EMERGING AS HEROES AFTER THE DEVASTATION OF NATURAL DISASTER: CAN WOMEN AND CHILDREN UTILIZE PUBLIC NUISANCE CLAIMS TO CATALYZE REGULATION OF GREENHOUSE GAS EMISSIONS BY U.S. CORPORATIONS?

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The United States government continues to abdicate its role in regulation of greenhouse gas emissions despite scientific and societal consensus that climate change is an imperative issue.[1] For example, John P. Holdren, a Harvard University climate change expert, stresses the "need for a massive effort to slow the pace of global climatic disruption before intolerable consequences become inevitable."[2] The consequences of climate change—including, but not limited to "more widespread outbreaks of infectio[us] [disease],"[3] "greater risk of flooding in coastal communities,"[4] and "more powerful and dangerous hurricanes"[5]—are increasingly publicized by the mainstream media and therefore are a cause for widespread, escalating public concern. The 2006 Stern Review Report on the Economics of Climate Change emphasized that "[i]f [greenhouse gas] emissions continue unabated, the world will experience a radical transformation of its climate," creating "profound implications . . . for our way of life."[6]

In an effort to advocate for protection of "our way of life," this Note discusses the public nuisance doctrine as a supplement to, rather than a replacement for, legislatively imposed regulation of greenhouse gases. This Note explores

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[1] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 505 (2007) (seminal climate change case arguing for federal regulation of greenhouse gases due to the detrimental societal effect of global warming).

[2] *See* Elisabeth Rosenthal & Andrew C. Revkin, *Panel Issues Bleak Report on Climate Change*, N.Y. TIMES, Feb. 2, 2007, *available at* http://www.nytimes.com/2007/02/02/science/earth/02cnd-climate.html?_r=1&oref=slogin (quoting John P. Holdren, "energy and climate expert at Harvard University").

[3] Natural Resources Defense Council, *The Consequences of Global Warming on Health*, http://www.nrdc.org/globalWarming/fcons/fcons2.asp (last visited Aug. 3, 2009).

[4] Natural Resources Defense Council, *The Consequences of Global Warming on Glaciers and Sea Levels*, http://www.nrdc.org/globalWarming/fcons/fcons4.asp (last visited Aug. 3, 2009).

[5] Natural Resources Defense Council, *The Consequences of Global Warming on Weather Patterns*, http://www.nrdc.org/globalWarming/fcons/fcons1.asp (last visited Aug. 3, 2009).

[6] NICHOLAS STERN, CABINET OFFICE-HM TREASURY, STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE 17 (2006), *available at* http://www.hm-treasury.gov.uk/d/Chapter_1_The_Science_of_Climate_Change.pdf.

whether the common law public nuisance doctrine provides a legal framework in which women and children natural disaster victims can advocate for regulation of greenhouse gas emissions by U.S. corporations. These women and children experience unique harm in the aftermath of natural disaster, and suffer, for example, from increased risk of domestic violence[7] and decreased attention to female health requirements.[8] This Note therefore argues that women and children disaster victims are potential public nuisance plaintiffs because they experience harm different in type and extent from the harm that climate change inflicts upon the majority of humanity.

However, legal scholars stress that legislative regulation of greenhouse gases on an international scale, instead of piecemeal judicial relief like public nuisance cases, continues to provide the most effective solution to the climate change crisis.[9] Professor Eric A. Posner of the University of Chicago Law School emphasizes the continuing need for the political system—rather than the judicial process—to provide the foundation for progression of greenhouse gas regulation: "[w]hatever the merits of policy-driven litigation . . . the assumption that it can drive global greenhouse gas policy . . . in the right direction, is doubtful."[10]

The arguments contained within this Note are therefore advanced with respect for the more effective, though currently underutilized, option of regulating greenhouse gas emissions via domestic and international legislative and policy decisions. Current U.S. regulation of greenhouse gases does not often create preemption issues for climate change litigation plaintiffs.[11] However, if the U.S. federal government decides to proactively promulgate climate change regulations, preemption could bar many climate change public nuisance claims.[12] For example, Congress has enacted a "uniform, nationwide solution"[13] in regards to new automobile emission standards, generally preempting state and local governments from enacting different solutions.[14] If the federal government adopted such a comprehensive greenhouse gas regulation scheme, preemption may bar the claims

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[7] *See* LIN CHEW & KAVITA N. RAMDAS, CAUGHT IN THE STORM: THE IMPACT OF NATURAL DISASTERS ON WOMEN 2 (2005), *available at* http://www.globalfundforwomen.org/cms/images/stories/downloads/disaster-report.pdf (citing Women Health & Development Program, Pan American Health Organization, *Gender and Natural Disasters*, www.paho.org/genderandhealth/).

[8] *Id.*

[9] Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 704 (2008).

[10] *See* Eric A. Posner, Commentary, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925, 1944-45 (2007).

[11] Hsu, *supra* note 9, at 756 ("[o]f all the climate change lawsuits thus far, . . . none have been tossed out on preemption grounds, suggesting that the current Clean Air Act is not a threat . . . .").

[12] Washington v. Gen. Motors Corp., 406 U.S. 109, 114-15 (1972) (discussing the preemptive interplay of public nuisance claims and congressional regulation).

[13] *Id.* at 114.

[14] *Id.*

of climate change public nuisance plaintiffs against entities in compliance with relevant federal regulations.

This Note does not discuss at length the existence of scientific consensus regarding climate change, due to the Supreme Court's relatively recent recognition of the phenomenon of global warming.[15] Similarly, this Note does not seek to prove the connection between climate change and any specific instance of natural disaster, though the Note's validity rests on the now firmly established general connection between global warming and increasing frequency and severity of natural disasters.[16] Instead, this Note explores whether—in light of the now established connection between climate change and natural disaster[17] and the disproportionate impact of natural disaster on women and children[18]—American women and children can successfully utilize the public nuisance doctrine to bring lawsuits against domestic corporations for lack of greenhouse gas regulation.

Part I of this Note presents the legal arguments necessary to fit the grievances of women and children harmed by natural disaster into the framework of a climate change public nuisance claim. Part II then assumes the existence of a successful public nuisance claim by women and children disaster victims and explores other jurisprudential limitations upon providing these women and children with a successful day in court.

I. INTRODUCTION: FITTING GLOBAL WARMING GRIEVANCES INTO THE FRAMEWORK OF A NUISANCE LAWSUIT

A public nuisance is defined as "an unreasonable interference with a right common to the general public, including public health and safety."[19] Public nuisance suits most commonly arise between a governmental body as plaintiff and an individual, corporation, or other entity causing the alleged harm.[20] Private parties can, however, act as plaintiffs in a public nuisance case when the private party or parties have experienced a "special injury," which is defined as an injury different in kind and extent from an injury experienced by the general public.[21]

Private nuisance suits, in contrast, "may only remedy the effects of pollution suffered by a single plaintiff, or a small handful of plaintiffs."[22] A private nuisance

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[15] *See* Massachusetts v. EPA, 549 U.S. 497, 505 (2007).

[16] *See* Intergovernmental Panel on Climate Change, *Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 7, 16 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf.

[17] *See id.*

[18] *See, e.g.*, World Health Organization Regional Office for Southeast Asia, Gender, Women and Health: Gender and Disaster (Jan. 27, 2009), http://www.searo.who.int/en/Section13/Section390_8282.htm.

