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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

AMICUS CURIAE BRIEF OF NATSO, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

NATSO, Inc. ("NATSO") is a national trade association representing the travel plaza and truckstop industry. NATSO's members run the gamut from small mom-and-pop stores and family-run businesses to medium and larger sized corporations. NATSO, and its members, are active participants in the ongoing debate before the political branches regarding how to address climate change.

Any judicially imposed emissions cap that might issue in this case to allegedly remedy injuries flowing from a warming earth would directly impact NATSO's members by requiring them to change their business practices or, like the defendants, face the potential for future civil litigation. Additionally, any emissions abatement order in this case would necessarily have adverse implications for the supply of motor fuel, thereby creating negative economic consequences for NATSO's members. Because of this case's precedential significance, it most likely will have direct and adverse impact on the businesses and livelihoods of

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[1] In accordance with Rule 37.6, *amicus curiae* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of Court. NATSO provided the required notice of filing to all parties.

NATSO's members. As a consequence, the Court should allow NATSO's voice to be heard.

STATEMENT OF THE CASE

NATSO adopts Petitioner's statement of the case.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be granted for the following four reasons.

First, the Second Circuit's decision violates a core postulate of this Court's political question doctrine jurisprudence – namely, that justiciability turns on the judiciary's competence to apply coherent legal principles to the specific dispute in front of it (its "law *application* function"), rather than on the plaintiff's ability to couch a claim in the language of a traditional cause of action ("semantic cataloguing"). In doing so, the Second Circuit's decision, in both its reasoning and result, conflicts with relevant decisions of this Court. The judicially administered common-law of nuisance is not a constitutionally permissible mechanism through which to address global climate change. When stripped of its common-law *label*, this lawsuit is exposed as a clear end run around the political law-making process committed to Congress by the text and structure of the Constitution.

Second, the Second Circuit decision, by contradicting both the methodology employed by several courts of appeals and the explicit holdings of two district courts, compounds the doctrinal confusion surrounding the political question doctrine. This doctrinal incoherence cries out for this Court to step in and supply clarity for principled adjudication.

Third, the circuits are split over whether mere contribution to a generalized environmental problem, without more, can generate standing.

Fourth, this is not a case in which mere misapplication of an otherwise correct legal standard has occurred. Rather, the errors are so grave and so likely to recur that immediate review to prevent significant irreparable harm is necessary. Not only will judicial action in this field require costly and irreversible technological change on the part of defendants, but permitting an ad hoc mishmash of common-law regimes will frustrate congressional attempts to design coherent and systematic market-based solutions which can remedy the problem. Laurence H. Tribe, Joshua D. Branson, and Tristan L. Duncan, Wash. Legal Found., *Critical Legal Issues Series No. 169, Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 22 (Jan. 2010).

Thus, far from providing meaningful redress for the environmental worldwide problem posed, judicial intervention risks making global warming worse. "Frequently an issue of this sort will come before the

Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." *Morrison v. Olson,* 487 U.S. 654, 699 (1988) (Scalia, J. dissenting).

ARGUMENT

I. THE SECOND CIRCUIT DECISION VIOLATES THE CORE POSTULATE OF THIS COURT'S POLITICAL QUESTION DOCTRINE JURISPRUDENCE, WHICH REJECTS "SEMANTIC CATALOGUING" AND CONFINES ARTICLE III COURTS TO A LAW APPLICATION, NOT LAW CREATION, FUNCTION.

The political question doctrine originated in *Marbury v. Madison*, where Chief Justice Marshall opined that "[q]uestions in their nature political . . . can never be made in this court." 5 U.S. (1 Cranch) 137, 170 (1803). This Court articulated the criteria for identifying political questions in *Baker v. Carr*, 369 U.S. 186, 216 (1962). Among them, and applicable here, are "a textually demonstrable commitment to a coordinate political department; . . . a lack of judicially discoverable and manageable standards . . . ; [and] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* RICHARD H. FALLON, JR. ET AL., HART &

WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 235 (6th ed. 2009) ("No single criterion seems to control, and some appear to . . . have a . . . prudential or functional feel to them.").

In all of its aspects, the political question doctrine is "a function of the separation of powers." *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 456 (1992). *Cf. Mistretta v. United States,* 488 U.S. 361, 381 (1989) (quoting *Buckley v. Valeo,* 424 U.S. 1, 122 (1976) (discussing overarching separation of powers principles generally and explaining that their primary purpose is to prevent "encroachment or aggrandizement [by] one branch at the expense of the other[s]"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Constitution diffuses power the better to secure liberty. . . .").

