

Case No. 07-60756

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Ned Comer, *et al.*,

Plaintiffs-Appellants

v.

Murphy Oil USA, *et al.*,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

**BRIEF FOR AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL  
DEFENSE FUND FILED IN SUPPORT OF DEFENDANTS-APPELLEES  
FOR AFFIRMANCE OF THE JUDGMENT BELOW**

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*Comer v. Murphy Oil, et al.*, No. 07-60756

The undersigned counsel for amicus Eagle Forum Education & Legal Defense Fund certifies that the following listed persons and entities as described in the fourth sentence of LAR 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: May 6, 2010

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**STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY  
TO FILE**

Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”) is a nonprofit organization founded in 1981. For nearly thirty years it has defended free enterprise, individual responsibility, and adherence to the U.S. Constitution and Rule of Law. Eagle Forum ELDF consistently opposes judicial activism that can disrupt our system of government and violate the substantive rights of citizens and successful businesses.

Eagle Forum ELDF thereby has a direct and vital interest in the issues presented before this Court.

Eagle Forum ELDF has been cited and quoted by prior decisions of U.S. Courts of Appeals. *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 169 n.11 (3<sup>rd</sup> Cir. 2005); *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001). In a prior *en banc* sitting in this Circuit, this Court sided with the position taken by an *amicus* brief filed by Eagle Forum ELDF in reversing the panel decision. *Veeck v. Southern Building Code Congress Int’l, Inc.*, 293 F.3d 791 (5<sup>th</sup> Cir. 2002).

Eagle Forum ELDF requested consent to file this brief, but did not receive consent from every one of the many parties in this action. Accordingly, a motion to file accompanies this brief. Now-Justice Samuel Alito, when he served on the Third

Circuit, held that *amicus* briefs should be widely allowed. *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3<sup>rd</sup> Cir. 2002).

### **BACKGROUND**

In an unprecedented lawsuit against energy, fossil fuel, and chemical companies, plaintiffs assert that the production of energy affects global temperatures, which in turn somehow exacerbated global warming, which then inflicted extra damage on property owned by plaintiffs:

Plaintiffs’ public and private nuisance claims assert that defendants intentionally and unreasonably used their property so as to produce massive amounts of greenhouse gasses and thereby injure both plaintiffs and the general public by contributing to global warming, which caused the sea level rise and added to the ferocity of Hurricane Katrina, the combined effects of which resulted in the destruction of plaintiffs’ private property, as well as their loss of use of certain public property in the vicinity of their dwellings.

*Comer v. Murphy Oil USA*, 585 F.3d 855, 860-61 (5<sup>th</sup> Cir. 2009), *vacated*, 2010 U.S. App. LEXIS 4253 (5th Cir. Feb. 26, 2010). Plaintiffs even allege far more.

But long before theories of man-made global warming, climatologists predicted that a hurricane would wipe out New Orleans, which is located precariously below sea level, and inevitably harm other property in the general area. On the same Gulf Coast the town of Galveston, Texas was decimated by a hurricane in 1900 that killed between 6,000 and 12,000 residents; another devastating hurricane hit it again 15 years later. These pre-global warming hurricanes were far more deadly than Hurricane Katrina.

Allegedly this time the harm was somehow caused by a collage of smokestacks, and billions of dollars should be paid for it. The panel decision reversed a dismissal of these claims by the trial court in Mississippi, and ordered that plaintiffs be allowed to continue to litigate their claims. The panel decision was rendered on October 16, 2009, after a remarkably cool summer<sup>1</sup> and before another harsh winter.<sup>2</sup> The panel decision was also rendered before the “Climategate” scandal that revealed manipulation of data used to support the far-fetched claims of man-made global warming, or “Mann”<sup>3</sup>-made global warming.

The University of Texas at Austin and George Mason University released the

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1 Deroy Murdock, “Global Cooling Chills Summer 2009,” NATIONAL REVIEW Online, July 13, 2009, <http://article.nationalreview.com/399773/global-cooling-chills-summer-2009/deroy-murdock?page=2>.

2 “How Extreme Was The Winter of 2009-2010?,” Accuweather.com, March 19, 2010, <http://www.accuweather.com/blogs/news/story/26257/how-extreme-was-the-winter-of-1.asp>; “Will Media Ignore Harsh Winter of 2008 to Preserve Global Warming Myth?,” Newsbusters.org, February 28, 2008, <http://newsbusters.org/blogs/noel-sheppard/2008/02/25/will-media-ignore-harsh-winter-2008-preserve-global-warming-myth>.

3 A 1998 climate study by geology professor Michael Mann, which showed a sharp increase in the world’s temperatures in the past century, “was seen by many as proof that climate change was rapidly occurring and that humans played a significant role in the change.” “Despite ongoing criticism, the study formed the backbone of global warming theories -- until leaked e-mails cast fresh doubt on Mann’s methodology and integrity, notably ‘the trick’ he used to make his data so compelling.” “State of Virginia to Investigate Global Warming Scientist Mann,” FoxNews.com, April 30, 2010, <http://www.foxnews.com/scitech/2010/04/30/virginia-attorney-general-global-warming-michael-mann/>.



results of a study on March 29, 2010, which “found that only about half of the 571 television weathercasters surveyed believed that global warming was occurring and fewer than a third believed that climate change was ‘caused mostly by human activities.’” Leslie Kaufman, “Among Weathercasters, Doubt on Warming,” NEW YORK TIMES, online March 29, 2010, in print, March 30, 2010, p. A1.<sup>4</sup> Indeed, record *low* temperatures have been recorded in many areas despite claims by some experts that the globe is dangerously warming due to energy production and use. Snow fell for the first time in mid-October in Pennsylvania, and the Corn Belt experienced its coldest July in 115 years. There has been an increase of 26% in the size of Arctic ice in a year’s time. The public recognizes what man-made global warming activists deny: by late last year only 36% of Americans now believe in global warming due to humans, down from 47% in 2008.<sup>5</sup>

