NORTH CAROLINA

ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV003385-670

THE TOWN OF CARRBORO, NORTH CAROLINA,

Plaintiff,

v.

DUKE ENERGY CORPORATION,

Defendant.

DUKE ENERGY'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS UNDER N.C. RULE 12(b)(1)

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INTRODUCTION

The Town of Carrboro ("Carrboro") acknowledges in its Complaint, as it must, that climate change is caused by worldwide conduct, including "human-made emissions," and other sources going back over 100 years. (*See, e.g.*, Complaint, ECF No. 2, ¶¶ 35–36, 51–52, 90 ("Compl.").) Yet Carrboro seeks to use North Carolina common tort law to hold Defendant Duke Energy Corporation ("Duke Energy"), alone, liable for the alleged past and future effects of *global* climate change on Carrboro. (Compl. ¶ 3.) In so doing, Carrboro exceeds its authority as a municipality by seeking both to relitigate the General Assembly's and the State Utilities Commission's energy policy decisions in North Carolina, as well as policy decisions made in several other states, and to penalize Duke Energy for the lawful implementation of these regulators' orders in providing power to customers in the State and across the country. The federal government has not delegated this authority to Carrboro. The North Carolina General Assembly has not delegated this authority to Carrboro or any of the other 500-plus municipalities in the State.

And while Carrboro claims that the "tortious conduct" at issue is an alleged "knowing deception campaign concerning the causes and dangers posed by the climate crisis" "to deceive the public and decision-makers," (Compl. ¶¶ 1, 3), in actuality this suit centers around the effects of global greenhouse gas emissions—from billions of consumers. (*See, e.g.*, Compl. ¶¶ 3, 8, 190.) The Complaint itself reveals that the only alleged connection between Duke Energy's purported misconduct (alleged deceptive statements) and Carrboro's alleged injuries, is increased greenhouse gas emissions by "the public" resulting in accelerated climate change. (*See* Compl. ¶¶ 8, 9, 190–205.) Climate change is a global phenomenon, and implicates *worldwide conduct*, including "human-made emissions," and other sources going back over 100 years. (*See, e.g.*, Compl. ¶¶ 35–36, 51–52, 90.) Carrboro cannot trace its alleged harms back through a web of innumerable individual and government choices about how and what types of fuels to use to purported conduct by Duke Energy.

Nor can Carrboro use the courts to second guess the energy and climate policy choices made by the appropriate bodies. The General Assembly in North Carolina is vested with the authority to, and does, evaluate and determine how to balance potential climate effects against energy security and affordability. For example, North Carolina has made commitments to significantly reduce statewide greenhouse gas emissions, *see* N.C. Exec. Order No. 80 (Oct. 29, 2018), while continuing to direct Duke Energy to procure new fossil fuel resources in order to meet growing electricity

demand, *see* NCUC, Docket No. E-100, Sub 179, Order Adopting Initial Carbon Plan and Providing Direction for Future Planning (Dec. 30, 2022).

And, in other states, the federal government and appropriate government bodies make the same judgment calls to strike the appropriate balance. All these choices, which include decisions by government entities and regulators to direct and approve investments in fossil fuel resources to meet energy demand, have been made within the last two decades, during which Carrboro alleges that the knowledge of the connection between fossil fuels and anthropogenic climate change has been open and obvious. (*See* Compl. ¶ 104 (referencing "overwhelming scientific consensus" as of 2004).)

All agree that addressing climate change is important. Duke Energy supports addressing climate change, but it must be done in a manner that accounts for many complexities and balances factors reserved for policymaking, not litigation. Carrboro is, respectfully, outside its lane, and this Court must dismiss the Complaint in its entirety for lack of subject matter jurisdiction.

LEGAL STANDARD

A Rule 12(b)(1) motion challenges a court's jurisdiction over the subject matter of the plaintiff's claims. N.C. R. Civ. P. 12(b)(1). "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). It "has been defined as 'the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment.'" *High v. Pearce*, 220 N.C. 266, 17 S.E.2d 108 (1941) (citations omitted). As a result, "the proceedings of a court without jurisdiction of the

subject matter are a nullity." *Burgess v. Gibbs,* 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (citation omitted).

The plaintiff bears the burden of establishing subject matter jurisdiction. *See Harper v. Asheville*, 160 N.C. App. 209, 217, 585 S.E.2d 240, 245 (2003). In ruling on a motion to dismiss for lack of standing pursuant to Rule 12(b)(1), the Court may consider matters outside the pleadings. *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 491, 598 S.E.2d 667, 670 (2004) (citation omitted).

STATEMENT OF THE CASE

I. Carrboro files suit against Duke Energy.

Carrboro filed this suit on December 4, 2024, the day after it passed a resolution authorizing this civil action. (Compl. ¶ 32.) Carrboro alleges state common law claims for public nuisance, private nuisance, trespass, negligence, and gross negligence. (Compl. ¶¶ 206–72.) To support these claims, Carrboro alleges that Duke Energy engaged in a "knowing deception campaign concerning the causes and dangers posed by the climate crisis" to "deceive the public and decision-makers." (Compl. ¶¶ 1, 3.)

