No. 10-174

Supreme Court, U.S.
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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 LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors with an interest and expertise in constitutional, administrative, environmental, and general issues of regulatory law issues. Each is concerned with the status and development of the law in these areas, and believes that the questions raised by this case are of the highest importance and merit the Supreme Court's exercise of its discretion to review the Second Circuit's decision. Many have participated as *amici* to courts of appeals that have considered public nuisance actions brought against emitters of greenhouse gases or conventional pollutants, including the proceedings below and those in *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), and *North Carolina v. TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it entirely authored this brief and no party, its counsel, or any other entity but *amici* and their counsel made a monetary contribution to fund the brief's preparation or submission. All parties have consented to the filing of this brief, and undersigned counsel notified Counsel of Record for all parties of *amici curiae's* intent to file this brief at least 10 days before September 3, 2010. Letters reflecting their consent are filed with the Clerk.

system, separation of powers, administrative law, and tort law.

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The views expressed herein are those of the individual *amici curiae*, and do not necessarily represent the views of any group or organization with which they may be affiliated.

SUMMARY OF THE ARGUMENT

Far from being an "ordinary tort suit" the Second Circuit's decision below in *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), is an attempt to judicially regulate greenhouse gas emissions from the entities Respondents allege are the five largest greenhouse gas emitters in the United States. Respondents' action is part of a broader, misguided push for judicial regulation, and is mirrored by suits brought by Gulf Coast residents, *see Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010),

appeal dismissed, 607 F.3d 1049 (5th Cir. 2010), Native Americans, *see Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir. Nov. 5, 2009), and officious intermeddlers, *see Korsinsky v. EPA*, No. 05-cv-859 (NRB), 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005). The initial targets of these attempts at judicial regulation have been America's core industries – electric utilities, automobile manufacturers, energy producers, and chemical companies – but the legal principles underlying these suits could extend to any business that emits greenhouse gases.

Greenhouse gas emissions should not, however, be regulated in accordance with "the same principles we use to regulate prostitution, obstacles in highways, and bullfights." *North Carolina v. TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010). The effects that this decision and its sister actions could have on the United States economy are undisputed: liability in this and other cases could amount to billions of dollars. *See* Mark Latham, *Environmental Liabilities and Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change-Related Risks*, 39 Envtl. L. 647, 666 (2009).

The harm that the Court of Appeals' decision causes to the political and judicial processes is no less troubling. Greenhouse gas public nuisance suits have poisoned the judiciary by giving judges the opportunity to use this "legal garbage can" of a tort, *see* William L. Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399, 410 (1942), as a prod for advancing their

preferred political agenda. This is not an appropriate role for a judiciary that must say what the law is, not what it ought to be. Greenhouse gas public nuisance actions threaten to allow litigants to undermine the judicial process in another way – through the very recusal system that is supposed to protect judicial integrity. With legal theories under which nearly any business is a potential defendant, plaintiffs have the power to "pick and choose" their judges through the selection of defendants in which disfavored judges have publicly disclosed their financial holdings. This threatens neutrality, impartiality, and ultimately the perception and reality of justice.

All of this might not matter if the Second Circuit's holding were correct, but it is not. Every district court that has been presented with a greenhouse gas public nuisance action has determined that it would be impossible to reach a principled resolution without overstepping the constitutional limits on judicial power. These courts have rightfully abstained from making piecemeal environmental policy on the basis of testimony proffered by a handful of paid experts and in the face of serious and significant political and administrative disputes about how best to address the global phenomenon of climate change.

The Court has previously recognized the "unusual importance" of EPA's statutory authority to regulate greenhouse gas emissions under the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007). Definitive resolution of whether federal common law provides an avenue for piecemeal judicial regulation

of greenhouse gas emissions is no less important. The Court should grant certiorari and finally determine whether it is the province of the judiciary or the political branches to set global warming policy.

