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No. 10-174

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

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

BRIEF OF THE STATES OF INDIANA, ARKANSAS, HAWAII, KANSAS, KENTUCKY, NEBRASKA, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, UTAH, AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

*Counsel of Record

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Amici *States*

(Additional counsel listed inside cover)

ADDITIONAL COUNSEL

DUSTIN MCDANIEL
Attorney General
State of Arkansas

MARK J. BENNETT
Attorney General
State of Hawaii

STEVE SIX
Attorney General
State of Kansas

JACK CONWAY
Attorney General
State of Kentucky

JON BRUNING
Attorney General
State of Nebraska

WAYNE J. STENEHJEM
Attorney General
State of North Dakota

RICHARD CORDRAY
Attorney General
State of Ohio

THOMAS W. CORBETT, JR.
Attorney General
State of Pennsylvania

HENRY D. MCMASTER
Attorney General
State of South Carolina

MARK L. SHURTLEFF
Attorney General
State of Utah

BRUCE A. SALZBURG
Attorney General
State of Wyoming

QUESTION 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 question presented by the Petition that the *Amici* States address is as follows:

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 THE *AMICI* STATES[1]

The justiciability of climate change lawsuits under federal common law is an issue of extraordinary national importance. To permit federal adjudication of claims seeking damages for past emissions and injunctions curtailing future emissions would heighten the risks and uncertainties for businesses and countless other entities, including state agencies, which may suddenly find themselves as defendants in a federal suit. The list of potential defendants is limitless because the plaintiffs' theory of liability involves nothing more specific than prosecuting the emission of carbon dioxide ("CO_2"). The prospect that federal courts may use such suits to confound the political branches' legislative and administrative processes by establishing emissions policy (more likely, multiple *conflicting* policies) on a piecemeal, *ad hoc*, case-by-case basis under the aegis of federal common law presents an issue warranting the Court's immediate attention.

States have an especially strong interest in this case because, as utility owners, power plant operators, and generally significant CO_2 emitters (through facilities, vehicle fleets and highway construction, among other functions), they may be

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *Amici* States' intention to file this brief more than 10 days prior to the due date of this brief.

future defendants in similar actions. The theory of liability being advanced here has no limiting principle. It would permit federal courts to impose CO_2 emission limits on any entity in the country, and one might reasonably expect that the major economic actors of each state, not to mention state government entities themselves, would be on a list of potential defendants.

What is more, this lawsuit threatens substantial impact on state environmental regulatory schemes. Each of the defendant utilities operates under state-issued pollution control permits, as do all power plants and large pollution emitters. To the extent that this lawsuit would enable a court to cap CO_2 emissions that states would permit (either because state law has not heretofore defined CO_2 as an endangering pollutant or because future CO_2 emission limits will be set higher than a federal court's standard), allowing some states to seek common-law injunctions against industries in other states would undermine the entire state-federal regulatory scheme. Exercising their role in this cooperative regulatory effort, state political branches have struck balances between economic development and environmental protection that deserve respect in federal court.

SUMMARY OF THE ARGUMENT

Immediate review of this case is justified because, if allowed to proceed in the district court, it will embroil the federal judiciary in one of the most high-profile and contentious political debates of our time. Reasonable people disagree on many levels over the

extent to which greenhouse gas emissions, and especially CO_2 emissions, should be regulated. Given that every industry, and indeed every living mammal, constantly emits CO_2, such emissions cannot simply be banned outright, no matter what the harm to the environment. Someone has to make a policy determination as to how much is acceptable and how much is too much.

That someone should not be the federal judiciary. The point at which the volume of CO_2 emissions justifies regulation admits of no discernible, judicially manageable principle. Under the Court's political question doctrine, the federal judiciary has no jurisdiction over cases where the judiciary cannot decide liability without resolving profound policy questions. With regard to CO_2 emissions, politically accountable officials, not life-tenured judges, must decide where to draw the regulatory line—as they have done or are in the midst of doing on both federal and state levels.

For a federal court even to attempt to use something as nebulous as common law to decide whether and how to impose greenhouse gas regulations on a select list of defendants can only erode public confidence in the judiciary as courts of law rather than policy. This is particularly true in light of federal and state efforts underway to regulate greenhouse gas emissions, and the ongoing national debate over whether additional federal laws, such as proposed "cap and trade" legislation, are proper. The Court needs to step in now to decide whether this case presents claims that a federal court may properly adjudicate. Waiting until after

final judgment will be too late, regardless of outcome.