Carrboro contends that these alleged representations contributed to global climate change, which caused it to suffer certain harms within its territory: repairing, maintaining, and replacing roads; providing stormwater protection infrastructure; and "cooling multiple buildings, including offices, the public library, town hall, and the police and fire department buildings." (Compl. ¶¶ 8–9, 190–205.) Carrboro alleges that these damages resulted from the effects of climate change. (*See, e.g.*, Compl. ¶¶ 10, 190–205.) But these allegations require an attenuated series of

unsupported assumptions that go beyond the scope of traditional notions of tort and causation and ignore the myriad contributions to global climate change. Summed up, Carrboro alleges that: (i) Duke Energy engaged in deception regarding the risks of climate change unbeknownst to the public (Compl. ¶¶ 5, 68); (ii) this alleged deception delayed the energy transition away from fossil fuels (Compl. ¶ 5); (iii) this facilitated Duke Energy's, the public's, decision-makers', and the world's continued reliance on fossil-fuels usage (Compl. ¶¶ 67, 150); (iv) as a result, greenhouse gas emissions *worldwide* "continued largely unabated" (Compl. ¶¶ 8–9); (v) the resulting emissions from that increased usage exacerbated climate change (Compl. ¶¶ 146, 154); and finally (vi) global climate change, in turn, caused the alleged damages and harms to Carrboro, in large part through adverse weather (Compl. ¶¶ 190–205).

Carrboro asserts in a single paragraph that it is not seeking limits on Duke Energy's own emissions or operations and that it does not seek injunctive relief. (Compl. ¶ 11.) Yet this is contradicted by several other paragraphs where Carrboro's Complaint focuses on emissions it attributes to Duke Energy as causing it harm, (Compl. ¶¶ 20–25, 137–45), including alleging that these emissions "are both unreasonable and unnecessary" and that Duke Energy "owed a duty of care to take reasonable steps to reduce [its] carbon emissions." (Compl. ¶¶ 145, 245, 248, 251.) But, again, Carrboro does not allege that it suffers damages from Duke Energy's emissions alone. Carrboro's Complaint instead specifies that its alleged damages result from the *effects* of global *climate change*, which are "principally caused by the

greenhouse gas emissions associated with burning fossil fuels [. . .]." (Compl. ¶¶ 3, 9.)

Though Carrboro alleges that the "Duke Energy" emissions it primarily complains of "occur at electricity generation facilities that [Duke Energy] owns and operates" (Compl. ¶¶ 21, 24, 138; *see also* Compl. ¶¶ 139–43 (referring to emissions from Duke's utilities and "power plants"), the facilities referenced are all operated by separate utility subsidiaries in North Carolina and multiple other states that are regulated by state utilities commissions and other regulatory bodies. For example, Carrboro identifies "numerous electric utilities" including "Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, Duke Energy Florida, LLC, Duke Energy Ohio, Inc., and Duke Energy Indiana, LLC," (Compl. ¶ 21), and alleges these electric generating facilities are located in "North Carolina, South Carolina, Florida, Indiana, Illinois, Pennsylvania, Ohio, and Tennessee." (Compl. ¶ 24.) Carrboro also includes cursory language that "Duke also contributes to fossil fuel emissions in many additional and material respects;" it then identifies immaterial emissions (e.g., operating its buildings) or emissions caused by third parties (e.g., "supplying natural gas to customers" and "encouraging . . . the use of fossil fuels by the public and governmental entities such as the Town." (Compl. ¶ 138.)

II. Greenhouse gas emissions and energy production are subject to existing federal and state regulatory frameworks.

Electric utilities, including those operated by Duke Energy's subsidiaries in multiple states, are subject to federal and state regulatory frameworks that work

together to balance the provision of utilities' services to the public with many other factors including the levels of permissible emissions for these services.

Under the authority of the Clean Air Act (the "CAA"), the EPA has issued regulations to control greenhouse gas emissions across the energy supply chain, which include regulating carbon dioxide emissions from fossil-fuel-fired power plants and requiring many industrial sources to employ control technologies constituting the best system of emissions reduction to limit greenhouse gas emissions. 42 U.S.C. § 7475; 42 U.S.C. § 7411(b)(1)(A)–(B), (d).

While EPA sets the regulatory standards for greenhouse gas emissions, the CAA assigns States a significant, but specific, role in enforcing these standards. States—including those where Duke Energy subsidiaries operate (Compl. ¶ 24)—adopt their own plans for enforcing these standards, including for existing facilities, through a process involving public input to ensure that the plans are adapted to the particular circumstances of each State. *See* 42 U.S.C. §§ 7410(a), 7411(d).

Operating within this framework, North Carolina, through the General Assembly, has vested certain state agencies with the responsibility to regulate the operations of utilities and the effects of providing utility services to the public. The General Assembly has granted authority in regulating electric utilities to the following three agencies: (1) the N.C. Utilities Commission (the "Utilities Commission"), (2) the N.C. Department of Environmental Quality ("DEQ"), and (3) the Environmental Management Commission ("EMC"). *See* N.C. Gen. Stat. § 62-2(b) ("[A]uthority shall be vested in the [Utilities Commission] to regulate public

utilities"); *see also* N.C. Gen. Stat. § 62-110.9; N.C. Gen. Stat. § 113-8; N.C. Gen. Stat. § 143-215.2; N.C. Gen. Stat. §§ 143-215.3(a)(2), (a)(5). The Climate Change Interagency Council ("CCIC"), created in 2018 by Executive Order 80, is also a companion advisor on certain regulatory issues. The Utilities Commission regulates the rates of investor-owned public utilities in the state and ensures utility services are provided safely. N.C. Gen. Stat. § 62-2(b). The Utilities Commission regulates Duke Energy's resource plans for the State, including all its major generation resource decisions. N.C. Gen. Stat. § 62-2(a)(3a); 62-110.1. In doing so, the Utilities Commission makes decisions balancing energy needs with environmental concerns (among other complex technical considerations). N.C. Gen. Stat. §§ 62-2(a)(5), 62-105(a). The DEQ and EMC preserve and enhance North Carolina's natural resources. *See* N.C. Gen Stat. § 143-211. In carrying out their regulatory roles, these agencies solicit and incorporate feedback from the public. For instance, the Utilities Commission conducts hearings and solicits public comments regarding rate cases, new projects, and resource planning. *See* NCUC, *Select Hearing Schedule*, https://www.ncuc.gov/hearings/hearings.html.