[19] Daniel A. Farber et al., CASES AND MATERIALS ON ENVIRONMENTAL LAW 524 (7th ed. 2006).

[20] *Id.* at 523-24.

[21] *Id.* at 524.

[22] *Id.* at 518.

cause of action stems from "invasion of another's interest in the private use and enjoyment of land."[23] This Note focuses on the possible success of a public nuisance claim against large domestic greenhouse gas emitters. While women and children displaced by natural disasters certainly may have private nuisance claims due to interference with use and enjoyment of their homes and property, this Note will explore climate change-related public nuisance claims, since such claims might provide a remedy for a large group of plaintiffs.

Pooling individual claims into a larger public nuisance suit assists individuals that lack the time or economic resources to hire a lawyer—an especially poignant concern for individuals in the chaotic aftermath of natural disaster—and conserves judicial resources by preventing the courts from hearing multiple private nuisance claims involving the same legal arguments. The individual claims of the women and children natural disaster victims can be funneled into one public nuisance suit because, as explained in subsection A *infra*, all of the victims can claim harm to health and safety. Health and safety, as a right common to the general public, is therefore appropriate subject matter for public nuisance litigation.[24]

The Restatement of Torts requires that courts hearing public or private nuisance complaints balance the gravity of the harm experienced by the plaintiff or plaintiffs against the "utility of the actor's conduct."[25] The Restatement further provides several factors to incorporate into "measuring" the gravity of the harm experienced by the plaintiff or plaintiffs:

> (a) [t]he extent of the harm involved;
> (b) [t]he character of the harm involved;
> (c) [t]he social value that the law attaches to the type of use or enjoyment invaded;
> (d) [t]he suitability of the particular use or enjoyment invaded to the character of the locality; and
> (e) [t]he burden on the person harmed of avoiding the harm.[26]
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> Similarly, the Restatement lists several factors to consider when determining utility of the actor's conduct:
> (a) [t]he social value that the law attaches to the primary purpose of the conduct;
> (b) [t]he suitability of the conduct to the character of the locality; and
> (c) [t]he impracticability of preventing or avoiding the invasion.[27]

The following section of this Note argues that women and children harmed by natural disaster can successfully establish the requisite "special injury" threshold of a public nuisance claim against large U.S. electricity generators. Domestic

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[23] Restatement (Second) of Torts § 821(d) (1982).
[24] *See* Farber, *supra* note 19, at 523.
[25] Restatement of Torts § 826 (1939).
[26] *Id.* at § 827.
[27] *Id.* at § 828.

energy producers are common defendants to both actual[28] and hypothetical[29] climate change litigation because these entities produce such a great portion of U.S. carbon dioxide emissions.[30] This Note imagines as defendants the same type of large electric utilities—American Electric Power, Southern Company, Tennessee Valley Authority, Xcel Energy, and Cinergy Corporation—that were defendants to the climate change case *Connecticut v. American Electric Power.*[31] At the time of the *Connecticut* case, the defendants were the five largest domestic carbon dioxide emitters and were responsible for a quarter of all carbon dioxide emissions from the U.S. electric power industry.[32] The conclusion of this section explores the likely outcome of judicial application of the aforementioned balancing test to the public nuisance claim of a group of women and children harmed by a natural disaster.

A. Because of socioeconomic disadvantages, U.S. women and children meet the public nuisance requirement of special injury from climate change-induced natural disasters.

A multiplicity of socioeconomic factors contributes to the disproportionate impact of natural disasters on women and children. The evidence put forth *infra* shows that women and children are impacted by climate change—specifically, the natural disasters that are now a proven effect of climate change—in a manner that differs in both kind and extent from the impact of climate change on the general public.

Shi-Ling Hsu, in a 2008 University of Colorado Law Review article, envisioned a public nuisance lawsuit between the Inuit people and large U.S. power companies, and determined that the Inuit people are experiencing climate change-related injury sufficient enough to meet the special injury requirement of a public nuisance case.[33] The Arctic region Inuit primarily live in villages located on permafrost, and rising temperatures "have already caused some Inuit villages to begin sinking into the ground . . . so that entire Inuit villages will have to be moved within the next decade."[34] In addition, the lifestyle of the Arctic Inuit people is "highly dependent upon . . . species which will either migrate or risk extinction"[35] as the result of climate change.

Subsection 1 *infra* details the evidence that climate change-induced natural disaster endangers the health, safety, and lifestyle of American women and

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[28] *See, e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (2005).
[29] *See, e.g.*, Hsu, *supra* note 9, at 704.
[30] Connecticut, 406 F. Supp. 2d at 268.
[31] *Id.* at 267.
[32] *See id.* at 268.
[33] *See* Hsu, *supra* note 9, at 734.
[34] *Id.* at 721-22.
[35] *Id.* at 722.

children. Such women and children feel the effects of climate change in a manner that is different in kind and extent from the injury imposed upon the general public by climate change. Especially because courts have recently "liberalized [the special injury] test,"[36] a court would likely find, after analysis of the following evidence, that women and children show special injury as the result of climate change-related natural disasters. This Note extrapolates from Hsu's finding that the Arctic Inuit peoples experience a special injury from climate change, and further argues that the harms inflicted upon U.S. women and children after a natural disaster differ from the harms to the general public "in degree and kind, and provide precisely the kind of distinction that courts would look for in . . . standing to bring a suit for public nuisance."[37]

1. General Socioeconomic Impacts of Natural Disaster on Women and Children

A 2005 World Health Organization report recognized and statistically detailed the disproportionate impact of natural disasters on women and children, finding that women and children constitute over seventy-five percent of individuals displaced by disasters.[38] A major difference between women and men, especially in impoverished communities, arises from the varying capacity of these two groups to recover economically after a disaster. Women and children do not have the same ability as men to relocate after the devastation of a natural disaster.[39] "Men can trek and go looking for greener pastures in urban areas, in other countries, but for women, they are usually left on site to face the consequences," states Wangari Maathai, 2004 Nobel Peace Prize recipient.[40]

As explained in a 2005 publication by the nonprofit Global Fund for Women, "[d]ue to their caretaking responsibilities, [women] are not free to relocate in search of work."[41] Female employment rates are disproportionately impacted by natural disasters, since "[w]omen are especially likely to work in agricultural industry or the informal economy, both of which tend to be heavily impacted by natural disasters. Due to this fact and their lower educational and literacy levels, they are overrepresented among those who end up unemployed."[42] In sum, women, when lacking the same economic and cultural resources as men, are stymied in their ability to physically relocate, and therefore are systematically disadvantaged in the aftermath of natural disasters. As discussed in Subsection 2 *infra*, in nations with

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36 *See* Farber, *supra* note 19, at 524.

37 Hsu, *supra* note 9, at 734.

38 *See* World Health Organization Regional Office for Southeast Asia , *supra* note 18.

39 *See* Rosanne Skirble, Nobel Laureates Say Global Warming Disproportionately Affects Women, VOICE OF AMERICA NEWS (May 20, 2008), http://www.voanews.com/english/archive/2008-05/2008-05-20-voa24.cfm?CFID=38847878&CFTOKEN=11689414.