REASONS FOR GRANTING THE PETITION

I. As a Threshold Issue in This Nationally Important Case, the Justiciability of Plaintiffs' Nuisance Claims in Light of the Political Question Doctrine Warrants Immediate Review

A. The political question doctrine is eroded when cases are improperly allowed to proceed to judgment

Article III courts lack jurisdiction over political questions. *Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("[N]o justiciable controversy is presented when the parties seek adjudication of only a political question . . . ."); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (the political question doctrine is a "jurisdictional limitation[] imposed upon federal courts by the 'case or controversy' requirement of Art[icle] III"). Thus, "the presence of a political question . . . prevent[s] the power of the federal judiciary from being invoked by the complaining party." *Schlesinger*, 418 U.S. at 215.

In the political question context, therefore, justiciability is a threshold determination that must be made at the outset of a case. *See id.* The political question doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). At its core, the doctrine is "designed to

restrain the Judiciary from inappropriate interference in the business of the other branches of Government." *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). It embraces the pragmatic if unglamorous reality that there are certain issues the judiciary is simply ill-suited to resolve.

Federal courts inevitably lose credibility and stature—and, ultimately, the faith of the citizenry—when they wade into matters that can practically be resolved only by the political branches and the will of the people. Such participation only fuels public suspicion that judges will "legislate from the bench" in the guise of amorphous legal doctrine whenever it suits them. Indeed, while the Court in *Baker* identified "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" as but one basis for applying the political question shield, *Baker*, 369 U.S. at 217, surely the need to avoid expressing institutional disrespect underlies the doctrine as a whole.

In this regard, an errant foray into politics by the lower courts, and the institutional disrespect such a venture inevitably expresses (even unintentionally), cannot entirely be remedied by post-judgment review in this Court. That is, later reversing or vacating what is essentially a political, not legal, judgment by lower courts cannot wipe away the institutional mistrust such a decision is likely to engender in the meantime.

Nor does the prospect that defendants might ultimately prevail on the merits ameliorate these

concerns. Even a defense verdict would carry a tinge of disrespect for coordinate branches and levels of government. It would convey the message that, while federal courts are not interfering this time, all concerned, including government officials with responsibility for creating environmental policy, operate at the sufferance of the federal judiciary. There is simply no way around the fact that allowing lower federal courts to proceed to judgment—any judgment—on a verboten political question causes irreparable harm to the judicial system.

We are talking here of course only about reasons for this Court to exercise discretionary review prior to final judgment, not anyone's right to appeal before final judgment. But an analogy to the collateral order doctrine still has some utility. When lower courts reject governmental immunity claims, for example, the defendant may take an appeal (even successive appeals) prior to final judgment because the right to immunity from *suit* (*i.e.*, discovery, trial, etc.), as distinct from immunity from *liability* cannot effectively be reviewed once the official has had to endure the entire litigation process. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). With regard to the political question doctrine, similarly, the complete protection it affords the federal judiciary from politics will be eroded if the doctrine is not vindicated until after final judgment. To be sure, reversal of a final judgment in a political question case will effectively remove the courts from the political arena on that issue, but it cannot undo the significant reputational harm to the federal judiciary as courts of law, not politics, that will already have occurred.

The Court has acknowledged this reality in previous cases by granting *certiorari* in order to determine whether a case presents a nonjusticiable political question before allowing the case to proceed to judgment in the lower courts. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 349-52 (1976) (granting *certiorari* to determine justiciability based on political question doctrine and whether constitutional challenge of patronage practices stated a valid claim for relief); *United States v. Nixon*, 481 U.S. 683, 686-90 (1974) (granting *certiorari* on denial of motion to quash subpoena and denial of claim of executive privilege); *Gilligan v. Morgan*, 413 U.S. 1, 3-4 (1973) (granting *certiorari* before case could be remanded to district court in order to determine justiciability of question regarding proper training of Ohio National Guard troops).

As in these cases, this Court's review is warranted prior to final judgment here in order to determine whether the plaintiffs' claims in this case present nonjusticiable political questions.

