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No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether States and private parties may bring a cause of action under the federal common law of nuisance to limit greenhouse gas emissions from certain sources where no statute creates such a cause of action, and where the lawsuit does not present any "uniquely federal interest." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

Whether a nuisance claim addressing global climate change, which would require a court to determine whether Defendants' greenhouse gas producing activities were reasonable under the circumstances relative to untold millions of other sources of greenhouse gas emissions throughout the world, is nonjusticiable under the political question doctrine on the grounds that there is a "lack of judicially discoverable and manageable standards for resolving" the dispute, and that the action presents the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. THE CIRCUIT COURT'S OPINION AMOUNTS TO AN UNPRECEDENTED EXPANSION OF THE FEDERAL COMMON LAW OF NUISANCE AND CONFLICTS WITH OTHER CIRCUITS CONCERNING THE PARTIES THAT MAY INVOKE IT. 10

II. DETERMINING WHICH PARTIES MUST BEAR THE BURDEN OF REDUCING GREENHOUSE GAS EMISSIONS AND THE REASONABLENESS OF GREENHOUSE GAS EMITTING ACTIVITIES PRESENT NONJUSTICIABLE POLITICAL QUESTIONS. 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Baker v. Carr,
369 U.S. 186 (1962) 9, 17, 20, 21

Cal. Tahoe Reg'l Planning Agency v. Jennings,
594 F.2d 181 (9th Cir. 1979) 15

California v. Gen. Motors Corp.,
No. C06-05755 MJJ, 2007 WL 2726871
(N.D. Cal. Sept. 17, 2007) ..... passim

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 10, 11, 17

Comer v. Murphy Oil USA,
No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) 8

Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train,
539 F.2d 1006 (4th Cir. 1976) 15

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 10, 11

Georgia v. Tenn. Copper Co.,
206 U.S. 230 (1907) 12, 14, 15

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) ..... passim

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992) 19

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

Massachusetts v. U.S. Veterans Admin.,
541 F.2d 119 (1st Cir. 1976) 12

Missouri v. Illinois,
200 U.S. 496 (1906) 13, 15

Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles,
869 F.2d 1196 (9th Cir. 1988) 12, 15

Nat'l Sea Clammers Ass'n v. City of New York,
616 F.2d 1222 (3d Cir.1980) 15

Native Vill. of Kivalina v. ExxonMobil Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009).. 8, 19, 20, 21

New York v. New Jersey,
256 U.S. 296 (1921) 13

North Dakota v. Minnesota,
263 U.S. 365 (1923) 12

Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality of Ore.,
511 U.S. 93 (1994) 13

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 11

Tex. Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 9, 11

Vieth v. Jubelirer,
541 U.S. 267 (2004) 19

OTHER AUTHORITIES

Daniel Hays, *Climate Claims Are The 'New Asbestos,' Swiss Re Suggests*, Nat'l Underwriter Prop. & Cas., May 29, 2009 8

EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008*, Rep. No. EPA 430-R-10-006 (2002) 5

Restatement (Second) of Torts § 821B cmt. e (1979) 20

Restatement (Second) of Torts § 840E 19

Vanessa Houlder, *Climate Change Could Be the Next Legal Battlefield*, Fin. Times (London), July 14, 2003 8

RULES

Rule 37.2(a) 1

REGULATIONS

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) 6, 7

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) 7

Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) 7

BRIEF OF THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae the Association of International Automobile Manufacturers ("AIAM"), the Alliance of Automobile Manufacturers (the "Alliance") and the National Automobile Dealers Association ("NADA") respectfully submit that the petition for a writ of certiorari should be granted.[1]

INTEREST OF *AMICUS CURIAE*

The question presented in this case is whether States and private parties may invoke the federal common law of nuisance to require that some sectors of the economy, but not others, bear the burden of addressing global climate change. This question has arisen in a number of recent cases, some seeking to require those defendants singled-out in the lawsuit to abate their greenhouse gas emissions, and others seeking monetary damages for injuries allegedly caused by climate change. *Amici* have a significant interest in the correct resolution of this question because certain AIAM and Alliance members were

[1] Pursuant to this Court's Rule 37.2(a), counsel of record received timely notice of the intent to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

the targets of such a lawsuit, *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (*General Motors*), in which the State of California sought billions of dollars in damages the State claimed were caused by climate change. The *General Motors* court correctly dismissed that action on the ground that the issue presented a nonjusticiable political question, and the State of California ultimately dismissed its appeal.