Unlike these regulators, Carrboro has no authority to regulate electric utilities' rates, emissions, or energy generation portfolios. The General Assembly has not given municipalities authority on any of these topics. Instead, municipalities (and other interested persons) participate in the regulatory process by providing feedback to the appropriate regulators during ongoing proceedings. For instance, the group that is funding Carrboro's litigation here, addressed below, has frequently

participated in proceedings relating to resource portfolios and natural gas generation that are directly tied to issues in this lawsuit. *See* NCUC Docket No. E-100, Sub 190, Post-Hearing Brief of NC WARN, et al. (Sept. 3, 2024).

III. Other courts addressing similar suits have not allowed municipalities to regulate emissions and national energy policy via tort law.

Although this case is the first of its kind seeking to hold an energy company liable for alleged effects of global climate change through tort law in North Carolina, it is not the first in the Nation. Carrboro recycles allegations from these prior actions, including that defendants "have known for decades that their fossil fuel products pose a severe risk to the planet's climate," and yet "downplayed the risks . . . , which has caused and will continue to cause significant changes to [Plaintiff's] climate and landscape." *New York v. Chevron*, 993 F.3d 81, 86–87 (2d Cir. 2021). (S*ee also*, Compl. ¶¶ 4, 8–9, 47, 67–68, 138.) Multiple federal and state courts across the Nation have dismissed similar actions.[1] *See, e.g.*, *Chevron*, 993 F.3d 81; *Oakland v. BP*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *vacated on other grounds,* 960 F.3d 570 (9th Cir. 2020); *Comer v. Murphy Oil USA*, 839 F. Supp. 2d 849 (S.D. Miss. 2012); *Mayor & City Council of Baltimore v. BP*, No. 24-C-18-004219, 2024 WL 3678699 (Md. Cir. Ct. July 10, 2024); *Annapolis v. BP,* No. C-02-CV-21-250 (Md. Cir. Ct. Jan. 23, 2025); *Platkin v. Exxon Mobil*, No. MER-L-001797-22 (N.J. Super. Ct. Feb. 5, 2025).

[1] Many of these similar lawsuits were dismissed as preempted under federal law, because the statute of limitations had run, or for failure to state a claim, independent of arguments under Rule 12(b)(1). As will be discussed in Duke Energy's forthcoming Motion to Dismiss on Rule 12(b)(6) grounds, Carrboro's Complaint is subject to dismissal on those grounds as well.

IV. Carrboro is funding this lawsuit through a third-party nonprofit organization that is leveraging the case for political purposes.

Carrboro publicly acknowledges that it was recruited to be the plaintiff by NC WARN,[2] a third-party nonprofit organization focusing on global climate change that has targeted Duke Energy for years.[3] On the same day it filed this lawsuit, Carrboro held a press conference where a Council Member for Carrboro stated that Carrboro intends for this litigation to serve as a model for other towns to file similar lawsuits against electric utilities.[4] Furthermore, through counsel and through its Mayor, Carrboro stated that it is "not paying the legal fees or the litigation expenses for this case."[5] Instead, NC WARN pays those costs.[6]

Carrboro offers no explanation for why it is bringing its claims now, when Carrboro alleges that the connection between fossil fuels and anthropogenic climate change has been open and obvious for over two decades, and Carrboro itself has acted to address the issue in other ways. (Compl. ¶ 104.) Carrboro specifically alleges that it has taken various steps over the past decade—including adopting a Community

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[2] Counsel for Carrboro in this matter has been "NC WARN's attorney for years," according to NC WARN. *The Robust Opposition: NC Town Sues Duke Energy Over Climate Crisis*, at 15:44–15:47 (Feb. 23, 2025), https://www.youtube.com/watch?v=skLdOBHaKcY&t=21.

[3] *Id.*, at 2:50–3:09, 42:32–43:03.

[4] *Town of Carrboro News Conference*, at 32:04–32:26 (Dec. 4, 2024), https://www.youtube.com/live/IkHOTuTkd-o.

[5] *Id.* at 54:26–54:40.

[6] *Id.* NC WARN's website states: "Nonprofit NC WARN is paying the legal fees associated with the Town of Carrboro's challenge against Duke Energy," which is followed by a plea for fundraising for NC WARN. *See* Sue Duke Energy, *Support This Work*, https://www.suedukeenergy.org/take-action/support.

Climate Action Plan in 2014 and adopting an Energy and Climate Protection Plan in 2017—to mitigate climate change harms. (Compl. ¶¶ 177–89.)

ARGUMENT

This court lacks subject matter jurisdiction over Carrboro's claims and the Complaint warrants dismissal for at least two reasons.

First, Carrboro's claims are non-justiciable under North Carolina's political question doctrine. As discussed above, Carrboro's Complaint seeks to hold Duke Energy solely liable for the alleged past and future effects of *global* climate change on Carrboro, and in so doing, asks to relitigate the General Assembly's and the State Utilities Commission's energy policy decisions in North Carolina. Carrboro also seeks to penalize Duke Energy for its provision of electricity under the authority of utilities regulators. These issues are committed to state agencies and legislatures and there is no judicially manageable standard by which this Court can adjudicate this case. To adjudicate this case, Carrboro asks the Court to do things that it cannot. First, Carrboro asks this Court to speculate regarding another reality where Duke Energy had made different statements regarding fuel use and climate change, and evaluate whether and how the public's response would have accelerated the transition to renewable energy (and therefore lessened global climate change). Second, Carrboro asks this Court to determine that Duke Energy's own greenhouse gas emissions were so "unreasonable" as to be sufficient to violate common tort laws, overriding the decisions of state regulators for multiple public utilities.