ARGUMENT

I. The Second Circuit's Decision Presents Recurring Issues Of Great National Importance.

This case presents recurring questions of great importance that only this Court can resolve. The tort of public nuisance is neither an effective nor an appropriate mechanism for addressing the complex scientific, social, economic, and political issues involved in environmental protection and management, let alone those surrounding the phenomenon of global climate change. The Second Circuit's decision, however, threatens to make it the primary regulatory tool in that court's footprint and throughout the country. The Second Circuit's decision may also distort the political and administrative processes, and it gives plaintiffs an opportunity to undermine the legitimacy of the courts. The Court should grant certiorari to decide the questions presented by the Petitioners.

A. Greenhouse Gas Public Nuisance Actions Are The Wrong Mechanism For Addressing An Issue Of Manifest Importance To The Nation, Global Climate Change.

There is no dispute that global climate change is an issue of paramount national importance. In *Massachusetts v. EPA*, this Court expressly found that global climate change was sufficiently important to justify the Court's exercise of its certiorari jurisdiction in the absence of a circuit split and in the face of very serious jurisdictional issues: "Notwithstanding the serious character of th[e] jurisdictional argument and the absence of any conflicting decisions . . . , the unusual importance of the underlying issue persuaded us to grant the writ." 549 U.S. at 505-06. The court below has similarly attested to the importance of the issues this action seeks to address: "It cannot be gainsaid that global warming poses serious economic and ecological problems that have an impact on both domestic politics and international relations." *Connecticut*, 582 F.3d at 325.

In light of the importance of these issues, it is critical that any regulatory program addressing greenhouse gas emissions be the product of a *political* process that balances the myriad of interests at stake and that is able to arrive at manageable standards. In a recent decision reversing a district court decision finding that conventional pollutant emissions from TVA power plants in the State of Tennessee constitute a public nuisance in the State of North Carolina, the

United States Court of Appeals for the Fourth Circuit convincingly explained why public nuisance law is not up to this task:

> [W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application. If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bullfights, we will be hard pressed to derive any manageable criteria by which to make decisions.

North Carolina, 2010 WL 2891572 at *7 (Wilkinson, J.) (citations omitted). This Court has recognized the "often vague and indeterminate" nature of nuisance law as well. *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). *See also* W. Keeton, et al., *Prosser and Keeton on The Law of Torts* § 86, at 616 (5th ed. 1984) (footnotes omitted) ("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, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."). And make no mistake, public nuisance determinations – especially those made with respect to a gas that is emitted by virtually every corporate and natural person on the planet to contribute collectively and indistinguishably to a global phenomenon – are regulation.

The decision below reflects nuisance law's shortcoming. The legal standard articulated by the Second

Circuit is whether Respondents' activities constitute "an unreasonable interference with a right common to the general public." *Connecticut*, 582 F.3d at 352. Determining what is and is not reasonable necessarily involves "weighing of the gravity of the harm against the utility of the conduct." *Restatement (Second) of Torts* § 821B cmt. e (1979). A more vacuous legal standard, particularly when applied outside of the traditional narrow framework of nuisance actions, is hard to imagine – determining whether a particular method for providing affordable, reliable electric generation is more socially beneficial than its particular contribution to the harms Respondents allege they will suffer is akin to "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., dissenting). And while the federal judiciary is fully capable of resolving complex cases and controversies, federal judges are neither technical experts nor accountable political actors. Courts should not use federal common law and rely on dueling experts to set emission control limits (or to award monetary damages) when confronted with one of the most controversial and significant social, economic, environmental, and political questions of our times.

The inevitable consequence of allowing the proliferation of global climate change tort claims would be for different courts to establish different levels of, and rules for calculating, the "reasonable" level of emissions from the same class of facilities –

and perhaps from the same facilities themselves. *See North Carolina*, 2010 WL 2891572 at *7 ("We are hardly at liberty to ignore the Supreme Court's concerns and the practical effects of having multiple and conflicting standards to guide emissions. These difficulties are heightened if we allow multiple courts in different states to determine whether a single source constitutes a nuisance."). The effect would be to hold every emitter subject to an uncertain standard, while failing to establish any sort of viable national climate change policy.