Amici are trade associations collectively representing almost the entire automobile industry in the United States. The Alliance is a trade association of car and light truck manufacturers, whose members include BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar, Land Rover, Mazda North America, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota Motor North America, Inc., and Volkswagen Group of America. AIAM's members include 15 foreign-based automobile manufacturers, such as American Honda Motor Company, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America, Inc., Mitsubishi Motors North America, Inc., Nissan North America, Inc., Subaru of America, Inc., and Toyota Motor North America, Inc. NADA is a trade association that represents franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair, and parts sales. These trade associations represent their members' interests in matters impacting the automobile industry, such as motor vehicle safety, emissions, and fuel economy, and they regularly represent their interests in litigation.

Amici seek to participate in this matter because if the Second Circuit's holding is left undisturbed, it

would have wide-ranging consequences for not just the automobile industry, but across the economy. Virtually every element of industry either emits greenhouse gasses as part of its operation or manufactures, markets or sells greenhouse gas emitting products. The result would be that any party that is responsible for any amount of greenhouse gas emissions could be subject to a federal lawsuit seeking either monetary compensation for alleged climate-related injuries, or injunctive relief to abate its emissions. *Amici* believe that because addressing global climate change is an issue of broad national and international concern, this Court's precedents dictate that it is committed to the political branches and not to *ad hoc* adjudication in the Article III courts.

STATEMENT

This lawsuit raises core issues that lie at the intersection between the nation's energy policy and concerns for environmental protection. Plaintiffs allege that Defendants' emissions of greenhouse gasses—principally carbon dioxide—contribute to global climate change and thereby cause a public nuisance under the federal common law. Plaintiffs seek an injunction forcing Defendants to cap and then reduce their carbon dioxide emissions.

1. Controlling carbon dioxide emissions presents unique challenges that do not arise in traditional environmental public nuisance actions. First, the emission of carbon dioxide is ubiquitous. Not only is it exhaled by humans and animals when converting food into energy and living tissue, but carbon dioxide is also released whenever a carbon-containing fuel—such as oil, natural gas, and coal—is burned. These

fossil fuels provide the energy source for nearly all modes of transportation, every piece of equipment employing an internal combustion engine, every combustion-generated source of heat, and approximately 70% of all electricity generated in the United States. The sources of carbon dioxide emissions in the United States are inestimable.

Second, a source of carbon dioxide has the same impact on climate change no matter where it is located. Carbon dioxide does not remain close to the earth's surface and localized near its source. Rather, it disperses swiftly and evenly throughout the atmosphere and mixes indistinguishably with carbon dioxide from distant biological and man-made sources. Consequently, emissions of carbon dioxide from a source in Connecticut have no greater impact in Connecticut than they do elsewhere in the United States or indeed the world. Similarly, whatever climate change impacts Connecticut may be experiencing are equally caused by carbon dioxide sources within the state as they are by such sources in the other forty-nine states and throughout the globe. In essence, therefore, every person and entity in the world is responsible for some amount of the carbon dioxide emissions that is believed to influence climate change across the globe.

Third, carbon dioxide is inert and extremely stable. Unlike other substances that are emitted from combustion sources, such as oxides of nitrogen and carbon monoxide, there are no aftertreatment devices that can capture and reduce carbon dioxide to some other chemical form. Rather, the amount of carbon dioxide emitted from a combustion source depends entirely on the quantity and type of fuel burned. For example, burning a gallon of gasoline results in the emission of roughly twenty pounds of

carbon dioxide, regardless of the characteristics of the vehicle that burned the fuel. Consequently, the only means currently available to lower the amount of carbon dioxide emitted from man-made sources is to reduce the amount of carbon that is oxidized in combustion to create energy.

2. Any policies adopted to address global climate change would therefore entail reducing the carbon-intensity of the American economy. This can be accomplished in three ways, which can be exemplified by developments in the automobile industry. One, we can simply produce fewer emissions by using less energy through doing less, for example by driving our existing cars and trucks less.[2] Two, we can produce fewer emissions without decreasing activity levels by being more fuel efficient, for example by utilizing gasoline-powered cars that achieve better fuel economy. Three, we can also generate lower emissions while maintaining activity levels by switching to fuels that are less carbon intensive, for example by producing cars that run on ethanol, natural gas or electricity.