B. The institutional harm of permitting this litigation to proceed is particularly acute given the multi-layered environmental regulatory scheme that already exists

Allowing this case to proceed poses a particular threat to respect for federal courts as limited-power institutions because so many layers of environmental regulation already exist at the hands of politically accountable officials—with more on the

way. Air pollution generally—and greenhouse gas emissions in particular—are already regulated by the federal government, regional state alliances, and individual states. The threatened addition of a judicial layer to this regulatory hierarchy disturbs the delicate balance struck between ecologic and economic health by these various regulatory authorities. In fact, the very pendency of the claim on the merits may prompt emitters to adjust their activities, or even deter future industrial competitors from launching, in anticipation of highly uncertain future judicial decrees. Furthermore, to the extent that a judicial injunction could, at some future point, regulate states—who are also significant greenhouse gas emitters—the decision below threatens state sovereignty.

1. Much of the complex web of federal and state environmental regulations that already govern those who emit large levels of CO_2 and other pollutants arises from the Clean Air Act, 42 U.S.C. § 7401 *et seq.* ("CAA"). The CAA requires the United States Environmental Protection Agency ("EPA") to establish national health-based air quality standards to protect against common environmental pollutants. States play a significant role in enforcing these standards.

With regard to CO_2 emissions in particular, the Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), triggered a regulatory review leading to EPA's 2009 finding that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." Endangerment and Cause or Contribute

Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66497 (December 15, 2009). That finding, known as the "endangerment finding," was the first step in EPA's plan to establish a regulatory program for greenhouse gas emissions under the CAA. *Id.* at 66505-06.

EPA has also promulgated rules under the CAA that require preconstruction and operating permits for stationary sources of greenhouse gas emissions, and that also tailor application of those requirements so that large new and modified stationary sources are regulated first, with progressively smaller sources brought into the program over time. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31516 (June 3, 2010) ("In particular, EPA is establishing with this rulemaking a phase-in approach for [prevention of significant deterioration] and title V applicability, and is establishing the first two steps of the phase-in for the largest emitters of [greenhouse gases]. We also commit to certain follow-up actions regarding future steps beyond the first two[.]").

Building on its endangerment finding, EPA has also promulgated vehicle emissions standards and proposed modifications to existing CAA permitting regimes. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25324 (May 7, 2010); Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas

Emissions: Federal Implementation Plan, 75 Fed. Reg. 52916 (August 30, 2010); Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, http://www.epa.gov/NSR/documents/20100810FinalGHGSIPCallProposal.pdf (August 12, 2010).

EPA's actions in the wake of *Massachusetts v. EPA* have not been without controversy. Both the endangerment finding and the tailoring rule have generated legal challenges from states (including *Amici* States Hawaii, Indiana, Kentucky, Nebraska, North Dakota, Pennsylvania, South Carolina, and Utah), industry groups, and independent organizations. *See Ga. Coal. for Sound Envtl. Policy v. EPA*, No. 10-1200 (D.C. Cir. July 30, 2010) (consolidating 21 separate challenges to the endangerment finding and tailoring rule); *Coal. for Responsible Regulation v. EPA*, No. 09-1322 (D.C. Cir. December 23, 2009) (consolidating 16 separate challenges to the greenhouse gas endangerment finding).

But, like *Massachusetts v. EPA* itself, these legal challenges seek only to hold EPA to regulatory limits imposed by Congress, not to involve the federal judiciary in the underlying decision whether and how much to regulate CO_2 emissions.

In addition, Congress has of late been debating whether to add to the federal air pollution regulatory scheme through so-called "cap and trade" legislation. *See* Clean Energy Jobs and American Power Act, S.

1733, 111th Cong. (2010); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). This legislation, if passed, would create nationwide CO_2 emission caps and allow regulated emitters to trade permits amongst themselves. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). Many oppose such additional restrictions as too costly in light of the expected benefits for the environment. H.R. Rep. No. 111-137 at 725-26 (2010) (discussing opposition views regarding American Clean Energy and Security Act of 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr137.pdf. Public debate and federal elections will dictate which view prevails.