Apart from the political question doctrine barring this suit, Carrboro's Complaint fails for lack of standing. Carrboro and 500-plus municipalities like it lack

authority to bring suits like this. The General Assembly has not created a cause of action allowing municipalities to sue for climate change. The common law likewise has never allowed municipalities to bring tort claims to recover for such damages. Moreover, Carrboro's Complaint fails traceability for two reasons: it does not trace its harm to representations or emissions from Duke Energy and its allegations reveal that it cannot do so. Finally, Carrboro cannot redress global climate change through tort damages from Duke Energy.

I. North Carolina's political question doctrine bars Carrboro's claims.

Carrboro's claims would require the Court to usurp other political branches' power to set energy and climate policy in violation of the political question doctrine. North Carolina courts lack the authority to meld the legislative, executive, and judicial functions into a transmogrified tort that would deputize 100-plus counties and 500-plus municipalities to police emissions and set energy and climate policy across the entire State (if not country).

The North Carolina Constitution "forever separate[s]" the legislative, executive, and judicial functions. N.C. Const. art. I, § 6. Because of this structural arrangement, the North Carolina Supreme Court has explained that a matter is barred by North Carolina's political question doctrine, if any one of three circumstances exist: (i) the constitution expressly assigns responsibility to one branch of government; (ii) there is not a judicially discoverable or manageable standard by which to decide the issue; or (iii) adjudicating the issue requires courts to make policy determinations that are better suited for the policymaking branch of government.

Bacon v. Lee, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001); *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023). All three conditions apply here.

A. The North Carolina Constitution expressly assigns ultimate responsibility for conservation of its natural resources and to control pollution to the General Assembly.

One prominent characteristic of a political question is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (citation omitted); *Harper*, 384 N.C. at 327, 886 S.E.2d at 416. Under the North Carolina Constitution, only the General Assembly may give "powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable." N.C. Const. art. VII, § 1. To the extent regulating climate change is not reserved to the federal government—as is the case for interstate emissions—it is the responsibility of the General Assembly to prescribe laws for the protection of North Carolina's natural resources, as well as to control and limit pollution within the state.

Indeed, the North Carolina Constitution provides only one role for municipalities, and that role itself is a *limitation*. Article XIV § 5 establishes certain limitations for the State and its political subdivisions and the General Assembly. *See* N.C. Const. art. XIV, § 5. This Constitutional provision passingly mentions that municipalities can offer property to dedicate for preservation and protection. Specifically, "[t]he State and its counties, cities and towns, and other units of local government" have power to "purchase or gift properties or interests in properties" as preserves. *Id.*

This provision provides the *authority* to pass general law protecting public property only to the General Assembly. Elsewhere, the Constitution vests general lawmaking authority in the General Assembly. *See* N.C. Const. art. II, § 1.

As applicable here, the General Assembly has exercised its authority to vest "the North Carolina Utilities Commission" with the "authority" "to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth" by the General Assembly. N.C. Gen. Stat. § 62-2(b); *see supra* at 7–9. The General Assembly also authorizes the Utilities Commission to make decisions that require it to balance critical energy needs with environmental concerns as it formulates North Carolina's energy portfolio. *See* N.C. Gen. Stat. § 62-105(a). And the General Assembly granted the DEQ and EMC authority to preserve and enhance North Carolina's natural resources, including its air. *See* N.C. Gen Stat. § 143-21.

By contrast, the North Carolina Constitution does not give this authority to Carrboro or any other municipality, nor has the General Assembly. Carrboro cannot obtain this authority by court action. The General Assembly squarely and unambiguously assigned it elsewhere. But Carrboro's Complaint seeks to evade these limitations by asking this Court to penalize Duke Energy for energy generation decisions and associated emissions of regulated utilities that, within North Carolina, fall squarely within the policymaking purview of the entities designated by the General Assembly. Allowing such claims to proceed would impermissibly substitute

Carrboro (and this Court in ruling on these policy issues) for the General Assembly in setting environmental, energy, and climate policy. Carrboro's claims also seek to address emissions from regulated public electric utilities in multiple other states that are each regulated by a separate state utility commission and state agencies, further underscoring the competing policy issues at play.

B. Carrboro's claims lack a judicially manageable standard.

A question is nonjusticiable "when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004); *Harper*, 384 N.C. at 298, 886 S.E.2d at 399. Here, Carrboro is asking this Court and a jury to determine that emissions it attributes to Duke Energy were "unreasonable" and in violation of tort laws, even though these emissions were authorized by various regulators. (Compl. ¶ 145 (alleging that Duke Energy's "emissions are both unreasonable and unnecessary"); Compl. ¶ 245 (alleging that Duke Energy "owed a duty of care to Plaintiff to take reasonable steps to reduce [Duke Energy's] carbon emissions"); *see also* Compl. ¶¶ 248, 251 (same).) Carrboro does not allege (indeed, cannot allege) that carbon emissions from power plants operated by Duke Energy's subsidiaries are unlawful or in violation of a specific permit or regulation. Far from "satisfactory and manageable criteria or standards," there are *no* judicial criteria to render Carrboro's requested determination.

