on the balancing of markets litigation, regulation, and some broad public policy issues as to what's the proper role of the courts, the legislature, and so forth. We have a great line up of scholars to talk to you on that one. Then, Larry Ribstein is going to talk about the death of big law at lunch, which I think is something you'll find interesting. The final panel, "The Role of the Civil Justice System and Allocating Societal Risk," is another big picture type of question.

These issues are things that are very much in our mind. There is policy relevance with this panel. The other panels relate to issues in terms of the changes that have been going on in Washington and the way we think about the relative merits of different parts of our legal system in terms of addressing challenges. The first panel is a distinguished group of folks that we have put together here. All of them have participated in some of our programs in the past, and they passed that test, so we are thrilled to have them back here. To my immediate left is Rich Faulk from Gardere in Houston. Rich is an accomplished litigator in a lot of environmental law areas.

He's been very much involved in the climate change litigation, and public nuisance lawsuits. Rich is going to take on a professorial role and give us an overview of the leading cases that are covered here. To his left is Eric Mayer from Susman Godfrey in Houston. Eric is substituting for Steve Susman, and Eric has participated in our programs in the past. Steve had some litigation that he couldn't get away from, so I'm sure that Eric will fill in ably because I've seen him in action before. Then, we have following up is Joe Speelman who is from the Houston office of Blank Rome.

Joe has spent many years in the corporate counsel office, most recently with LyondellBasell, and he is very much involved from a corporate perspective in how you deal with threats of these large lawsuits dealing with public nuisance and climate change issues. Following that is Professor Jason Johnston from the University of Virginia. Jason is going to give us a policy perspective on a number of these issues. Now, the perspectives I would characterize is that Eric Mayer is going to be pro-public nuisance, climate change litigation cases, and the other three are basically going to express some skepticism about those types of cases.

This may seem unbalanced, but Eric is not daunted by this challenge at all. In fact, he welcomes it. He thinks we should have more people up here on the other side; so balance is in the eye of the beholder, and I think that you will see we've got a good fight going on up here. We'll turn it over to Professor Rich Faulk.

RICHARD O. FAULK: Good morning. I'm supposed to be a neutral professor.

HENRY N. BUTLER: For the first few minutes.

RICHARD O. FAULK: For the first few minutes in any event, so Eric has a bit of a respite here as I go forward. I'm going to set the stage for what this litigation is all about. We can't get anymore topical or newsworthy than climate change litigation. Yesterday, the Supreme Court of the United States granted certiorari in a big case called *Connecticut v. American Electric Power*¹—a case in which we have filed a brief—on whether climate change litigation will be allowed to proceed in this country. The case is a public nuisance case under federal law involving emissions of greenhouse gases by public utility companies up in the Northeast. It will probably have a major impact not only in that particular area, but also upon other cases that are pending elsewhere.

There's another case involving the exacerbation of Hurricane Katrina by greenhouse gases that is also in front of the Supreme Court on a writ of mandamus application. And there is another case that is being prosecuted by my friend Eric Mayer in the Ninth Circuit, which involves, as he will tell you, a native village in Alaska whose coastline has been eroded. They claim that their village is in danger because global warming has melted the ice pack that normally protects their coast from wave action. Those three cases are the big cases currently pending.

These cases are framed under federal common law as a general rule under a tort called public nuisance. I suspect all of you have had or have had to deal with public nuisance cases at one point or another. The question here is whether the vessel of public nuisance can hold a universal tort based upon climate change issues. Many advocates, such as Eric here, will argue that the issue isn't one of the tort's vitality—it's really a question of scale. Others, including me, think that size matters, and that the unmanageability and lack of standards governing greenhouse gas emissions makes the cases non-justiciable.

Public nuisance consists of a few elements, and they're not very complicated. First of all, a public right must be involved—a right common to the general public that they have a legal right to enjoy. Second, there must be a substantial interference with that right that causes some sort of damage, or threatens to cause some sort of damage. Two remedies are available in public nuisance litigation. The first is an equitable remedy known as

abatement, where a court can, upon finding a public nuisance, order the defendant to stop or to change its activities. The court can also order the defendant to remediate the problems caused by it. Under some circumstances, damages may be awarded. Costs of remediation and other compensatory awards may be available.

Let's look at a couple of examples. I live in Houston. Let's say that during Hurricane Ike a tree fell from my property and crashed into my neighbor's house and damaged his roof. Under those circumstances, no public right is involved. Under those circumstances, it's simply a private dispute between landowners.

It may be *private* nuisance that he has a tree in his living room, but it's a matter between us as private land owners, and a public nuisance does not arise.

But let's say that the tree falls the other way and it blocks the street in front of my house. Under those circumstances, the public has a clear right to go down that road, to navigate it, to deal with whatever errands it needs to run. Since the fallen tree invades a right that's common to everyone, it's a public nuisance. The remedy is to order me to remove the tree.

Now, that's a simple illustration. Let's look at global warming. Let's say, for example, that several utility companies in the Northeast burn coal in their plants. Those plants, through their smokestacks, release greenhouse gases—all kinds of things like carbon dioxide, methane, various other things as a result of the combustion of the coal. Let's say that, for the purposes of argument, science has established that those types of emissions cause or contribute to cause global warming, which is a deleterious thing to human beings.

I don't think anyone would doubt that the air we breathe is a common resource. So, there probably is a public right involved in these circumstances. But there are other issues. One of them is whether the emissions of these particular defendants are, in fact, substantially contributing or causing the climate change.

Generally in tort cases involving public nuisance, there is a term, which we all know from negligence cases and other torts, called proximate causation. In proximate causation, there is a "but for" test: but for the defendant's activity, would the injury have happened? Can we say that climate change would not have happened if these power plants, these isolated five power plants, were not emitting greenhouse gases? If they completely stopped, would we still have global warming? If you shut them down completely and have them completely dismantled, would we still have global warming? Is it really *their* emissions that are causing this, or is it the other billions and billions of things on the planet that caused global warming—such as volcanoes? Such as gases being naturally released through earth actions, through off-gassing? Is it the refinery down in Texas instead?

Is it the elephant on the grasses in Africa? Is it my cows on my ranch in Texas who emit methane every day from their digestive systems? How

can we characterize the public utilities' actions as "but for" causes or "substantial contributions?" So far, the courts haven't even reached these issues on the merits.

But there's another issue that we have to consider. What kind of order can a court of equity render in a climate change case? As judges, you all know that, in equity, any order you render needs to solve the problem, right?

You don't want your order to just be a symbolic act. As a matter of fact, there's the maxim of equity—which we've all heard since law school—that "equity does not do a vain thing." Equity does not engage in idle gestures. Let's say we shut down the plants or regulate the emissions from the electrical plants in the Northeast. Does that solve the problem of global warming? Can a truly efficacious order be rendered in those circumstances? Or is that something from which equity simply must abstain? And that's an issue that comes up.