Nevertheless, the propaganda for energy control continues, in a way reminiscent of the drumbeat for gun control. A father’s letter to the editor of the Education Reporter described what his 5th-grade daughter Lily, at Three Oaks Elementary, Fort Myers, Florida, said she had learned in school: “I would rather just

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4 <http://www.nytimes.com/2010/03/30/science/earth/30warming.html>

5 Stephen Power, “Survey Says: Americans Not Worried About Global Warming,” WSJ BlogsPolitics, Gather.com, <http://www.gather.com/viewArticle.action?articleId=281474977866878&grpId=3659174697241980>

shoot myself in the head because it would be a less painful death than to suffer and die from global warming.” Education Reporter, No. 288 (Jan. 2010).<sup>6</sup> Indeed, a couple in Argentina did exactly that: they killed themselves and one of their two children, and nearly killed the other due to a suicide pact motivated by exaggerated fears of global warming. “Baby Survives Parents’ Global Warming Suicide Pact,” TELEGRAPH, March 1, 2010.<sup>7</sup>

However, not every politician buys into or supports the theory of man-made global warming. At the close of a much-publicized international meeting of world leaders in Copenhagen, Czech Republic President Vaclav Klaus<sup>8</sup> declared the following:

I’m convinced that after years of studying the phenomenon, global warming is not a matter of temperature. Global warming is a new religion, a religion of climate change. ... This religion tells us that people are responsible for very small increases in temperatures, and they should be punished. ... I’m absolutely convinced that the very small global warming we are experiencing is the result of natural causes. It’s a cyclical phenomenon in the history of the Earth. The role of man is very small, almost negligible. Politicians, their fellow travelers, and the media understood that this is a good topic to take on, because

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<sup>6</sup> <http://www.eagleforum.org/educate/2010/jan10/editor.html>

<sup>7</sup> <http://www.telegraph.co.uk/news/worldnews/southamerica/argentina/7344329/Baby-survives-parents-global-warming-suicide-pact.html>

<sup>8</sup> Václav Klaus is the second President of the Czech Republic, is in his second term, and is a former Prime Minister of the Czech Republic. An economist, Czech President Klaus has published over 20 books on various social, political and economics subjects, as well as articles about economics and global warming. He holds nearly 50 honorary degrees and is the foreign member of the Serbian Academy of Sciences and Arts.

talking about the world in the years 2050, 2080, and 2200 is an excellent way to escape from current reality.

Gene J. Koprowski, "Czech President Klaus: Global Warming Not Science, But A 'New Religion,'" FoxNews.com, Dec. 18, 2009.<sup>9</sup>

Where energy is plentiful and cheap, the life expectancy of people is the longest, as in Japan, North America, and Western Europe. Where energy is scarce, the life expectancy is the shortest, as in South Asia and Africa. Most Americans evidently even *prefer* warmer weather, when plentiful energy is available for comfort, as demonstrated by millions who move to the South. Far from causing harm, energy companies enhance the quality of life and their activities have provided enormous net benefits, not costs, to everyone, including the plaintiffs in this action.

### **SUMMARY OF THE ARGUMENT**

As Arthur Robinson, Ph.D., a leading independent scientist, explained in a peer-reviewed journal:

There are no experimental data to support the hypothesis that increases in human hydrocarbon use or in atmospheric carbon dioxide and other greenhouse gases are causing or can be expected to cause unfavorable changes in global temperatures, weather, or landscape. There is no reason to limit human production of CO<sub>2</sub>, CH<sub>4</sub>, and other minor greenhouse gases as has been proposed.

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<sup>9</sup><http://www.foxnews.com/scitech/2009/12/18/czech-president-klaus-global-warming-science-new-religion/>.

Arthur B. Robinson, Noah E. Robinson, & Willie Soon, *Environmental Effects of Increased Atmospheric Carbon Dioxide*, 12 (3) J. Amer. Physicians & Surgeons, 79, 89 (Fall 2007).<sup>10</sup> In layman's terms, the data simply do not support the politically and legally motivated claims of man-made global warming.

Plaintiffs cannot state a justiciable claim. They must rely on expert testimony, but the testimony cannot meet *Daubert's* requirements for admissibility. Whether man-made global warming exists is itself controversial and disputed and continues to be the subject of much political debate. Even if global warming exists, the connection of global warming to Plaintiffs' damage from Hurricane Katrina is too tenuous and too removed from Defendants to warrant any finding of liability. To the contrary, Defendants' activities relating to providing energy for use is enormously beneficial to individuals and such benefits would far outweigh any damages.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

“[I]t is well settled that an appellate tribunal may affirm a trial court's judgment on any ground supported by the record.” *Lee v. Kemna*, 534 U.S. 362, 391 (2002) (citing *Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982)). This fundamental principle has been repeatedly affirmed by this Court. This Court may “affirm a grant

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<sup>10</sup> <http://www.jpands.org/vol12no3/robinson.pdf>

of summary judgment on any grounds supported by the record and presented to the [district] court.” *Hernandez v. Velasquez*, 522 F.3d 556, 560 (5th Cir. 2008). Similarly, this Court may affirm “a district court’s Rule 12(b)(6) dismissal on any grounds raised below and supported by the record.” *Cuvillier v. Sullivan*, 503 F.3d 397, 401 (2007) (citation omitted).

**II. Claims of Man-Made Global Warming Cannot Currently Be Verified by Expert Testimony Admissible under *Daubert* Because the Claims Are Not “Testable” or “Falsifiable”; Accordingly, This Lawsuit Should Be Dismissed**

This type of lawsuit cannot proceed unless there is expert testimony that is admissible under the standard set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and no such expert testimony is possible. A claim that some smokestacks or car exhaust caused or exacerbated Hurricane Katrina is simply not testable or falsifiable. Put another way, such claim could be utterly false and there is no way to show that it is false. The world could be in a warming or cooling phase for reasons entirely unrelated to the behavior of the defendants in this action, but there is no way to disprove an expert hired to say that smokestacks caused some global environmental phenomenon. It is impossible to verify the claims of man-made global warming by expert testimony admissible under the *Daubert* standard, and this lawsuit should be dismissed on these grounds.

