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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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) submits this brief in support of the petition for writ of certiorari filed by American Electric Power Co., *et al.*[1]

PLF is the largest and most experienced nonprofit, public-interest law foundation of its kind in the United States, incorporated for the purpose of litigating in the public interest. For more than 35 years, PLF has litigated in support of the rights of individuals to make reasonable use of their private property free of unnecessarily intrusive government interference, and has advocated in favor of maintaining a reasonable balance between regulatory efforts to protect the environment and the other necessary and proper functions of government and of free society.

To further this interest, PLF established a Global Warming Project. The Project's purpose is to ensure that the crisis of global warming—regardless of the crisis' actual, imminent, or long-term effects to the physical environment and human populations—not be used as a pretext to violate individuals' property rights and other constitutionally protected liberties. As an example of the Project's work, PLF submitted an amicus brief in *Massachusetts v. Environmental Protection Agency (EPA)*, 549 U.S. 497 (2007), arguing

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[1] In accordance with Rule 37.2(a), PLF provided ten days' notice to counsel of record of its intention to file this amicus brief. Counsel of record have consented to the filing of this brief. Letters evidencing this consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, PLF states that no counsel for a party authored any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

that the threat of global warming does not justify a departure from the normal rules of standing in the federal courts. PLF also has participated as amicus in global warming public nuisance cases in the Fifth and Ninth Circuit Courts of Appeals. *See Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010); *Native Village of Kivalina v. ExxonMobile Corp.*, No. 09-17490 (9th Cir.). PLF believes that this case raises important public interest questions about the country's response to global climate change, and the extent to which that response can be controlled or dictated by enterprising litigants through the judicial system.

SUMMARY OF ARGUMENT

Respondents State of Connecticut, *et al.*, have brought public nuisance tort claims against Petitioners American Electric Power Co., *et al.*, for harms allegedly caused by the Respondents' greenhouse gas emissions. A panel of the Second Circuit Court of Appeals upheld those claims against jurisdictional attack. *See* Petitioners' Appendix (Pet. App.) 17a-76a. This Court should grant certiorari to review the Second Circuit's decision, for the following reasons:

First, the Second Circuit's standing analysis diverges from the decisions of other circuit courts of appeals on the law of pollution abatement actions and what plaintiffs must show to establish their standing in such actions.

Second, the Second Circuit's decision goes to the heart of the current debate over the nation's appropriate response to global warming and necessarily raises an issue of nationwide importance, as this Court recognized in *Massachusetts v. EPA*.

Third, the Second Circuit's decision raises another issue of national significance: whether litigants may address the international problem of climate change by prosecuting nuisance claims against selectively chosen private parties. If permitted to continue, the Respondents' lawsuit will represent only the first of many global warming suits in which litigants will ask the courts to make policy decisions and political choices. Such decisions invade the province of the legislative and executive branches; therefore, this Court should determine the justiciability of the Respondents' claims so as to ensure that private litigants do not unjustly set national climate change policies, or otherwise interfere with the elected branches' ability to address the issue as they would deem most appropriate.

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED TO REVIEW THE SECOND CIRCUIT'S INTERPRETATION OF STANDING, WHICH IS INCONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

To establish standing to sue in federal court, a plaintiff must show that his injury is fairly traceable to the allegedly wrongful action of the defendant. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant . . . .") (internal quotation marks omitted). The Second Circuit, relying upon a line of

cases under the Clean Water Act, reasoned that the Respondents' injuries are fairly traceable to the Petitioners' emissions because the latter "contribute to" the Respondents' injuries. Pet. App. 71a-72a. The Second Circuit significantly distorted this case law, thereby impermissibly lowering the bar of fair traceability.