Carrboro asks this Court to not only invade the province of the Utilities Commission, but also asks this Court to reweigh a wide variety of complex decisions rendered by the federal government and a myriad of other state authorities. For

example, Carrboro alleges that Duke Energy "failed to timely retire its coal plants, increased its reliance upon natural gas, and refused to invest meaningfully in clean energy," (Compl. ¶ 61), even though state utility commissions supervise and control virtually all aspects related to these decisions. Carrboro also alleges that Duke Energy's transition to natural gas was "deceptive" even though various utilities commissions are required to approve the procurement of all new natural gas generation assets. (Compl. ¶¶ 129–36.) Similarly, the Complaint attacks Duke Energy's contributions to fossil-fuel emissions through activities that are reviewed and approved by utilities commissions. (Compl. ¶ 138.)

State tort law cannot supplant federal and state law that establish this framework. Not surprisingly, courts confronting similar issues have concluded that "[i]f courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern." *N. Carolina, ex rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010); *see also Comer*, 839 F. Supp. 2d at 864–65 (plaintiffs' claims for public and private nuisance, trespass, and negligence lacked judicially discoverable or manageable standards for determining whether defendants' levels of emissions were unreasonable). This conclusion is true within North Carolina. The fallacy of Carrboro's suit is further compounded by Carrboro's attempt to extend the alleged harmful emissions beyond state borders. (*See, e.g.*, Compl. ¶24 (describing the sources of Duke Energy's emissions as "throughout the eastern and midwestern portions of the United States").)

The standards established by North Carolina courts for analyzing nuisance, trespass, and negligence claims would not provide sufficient guidance to the Court or a jury to measure or determine "unreasonable" energy generation portfolio choices and carbon emissions levels within North Carolina, let alone across the country and worldwide. Carrboro's invitation to this Court to engage in ad-hoc legislation from the bench is contrary to the established legal framework governing these issues, which weighs several important policy factors in setting and regulating emissions and public utilities. Injecting the judiciary into these inquiries would embroil the North Carolina courts in endless, amorphous, and contradictory litigation at constant loggerheads with the decisionmakers constitutionally responsible for deciding these issues. If this were allowed, *all* superior court judges in North Carolina could set competing standards for any action that was alleged to have contributed to climate change.[7] This is not some theoretical outcome: Carrboro, and NC WARN as this litigation's funder, are explicit that this is their goal. *See supra* at 10–11. A patchwork quilt of tort-based emissions and energy regulation within the state is not

[7] Rather than creating a new judicial standard, if any authority remains beyond that held by the federal government, this issue should be left to the State as *parens patriae*. *See N. Carolina ex rel. Cooper v. TVA*, 549 F. Supp. 2d 725, 728, 731 (W.D.N.C. 2008); *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007). *See also Warren Cnty. v. North Carolina*, 528 F. Supp. 276, 283 (E.D.N.C. 1981) (dismissing claim brought by county under Toxic Substance Control Act because the State, not the county, "would be the proper party, as parens patriae, to seek vindication of the federal statutory right"); *Pernell v. Henderson*, 220 N.C. 79, 16 S.E.2d 449, 451 (1941) (municipality that impounded water in reservoirs and distributed that water could not bring suit, in role of *parens patriae*, with respect to that water as riparian owner).

only unconstitutional, but also unworkable. "Energy policy cannot be set, and the environment cannot prosper, in this way." *TVA*, 615 F.3d at 298.

C. Adjudicating Carrboro's claims would require courts to make policy determinations that are for the General Assembly.

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed" to other branches. *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854; *Harper*, 384 N.C. at 350, 886 S.E.2d at 431. As noted above, Carrboro's allegations ask this Court to make energy and climate policy determinations committed to the General Assembly, to the extent those determinations are not reserved to the federal government. This is the textbook definition of a non-justiciable political question under North Carolina law, which imposes more stringent requirements than federal law. "Unlike the United States Constitution" "the Constitution of North Carolina includes an *express* separation of powers provision." *Bacon*, 353 N.C. at 716, 549 S.E.2d at 853–54.

Against this backdrop, the General Assembly granted to the Utilities Commission—not municipalities—authority to regulate utilities. N.C. Gen. Stat. § 62-2 (stating that "authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements. . . ."). And the General Assembly has consistently exercised its power to authorize the regulation of electric utilities, the environment, and all related areas. Beyond the authority it granted to the

Utilities Commission, the General Assembly has granted DEQ and EMC the authority to preserve and enhance North Carolina's natural resources and to regulate emissions specifically. *See* N.C. Gen Stat. § 143-211.

Moreover, the General Assembly authorized the Utilities Commission to make decisions that require it to balance critical energy needs with environmental concerns, accounting for a variety of policy goals and complex technical considerations. N.C. Gen. Stat. § 62-2(a)(5). The Utilities Commission renders these decisions through a process that accounts for significant public input and deliberation. And the Utilities Commission has made myriad such decisions with respect to Duke Energy affiliates and predecessors, with regular and detailed input from a wide range of stakeholders including NC WARN.[8] The Utilities Commission further oversees annual reporting by utilities to ensure that it has access to relevant information to inform its decision-making. N.C. Gen. Stat. § 62-36.

Both the General Assembly and the Utilities Commission have sometimes found, in exercising their respective roles, that the continued expansion of fossil-fuel facilities serves the public interest, including since the time when Carrboro alleges the connection between fossil-fuel emissions and climate change was open and obvious. (Compl. ¶ 104 (alleging "overwhelming scientific consensus" as of 2004).) The General Assembly found that "the construction of facilities in and the extension

[8] The Utilities Commission makes dockets on such actions publicly available at https://starw1.ncuc.gov/NCUC/page/Dockets/portal.aspx. The Utilities Commission's orders on various proceedings involving Duke Energy, from construction of new facilities to transmission projects, are available in this database.

of natural gas service to unserved areas" should be given special consideration by the Utilities Commission. N.C. Gen. Stat. §§ 62-158, 62-159. And, as recently as November 2024, the Utilities Commission directed Duke Energy to procure new fossil gas combustion turbine capacity and new fossil gas combined cycle capacity. *See* NCUC, Docket No. E-100, Sub 190, Order Accepting Stipulation, Granting Partial Waiver of Commission Rule R8-60A(d)(4), and Providing Further Direction For Future Planning (Nov. 1, 2024).