The *Daubert* standard, inspired by work of the eminent Karl Popper, places

essential limits on the use of falsehoods that masquerade as science. This case at bar presents a classic example. The twin standards of “testability” and “falsifiability” provide the simplest and most effective basis for dismissing a lawsuit that has the potential for misusing science for financial reward.

**A. Claims of Man-Made Global Warming Lack Testability and Falsifiability, and Thus Cannot Be Proven by Expert Testimony under *Daubert***

One of the clearest descriptions of the essential *Daubert* limitations of testability and falsifiability was provided by the Third Circuit:

“Testability” has also been described as “falsifiability.” *See, e.g., Daubert*, 509 U.S. at 593 (citing Karl R. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989)). A proposition is “falsifiable” if it is “capable of being proved false; defeasible.” *Webster’s Third New International Dictionary* 820 (unabridged ed. 1966). Proving a statement false typically requires demonstrating a counterexample empirically--for instance, the hypothesis “all crows are black” is falsifiable (because an albino crow could be found tomorrow), but a clairvoyant’s statement that he receives messages from dead relatives is not (because there is no way for the departed to deny this).

*United States v. Mitchell*, 365 F.3d 215, 225 (3<sup>rd</sup> Cir. 2004).

Just as there is no way to falsify a claim that someone is receiving messages from dead relatives, there is no way to falsify a claim that smokestacks exacerbated Hurricane Katrina. No relevant laboratory experiment can be done; no relevant cosmological phenomena can be observed; and no sampling of hurricanes and smokestacks can be analyzed. The claim of causation may be utterly absurd, as the claim of messages from the dead is, and yet there is no way to prove such claim is false. Courts of law therefore exclude all such testimony under the *Daubert* standard.

Plaintiffs simply cannot provide any expert testimony to support their claim that a one-time event – Hurricane Katrina – was indirectly exacerbated by a collection of smokestacks somewhere. Undoubtedly plaintiffs could hire experts who would propound theories in the name of science to support such a far-fetched claim, but as with the claims of hearing messages from the dead, the standards of *Daubert* require their exclusion from admissibility. No expert testimony is possible that could earnestly satisfy the helpful criteria of *Daubert* for testability and falsifiability.

Under the Federal Rules of Evidence, the trial judge, acting as “gatekeeper,” “must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.” *Id.* Even the presence of *Daubert*’s general acceptance factor does not help show an expert’s testimony is reliable “where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999). A significant number of persons believe man-made global warming is an unreliable theory. *E.g.*, “Global Warming: Was It Ever A Crisis?,” The 2009 International Conference on Climate Change, sponsored by The Heartland Institute, March 8-10, 2009, New York City, NY (proceedings indicated that the majority of

scientists worldwide do not agree with human-induced global warming or even that the earth is still warming.)<sup>11</sup>

This Court has previously noted, “the law cannot wait for future scientific investigation and research.” *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 275, 279 (5<sup>th</sup> Cir. 1998) (finding “‘analytical gap’ between [the expert’s] causation opinion and the scientific knowledge and available data advanced to support that opinion . . . too wide.”) Rather, courts must resolve cases “on the basis of scientific knowledge that is currently available.” *Id.* For a scientific opinion to have evidentiary relevance and reliability, “[it] must be based on scientifically valid principles.” *Id.*

Plaintiffs have not and cannot make a showing of valid scientific principles supporting and linking global warming to the causation of Hurricane Katrina or the magnitude of Hurricane Katrina. The scientific knowledge is not there. *Daubert* does not countenance a sequence of law leading science. *Wells v. Smithkline Beecham Corp.*, slip op. at 15, 2010 U.S. App. Lexis 5894 (5<sup>th</sup> Cir. March 22, 2010), citing *Rosen v. Ciba-Geigy Corp.*, 78 F.3d. 316, 319 (7<sup>th</sup> Cir. 1996) (“Law lags science; it does not lead it.”).

**B. The Absence of any Credible Expert Testimony Requires Dismissal of the Claims**

Judge Davis, concurring separately with the panel decision of this Court in this

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<sup>11</sup> <http://www.heartland.org/events/NewYork09/index.html>



action, correctly noted that the decision below should have been affirmed for failure to state a claim:

The defendants argued an alternative basis for dismissal to the district court -- that the plaintiffs failed to state a claim under common law. Specifically, the defendants argued to the district court that the plaintiffs failed to allege facts that could establish that the defendant's actions were a proximate cause of the plaintiffs' alleged injuries. If it were up to me, I would affirm the district court on this alternative ground.

*Comer v. Murphy Oil*, 585 F.3d at 880 (5<sup>th</sup> Cir. 2009) (Davis, J., concurring).

This Court affirmed the holding by a district court in *Wells v. Smithkline Beecham Corp.*, slip op., 2010 U.S. App. LEXIS 5892 (5<sup>th</sup> Cir. March 22, 2010), dismissing a case where the court concluded that, even if the expert testimony were admitted, the opinions would not suffice to create a fact question about general causation because the experts' conclusions were not scientifically reliable. The plaintiff in *Wells* had complained that the defendant had failed to warn him that one of its drugs could make him to gamble away millions. The experts had based their general causation conclusion primarily on the scientific literature, which they claimed showed an association between the accused drug and problem gambling. However, the court found that the literature did not provide the necessary "scientific knowledge" upon which to base an opinion under *Daubert*. All but one of the studies was "anecdotal evidence," and each expert conceded that the studies were not statistically significant epidemiology but rather were case studies. This Court noted

that it has “frowned on causative conclusions bereft of statistically significant epidemiological support,” *Id.*, slip op at 9-10, citing *e.g.*, *Burleson v. Tex. Dep’t of Criminal Justice*, 393 F.3d 347, 352 (5<sup>th</sup> Cir. 2004); *Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 197 (5<sup>th</sup> Cir. 1996). This Court affirmed because the experts’ opinions were not scientifically reliable, and thus, with the expert testimony inadmissible, the “liability cupboard [was] bare.” *Wells*, slip op. at 1.