All of the cases cited by the Second Circuit to support its standing analysis concern instances where the alleged polluter was worsening, to some degree, a discrete geographical area, *i.e.*, not the entire Earth. *See id.* (citing and discussing *Pub. Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64 (3d Cir. 1990) (Clean Water Act challenge to pollution in Kill Van Kull, a regulable waterbody); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (en banc) (same as to a manmade lake and the Edisto River); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996) (same as to Galveston Bay); *Natural Res. Def. Council v. Watkins*, 954 F.2d 974 (4th Cir. 1992) (same as to the Savannah River)). Because the defendants were allegedly polluting a geographic region of limited scope, these courts of appeals could entertain the benign presumption that such alleged pollution would worsen the plaintiffs' injuries (which were a function of the geographical area's polluted status).

The "contribution" cases do not, however, stand for the proposition that causation is irrelevant for fair traceability, as the Second Circuit apparently believed. Instead, they stand for the proposition that causation may be reasonably presumed where the plaintiff is injured by the polluted status of a discrete geographical area, and the defendant's actions worsen

that polluted status. These "contribution" cases have no application here because the twin bases for the presumption of causation—a discrete geographical area and a discrete set of potential polluters—are absent. Rather, here the geographical area is the entire Earth's atmosphere, and the set of potential polluters includes every emitter of greenhouse gases. Under such circumstances, it would be unreasonable to maintain the presumption of causation, and nothing in these "contribution" cases would support the Second Circuit's standing analysis.

The Second Circuit's decision is unsupported by the "contribution" cases for another reason. In these cases, there was a direct causal link and correlation between the defendants' polluting activities and the plaintiffs' injuries—the more pollution added, the greater the harm. But here there is no similar correlation. The addition of greenhouse gases to the atmosphere does not necessarily produce any harm to any of the Respondents. Rather, the alleged harm is a function of the change in climate, which itself is alleged to be a function, at least in part, of greenhouse gas emissions. Asserting that the Respondents have added greenhouse gases to the atmosphere cannot establish fair traceability under the "contribution" cases' logic because the Respondents' injuries are not a direct function of the quantity of greenhouse gases in the atmosphere, but rather of the *effects* of unknown quantities of such gases on climate-related phenomena. Were the causal requirement relaxed, then the respondents could establish fair traceability as against any human being, whose daily expiration of carbon dioxiode "contributes" to the total amount of greenhouse gases in the atmosphere. The Second Circuit's decision therefore advances a new and

unwarranted approach to public nuisance pollution cases that diverges from the law of other circuits and merits this Court's review.

II

CERTIORARI SHOULD BE GRANTED TO REVIEW THE SECOND CIRCUIT'S CONCLUSION THAT THE RESPONDENTS' INJURIES ARE LIKELY TO BE REDRESSED AT LEAST IN PART BY CAPPING AND REDUCING THE PETITIONERS' EMISSIONS, WHICH RAISES AN ISSUE OF NATIONWIDE IMPORTANCE

The Second Circuit concluded that the relief requested by the Respondents—a cap and gradual reduction in the Petitioners' emissions—would remedy, to at least some degree, their global-warming-related injuries. Pet. App. 75a-76a. In addition to fair traceability, standing doctrine requires that "it must be likely, as opposed to merely speculative, that the [plaintiff's] injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). By holding, through a misreading of this Court's standing analysis in *Massachusetts v. EPA*, that the Respondents' injuries would likely be redressed by a cap-and-reduction emissions scheme, the Second Circuit raised an issue of nationwide importance.

As explained in the previous section, there is no direct correlation between greenhouse gas emissions and global-warming-related injuries. The mere emission of greenhouse gases does not injure the Respondents. Rather, the correlation between

emissions and the Respondents' injuries depends upon how greenhouse gases, in various quantities, affect weather and other climatological patterns that in turn negatively affect the Respondents' territories and private lands. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,524-26, 66,530-36 (Dec. 15, 2009) (EPA analysis that greenhouse gas emissions are reasonably anticipated to endanger public health and welfare based on the impact of climate change to, inter alia, air quality, weather events, food production, and sea level); *see also id.* at 66,524 ("[EPA] is not limited to only considering whether there are any direct health effects such as respiratory or toxic effects associated with exposure to greenhouse gases."). Although it is not speculative whether a cap and reduction order would reduce the Petitioners' emissions, it *is* entirely speculative whether such a cap and reduction would produce any measurable change in the quality or quantity of the Respondents' alleged global-warming-related injuries.

