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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 *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AMERICAN PETROLEUM INSTITUTE, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center, American Petroleum Institute and American Tort Reform Association ("*Amici*") represent large and small businesses throughout the United States. They have a substantial interest in ensuring that courts follow constitutional and traditional tort law principles. The nature of this case extends far beyond these individual petitioners and respondents. It represents an effort to circumvent the legislative and executive branches on environmental policy issues, and has national and international implications. Should the Second Circuit ruling stand and subject utilities and other businesses engaged in lawful conduct to liability for alleged impacts of global climate change, *amici*'s members would be adversely affected.

STATEMENT OF THE CASE

Amici adopt Petitioners Statement of the Case.

SUMMARY OF ARGUMENT

The Second Circuit's ruling represents an unprecedented and unwise expansion of federal common law in the area of public nuisance. The tort of public nuisance is a centuries-old tort with distinct elements and purpose: to allow governments to stop

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[1] Per Rule 37.2, at least 10 days notice was given to the parties of *amici's* intention to file this brief. The parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Per Rule 37.6, *amici* 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 *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

someone from engaging in objectively wrongful behavior that invades a public right and, when appropriate, require the abatement of that nuisance. *See* Restatement (Second) of Torts § 821B cmt. a (1979) (historically classifying such conduct as quasi-criminal). The Second Circuit ruling removes the core public nuisance requirement that the defendant engaged in such wrongful conduct. It also dilutes causation so any connection to a public nuisance can establish liability. The result is a warped federal "super tort" for subjecting American businesses to liability for nearly any environmental harm.

For the past forty years, efforts to enlarge public nuisance doctrine have largely been tried under state common law. Most have failed. The cases have ranged from attempts to subject businesses to liability for smog in Los Angeles to gun violence in cities to lead paint in people's homes. *See Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2009). Judges schooled in the character and elements of the 700 year-old tort dismissed the cases for failure to state a claim or, as with recent climate change cases, on political question grounds. *See, e.g.*, *Comer v. Murphy Oil Co.*, 585 F.3d 855, 860 n.2 (5th Cir. 2009) (reciting the district court's bench ruling that courts are "ill-equipped or unequipped" to adjudicate the claims), *vacated*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010). These state and federal judges applying state tort law appreciated that removing wrongful causation from public nuisance theory would be as extreme as removing breach and causation from negligence; the result would be a "monster that would devour in one

gulp the entire law of tort." *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).

For proponents, the lure of such a leap in tort law is the creation of a powerful tool for advancing political agendas outside of the checks and balances of the political process. *See Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009) ("Plaintiffs are in effect asking this Court to make a political judgment"). Liability would force businesses to change practices or facilitate regulatory or legislative changes. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328-29 (2008) (explaining that tort duties "directly regulate" conduct). Former Clinton Labor Secretary Robert Reich termed lawsuits with such a purpose "regulation through litigation," calling them "faux legislation, which sacrifices democracy." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22.

Here, Respondents are trying to "regulate" – via the courts – emission reductions not achieved through the political process. Respondents strategically filed their claims under federal common law, where public nuisance doctrine is not as well-developed as in the states. They found a receptive court in the Second Circuit, whose expanded view of federal public nuisance claims, as expressed in this opinion, is that "if regulatory gaps exist, [federal common law can fill] those interstices." *Connecticut v. Am. Elect. Power Co., Inc.*, 582 F.3d 309, 330 (2d Cir. 2009).

This Court should grant this Petition to provide clarity on the limited scope and application of the federal common law, particularly in the area of pub-

lic nuisance. Otherwise, "gap-filling" litigation envisioned by this decision will create a rapid expansion of federal lawsuits in many areas of the law. It also would be unsound for the federal common law to make a leap largely rejected in the states.

This brief responds to the second and third questions presented. It grounds Respondents' claims in public nuisance doctrine and explains why lawsuits naming private sector companies for global climate change injuries fail to state a cause of action; they are also barred under the political question doctrine.