40 *Id.*

41 CHEW & RAMDAS, *supra* note 7, at 3.

42 *Id.*

comparatively low gender inequality, the disproportionate impact of natural disaster on women and children is likely to be less pronounced.[43]

Relocation ability is only one of many factors that create an unequal effect of natural disasters on women and children. Health care, for example, becomes a great liability for women and children in the aftermath of a disaster.[44] Pregnant women often lose access to prenatal care, and supplies of birth control and female sanitary products quickly dwindle.[45] Relief aid frequently fails to include health supplies for women, and supply allotment often discounts or ignores the unique amount and type of supplies needed by a mother with a child or children.[46]

The breakdown of government structure and legal assistance after a natural disaster also has a biased impact on violence toward women.[47] The government, while responding to the mass chaos that follows a natural disaster, is limited in its ability to respond to domestic violence, rape, and other instances of violence against women.[48] For example, "38 cases of rape [were documented] in the aftermath of Hurricanes Katrina and Rita."[49]

2. Consideration of Gender Equality in Analyzing the Effects of Natural Disaster on American Women and Children

A study published in 2007 by the Association of American Geographers shows that women are impacted more proportionately by natural disasters in nations with fewer "existing patterns of discrimination."[50] A 2008 London School of Economics and Political Science article states that: "the most important reason why women are more vulnerable to the fatal impact of natural disasters is because of their lower social and economic status in many countries."[51] Therefore, it becomes necessary to question whether American women and children can demonstrate the gender-biased impact of a natural disaster in the same way as women and children in nations with more embedded notions of gender inequality. Establishing the special injury aspect of a public nuisance claim requires

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[43] *See* Press & Info. Office, The London School of Economics & Political Science, *More Women Die than Men as a Result of Natural Disasters*, Sept. 1, 2006, http://www.lse.ac.uk/collections/pressAndInformationOffice/newsAndEvents/archives/2006/WomenAndNaturalDisasters.htm.

[44] CHEW & RAMDAS, *supra* note 7, at 2.

[45] *See id.*

[46] *See id.* at 3.

[47] *See id.* at 2.

[48] *See id.*

[49] *Id.*

[50] *See* Eric Neumayer & Thomas Plümper, *The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981-2002*, 97 ANNALS ASS'N AM. GEOGRAPHERS 551 (2007), *available at* http://www.lse.ac.uk/collections/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Disastersarticle.pdf#search=%22The%20Gendered%20Nature%20of%20Natural%20Disasters%22.

[51] *Id.*

demonstration of a disproportionate impact of natural disasters on women and children.

The aftermath of Hurricane Katrina did inflict a disparate disadvantage upon U.S. women and children to the extent that these two demographic groups experienced a special injury. The Global Fund for Women, due to "human rights abuses" occurring after Hurricane Katrina, "provid[ed] . . . support to women of color and low-income women in the Gulf Coast region . . . ."[52] Merni Carter of the Louisiana Coalition Against Domestic Violence, for example, "received reports that women and children [were] being battered by their partners in the emergency shelters."[53] The income of Louisianan women was statistically disproportionately impacted by Hurricane Katrina: "[m]en's median annual income has risen after [Hurricane Katrina], in part due to the rise in heavy-labor jobs like demolition and construction. Women, who were more likely to work in the health care, education, and hospitality sectors, saw their median income decline."[54]

Whether the concern is violence, poverty, health care, or otherwise, it cannot be denied that American women and children, especially low-income women and children, are unequally burdened by disasters, and experience the same "special injury" experienced by disadvantaged groups of women and children around the world after a natural disaster. Evidence gathered in the aftermath of Hurricane Katrina proves that courts cannot assume that the relative affluence or gender equality enjoyed by many Americans equalizes the impact of U.S. natural disasters across all demographic groups across the nation.

B. Application of the Private Harm/Societal Benefit Balancing Test to Women and Children with Climate Change Public Nuisance Claims

A test that balances private harm against societal benefit can often be detrimental to plaintiffs, even those with valid nuisance claims. Especially when considering harm to an individual plaintiff, "the harm suffered by [the plaintiff] will likely seem small in comparison to the social utility of an industrial concern . . . which produces a valuable product, [and] employs hundreds of workers . . . ."[55] In the seminal nuisance case of *Boomer v. Atlantic Cement Co.*, the neighbor of a cement plant sought to close the plant due to "dirt, smoke, and vibration emanating from the plant."[56] The court would not close the plant, considering that the damage claimed by the plaintiff was "relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs

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[52] CHEW & RAMDAS, *supra* note 7, at 5.

[53] *Id.* at 2.

[54] *See* ROBERT R.M. VERCHICK, RISK, FAIRNESS, AND THE GEOGRAPHY OF DISASTER 27-28 (Tomer Broud ed., 2007), *available at* http://ssrn.com/abstract=959247.

[55] FARBER, *supra* note 19, at 518.

[56] Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 222 (1970).

seek."[57] Instead, the court ruled that the cement plant had to pay plaintiffs damages to compensate "for total economic loss to property present and future caused by defendant's operations."[58]

A claim certainly exists that the generation of power is of great societal value. A May 2007 Bureau of Labor Statistics document reported that close to 400,000 Americans were employed in the industry of "Electric Power Generation, Transmission, and Distribution."[59] Perhaps more significantly, the indeterminate and great benefit that Americans obtain from consumption of fossil fuel-generated power cannot be ignored. Even so, it is entirely plausible that a court would determine that a balance of social utility against private harm would fall in favor of the women and children whose lifestyles were entirely disrupted by natural disaster. The evidence discussed *supra*—showing the special injury that women and children experience after natural disasters—would be relevant during a court's measurement of these plaintiffs' harms. The remainder of this section analyzes the Restatement public nuisance balancing test and argues that the complete lifestyle endangerment experienced by women and children after a natural disaster should outweigh the economic harm that greenhouse gas emission reduction requirements would cause for domestic energy companies.

1. Plaintiff Harm

Recall that the Restatement lists the following factors to incorporate into consideration of a plaintiff's harm:

> (a) [t]he extent of the harm involved;
> (b) [t]he character of the harm involved;
> (c) [t]he social value that the law attaches to the type of use or enjoyment invaded;
> (d) [t]he suitability of the particular use or enjoyment invaded to the character
> of the locality; and
> (e) [t]he burden on the person harmed of avoiding the harm.

The disproportionate harm that women and children experience after natural disasters goes far beyond the "dirt, smoke, and vibration" that formed the basis of the complaint in *Boomer*.[60] The female and child plaintiffs in a lawsuit against large U.S. utility companies could validly claim a total loss of lifestyle as the harm

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[57] *Id.* at 223.

[58] *Id.* at 225.

[59] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MAY 2007 NATIONAL INDUSTRY-SPECIFIC OCCUPATION EMPLOYMENT AND WAGE ESTIMATES NAICS 221100 – ELECTRIC POWER GENERATION, TRANSMISSION AND DISTRIBUTION (2008), *available at* http://www.bls.gov/oes/current/naics4_22100.htm#b00-0000.