With respect to the first *Baker* factor, the Second Circuit overlooked that textual commitments need not be express, but may be implied from the Constitution's structure and framework. *See Nixon v. United States,* 506 U.S. 224, 228-29 (1993) ("[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."); *see also* 16 AM. JUR. 2D *Constitutional Law*, sec. 62-76 (2009). Accordingly, the Constitution's lack of a "climate change" or "carbon

emissions" clause should not end the analysis. Instead, the more relevant question is whether the Constitution implicitly commits resolution of systemic, interdependent, national and international policy-oriented disputes such as climate change to Congress's regulatory and lawmaking function. Solutions to such inherently global issues are more appropriately assigned to legislative processes that incorporate the views and interests of the many stakeholders, and not the judicial process, which excludes nonparties. *See* Joseph A. Siegel, *Collaborative Decision Making on Climate Change in the Federal Government*, 27 PACE ENVT'L L. REV. 257, 259 (2009).

"Behind the words of the constitutional provisions are postulates which limit and control." *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). In this case, the controlling postulate marks functions that only Congress or the President could discharge competently as committed, respectively, to Congress and the President. *INS v. Chada*, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

Responding to the challenges posed by global warming will require policy choices that are inherently legislative and thus inherently committed to Congress. The "Constitution is neither silent nor equivocal about who shall make the laws. . . ." *Youngstown*, 343 U.S. at 587.[2] Article I vests lawmaking power exclusively in Congress, not the federal courts. *See* U.S. Const., Art. I sec. 1 ("All legislative powers herein granted shall be vested in a Congress of the United States"); *see generally O'Melveny & Myers v. Federal Deposit Insurance Corp.*, 512 U.S. 79, 89 (1994) (creation of a new liability rule is "more appropriately for those who write the laws, rather than for those who interpret them."); *Sosa v. Alvarez-Machain,* 542 U.S. 692, 727 (2004). In this case, plaintiffs ask the courts to legislate. An abatement order would embody a legislative judgment about what carbon emissions policy ought to be, derived from a cost-benefit analysis of costs to plaintiffs versus utility of continued energy production at current levels. In the context of the unique, global, inherently systemic nature of climate change, balancing of competing considerations of costs and utility is not possible in

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[2] While *Youngstown*, which involved a presidential order to the Secretary of Commerce to take possession of the nation's steel mills to *continue* steel production, is not a political question doctrine case, it is relevant to the separation of powers issues here. As much as the presidential order in *Youngstown*, the requested judicial abatement order against the utilities to *curtail* energy production here would usurp law-making powers that the Constitution vests exclusively in Congress.

any traditional common-law calculus. Indeed, such substantive, noninterstitial, lawmaking in the guise of the common-law unconstitutionally aggrandizes judicial power beyond the Judiciary's law-application function and unconstitutionally violates separation-of-power principles.

A. Certiorari Is Warranted Because The Second Circuit's Attribution Of Decisive Significance To The *Label* Attached To The Plaintiffs' Cause Of Action, And Its Corresponding Failure To Dissect The *Application* Of That Cause Of Action To The Underlying Issue Of Climate Change, Conflicts With The Core Commands Of This Court's Relevant Political Question Doctrine Decisions.

The Second Circuit erred by focusing on the *label*, and not the true nature, of the plaintiffs' claims. Based on the claims' "public nuisance" *label*, the court viewed them as presumptively justiciable and concluded that the issues in the case were not textually committed to the political branches but instead to the judiciary. This analysis, however, would eviscerate the political question doctrine, as lawyers could simply plead around it. Rather, a court must look at the issues underlying claims, not the *labels* placed on them. *Baker*, 369 U.S. at 217; *Luther v. Borden,* 48 U.S. (7 How.) 1, 7 (1849) (common-law trespass claim

was a nonjusticiable political question because underlying issues were for Congress to decide); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (civil rights action under Fourteenth Amendment was nonjusticiable political question because requested injunctive relief seeking judicial creation and supervision of new standards for Militia discipline was for Congress to decide); *Vieth v. Jubelirer*, 541 U.S. 267, 296-97 (2004) (equal protection challenge was a political question due to lack of judicially manageable standards for determining when a political gerrymander goes "too far").