So in climate change cases, these concerns translate into two threshold issues. The first issue concerns standing. In order to bring a lawsuit into your courts, a plaintiff must have standing to sue, and usually that's pretty obvious. They have been hurt and allege that their damage is caused by this particular defendant. But what if they can't trace their injury to the actions of any particular defendant that they have sued? And what if they admit that they can't prove that the defendant who owns this particular power plant caused the injury that they are suffering from? That raises the issue of constitutional standing. That's one of the issues that the Supreme Court of the United States granted certiorari to review yesterday in our case.

The other issue concerns the "political question" doctrine. That issue asks whether courts have any business being involved in this sort of a dispute. If courts can't render orders that solve the entire problem, if courts can't identify traceable injuries caused by global emissions, isn't this a controversy that should best be dealt with by an international body? By an international treaty? Isn't this an issue of international relations? After all, the only judge I know that has universal jurisdiction doesn't really sit on any court that I practice in front of—I see him every Sunday at church.

Under those circumstances, is this a "political" question? Is this something that Congress and the EPA should handle—instead of the courts? That's an issue that the Supreme Court has agreed to review in our case.

And lastly, we have to consider the impact of the EPA's recent decision to regulate greenhouse gases—regardless of whether the courts take action.² EPA has now decided to regulate certain facilities, and they're in the process of promulgating hundreds and thousands of regulations. What's left for courts to do? Hasn't the EPA displaced all the tort suits? That's exactly what President Obama, through the Solicitor General, told the Supreme Court in a brief that he filed in our case.

He said, "Let the EPA regulate. We're regulating. Step aside. We don't want lawsuits in this particular issue. We have displaced the field.

We're regulating these gases on our own and we should be allowed to continue without any interference by the courts."

So that's your primer. I realize I have downloaded a lot of information, and I have tried to be neutral in this presentation.

Now, I will just ask one question of Eric, and I know he's going to answer this in his presentation because he's told me so.

Assuming all of this falls apart, and the Supreme Court says, "Yes, you can proceed with your climate change lawsuits"—I would really like to know how they are going to be tried. If this gigantic global situation is coming soon to your courts, I think each of you judges should have an idea of what to expect. Eric should tell you how he's going to try these cases and make sense out of them in front of you and in front of juries. So with that question asked, I will sit down.

ERIC MAYER: I can proceed without him. The slides are only pictures. They're just pictures of the native village of Kivalina, and I think I can convey to all of you a little bit about this plaintiff and why this litigation was something that we became involved in. My name is Eric Mayer. I'm with the Susman Godfrey firm. We are commercial litigators that have offices in a variety of cities: Houston, Dallas, New York, Los Angeles, and Seattle. We are a commercial litigation firm, but we do some climate change litigation, and we do some litigation in the environmental arena on a pro bono basis.

All of the work that we have done in this area has been without charge. Our single largest client is a coalition of Texas cities, including Houston and Dallas, that hired us after we offered our time pro bono to begin litigating the permitting of coal fired power plants around the state of Texas. We've done a couple of those proceedings. The reason I raise that is because I think as trial judges, you should be aware that the global climate change issues are getting more traction at traditional law firms. Law firms, like mine, that do civil litigation have become involved in some of this litigation. I don't think anyone believes that this is a money-making venture.

We became involved because of our obligation to do a significant amount of pro bono work, and we have done that for the last five years. The case that I wanted to talk about—and I did mention that I would speak about when we win in the Ninth Circuit—how we will try our case. I'm going to proceed and begin with that. But let me just tell you first a little bit about Kivalina, and why we took the case and why we got involved. Kivalina is a village that sits north of the Arctic Circle; if you imagine Alaska, you have got to go to the northern portions of Alaska. It is a settlement that has been there for generations, and it's a federally recognized Indian tribe.

That has some significance, which I will get to in a moment. It's also a city that's recognized under the State of Alaska, and that has some significance because what's happening in Kivalina is that the area that the tribe inhabits is at the end of a long peninsula. The peninsula sits out into the

ocean. Previously, ice has surrounded the peninsula most of the year—naturally forming ice sits there virtually all year. But several years ago, the tribal leaders noticed the ice was melting, and the ice was establishing itself later in the year. The ice was forming much later in the fall and breaking up much earlier in the spring.

They noticed that because the ice wasn't forming and lasting as long as it was, that the land that they sit on was subject to terrific winter storms. Those terrific winter storms began to erode the land that the tribe has sovereignty over. There's a treaty. This is their land. It's recognized by the U.S. Government as a separate, independent sovereign. The tribal leaders had to make a decision what to do, so they contacted the Army Corps of Engineers, and they contacted the U.S. Government Accountability Office, and they said, "Please come in and help us. We have 400 or so people that live here and have lived here for generations, but our land is now being eroded."

They got two reports. The reports from the Army Corps of Engineers and of the Government Accountability Office said, "You're going to have to move. You can't stay here any longer. The erosion is so significant and dangerous that the land that you and your forefathers have inhabited is eroding away, and the buildings that you have constructed have to be moved. The cost of that is going to be between \$95 and \$400 million." And they went on.

Both organizations said the property is being damaged because of global warming. The Indian tribe leaders had to decide what to do. They don't have the \$400 million to move. So they began to seek legal advice—not originally from my firm, but from a bunch of public interest law firms. The lawyers that were working at those firms decided to start looking at the law of federal public nuisance because they have a report that says climate change and global warming is resulting in the erosion of the property. This is property that this Indian tribe owns. The tribal leaders—if you stop and step back a moment—the tribal leaders have an obligation to their constituents.

They're charged with maintaining the tribal lands. If they do nothing, that's really not consistent with exercising their right to make sure the property is there not only for themselves, but also for the future generations. So, with a bunch of law firms, a lawsuit was filed on Kivalina's behalf in federal court in California, against Exxon Mobil and fifteen of the nation's largest oil and gas coal companies.³ Now, many people have said, including members on our panel, that climate change lawsuits like ours are going to fail in the courts because they pose really significant challenges to the whole concept of torts, duty, and causation.

Some commentators have said that although our lawsuits are destined to fail, they are doing wonderful things by forcing the attention of the community on these issues, and bringing about change that is needed in order for the society to continue. Because what we're really talking about

is what does a sovereign do when the sovereign feels that his or her property is being invaded and damaged by another entity? If you stop for a moment and think about what did the United States do before we had pollution laws?

If you look at the cases that came before the United States Supreme Court, they are public nuisance pollution cases: State of Illinois suing another state and a bunch of cities for polluting some of the Great Lakes,⁴ State of Georgia suing other states for what is a precursor to acid rain.⁵ One of the questions was, is the tort vessel sufficient to hold it? The short answer is: yes, of course it is, because that's exactly what we did prior to the time we had pollution laws in this country. The reason the sovereign is important is because in a federation—such as the United States of America—if a state is unhappy with what someone else is doing, they cannot stop those emissions through an aggressive act.

As part of membership in the United States, the sovereign—such as my state, Texas—has given up its ability to go to war with Oklahoma for polluting Texas property. They can't do it. The Supreme Court has said in *Massachusetts v. EPA*,⁶ which was decided several years ago, that states have standing. Sovereigns have standing to challenge pollution because the only way they can challenge it is in court. They don't have the ability to do anything else. That's part of what this great United States of America is all about.