ARGUMENT

I. THIS CASE IS AN UNPRECEDENTED STEP IN THE DECADES-LONG PURSUIT TO TURN THE TORT OF PUBLIC NUISANCE INTO A CATCH-ALL ENVIRONMENTAL "SUPER TORT"

A. Public Nuisance Law Has Distinct Elements and Boundaries

The tort of public nuisance has centuries of jurisprudence defining its purpose, elements and boundaries. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003). The four time-honored elements of public nuisance theory are: (1) the existence of a "public right"; (2) unreasonable conduct by the alleged tortfeasor in interfering with that public right; (3) control of the nuisance; and (4) proximate cause between defendant's unreasonable conduct and the public nuisance, and any alleged injury. *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 452-53 (R.I. 2009) (detailing the four elements as "essential to establish" a

public nuisance claim). States have applied the tort in slightly different ways, as is customary with common law, though the essence of public nuisance liability has remained constant.

The quintessential public nuisance is a barrier stopping the use of a public road. If the person blocked the road for a reasonable purpose, such as landing a distressed plane, there is no liability. *See* Restatement (Second) of Torts § 821A cmt c. (1979) ("If the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it."). But, if a person unreasonably interfered with travel on a public road, for example as part of an unauthorized protest, the government can enjoin the person from blocking the road and require him or her to abate any damage caused to the road. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 570 (2006) (noting that governments cannot recover damages because such public nuisance actions are not compensatory or punitive).

Governments, namely states and municipalities, are the principal plaintiffs in public nuisance suits. Private plaintiffs, such as the land Trusts in this case, generally cannot bring public nuisance claims. The exception is when a plaintiff is injured from the public nuisance in a way "different [in] kind from that suffered by other persons exercising the same public right." Restatement (Second) of Torts § 821C cmt. b (1979) ("It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree"). If a private plaintiff can prove the tort's four elements and a different-in-kind in-

jury, it can bring a public nuisance claim for only the special damages. Private plaintiffs cannot seek an injunction or abatement in public nuisance law.

Extending the example, individuals sitting in traffic caused by a blockade, regardless of length or consequences, do not have public nuisance claims. A person specially injured by crashing into the blockade can bring a claim for only the correlated special damages.

As discussed in detail herein, under these long-standing tenets of public nuisance law the state and city Respondents here cannot state a public nuisance claim because each Petitioner's GHG emissions are lawful, not unreasonable, and are not a proximate cause of Respondents' alleged injuries. Further, the Trusts have no cause of action because, even if their allegations are true, they have not sustained a harm different in kind than any other landowner.

B. There Has Been a Campaign to Recast Public Nuisance into a "Super Tort"

In the 1970s, environmental interest group attorneys campaigned to transform public nuisance from a restrained government enforcement tort into a tool for requiring businesses to remediate environmental conditions, regardless of fault. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). They tried to capitalize on the amorphous nature of the word "nuisance." *See* W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word

'nuisance.' It has meant all things to all people."). The tort also had not been used much in the post-industrialized era, and many courts did not have a view of how to apply the tort in modern times.

As part of this campaign, several plaintiff environmental lawyers pursued changes to the public nuisance chapters of the Restatement (Second) that would have "[broken] the bounds of traditional public nuisance." Antolini, *supra*, at 838. Most notably, they tried to remove the wrongful conduct requirement so claims could be brought, as attempted here, even when defendants were engaged in lawful activities. *See id.* They also sought to get rid of the special injury rule. Doing so would allow "severe" harms to be compensable even when not different in kind from harms to the public. They also wanted private plaintiffs, including interest groups, to be able to form class actions and seek injunctive relief and abatement costs. *See id.*

Although fully presented, none of these specific changes were included in the black letter of the Restatement (Second). While some ambiguities appear in the comments to the Restatement (Second), the vast majority of courts, as the next section will show, have rejected these changes.

C. Courts Have Rejected Efforts to Transform Public Nuisance Into a Catch-All Tort

Public nuisance has proven not to be a tort without boundaries. The first test case, *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971), pursued corporations for emitting gases that, when mixed together, allegedly contributed to smog

in Los Angeles. Plaintiffs sued for billions of dollars in compensatory and punitive damages.