In addition, a rule that invites litigants to escape the thrust of the political question doctrine by nothing more than semantic manipulation constitutes a transparent resort to a form of circular reasoning that *always* leads to a finding of justiciability. This is made clear by the Panel's conclusion that, since the claims presented by plaintiffs were common-law nuisance claims, "judicially manageable standards" for resolving the climate change problems alleged by plaintiffs to be a source of their injuries were provided by the common-law of nuisance. *See Connecticut v. American Electric Power*, 582 F.3d 309 (2d Cir. 2009) ("*AEP*").

The implication of this circular reasoning is clear: As long as a claim is stated under the *label* of a traditional common-law cause of action, that cause of action will always provide judicially manageable standards for addressing whatever problem the complaint asks the court to resolve, and the claim will always be justiciable. The Panel's reliance on this

question-begging technique in itself warrants granting certiorari, for nothing less is at stake than the very survival of the political question doctrine and of the fundamental separation of powers principles it embodies.

Instead of evaluating the types of carbon-specific issues likely to emerge during the litigation, the Court concluded that generalized judicial experience with respect to the plaintiffs' cause of action automatically satisfied *Baker's* second and third prongs. In doing so, the Second Circuit departed from the basic teaching that the political-question doctrine governs the judicial resolution of certain types of disputes, *not* the entertainment of certain causes of action. Article III, through the political question doctrine, limits "judicial action [to action that is] . . . governed by *standard,* by *rule*." *Vieth*, 541 U.S. at 278 (emphasis in original). The determination of whether a dispute is amenable to sufficiently principled resolution to comply with the Article III conception of the "judicial power" requires a "discriminating analysis of the particular question posed" and in particular "the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12. As such, the search for a nonjusticiable political question must be guided by a fact-intensive "discriminating inquiry," not "semantic cataloguing." *Id.* at 217.

B. The Second Circuit's Category Root Error Stemmed From Its Mistaken Equation Of Climate Change With Traditional Air Pollution Cases When, In Fact, Climate Change Cases Involve Differences In Kind, Not Just Degree, From Ordinary Nuisance Cases.

The Second Circuit's most fundamental analytical error was it presumed that any reduction in carbon emissions "slows" global warming and thereby remedies plaintiffs' alleged injuries at least to some degree. This is not so. The court did acknowledge that climate change is caused by numerous sources of greenhouse gases, but then concluded that, merely because the "Plaintiffs' injuries are part of a worldwide problem does not mean Defendants' contribution to that problem cannot be addressed through principled adjudication." *AEP*, 582 F.3d at 329. In taking that step, the court made a fundamental category error: it framed climate change as a traditional pollution problem when in fact it is anything but.

In essence, the Panel assumed that climate change is simply a bigger version of a classic air pollution problem and that the nuisance doctrine is therefore equipped to manage it. That assumption is fatally flawed.[3] Carbon dioxide is unlike any

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[3] None of the following arguments requires any additional judicial fact-finding inappropriate for the pleading stage of the litigation. The "stock pollutant" description of carbon dioxide merely clarifies what the plaintiffs have already alleged, as it is

(Continued on following page)

traditional pollutant; it is a stock pollutant, meaning that the injuries associated with climate change stem only from the overall concentration of carbon dioxide, irrespective of source. *See* PETER READ, RESPONDING TO GLOBAL WARMING: THE TECHNOLOGY, ECONOMICS AND POLITICS OF SUSTAINABLE ENERGY 153 (Zed Books 1994). The relationship between greenhouse gas emissions and global warming "does not operate like the kind of simple, short-term, more linear relationship between cause and effect that most people . . . assume is at work when they contemplate pollution." Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1164 (2009). Because a linear cause and effect relationship is absent here, the problem of remedying global climate change is even less amenable to reasoned adjudication than attempting to "balance" interests that "are incommensurate." In that context, Justice Scalia wrote "balancing" interests that "are incommensurate" is "more like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J. concurring in judgment).