That's why those cases originally began in the courts in the first place—because states were unhappy with what other states were doing that impacted their constituents. If you build a large plant right across the border in Oklahoma, and then I have people in Texas that can no longer farm their land because sulfur emissions fall on and kill the alfalfa, do you have a remedy? Yes, you do have a remedy, and the remedy is public nuisance. Now, there are some restrictions on it. The law in this country is that if the area is regulated by the federal government, then the federal common law nuisance doesn't exist because the theory is, "Hey, the government has stepped in and regulated it."

We don't need federal common law for this issue. That becomes important with what we just learned because under the Bush Administration, greenhouse gases were not regulated. The EPA refused to regulate them. That resulted in a lawsuit by Massachusetts and several other states to demand that the EPA start regulating greenhouse gases, because the failure to regulate greenhouse gases was causing global warming, which was impacting Massachusetts's property—its coastline. That went all the way to the U.S. Supreme Court in a 5–4 decision. The United States Supreme Court said, "You're right, Massachusetts."

Carbon dioxide and greenhouse gas emissions are pollutants under the Clean Air Act. The EPA has no excuse for not regulating them. Congress has said they have to regulate them. The Bush Administration has refused. We, as the highest court in this land, order the EPA to begin regulating

greenhouse gases. Now, from a litigator's standpoint, that was very helpful for me because it indicated clearly that there was a total absence of regulation. The Supreme Court had to step in and order it done. Hence, that permitted the lawsuit of public nuisance to proceed. The law of nuisance is complex. It is multifaceted, but in general, our lawsuit is fairly simple.

Under the law of public nuisance, federal common law, a nuisance is unreasonable if the harm to the public outweighs the social utility of the conduct that's causing the nuisance. The common law has helped us develop shortcuts for determining when something is unreasonable. For example, if an actor is intentionally invading the interests of another's land, and the harm to the land is severe, then that is an unreasonable interference for nuisance purposes regardless of the utility of the actor's conduct. So, if you're invading someone's land, that invasion is serious. The Restatement of Torts section 829(a)⁷ states, regardless of the utility of the conduct, that's an unreasonable interference.

That doesn't mean the actor has to stop what they're doing. I mean, a misconception here is that every nuisance suit is an abatement—it's not. Our suit, the Kivalina suit, is not an injunctive request. We're simply saying it's \$400 million to move this Indian tribe. The invasion is significant. It doesn't matter that the defendants, the emitters of almost 4% of global greenhouse gases worldwide, may be doing something that is socially beneficial. The question is: who will pay for the move? Under public nuisance law, section 829(a) of the second restatement, that is an unreasonable interference.

The actor only stops what he or she is doing if an injunction is requested. The injunction—I posit to you as trial judges—the injunction is where you have to weigh the utility. You have to decide whether you're going to stop somebody from doing something. We're not seeking that, and I would concede those are much more difficult cases to prove on the plaintiff's side. The injunctive cases you typically see that are successful in this area, are brought by states, not by private litigants. We have not asked for injunctive relief, and under restatement section 829(a), once an intentional invasion that causes severe harm to another's land occurs, the actor has to pay for the harm they have caused.

They can still continue the conduct; they just have to pay for it through the mechanism of damages. Here's an example. The case is *Jost v. Dairyland Power Cooperative*⁸—it's a Wisconsin Supreme Court decision—State of Wisconsin. A power plant in the City of Wisconsin is emitting sulfur fumes that are causing alfalfa crops in the city to wither and die. Screen doors and windows in the houses are rusting through. You cannot grow flowers in your yard because of the chemicals in the air.—The farmers sue. They say the sulfur fumes constitute a public nuisance.

The defendant says, "Wait a minute. We're providing a great social utility here. We're generating power for the city. How can this be a problem? You can't call us a nuisance unless you weigh and tell us that what

we're doing is wrong." The Wisconsin Supreme Court says no. In its holding, it's a common law precursor to section 829(a). It says the air pollution is still unreasonable, even if the activity causing the pollution has great social utility because it causes a severe harm to the land of the property owners adjacent to the power plant—and that's the same situation we have here in Kivalina.

We alleged that the defendants have emitted collectively, hundreds of millions of tons of greenhouse gases over the last few decades, and those emissions have contributed to climate change, which is why the ice pack is no longer forming. Now, the defendants have argued that the court cannot possibly adjudicate the case because it would have to weigh the social utility of power production versus the harm to the Indian village. It's simply wrong as a matter of black letter nuisance law. That's not what the Supreme Court of Wisconsin held in *Jost*, and it's the opposite of the rule in section 829(a).

The defendants have also made another argument: there's no principled way of how you could decide among the millions of actors who contributed to climate change, who should bear the cost of moving the Indian village. Why should Exxon have to pay? Why shouldn't you go sue the power plants in China? That is not an unusual question. Of course, it's a good question. But the law in this country has dealt with that question, too; it arises in every multiple polluter case that exists. There's litigation right now between the State of Oklahoma and Tyson Foods.⁹ There is a huge litigation about the placement of poultry waste on land in the Illinois River Water Shed.

Oklahoma has sought an injunction, which was denied. But there's a lawsuit by Oklahoma against Tyson, among others, but against Tyson for pollution under public nuisance and state pollution laws. Tyson's response was, "Well, wait a minute. You're suing me but this pollution is caused by everybody that has cattle farms, and it's caused by everybody that has septic tanks. So we're going to sue in a third party action; we're going to sue everybody else that's polluting in the State of Oklahoma, and guess what trial judge, this case is totally unmanageable—we can't have a case with 10,000 defendants."

The law in this country is that you can sue those defendants that you think are responsible, and there are mechanisms within the law to deal with this issue of whether others should be joined to the lawsuit. That's typically in the pleading stages of the lawsuit. This issue has come up—what Oklahoma said is, "Listen, we're going to let you third party in some other people who you claim are the major polluters beside you, the chicken polluters. That's fine. We're going to sever those claims. Let's deal with you in the State of Oklahoma because there's a lot of issues here we have to deal with."

For example, is the chicken waste causing the pollution? If it is, then we'll deal with the claims we have severed, and you can try to assert your

claims for apportionment or contribution. So in every multiple polluter case, you're going to hear the argument that there are other polluters who should be before the court. Let me say, in *Massachusetts v. EPA*, one of the arguments the EPA made to the U.S. Supreme Court was as follows: we are not wasting our time regulating greenhouse gases because we only represent the United States of America, and most of the greenhouse gases are in China or in India.

The U.S. Supreme Court said, "That's not a good reason. The fact that others may be doing it doesn't relieve you of the responsibility to get out and start regulating." Now, courts have developed four ways to deal with multiple polluter cases. The first is an implicit recognition of plaintiff's right to select the defendants who they claim are responsible. The fact that there may be other defendants who are responsible does not mean that these defendants who the plaintiff has sued are not responsible—and that was the district court holding in *Illinois v. Milwaukee*,¹⁰ which was a multi-state polluter case.