Determining how much this nation should reduce its greenhouse gas emissions and selecting the appropriate means for achieving those reductions entails complex policy choices of the highest order.

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2 Indeed, the increase in the price of gasoline coupled with the recent economic downturn has led to a significant decline in petroleum consumption and greenhouse gas emissions by the transportation sector simply by virtue of the fact that people are driving their cars less. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008*, Rep. No. EPA 430-R-10-006, at 2-1 (2002), available at http://epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010_Report.pdf.

The elected branches of government are currently addressing these questions. For example, as a result of this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S. Environmental Protection Agency has recently worked with the National Highway Traffic Safety Administration (NHTSA) to finalize a joint national program governing both motor vehicle greenhouse gas emissions and fuel economy. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).[3] Beginning with the 2012 model year (which starts in January of 2011), each automaker's combined fleet of cars and light duty trucks must meet increasingly stringent fuel economy and corresponding greenhouse gas emissions standards. By the 2016 model year, the standards impose a maximum emission rate of 250 grams of carbon dioxide equivalent and a commensurate fuel economy of 35.5 miles per gallon. The regulations include credits to encourage the commercialization of vehicles that run on fuels other than gasoline, such as electric vehicles, plug-in hybrid electric vehicles, and fuel cell vehicles.

These standards were adopted by EPA and NHTSA after a public notice-and-comment process. Each agency weighed and balanced a number of competing policy concerns, consistent with their enabling statutes. For instance, EPA explained in the preamble to the rulemaking that it "is called

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[3] This coordination was "both needed and possible because the relationship between improving fuel economy and reducing CO2 tailpipe emissions is a very direct and close one." Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. at 25,327.

upon to weigh and balance various factors, and to exercise judgment in setting standards that are a reasonable balance of the relevant factors." Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. at 25,404. In setting its standards, the agency therefore "considered many factors, such as cost, impacts on emissions (both GHG and non-GHG), impacts on oil conservation, impacts on noise, energy, safety, and other factors, and has, where practicable, quantified the costs and benefits of the rule." *Id.*

EPA takes the position that the regulation of tailpipe greenhouse gas emissions under Title II of the Clean Air Act triggers the agency's obligation to regulate greenhouse gas emissions from stationary sources. EPA has finalized the first set of such regulations, which will go into effect for large stationary sources on January 2, 2011. *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010). The rule adopted by EPA regulates greenhouse gas emissions from stationary sources under the Prevention of Significant Deterioration (PSD) program and the Title V operating permit program. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010). Under EPA's rule, the burden of reducing these emissions will fall initially on stationary sources that emit at least 75,000 tons of carbon dioxide equivalent per year and would otherwise require a preconstruction permit for a non-greenhouse gas pollutant.

3. At the same time the elected branches are struggling with these far-reaching policy questions, courts have also been invited to tackle the issue of

greenhouse gas emissions and global climate change. Every district court to have considered the issue has dismissed the case on political question grounds.

In addition to the current action, residents of the Gulf Coast sued a collection of oil, chemical and power companies for money damages alleging that the defendants' emissions of greenhouse gasses contributed to global warming that in turn added to the ferocity of Hurricane Katrina. *Comer v. Murphy Oil USA,* No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007). A similar climate-related action was brought by the State of California against six automobile companies seeking to recover billions of dollars in damages the State claimed were caused by climate change. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). Finally, a city and the governing body of an Eskimo village sued a collection of oil, energy and utility companies for the cost of relocating the city and tribe, alleging that as a result of global warming, the Arctic sea ice protecting the Kivalina coast from winter storms has diminished and resulted in erosion and the destruction of their land. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). As pointed out in the Petition for Writ of Certiorari, legal observers anticipate an explosion of climate-related lawsuits, and predict that these actions could inundate courts in the same fashion asbestos and tobacco lawsuits have in the past. Vanessa Houlder, *Climate Change Could Be the Next Legal Battlefield*, Fin. Times (London), July 14, 2003, at 10; Daniel Hays, *Climate Claims Are The 'New Asbestos,' Swiss Re Suggests*, Nat'l Underwriter Prop. & Cas., May 29, 2009.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be granted so that this Court may put back in its bottle the genie that has become an ever-expanding federal common law of nuisance. Ignoring this Court's pronouncements that federal courts may create common law in only a "few and restricted" instances, *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), the Second Circuit has held that the federal common law of nuisance is as broad as the Restatement of Torts will allow. This ruling will have the practical effect of giving every person and entity in the world claiming an impact from global climate change a federal cause of action for both money damages and injunctive relief against every greenhouse gas emitting person or entity in the country.

