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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 UNIONS FOR JOBS AND THE ENVIRONMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

LAURENCE J. COHEN*
SHERMAN, DUNN, COHEN,
LEIFER & YELLIG, P.C.
900 SEVENTH STREET, N.W.,
SUITE 1000
WASHINGTON, D.C. 20001
TELEPHONE: (202) 785-9300
FAX: (202) 775-1950

*COUNSEL OF RECORD

EUGENE M. TRISKO
ATTORNEY AT LAW
P.O. BOX 47
GLENWOOD, MD 21738-0047
TELEPHONE: (301) 639-5238
FAX (410) 489-9483

OF COUNSEL

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

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INTEREST OF AMICUS CURIAE[1]

Unions for Jobs and the Environment, Inc. ("UJAE") is an association of ten national and international unions whose 3.2 million members seek to have a voice for union and worker concerns regarding U.S. global climate change policy and other environmental issues.[2] UJAE member unions are engaged in various aspects of U.S. energy supply, production, utilization and transportation. UJAE actively represents its members' concerns before all branches of the government where proposed actions would impact jobs or unduly burden the well-being of workers.

UJAE is accredited and participates as a non-governmental organization ("NGO") with formal observer status at the United Nations' Framework Convention on Climate Change, S. Treaty Doc. No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992) ("FCCC"). UJAE and its members have been involved for the past decade in both domestic and international climate change policy debates,

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel hereby certifies that the brief submitted on behalf of *amicus curiae* UJAE was not authored in whole or in part by counsel for a party, and no person or entity other than *amicus* and its staff have made a monetary contribution to the preparation of this brief. All parties and the Solicitor General have granted blanket consents for the filing of *amicus curiae* briefs. Counsel timely served notice of intent to file this brief with the Solicitor General and with all parties.

[2] Formed in 2000, UJAE is a non-profit § 501(c)(4) organization incorporated in Maryland formed of: the Brotherhood of Locomotive Engineers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Teamsters; Marine Engineers Beneficial Association; Transportation Communications International Union; United Food and Commercial Workers; United Mine Workers of America; United Transportation Union; and Utility Workers Union of America. For more information, see the UJAE website at http://www.ujae.org.

including the development of regulations by the U.S. Environmental Protection Agency ("EPA") implementing this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) ("*Massachusetts*"). The jobs and economic well-being of UJAE members will be critically impacted by decisions regarding climate change. UJAE seeks to ensure that any remedies for global climate change take workers' interests into account, incorporate appropriate mechanisms for transitioning to a lower-carbon economy, including strong technological incentives and labor protections such as "border adjustment" mechanisms to address international disparities in greenhouse gas ("GHG") controls, and avoid piecemeal emissions control actions having little impact on future global concentrations of greenhouse gases, or their related environmental effects. UJAE has sought to play a constructive role in helping to define domestic and international approaches to controlling GHG emissions, and has invested substantial resources in participating in the climate change policy process.

UJAE previously filed *amicus curiae* briefs before the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit in the related climate change nuisance cases, *Connecticut et al. v. American Electric Power et al.* and *Open Space Institute v. American Electric Power et al.* ("*American Electric Power*"). UJAE believes that substantial arguments support the Petition for Writ of Certiorari filed in these cases. The Second Circuit's decision in *American Electric Power* merits review because the Second Circuit has decided an important question of federal law that has not been settled by this Court,[3] namely, whether under the U.S. Constitution plaintiffs can maintain common law nuisance claims against specific defendants for emitting greenhouse gases. Moreover, conflicts are increasing

[3] *See* SUP. CT. R. 10(c).

among the federal circuit courts regarding the appropriate role of common law nuisance claims in cases involving the Clean Air Act, as evidenced by the Second Circuit's decision in this case and the Fourth Circuit's recent decision in *North Carolina* v. *TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010), discussed *infra*.