The State of Illinois sued Milwaukee and other jurisdictions that surrounded one of the Great Lakes for polluting. The second way they deal with multiple causation is the common law rule, which you'll see in Prosser and Keaton on torts.

I'm going to read you a quote now from Judge Posner in the Seventh Circuit, "Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them have created a nuisance, pollution to the stream, even to a slight extent, becomes unreasonable and, therefore, a nuisance when similar pollution by others makes the condition of the stream approach the danger point. The single act itself becomes wrongful because it is done in the context of what others are doing. If each defendant bears a like relationship to the event, and each seeks to escape liability for a reason that, if recognized, would likewise protect every other defendant in the group, leaving the plaintiff without a remedy, the attempt to escape fails and each defendant is liable." That's a quote from Judge Posner—summary of the common law and pollution cases from an en banc decision of the Seventh Circuit in *Boim v. Holy Land*,¹¹ a recent decision of the Seventh Circuit. The key point here is the knowledge point.

In our lawsuit, we claim through a conspiracy allegation that each of the major defendants in our case knew that the emission of greenhouse gases was, in fact, causing global warming. We also have an allegation that the defendants conspired together to create doubt among the public about whether greenhouse gas emissions were causing climate change. Now, there's also an exception under the tort restatements third for liability for physical and emotional harm for trivial contributors.¹² One of the arguments these defendants have made is, "Wait a minute. If you're suing all of us, don't we have the right to sue every resident of California for driving their cars because each one of those residents is contributing greenhouse gases?"

We don't believe the law permits that type of—there's a trivial exception. We don't believe that's a legitimate defense, but we also believe that, if there are other contributors that they believe are providing pollution, that they believe should be before the court, they can implead them as was done in the *Tyson* litigation—the trial judge can then decide. The third way that Courts have dealt with multiple polluters is the notion that the injury is indivisible. When there's no way to know how much damage Exxon caused versus BP, the law in this country has been that each is responsible, and there's apportionment.

For example, if the defendants could argue successfully that they only contribute 4% of the emissions in the world toward global warming, therefore, we should only recover 4% of our 400 from them, that would be a legitimate defense. They could certainly assert it, and it may be something that the trial judge would accept. But none of this has happened because obviously, we haven't even briefed this issue of apportionment; the apportionment issue also answers joinder, impleader, and contribution issues. Defendants have raised the "specter of potentially unlimited joinder," as they put it.

The idea that everyone on earth will end up in this lawsuit—there are two problems with that. The first is the limiting principles of knowledge and triviality, which I mentioned. The defendants may or may not be able to show that unused joint tortfeasors had the requisite level of knowledge. Besides this triviality problem of each individual driving a car in California, you have the question of knowledge. The defendants are very different in terms of knowledge. They each have scientific staffs that have been studying this issue, and we contend, obviously, that certain defendants engaged in a pattern of misinformation to the public.

Let's say that for the sake of argument, the harm cannot be apportioned, and the defendants have a valid impleader action against some unjoined third parties. The fourth way courts have dealt with multiple polluters situations is denying or severing a claim for impleaded parties—and that's what happened in *Tyson Food*. Let me skip to the end—how are we going to try our case? When we get back to the trial court, we're going to call a representative from the village of Kivalina to explain the problem of melting sea ice, and what the storms are doing to their land. We're going to show how this 400-person village hardly emits any greenhouse gases.

The last thing we're going to do—to obviously guard against some claim of comparative responsibility—is we'll call a damages expert and probably introduce ourselves, the reports from the government, the Government Accountability Office and the Army Corps of Engineers. They are U.S. Government reports—they are self-authenticating. They are going to come into evidence. We'll read in the record interrogatory responses that we will have asked each one of the defendants tell us over the last twenty years, what their greenhouse gas emissions have been.

We'll call some experts on our side to make the point that the greenhouse gas emissions mix in the atmosphere to cause climate change—although I think that's how Justice Stevens began his decision in *Massachusetts v. EPA*, and I don't think we'll have a problem establishing from a scientific standpoint, that's what happened. We will call some of the defendants, executives, and scientists, and cross examine the defendants' experts on why they believe the greenhouse gases don't result in the change in climate that has effected Kivalina. And then we will probably rest.

At the end of the day, we believe that the evidence will support the public nuisance claim that we have filed, and we'll get some compensation for the move for the village of Kivalina. With that, I'm going to end, and I welcome any questions that some of you may have following this presentation.

HENRY N. BUTLER: Thank you very much, Eric. I can't help but ask about the damages calculation and the \$400 million figure for the 400 people. Can I join the tribe right now?

ERIC MAYER: Well, it's \$95 million to \$400 million—the cost of the actual move could be as low as \$95 million.

HENRY N. BUTLER: It seems to me that Ted Stevens has not been doing a very good job with his port. Why didn't he just build a big old sea wall right there?

ERIC MAYER: Well, the pictures that I didn't get to—you can see, they have actually tried to build walls. There's a lot of protective work that has been done at great cost, up until this point; but the experts have finally told them, "There's no more protection you can do. You've got to move."

HENRY N. BUTLER: Okay, and are they going to pick up the buildings and move the buildings?

ERIC MAYER: Yes. They're going to have to move the property.

HENRY BUTLER: Why do they have to do that? Why don't they just abandon it?

ERIC MAYER: Because there is a fair amount of property that they have constructed there.

HENRY N. BUTLER: Okay—all right. There's so much, before we have to get to damages, on the question—but I just couldn't help but ask those questions. Now, we'll turn it over to Joe Speelman, who is going to talk about the corporate perspective of dealing with these types of litigations.

JOSEPH F. SPEELMAN: Good morning. I have spent thirty-one years in-house, representing large manufacturing corporations in the United States; including nineteen years as Chief of Litigation at the third largest chemical manufacturer in the world. I have a perspective that's different than what you have heard this morning. Let me first address one thing that my friend and colleague, Mr. Mayer, said. He said, "It's not a money making venture." That's baloney. This is all about money. We just heard the exchange. This whole thing is about money. I'm going to talk to you in the next few minutes about two of the largest transfers of wealth ever in our country's history. Then, I'm going to finish by talking about what is the issue today, which is the largest transfer of wealth proposed in the entire world, ever.

It's about the money. Twenty years ago, Stuart Altschuler wrote an article that was entitled, *Usurping Regulatory Power Through Mass Tort Litigation*.¹³ In that visionary article written twenty years ago, everything that has happened was predicted by Mr. Altschuler. The idea expressed by the National Resources Defense Counsel and other NGOs was that they didn't like democracy because it didn't get them what they wanted, and so they were going to use the courts to run the American political process—fundamentally anti-democratic philosophy that they have consistently maintained—and might I add—relatively successfully.

Now, during my nineteen years as Chief of Litigation, it has been my privilege to retain both Eric and Steve Susman from the Susman firm to represent my client, and Rich Faulk. I have no greater admiration and respect for both those firms than anybody. That having been said, the real title of my program could be—since this is about climate change and it's in December—we could say, "Baby it's cold outside." That's a catchy phrase. But really, it's more about the following: from those people who brought you asbestos and tobacco, we're on the cusp of the largest proposed transfer of wealth in the entire world, and you as judges, are being asked to do it.