At the federal level, then, the political branches' regulation of greenhouse gases remains the subject of energetic regulatory efforts and vigorous policy debates. As the brief of the Tennessee Valley Authority in Support of the Petitioners suggests, some level of further review is warranted because permitting federal common law nuisance claims for alleged injuries resulting from greenhouse gas emissions is not compatible with the existing federal regulatory scheme. *See* TVA Br. at 31-32 (explaining how EPA regulatory activity following the Second Circuit's decision illustrates the CAA's displacement of the federal common law).

2. The States exercise considerable authority over the implementation of the CAA. The Act requires states to adopt their own State Implementation Plans for compliance with National

Ambient Air Quality Standards within three years of EPA promulgation of such standards. *See* 42 U.S.C. § 7410(a). While such plans must meet basic requirements and are subject to EPA approval or disapproval, they must be adopted through a process involving public input, ensuring that the plans are adapted to the particular circumstances of each state. *Id.* States are free to choose how best to meet federal requirements within their borders and are expressly allowed to have more stringent requirements than the basic federal mandate. *See* 42 U.S.C. § 7416. As a consequence, no two State Implementation Plans are identical.

States have also formed numerous regional alliances attempting to address problems associated with greenhouse gas emissions and climate change. *See, e.g.,* Western Climate Initiative, http://www.westernclimateinitiative.org/wci-partners (regional alliance between Arizona, British Columbia, California, Manitoba, Montana, New Mexico, Ontario, Oregon, Quebec, Utah, and Washington); Midwestern Greenhouse Gas Reduction Accord, http://midwesternaccord.org/ (regional alliance between Iowa, Illinois, Kansas, Manitoba, Michigan, Minnesota, and Wisconsin); Regional Greenhouse Gas Initiative, http://www.rggi.org/docs/RGGI_Fact_Sheet.pdf (regional alliance between Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont).

These alliances work to create uniform policies and regulations across member states to facilitate greenhouse gas regulation. *See, e.g.,* Western

Climate Initiative, http://www.westernclimate initiative.org/designing-the-program (providing blueprint for regional cap-and-trade and offset program to begin in 2012 and for complementary energy policies); Midwestern Greenhouse Gas Reduction Accord, http://midwesternaccord.org/ (issuing recommendations and model rules to member governors to facilitate regional cap-and-trade agreement); Regional Greenhouse Gas Initiative, http://www.rggi.org/design (ongoing regional "cap and trade" program based on individual member implementation of model rule). The alliances attempt to craft emission policies that are appropriate for each geographic region as a whole, in response to the complex and interconnected nature of the problem.[2]

In addition to their CAA responsibilities and these regional alliances, many states individually regulate greenhouse gases in a variety of ways. At least 21 states have begun reducing emissions through some combination of emission caps, carbon offsets, permit trading, renewable energy requirements, energy efficiency requirements, or agricultural changes to improve carbon sequestering. *See, e.g.*, California Air Resources Board, *Climate*

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[2] Notably, each of the plaintiff states is a member of the alliance associated with its region. *See* Western Climate Initiative, http://www.westernclimateinitiative.org/wci-partners (listing California as a member); Midwestern Greenhouse Gas Reduction Accord, http://midwesternaccord.org/ (listing Iowa and Wisconsin as members); Regional Greenhouse Gas Initiative, http://www.rggi.org/design (listing Connecticut, New Jersey, New York, Rhode Island and Vermont as members).

Change, http://www.arb.ca.gov/cc/cc.htm (listing California's environmental programs, including energy efficiency and emission cap and trade); Pew Center on Global Climate Change, *State and Local Net Greenhouse Gas Emissions Reduction Programs*, http://www.pewclimate.org/states.cfm?ID=45 (describing Nebraska's efforts toward increasing carbon sequestration); Virginia Governor's Commission on Climate Change, *Final Report: A Climate Change Action Plan* (2008), *available at* http://www.deq.state.va.us/export/sites/default/info/documents/climate/CCC_Final_Report-Final_12152008.pdf; *see also* Pew Center on Global Climate Change, *U.S. States and Regions*, http://www.pewclimate.org/states-regions (providing a dynamic map of state and regional activities in the United States). For many states, a large part of this regulation consists of regulating motor vehicle greenhouse gas emissions in particular. *See, e.g.*, California Environmental Protection Agency Air Resources Board, Clean Car Standards – Pavley, Assembly Bill 1493, http://www.arb.ca.gov/cc/ccms/ccms.htm (detailing California's attempts to secure more stringent GHG standards than provided for under federal law); VTrans Climate Change Action Plan, http://www.aot.state.vt.us/planning/Documents/Planning/VTransClimateActionPlanfinal1.pdf (June 2008).