The court, in dismissing the claims, appreciated their inconsistency with traditional public nuisance law, the political nature of the underlying issues, and the proper role of the legislature, not the judiciary, in making regulatory decisions: plaintiffs were "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the court." *Id.* at 645. The court noted that granting relief would "halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent." *Id.* at 644.

Advocates for expanding public nuisance law have had occasional successes,[2] but all major attempts to morph public nuisance into a "super tort" for speculative lawsuits have failed. In asbestos litigation, for instance, courts rejected cases from municipalities and school districts asserting public nuisance claims against manufacturers to abate asbestos from public and private properties. *See, e.g., Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (public nuisance would "give rise to a cause of action . . . regardless of the defendant's degree of culpability"). In state attorney general liti-

[2] For example, a court allowed a pollution claim against a business that did not contribute to the pollution and never controlled the polluted land. *See State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971 (Sup. Ct. 1983). The court admitted that determining responsibility was "a political question to be decided in the legislative arena," but allowed the claim, saying "[s]omeone must pay to correct the problem." *Id.* at 977.

gation against tobacco manufacturers, the only court to address the public nuisance claim rejected it. *See Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997). Such claims were also unsuccessful in a variety of other contexts, such as harms caused by guns, lead paint, and drunk driving. *See, e.g., Chicago*, 821 N.E.2d at 1099; *Lead Indus. Ass'n*, 951 A.2d at 428; *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *Goodwin v. Anheuser-Busch, Inc.*, No. BC310105, 2005 WL 280330, at *8 (Cal. Super. Ct. order Jan. 28, 2005).

II. RESPONDENTS CANNOT STATE A VIABLE PUBLIC NUISANCE CLAIM

Here, Respondents similarly tried to shortcut the elements of public nuisance law. This suit, though, was filed under federal common law – an avenue around these state common law decisions. The Court should grant the Petition to clarify that if federal common law does apply, it is not so broad as to render private parties liable for global climate change or specific weather events.

A. Respondents' Version of Public Nuisance is Unfounded in Federal and State Law

Respondents seek several fundamental changes to public nuisance law. First, both the government and private claims eliminate the unreasonable conduct element and dilute causation. Second, the Trusts' claims are based on future injuries, not actual special injuries, allege severe harm, not different harm, and seek injunctive relief, not damages.

1) Petitioners Have Not Engaged in Objectively Wrongful Conduct

The Second Circuit, in defining "unreasonable" interference, concludes that any known, continuing conduct of a significant or long-lasting impact on a public right is unreasonable. *See id.* at 352-353. There is, however, no consideration of the wrongfulness, acceptability or utility of the petitioners' conduct. Thus, the court broadly expands the kind of conduct that can give rise to public nuisance liability. *See* Restatement (Second) of Torts §821B cmt. b (1979). Such a ruling represents a giant leap from the tort's historical application of defining public nuisance conduct as "common law crimes" and "contrary to common standards of decency." *Id.*

As state and federal courts have recognized, if the objectively wrongful conduct requirement is removed from public nuisance, plaintiffs will "deliberately frame[] [their] case as a public nuisance action" to get around constraints of the American legal system. *Chicago v. American Cyanamid*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003). Justice O'Connor has observed that such objective standards are necessary because they provide notice that one's actions could lead to liability. *See Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to common law liability).

Here, while Respondents clearly do not agree with Petitioners' emissions practices, there has been no objective, wrongful, liability-causing event. Petitioners have not failed to comply with any specific environmental law or regulation; instead Respondents are asking a court to create those standards. This political agenda to curb GHG emissions,

though, does not turn the lawful production of electricity into quasi-criminal or unreasonable conduct.

Should the Court grant this Petition, it can clarify the difference between political controversies such as that alleged here and objectively wrongful conduct as were alleged in previous applications of federal common law public nuisance cases, namely in *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (noxious, sulphurous acid gas) and *Missouri v. Illinois*, 180 U.S. 208 (1901) (dumping sewage).