I would ask you to step back, talk to your colleagues, and let's have a second—a quiet, rational second thought about this process. I have been quoted in the past as saying the American tort system is broken, and it is. We have commoditized the law in the process to the point that we have the following absurd results. In tobacco, we had the largest transfer of wealth in this country. It's still going on, and what did we accomplish? More young girls smoke cigarettes now than ever before. Cigarettes are not gone and, in fact, they are guaranteed they are going to be around for a long time. Why?

Because the annuities created in favor of the American plaintiff's bar require funding from non-bankrupt tobacco companies. Therefore, the cost of tobacco and cigarettes has gone up ridiculously. They're still around. They're making money, and they're paying their annuities to the American plaintiff's bar. We still have smoking, and we still have cancer deaths. As

I've said before, more young girls smoke now than ever before. Is that the way this is supposed to work? What did we accomplish as a society? Nothing. But we did transfer wealth to a few people. What did they do with that wealth? Well, there's always asbestos.

I recently had the opportunity to watch a Chapter 11 bankruptcy proceeding in New York City. In that proceeding, a lawyer from Texas filed 285,000 proofs of claim for asbestos liability against the debtor; 285,000 claimants asserting that that lawyer represented all 285,000 of them and that they were all injured. The bankruptcy judge, being a good judge and a judge that's been around a while, granted the defendant's motion to seek some more clarification about it. Do you really represent all these people? Are they really injured? Did the debtor cause that injury? Seven days after that order was entered, which was a fair order, all 285,000 claims were withdrawn.

Subsequent to that, several letters came in from a number of those 285,000 people that said, "I saw my name listed, and some lawyer in Texas said that he represents me. Can you tell me how I can get a hold of this person because I don't know?" The commoditization of the law and the abuse is unbelievable. Who pays for that? Well, one of the things that businesses try to do is make money. If you watch television at all, you know that companies are being exhorted to hire people. We need to reduce unemployment. Why aren't you guys hiring people? For twenty years, I've watched business leaders—most of whom are engineers, by the way.

I always used to tell young lawyers or law students, "If you're going to go into the law, and you're going to go in-house, understand that you live in a nest of engineers because engineers are wonderful people who make things, and they end up being business leaders." Engineers have a very rational and direct thought process. To try to explain the law and the consequences to them the way it used to be, was a challenge because they didn't understand it. The typical comment was, "But we didn't do anything wrong. Didn't we abide by the law?" "Yes." "Why are we being sued? Why is this liability before us?" What is the answer to that?

The answer is: about every two or three years, the people that brought you asbestos and tobacco come up with new ideas; predatory ideas. They're designed to separate money from people that have it and take it somewhere else. So it is about the money. Now, try to explain that to your client. Put yourself in my posture. The only way I can safely advise a client to avoid liability in this environment is to not make, buy, sell, or insure anything—but that would make it really hard for us to do what the administration asks business to do, which is to hire people.

Is it the American business's responsibility? Is it our responsibility to deal with the change in the climate in this world? Well, let me talk about that for a minute. The theory is public nuisance, and it's a novel theory, but I want to give you some comments from people who had a lot to do with creating that theory. Professor Jim Henderson, from Cornell University,

he's a co-reporter for the Restatement Third on Products Liability which includes the language that all rely upon for public nuisance. There has been litigation for almost thirty years now on lead, and involving people who are responsible for lead in paint.

That was legally, in fact, compelled, fifty years ago; but now somebody says, "Oh, this is a horrible thing. We need money." So litigation ensues. Before the Rhode Island Supreme Court, Professor Henderson in an amicus brief termed the theory of public nuisance the way it's being utilized now, as simply lawlessness—nothing less than pure lawlessness. This is the man that wrote the language on public nuisance, but never intended it to be used the way it is being used. It's being used to try to change society. Is that the law's job? Or is the law's job to try to set standards so that people like me can advise clients on how they can obey the law? It's so much fun to say, "Do the right thing." What is the right thing?

If you keep changing what is right, and then seek damages for what was right then, but it's not right now—how long can that go on? How many jobs can business create when they're constantly having to look at their books and figure out how much liability they have to reserve for? There's another case I want to refer you to. It's *North Carolina v. TVA*,¹⁴ in the Fourth Circuit. It's very similar. It's on this public nuisance theory. While the Supreme Court hasn't said they are going to look at that, there might be a reason why they have said they're not going to, because that decision stated there is not a public nuisance cause of action in this sort of situation—this being climate change and damage.

The circuit court deemed the theory of public nuisance, as it's being utilized, standardless liability—no standards. No ability for Joe Speelman to advise his client on how to do the right thing to avoid liability. There are no standards. I can't tell you how to do it. And if I can't do that, then the entire process by which business operates and makes things and sells things in this country, ultimately comes down—we get to what we really have, which is a casino mentality. So, as I said when I started—from those folks that brought you asbestos, lead litigation, and tobacco—we now have climate change.

Well, that's interesting. Let's talk about that for a minute. What should the defense be? Well, the defense needs to respond to this. The response needs to be principled, and it needs to be consistent. You need to hear what it is, but here are some points that underpin it. First, we insist in this country on rule of law, and not the rule of politics in law. That's important. Now, we also have to understand that we have an industrial base in this country that everybody is happy with in the sense that they like employment, and they like that process; so we have to be mindful of that.

Let me go on and make a really ripe statement. I think we have to defend American jobs and American industry, and we have to balance the legal issues and understand that there's a political debate going on here that is the essence of democracy. The law shouldn't be used to undermine that

debate. Well, let's start with the defense. First, legitimate science: I want all of you to go to Google when you get a chance—or, if you're like me, ask your seventeen-and-a-half year-old son to go to Google for you, because I'm not that capable. I want you to Google "Wall Street Journal Climate Gate." That's all. Type that in.

You're going to find the most fascinating set of articles, and it goes like this—I'm going to shorthand it because I'm from Kansas, and we speak in monosyllables as often as we can. Look, third division university in England gets the opportunity to do research from a grant, the source of which they still won't talk about. They conclude from this research that people, that industrialized society is causing global warming. Upon further review, it may not be true. The people involved attempted to hide this, attempted to intimidate scientists who disagreed or who raised questions.

All of this is documented. If you were a judge, how would you rule on evidence that's undermined like that? Would you allow that in? A number of scientists now say there's no consensus that people cause global warming. But let's go beyond that, and let's talk about the rational legal thought process here. I want to mention four words to you, and you're going to recognize all four of them: China, Russia, India, Japan. They all met in Copenhagen with great fan fare last year, and all four of them flipped America off on the concept of responsibility. And every one of those, with the possible exception of Russia, generate more greenhouse gas than this country does.

China is the largest greenhouse gas producer in the world by far, and getting worse. Neil Cavuto—I'm a fan of his. He has a way of putting it straight when he sees a ridiculous argument. He says, "Give me a break." Well, give me a break. This is not about American law, and American law can't fix this issue. What is the impact on our economy? Well, I think we have to think about how we're going to impact our economy if we're going to transfer—based on flawed science from a third division university in England—more wealth than has ever been transferred in the world before.