In *Moore v. Ashland Chem., Inc.*, 151 F.3d 269 (5<sup>th</sup> Cir. 1998), a toxic tort case, this Court, sitting *en banc*, affirmed a district court’s exclusion of an opinion of a physician on the causal relationship between the plaintiff’s exposure to industrial chemicals and his pulmonary illness. The physician had cited no scientific support for his theory and the theory met none of *Daubert*’s factors indicating it was based on sound scientific principles. The physician’s theory had not been tested; the theory had not been subjected to peer review or publication; the potential rate of error had not been determined or applied; and the theory had not been generally accepted in the scientific community. In sum, the physician could cite no scientific support for his conclusion that plaintiff’s exposure to any irritant at unknown levels triggered his asthmatic-type condition. This Court said, “Under the *Daubert* regime, trial courts are encouraged to exclude such speculative testimony as lacking any scientific validity.” *Id.* at 279.

The Supreme Court found no abuse of discretion by a district court in

excluding a plaintiff's expert testimony to establish his causation theory after finding the theory scientifically unreliable and inadmissible in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). The Court said the expert testimony had failed to show a link between the plaintiffs' exposure to PCBs and his small cell lung cancer beyond "subjective belief or unsupported speculation" and therefore the testimony was inadmissible. The Supreme Court emphasized that a district court, acting as a gatekeeper, must evaluate whether there is an adequate "fit" between the data and the opinion offered. *Id.* at 155.

Where expert testimony is necessary for a plaintiff to establish its case and such evidence is excluded or not available, then "allowing courts of appeals to direct the entry of judgment for defendants" is entirely appropriate. *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000). "Inadmissible evidence contributes nothing to a 'legally sufficient evidentiary basis,'" and "[i]t is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail." *Id.*, citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993).

The Supreme Court also found no abuse of discretion by a trial court in excluding expert testimony on the ground that the expert's methodology failed the Rule 702 reliability standard, and consequently granting summary judgment for the defendant, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In this product

liability case, the expert had concluded that a defect in an automobile tire had caused the tire to blow out. The court examined the expert's methodology in light of the reliability-related *Daubert* factors and found the factors argued against reliability of the expert's methods. The Supreme Court expressly approved the district court's acting as a *Daubert*-type reliability "gatekeeper." 526 U.S. at 143-145.

In a case where the plaintiffs had relied on a *res ipsa loquitur* theory of liability, the Seventh Circuit affirmed a district court's dismissal of the suit after excluding an expert's testimony for failing the *Daubert* factors and then finding that the plaintiffs could not prove their case without that expert testimony. The plaintiffs had complained of injury from an airbag improperly deploying when their automobile hit a pothole or chunk of concrete. Without the testimony of their expert, the plaintiffs were left essentially with a recall notice and an argument that a properly controlled airbag would not have deployed. *Smoot v. Mazda Motors of America, Inc.*, 469 F.3d 675 (7<sup>th</sup> Cir. 2006). The Seventh Circuit said that, "[a] case based on so little evidence gives rise to an inference that the plaintiffs searched no further because they were pessimistic that their case had any real merit." *Id.* at 682.

### **III. The Politicization of the Science of Global Warming Renders it Non-Justiciable**

The science of global warming has been so thoroughly politicized and corrupted that it is beyond repair at this time as a credible basis for a lawsuit in federal court. The United Nations-sponsored Intergovernmental Panel on Climate

Change (IPCC), which has played a key role in conclusions of man-made global warming that provide the basis for Plaintiff's action, was "a political rather than scientific entity" from "the very beginning," "with its leading scientists reflecting the positions of their governments or seeking to induce their governments to adopt the IPCC position." S. Fred Singer,<sup>12</sup> ed., *Nature, Not Human Activity, Rules the Climate: Summary for Policymakers of the Report of the Nongovernmental International Panel on Climate Change*, Chicago, IL: The Heartland Institute, iv (2008);<sup>13</sup> Indeed, "a small group of activists wrote the all-important Summary for Policymakers for each of the four IPCC reports." *Id.* at iv-v; also see, Craig Idso & S. Fred Singer, *Climate Change Reconsidered: The 2009 Report of the Nongovernmental International Panel on Climate Change*, Chicago, IL: The Heartland Institute (2009).<sup>14</sup> With respect to those four IPCC reports, Frederick Seitz, President Emeritus of Rockefeller University, Past President of the National Academy of Sciences and of the American Physical Society, and Chairman of the Science and Environmental Policy Project, said:

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12 S. Fred Singer is President of the Science and Environmental Policy Project, Professor Emeritus of Environmental Science at the University of Virginia, and a Fellow of the American Geophysical Union, the American Physical Society, the American Association for the Advancement of Science, and the American Institute of Aeronautics and Astronautics.

13 [http://www.sepp.org/publications/NIPCC\\_final.pdf](http://www.sepp.org/publications/NIPCC_final.pdf)

14 [www.nipccreport.org](http://www.nipccreport.org).

The IPCC is pre-programmed to produce reports to support the hypotheses of anthropogenic warming and the control of greenhouse gases, as envisioned in the Global Climate Treaty. The 1990 IPCC Summary completely ignored satellite data, since they showed no warming. The 1995 IPCC report was notorious for the significant alternations made to the text *after* it was approved by the scientists—in order to convey the impression of a human influence. The 2001 IPCC report claimed the twentieth century showed ‘unusual warming’ based on the now-discredited hockey-stick graph. The latest IPCC report, published in 2007, completely devaluates the climate contributions from changes in solar activity, which are likely to dominate any human influence.

S. Fred Singer, ed., *The Heartland Institute* at iii (Foreword by Frederick Seitz).

Such politicization and manipulation of the science renders it non-justiciable; only the political process with its broader public scrutiny can realistically tackle the formidable challenge of sorting fact from fiction. Even before the release of internal emails (apparently by a whistleblower) that demonstrated the manipulation of the science for political goals, John Coleman, the founder of the Weather Channel, called the claims about man-made global warming “the greatest scam in history.” John Coleman, “The Amazing Story Behind the Global Warming Scam,” [www.kusi.com/weather/colemanscorner/38574742.html](http://www.kusi.com/weather/colemanscorner/38574742.html) (Jan. 28, 2009, revised Feb. 4, 2009); [www.icecap.us/index.php/go/joes-blog/comments\\_about\\_global\\_warming](http://www.icecap.us/index.php/go/joes-blog/comments_about_global_warming) (Nov. 11, 2007). The pervasive corruption of the science renders this issue non-justiciable.