To ask one court, armed only with the Restatement of Torts, to resolve those issues is to ask the impossible. *See Massachusetts v. EPA,* 549 U.S. 497, 533 (2007) (recognizing that this Court had "neither

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the scientific theory upon which their allegations rely. *See* Complaint ¶¶ 87-94, *Connecticut v. Am. Elec. Power*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

the expertise nor the authority to evaluate [climate change] policy judgments"); *Union Elec. Co. v. EPA*, 515 F.2d 206, 219 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976) ("It is not our role to sit as a super-legislature balancing the necessity of compliance with the clean air standards against competing economic and technological considerations."); *North Carolina v. Tennessee Valley Authority*, No. 09-1623, 2010 WL 2891572, at *3 (4th Cir. July 26, 2010) ("If 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. Energy policy cannot beget and the environment cannot prosper, in this way.")

The above arguments are ones that courts, because of their lack of policy expertise and because of their constitutional inability to bind non-parties, are methodologically and institutionally incapable of addressing. Tribe, et al., *supra*, at 21.

II. BY CONTRADICTING THE METHODOLOGY EMPLOYED BY SEVERAL COURTS OF APPEALS AND THE EXPLICIT HOLDINGS OF TWO DISTRICT COURTS, THE SECOND CIRCUIT COMPOUNDED THE DOCTRINAL CONFUSION SURROUNDING THE POLITICAL QUESTION DOCTRINE REQUIRING THIS COURT'S IMMEDIATE GUIDANCE.

Several courts of appeals have rejected the "semantic cataloguing" or "*labeling*" approach adopted by

the Second Circuit and instead followed a methodology whereby the court looks beyond the familiar common-law terminology and instead, tailors the fit between the alleged injury, wrongful conduct, and requested relief to the proper governmental function to determine justiciability. In doing so, courts must be on guard for insuperable problems of unmanageability that might "emerge" as the claim is tried. *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1202 (5th Cir. 1978). Even if the complaint itself does not facially advance a baldly political question, several courts have held common-law claims to be nonjusticiable when the *application* of seemingly traditional causes of action requires judicial resolution of underlying political disputes. *See Carmichael v. Kellogg, Brown & Root Serv., Inc.*, 572 F.3d 1271 (11th Cir. 2009) (negligence); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 n.8 (9th Cir. 2007) (wrongful death, public nuisance); *El-Shifa Pharm. Indus v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (defamation).

This concern with the content of a complaint – instead of its mere form – has led two district courts to reach conclusions that conflict flatly with that of the Second Circuit. In *California v. General Motors Corp.*, the Northern District of California held nonjusticiable a similar nuisance claim alleging injury stemming from climate change. No. C06-05755, 2007 WL 2726871 (N.D. Cal. 2007). Because the claim "would require the Court to create a quotient or standard" assessing the harm and the benefit generated by fossil fuel consumption, the court held

that the claim impermissibly asked it to engage in a "balancing of . . . competing interests . . . to be made by the political branches." *Id.* at *8. Two years later, another Northern District of California court directly repudiated the Second Circuit's *AEP* decision, holding that the climate change nuisance claim before it would force the court to venture into sophisticated programmatic analysis of American energy policy, an analysis that was beyond nuisance doctrine's limits. *See Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). These decisions epitomize the type of "discriminating analysis" of climate change and its intersection with nuisance principles that this Court's holdings demand.

The Second Circuit's misstep – and the direct conflict between its decision and those of the U.S. District Court for the Northern District of California – is symptomatic of the broader doctrinal chaos in this area. In reaching a conclusion similar, but not identical, to the *AEP* court's, a panel of the Fifth Circuit, in a vacated opinion, recently argued that *Baker's* formulations are merely "open-textured, interpretive guides to aid federal courts in deciding" whether a question is nonjusticiable. *Comer v. Murphy Oil*, 585 F.3d 855, 872 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). It then concluded that a nuisance suit against carbon emitters was justiciable in large part because "[c]ommon-law tort claims are rarely thought to present nonjusticiable political questions." *Id.* at 873.

The placement of so much weight on the form of the cause of action alleged, however misguided, is unlikely to represent a singular aberration. On the contrary, it seems a predictable consequence of the fact that this Court has provided only sketchy, "open-textured, interpretive guides" to the general process of applying the political question doctrine. In this vein, the D.C. Circuit recently observed that the political question doctrine has become "notorious for its imprecision," *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008), echoing Judge Bork's earlier remark that the "murky and unsettled" contours of the doctrine have generated a "lack of consensus about its meaning." *Tel-Oren v. Libyan Arab Repub.*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring).