There is no room for courts to second guess these policy judgments and refashion energy policy via tort suits brought by municipalities. *See Neuse River Found. v. Smithfield Foods*, 155 N.C. App. 110, 118, 574 S.E.2d 48, 54, (N.C. App., 2002) ("It is not the role of the judicial branch of government to pre-empt the legislative branch's policy considerations and appropriate authorization of an activity."), *abrogated on other grounds by Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 601, 853 S.E.2d 698, 729 (2021). Doing so would interfere with the balance of various competing policy goals outlined by the General Assembly and implemented through existing regulatory programs. This Court is the first in the state invited by a municipality to delve into these policy issues reserved for other branches. The North Carolina Constitution has not vested this Court with authority or jurisdiction to rebalance empirical policy issues. The General Assembly likewise has not invited Carrboro to the table. This Court should decline the invitation.

II. Carrboro lacks standing under North Carolina law to bring claims for alleged harms from global climate change via state common tort law.

In addition to being barred by the political question doctrine, Carrboro's Complaint must be dismissed because the municipality lacks standing to bring these claims. To establish standing, "a plaintiff must demonstrate the following: a legal injury; the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision." *Soc'y for Hist. Pres. of Twentysixth N. Carolina Troops v. Asheville*, 282 N.C. App. 700, 704, 872 S.E.2d 134, 138 *aff'd as modified sub nom.* 385 N.C. 744, 898 S.E.2d 760 (2024). Carrboro does not have standing under North Carolina law to bring its claims because it fails the relevant inquiry on every prong.

A. Carrboro has not alleged a cause of action created by the General Assembly, nor are municipalities' costs from climate change a "traditional injury" under common law.

Under North Carolina standing requirements, a plaintiff must have either a "traditional injury" protected at common law or an injury through a "cause[] of action" created by the General Assembly that allows "a plaintiff to recover in the absence of a traditional injury." *Comm. to Elect Dan Forest*, 376 N.C. at 598, 853 S.E.2d at 727. Carrboro has not alleged a cognizable injury under statute or common law.

1. The General Assembly has not created a cause of action allowing municipalities to sue for climate change.

"It is a well-established principle that municipalities, as creatures of the State, can exercise *only* that power which the legislature has conferred upon them." *Bowers v. High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994) (emphasis added); *BellSouth Telecommunications v. Laurinburg*, 168 N.C. App. 75, 80, 606 S.E.2d 721, 724 (2005) (citing the same). The General Assembly is the legislative body that sets

the limits of municipal authority. (Compl. ¶¶ 12, 31.) *Town of Midland v. Harrell*, 282 N.C. App. 354, 360, 871 S.E.2d 392, 396 ("As solely a creature of legislative charter, our General Statutes provide that a city or town may exercise its powers only as delegated from the General Assembly."), *aff'd*, 385 N.C. 365, 892 S.E.2d 845 (2023).

The General Assembly vested municipalities with limited authority under Chapter 160A of the North Carolina General Statutes to use the court system as an exercise of their municipal corporate authority. As North Carolina courts have consistently explained, the "primary function of a municipal corporation is to provide local government within its limits and authorized services to its inhabitants." *Domestic Elec. Serv. v. Rocky Mount*, 285 N.C. 135, 144, 203 S.E.2d 838, 844 (1974). A municipality exceeds these limits when it puts itself in conflict with regulatory authorities acting within their delegated authority. *See id.* at 143–44, 203 S.E.2d at 843–44 (finding that municipality was not acting within "reasonable limitations" as set out in statute by putting itself in conflict with the Utilities Commission, which had already designated an investor-owned entity to provide electrical service).

This is what Carrboro has done here. Carrboro exceeds its legislature-given authority by attempting to usurp the reasoned decisions reached by the Utilities Commission, as well as DEQ and EMC, regarding Duke Energy subsidiaries' energy production, resource procurement, and allowable emissions. (*See supra* at 7–9, 13–15.) For example, the Utilities Commission regulates and approves Duke Energy's major generation resource decisions. N.C. Gen. Stat. § 62-2(a)(3a); 62-110.1. Carrboro cites only its local police power as authority (Compl. ¶ 31), but this is not a

license to impose backdoor limits on Duke Energy's lawful activities through litigation. *See Stillings v. City of Winston-Salem*, 63 N.C. App. 618, 623, 306 S.E.2d 489, 493 (1983) ("Any derivative power, such as a local police power, has inherent limitations."), *rev'd sub nom. Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984). The Complaint reveals that Carrboro exceeds the bounds of its limited police powers. *See supra* at 4–6. Carrboro has elsewhere admitted the political purpose of the litigation as advertised by NC WARN, who is financing the litigation. *See supra* at 10–11. Carrboro does not cite any other applicable statute, and Duke Energy is aware of no applicable statutory cause of action, that would allow Carrboro to sue here. Nor is there any grant of authority for Carrboro to use third-party funds to bring suit after being recruited by an advocacy group to serve as a plaintiff. *See id.*

2. Municipalities have no common law right to sue for injuries caused by "climate change."

In the absence of statutory authorization to bring this action, Carrboro must point to some traditional right recognized by common law. *See, e.g.*, *Comm. to Elect Dan Forest*, 376 N.C. at 609, 853 S.E.2d at 734. Although Carrboro nominally alleges traditional common law causes of action—trespass, negligence, gross negligence, public nuisance, and private nuisance—Carrboro's alleged *injury* stems from attenuated climate effects, (*see e.g.*, Compl. ¶ 190), that fall outside all reasonable bounds of recoverable rights traditionally recognized by common law. None of the common law causes of action that Carrboro raises provides a basis for a municipality to recover for climate change-related harms.