Is that what we should be doing, and should the law be used as a device or a weapon to accomplish this? Or should the law step back and take a calm second view? What is the impact of a volcano erupting anywhere in the world? Does anybody know? Anybody know how many volcanoes are active? Well, I can tell you. Again, my seventeen-and-a-half year old looked this up for me: 1,500 active volcanoes in this world. Do you know that one volcano erupting—all the things we do like recycling—wipes all of that out because of the greenhouse gas it emits? We have 1,500 volcanoes that are belching periodically in this world.

One last question I want to leave you with: does anybody know why Greenland is called Greenland? Fifteen hundred years ago, when the Vikings landed there to start farms, it was the greenest, most beautiful country they had ever seen. You can take tours now to Greenland and visit those ruins. They're still there. Why did they leave? Because it turned white.

Why did it do that? It wasn't General Motors's fault. General Motors wasn't even in existence, nor was Exxon Mobil. Folks, every 1,500 years, climates change in this world, and it's nobody's fault, unless you want to blame the Almighty.

And I don't advise it because you don't have personal jurisdiction. Look, let's be rational about this. This is goofy. It would be funny if it weren't for the amount of money involved. So Eric, with all due respect—it is about the money. Climate change is bigger than American law. It's bigger than American courts, and it's bigger than decisions arbitrarily made; it needs to be discussed in that context before anybody writes a check. In order to write a check, of course, you have to have money in the bank. In order to have money in the bank, you have to make money. In order to hire people, you have to make money. Thank you.

HENRY N. BUTLER: All right, Jason, you have two minutes. You try to stop these guys. You have three minutes now, Jason.

JASON S. JOHNSTON: I'm going to not talk too much—I have three basic points: these interstate public nuisance actions are inefficient, they're anti-democratic, and they're counterproductive, ironically, for advocates of greenhouse gas emission reduction. There's a lot I could say about the science. I could maybe direct you later to a long monograph that I have online that attempts to cross examine the climate change science, and that monograph is cited in some of the ongoing litigation challenging EPA's endangerment finding. But I think what I'm going to do today is—given the thorough and expansive coverage of all the previous talks—I'll try to be brief and focus on a couple of points.

Really, the point that this litigation is anti-democratic, counterproductive, and not justified by the foundations of interstate public nuisance law: I want to clarify that at the outset. We are talking about a limited set of cases here. These are all interstate public nuisance cases. There are plaintiffs in some states suing defendants who, for the most part, are in other states. There is some overlap in some of the cases such as *Comer*¹⁵ and *Kivalina*,¹⁶ but generally, the interstate character of these public nuisance actions is very, very important. Why?

Just imagine this: an attorney general brings a public nuisance action—not interstate—against whom? Oil companies and other companies located only in that attorney general's state? We haven't seen that litigation, and I ask you, do you think we're going to see that litigation? You don't sue anybody else. You just bring an ordinary public nuisance action against emitters of greenhouse gases located only in your state, so the interstate character of these things is very important. There are a set of cases articulated by the Supreme Court a long, long time ago—not recently, or fairly recently that apply to interstate public nuisance. The point is, most of these cases involve an extensive amount of externalization of cost to “pol-

luters” that are located in states other than the states where the victims are located.

A great example is *Connecticut v. AEC*. The Supreme Court granted certiorari, as Rich mentioned, on that case yesterday. The defendants are a group of power companies; they provide power to states located in the South and the Midwest. The plaintiffs are a group of states. There is no overlap between the plaintiff states and the people served by the defendant power companies. That’s perfect externalization. “Global warming,” the plaintiff attorney general will say, “is a problem, but we’re not going to sue our guys. We’re going to sue people who provide coal based electricity in other states. So we’re going to externalize all the costs of reducing greenhouse gas emissions to the people located in states other than ours.”

Now, what’s the problem with externalization across states? One: it’s very likely that this is going to be an inefficient externalization. That is to say you come up with some award from the court, and the basic idea of economics is we use the liability system, to what? To internalize costs. If people bear the costs of their actions, they have an incentive then to take precautions or take various steps to lower the cost to other people of the actions that they take. The inefficiency of the externalization here is very, very likely. Why? Among other things, there are very real benefits from global warming that can be expected to benefit lots of states and lots of cities.

This is not fanciful. Matt Cohn—who is an economist at UCLA, is the gold standard basically of applied environmental economics—just published a book talking about how American cities are going to be gigantic beneficiaries in a global warming environment. Matt Cohn is as mainstream as it gets when it comes to environmental economics. North Dakota, South Dakota, Minnesota—all kinds of places—could expect increases in agricultural productivity. Any time there are beneficiaries, they’re not at the table.

States that think they’re going to be beneficiaries, or think that they’re going to be real net losers from greenhouse gas emission reduction—because they’re states where a lot of electricity comes from burning coal and/or they mine and produce coal in those states—those states are not at the table in these litigations either. There are a lot of benefits and costs that are not included in this dyadic interstate public nuisance litigation. They’re almost sure to generate inefficient results. Another reason why they’re sure to generate inefficient results is because the benefit of any litigation depends upon the remedy affecting behavior, and behavior affecting the harm that people suffer.

It’s simply a fact that by 2020, China is going to be responsible—forget about India and Brazil—for about 45% of the world’s greenhouse gas emission reduction. So, there’s no remedy in any of these cases that will provide any relief to any of the plaintiffs—except if you think, as in *Comer* and *Kivalina*, that these are appropriate situations for what, for a

damage remedy. Give damages to people for the harm that they allegedly have already suffered due to global warming; and the defendants being sued, of course, have been to some extent, contributors allegedly to the greenhouse gas emission build up in the atmosphere that's caused this global warming problem.

So the problem with *Kivalina* and *Comer*: you could say, "Gosh, they're the plaintiffs that are going to get a remedy. They're going to get money if they're successful." There are a bunch of defendants in *Kivalina*, for example, but one of them is not China National Petroleum. They didn't sue China National Petroleum. What are we going to get out of *Kivalina* and *Comer*? This is to pick up on a theme that Joe just articulated. We're going to get cost imposition, if these cases are successful: the imposition of some kind of costs and damages on not entirely American companies. I believe BP was also sued and *Kivalina* and Shell.

But we're going to primarily concentrate costs on American companies, which is a great thing to do in terms of what, international competitiveness? We are now—in my opinion, and I'm trying to show this empirically—beginning to see the effects of twenty to thirty years of the explosion in American tort liability in a very real sense, which is we don't compete. It's affected American companies' costs. We do not compete any longer, effectively, on the international stage. The tort system in its position of liability on American firms is a reason for that. If you impose costs on American firms, but not on Chinese firms, you exacerbate a problem that is basically a catastrophic problem for the United States.