B. The Second Circuit's Decision Presents A Recurring Problem That The Court Should Resolve Now.

Far from being unique, this action has parallels both in the Second Circuit and around the Country. As discussed in the Petition for a Writ of Certiorari, the United States Court of Appeals for the Fifth Circuit was recently seized of this issue in *Comer*, and the United States Court of Appeals for the Ninth Circuit is currently considering it in *Kivalina*, after yet another appeal before it was voluntarily dismissed. *See California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009). The present action was followed by a copycat suit, a "cut-and-paste" complaint by a private plaintiff that was dismissed because the plaintiff lacked standing. *See Korsinsky v. EPA*,

No. 05-cv-859 (NRB), 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005).

Media reports suggest that the Second Circuit's decision, if left unchecked, will precipitate even more public nuisance actions. Gene J. Koprowski, *Global Warming Advocates Threaten Blizzard of Lawsuits*, FOXNews (Mar. 29, 2010), http://www.foxnews.com/scitech/2010/03/29/global-warming-advocates-threaten-blizzard-lawsuits/. The presence in New York of many large corporations makes it likely that the Second Circuit will become the forum of choice for these suits. And given the ubiquity of greenhouse gas emissions, there is no shortage of potential defendants. Laurence H. Tribe, et al., *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 15 (Wash. Legal Found., Working Paper No. 169, 2010) ("[C]limate change results only from the non-linear, collective impact of millions of fungible, climactically [sic] indistinguishable, and geographically dispersed emitters."). EPA has estimated that over 6 million different sources in the United States emit over 100 tons per year of carbon dioxide equivalent emissions, and at least 15,000 sources emit over 100,000 tons per year of carbon dioxide equivalent emissions. *See* 75 Fed. Reg. 31,540 (2010). If litigation is the appropriate response to global climate change, it is no exaggeration to say that the only appropriate litigation would have to include virtually every natural and corporate person worldwide as simultaneous plaintiffs and defendants.

C. The Second Circuit's Decision Has Negative Ramifications For The Judicial And Political Processes.

Beyond being an issue of great national importance that will recur in the Second Circuit and other federal courts, public nuisance actions based on greenhouse gas emissions pose unique challenges to the judicial and political processes.

The Court previously had the opportunity to consider the multitude of legislative enactments addressing global climate change. *Massachusetts*, 549 U.S. at 506-07. The legislative process continues: the House of Representatives passed a greenhouse gas emission control bill earlier this term, American Clean Energy and Security Act of 2009, H.R. 2254, 111th Cong. (2009), but the leading greenhouse gas bill in the Senate has lost sponsors and appears unlikely to be enacted, *see* Robin Bravender, *Carbon Cap Likely Dead This Year – Lieberman*, EENews PM (July 29, 2010), http://www.eenews.net/eenewspm/2010/07/29/2/. (Notably, none of the major bills considered by the House of Representatives or Senate contains provisions that in any way resemble a public nuisance remedy.) Extending common law public nuisance liability to regulated entities exerts artificial pressure on the political process and may drive the political process in the direction of particular actions that would not otherwise occur:

> Because the White House supports legislation to limit greenhouse gas emissions,

> many attorneys expected the Obama administration['s response to the Second Circuit's decision] to avoid criticizing a ruling that could become so disruptive that it would force Congress to take action. Jonathan Zesloff, a law professor at the University of California, Los Angeles, said in a recent blog post that the White House would undermine its goals by siding with utilities.
>
> If the Supreme Court does not take the case, he wrote, "then the only way to get rid of the suit is for Congress to displace it. And the only way for Congress to displace it is to pass legislation. As is the case with EPA authority to regulate carbon, this puts more bargaining power on the side that wants regulation."

Gabriel Nelson, *Obama Admin Urges Supreme Court to Vacate "Nuisance" Ruling*, Greenwire (Aug. 25, 2010), http://www.eenews.net/Greenwire/2010/08/25/1/. Judicial power should not, of course, be co-opted to nudge the political process.