2) Respondents' Allegations Belie Causation Between Petitioners' Emissions and Respondents' Injuries

Under the Second Circuit's causation ruling, any contribution to a public nuisance, regardless of how small, is the basis for a federal common law action. *See* 582 F.3d at 356 (citing Restatement (Second) of Torts § 840D that "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution."). This misinterpretation of the Restatement violates the fundamental tort law principle that "there [must be] some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *See* Keeton, *supra*, at § 41, 263. Indeed, when the Restatement (Second) addressed causation, it required a defendant's conduct to be a substantial factor in producing the alleged harm.

Proximate cause requires both factual and legal causation: but-for Petitioners' emissions the alleged injuries would not have occurred, and the injuries are closely related such that a reasonable person would see it as a likely result of his/her conduct. *See*

Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 380 (1996); *cf.* Fowler V. Harper, *et al.*, The Law of Torts § 20.2 (1986). Even taking Respondents' causation allegations as true, no Petitioner could be a "but for" cause of global climate change. *See Kivalina*, 663 F. Supp. 2d at n 4 (if "combustion of fossil fuels is causing global warming, it is evidence that any person, entity or industry which uses or consumes such fuels bears at least some responsibility for Plaintiffs' harm."). Also, no Petitioner could have reasonably foreseen Respondents' alleged injuries such that it "should have avoided the injury" by acting differently on its own. Dan B. Dobbs, *The Law of Torts* § 180, 444 (2000).

Accordingly, Respondents seek a mere "contribution" test unsupported by state tort law or prior explanations of federal common law. *See, e.g., Texas Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 668 (E.D. Tex. 1998) (in industry suits, "the nexus between cause and effect [for each defendant] is too attenuated to justify liability."). This mere contribution test proposes a standard much lower than the "but for", "substantial factor" and "single indivisible injury" tests, and less conventional burden-shifting theories as market-share, risk contribution, or enterprise liability. *See* Restatement (Second) of Torts § 432 (1979); *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213, 216 (6th Cir. 1974) ("Like most jurisdictions, Michigan has had great difficulty with the problems posed in tort cases by multiple causes for single or indivisible injuries."); *Gibson v. Am. Cyanamid Co.*, _ F. Supp. 2d _, 2010 WL 2465498 (E.D. Wis. 2010) (risk contribution violates due process).

The actual purpose of Section 840D is to assure that a tortfeasor cannot escape liability just because others contributed to the harm, particularly when the tortfeasor is aware of those contributions. As the Restatement (Second) explains, collective liability theories, where permitted, are only manageable when a discrete and identifiable group of tortfeasors allegedly contributed to an identifiable harm: "The possibility arises that there may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule may cause disproportionate hardship to defendants." Restatement (Second) of Torts § 433B cmt. e (1979).

This is the situation under Respondents allegations, which state that a myriad of GHG sources over decades caused climate change. As this Court has observed, such "severe retroactive liability on a limited class of parties that could not have been anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience" deserves constitutional scrutiny. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998).

3) The Trusts' Claims Violate the Special Injury Rule

The Trusts only claim here is for potential future injury, *i.e.*, "the ecological value of their properties will be diminished" by climate change. *Id.* at 341-42. ("The Trusts do not allege any current injury").

Commonsense, the Restatement (Second), and centuries of jurisprudence on the special injury rule dictate that a private plaintiff can recover only if it has *already* suffered the special injury. *See* Res-

tatement § 821C ("one *must have suffered* harm") (emphasis added); Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359, 362-63 (1990). Without the injury, there is no basis for assessing one's special damages. Expanding special injury liability to include speculative future damages would go beyond even the doctrine's broadest assertions. *See U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 13 (Fla. 1974) (nonprofit seeking to stop business conduct had not suffered a special injury).

Also, diminished property value from climate change, even if it occurs, is not special to the Trusts. Property owners around the globe, particularly those with large holdings or with properties sensitive to weather changes, would be affected by climate change in the same way the Trusts allege. The Second Circuit evades this fact by suggesting that §821C allows severe harm, even if not special, to form the basis of a special injury claim. *See* 582 F.3d at 367. Courts have widely held that severity alone is not a surrogate for the "different in kind" requirement. *See, e.g., Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196, 1198 (9th Cir. 1997) ("spill may have affected Alaskan Natives more severely than other members of the general public, [but] their right to [culture and lifestyle] is shared by all Alaskans.").