[60] *Boomer*, 26 N.Y.2d at 222.

experienced from natural disaster. The Arctic Inuit plaintiffs in Shi-Ling Hsu's aforementioned hypothetical lawsuit might even have less of a chance of prevailing in a harms/benefit balancing test because part of the Inuit's claim was based on a "cultural or traditional lifestyle" argument.[61] Attaching a monetary amount to a cultural harm is speculative in practice, as it makes cultural damages a concept that a court may feel uncomfortable with.[62]

In contrast, the women and children harmed by natural disaster are not arguing for the right to continue a certain cultural practice that is threatened by rising temperatures. Instead, these disaster victims are fighting for fundamental rights like access to employment, health care, and housing. Not only would it be a burden for plaintiffs to avoid the harm caused by natural disasters, but also as discussed earlier, women and children—due to social and economic constraints—may simply be unable to exercise the option of moving away from the harm. In addition, many of the harms experienced by women and children natural disaster victims, such as loss of salary and loss of a home, can be attached to a certain monetary value.

The Restatement factors are not binding on courts but rather provide guidance for courts determining whether a plaintiff's claim is "worthy" of causing the undoing of a defendant's publicly beneficial conduct.[63] A court would not, therefore, have to take as determinative the harm inflicted upon women and children by natural disasters. As Shi-Ling Hsu wrote: "I would go so far as to say that the [Restatement] factors tilt in favor of a finding of liability [on the part of large U.S. electric companies]. However, I question whether at this juncture courts are truly willing to go there."[64] In a similar manner, one can only guess whether a court would find that the harms inflicted upon the women and children natural disaster victims justify public nuisance liability of large U.S. electric companies.

2. Defendant Benefit

In a public nuisance suit between natural disaster victims and U.S. electricity generators, the harm inflicted upon women and children by a natural disaster would need to be balanced against the social utility of the service provided by large domestic power companies—namely, energy generation. The Restatement, encourages courts to incorporate the following factors into its analysis of the defendant's conduct:

(a) [t]he social value that the law attaches to the primary purpose of the

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[61] *See* Hsu, *supra* note 9, at 737-38 ("for the Inuit this is not recreational fishing and hunting, but an integral part of their culture . . . .").

[62] *Id.* at 745-46.

[63] *Id.* at 736.

[64] *Id.* at 742.

conduct;
(b) [t]he suitability of the conduct to the character of the locality; and
(c) [t]he impracticability of preventing or avoiding the invasion.[65]

As previously discussed, due to the immense societal benefits of electricity generation, a court could determine that a public nuisance plaintiff could never demonstrate harm extreme enough to outweigh the many benefits of defendants' electricity generation. However, especially in the face of the drastic harm felt by women and children after an instance of natural disaster, a court may be willing to look beyond the social benefit of power generation to examine the industrial burden of preventing or avoiding the harm by mitigation of carbon dioxide emissions.

In his analysis of the hypothetical public nuisance case by the Arctic Inuit people, Hsu wrote: "a court [plausibly] would find that it would have been easy enough for the electricity generation industry to reduce its carbon dioxide emissions . . . ."[66] Hsu concluded this after examining industry evidence and finding that "it . . . appears that the electricity generation industry has passed up numerous opportunities to reduce . . . the environmental harms from its business."[67] More specifically, Hsu compared the evolution of efficiency in the electricity generation industry and the semiconductor industry.[68] He found no reason for the slow progress of combustion efficiency while power of computer processing chips has been "doubled . . . every two years since the 1970s."[69] A plaintiff bringing a lawsuit against a large U.S. power company would need to show more specific instances of the industry passing up opportunities to avoid the known harm caused by greenhouse gas emissions instead of just advancing proof of general progress of other industries. Hsu maintains that "[i]t would be easy to make the case that the . . . U.S. electricity generation industry has . . . missed many chances to prevent, avoid, or even reduce its impact on the environment."[70] This same argument should be extended to a public nuisance suit brought by women and children natural disaster victims. Attorneys for the disaster victim plaintiffs would need to research and present to the court, if possible, examples of ignored opportunities for progress within the electricity generation industry. They would highlight the ease with which the industry could have changed to lessen even some of the drastic damages felt by women and children in the wake of natural disaster.

Again, due to the non-mandatory nature of the Restatement factors, it is difficult to predict the outcome of a cost-benefit analysis between disaster victim's harm and the societal benefit of electricity generation. Though electricity

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65 RESTATEMENT (FIRST) OF TORTS § 828 (2009).

66 *See* Hsu, *supra* note 9, at 741.

67 *Id.*

68 *Id.* (citing *Moore's Law on Chips Marks 40th*, BBC NEWS - TECHNOLOGY, Apr. 18, 2005, *available at* http://news.bbc.co.uk/1/hi/technology/4446285.stm).

69 *Id.*

70 *See* Hsu, *supra* note 9, at 741.

generation has great social value, a court would have to balance this value against the complete lifestyle upheaval undergone by natural disaster victims, and the comparatively smaller changes and sacrifices that may have been possible in order to make the electric sector a less environmentally damaging industry. The remainder of this Note assumes that a court, due to the uniquely extreme nature of the injury inflicted upon women and children by natural disaster, would find such plaintiffs to pass both the special injury requirement and the balancing test that form part of any public nuisance legal analysis. Women and children victims of natural disaster may meet such public nuisance requirements, but, as the rest of this Note discusses, they may still have great jurisprudential hurdles to overcome before obtaining a successful outcome for a climate change-related public nuisance claim.

II. POSSIBLE JURISPRUDENTIAL LIMITATIONS ON A VALID CLIMATE CHANGE PUBLIC NUISANCE CLAIM

A. Standing

The Supreme Court in *Lujan v. Defenders of Wildlife*[71] outlined a now well-known tripartite test for plaintiff standing:

> First, the plaintiff must have suffered an 'injury in fact' . . . [an injury that is both] concrete and particularized . . and 'actual or imminent' . . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be 'likely' . . . that the injury will be 'redressed by a favorable decision.'[72]

1. Injury in fact

The women and children involved in a public nuisance lawsuit against large U.S. power companies experienced "actual harm" as the result of a natural disaster, showing "concrete and particular injury" in the form of lost homes, lost jobs, and lost health care.[73] These women and children plaintiffs experienced unique, actual harm since the general public is not feeling the same impact from climate change-related natural disasters. Indeed, one of the reasons that women and children harmed by natural disaster are promising candidates for plaintiffs in a climate change public nuisance case is that these plaintiffs, like the Arctic Inuit people in Shi-Ling Hsu's hypothetical lawsuit, are not looking ahead to possible future harm caused by climate change, but are instead able to pinpoint current and unique injury.

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[71] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotations omitted).

[72] *Id.*

[73] *Id.*

The potentially large numbers of women and children impacted by U.S. natural disasters may cause concern that these plaintiffs' individuals injuries, when considered in the aggregate, become akin to a "generalized grievance" rather than a unique injury.[74] Generalized grievances are "shared in substantially equal measure by all or a large class of citizens . . . [and] that harm alone normally does not warrant exercise of jurisdiction."[75] However, in *Federal Election Commission v. Akins*, the Supreme Court held that a widely shared harm will be barred as a generalized grievance only if the shared harm is "abstract and indefinite."[76] As New York City environmental attorney Michael Gerrard explains, "[c]ourts would likely be more sympathetic to a plaintiff alleging more serious injuries even if many others are experiencing those same injuries."[77] Women and children in the aftermath of natural disaster can allege concrete harms that should not be categorized as abstract or indefinite. These female and child plaintiffs would therefore not likely experience difficulty establishing the first standing requirement of injury in fact. The following subsections therefore focus on the causation and redress prongs of the *Lujan* standing test.