SUMMARY OF THE ARGUMENT

This Court should grant the Petition for Writ of Certiorari on the basis that, contrary to the conclusions reached by the Second Circuit, the federal and state common-law nuisance claims at issue here would require a court to resolve political questions properly reserved for legislative and executive action. The damages alleged by Respondents can be remedied only by comprehensive national and multilateral emissions reductions strategies that Congress, EPA, the Department of State, and other executive agencies are now pursuing through legislation, a variety of regulations under the Clean Air Act addressing domestic GHG emissions from mobile and stationary sources, and multilateral negotiations involving industrial and developing nations under the UN FCCC. The competence for decision-making on the complex design of climate change mitigation strategies resides with the executive and legislative branches, not the judiciary.

Actions by Congress and the Obama Administration underscore the separation of powers arguments applicable to these and similar cases. President Obama, the Congress, and federal executive agencies are engaged in a series of complex policy-making, diplomatic, and cooperative efforts to craft comprehensive climate change remedies. EPA has begun to fashion a broad framework for regulating GHG emissions from both mobile and stationary sources under the Clean Air Act, 42 U.S.C. §7401, *et seq*. If the petition in this case were granted, UJAE would argue that the Clean Air Act clearly displaces any

federal common law claim that otherwise may have been available to litigants seeking to apply nuisance remedies against GHG emitters.

Judicial interference with policymaking on climate change issues in this and similar cases would be an improper intervention into a political question, as it would fail to show proper deference to the legislative and executive braches. Moreover, there are no sufficient judicially discoverable and manageable standards for effectively resolving the impacts of climate change alleged in such nuisance cases.

Because the judicial branch lacks the ability to craft a comprehensive approach to climate change that addresses the intersecting economic, environmental, technological, and diplomatic issues in this inherently global environmental phenomenon, a judicial role in establishing policy through nuisance lawsuits is improper and unwise. Nuisance litigation cannot be used as a tool to craft climate change policy. The risk of disturbing the complex economic, political, social and diplomatic considerations being carefully weighed and balanced by policymaking efforts among the representative branches of government makes the issue here an important matter of federal law that should be settled by this Court.

Judicial deference in political matters is a cornerstone of our constitutional system. As this Court explained in *Marbury v. Madison*, "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political...can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). This Court has further held that the determining issue for whether a matter is a political question "is the relationship between the judiciary and the coordinate branches of the Federal

Government" and that the question of whether a matter is a nonjusticiable political question will turn on "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination" of the matter at hand. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Disputes that a court cannot resolve without "expressing a lack of respect due coordinate branches of government" or for which there is a "lack of judicially discoverable and manageable standards" for resolution of a matter are properly considered nonjusticiable political questions. *Id.* at 217.

ARGUMENT

I. THE SECOND CIRCUIT DECISION FAILS TO SHOW DUE RESPECT FOR CLIMATE CHANGE POLICY DEVELOPMENT BY THE LEGISLATIVE AND EXECUTIVE BRANCHES.

In this and similar cases, courts cannot fashion climate change remedies without showing a lack of due respect to the coordinate political branches. Climate change policy has been the subject of intense, complicated, and evolving efforts involving both houses of Congress, the President and executive agencies, and international diplomacy.

A. Executive Branch Actions Are Accelerating.

In 2009, President Obama ordered every executive agency to undertake efforts to address climate change and to develop policies that are consistent with "developing the domestic and international dimensions of a U.S. strategy for adaptation to climate change." Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,124 (Oct. 8, 2009).

Regulatory actions to address climate change are being pursued on a fast track by EPA. In the wake of this

Court's decision in *Massachusetts*, requiring that EPA consider a petition to regulate GHG emissions from motor vehicles, EPA has initiated multiple interrelated rulemakings to address GHG emissions under the Clean Air Act. These regulations are designed to put in place, under the Clean Air Act, a nationally applicable program to control GHG emissions from a wide range of industrial source sectors, going well beyond the automotive tailpipe emissions at issue in *Massachusetts*, and independent of potential national climate change legislation. *See* DRAFT FY 2011-2015 EPA STRATEGIC PLAN, 75 Fed. Reg. 74,736 (June 18, 2010, notice of availability.) In EPA's strategic plan, "taking action on climate change and improving air quality" is the first among the agency's five strategic goals. *Id.* at 74,737.