This Court has never recognized such a sweeping application of the federal common law of nuisance. Instead, that doctrine has long been reserved for those very limited instances where a State is suing sources outside of its borders for interstate pollution having a direct and immediate effect on the health and welfare of its citizens. The Second Circuit's decision unleashes the federal common law of nuisance from these moorings, and casts aside all of this Court's careful limitations on the scope of this judicially-created federal cause of action.

By expanding the scope of the federal common law of nuisance in this novel manner, the Second Circuit's decision runs headlong into the political question doctrine articulated in *Baker v. Carr*, 369 U.S. 186 (1962). Adjudicating this action will necessarily require a court to make fundamental policy decisions concerning how this nation should

have met, and should continue to meet, its growing need for energy. A court would have to decide, for example, which of the innumerable sources of greenhouse gas emissions in the nation are legally responsible for addressing the impacts of global climate change, and what level of historical greenhouse gas emissions are to be retroactively adjudged unreasonable under the circumstances. Aside from invoking "vague and indeterminate nuisance concepts," *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*"), the Second Circuit articulated no judicially discoverable standards to make these key determinations, nor did it recognize the inherently policy-laden nature of these questions.

The Second Circuit's legally untenable holding has vastly expanded the federal common law of nuisance beyond its previously-recognized limits, and would enmesh the Article III courts in political questions of profound importance with wide-ranging implications. This Court should grant the petition for a writ of certiorari to both reaffirm the limited nature of the federal common law and to avoid the very evils for which the political question doctrine was created.

ARGUMENT

I. THE CIRCUIT COURT'S OPINION AMOUNTS TO AN UNPRECEDENTED EXPANSION OF THE FEDERAL COMMON LAW OF NUISANCE AND CONFLICTS WITH OTHER CIRCUITS CONCERNING THE PARTIES THAT MAY INVOKE IT.

1. It is a fundamental tenet of federal jurisprudence that the power of federal courts to

create common law is extremely narrow. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). "Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee II,* 451 U.S. at 312. "*Erie* recognized as much in ruling that a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress." *Id.* at 313. Accordingly, this Court must "start with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law." *Id.* at 317. This limitation on the power to create common law reflects the overarching principle that "a decision to create a private right of action is one better left to the legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Consistent with these principles, this Court has held that federal courts may create common law in only a "few and restricted" instances that "fall into essentially two categories": first, where "Congress has given the courts the power to develop substantive law"; and second, where "a federal rule of decision is necessary to protect uniquely federal interests." *Tex. Indus.,* 451 U.S. at 640 (citations and internal quotation marks omitted). A "uniquely federal interest" exists "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases." *Id.* at 641. It is therefore not surprising that in the 70 years since *Erie* was decided, this Court has recognized a federal common law cause of action for

an interstate nuisance only once, when in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), it authorized one State to seek injunctive relief against a source in another State to enjoin water pollution when such pollution produced a "simple type" of nuisance. *Id.* at 106 n.8 (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923)).

2. Global climate change is far from the "simple type" of nuisance this Court has previously recognized, which has invariably entailed a State seeking to abate pollution originating from discrete sources outside of its borders and causing traceable and identifiable harm to its own citizens. *See, Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907) (Georgia sought to abate emissions of noxious gas that emanated from factories located in Tennessee and wafted over the Tennessee border and into Georgia); *Milwaukee I*, 406 U.S. at 107 n.9 (holding that injunctive relief might be proper to protect Illinois from "improper impairment by sources outside its domain"). This limitation results from the fact that "federal common law was originally recognized to fill a void in the law applicable to suits seeking abatement of pollution originating within the domain of one state sovereign and exerting adverse effects in the domain of another." *Massachusetts v. U.S. Veterans Admin.*, 541 F.2d 119, 123 (1st Cir. 1976). The federal common law of nuisance therefore encompasses "only those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control..." *Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles*, 869 F.2d 1196, 1205 (9th Cir. 1988).