In the instance of nonjusticiability, “the Court’s inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its

breach judicially determined, and whether protection for the right asserted can be judicially molded.” *Baker v. Carr*, 369 U.S. 186, 198 (1962). These questions relating to global warming involve contingencies and uncertainties that cannot rightfully be resolved by the judiciary.

As the Supreme Court has noted, where matters have fundamental importance in politics rather than in law, the Court “should resist the temptation to unnecessarily resolve tangential legal disputes” where doing so threatens to determine the outcome of the matter. *Bush v. Gore*, 531 U.S. 98, 153 (2000).

**A. The Widely Publicized Internal Emails Reflect Manipulation of the Data for Political Goals**

In November 2009, there was an extraordinary release of private emails from the leading institution investigating alleged global warming – the Climate Research Unit (CRU) at the University of East Anglia (UEA) in the United Kingdom. House of Commons, Science and Technology Committee, UK Parliament, “The Disclosure of Climate Data from the Climatic Research Unit at the University of East Anglia,” Eighth Report of Session 2009-10, published March 31, 2010.<sup>15</sup> This became popularly known as “Climategate” due to the scandal of Watergate proportions that

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<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/387/387i.pdf>  
;<http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmselect/cmsctech/387/38703.htm>.

resulted from the revelations. The CRU had been failing to respond to inquiries from the public for disclosure of the data underlying its claims of global warming, and the disclosure of private emails at the facility demonstrated the improper motivations for withholding the data. A government report that was overly sympathetic to the CRU and its head, Professor Phil Jones, nevertheless concluded that:

The disclosed e-mails appear to show a culture of non-disclosure at CRU and instances where information may have been deleted, to avoid disclosure. We found *prima facie* evidence to suggest that the UEA found ways to support the culture at CRU of resisting disclosure of information to climate change sceptics.

*Id.* at 35.

Numerous incriminating emails were released demonstrating the politicization and distortion of the science for pre-ordained goals. Consider, for example, this email by Professor Phil Jones:

I've just completed Mike's Nature trick of adding in the real temps to each series for the last 20 years (ie from 1981 onwards) and [*sic*] from 1961 for Keith's to hide the decline.

*Id.* at 19. The motivation for the use of the "trick" has been explained:

The tree ring data did not match the model expectation (ie the 'hockey stick' pattern of a sudden rise at the end of the period). Rather than admit this, the team-workers discuss using Michael Mann's 'trick' of replacing the offending tree-ring data and using instrumental data in its place in a spliced graph.

*Id.* at 19.

The data from the National Aeronautics and Space Administration are even



worse than the Climategate data, as admitted by NASA itself. “NASA Data Worse Than Climategate Data, Space Agency Admits,” Fox News (March 30, 2010).<sup>16</sup> Without scientifically credible and reliable temperature readings, there is no way that a court of law could properly assess damages for global warming claims.

A first official probe into the scandal has also met with conflict. The person heading the probe has been said to have a financial interest in companies that would benefit from efforts to arrest man-made global warming, and thus himself to have a conflict of interests. This conflict further indicates the political quagmire of the global warming issue. See “Climate-Gate Gets a Whitewash,” INVESTORS BUSINESS DAILY, April 15, 2010.<sup>17</sup>

**B. Recent Cooling Trends Disprove – Or At Least Render Implausible – the Claims of a Global Warming *Crisis***

The average snowfall in Houston from 1934 until 2002 was 0.4 inches annually.<sup>18</sup> It snowed *twice* in Houston this past winter, which is akin to lightning striking in the

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16 <http://www.foxnews.com/scitech/2010/03/30/nasa-data-worse-than-climategate-data/>

17 <http://www.investors.com/NewsAndAnalysis/Article.aspx?id=530423>

18 Nat’l Climatic Data Center, U.S. Dept. of Commerce, Comparative Climate Data, Snowfall, Aug. 20, 2008, <http://lwf.ncdc.noaa.gov/oa/climate/online/ccd/snowfall.html>

same place twice.<sup>19</sup> The advocates of man-made global warming did not predict the cooling which was observed nationwide, and they cannot explain it in a manner consistent with their model. The cooling suggests this: there is no crisis of man-made global warming. See *id.*

Actual measurements of Earth's temperature and climate show no man-made warming trend. During four of the seven decades since 1940, when average CO<sub>2</sub> levels steadily increased, U.S. average temperatures were actually decreasing. Arthur B. Robinson, Noah E. Robinson, & Willie Soon, *Environmental Effects of Increased Atmospheric Carbon Dioxide*, 12 (3) *J. Amer. Physicians & Surgeons*, 79, 81 (Fall 2007).<sup>20</sup>

“Predictions of catastrophic global warming are based on computer climate modeling, a branch of science still in its infancy. . . . The computer climate models upon which ‘human-caused global warming’ is based have substantial uncertainties and are markedly unreliable. This is not surprising, since the climate is a coupled, non-linear dynamical system. It is very complex.” No empirical records verify any of the global warming computer models or their flawed predictions. *Id.* at 81, 85.