Beyond simply impacting the political process incidentally, the Second Circuit's decision could allow judges to use their positions as a tool for political action. Judge Hall, the author of the Second Circuit's decision, has publicly expressed his hope that the decision would prompt political action:

> . . . Hall nevertheless said he hopes the ruling and others like it will pressure both the executive branch and Congress to implement climate policies, because its burdensome "nuisance action by nuisance action"

> approach is hanging over their heads like a "sword of Damocles."
>
> "To the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense," he said, at least to get the executive branch moving to develop regulations and to control the fight that will emerge once regulations are promulgated. He also hoped that the existence of this nuisance action may influence the Senate to provide 60 votes to pass a climate bill.
>
> He said that until federal policies displace the damages cases, "the litigation may provide a backstop to the regulations and perhaps some small impetus [for regulatory and legislative action]." He added that the litigation is viable "at least in the 2nd Circuit."

Key Judge Downplays Prospects for Successful Climate Damages Suits, Inside EPA, Mar. 5, 2010, at 18.

But "[i]t is emphatically the duty of the Judicial Department to say what the law is," and not what it ought to be, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and legislative power is vested in Congress, not the Judiciary. *See* U.S. Const. Art. I, § 1. Federal common law accordingly is disfavored, and "cases in which judicial creation of a special federal rule would be justified . . . are few and restricted." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). It is neither legitimate nor consistent with this Court's jurisprudence to decide cases so as to

spur political action, particularly where the tool wielded – federal common law – is disfavored under the best of circumstances.

The Second Circuit's decision would likewise negatively impact the administrative process. Congress' "establishment of a comprehensive regulatory program supervised by an expert administrative agency" displaces federal common law. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The Clean Air Act is just such a comprehensive regulatory program supervised by an expert agency, the EPA, that has finalized the following rules in the time since the Second Circuit's decision:

- A greenhouse gas emission reporting rule that EPA expects will inform any decision about whether to regulate greenhouse gases. 74 Fed. Reg. 56,264 (2009).
- An "endangerment finding" under Clean Air Act § 202 determining that greenhouse gases may reasonably be anticipated to endanger public health or welfare. 74 Fed. Reg. 66,4977 (2009).
- A light-duty vehicle greenhouse-gas emission control rule. 75 Fed. Reg. 25,324 (2010).
- A "tailoring rule" rewriting Congress' emission rate standards for the prevention of significant deterioration and Title V permitting programs to allow for regulation of greenhouse gases. 75 Fed. Reg. 31,514 (2010).

When these regulatory actions are considered together, it is beyond cavil that EPA has regulated greenhouse gas emissions under the Clean Air Act both for mobile sources and for stationary sources of the type that Petitioners are alleged to operate. It is simply no longer the case that "EPA has yet to make any determination that such emissions are subject to regulation under the [Clean Air] Act, much less endeavor *actually* to regulate the emissions." *Connecticut*, 582 F.3d at 381.

Finally, the decision below could allow future greenhouse gas public nuisance plaintiffs to undermine the judicial process through the recusal system. Recusals have already been a problem in another major greenhouse gas public nuisance action. In *Comer v. Murphy Oil USA*, the United States Court of Appeals for the Fifth Circuit granted rehearing and vacated a panel decision that would have allowed a putative class action to proceed on greenhouse gas public nuisance theories, but then dismissed the appeal for lack of quorum after one of the Judges who participated in the decision to rehear the case en banc later recused herself. The *Comer* plaintiffs named over thirty companies allegedly responsible for causing or contributing to Hurricane Katrina, and had lodged yet another complaint that included an additional *one hundred and ten* companies.

Recusals similarly have been problematic in other situations where a multitude of major corporations were named as defendants. For instance, this Court lacked a quorum to decide the petition for

certiorari in *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008), an Alien Tort Statute, 28 U.S.C. § 1350, action brought by victims of the South African apartheid regime against multinational corporations that did business with that country's government.

Plaintiffs will attempt to ensure the most favorable consideration of their action by strategically choosing defendants to force the recusal of federal judges they perceive to be unsympathetic to their claims. In the case of greenhouse gas public nuisance claims, this problem is uniquely acute, however, because of the lack of substance inherent in the cause of action and the corresponding lack of limitations on the universe of potential defendants – millions of sources in the United States emit significant quantities of greenhouse gases. The costs of strategic defendant selection are also minimal. *See* Judicial Watch, Judicial Financial Disclosure Database, http://www.judicialwatch.org/judicial-financial-disclosure (offering, for free, "a browsable and searchable archive of financial disclosure reports for all Supreme Court justices, appellate court and district court judges"). This problem may be unavoidable where courts discharge their duty under federal statute, but courts should not extend federal common law causes of action in situations that have a significant potential for abuse, such as that presented here.