At least six other states are engaged in administrative or legislative inquiries into possible additional greenhouse gas regulation. *See, e.g.*, *Climate Change in Alaska*, http://www.climatechange.alaska.gov/; Kentucky Climate Action Plan Council, *Kentucky Climate Action Planning Council*

(KCAPC) Process, http://www.kyclimatechange.us/stakeholder.cfm; North Carolina, *Climate Action Plan Advisory Group*, http://www.ncclimatechange.us/; Pennsylvania Dep't of Environmental Protection, *Pennsylvania Climate Change Advisory Committee*, http://www.portal.state.pa.us/portal/server.pt/community/climate_change_advisory_committee/10412. Inquiries of this sort result in plans which, while they may not have the force of law, form the basis of future state action. *See, e.g.*, Idaho Department of Environmental Quality, *Greenhouse Gas Emissions Reduction Action Plan for 2008-2009* (May 2008), *available at* http://www.deq.state.id.us/air/prog_issues/ghg/pdfs/ghg_action_plan_final_052908.pdf.

Though the goals of these regulations are similar, each state pursues them differently—a natural result of the social, political, environmental, and economic diversity that exists among states. A plan to modify greenhouse gas emissions that is acceptable to Vermont may be unacceptable to Indiana, Georgia, Texas, or Washington, for example. By asking a single federal court in New York to impose emission limits on defendant companies, each of which is presumably compliant with the regulations of each state in which it operates, plaintiffs are pushing the courts to ignore this diversity and export plaintiffs' preferred environmental policies to other states. The decision below is effectively an open invitation for federal courts to undertake collateral review of state environmental policies. The Court should take this case now to prevent such possible interference with the results of ongoing, vigorous public debates across

the country concerning regulation of greenhouse gas emissions.

II. The Second Circuit Erred in Rejecting Application of the Political Question Doctrine

The Second Circuit held that exercising federal jurisdiction in this case is appropriate because "federal courts have successfully adjudicated complex common law public nuisance cases for over a century." Pet. App. 28a. The jurisdictional problems of this case, however, stem not from its "complex" nature but from the fact that it can be adjudicated only by judicial resolution of highly sensitive policy tradeoffs that carry global impacts. The decision below fails to acknowledge that, precisely because it lacks electoral accountability, the judicial branch is not institutionally competent to make tradeoffs affecting far more than a single local emissions problem, or to divine standards to carry them out.

1. In *Baker v. Carr*, this Court laid out six "formulations" which "may describe a political question." 316 U.S. 186, 217 (1962). They are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) "a lack of judicially discoverable or manageable standards for resolving" the issue, (3) "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion," (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate

branches of government," (5) "an unusual need for unquestioning adherence to a political decision already made," or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

The plaintiffs' claims implicate at least two of the circumstances identified in *Baker*, and are thus barred by the political question doctrine. The claims in this case, premised on the allegations that defendants' emissions are "unreasonable," would require the court to "weigh[] . . . the gravity of the harm against the utility of the conduct." Restatement (Second) of Torts, § 821B cmt. e (1979). Because climate change is a phenomenon attributed to the *global* aggregation of greenhouse gas emissions, a court would first need to determine a "reasonable" global level of emissions and then determine worldwide which particular sectors and industries (indeed which individual entities and facilities) should be responsible for reducing their emissions by what amounts in order to achieve that global level. A court lacks "judicially discoverable and manageable standards" to decide these *ad hoc* policy questions and would first require "initial policy determination[s] of a kind clearly for non-judicial discretion." *Baker*, 369 U.S. at 217 (*Baker* factors 2 and 3).

Deciding what constitutes a "reasonable" level of emissions requires a balancing of economic, social, environmental, foreign policy and national security interests far beyond the institutional competence of the judiciary and requiring multiple threshold policy determinations by the electorally accountable

branches of the government. As EPA itself has recognized, "[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change." Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003).