2. Causation

Lujan requires that plaintiff's harm be fairly traceable to the defendant's conduct.[78] Causation has historically proven to be a difficult threshold requirement for plaintiffs in climate change litigation, because plaintiffs cannot base a successful case only upon the premise of general causation—the idea that greenhouse gas emissions cause an increased number of natural disasters, and also increase the severity of these disasters.[79] Plaintiffs have the additional burden of establishing specific, or proximate, causation.[80] In essence, plaintiffs must show that the defendant's conduct is linked to the specific instance of natural disaster that harmed the plaintiffs.[81]

Gerrard writes that "[i]n climate change litigation, it may be possible to prove generic causation, but more difficult to prove specific causation."[82] The women and children victims of a natural disaster can point to a now abundant source of evidence linking climate change to a rising number and severity of such disasters.[83] However, a more problematic step for natural disaster victim plaintiffs may involve linking the specific actions of the defendant electricity generators to a natural

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74 Warth v. Seldin, 422 U.S. 490, 499 (1972).

75 *Id.*

76 Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998).

77 GLOBAL CLIMATE CHANGE AND U.S. LAW 186 (Michael B. Gerrard ed., 2007).

78 *Lujan*, 504 U.S. at 560.

79 GERRARD, *supra* note 77, at 200-01.

80 *Id.*

81 *Id.*

82 *Id.*

83 *See* Intergovernmental Panel on Climate Change, *supra* note 16, at 7, 16.

disaster. Gerrard, for example, in his book *Global Climate Change and U.S. Law*, cited a study that listed rising sea levels as the "primary factor in the increase in [severe] hurricanes . . ." but he expressed concern that the study could not accurately link anthropogenic—as opposed to natural—activities to the warming global temperatures causing rising sea levels.[84] He then wrote that "[p]roving that global warming caused a specific storm . . . is even more difficult."[85]

Nuisance lawsuits, however, often reaffirm the longstanding principle that "[i]t is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance . . . . Each and every one is liable to a separate action, and to be restrained."[86] For example, in *Michie v. Great Lakes Steel Division*, the Sixth Circuit found a defendant liable for air pollution damages even though multiple entities were contributing to the Plaintiff's alleged harms.[87] Hsu optimistically points to the Restatement of Torts idea that "where the harm is divisible, the presence of other polluters should be even less of a bar, since a polluter may be held liable only for its share of the harm."[88] Hsu therefore considers that a court may be willing to hold U.S. power companies liable "on the basis of historical contributions to the buildup of greenhouse gases."[89] An analysis of an entity's historical relative contribution to greenhouse gas emissions would likely prove a difficult calculation, but divisible harm at least provides the judiciary with a familiar framework under which to allocate liability.[90]

Arguably, the Supreme Court recently relaxed the causation requirement in *Massachusetts v. EPA*.[91] The Supreme Court, in this 2007 climate change case, argued against "the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."[92] The United States Environmental Protection Agency ("EPA" or "Agency") argued that the Agency's lack of greenhouse regulation was only a small part of the global climate change crisis such that Agency action or inaction could not possibly be the cause of plaintiff's harm.[93] The Supreme Court rejected that argument[94] and adopted a novel approach to standing requirements that is much more favorable to plaintiffs in climate change litigation.

The female and child plaintiffs in a climate change suit against U.S. power industries would not necessarily enjoy the same relaxed causation requirements as

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[84] GERRARD, *supra* note 77, at 204.

[85] *Id.*

[86] Woodyear v. Shaefer, 57 Md. 1, 5 (1881).

[87] Michie v. Great Lakes Steel Div., 495 F.2d 213, 215-16 (6th Cir. 1974).

[88] Hsu, *supra* note 9, at 750 (citing RESTATEMENT OF TORTS § 881(1939)).

[89] *Id.*

[90] *Id.*

[91] *See* Massachusetts v. EPA, 549 U.S. 497, 523-25 (2007).

[92] *Id.* at 524.

[93] *Id.* at 523.

[94] *Id.* at 524-25.

the plaintiffs in *Massachusetts v. EPA* because the Court's allowance of relaxed standing requirements in that case stemmed in part from the Court's special solicitude for the state's quasi-sovereign interests.[95] The Court's solicitude for state interests is founded on the idea that because a state gives up some of its rights—such as the ability to "negotiate an emissions treaty with China or India"[96]—by becoming part of a union of states, the Court will take extra precaution in safeguarding state interests.[97]

Cases proceeding *Massachusetts v. EPA* have not generally invoked the same relaxed standing requirements when the plaintiff to the case is a private party. For example, the plaintiffs in *Coalition for a Sustainable Delta v. Carlson*,[98] a 2008 case in the Eastern District of California, urged the court to adopt the *Massachusetts v. EPA* determination that a plaintiff's injury can be fairly traceable to a defendant whose actions only partially contributed to that injury.[99] The California district court would not apply the requested causation standard, finding that the Supreme Court did not intend the *Massachusetts v. EPA* standard to extend to cases with private party plaintiffs.[100] The California court therefore found the *Massachusetts v. EPA* standard "of limited relevance to this case, brought by private citizens."[101] Similarly, in 2007, the D.C. Circuit declined to apply the *Massachusetts v. EPA* standing guidelines during an analysis of the imminence strand of standing, specifically because no state was involved in the case.[102] The flexibility of the tripartite standing test that would apply to women and children plaintiffs in a climate change public nuisance suit therefore depends on whether the suit involves private party plaintiffs or plaintiff cooperation with or representation by a state entity.

Procedural mechanisms may be available to natural disaster victims seeking the possibility of more flexible standing requirements by partnering with the state before filing of a climate public nuisance suit. Victims could collaborate with the State Attorney General ("AG") in the possibility of obtaining a "stronger position to survive standing challenges."[103] Case law has acknowledged that a state's interest in the health and well-being of its citizens constitutes a quasi-sovereign interest sufficient to establish *parens patriae* standing.[104] A state, because of this interest in the physical and economic well being of its citizens, could assert *parens*

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[95] *Id.* at 518-20.

[96] *Id.* at 519.

[97] Massachusetts v. EPA, 549 U.S. 497, 519-20 (2007).

[98] Coalition for a Sustainable Delta v. Carlson, 2008 U.S. Dist. LEXIS 63394(E.D. Cal. 2008).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 18.

[102] Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1294 n.2 (D.C. Cir. 2007).

[103] *See* Hsu, *supra* note 9, at 746 (suggesting the same partnership between the Arctic Inuit and Attorneys General).

[104] Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez., 458 U.S. 592, 607 (1982).

patriae standing and represent the women and children citizens of the state whose health and economic welfare were uniquely harmed by a natural disaster.[105] The doctrine of *parens patriae* is therefore a procedural means by which the state and its citizens who were victim to natural disaster could partner as plaintiffs to a climate change public nuisance suit.