To start, nuisance in North Carolina has not addressed, and cannot address, global climate change via an action for damages. *See State on Rel. of Albemarle v. Nance,* 266 N.C. App. 353, 354, 831 S.E.2d 605, 607 (2019). Lawful enterprises do not constitute nuisances when behaving lawfully. *Town of Clinton v. Ross*, 226 N.C. 682, 690, 40 S.E.2d 593, 598 (holding a lawful tobacco sales warehouse was "in no sense . . . a public or private nuisance"). The North Carolina Utilities Commission has overseen the entire resource plan for Duke Energy's regulated in-state subsidiaries, including the decision to procure the fossil-fuel resources that Carrboro complains have been the source of its alleged harms. *See supra* at 18–21. Carrboro cannot displace the General Assembly's regulatory scheme via tort law to pursue alleged injuries from those regulated activities.

Nor is there a common law right to sue for trespass for a non-physical invasion to remedy public-health injuries. Common-law trespass only allows recovery for physical unauthorized entries to a property. *See Majebe v. N.C. Bd. of Med. Exam'rs*, 106 N.C. App. 253, 261, 416 S.E.2d 404, 408 (1992). Trespass due to weather events falls far outside this traditional scope.

Nor can Carrboro point to a common law duty running from a utility holding company, operating subsidiaries nationwide, to a municipality for matters governed exclusively by the federal and state governments, in order to state a claim of negligence or gross negligence. North Carolina only recognizes narrow, historical, "special relationship" duties, inapplicable here. *See King v. Durham Cnty. Mental Health Developmental Disabilities & Substance Abuse Auth.*, 113 N.C. App. 341, 345–

46, 439 S.E.2d 771, 774 (1994); *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 330, 626 S.E.2d 263, 269 (2006).

Because Carrboro does not have a statutory or common law right to assert its claims, Carrboro does not have an injury conferring standing in this case. *See United Daughters of the Confederacy v. Winston-Salem by & through Joines*, 383 N.C. 612, 629, 881 S.E.2d 32, 47 (2022); *Soc'y for Hist. Pres. of Twentysixth N. Carolina Troops,* 282 N.C. App. at 706, 872 S.E.2d at 140.

B. Carrboro does not, and cannot, trace its claimed injuries arising from global climate change to statements or actions of Duke Energy.

North Carolina requires a plaintiff to allege the "traceability of the injury to a defendant's actions." *See Soc'y for Hist. Pres. of Twentysixth N. Carolina Troops*, 282 N.C. App. at 704, 872 S.E.2d at 138.[9] In meeting this requirement, "a plaintiff must show that the injury alleged is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court." *Orr v. EPA*, 641 F. Supp. 3d 258, 272 (W.D.N.C. 2022), *aff'd as modified*, No. 23-1056, 2024 WL 2874280 (4th Cir. June 7, 2024); *see also Hamm v. Blue Cross and Blue Shield of N. Carolina*, No. 05 CVS 5606, 2010 WL 5557501, at *5 (N.C. Super. Aug. 27, 2010).

Here, Carrboro's claims fail as a matter of law for lack of traceability for at least two reasons.

[9] North Carolina jurisprudence on traceability roughly tracks Article III standing principles under federal law. *See, e.g.*, *Neuse River Foundation*, 155 N.C. App. at 114, 574 S.E.2d at 52.

First, Carrboro has not alleged, and cannot allege, a traceable connection between any statements or action from Duke Energy and its alleged climate-related injuries. Carrboro's request for relief requires the Court to speculate regarding the impact of Duke Energy's alleged statements and emissions on the effects of global climate change and more than a hundred years of countless decisions by billions of users of fossil fuels worldwide—including Carrboro—and natural phenomena that contribute to these effects. The Complaint lacks traceability. *See, e.g.*, *N. Carolina Coal. for Israel v. City of Durham, N. Carolina*, No. 1:19CV309, 2019 WL 11767624, at *5 (M.D.N.C. Oct. 18, 2019) (dismissing claims upon finding that allegations that defendants' conduct created an environment where injury could occur was not sufficiently traceable for standing purposes because to hold otherwise "requires speculation into the subjective motives of independent actors who are not before the court"), *report and recommendation adopted sub nom. N. Carolina Coal. for Israel v. City of Durham*, No. 1:19CV309, 2019 WL 11767682 (M.D.N.C. Nov. 25, 2019), *aff'd sub nom. N. Carolina Coal. for Israel v. City of Durham, N. Carolina*, 836 F. App'x 183 (4th Cir. 2021); *N. Carolina Fisheries Ass'n v. Pritzker*, No. 4:14-CV-138-D, 2015 WL 4488509 (E.D.N.C. July 22, 2015); *see supra* at 4–6 (describing Carrboro's attenuated theory of liability).

Second, and independently, Carrboro has not alleged how it can parse global climate change and hold Duke Energy solely liable under North Carolina law, separate and apart from the independent actions of numerous third parties not before the court. *See Orr*, 641 F. Supp. 3d at 272 (dismissing a case for lack of standing

where plaintiff's complaint "fails to establish a causal connection between his alleged injury and Defendants'" actions as opposed to "the result of the independent action of some third party not before the court"). Indeed, Carrboro's allegations are clear that: (i) the harms it alleges to have suffered (or that it will suffer) are the result of global climate change; (ii) there is a consensus view that global climate change is the "result of human-made emission of fossil fuels," which occurs internationally; and (iii) Duke Energy's emissions are only a fraction of global emissions. (Compl. ¶¶ 90, 143, 190–205.)