You can't have a situation in which we import more, and more, and more from a low-cost country, which is China, and then borrow from it—this is not sustainable. The tort system has made a profound contribution, a significant contribution in my opinion, to this. But you could say to yourself, "Who cares if this is efficient or not efficient—the kind of externalization, the kind of cost shifting that you get out of these interstate public nuisance cases." Well, maybe you don't care about efficiency. I think you should care about democracy. We live in a democracy. China is not a democracy. This is an incredibly important point, of course, for Americans to realize, which they don't seem to usually realize.

Does the efficiency of interstate cross externalization even matter? You might say, "No, I don't care." Well, the problem with these cases is worse in a sense. How are we supposed to deal in a democracy with the problem of alleged harm caused by greenhouse gas emissions through the democratic process in Congress? How would that process work? I don't know exactly. Nobody knows exactly. There's no political scientist even, who can give you an exact answer to that; but it would surely be the outcome of a bargaining process in which members of Congress more or less represent the preferences of the median voters in their states or jurisdictions.

Some states think they're going to be big winners from greenhouse gas emission reduction. California, for example, where they've almost bet the state vote on greenhouse gas emission reduction, and it's a sinking boat. And there are states—West Virginia, Wyoming, probably Indiana, maybe a large number of other states—who think, “Well, we don't think that we would gain that much from greenhouse gas emission reduction, unless we get a lot of other stuff thrown into any bill that would allegedly accomplish greenhouse gas emission reduction.” So what is it? It's a bargain. It probably wouldn't be an efficient result. There's nothing that says that the deals that emerge from Congress are efficient.

But they're democratic. The important point for present purposes, is the deal that you would expect that would emerge from Congress; if you look at Waxman, for example, a bill that now will never be reintroduced again for a very, very long time, maybe never. But that gives you an example of what emerges from Congress. It's a lot different than what you get from these interstate public nuisance cases that are cooking along. So in that sense, it's profoundly antidemocratic. You're going to get courts, federal courts, issuing injunctions or assessing damages. Either way, they're generating outcomes, which are going to be very different than anything you would ever expect to emerge from a democratically elected Congress.

I'll conclude with a couple of points. None of this is actually consistent with the doctrine. That these cases exist in the first place or would end up in plaintiff victories only occur through a very ahistorical and blinded reading of the interstate public nuisances cases. Generally, the Supreme Court has said that this is a matter of federal common law, by the way. Interstate nuisance is federal common law. There is not a lot of federal common law. Why is there not a lot of federal common law? Because the Court said things like this: you have a question of federal common law emerge only when the Court is compelled to consider this, and the question cannot be answered from federal statute alone.

It's compelled. The Court has to act. Well, there was a time when the Supreme Court thought they had to act in these interstate public nuisance cases 100 years ago; these two most important cases, *Georgia v. Tennessee Copper Company*¹⁷ and *Missouri v. Illinois*.¹⁸ Those cases are over 100 years old. That's forty years after the Civil War. Justice Holmes wrote those opinions. In both of those opinions, he talks about the states relinquishing some aspects of sovereignty, and he also says we have to step in here and resolve these interstate public nuisance disputes because we don't want what? We don't want the states to go to war with one another. People today tend to think this was just what, metaphorical? It wasn't metaphorical.

He was wounded seven times in the Civil War; Justice Holmes was. The Civil War was a reality. Also, what was true 100 years ago about the perceived extent of potential constitutional authority of the federal government to regulate—very, very limited compared to today, right? Holmes

himself in one of these opinions stated, it's a very real question about whether the federal government could—that is to say Congress could—do anything in this area, so we have to act. That is to say the Supreme Court is saying they've got to get involved in this dispute between Missouri and Illinois over what the City of Chicago is doing with its sewage because there's nobody else.

That's not true today. As you all know, Congress's power is generally understood to be very, very broad, perhaps not unlimited, but very broad. So Congress can act, and Congress has acted. I could say more about these cases, but I'm going to try to stay within my time limit. The other thing Justice Holmes said very quickly is he said a precondition of interstate nuisance liability is what? Symmetry. No state gets to sue another state unless they're not doing the same thing, if they complain about what the defendant state is doing. In all of these cases involving interstate public nuisance where you have state attorney generals as plaintiffs, that simple test would basically doom all these lawsuits.

Finally, what's going to happen? Who knows what's going to happen at the Supreme Court level. But these are likely to be very ineffective and counterproductive. Remember, for a lot of environmental groups, the reason for bringing these interstate public nuisance cases is they thought they were going to force Congress to act. Well, Congress didn't act. There's not going to be any federal greenhouse gas cap and trade legislation at least for the next two years—most people I know in the environmental community would say for the next six years. So that didn't happen.

It just didn't work if that was the goal. What has happened? Well, we got this regulatory program under the Clean Air Act, which the Supreme Court in *Massachusetts v. EPA*, in one of Justice Stevens's final departing acts, decided that they had to do. So we have regulation. The EPA is proposing to regulate all big stationary sources of greenhouse gas emissions. The EPA has already done what? Regulating greenhouse gas tailpipe emissions from automobiles by promulgating new, tougher cap based standard. We've got a pretty comprehensive regulatory program; even though, in my opinion and the opinion of other people, I think there are aspects of the Clean Air Act Regulatory Program that are illegal.

But we have it. Given that, it doesn't seem like however you interpret the law of interstate public nuisance, there can be an argument that this is an area where the Supreme Court is compelled to articulate federal common law. So that's that.

HENRY N. BUTLER: Thank you, Jason. We're going to jump to Eric right now who I imagine has a little bit of response to this. Then we'll go with Rich Faulk who has got a professorial hat response, he says, here for a moment.

ERIC MAYER: I'll say a couple of things. Obviously, I have some disagreement. The thing I think that is something that we ought to stop and talk about is this: most of you are judges. There's a comment that several of the speakers have made that this is undemocratic. That I disagree with because the highest decision of the courts in this country is part of the democracy. When we have disputes in this society, we turn to judges to help resolve them. Now, he may not like what Justice Stevens wrote in a 5-4 majority opinion, but he should not lose sight of the fact that there are five U.S. Supreme Court justices that signed that opinion. That is democracy.

I think it's impugning the system to suggest that. That is why society today is so adversarial, because while I disagree, I may not like the fact they took the certiorari petition in the case that they did on Monday. But whatever decision comes out of that Court is democracy. It is democracy. The fact that Exxon may not like that the cost of creating greenhouse gases is going to be more spread about in this country because concepts of tort law say that somebody who is not responsible for the damage, who has a remedy under public nuisance law, can collect some of that, is democratic.

That's what this country was founded on. I do find it improper to suggest that any ruling by the Supreme Court is undemocratic. It may not make economic sense, and the speaker may feel that it's not justified under his view of economics, but it is the essence of democracy in this country. What separates this country from other countries is that somebody like Kivalina can use the Court system to address inequities that it perceives exist and do so within the framework of democracy. So, I do think it is an incorrect assumption to say that the evolution of tort law is undemocratic.

The cases that we cite are old. Some of them are more recent. But they are dealing with societal issues of how we balance the rights of one group of people versus another. That's what this is all about. Should the companies that generate greenhouse gases and their shareholders have the money without bearing any of the burdens? Should they be required to share some of the burdens? Is that fair? Now, economically, it may not be fair, and there are problems with assessing blame and holding people responsible and figuring out a rational form of damages. But I would submit to you that as judges, that is precisely why you are in the positions you are, because we as a society need that type of resolution.