In addition to providing possible standing benefits, access to state legal resources could provide natural disaster victims with access to advice and assistance, and could decrease the time and energy that the already burdened victims need to spend on organizing a strong case. Gerrard points to another advantage of partnership between women and children victim-plaintiffs and the state government: "[i]t is easier for states or governments to prove causation from climate change because they can base their claims on a larger geographic area where it is easier to measure the impacts of global warming . . . ."[106] In sum, partnership with the government might provide women and children victims of natural disaster with both procedural and practical benefits in the pursuit of a successful climate change public nuisance suit. As discussed *infra* in part B of this Note, however, partnership with a state entity may also create prudential standing obstacles for disaster victim plaintiffs to a public nuisance suit. State involvement is therefore not a definite benefit for such plaintiffs, so the astuteness of involving the state in such a suit is discussed more comprehensively in the final section of this Note.

Involvement of a state entity as co-plaintiff would not automatically provide women and children plaintiffs with access to relaxed standing requirements, since *Massachusetts v. EPA*, which involved a statutory standing element based on a Clean Air Act citizen suit provision,[107] has also been distinguished from cases involving common law causes of action. The court in *Colorado ex rel. Suthers*, for example, deemed *Massachusetts v. EPA* to have "limited applicability in this case where no comparable procedural right to protect [p]laintiff's interests is present."[108] In a 2008 case between the United States and the Canadian government[109] that considered both the state sovereignty and the statutory standing prongs of *Massachusetts v. EPA*, the Federal Circuit declined to grant Canada relaxed standing requirements. Although the case was brought pursuant to a "Court of International Trade jurisdictional statute," Canada was not a state entity and therefore the court did not need to make unique state sovereignty considerations in

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[105] *See* Sara Zdeb, Note, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059, 1070 (2008) (arguing that damages from global warming suffice to satisfy the health and well-being requirement of *parens patriae* standing).

[106] *See* GERRARD, *supra* note 77, at 201.

[107] *See* Massachusetts v. EPA, 549 U.S. 497, at 514 n.16 (2007).

[108] Colo. *ex rel.* Suthers v. Gonzales, 558 F. Supp. 2d 1158, 1164 (D. Colo. 2007).

[109] Canadian Lumber Trade Alliance v. United States, 517 F.3d 1319 (Fed. Cir. 2008).

regards to Canada's rights.[110] The case implies that any relaxed standing requirements based on *Massachusetts v. EPA* will arise only in cases involving a state plaintiff that can claim a procedural grant of standing pursuant to a statute.

The extension of the *Massachusetts v. EPA* standing analysis to a public nuisance case between women and children natural disaster victims and U.S. electric companies is therefore questionable at best. Common law tort principles, as opposed to any statutory grant of standing, would provide the foundation of the suit. Precedent suggests that both state sovereignty *and* a statutory grant of standing form the requisite basis for any relaxed standing requirements under *Massachusetts v. EPA*. It seems, then, that even with a state entity as co-plaintiff, a flexible standing analysis may not be available for women and children victim-plaintiffs.

3. Redress

Finally, *Lujan* requires that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[111] Case law is replete with valid arguments, such as that advanced by the EPA in *Massachusetts v. EPA*, that climate change and its repercussions cannot adequately be addressed except by international policy change. Again, in the context of a state plaintiff, the court in *Massachusetts v. EPA* liberalized the redress requirement when it held: "[w]hile 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 EPA has a duty to take steps to *slow* or *reduce* it."[112]

Notably, the Supreme Court in *Massachusetts v. EPA* reaffirmed the redress discussion in *Larson v. Valente*, which noted: "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury."[113] A payment of damages from U.S. electric utilities to women and children victims of natural disaster would "relieve a discrete injury" of those victims, and would help the victims restore at least a portion of economic and social stability to their respective lives. Presumably, the benefits of climate change litigation would be more widespread if such litigation resulted in injunctive relief and the cessation or reduction of greenhouse gas emissions from large U.S. power companies. However, even the award of damages to natural disaster victims would provide a larger public benefit, as it would shift some of the costs of natural disaster repair away from the government and individuals and toward the private energy production industry. The possibility of a large monetary loss in the form of

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[110] *Id.* at 1337.

[111] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38, 43 (1976)).

[112] *See Massachusetts*, 549 U.S. at 1458 (emphasis in original).

[113] Larson v. Valente, 456 U.S. 228, 243 n.15 (1982).

damages, and the concern of bad publicity, may encourage industry cooperation and regulation of greenhouse gas emission before the filing of a climate change lawsuit.

In Hsu's hypothetical lawsuit between the Arctic Inuit and the large U.S. electricity producers, Hsu emphasized the importance of the requested remedy in a court's determination of redress:

> [I]f an Inuit suit were brought for injunctive relief, the redressability element would be problematic, because requiring abatement of the greenhouse gas emissions from the U.S. electricity industry would . . . reduce the annual contribution of greenhouse gas emissions . . . [only minimally] . . . . But in a claim for damages . . . a remedy could simply be the proportion of damages attributable to defendants' omissions.[114]

Hsu's reasoning could similarly apply to the public nuisance argument of women and children victims of natural disasters—natural disaster plaintiffs would more likely pass the judicial redress requirements in the case that damages are being requested as remedial relief.

As discussed *supra* in subsection 2, cooperation with the state could cause public nuisance climate change litigation to involve more flexible causation standards. In addition, state-plaintiff collaboration—following the redress arguments of the *Massachusetts v. EPA* court—could help women and children disaster victims to obtain judicial imposition of more relaxed redress requirements. As mentioned during the preceding causation analysis, it is unclear that flexible redress requirements would be applied to the women and children disaster victim plaintiffs since the case would be based on common law rather than a procedural grant of standing.

However, the state sovereignty and statutory standing elements outlined in *Massachusetts v. EPA* may present less formidable obstacles under a redress analysis than under a causation analysis. Pursuant to *Larson v. Valente*, one could claim that monetary damages paid to a natural disaster victim provide exactly the type of relief necessary to alleviate the discrete economic injury that plaintiffs have felt as the result of the natural disaster. In contrast, if a court took a broader view of the harm at issue and viewed the public nuisance suit as attempting to address climate change rather than the particular injury to the disaster victims, that court would ask if monetary damages, the requested relief, would "slow" or "reduce" global warming. A court might not view a financial award to natural disaster victims, as opposed to injunctive relief in the form of reduced greenhouse gas emissions, as contributing to the slowing or reduction of climate change, the alleged harm. As discussed in part B *infra*, the political question doctrine may result in the court looking past the discrete harm to the disaster victims and setting aside the case because it arises from the politically contentious issue of climate

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[114] *See* Hsu, *supra* note 9, at 747-48.

change. If a court sees climate change as the ultimate harm or problem at issue, it follows that redress issues may occur if damages flow directly to the disaster victim plaintiffs instead of toward any larger climate change solution.

B. Prudential Concerns: Climate Change Regulation as a Political Question

The political question doctrine possibly creates the largest obstacle for women and children disaster victims who are acting as public nuisance plaintiffs. *Baker v. Carr*,[115] a landmark political question case, listed six characteristics of a political question and stated that the presence of any one characteristic in a case could warrant a determination that the case is unsuitable for judicial resolution.[116] The six *Baker* political question considerations were:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[117]

When a case involves a policy question best suited for the legislature, the political question doctrine can deprive plaintiffs of standing even if those plaintiffs establish the injury, causation, and redressability prongs of the *Lujan* standing test. This doctrine could therefore result in the dismissal of a public nuisance suit by women and children disaster victims, even though the victims may show a strong case of concrete, particular injury and even if the victims partnered with states and then satisfied the relaxed requirements for the tripartite standing test. To be successful, the public nuisance claim of the disaster victims must, if possible, be distinguished from past climate change litigation that was dismissed due to the political question doctrine.