EPA's plans for advancing the regulation of GHGs under the Clean Air Act were developed soon after this Court's decision in *Massachusetts*. In July 2008, EPA published an advance notice of proposed rulemaking that described the complexities of regulating GHG emissions under the CAA, and sought comment from the public. *See* EPA, REGULATING GREENHOUSE GAS EMISSIONS UNDER THE CLEAN AIR ACT, 73 Fed. Reg. 44,354 (July 20, 2008).

In 2009, EPA took action to establish a regulatory program to address GHG emissions from domestic sources. In October 2009, EPA published a final rule implementing a congressional directive to establish a national inventory of emitting sources, requiring sources from nearly all significant sectors to report their GHG emissions annually. EPA, MANDATORY REPORTING OF GREENHOUSE GASES, 74 Fed. Reg. 56,260 (October 30, 2009). The rule also is intended to help inform "legislative efforts to address GHG emissions" because "accurate and timely information on GHG emissions is essential for informing many future climate decisions." *Id.* at 56,265.

In December 2009, EPA published formal findings that atmospheric concentrations of GHGs pose a threat to public health and welfare within the meaning of the Clean Air Act. EPA, ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES, 74 Fed. Reg. 66,496 (December 15, 2009). Based on those findings, in May 2010, EPA published final rules jointly with the Department of Transportation ("DOT"), creating new national efficiency and emissions standards for motor vehicles. EPA AND DOT, LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSION STANDARDS AND CORPORATE AVERAGE FUEL ECONOMY STANDARDS, 76 Fed. Reg. 25,324, 25,326 (May 7, 2010).

In EPA's view, the regulation of emissions from motor vehicles will trigger the regulation of other GHG emission sources under the Clean Air Act, including large electricity producers and manufacturing entities. *Id.* Because of the complexity of the statutory requirements relating to other emission sources, EPA has announced modifications to its implementation of the GHG regulations. EPA, FINAL RULE: PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE GAS TAILORING RULE ("Tailoring Rule"), 76 Fed. Reg. 31,514 (June 3, 2010). This rule is intended to "tailor" new GHG permitting requirements to avoid immediate application of Best Available Control Technology ("BACT") requirements to smaller emitting sources. The rule will be phased in over a period of several years, and will apply to a wide variety of stationary source GHG emitters. *Id.* EPA has assembled a BACT Working Group to provide advice on the design of guidance for BACT determinations, and intends to issue BACT Guidance to the states later this year to facilitate state regulation of GHG emissions from new and modified sources subject to the Tailoring Rule. *See* http://www.epa.gov/oar/caaac/climatechangewg.html. As EPA explains, the Tailoring Rule is the first step in a wide-

ranging program to address GHG emissions from stationary sources:

> For the first step of this Tailoring Rule, which will begin on January 2, 2011, PSD or title V requirements will apply to sources' GHG emissions only if the sources are subject to PSD or title V anyway due to their non-GHG conventional pollutants. ... Specifically, for PSD, Step 1 requires that as of January 2, 2011, the applicable requirements of PSD, most notably, the best available control technology (BACT) requirement, will apply to projects that increase net GHG emissions by at least 75,000 tons per year (tpy) carbon dioxide equivalent (CO2e), but only if the project also significantly increases emissions of at least one non-GHG pollutant. For the title V program, only existing sources with, or new sources obtaining, title V permits for non-GHG pollutants will be required to address GHGs during this first step. ...
>
> The second step of the tailoring rule, that begins on July 1, 2011, will phase-in additional large sources of GHG emissions. New sources as well as existing sources not already subject to title V that emit, or have the potential to emit, at least 100,000 tpy CO2e will become subject to the PSD and title V requirements. ...
>
> (W)e also intend to issue a supplemental notice of proposed rulemaking (SNPR) in 2011, in which we will propose or solicit comment on a third step of the phase-in that would include more sources, beginning by July 1, 2013. ... We are establishing an enforceable commitment that we will complete this rulemaking by July 1, 2012, which will allow for 1 year's notice before step 3 would take effect. ...