II. The Second Circuit's Decision Is Erroneous.

The Second Circuit's decision to exercise jurisdiction over Respondent's claims was erroneous. In *Massachusetts*, this Court held that EPA could act to regulate greenhouse gases where Congress affirmatively exercised its constitutional power and enacted a broad regulatory statute encompassing air quality issues and that states could challenge EPA's decision not to do so. What the Court did not hold was that the judicial power extends outside the realm of congressionally articulated procedural rights to claims by States or private actors. And without congressional action – either to establish standing by articulating a chain of causation that the political branches deemed sufficient or to make initial policy determinations and set standards that provide substance for judicial adjudication – such suits have been, and remain, outside the set of cases and controversies that Article III Courts may permissibly decide.

A. Respondents Lack Standing Because The Court Cannot Redress Their Alleged Injuries.

The Second Circuit erred in determining that the Respondents had standing to bring their greenhouse gas public nuisance claims. *Massachusetts* held only that States, in their *parens patriae* capacity, could challenge EPA's rational for refusing to act under the Clean Air Act, in which Congress defined the injury and articulated the chain of causation giving rise to a

case or controversy where none existed before. 549 U.S. at 516 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment)). Even the Second Circuit recognized the significance of Congress' creation of this procedural right and stated that it "was 'of critical importance to the standing inquiry'" because it allowed the *Massachusetts* petitioners to avoid meeting "'all the normal standards for redressability and immediacy'" incumbent on plaintiffs in federal court. *Connecticut*, 582 F.3d at 309 (quoting *Massachusetts*, 549 U.S. at 516-17).

Despite the undisputed fact that the Respondents asserted no statutory procedural right, the Second Circuit held that *Massachusetts* "disposed of" the argument that courts may not "redress the injuries about which Plaintiffs complain because global warming will continue despite any reduction in Defendants' emissions." *Connecticut*, 582 F.3d at 348. That is simply not the case. The Respondents in this action have alleged no more than that the remedy they seek would "achieve the . . . share of the . . . reductions necessary to significantly slow the rate and magnitude of warming." Compl. ¶ 148, No. 04-5669 (S.D.N.Y. July 21, 2004). But they did not, and cannot, allege that the relief requested would actually slow the rate and magnitude of warming. Redressability is not plausible, given that Petitioners' emissions are a very small portion of the historic, global pool of accumulated carbon in the atmosphere. Moreover, the effectiveness of any relief depends on

speculation about the actions of third parties. And regardless of the outcome of this action, emissions from China, India, and other jurisdictions beyond the Court's control have the final word on whether Respondents will suffer the injuries alleged under their own theory of the case.

The political branches have the prerogative to legislate futile administrative schemes, but at the very least it is not within the purview of the federal judiciary to speculate about the actions of third parties, *see Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Warth v. Seldin*, 422 U.S. 490, 509 (1975), or otherwise to entertain suits where the Plaintiffs cannot allege that their requested relief would redress their injury. The Court should grant certiorari and reverse the Second Circuit's decision on standing.

B. Respondents' Claims Present A Non-Justiciable Political Question.

The claims Respondents presented in the court below present a non-justiciable political question. "[I]t has been axiomatic throughout our constitutional history that there exist some questions beyond the proper reach of the judiciary." Tribe, *supra*, at 3. Article III power therefore does not extend to situations where courts cannot assign responsibility in the absence of antecedent legal principles reflecting the political branches' policy judgments. *See id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170

(1803), and *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Two specific circumstances that place a case outside Article III jurisdiction are the "lack of judicially discoverable and manageable standards for resolving" the issue and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Tort claims may state political questions. *See Antolok v. United States*, 873 F.2d 369, 383 (D.C. Cir. 1989) (Sentelle, J.).