Opponents of judicially created climate change policy frequently invoke the idea that any climate change policy created by the unelected judiciary is an inappropriate intrusion of the courts into a complex and political issue that falls within the legislative realm.[118] The courts have shown a willingness to invalidate climate change regulation in the name of the political question doctrine. For

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[115] Baker v. Carr, 369 U.S. 186, 217 (1962).

[116] *Id.*

[117] *Id.*

[118] For one of many publications arguing that climate change is a political question, *see* Theodore J. Boutrous, Jr. & Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance,"* 35 ECOLOGY L. CURRENTS 80 (2008), *available at* http://elq.typepad.com/currents/pdf/currents35-11-boutrous-2008-0915.pdf.

example, in *Connecticut v. American Electric Power Co.*, the United States District Court for the Southern District of New York deemed climate change regulation to be an issue for the legislature, claiming that judicial action was "impossible without an 'initial policy determination' first having been made by the elected branches to which our system commits such policy decisions . . . ."[119]

The plaintiffs in *Connecticut* requested that defendant power companies cap emissions and undergo an annual percentage decrease in emissions.[120] The court found that the plaintiff's claim would require an inappropriate judicial policy determination because the court would have to:

> (1) determine the appropriate level at which to cap the carbon dioxide emissions of these [d]efendants; (2) determine the appropriate percentage reduction to impose upon [d]efendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security . . . .[121]

The *Connecticut* court, based on the preceding quote, demonstrated a discomfort not only with judicial involvement in climate change regulation, but also more significantly with the technical and broad nature of the injunctive relief that plaintiffs requested. Instead of requesting damages or a complete injunction, plaintiffs were in essence asking judges to understand and approve a greenhouse gas emission reduction scheme of the sort usually developed and implemented by scientists and the legislature.

Recent cases have been distinguished from *Connecticut* when the requested relief is in the form of damages, a remedy that the courts are typically comfortable with administering. For example, in *Barasich v. Columbia Gulf Transmission Co.*,[122] a 2006 public nuisance case by property owners against oil and gas pipeline companies, a federal district court in Louisiana deemed the case justiciable in part because the plaintiffs were seeking damages instead of injunctive relief.[123] The *Barasich* court quoted a 1998 case in which the Fifth Circuit stated that: "as compared to injunctive relief, requests for monetary damages are less likely to raise political questions. Monetary damages might but typically do not require courts to dictate policy to federal agencies . . . ."[124] The Louisiana district court also pointed

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[119] Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272 (2005).

[120] *Id.*

[121] *Id.*

[122] Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676 (2006).

[123] *Id.* at 685-86.

[124] *Id.* at 685 (quoting Gordon v. Texas, 153 F.3d 190, 195 (5th Cir. 1998)).

to a Ninth Circuit opinion that stated: "actions seeking only damages are 'particularly judicially manageable' and 'particularly non-intrusive.'"[125]

Courts, when examining cases for the presence of a political question, have also distinguished between complete injunctions and the more complicated type of emission-reduction scheme at issue in *Connecticut*. For example, the plaintiffs in a 2006 products liability case in the Southern District of New York[126] requested that defendant gasoline companies completely abate the use of a certain gasoline additive.[127] The New York court distinguished the case before it from *Connecticut*, stating that plaintiffs' request to prevent all further releases of the gasoline additive was different than the "quasi-legislative,"[128] complicated injunction at issue in *Connecticut*.[129] Circuit court decisions therefore demonstrate that political question analysis can hinge upon the nature of the remedy requested by plaintiffs and whether the remedy involves the type of injunction that may cause judicial intrusion into the legislative realm.

The *Barasich* court also emphasized that because the plaintiffs' public nuisance claim was a typical common law tort action, the case involved judicially manageable tort standards that need not invoke the political question doctrine.[130] The court found it significant that the U.S. Supreme Court had never made a finding of a lack of judicially manageable standards in a normal tort dispute between two private parties.[131] A Tenth Circuit case similarly found that a politically contentious nuclear contamination tort case was not barred from the courts as a political question because the case involved judicially common individual tort recoveries.[132] The Tenth Circuit wrote that the political question doctrine does not "rule out all the possible remedies which are available to people who are either physically hurt or materially hurt. Thus, the political question theory and the separation of powers doctrines do not ordinarily prevent individual tort recoveries."[133]

The *Barasich* case was also politically contentious because the plaintiffs alleged that the oil and gas companies—due to their dredging activities on the Louisiana coast—worsened the harm caused in Louisiana from Hurricane Katrina. Even so, the court quoted *Klinghoffer v. S.N.C. Achille Lauro*, a Second Circuit case, which stated: "a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question."[134]

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125 *Id.* (quoting Koohi v. United States, 976 F.2d 1328, 1332 (9th Cir. 1992)).

126 In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 438 F. Supp. 2d 291 (S.D.N.Y. 2006).

127 *Id.* at 293.

128 *Id.* at 301.

129 *Id.*

130 *See* Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 684 (2006).

131 *Id.*

132 McKay v. United States, 703 F.2d 464, 470 (10th Cir. 1983).

133 *Id.*

134 *See Barasich*, 467 F. Supp. 2d at 685 (quoting Klinghoffer v. S.N.C. Achille Lauro Ed Altri-

Though *Klinghoffer* was later overturned,[135] the political question language of that case is still good precedent as quoted in *Barasich*. *Barasich* therefore continues to stand for the proposition that a politically controversial case need not be dismissed solely on grounds of the political question doctrine if the case is based on judicially manageable standards and seeks a remedy that will not require the judiciary to act in a "quasi-legislative" fashion.[136]

Just as the requested remedy of women and children disaster victim plaintiffs could impact analysis under the redressability prong of the *Lujan* standing test, *Barasich* and similar cases suggest that the requested remedy could affect application of the political question doctrine to the hypothetical climate change public nuisance case. *Connecticut* clarifies that the judiciary would hesitate to get involved if the public nuisance plaintiffs requested a complex injunction that required the court to approve a cap-and-reduce emissions scheme.[137] However, case law proceeding *Connecticut* demonstrates that courts are more comfortable with granting a traditional, complete injunction.[138] Even if a court was unwilling to grant a total injunction against large U.S. electricity generators because of the climate change policy and economic ramifications, the disaster victim plaintiffs would not necessarily be without a valid case.

First, the women and children disaster victims have the advantage of bringing a case that involves a public nuisance claim, which is a common tort based on judicially manageable standards. While climate change is certainly a politically contentious contemporary issue, case law supports the proposition that a contentious case, when based on manageable standards, need not necessarily be dismissed for political question reasons.[139] Second, if female and child victims were to request damages in a climate change public nuisance suit rather than an injunction, the plaintiffs could bolster their damages claim on precedent supporting that a remedy of damages is especially unlikely to invoke the political question doctrine.