EPA, REGULATORY IMPACT ANALYSIS FOR THE FINAL

GREENHOUSE GAS TAILORING RULE, FINAL REPORT (EPA 452/R-10-003, May 2010) at 5-7.

Other regulatory climate change initiatives are underway at the Departments of Interior, Energy, and other executive departments and agencies. In September 2009, the Department of the Interior ("DOI") launched a "coordinated Department-wide strategy to increase scientific understanding of and development of effective adaptive management tools to address the impact of climate change on our natural and cultural resources." DOI, SECRETARIAL ORDER NO. 3289, ADDRESSING THE IMPACTS OF CLIMATE CHANGE ON AMERICA'S WATER, LAND, AND OTHER NATURAL AND CULTURAL RESOURCES (Sept. 14, 2009), http://www.doi.gov/archive/climatechange/SecOrder3289.pdf.

The Department of Energy ("DOE") is funding and directing research and development of new energy technologies that may be able to reduce GHG emissions through its U.S. Climate Change Technology Program. *See* DOE, STRATEGIC PLAN, U.S. CLIMATE CHANGE TECHNOLOGY PROGRAM (September 2006). DOE also is involved in policy efforts to increase the pace of commercialization and deployment of technologies that reduce GHG emissions through carbon capture and sequestration demonstration projects and various energy efficiency initiatives. DOE, STRATEGIES FOR THE COMMER-CIALIZATION AND DEPLOYMENT OF GREENHOUSE GAS INTENSITY-REDUCING TECHNOLOGIES AND PRACTICES (January 2009).

B. LEGISLATIVE ACTIONS REFLECT THE IMPROPRIETY OF AD HOC, PIECEMEAL REMEDIES FOR CLIMATE CHANGE.

Climate change policy in Congress has evolved rapidly over the past two decades. The legislation that Congress

has developed reflects the representative branches' recognition of the profound economic, trade and social impacts associated with restrictions on GHG emissions. These policy proposals have uniformly included, at a minimum, emission reductions, support for alternative technologies such as carbon capture and sequestration, coordination with international efforts, and policies designed to mitigate and compensate for increased energy costs that are likely to cause economic damage and job displacement in trade-sensitive and energy-intensive industries.

On June 26, 2009, the House of Representatives passed H.R. 2454, *The American Clean Energy and Security Act.* H.R. 2454 (111th Cong., 1st Sess.) This legislation typifies Congress's efforts to carefully balance the economic, technological, social and environmental variables essential to a national climate change policy. H.R. 2454 was the result of multiple hearings before House committees, consultations with the international community, and testimony from dozens of expert witnesses before the House Committee on Energy and Commerce. *See* H.R. Rep. No. 11-137, pt. 1, at 318-20 (111th Cong., 1st Sess.) Ultimately, the bill passed by the House embraced comprehensive emission reduction mandates with broad-based technological incentives, protection for energy-intensive and trade-sensitive industries, mechanisms to control the impact of higher energy prices on consumers, and programs to build strong international emission "offset" markets to reduce adverse impacts on the domestic economy. The legislation also provided extensive program support for worker retraining and provisions to ensure comparable wages for workers at projects funded under the bill's various energy technology provisions.

The U.S. Senate also has developed comprehensive climate change legislation, which remains under considera-

tion. *See* American Power Act (available at: http://kerry.senate.gov/_imo/media/doc/_APAbill3.pdf). Although differing in a range of specific features, the Senate legislative language mirrors the approach taken by H.R. 2454 with a market-based cap-and-trade system for GHG emissions reductions, incentives to spur technology development, and provisions to mitigate increases in energy costs. While the Senate may defer action on climate legislation this year, new bills are sure to be introduced in the 112th Congress.

Taken together, recent legislative proposals in the House and Senate underscore the fact that courts cannot craft *ad hoc* remedies to climate change without showing a lack of respect to the legislative branch. Both houses of Congress have engaged in complex and detailed fact-findings and hearings, and the legislation being pursued reflects the comprehensive and international nature of the emission mitigation strategies that must be considered in any effort to address climate change.