Greenhouse gas emissions are fundamentally different because there are millions of sources of the alleged nuisance and they can be found both within and outside the complaining State. Every state tolerates—or indeed encourages through economic development subsidies—the emission of greenhouse gasses from within its own borders, and directly contributes to those emissions through its ownership of energy-consuming public facilities. Consequently, the carbon dioxide present in Connecticut is equally traceable to sources located within that State as it is to sources outside the State. A State, however, may not invoke federal common law to enjoin out-of-state activities where it allows the very same activities within its own borders. *See, e.g., Missouri v. Illinois*, 200 U.S. 496, 522 (1906) (denying injunction where "the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains"); *New York v. New Jersey*, 256 U.S. 296, 310-11 (1921) (denying request by New York for injunction barring New Jersey from discharging sewage into harbor "when it is considered that for many years all of the sewage from the great population of New York City and its environs . . . has been discharged into the harbor").

Moreover, allowing States to apply the federal common law of nuisance in the context of greenhouse gas emissions would invite each state to try to export the costs of greenhouse gas regulation to businesses in other States. Empowering a State to use federal common law nuisance claims to impose carbon dioxide emission limits exclusively on out-of-state businesses would give in-state businesses—that emit the exact same carbon dioxide and contribute equally to any resulting climate change impacts—an unfair competitive advantage. States may not mandate

"differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994).

This concern is particularly acute where the State seeking to impose carbon dioxide emission limits on a particular business sector does not internalize the costs of those limits because it is neither the producer nor the sole consumer of the product generating the emissions. Motor vehicles, for example, are manufactured predominantly in the Midwest and the South, but are purchased throughout the nation. A single State or group of States should not be able to use a common law nuisance claim to impose carbon dioxide emission limits on motor vehicles, or exact tribute for lawful, historical emissions, where the costs of those actions will be borne primarily by other States. As discussed below, because reducing greenhouse gas emissions results in costs and benefits felt throughout the entire nation, the policy choice of setting appropriate emission limits properly rests with the elected branches of our government, and is not a matter of federal common law.

3. The Second Circuit's opinion is further flawed because it casts aside two previously-recognized and important restrictions on the federal common law of nuisance, namely that it (1) may only be invoked by a State that is (2) seeking injunctive relief, and not monetary damages. This Court has never allowed non-State parties to invoke the federal common law of nuisance, nor has it recognized an action for money damages.

While acknowledging a limited federal common law of nuisance that allows a State sovereign to sue

another State sovereign or its citizens to abate interstate pollution, this Court was motivated—and constrained—by fundamental questions of federalism. *See Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906). Until the instant case, the courts of appeals have largely recognized these limits. The Ninth Circuit, for instance, has noted that the federal common law of nuisance applies "only [to] those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control." *Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles*, 869 F.2d 1196, 1205 (9th Cir. 1988);[4] *see also Cal. Tahoe Reg'l Planning Agency v. Jennings,* 594 F.2d 181, 193-194 (9th Cir. 1979) (emphasizing the limited scope of "the federal common law of nuisance," which at most "permits one state to enjoin damaging activities carried on in another" and "bestows upon us no power to root out that which happens to offend . . . a vigorous plaintiff"). The Fourth Circuit has also noted that the federal common law of nuisance "has not been extended beyond the abatement of public nuisances in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm." *Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006,

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[4] In support of its conclusion, the *National Audubon* court noted that in *Georgia v. Tennessee Copper Co.*, this "Court focused on the facts that the plaintiff was a state and the injury was interstate," and that in *Milwaukee I*, "the case [again] centered on an interstate controversy which involved a state suing sources outside its domain which were causing pollution within the state." *Nat'l Audubon Soc'y*, 869 F.2d at 1204-05.

1009 (4th Cir. 1976); *but see National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1233 (3d Cir. 1980) (holding that "that the common law nuisance remedy recognized in *Illinois v. City of Milwaukee* is available in suits by private parties.").

The Second Circuit's decision allowing municipal and private entities to assert a claim under the federal common law of nuisance represents a marked departure from this Court's precedent, and highlights a split in the circuits on this question. If left standing, the decision would significantly expand the parties that may invoke the doctrine, and would likely result in a flood of federal common law nuisance claims brought in federal court. Moreover, although the Plaintiffs in this particular action have sought only injunctive relief, the Second Circuit's reliance on the Restatement of Torts to delineate the outer bounds of the federal common law of nuisance could be read as opening the door to damages actions.