Nor was the *AEP* Panel alone in its myopic focus on the formulaic *label* attached to the plaintiffs' cause of action. An earlier Second Circuit decision reasoned that where a plaintiff presents an "ordinary tort suit, alleging that the defendants breached a duty of care," the claim is justiciable because tort suits are "constitutionally committed . . . [to] the Judiciary." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991). Various other courts have similarly centered their inquiries on classifying the cause of action. *See In re African-American Slave Descendants Litig.*, 471 F.3d 754, 758 (7th Cir. 2006) ("[T]he plaintiffs have been careful to cast the litigation as a quest for conventional legal relief."); *McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983) ("[T]he political

question theory . . . [does] not ordinarily prevent individual tort recoveries."). In other words, some courts, like the *AEP* panel, allow the plaintiffs' own classification of their legal theory to determine tautologically whether the claim is justiciable, while others, like the court in *Kivalina*, engage in a more searching scrutiny. This Court's review is essential to restore some order in political question doctrine cases, so that the doctrine can once again "constrain . . . jurists from inserting their own ideological beliefs in ad hoc, unreasoned ways." Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L. J. 1457, 1470 (2005).

Indeed, the Second Circuit's reasoning begs the question which is at the heart of *Baker's* third factor: When is a policy determination made by a court properly within the judicial function, and when does a policy determination cross the line and impinge on the legislative function? To suggest that the dividing line can be ascertained merely by reference to the axiom that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions," *Vieth*, 541 U.S. at 278, does not fully answer the question. In concluding that the RESTATEMENT (SECOND) OF TORTS supplies judicially manageable standards and does not require federal courts to make a policy decision of a nonjudicial nature, the Second Circuit decision suggests that any nuisance case is justiciable. But the Restatement's introduction acknowledges that courts "regard the law of torts as a dynamic set of norms, inviting adaptation as social

conditions and prevailing values change, *within the limits of the judicial function*." Introduction to RESTATEMENT (SECOND) OF TORTS, vol. 4, at viii (1979) (emphasis added).

Thus, the Second Circuit either overlooked or failed to understand the inherent restrictions that the common-law of nuisance, as reflected in the *Restatement*, has always incorporated into the common law-making power. The judgments of national and international policy that plaintiffs ask federal courts to make in this case lie far beyond the scope of properly judicial common-law decision making. The *Restatement* implicitly recognizes as much when it provides that the courts should root their judgments of "unreasonableness" in nuisance cases in "community standards," *id.* § 828 cmt. b, because, apart from community standards, "there is often no uniformly acceptable scale or standard of social values to which courts can refer." *Id.* In this case, for which it is clear that no "community standards" exist, a court could not proceed without making uncabined policy judgments that even the *Restatement* recognizes courts should eschew as "outside the limits of the judicial function." *See generally* JESSE DUKMINIER, ET AL., PROPERTY 665 (6th ed. Aspen Publishers 2006) ("[N]uisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems.").

The Restatement's own self-limiting terms therefore suggest that climate change disputes are non-justiciable both because of lack of judicially

manageable standards and because of the need for a policy decision of a non-judicial nature.

III. THE CIRCUITS ARE SPLIT OVER WHETHER MERE CONTRIBUTION TO A GENERALIZED ENVIRONMENTAL PROBLEM, WITHOUT MORE, CAN GENERATE STANDING.

A conflict now exists between the Second Circuit *AEP* decision and other circuits with respect to the following important federal question: whether an individual emitter's mere contribution to a generalized global environmental phenomenon is sufficient to satisfy Article III standing, where:

(1) the plaintiff has no meaningful connection to the emitter's "zone of discharge," and

(2) no statutory permit exists from which causation can be presumed.

In addition, the Second Circuit decision conflicts with this Court's relevant standing decisions that find that Article III standing is lacking when:

(1) the relief sought does not involve assertion of procedural rights pertaining to the regulation of the discharge, and

(2) an essential dimension of specificity with respect to *both* the plaintiffs' alleged *injuries* and the defendants' alleged wrongful *conduct* is absent.

A. The Second Circuit Split From The Majority Approach, Which Finds No Article III Standing Under The "Contribution Test" Unless The Plaintiff Can Identify A Geographically Discrete "Zone Of Discharge" In Which She Suffers Injury.

It is axiomatic that there is no standing unless the plaintiff demonstrates a "causal connection between the injury and the conduct complained of" such that her injury is "fairly traceable to the actions of the defendant." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citation and internal quotation marks omitted); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992).