Case law proceeding *Massachusetts v. EPA* unfortunately does not support the contention that women and children disaster victims could overcome the political question hurdle merely by requesting damages as a remedy and by presenting a case based on judicially manageable public nuisance tort standards. In 2007, the state of California brought a climate change public nuisance suit against six automobile companies seeking a remedy of damages.[140] California advanced arguments that were accepted in *Barasich*—namely, that California's public

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Gestione, etc., 937 F.2d 44, 49 (2d Cir. 1991)).

135 The case was later vacated for reasons unrelated to the political question doctrine. *See* Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, 1997 U.S. Dist. LEXIS 8238 (S.D.N.Y. 1997).

136 *Barasich*, 467 F. Supp. 2d at 685.

137 Connecticut v. Am. Elec. Power Co., *supra* note 119, at page 272.

138 *See, e.g.*, In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., *supra* note 126, at page 301.

139 *Barasich*, 467 F. Supp. 2d at 685.

140 California v. GMC, 2007 U.S. Dist. LEXIS 68547 1, 15 (N.D. Cal. 2007).

nuisance claim, though based on the contentious and complex issue, was a common tort suit requesting only damages and therefore appropriate for resolution by the judiciary.[141] The District Court for the Northern District of California explicitly recognized the difference between the requested damages remedy and the injunction that was at issue in *Connecticut*.[142] However, the court found that regardless of the requested remedy, a climate change public nuisance case required the judiciary to make an inappropriate policy judgment in the form of "balanc[ing] the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development."[143]

One significant difference between the *Barasich* line of cases and the federal California case is the involvement of a state plaintiff. For example, the *Barasich* court partially based its decision that a politically contentious public nuisance case was justiciable on the fact that the U.S. Supreme Court had never made a lack of manageable standards finding in a normal tort suit between two *private* parties,[144] suggesting that state involvement on one side of a case might create more political question doctrine problems. Perhaps, then, women and children disaster victim plaintiffs would incur less of a political question issue by avoiding legal collaboration with a state entity. Avoidance of a relationship with the state could be problematic for the women and children natural disaster plaintiffs, since, as discussed in part A of this section, the causation and redressability elements of standing can be more easily satisfied under *Massachusetts v. EPA* when state interests are at issue in a case.

C. Associational Standing as an Alternative to a Partnership with a State Entity

Associational standing provides a means by which women and children natural disaster victims could obtain assistance with a public nuisance case while avoiding partnership with a state entity. Keeping the suit between two private parties—an association on behalf of the natural disaster victims versus the domestic energy companies—could allow the suit to undergo less intense scrutiny under the political question doctrine. The disaster victim plaintiffs, however, would still be receiving the requisite legal and organizational advice from the representative association.

An association could be a plaintiff to the climate change public nuisance suit in one of two ways: (1) by bringing suit on behalf of its members; or (2) by suing on its own behalf. The Supreme Court in the 1977 case *Hunt v. Washington* outlined a tripartite standing test for associations suing on behalf of its members, holding that:

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[141] *Id.* at 15.

[142] *Id.* at 23.

[143] *Id.* at 24.

[144] Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 684 (2006).

> "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[145]

The Court has held this tripartite test to mean that an association can typically sue on behalf of its members only when seeking prospective or injunctive relief, but not when seeking damages that would then be awarded to the association's members.[146] An association can also sue on its own behalf,[147] when, for example, a rule, or perhaps an agency's lack of regulation, prevents the association from performing its purpose.[148]

Utilizing associational standing in its capacity to allow organizations to sue for its members would help women and children disaster victims only in very limited circumstances. Finding an organization that could sue on behalf of female and child members could be unrealistic, as the potential plaintiffs harmed by a natural disaster are not likely to be a cohesive group of members of one advocacy group. A successful public climate change public nuisance suit is more likely to arise from an association suing on its own behalf. An advocacy group with the right purpose, such as ensuring the nourishment and shelter needs of poverty-stricken women in a certain community, could have a strong argument that natural disasters are preventing the successful fulfillment of its organizational mission.

The ability of an association to sue on its own behalf therefore provides the most probable outlet for natural disaster victim plaintiffs wishing to bring a public nuisance case without involving the state as a co-plaintiff. Note that, while lack of state involvement could possibly allow the women and children plaintiffs' case to undergo less strict analysis under the political question doctrine, if a state is not involved in the public nuisance case, then the plaintiffs would not have the benefit of invoking the relaxed standing requirements accepted by the Court in *Massachusetts v. EPA*.

CONCLUSION

Women and children victims of natural disasters seemingly fall among the majority of potential climate change plaintiffs who will be hard-pressed to obtain a day in court under the contemporary climate change regulatory regime. Because of the sharply disparate impacts of natural disasters on the physical health and the

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145 Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

146 *Id.* The Court later held that an association can seek damages on behalf of its members when Congress has authorized such an action by statute, but since such authorization has not occurred for organizations brining climate change suits for its members, this exception is not discussed further in this note. *See* United Food & Commercial Workers Union Local 751 v. Brown Group, 517 U.S. 544, 546 (1996).

147 *See* Warth v. Seldin, 422 U.S. 490, 511 (1972).

148 Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-80 (1982).

economic well-being of women and children, these two demographic groups unfortunately experience an injury different in type and extent from the injury that most humans experience as the result of global climate change. As a result, women and children natural disaster victims can claim a special injury from climate change and therefore can fit into the requisite public nuisance legal framework.

Despite the devastating impact of climate change-induced natural disasters on female and child climate change plaintiffs, contemporary legal standing requirements are not yet amenable to providing such plaintiffs with a valid public nuisance claim. First, an argument that the relaxed standing requirements in the recent *Massachusetts v. EPA* decision should apply to the public nuisance plaintiffs may ultimately be unsuccessful. The disaster victim plaintiffs' claim—because it is based on fundamental common law tort standards rather than a statutory procedural right—is distinguishable from the claim at issue in *Massachusetts v. EPA*. Also, the relaxed standing requirements would only follow from a legal partnership with a state entity, and such a partnership would likely result in a political question doctrine obstacle. Even without state involvement, there is no precedent to completely assure the women and children plaintiffs that their case would survive the political question analysis. In fact, precedent suggests that even if disaster victim plaintiffs request only damages and take other steps to separate their public nuisance case from the contentious political debate surrounding climate change, the political question doctrine will still hinder the plaintiffs' pursuit of a valid case.

However, analysis of a hypothetical climate change public nuisance case of women and children natural disaster victims reveals an opportunity for women and children advocacy groups. Individuals like Wangari Maathai and organizations like the Global Fund for Women present only the beginning of the possible—indeed, the necessary—partnership between those fighting for women's rights and those urging the United States to become a leader in the movement to address and mitigate the impacts of climate change. The devastating impacts of natural disasters on American women and children will only become more apparent as climate change increases the frequency and severity of natural disasters. These women and children add an unacceptable element of personification to the growing list of problems that result from global warming. Climate change activists must increase collaboration with women and children advocacy groups in order to make more widely known the impact that climate change will have on the most vulnerable women and children in the United States. The ramifications of climate change will perhaps stop being reduced to a cold science as more people start to comprehend that when the United States fails to regulate greenhouse gas emissions, the nation also fails to protect the health, safety, and economic welfare of America's women and children.