By applying the federal common law of nuisance to the complex question of global climate change (and not just nuisances of a simple type), by holding that a federal common law nuisance claim may be pursued by any party (and not just by States), and by adopting a broad view of the doctrine that would allow the recovery of monetary damages (and not just injunctive relief), the Second Circuit has fundamentally rewritten the federal common law. Given that countless people and businesses may claim that they have been harmed by global climate change, recognizing such an expansive cause of action could lead to a torrent of new litigation in the federal courts. This Court should step in and restore the federal common law of nuisance back to its original and much more limited scope.

II. DETERMINING WHICH PARTIES MUST BEAR THE BURDEN OF REDUCING GREENHOUSE GAS EMISSIONS AND THE REASONABLENESS OF GREENHOUSE GAS EMITTING ACTIVITIES PRESENT NONJUSTICIABLE POLITICAL QUESTIONS.

Review by this Court is also warranted because adjudicating Plaintiffs' claims would necessarily require a court to employ the "vague and indeterminate" nuisance standard, *Milwaukee II*, 451 U.S. at 317, to make broad policy pronouncements concerning the nation's past, current and future energy policy. A court presiding over a climate-related nuisance claim would have to determine which among the millions of greenhouse gas emitters in the nation, if any, may be held legally responsible, and which greenhouse gas producing activities are unreasonable under the circumstances, if any. A court cannot draw these inherently policy-laden lines without running afoul of the political question doctrine. That doctrine is implicated where there is "a lack of judicially discoverable and manageable standards for resolving" the dispute before the court, or where the action presents the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

1. Because the basic actions creating greenhouse gas emissions (the burning of carbon-based fuels) are commonplace and ubiquitous, every participant in the world economy shares some responsibility for the concentration of greenhouse gasses in the atmosphere. Consequently, a court adjudicating a climate-related nuisance action will be required to

determine which emitters of greenhouse gasses should be held legally liable, if any, and must therefore reduce their emissions or compensate those who claim damages from global climate change. The Second Circuit did not articulate any standard for drawing this line and failed to recognize that its placement entails an exercise in policy making constitutionally vested in the elected branches of government.

The Second Circuit attempted to brush this issue aside, claiming that "[t]he possibility that mandatory emissions reductions may be imposed upon these defendants is quite different from mandatory emissions reduction requirements on American industry." Pet. App. 26a n.4 (quotations omitted).[5] But the impact of a decision in this case will likely reach much further than just the six defendants whom Plaintiffs have chosen to sue. For one thing, any decision by a federal court assessing legal liability for greenhouse gas emissions will, as a practical matter, impact the actions of other similar

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5 Notably, the Circuit Court's conclusion that a decision in this action will have no broader impact than to address the emissions of the defendants before it is contradicted by its reasoning for allowing private parties to assert the federal common law of nuisance. In support of that conclusion, the court pointed to an "'overriding federal interest in the need for a uniform rule of decision.'" Pet. App. 97a (quoting *Milwaukee I*, 406 U.S. at 105 n.6). But if this action has been properly asserted by non-State plaintiffs because of an "overriding federal interest in the need for a uniform rule of decision" concerning industrial emissions of greenhouse gasses, then, contrary to the Second Circuit's assertion otherwise, a decision by a court adjudicating Plaintiffs' claims would have to articulate a broadly-applicable standard for determining what levels of greenhouse gas emissions create a nuisance.

greenhouse gas emitters. For another, the Second Circuit did not consider the possibility that other greenhouse gas sources may be brought into the action as defendants, which is very likely given that Plaintiffs are seeking to hold just these six defendants "jointly and severally liable for creating, contributing to, or maintaining [the] public nuisance" of global climate change. Pet. App. 11a. Even where a nuisance action seeks injunctive relief, a defendant may implead other joint-tort feasors and seek an order requiring them to bear a share of the emission reductions required to abate the nuisance. Restatement (Second) of Torts § 840E. The list of joint tortfeasors that have contributed to greenhouse gas emissions is endless. The Second Circuit's decision does not offer any standard that is "principled, rational, and based upon reasoned distinctions" for determining where the line should be drawn between those who may properly be held responsible for abating the emissions believed to cause global climate change and those who may not. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). Indeed, "one searches in vain . . . for anything resembling a principle in the common law of nuisance." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

For this reason, district courts forced to address this issue have uniformly and correctly concluded that drawing the line between those greenhouse gas emitters that are legally liable for climate change and those that are not "requires the judiciary to make a policy decision about who should bear the cost of global warming." *Kivalina*, 663 F. Supp. 2d at 876-77. However, "[t]he Court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the

Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result[s] from multiple sources around the globe." *General Motors*, 2007 WL 2726871, at *15. Simply put, "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Kivalina,* 663 F. Supp. 2d at 877.