The Second Circuit's analysis cannot be reconciled with *Massachusetts*. In *Massachusetts*, the redressability issue centered on whether forcing EPA to make a decision on the Commonwealth's request that the agency regulate greenhouse gases under the Clean Air Act would remedy, to any extent, the Commonwealth's global-warming-related harms. *See* 549 U.S. at 525. The Court answered yes: although such a remedy would not reverse global warming, the Court nevertheless possessed "jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it." *Id.* The Court addressed the standing inquiry in the context of the legal action before it—a challenge to the failure to respond fully to a rulemaking request. In

circumstances such as those, it was a simple task to affirm the existence of that which is absent from the present case: the one-to-one correlation of emissions reduction to injury amelioration. The Commonwealth was procedurally injured by EPA's failure to regulate to reduce emissions; an order from the Court that could lead to such regulation would remedy the procedural injury. That conclusion was easy for the Court to adopt because the requirements of redressability are relaxed in a procedural standing case. *See id.* at 517-18 ("[A] litigant to whom Congress has accorded a procedural right to protect his concrete interests—here, the right to challenge agency action unlawfully withheld, § 7607(b)(1)—can assert that right without meeting all the normal standards for redressability and immediacy.") (internal quotation marks and citation omitted).

The Respondents here have no such benefit because they advance no procedural injury. The Second Circuit's reliance on *Massachusetts* for a contrary result, and its mistaking of emission reduction with a remedy for the Respondents, seriously distort the redressability component of standing doctrine.

For that reason, the Second Circuit's analysis necessarily raises an issue of nationwide significance. As this Court observed in *Massachusetts*, "the unusual importance of the underlying issue"—whether EPA could regulate greenhouse gas vehicle emissions under the Clean Air Act— "persuaded us to grant the writ," notwithstanding the petitioners' questionable standing and the absence of any circuit split. 549 U.S. at 505-06. *Massachusetts* thus recognized that the extraordinary significance of global-warming-related

issues makes cases raising such issues especially apt for resolution by the nation's highest court. Here, the Second Circuit's decision authorizing global warming public nuisance suits is the vanguard of similar tort suits against the country's largest energy companies. *See, e.g.*, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated and rehearing* en banc *granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, Doc. No. 09-17490 (9th Cir.). Whether and to what extent greenhouse gas emissions can be limited by tort law is surely as important as whether EPA has the statutory authority to regulate vehicle greenhouse gas emissions, decided in *Massachusetts*. In the latter case, subsequent regulation would be based upon then-undetermined action by EPA, for which industry and the general public would have an opportunity to comment. But in the former case, no one—not Congress, not the general public, not other industry representatives—will have any opportunity to discuss or debate how a court should dictate the emissions reduction scheme for some of the largest energy companies in America. Whether such a scheme should be judicially imposed under the guise of public nuisance tort theory is an issue that merits this Court's review.

III

THE SECOND CIRCUIT'S HOLDING THAT SELECTIVE PROSECUTION OF NUISANCE CLAIMS DOES NOT VIOLATE THE POLITICAL QUESTION DOCTRINE IS AN ISSUE OF NATIONWIDE IMPORTANCE

Respondents' public nuisance suit seeks to hold a handful of selectively chosen defendants liable for their de minimis and undifferentiated contributions to the international problem of global climate change. The suit raises serious, and politically charged, policy questions as to what level of emissions are acceptable, how emissions should be reduced, and who should bear the costs of curbing global emissions. Laurence H. Tribe, et al., *Too Hot For Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-20 (Washington Legal Foundation, Working Paper No. 169, 2010).[2] Certiorari should be granted to review the justiciability of Respondents' claims so that these policy questions will be decided by law makers, not the courts.