The Second Circuit incorrectly concluded that the standing doctrine's causation prong was satisfied because plaintiffs alleged that the defendants' emissions "contribute to global warming." *AEP*, 582 at 347. In so doing, it purported to adopt the Third Circuit's test for evaluating standing in Clean Water Act cases, *id.* at 346-47, set forth in *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990), which requires proof that the defendant: "(1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." However, the Second Circuit abandoned the

"statutory permit" and "zone of discharge" requirements.

Unlike the effluents regulated under the Clean Water Act or the traditional aerial pollutants regulated under the Clean Air Act, according to plaintiffs' own pleadings, carbon gas does not flow to a demarcated spatial region and cause environmental harm to that region. Instead, the link between particle emission and climate change is both spatially and temporally attenuated; greenhouse gas emissions cause harm only far into the future and in scattered geographic areas wholly unrelated to the location of emissions. *See Lazarus, supra,* at 1176-77. As such, there is no meaningful zone of discharge for carbon emissions, since the effects of those emissions are both cumulative and distributed globally, irrespective of their geographic source.

As the Fourth Circuit emphasized when applying the *Powell Duffryn* test, the Constitution demands that "some distinction . . . be made between plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to that defendant." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000). The Fifth and Seventh Circuits have similarly adopted *Gaston Copper's* reasoning, holding that plaintiffs must allege injury arising out of their use of some spatially limited discharge zone. *See Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360-61 (5th Cir. 1996) (finding an eighteen-mile span of

water "too large to infer causation"); *Texas Indep. Producers and Royalty Owners Assoc.*, 410 F.3d 964, 973 (7th Cir. 2005).

The *Powell Duffryn* "Zone of Discharge" test is in square conflict with the Second Circuit's unrestrained misapplication of *Powell Duffryn*. *Cf. Kivalina,* 663 F. Supp. 2d at 878-80 (comparing and contrasting spatially limited approaches to causation with literal applications of *Powell Duffryn*). Indeed, the permissiveness of the Second Circuit's "contribution" formulation has no meaningful limits and enables a state to become a "roving environmental ombudsman seeking to right environmental wrongs wherever [it] might find them." *Gaston Copper*, 204 F.3d at 157. In finding that the plaintiffs have standing under this limitless contribution test, the Second Circuit distorted the Third Circuit's approach and split with a majority of circuits.

In addition, as Petitioners cogently argued and this *amicus* will not duplicate, the Second Circuit also split from the majority approach when it ignored the first prong of the *Powell Duffryn* test, which requires proof of a defendant's emission discharge beyond a statutory permit. Petitioners' Petition for a Writ of Certiorari at 18-20. Furthermore, the Second Circuit decision conflicts with the standing analysis in *Massachusetts v. EPA* because this case does not involve a procedural right pertaining to the regulation of the discharge. *Id.* at 15-18.

B. Plaintiffs' Claims Should Be Barred As "Generalized Grievances."

Of paramount importance to the standing inquiry is the requirement that claims present "something more than generalized grievances." *United States v. Richardson*, 418 U.S. 166, 180 (1974) (internal quotation omitted). In doing so, the plaintiff must articulate a chain of causation from challenged conduct to injury that possesses a constitutionally "essential dimension of specificity." *Schlesinger v. Reservists Cmte. to Stop the War*, 418 U.S. 208, 221 (1974). But the plaintiffs' claim here possesses no specificity; the named defendants are indistinguishable, in their relationship to the plaintiffs' alleged injury, from any other greenhouse gas emitters.

The Second Circuit's test, shorn of any limiting spatial principle, thus runs afoul of *Richardson's* specificity requirement. Granted, both *Richardson* and *Reservists* focused on the problem of undifferentiated *plaintiffs* – in both cases taxpayers – but the problem is no less acute when defendants are targeted not for any particular injury wrought on the plaintiffs but instead on their generic contribution to a global problem.

Such "potential for abuse of the judicial process" cannot be squared with this Court's standing jurisprudence. *Reservists*, 418 U.S. at 222. Under the Second Circuit's holding, where any plaintiff may sue any contributing defendant for systemic problems like climate change, courts would lose an important tool

with which to keep generalized political claims – like a charge that one company's outsourcing of American jobs had disturbed the overall American labor market and thus "contributed to" the recession felt by a plaintiff – out of courts. Tribe, et al., *supra*, at 16-17. ("adjudication of such abstract and undifferentiated claims 'opens the Judiciary to [the] charge of providing 'government by injunction', [*Reservists* at 222]. And government by injunction is neither accountable to majority will nor a product of the 'consent of the governed' ").