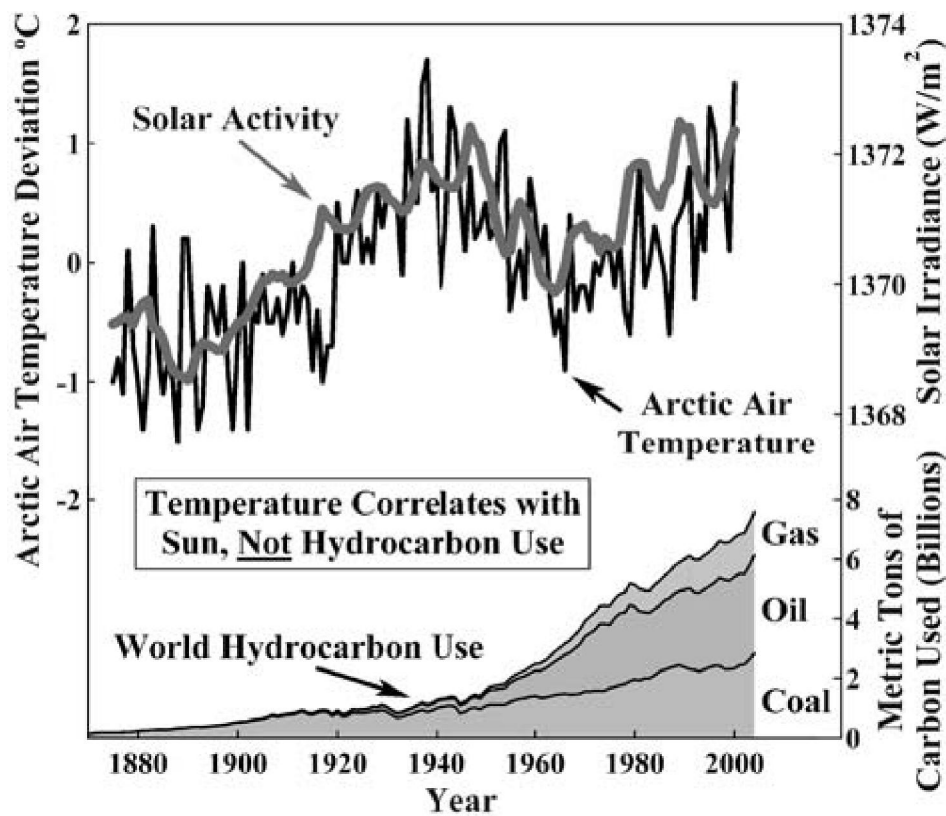
As the graph below shows, solar irradiance and Arctic surface air temperature

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<sup>19</sup> “Houston Wakes Up To Earliest Snowfall Ever,” MSNBC.com, Dec. 4, 2009, <http://www.msnbc.msn.com/id/34274883/ns/weather>

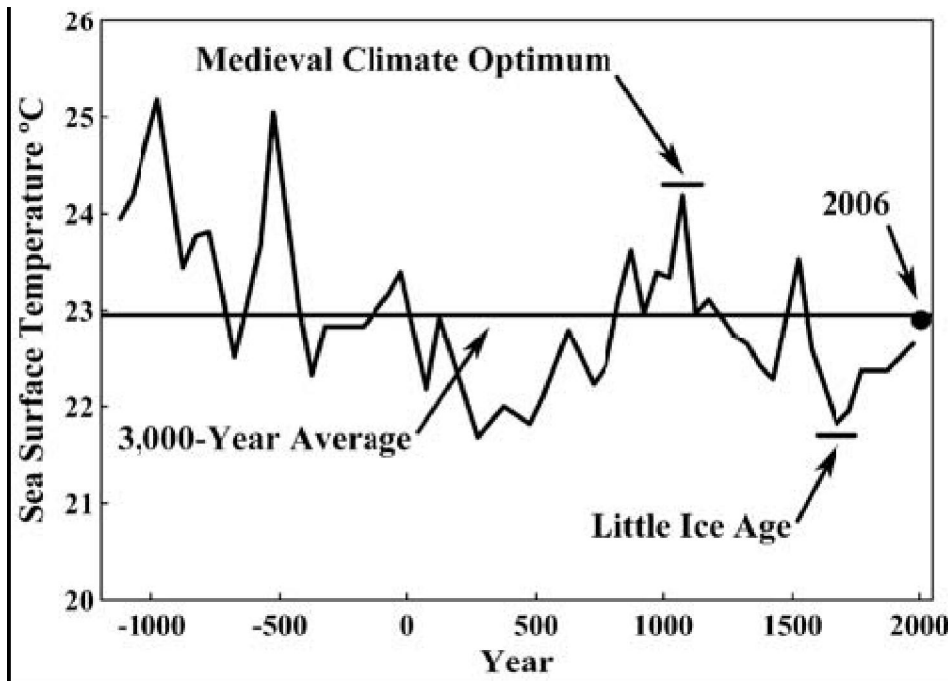
<sup>20</sup> <http://www.jpands.org/vol12no3/robinson.pdf>.

are closely correlated, whereas Arctic surface temperature and world hydrocarbon use are not correlated:



*Id.* at 80, 83. While correlation does not prove causality, non-correlation does prove non-causality. “The experimental data do not prove that solar activity is the only phenomenon responsible for substantial Earth temperature fluctuations, but they do show that human hydrocarbon use is not among those phenomena.” *Id.* at 83.

“The average temperature of the Earth has varied within a range of about 3°C during the past 3,000 years. It is currently increasing as the Earth recovers from a period that is known as the Little Ice Age,” as shown in the Figure below:

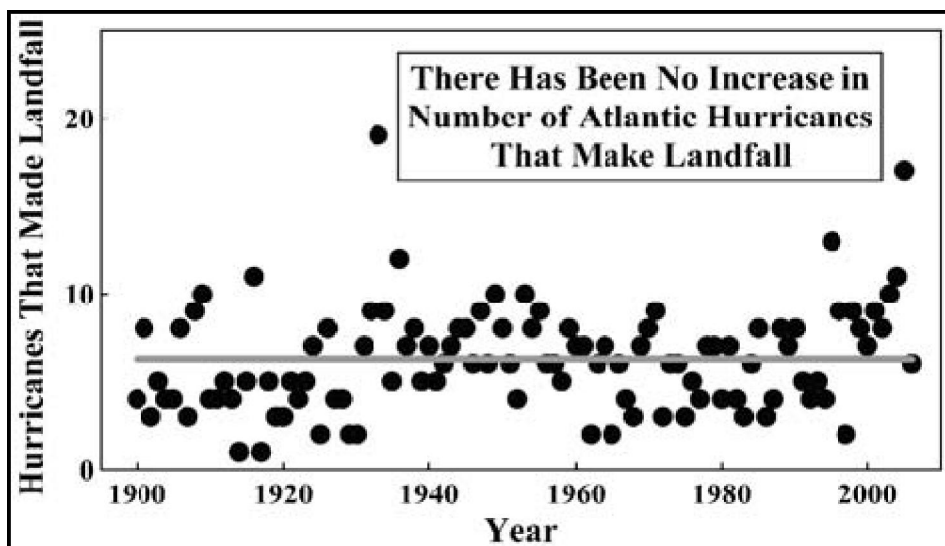


*Id.* at 79. “The historical record does not contain any report of ‘global warming’ catastrophes, even though temperatures have been higher than they are now during much of the last three millennia.” *Id.* at 82.