The political question doctrine provides that certain claims are nonjusticiable by their very nature because their resolution would require the weighing of political judgment. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). A nonjusticiable political question is presented where there are no judicially discoverable and manageable standards for its resolution. *Baker v. Carr*, 369 U.S. 186, 217 (1962). As this Court has made clear, the judicial branch would invade the

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[2] *Available at* http://www.wlf.org/publishing/publication_detail.asp?id=2132 (last visited Aug. 30, 2010).

province of the elected branches if it sought to answer such questions because their resolution demands the establishment of rules or the setting of policies. *Vieth*, 541 U.S. at 278. Since the judicial branch does not make the law, but merely adduces the law through practical reasoning and analysis, courts cannot entertain such questions. *See* Tribe, *supra*, at 13-20 (discussing *Vieth*'s pronouncement that courts lack power to decide questions absent established standards or rules).

In the present case, Respondents alleged that Petitioners have unreasonably contributed to the collective emissions of all humanity, which are allegedly causing or accelerating injuries attributed to climate change. This suit represents only the first of many more suits advancing traditional tort theories to hold selectively named defendants liable for their de minimis contribution to this collective and international problem. *See, e.g.*, *Native Village of Kivalina v. ExxonMobile Corp.*, No. 09-17490 (9th Cir.); *California v. GMC*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007). Indeed, litigants in yet another global warming tort case are currently seeking a writ of mandamus from this Court in *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010). Environmental activists will continue to bring these suits against hand-picked defendants in order to force the courts to establish emission policies because Congress has yet to take action. Justin R. Pidot, *Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues* 1 (2006) ("[T]he current spate of global warming litigation is also the product of a failure by national political institutions to

come to grips with global warming.").[3] Yet it is not the role of the judiciary to exercise political judgment or to establish public policy.

These suits seek to force courts to determine what level of emissions private individuals or entities should be allowed. *See* Tribe, *supra*, at 13-20. There are no judicially discoverable and manageable standards for resolution of that question because there is no discrete line of causation between the alleged tort and the supposed injury. *Id.* at 15. Moreover, in selectively choosing a handful of defendants out of the entire world of greenhouse gas emitters, the litigants in these suits are asking the courts to determine who should be burdened with emission restrictions. Yet the distribution of legal burdens in the setting of such a policy is necessarily a political act within the province of the elected branches.

Respondents have undoubtedly raised issues of great importance to the nation and to the entire international community. Yet they are asking courts to set policies to control climate change even as the elected branches consider the propriety of various policy choices. *See* Pidot, *supra*, at 1 (discussing over a dozen suits advanced on global warming in the face of the Bush Administration's policy decisions). Even assuming that greenhouse gas emissions are contributing to, or accelerating, global climate change, there are diverse opinions as to the best way to address that problem.

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[3] *Available at* http://www.law.georgetown.edu/gelpi/current_research/documents/GlobalWarmingLit_CourtsReport.pdf (last visited Aug. 30, 2010).

Many citizens, and elected representatives, believe that imposing restrictions on greenhouse gases would be injurious to our already faltering economy. *See* Toni Johnson, *Economic Challenges for Climate Change Policy*, Council on Foreign Relations (July 7, 2009) ("Finding an approach that manages to cut greenhouse gases without doing serious harm to the U.S. economy, particularly given the global economic downturn, remains a top concern.").[4] Some leading economists would suggest that we do nothing and allow the free market to develop solutions to the problem over time. William A. Niskanen, Testimony before the Committee on Energy and Natural Resources, United States Senate ("There are too many scientific, economic, and political issues yet to be resolved, however, to support an early commitment to control the emissions of greenhouse gases.").[5] Others would suggest that, rather than imposing restrictions on greenhouse gases, we should encourage the development of more efficient and environmentally friendly technologies through grants, tax-incentives, or educational initiatives. *See, e.g.*, Rob Atkinson, *Innovation Economics Can Fight Global Warming*, Bloomberg Businessweek, June 17, 2009 (arguing that innovation and public investments in technology are needed to address global warming).[6]

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[4] *Available at* http://www.cfr.org/publication/16009/economic_challenges_for_climate_change_policy.html (last visited Aug. 30, 2010).