Again, the Second Circuit takes federal common law down unwise paths not endorsed by the majority of state common law judges.

B. Federal Common Law Does Not Provide a Basis for Respondents' Public Nuisance Claims

Respondents' casting of their claims in federal common law should be scrutinized. *See* Theodore J. Boutrous, Jr. and Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance,"* 35 Ecology L. Currents 80, 87-88 (2008).

The Second Circuit's notion of a robust federal common law for gap-filling federal statutes is misguided. *See Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) ("there is no federal general common law"); *United States v. City of Las Cruces*, 289 F.3d 1170, 1186 (10th Cir. 2002) ("reluctance to create common law is a core feature of federal court jurisprudence."); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 314 n.7 (1981) ("If state law can be applied, there is no need for federal common law"). The Court has identified only a few areas in which federal common law can develop, namely admiralty and maritime cases, interstate disputes, and cases concerning international relations or the legal relations and proprietary interests of the United States. *See* Jack H. Friedenthal *et al.*, Civil Procedure 223 (1985).

In the post *Erie*-era, federal public nuisance cases have largely involved disputes between governments. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 104 (1972) (Illinois sought to require Wisconsin cities to abate a nuisance in interstate waters); Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 N.W.U. L. Rev. 551, 562-63 (2008) (federal common law is used if it is inappropriate to apply one state's

law over another). The instant claims against private actors thus fall far outside of the limited reach of federal common law.

III. RESPONDENTS' CLAIMS RAISE COMPLEX POLITICAL QUESTIONS

Federal district courts have correctly understood the political nature and purpose of climate change litigation.

Political interests aligned with Respondents have urged the federal government to limit GHG emissions for 30 years. *See Connecticut,* 582 F.3d at 381-88. Presidents George H.W. Bush, Clinton and Obama negotiated treaties on global emissions and Congress has considered numerous climate-related bills. But, as the Second Circuit points out, these efforts did not result in binding emission caps. *See id.* (requiring "research, planning and strategizing technology development, assessments, and monitoring, but no real action to abate emissions"). The Second Circuit wrongly states that it can conclude from this lack of emission controls that Congress has not "spoken" on this issue, and, thus, there is a basis for applying federal common law to GHG emissions. *See id.* at 388 (stating "until" Congress or EPA sets GHG emissions levels, plaintiffs have a viable claim).

As this Court can appreciate, the lack of strict emission limits does not mean Congress or the EPA has not considered and "spoken" on this issue; it is a reflection that a viable, balanced solution has not been agreed upon. In the 1990s, for example, the United States Senate, in response to the Kyoto Protocol, unanimously (95-0 vote) stated that "the Unit-

ed States should not be a signatory to any protocol. . . which would (A) mandate new commitments to limit or reduce greenhouse gas emissions." S. Res. 98, 105th Cong. (1997). Recently, members of both political parties said they "would not be inclined to support any bill that attached a cost to carbon emissions." Jessica Dye, *Senate Punts Climate Bill to Fall, Puts Focus on BP*, Law 360, July 22, 2010 (reporting legislation calling for a 17 percent reduction over ten years – nearly half the reduction sought here – did not have support of Congress); Jessica Dye, *Lugar Floats New Energy Plan Minus Cap-And-Trade*, Law 360, March 10, 2010 (noting new legislative efforts would "scrap greenhouse gas emission reduction goals"). The Solicitor General's brief details the EPA's extensive efforts on GHG emissions, including in response to *Massachusetts v. U.S. Environmental Protection Agency*, 549 U.S. 497 (2007).