Nonetheless, the Second Circuit characterized this case as an "ordinary tort suit." Pet. App. 38a-39a (quotation omitted). The court deflected concerns about the lawsuit's broad implications by noting that "[n]owhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches." *Id.* at 25a-26a. It is hard to imagine, however, that in the context of a lawsuit seeking to prevent global climate change, a court which undertakes to "weigh[] the gravity of the harm against the utility of the conduct" to determine what is "reasonable," Restatement (Second) of Torts § 821B cmt. e (1979), could *avoid* fashioning a comprehensive and far-reaching solution if it hopes to redress injuries alleged by the plaintiffs.

On a related point, this "reasonableness" balancing inquiry does not create any clear standard for choosing defendants from among the countless CO_2 emitters in the United States. This underscores the reality that a federal court must either be prepared to formulate a vast remedy or else conclude that no useful remedy exists.

The TVA echoes these concerns in its brief. *See* TVA Br. at 17 ("The confluence in this case of several factors—including the myriad potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made—demonstrates that plaintiffs' global-warming nuisance claims should be resolved by the representative Branches, not federal courts."). It posits, however, that prudential standing principles rather than limits on Article III justiciability bar consideration of plaintiffs' claims. *See* TVA Br. at 11-22. There would be very little practical difference between dismissing this case on prudential standing grounds and dismissing it on political question grounds. Both doctrines prevent courts from adjudicating claims having no clear standards that require underlying policy determinations "more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). TVA suggests that prudential standing offers a "more deferential and restrained basis for dismissing suits like plaintiffs' because the basis for dismissal can be revisited by Congress." TVA Br. at 19-20. Congress would be equally capable, however, of providing these plaintiffs with an enforceable CO_2 emission claim in response to dismissal of this suit on political question grounds. From the standpoint of the justiciability of plaintiffs' claims regarding greenhouse gas emissions, the problem here is not with a dearth of Congressional power to address such claims, but with an abundance of power that Congress at this point has

not seen fit to exercise in the way that plaintiffs would prefer.

2. Of particular concern to the *Amici* States is that they themselves might be targets either of a far-reaching district court remedy in this case or of some future lawsuit. States are significant CO_2 emitters and hosts of other emitters, which would seem to make them prime targets for a public nuisance lawsuit such as this one.

Even if this lawsuit is understood to implicate only the emissions of utilities, eight states own and operate coal-fired electric utilities that emit CO_2. *See* Platts 2010 UDI Directory of Electric Power Producers and Distributors (Platts ed., 118th ed. 2009) (listing state-owned electric utilities in Alaska, Arizona, California[3], Massachusetts, Nevada, New York, South Carolina, and Texas). In addition, 24 state-owned universities in 15 states operate campus coal-fired power plants. *See* Campus Coal Plants, SourceWatch, http://www.sourcewatch.org/index.php ?title=Campus_coal_plants.[4] Four states that are

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[3] California-owned utilities have largely embraced hydroelectric power, but the Northern California Power Agency continues to operate at least one fossil-fired steam plant. *See* Platts 2010 UDI Directory of Electric Power Producers and Distributors (Platts ed., 118th ed. 2009).

[4] The 24 state-owned universities currently operating coal-fired power plants are Ball State University (Indiana), Eastern Illinois University, Indiana University, Iowa State University, Michigan State University, Morehead State (Kentucky), Northern Michigan University, Ohio University, Pennsylvania

plaintiffs in this case (California, Iowa, New York, and Wisconsin) are also possible future defendants because they own utilities, or have state universities that operate power plants. *See id;* Platts 2010 UDI Directory of Electric Power Producers and Distributors (Platts ed., 118th ed. 2009).

What is more, because plaintiffs' common-law theory is not limited to capping utility emissions, *all* states are vulnerable to environmental nuisance claims in light of their significant CO_2 emissions, such as through large vehicle fleets and major highway projects. For example, Indiana owns and operates a fleet of approximately 10,000 vehicles—a significant source of CO_2 emissions. *See* 75 Fed. Reg. at 31,519 (stating that one-third of all energy-related emissions come from transportation). And Indiana's "Major Moves" program—a 10-year, $12 billion transportation plan launched in 2005—calls for a total of 104 new roadways by 2015 with 1,600 lane