HENRY N. BUTLER: Okay. Eric. Why don't you stay there. Jason, you want to respond to that?

JASON S. JOHNSTON: Just to clarify, I was not criticizing *Massachusetts v. EPA* as undemocratic or anti-democratic. That was a case in which the Supreme Court interpreted the Clean Air Act, which is clearly what the job of the Court is to do. I disagree with the decision. I think it's wrong, but I didn't mean to say it's anti-democratic. The conflict between outcomes in court and outcomes in Congress that I did call antidemocratic is between

the outcome and a lawsuit articulating federal common law where you have appointed, unelected, federal judges determining the outcome of global warming policy, and I compared that with the outcome that you would get in Congress.

There, it does seem to me it's fair to say that there's a conflict between democracy and the outcome of a democratic legislative body and what a federal court might come up with under the federal common law of interstate public nuisance. I think, when you look at—we don't have very many, as Mr. Mayer said of these interstate public nuisance cases—but when you look at some of the more recent ones, Justice Rehnquist's opinion in the second *Illinois v. Milwaukee*¹⁹ opinion, you see a very profound concern on his part with precisely the relationship between the courts and Congress and great, great, deference and great recognition to the fact that if Congress has authority to regulate in an area and has regulated, the Court really, really has to respect that and has told the regulatory agency that. So that's just to clarify.

ERIC MAYER: The last point is the China point because the China point was made by the EPA. The EPA said the same thing in *Massachusetts v. EPA*. They said, "Why should we regulate greenhouse gases? I mean, it's so insignificant. The U.S. has nothing." China is really the ones that are doing the pollution, and it comes up in the question of redressability because you can't have standing to pursue a claim if there's no redressing. In other words, if the Court acts, and it doesn't address your problem, then that's a standing issue. The Supreme Court said on this very issue, "While it may be true that regulating motor vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether the EPA has the duty to take the steps to slow or to reduce it."

Plaintiffs satisfy the redressability requirement when he shows that a favorable decision will relieve a discreet injury to himself. He need not show that a favorable decision will relieve his every injury. Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of the remedy might be delayed during a relatively short time it takes for the new motor vehicle fleet to replace an older one is irrelevant. Now, here's the part about China: nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century.

A reduction in domestic emissions would slow the pace of global emission increases no matter what else happens elsewhere. The point being that it's not sufficient to argue that it would be completely irrelevant, and we should do nothing because other countries are doing things that may end up resulting in more harm. The Supreme Court's point—and I admit; this was a case dealing with the EPA's refusal to regulate, not a public damages lawsuit. But the point I think the Supreme Court is making is that the fact

that it may only be a baby step or the fact that others maybe doing things—yes, that’s significant, but it’s not a reason for not acting.

I would submit to you that in the great mix of judicial decisions, that’s one aspect the judges will be weighing. But, it has to go to maybe apportionment of damages or how much you would be entitled to recover from the actor you did sue.

HENRY N. BUTLER: Thank you, Eric. We’re going to turn it over to Rich for a little bit, and then we’ll have time for a question or two.

RICHARD O. FAULK: When I got out of law school, I went to work for a court as a law clerk. I know a bunch of people have done that. In my youth, I was always eager for the court to decide every great issue that came before it. I used to get into arguments with the judges about, “Why don’t you reach out and decide this question. It’s right here in front of you.”

The Chief Justice—who had been a judge longer than I’ve been a lawyer now—used to look at me, and then he would say: “Rich, one of the things you learn when you sit on the bench is that you don’t decide anything that you don’t have to decide. You get into trouble when you start answering questions that you don’t have to decide, that aren’t truly presented to you—questions that you really don’t have to reach on the merits.” I suspect that all of you, one way or another, have had a little bit of that wisdom creep into your experience.

Now, why did I say that? Well, it dovetails into what I told the Supreme Court in the brief that we filed. This issue, in my view, is a question of jurisprudence. There’s “juris,” which is law, and “prudence,” which is what is the right and prudent thing to do.

So as a matter of jurisprudence, I believe we should recall a statement that Justice Cardozo wrote way back at the turn of the twentieth century.

He wrote that the common law moves in a “molar and molecular” fashion. What in the world is he talking about? Well, he’s saying that the common law chews on things for a while. It thinks about things for a while. It savors issues for a while before it really swallows them whole. The issue that we have here is just that. When we talk about “political” questions, or “standing” questions, we’re really asking, as a matter of prudence, whether courts should decide these issues. Should you weigh into this controversy? Even though courts are a part of our democratic institutions, is this something that a court should prudently do?

That’s the argument here. I think it’s really common judicial sense, if I can be so bold. I’ve learned that the greatest candor an advocate owes a judge is to honestly tell a judge when a case should be decided and when an issue should not be decided. The issue of climate change litigation requires that kind of candor.

So, I guess if I have to sum it up in a professorial sort of way, I still talk as an advocate, and I say you don't have to swallow it. You can chew on it for a while, but you don't have to swallow it.

HENRY N. BUTLER: Thank you. And Eric is going to close with a prediction for us.

ERIC MAYER: My prediction is that the Supreme Court will probably do an end to the public nuisance arena because the Obama Administration is now interested in having this area regulated. I think if you look at the cases, you'll see that if there's regulation, then the law seems to suggest there's no place for a public common law nuisance, but we'll see.

HENRY N. BUTLER: Well, please join me in thanking the panel.

¹ See *Am. Elec. Power Co. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 79 U.S.L.W. 3092 (U.S. Dec. 6, 2010) (No. 10-174).

² *Regulating Greenhouse Gases Under the Clean Air Act*, 73 Fed. Reg. 44354 (proposed July 30, 2008) (ANPR).

³ See *Native Village of Kivalina v. ExxonMobile Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

⁴ See *Missouri v. Illinois*, 180 U.S. 208 (1901); *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

⁵ See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

⁶ See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁷ RESTATEMENT (SECOND) OF TORTS §829(a) (1979).

⁸ See *Jost v. Dairyland Power Coop.*, 172 N.W.2d 647 (Wis. 1970).

⁹ See *Oklahoma v. Tyson Foods, Inc.*, 237 F.R.D. 679 (N.D. Okla. 2006).

¹⁰ See *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

¹¹ *Boim v. Holy Land Found. For Relief & Dev.*, 549 F.3d 685, 696-97 (2008).

¹² RESTATEMENT (THIRD) OF TORTS, *Liability for Physical and Emotional Harm*, §36 (2005).

¹³ Stuart Altschuler, *Government by 'Privateer' – Usurping Regulatory Power Through Mass Tort Litigation*, 42 FOR THE DEF. 9, Sept. 2000 at 37.

¹⁴ See *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (2010).

¹⁵ See *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

¹⁶ See *Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

¹⁷ See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

¹⁸ See *Missouri v. Illinois*, 200 U.S. 496 (1906).

¹⁹ See *Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981).