In 2005, after Hurricane Katrina struck the Gulf Coast, the National Oceanic and Atmospheric Administration reported that “NOAA research shows that the tropical multi-decadal signal is causing the increased Atlantic hurricane activity since 1995, and is not related to greenhouse warming.” Rather, NOAA attributed the increased hurricane activity to “natural occurring cycles in tropical climate patterns near the equator.” These cycles, NOAA explained, are called “the tropical multi-decadal signal.” They typically last several decades (20 to 30 years or even longer), and as a result, “the North Atlantic experiences alternating decades long (20 to 30 year periods or even longer) of above normal or below normal hurricane seasons.”

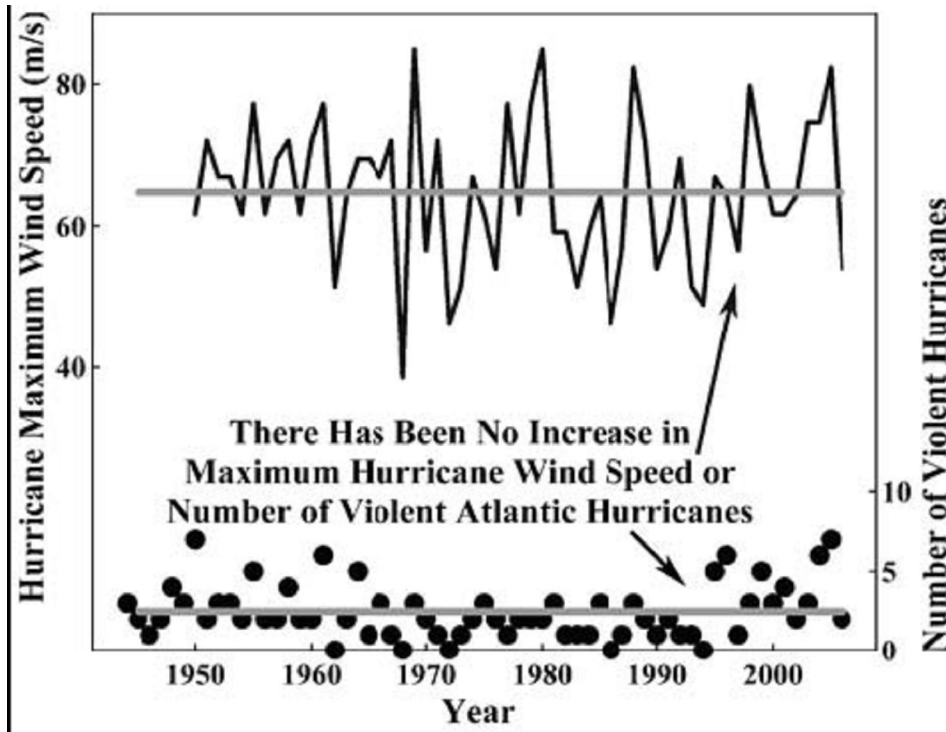
“NOAA Attributes Recent Increase in Hurricane Activity to Naturally Occurring Multi-Decadal Climate Variability,” NOAA Magazine Online, U.S. Dept. of Commerce (Nov. 29, 2005).<sup>21</sup>

When actual hurricane data over the last hundred years are considered, one can see there has been no increase in the number of Atlantic hurricanes that have made landfall, even though hydrocarbon use has increased 6-fold during this time.



Arthur B. Robinson, et al., 12 (3) J. Amer. Physicians & Surgeons at 80, 81, 85. Hurricane data for the last fifty years show that the number of violent hurricanes varies greatly from year to year and is overall no greater now than it was 50 years ago. Similarly, maximum wind speeds have not increased. *Id.* at 81, 85.

<sup>21</sup> <http://www.magazine.noaa.gov/stories/mag184.htm>.



*Id.* at 81.

**IV. Energy Production and Consumption Are Life-Enhancing, Causing Far More Good than Harm**

Energy production and consumption increase life expectancy and enhance the quality of life for all. Even if energy production somehow increases global warming and even exacerbated Hurricane Katrina, the benefits of energy production far exceed its detriment, both for society and for every individual. Energy production and consumption enhance every aspect of life-promoting and life-saving activities, from increasing physical comfort to facilitating the construction and operation of hospitals.

As Dr. Arthur Robinson explained:

As coal, oil, and natural gas are used to feed and lift from poverty vast numbers of people across the globe, more CO<sub>2</sub> will be released into the atmosphere.

This will help to maintain and improve the health, longevity, prosperity, and productivity of all people. The United States and other countries need to produce more energy, not less. The most practical, economical, and environmentally sound methods available are hydrocarbon and nuclear technologies.

Arthur B. Robinson, et al., 12 (3) J. Amer. Physicians & Surgeons at 79, 89.

The availability of cheap, plentiful energy is the greatest engine for a prosperous and improved quality of life. See Clinton A. Vince, Sherry A. Quirk & Stuart J. Rabin, *Integrated Resource Planning: The Case for Exporting Comprehensive Energy Planning to the Developing World*, 25 Case W. Res. J. Int'l L. 371 (Summer 1993).

Simply put, producing energy is a pro-life activity.