This Court, in other contexts, has considered conduct as speech. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968) (flag burning is form of speech). The active, continuing debate in Congress and EPA regarding GHG emissions is a testament to the complexity of setting emissions standards and the appropriateness of developing such limits, if at all, through the political process after adequate research and development. Judicial intervention under the mantle of federal common law "gap-filling" is directly contrary to the other two branches' conduct, regardless of whether Congress or the EPA resolve to implement emission standards. This lawsuit, therefore, has no place before this or any court.

A. Respondents Are Attempting to "Regulate" Emissions Through the Courts

Climate change lawsuits are attempts to take the campaign to cap emissions to a new arena: the courts. *See* Environmental Litigation: Law and Strategy 1 (Cary R. Perlman, ed. 2009) ("[F]our years ago, the issue had no significant legal footprint in the United States. Since then, however, the issue has exploded onto the legal scene, resulting in enormous social and economic shockwaves."). The first case was *Massachusetts*, which settled an issue of administrative law by directing the Bush EPA to respond to a rulemaking petition that asked it to consider whether GHG emissions from certain light duty vehicles "endanger public health or welfare" and should be regulated under the Clean Air Act. *See id.* at 529-35 (quoting 42 U.S.C. § 7521(a)(1)). *Massachusetts* did not directly or indirectly endorse regulation through tort litigation.

Four lawsuits, including this one, were filed against private sector interests associated with producing and using energy products. *See* John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, Bus. Week, Oct. 30, 2006, at 34 (observing this "ambitious legal war on oil, electric power, auto, and other companies"). These lawsuits seek to directly force companies to adopt limits unachieved in the political process. After the instant case, California's attorney general filed *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) against car-makers for making cars that emit exhaust. Two other cases, *Kivalina*, 663 F. Supp. 2d at 877 and *Comer*, 585 F.3d at 855,

sought recovery for specific injuries from weather events allegedly caused or made worse by global climate change.

All four federal trial courts dismissed the claims as political questions. *See Kivalina*, 663 F. Supp. 2d at 877 ("allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch"); *General Motors*, 2007 WL 2726871 at *13 (claim "expos[es] automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce"); *Comer*, 585 F.3d at 860 n.2 (citing district court's ruling that the global warming debate "has no place in the court"); *Connecticut v. Am. Elect. Power Co., Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) ("Because resolution of the issues presented here requires identification and balancing of environmental, foreign policy, and national security interests, an initial policy determination of a kind clearly for non-judicial discretion is required.") (internal citation omitted).

1) Determining Whether a Petitioner's Emissions Are Reasonable or Unreasonable Requires the Court to Improperly Establish Emission Standards

As each federal trial court judge recognized, the constitutional difficulty with these cases is that there are no "judicially discoverable and manageable standards" for assessing unreasonableness of a Petitioner's conduct with respect to emissions of GHGs. *Baker v. Carr*, 369 U.S. 186, 217 (1962). A trial court would have to determine that, for each Petitioner,

emissions above a certain level *unreasonably* contributed to the alleged hazardous conditions, whereas emissions below that level were *reasonable*, even if allegedly contributing to those conditions. Respondents suggest three percent per year for ten years.

Determining whether emissions should be reduced, by how much, and for which industries is exactly the kind of policy determination alluded to in *Baker* as being of "non-judicial discretion" and the province of Congress and federal regulators. *See id.* The activities underlying these lawsuits involve public utilities and other energy sources necessary to modern ways of life. The public relies on these products for turning on lights, heating their homes, having electricity to run everyday appliances, and meeting their most basic transportation needs.

Such global political decisions should not be decided in courts on limited information provided by lawyers on each side of a case. Weighing costs, benefits and social value of producing and using essential resources and factoring in any adverse effects of their production, their use, or the transition to any new regulatory scheme is part of the delicate balancing for which only Congress and administrative agencies are suited. They can conduct public hearings, commission research, engage in meaningful discourse with foreign nations, and consider the interests of all stakeholders. These branches of government, unlike the Judiciary, have the authority and competent tools to investigate and set U.S. emissions policy.