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State University, Purdue University (Indiana), Southeast Missouri State University, Southern Illinois University at Carbondale, University of Alaska at Fairbanks, University of Illinois at Urbana-Champaign, University of Iowa, University of Kentucky, University of Missouri at Columbia, University of North Dakota, University of North Carolina at Chapel Hill, University of Northern Iowa, University of Tennessee, University of Wisconsin at Madison, Virginia Tech, and West Virginia University. *See* Campus Coal Plants, SourceWatch, http://www.sourcewatch.org/index.php?title=Campus_coal_plants (last visited Aug. 30, 2010).

miles.[5] After accounting for the manufacture of concrete, steel, and other energy-intensive construction materials, as well as fuel consumed by construction equipment and vehicles, building one mile of roadway releases between 1,400 and 2,300 tons of CO_2. Clark Williams-Derry, *Increases in Greenhouse-Gas Emissions from Highway Widening Projects* 2 (2007), *available at* http://www.sightline.org/research/energy/res_pubs/analysis-ghg-roads. Over the long term, adding one mile of new highway lane increases CO_2 emissions from automobiles by more than 100,000 tons over 50 years, according to one estimate. *Id.* at 1. Thus, every state qualifies as an environmental nuisance defendant when all sources of CO_2 are considered.

And, as the broad injury claims of the plaintiffs suggest, perhaps every state could also qualify as a CO_2 nuisance plaintiff. Yet it should not be the case that one group of states may regulate the emissions, or emissions policies, of other states through federal common law litigation. To say the least, such interference would pose a grave threat to each state's recognized "right to govern," *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (citing *Chisholm v. Georgia*, 2 U.S. 419, 472 (1793)), and upset the balance of federalism and equality among the states. *See* The Federalist No. 22 (Alexander Hamilton) (observing that, to allow some states to control others "would be not merely to be insensible to the love of power, but

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[5] As of the end of 2009, 34 of these roadways had been completed and 16 were under construction. *See* About Major Moves, Indiana Department of Transportation, http://www.in.gov/indot/7039.htm.

even to sacrifice the desire of equality. It is neither rational to expect the first, nor just to require the last.").

3. The need to protect sovereign power from gradually migrating to another branch of government (or to another sovereign entirely) goes to the heart of considerations underlying the political question doctrine, which embraces the humble but realistic notion that the judiciary can neither answer all questions nor remedy all injuries. *See, e.g., Vieth v. Jubelirer,* 541 U.S. 267, 305-06 (2004) (plurality op.) (concluding that no judicially manageable standards exist under which to adjudicate political gerrymandering claims); *Nixon v. United States*, 506 U.S. 224, 230 (1993) (holding that use of word "try" in Impeachment Clause lacks precision to provide judicial standards, especially in light of clear, constitutional commands to Senate on impeachment procedure); *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence" than the "composition, training, equipping, and control of a military force"); *Coleman v. Miller*, 307 U.S. 433 (1939) (holding question of reasonable ratification period for constitutional amendment to require "an appraisal of a great variety of relevant conditions, political, social and economic" better suited to the political branches); *Luther v. Borden*, 48 U.S. (7 How.) 1, 38-41 (1849) (explaining the lack of power in the court to determine the legitimacy of a state government and inability to order effective relief); *Schneider v. Kissinger*, 412 F.3d 190, 196 (D.C. Cir. 2005) ("Unlike the executive, the judiciary has no covert

agents, no intelligence sources, and no policy advisors. The courts are therefore ill-suited to displace the political branches in such decision-making."); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309-11 (2d Cir. 1973) (holding that the determination of questions of military policy is beyond the competency of the courts).

Even in cases rejecting application of the political question doctrine, courts acknowledge the limits of institutional judicial competence. *See U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 457-59 (1992) ("In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable."); *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions . . . .").

Here, in contrast with cases where federal courts review the legality of agency rules by reference to how Congress has resolved a political debate, the Second Circuit's decision proposes to resolve by judicial fiat the ongoing public debate over greenhouse gas regulation. Such regulation requires determinations of national, regional, and local policy outside of the competency of the judiciary. Only statutes and regulations duly enacted by representatives accountable to the citizenry can legitimately define CO_2 limits. Accordingly,

permitting the federal judiciary to impose its own understanding of when the costs of CO_2 emission outweigh the benefits would constitute an impermissible intrusion into the political realm.

CONCLUSION

The Court should grant the Petition and reverse the decision below.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Amici *States*

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