[5] *Available at* http://www.cato.org/testimony/ct-wn093097.html (last visited Aug. 30, 2010).

[6] *Available at* http://www.businessweek.com/innovate/content/jun2009/id20090617_400202.htm (last visited Aug. 30, 2010).

While there are also many citizens, and elected representatives, who would support imposed restrictions on greenhouse gases, there are many ways to curb greenhouse gases and therefore many ways of allocating the burdens associated with that policy choice. *See* Guy Dauncey, *Stormy Weather: 101 Solutions to Global Climate Change* 71-80 (New Society Publishers, 2001) (discussing ten ways national governments can curb global emissions). Some support a national cap and trade system, while others advocate mandated emission standards. Yet to the extent that emission standards are imposed, there are political judgments to be made as to how stringent those standards should be, when they should apply, and whom they should bind.

These questions require the policy maker to consider the social and economic costs of the imposed regulations. Economists warn that these costs may hamper our economy, hindering business and raising costs for consumers. *See, e.g.*, David G. Victor, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming, Council on Foreign Relations* 56 (2001) ("For most industrial nations, meeting the Kyoto targets will be costly and will affect their economic competitiveness."). Of central concern in this political debate has been the propriety of imposing regulations which will raise energy costs for Americans, placing a particular hardship on the poor. Jerry Taylor, *Global Warming: The Anatomy of a Debate*, Cato Institute, Address to John Hopkins University Applied Physics Laboratory (Jan. 16, 1998) ("[I]ncreased energy costs are borne most directly by

the poor, who spend a greater portion of their income on energy than do the wealthy").[7]

Additionally, there are competing views as to how the United States should coordinate its efforts to curb greenhouse gases with other nations. Many citizens and elected representatives believe that international coordination is essential to any meaningful effort to reduce greenhouse gases and that the United States should not place socially and economically harmful restrictions on greenhouse gas emissions without an assurance that developing nations like China, India, and Brazil will impose similar restrictions. *See, e.g.*, Doug Palmer, *China Must 'Pay' to Cut Greenhouse Gases*, Reuters, July 20, 2009 (U.S. Commerce Secretary Gary Locke said, as the United States and other developed countries make costly commitments to address climate change, "developing countries like China must do the same").[8] As such, America's policy makers are continuing to engage world leaders as they work toward an agreeable solution to this collective problem. David Biello, *U.S. Commits to Greenhouse Gas Cuts Under Copenhagen Climate Accord*, Scientific American, Jan. 29, 2010 (discussing America's international commitments to curb greenhouse gas emissions).[9]

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[7] *Available at* http://www.cato.org/speeches/sp-jt011698.html (last visited Aug. 30, 2010).

[8] *Available at* http://www.reuters.com/article/idUSTRE56K0IZ20090721 (last visited Aug. 30, 2010).

[9] *Available at* http://www.scientificamerican.com/article.cfm?id=us-commits-to-greenhouse-gas-cuts-under-copenhagen-accord (last visited Aug. 30, 2010).

The elected branches are, at this time, carefully weighing this panoply of options and considerations. It remains to be determined what—if anything—should be done to address the international problem of climate change. However, the decision below will force our courts to weigh these determinations at this juncture. Thus litigants, rather than elected representatives, may fashion our national policies on greenhouse gas emissions. This may likely frustrate the policies and goals of our elected lawmakers in violation of the political question doctrine. *See e.g.*, Dep't of Justice Amicus Br. in Supp. of Pet'rs, No. 10-174, at 22-32 (arguing that federal law common law claims should be displaced by EPA actions). Given the importance of the global warming issue, as well as the social and economic effects greenhouse gas regulations may have on our country, it is vital that this Court determine the justiciability of Respondents' claims.

CONCLUSION

The petition should be granted.

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