IV. THESE IMPORTANT ARTICLE III JUSTICIABILITY QUESTIONS HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT BECAUSE PERMITTING COMMON LAW NUISANCE DOCTRINE, WHICH IS FUNDAMENTALLY ILL-SUITED TO GRAPPLE WITH THE NATIONAL AND INTERNATIONAL POLICY COMPLEXITIES OF CLIMATE CHANGE, RISKS CREATING SERIOUS AND IRREVERSIBLE HARM.

Although only the Second Circuit among the courts of appeals to date has decided the precise issue at stake – the justiciability of common-law nuisance claims targeting greenhouse gas emitters – the urgency and magnitude of the issues involved warrant immediate review by this Court rather than delay to await the development of an intercircuit conflict on the precise question at hand. Specifically, were this

Court to deny the writ in this case, and await the germination of a persistent circuit split on the precise question presented, it would precipitate two destructive consequences: it would (1) impose unrecoverable technological and economic costs on the American energy industry; and (2) inhibit Congress's ability to effectively and comprehensively craft a climate policy.

Because of the sensitivity and complexity of energy systems, mistakes in the institutional design of carbon abatement schemes are extraordinarily costly and not readily reversible. As one report concluded, what "makes climate change such a difficult policy problem is that decisions made today can have significant, uncertain, and difficult to reverse consequences extending many years into the future." Richard J. Lempert, et al., *Capital Cycles and the Timing of Climate Change Policy* (Oct. 2002), available at: http://www.pewclimate.org/docUploads/capital_cycles.pdf.

It is no response that Congress could simply overrule or preempt the operation of common-law remedies if and when it chooses to establish a comprehensive climate change policy. *See AEP*, 582 F.3d at 374-75. Neither is it a response that this Court could choose to wait for more courts of appeals to weigh in on the issue before granting certiorari. Both responses presume carbon reductions can be controlled by a simple on/off switch, and companies can easily comply with an injunction in the short-term and smoothly integrate into a legislatively created emissions trading regime later. But emissions

reductions are not so simple; they necessarily involve the retirement of expensive capital stock and often require vast and expensive technological overhauls within the energy companies. *See* Michael Toman, et al., *The Economics of "When" Flexibility in the Design of Greenhouse Gas Abatement Policies*, 24 ANNUAL REV. OF ENERGY AND THE ENVT. 431-460 (1999) (warning of the dangers of "haste further lead[ing] to wrong choice of technology"). Once companies commit to overhauling their technological infrastructure in order to achieve compliance with an injunction, the changes they make are likely to be extremely difficult and costly to reverse. Not only does this threaten excessive and irretrievable economic costs, but it runs the risk of "locking in" inferior technology as companies rush to innovate quickly enough to comply with short-term reduction requirements. Tribe, et al., *supra*, at 18. This Court should not force energy producers to wait, watch, and pray while the various circuits concoct their common-law "solutions" to the harms of climate change.

CONCLUSION

To rule for the plaintiffs *on their own nuisance theory*, the court would have to strike a balance between costs and benefits so far-reaching and global in character, and so ungrounded in any preexisting body of binding rules or principles, that it would be making rather than applying law. Moreover, in order to provide *meaningful* relief, given the worldwide character of the problems involved, the court would need to launch a regime of nationwide and probably

international regulation, usurping the role of both political branches. Were the court to attempt to resolve the complex and inextricable policy issues that it would necessarily confront while addressing plaintiffs' claims, it would be acting as "a sort of junior-varsity Congress." *Mistretta,* 488 U.S. at 427 (Scalia, J. dissenting). "One can believe strongly in access to courts for the protection of judicially enforceable rights and the preservation of legal boundaries . . . while still deploring the perversion of the judicial process to meddle in matters of policy formation far removed from those judicially manageable realms. Indeed, the two concerns are mutually reinforcing rather than contradictory, for courts squander the social and cultural capital they need in order to do what may be politically unpopular in preserving rights and protecting boundaries when they yield to the temptation to treat lawsuits as ubiquitously useful devices for making the world a better place." Tribe, et al., *supra*, at 2.

Respectfully submitted,

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