Contrary to the Second Circuit's decision, there are no judicially discoverable and manageable standards for resolving Respondents' claims. Questions that are "delicate, complex, and involve large elements of prophecy," *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), or that would plunge the court into a "sea of imponderables," *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality opinion), lack judicially discoverable and manageable standards. Every district court that has been asked to adjudicate a greenhouse gas public nuisance action has recognized that the issue simply is not decidable – absent any standards, there is simply no principled way for a federal judge to resolve whether the safe, reliable, and affordable production of energy, including a retrospective analysis of alternatives available in the past, does or does not outweigh the possible future benefits of potentially reducing the occurrence of adverse weather events, taking into account both whether emissions would have leaked to a foreign country and the impact of

emissions from millions of other sources. *See Kivalina*, 663 F. Supp. 2d 863; *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *California*, 2007 WL 2726871.

The "difficulty of fashioning relief" also evidences a lack of judicially discoverable and manageable standards. *Nixon v. United States*, 506 U.S. 224, 236 (1993). Parallel to the inability of courts to redress the injuries Respondents allege is courts' inability to bind parties that are not before them, which "automatically makes [courts] institutionally ill-suited to entertain lawsuits concerning problems [as] irreducibly global and interconnected in scope" as global climate change. Tribe, *supra*, at 21. The federal judiciary's inability to remedy effectively Respondents' alleged harm further evidences the existence in this action of a non-justiciable political question that the Second Circuit disregarded.

The Second Circuit also failed to recognize that deciding Respondents' claims would require it to make an initial policy determination of a kind clearly unfit for judicial discretion. This Court has recognized that federal judges "have neither the expertise nor the authority to evaluate . . . policy judgments" concerning whether and how to regulate greenhouse gas emissions. *Massachusetts*, 549 U.S. at 533; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981) ("'courts are fundamentally underequipped to formulate national policies or develop standards for matters

not legal in nature'"). Determining whether Petitioners' methods for providing affordable, reliable energy (or the frequency with which they use those methods) are more or less socially beneficial than the harms to which the Petitioners are alleged to contribute, considered in the context of millions of contributing emitters beyond the Court's control, requires a policy judgment that the political branches have struggled for decades to make. In addition to simply being an ineffective way to regulate greenhouse gas emissions, this determination requires far more than an inquiry into what is or is not "reasonable." *See, e.g.*, *California*, 2007 WL 2726871, at **6-7; *accord O'Melveny & Myers*, 512 U.S. at 89 (refusing to create federal common law tort malpractice liability standards because "[w]hat sort of tort liability to impose on lawyers and accountants . . . who provide services to federally insured financial institutions . . . 'involves a host of considerations that must be weighed and appraised'" and "'is more appropriately for those who write the laws, rather than for those who interpret them'") (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 n.41 (1981)).

Reversing the district court's decision required the Second Circuit to make other contentious policy determinations. The Second Circuit *sub silentio* chose to decide whether particular types of greenhouse gas emission limits should be or should have been imposed on emitters – the very same policy determination with which the political branches are currently grappling. *See Kivalina*, 663 F. Supp. 2d at 876-77;

Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005). The Second Circuit also decided *sub silentio* that Petitioners should be required to bear the cost of remedying any harms that Respondents can prove were caused by greenhouse gas emissions. *See Kivalina*, 663 F. Supp. 2d at 877 ("Plaintiffs are . . . asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming. . . . [T]he allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance."). These are inherently political questions.

The Court should grant certiorari and hold that Respondents' claims present a political question that cannot be considered or resolved by the federal courts.

CONCLUSION

After the Second Circuit issued its decision, Connecticut Attorney General Richard Blumenthal stated that it "set a precedent for all who threaten our planet." Press Release, Connecticut Attorney General's Office, Attorney General Praises Appeals Court Ruling Reinstating Global Warming Lawsuit (Sept. 21, 2009). Whether or not Petitioners' alleged actions "threaten our planet," the precedent set by the decision below is erroneous, places undue

pressure on the political and judicial processes, and licenses wasteful legal actions in areas beyond the judicial competence. For the foregoing reasons, as well as the reasons set forth by Petitioners and their other Amici, the petition for a writ of certiorari should be granted, and the Second Circuit's decision should be reversed.

Respectfully submitted,

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