#### **A. Life Expectancy of a Society Is Increased by Increasing Energy Production and Consumption**

The Central Intelligence Agency (CIA) World Factbook publishes the life expectancy for individuals in virtually all the countries of the world, 224 in all.<sup>22</sup>

Among large nations, the nations with highest life expectancies are as follows:

1. Japan
2. Singapore
3. Australia
4. Canada
5. France

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<sup>22</sup> Central Intelligence Agency, The World Factbook, Country Comparison—Life Expectancy at Birth (2009), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2102rank.html>

6. Sweden
7. Switzerland
8. Israel

If deaths due to accidents and crime were screened out to reflect true life expectancy based on health, then the United States would be in this highest group also. James Joyner, "U.S. Life Expectancy: We're Number 1," *Outside the Beltway*, July 31, 2009.<sup>23</sup>

What these nations have in common is plentiful energy at a consumer level. Increasing individual energy consumption is the single best way for a society to increase life expectancy. World Resources Institute, *EarthTrends: The Environmental Information Portal* (2006).<sup>24</sup>

At the other end of the spectrum, the opposite is tragically true. The life expectancy in African and South Asian nations is as low as one would expect by looking at their energy consumption per capita. India, expected to become the largest nation by population later in the 21<sup>st</sup> century, ranks 161 out of 224 nations in life expectancy. Its energy consumption tracks that ranking: it consumes less than one third of the world average per capita in energy. *Id.*<sup>25</sup> Similarly low numbers of

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<sup>23</sup> [http://www.outsidethebeltway.com/archives/us\\_life\\_expectancy\\_were\\_number\\_1/](http://www.outsidethebeltway.com/archives/us_life_expectancy_were_number_1/)

<sup>24</sup> [http://earthtrends.wri.org/pdf\\_library/country\\_profiles/ene\\_cou\\_036.pdf](http://earthtrends.wri.org/pdf_library/country_profiles/ene_cou_036.pdf)

<sup>25</sup> [http://earthtrends.wri.org/pdf\\_library/country\\_profiles/ene\\_cou\\_356.pdf](http://earthtrends.wri.org/pdf_library/country_profiles/ene_cou_356.pdf)



energy consumption per capita exist for other nations having low life expectancy, such as Angola and Zambia. *Id.*<sup>26</sup>

In addition to the direct benefits of energy production and consumption in terms of enhancing living conditions, there are also the indirect benefits resultant from the wealth created. Houston is properly known as the “energy capital of the world,”<sup>27</sup> but it is also widely known for having many of the finest hospitals.<sup>28</sup> This is not a coincidence. For example, on March 28, 2010, oil tycoon Dan Duncan passed away, and his obituary described how he gave many hundreds of millions of dollars to Houston-area hospitals.<sup>29</sup> Hospitals are not built or improved by limiting energy production.

There are “beneficial ... environmental effects” of energy use. *Swinomish Tribal Community v. Federal Energy Regulatory Comm.*, 627 F.2d 499, 514 (D.C. 1980). Increasing life expectancy, perhaps the greatest possible benefit of all, is one

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<sup>26</sup> [http://earthtrends.wri.org/pdf\\_library/country\\_profiles/ene\\_cou\\_356.pdf](http://earthtrends.wri.org/pdf_library/country_profiles/ene_cou_356.pdf)  
<http://earthtrends.wri.org/text/energy-resources/country-profile-204.html>

<sup>27</sup> Greater Houston Partnership, Houston Energy Capital, (visited May 5, 2010) <http://www.energycapitalhouston.org/>

<sup>28</sup> Greater Houston Partnership, Accredited Economic Development Organization, (visited May 5, 2010), <http://www.houston.org/economic-development/ratings-rankings/index.aspx>

<sup>29</sup> “Obituary: Dan Duncan, 77, Oil Billionaire and Medical Benefactor, TexasInsider.org, March 31, 2010, <http://www.texasinsider.org/?p=24687>

of these benefits.

**B. Damages Caused by Energy Production are Inherently Indeterminable, and Benefits Almost Certainly Exceed Losses for Every Individual**

Energy use is extraordinarily beneficial to individuals, and even if it caused warmer temperatures, that would be beneficial also. Dr. Arthur Robinson has explained:

The Earth has been much warmer during the past 3,000 years without catastrophic effects. *Warmer weather extends growing seasons and generally improves the habitability of colder regions.*

...

Human use of coal, oil, and natural gas has not harmfully warmed the Earth, and the extrapolation of current trends shows that it will not do so in the foreseeable future. The CO<sub>2</sub> produced does, however, accelerate the growth rates of plants and also permits plants to grow in drier regions. *Animal life, which depends upon plants, also flourishes, and the diversity of plant and animal life is increased.*

Human activities are producing part of the rise in CO<sub>2</sub> in the atmosphere. Mankind is moving the carbon in coal, oil, and natural gas from below ground to the atmosphere, where it is available for conversion into living things. *We are living in an increasingly lush environment of plants and animals as a result of this CO<sub>2</sub> increase. Our children will therefore enjoy an Earth with far more plant and animal life than that with which we now are blessed.*

Arthur B. Robinson, et al., 12 (3) J. Amer. Physicians & Surgeons at 79, 89.

(emphasis added).

Any damages caused to plaintiffs by defendants' energy production *must be offset* by the benefits that plaintiffs have received from the energy production and

use. All of the plaintiffs in this action have received enormous benefits from energy production and use; indeed, all American residents have. The net benefit (or loss) is inherently indeterminable, and thus nothing can be awarded. Plaintiffs' action should be dismissed and they should take nothing. *See, e.g., Beveridge v. Crawford Cotton Mills*, 262 F. 381, 383 (5<sup>th</sup> Cir. 1920) (affirming the dismissal of a complaint because the damages were "too vague and indefinite").

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the decision below and this action should be dismissed with plaintiffs taking nothing.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2010, I electronically filed the foregoing Brief of Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all parties in the case are believed to be represented by counsel who are registered CM/ECF users and that service will be accomplished by the CM/ECF system. However, the following counsel for parties have indicated they prefer service via US Mail and thus these were served with a copy of the foregoing Brief by first class mail on May 7, 2010.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,403 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

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