Carrboro's allegations that Duke Energy's emissions caused the harm that it complains of fail. Carrboro's even more speculative allegations that Duke Energy's statements caused the harm at issue fail too. This failure is only bolstered by Carrboro's admission that billions of independent third parties not before this Court are the critical link. As summarized previously, Carrboro alleges that:

- Duke Energy made alleged deceptive statements regarding the risks of climate change (Compl. ¶¶ 5, 68),
- which in turn delayed the energy transition away from fossil fuels (Compl. ¶ 5),
- which in turn facilitated the public's and government decision-makers' continued reliance on fossil fuels (Compl. ¶¶ 67, 150),
- which in turn resulted in greenhouse gas emissions *worldwide* "continu[ing] largely unabated" (Compl. ¶¶ 8–9),
- which in turn resulted in increased emissions that exacerbated climate change (Compl. ¶¶ 146, 154),

- which caused the alleged damages and harms to Carrboro, in large part through adverse weather (Compl. ¶¶ 190–205).

This argument fails the traceability standard.

In sum, a simple review of Carrboro's allegations shows that it cannot fairly trace its alleged harms, all of which are alleged to be the result of global climate change, to Duke Energy's alleged actions. *See supra* at 4–6.

C. Carrboro cannot redress climate change via tort law by alleging a right to recover municipal costs.

Finally, "the redressability prong requires that it be likely, and not merely speculative, that a favorable decision from the court will remedy the plaintiff's injury." *N. Carolina Fisheries Ass'n,* No. 4:14-CV-138-D, 2015 WL 4488509, at *7 (E.D.N.C. July 22, 2015). Carrboro does not—and cannot—allege that its harms from global climate change would not occur even if it obtained a favorable decision here against Duke Energy. As described above and as admitted by Carrboro, climate change is a global phenomenon that is the result of the acts of billions of third parties worldwide and other factors. According to Carrboro's own allegations, Duke Energy's emissions represent only a fraction of global emissions. (Compl. ¶¶ 90, 143, 190–205.) And remedying alleged effects of these specific emissions would require this Court to wade into a complex, interwoven framework of regulatory programs at both the federal and state level authorizing Duke Energy subsidiaries' resource planning and generation sources. *See supra* at 15–18.

Carrboro's abandonment of injunctive relief does not alter redressability. (Compl. ¶ 11.) Rather, to the extent a municipality can proceed by nuisance, the

General Assembly has outlined specific remedies available to municipalities. And the General Assembly has not authorized municipalities to recover municipal costs as damages through tort actions. *See, e.g.*, N.C. Gen. Stat. § 19-2.1 (limiting recovery for public nuisance to injunctive relief).[10]

Thus, this Court cannot redress Carrboro's claims.

CONCLUSION

For the foregoing reasons, Duke Energy respectfully requests that the Court grant its 12(b)(1) motion and that all Carrboro's claims be dismissed.

[10] Counsel is unaware of any North Carolina case where a municipality asserted claims of negligence or gross negligence to recover municipal costs.

This is the 17th day of March, 2025.

SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.

By: /s/ Christopher G. Smith
Christopher G. Smith
N.C. State Bar No. 22767
H. Hunter Bruton
N.C. State Bar No. 50601
Amelia L. Serrat
N.C. State Bar No. 49508
David A. Pasley
N.C. State Bar No. 52332
Shameka C. Rolla
N.C. State Bar No. 56584
Noel F. Hudson
N.C. State Bar No. 59776

Post Office Box 2611
Raleigh, NC 27602-2611
Ph: (919) 821-1220
Fax: (919) 821-6800
csmith@smithlaw.com
hbruton@smithlaw.com
aserrat@smithlaw.com
dpasley@smithlaw.com
srolla@smithlaw.com
nhudson@smithlaw.com

Sterling A. Marchand
(*admitted pro hac vice*)
Sterling.Marchand@bakerbotts.com
Kent Mayo
(*admitted pro hac vice*)
Kent.Mayo@bakerbotts.com

BAKER BOTTS L.L.P.
700 K Street N.W.
Washington, D.C. 20001
Telephone: 202.639.7700
Facsimile: 202.639.7890

Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with Rule 7.8 of the North Carolina Business Court Rules in that it (excluding the caption, any index, table of contents, or table of authorities, signature blocks, and required certificates) contains no more than 7,500 words, as determined by the word count feature of Microsoft Word.

This the 17th day of March, 2025.

SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.

By: /s/ Christopher G. Smith
Christopher G. Smith
N.C. State Bar No. 22767
Post Office Box 2611
Raleigh, NC 27602-2611
Ph: (919) 821-1220
Fax: (919) 821-6800
csmith@smithlaw.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served electronically via the North Carolina Business Court's e-filing system on all counsel of recording, including the following:

James A. Roberts
Matthew D. Quinn
LEWIS & ROBERTS, PLLC
jimroberts@lewis-roberts.com
mdq@lewis-roberts.com

Counsel for Plaintiff

This the 17th day of March, 2025.

SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P.

By: /s/ Christopher G. Smith
Christopher G. Smith
N.C. State Bar No. 22767
Post Office Box 2611
Raleigh, NC 27602-2611
Ph: (919) 821-1220
Fax: (919) 821-6800
csmith@smithlaw.com

Attorneys for Defendant