2) Determining Causation, Given the Alleged Global Sources of GHGs, Involves Political Questions

Under Respondents' causation allegations, there are "multiple worldwide sources of [GHGs] across myriad industries and multiple countries." *General Motors*, 2007 WL 2726871, at *15. Man-made sources include fossil fuel combustion, power plants, manufacturing, and auto and airplane exhaust throughout the world. *See* CRS Report for Congress, China's Greenhouse Gas Emissions and Mitigation Policies, Sept. 10, 2008 *at* http://www.fas.org/sgp/crs/row/ RL34659.pdf. Natural sources include volcanic outgassing, animal releases of gas, and breathing of all living aerobic organisms. *See* Natural Sources and Sinks of Carbon Dioxide, Environmental Protection Agency, Climate Change – Greenhouse Gas Emissions, *at* http://www.epa.gov/climatechange/ emissions/co2_natural.html.

Respondents could have named innumerable sources from around the world in this lawsuit, but made a *political* decision to sue only these six entities. This "seemingly arbitrary selection of Defendants, coupled with the gravity and extent of the harm alleged in this case, underscores the conclusion that the allocation of responsibility for global warming is best left to the executive or legislative branch." *Kivalina*, 663 F. Supp. 2d n 4. This Court can clarify that giving Respondents the sole right to make the "political judgment" that these Petitioners should be the only ones to bear the cost of global climate change violates the *Baker* standard that federal courts have a manageable method of discerning the

entities that are creating and contributing to the alleged nuisance.

B. The Litigation's Sponsors Admit this Case Represents Frustration With the Legislative Process

With surprising candor, the litigation's advocates and sponsors acknowledge the political purpose of these lawsuits. *See* Robert Meltz, Cong. Research Serv. Rep. for Cong., Climate Change Litigation: A Growing Phenomenon 33 (2008), *at* http://www.elaw.org/system/files/CRS_4_7_08.pdf (proponents "freely concede that such initiatives are make-do efforts that . . . may prod the national government to act.").

For example, Connecticut Attorney General Richard Blumenthal, the lead attorney general in the case, stated that "this lawsuit began with a lump in the throat, a gut feeling, emotion, that CO_2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. . . . [We were] brainstorming about what could be done." Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, 30 Colum. J. Envtl. L. 335, 339 (2005).

Matthew Pawa, the case's leading contingency fee attorney, explained his reasoning for picking these defendants: "The electric power sector is the obvious place to begin such emissions reductions because, economically, it is the low-hanging fruit." Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 Fordham Envtl. L. Rev. 407 (2005).

Even Second Circuit Judge Peter Hall, who authored the opinion allowing this case to continue, since conceded that "[y]ou really don't want a district judge supervising your relief in all of this stuff" but "[t]o the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense." *Key Judge Downplays Prospects for Successful Climate Change Suits*, Clean Air Report, Vol. 21 Iss. 5, Mar. 2, 2010.

Such end-games may entice those sympathetic to a particular political agenda, but they do not give rise to liability. This Court can clarify that Article III does not provide federal courts with authority to settle the national climate change policy debate.

IV. THIS LAWSUIT WOULD USHER IN A NEW ERA OF FEDERAL LITIGATION

If this case proceeds, these and other defendants will face speculative, federal tort cases after every harsh weather event. The alleged damages here, as with ice erosion around Kivalina and Hurricane Katrina, are not unique to these communities. Every hurricane, flood, drought, and heat-related condition could spawn federal climate change claims. Allowing such claims would also revive other "political" public nuisance cases, including those "to mandate the redesign of" products and regulate business methods, no matter how invalid or unpopular with policymakers or the public at-large. *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001).

The result would be the exact catch-all tort that courts expressly rejected for decades. *See Spitzer v. Sturm, Ruger & Co.*, 309 A.D. 91, 96 (N.Y. App. Div. 2003) ("All a creative mind would need to do is con-

struct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.").

"Public risk" cases, such as this one, expose the weakness of the judiciary to administer cases where there is no objectively wrongful conduct. *See* 2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991). Congress and agencies can fully vet Respondents' claims and engage in thorough risk-benefit analyses. Liability can then complement their regime by holding companies responsible if they cause harm by operating outside of those duly enacted laws.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully requests that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

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