2. Deciding Plaintiffs' nuisance claim would also require a court to determine which greenhouse gas emitting activities are reasonable under the circumstances and which are not. The Second Circuit did not articulate any standard a district court could follow in making that distinction, and, indeed, it is impossible to draw that line "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The Restatement defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979). Whether a particular interference is unreasonable under the circumstances turns on weighing "the gravity of the harm against the utility of the conduct." *Id.* § 821B cmt. e. In each category of public nuisance—whether intentional, negligent or reckless—"some aspect of the concept of unreasonableness is found." *Id.* "[I]n determining whether the gravity of the interference with the public right outweighs the utility of the actor's conduct, it is necessary to consider the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the character of the locality and the impracticability of preventing or avoiding the invasion." *Id.* § 828 cmt. a.

Addressing this question in the context of a climate-related nuisance action clearly entails a non-justiciable political question. By what standard is a court to determine "the social value that the law attaches to" the burning of fossil fuels to produce electricity or the manufacture of motor vehicles that run on gasoline? Similarly, because greenhouse gasses mix evenly in the atmosphere and the location of a source therefore has no impact on the concentration of greenhouse gasses at any particular location, how could a court determine "the suitability" of the greenhouse gas emitting conduct "to the character of the locality" where the source is situated? Finally, given the undeniable need for this country to burn fossil fuels for energy, how can a court determine "the impracticability of preventing or avoiding the invasion?" These questions can only be answered by formulating national policy concerning energy and greenhouse gas emissions. A court adjudicating a climate-related nuisance claim would be required to "balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," *General Motors*, 2007 WL 2726871, at *8, and that is plainly "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217 (1962).

Moreover, an action seeking injunctive relief to abate a source's greenhouse gas emissions necessarily entails a determination of what would be an "acceptable limit on the level of greenhouse gases emitted by Defendants." *Kivalina*, 663 F. Supp. 2d at 876. Plaintiffs do not claim that Defendants' activities should have resulted in zero emissions of carbon dioxide, but rather contend that the levels of carbon dioxide emitted from Defendants' activities

were unreasonably high under the circumstances. Deciding the optimum level of carbon dioxide emissions from a particular activity requires a far-ranging analysis of the relative social and economic costs and benefits of more stringent standards. A standard-setting authority—whether it be an expert agency or Congress—has the constitutional competence to set the appropriate level of emissions at the point where the benefits of enhanced stringency are outweighed by the additional costs to society.[6] The Courts do not possess those institutional tools.[7]

Clearly, climate-related nuisance actions present quintessential political questions. Adjudicating such claims will require a court to decide which segments of society—along the broad spectrum of contributors to worldwide greenhouse gas emissions—should be held legally liable and which should be excused. A

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6 Indeed, as discussed above, this is precisely the sort of policy-laden question that EPA is considering in determining which sectors of the economy should bear the burden of reducing greenhouse gas emissions and what the appropriate level of emissions from specific sources should be. Whether one agrees or disagrees with the decisions made by EPA and other regulatory agencies in this regard is beside the point. The point is that there are processes by which the public can participate in agency rulemaking as well as the legislative process, and the political branches must consider this input in addressing the complex problem of how best to reduce greenhouse gas emissions.

7 Furthermore, given the fact the greenhouse gas emissions disperse evenly across the nation (and indeed the world), a source of emissions could find itself subject to lawsuits in multiple jurisdictions, and consequently face the possibility of inconsistent judicial determinations concerning what is a reasonable level of greenhouse gas emissions under the circumstances.

court also will be required to determine under what circumstances greenhouse gas emissions are reasonable and under what circumstances they are not. Resolving these questions will require a non-judicial policy determination, and courts lack any discernable standard for resolving this dispute. Certiorari should be granted to ensure that the formulation of national policy concerning greenhouse gas emissions will rest with the political branches of government where it properly belongs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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