C. International Actions Should Be Considered.

The global nature of greenhouse gas emissions and atmospheric concentrations of GHGs catalyzed the 1992 negotiation and ratification of the United Nations Framework Convention on Climate Change. The U.S. is among the 154 signatory nations to the Convention. *See* STATUS OF RATIFICATION OF THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, U.N. Doc. FCCC/1996/INF.1, U.N. FCCC, March 1, 1996, http://unfccc.int/_resource/docs/_1996/sbsta/inf01.pdf. The Convention's long-term objective is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." FCCC Art. 2.

International negotiations on climate change have been

progressing steadily and climate change decisions by the executive and legislative branches are being made with an effort to coordinate domestic policy with international endeavors. In December 2009, at the 15th Conference of the Parties to the UN FCCC, President Obama helped to negotiate the "Copenhagen Accord" with India, China, Brazil and South Africa. *See* http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf.

The Copenhagen Accord sets an international goal of limiting the increase in global temperature to two degrees Celsius, provides for financing climate change adaptation measures, and includes a provision for industrial and developing country parties to submit climate change mitigation pledges. *Id.* The Accord marked a breakthrough in the willingness of major developing nations to agree to GHG emissions reductions, and more than 50 nations subsequently transmitted emission reduction pledges to the United Nations. *See* http://unfccc.int/meetings/items/5276.php. Key provisions of the Copenhagen Accord are now reflected in the negotiating text before the FCCC Working Group on Long-Term Cooperative Actions ("LCA"). The LCA is charged with negotiating a long-term "shared vision" to control global GHG emissions among both industrial and developing nations. *See* FCCC/AWGLCA/2010/6, May 17, 2010, http://unfccc.int/resource/docs/2010/awglca10/eng/06.pdf. Significantly, UJAE and other labor groups were successful in including language within the draft text of the LCA agreement on the need for a "just transition" of the workforce. *Id.*

The Second Circuit's decision in this matter threatens to interfere with these international efforts. The President is vested with inherent executive power to "make Treaties." U.S. Const. art. II, § 2, cl. 2. The U.S. legislative branch shares foreign powers related to, *inter alia*, commerce with foreign nations and ratifying

treaties. U.S. Const. art. I § 8, cls. 1,3,11-14, U.S. Const. art. II, § 2, cl. 2. This Court has "acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (citing *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983), and *Barclay's Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 327 (1994)).

In this case, providing judicial venues for Respondents to achieve mandatory reductions in GHG emissions would constitute improper interference in our nation's foreign policy. Success by Respondents in obtaining court-ordered reductions of GHG emissions would set the stage for similar suits in every state and federal court in the nation, for every possible plaintiff, and for any combination of defendants. Indeed, the volume of the possible lawsuits - if every U.S. emitter of GHGs were potentially answerable in any court to any person who claims to be affected by GHG emissions - is nearly infinite.

The potential for a groundswell of other nuisance lawsuits resulting in inconsistent climate change outcomes is significant. Several recent lawsuits in the federal courts make this concern concrete. The first, *Comer v. Murphy Oil USA*, is a lawsuit brought by residents of Mississippi against more than two dozen oil and coal companies and other defendants, alleging that GHG emissions from those companies were responsible for an increase in the magnitude of property losses associated with Hurricane Katrina. The Southern District of Mississippi dismissed the action on standing and political question grounds. *Comer* v. *Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007). A panel of the Fifth Circuit initially reversed, but the full court vacated the panel's opinion when it granted rehearing *en banc*. The Fifth Circuit subsequently dis-

missed the appeal due to an intervening loss of a quorum, leaving in place the district court's decision dismissing the action. *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).

A second case, *Native Village of Kivalina v. Exxon Mobil Corp.*, is a nuisance lawsuit brought against twenty-four oil, energy, and utility companies alleging that their contributions to climate change have resulted in the loss of Arctic sea ice. Similar to the lower court decision in *Comer*, the district court dismissed the case on political question grounds. *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F.Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir., Nov. 5, 2009).

More recently, the Fourth Circuit reversed a district court decision that had granted relief on state nuisance law grounds against TVA and other defendants, for damages allegedly caused by emissions regulated under the Clean Air Act. *North Carolina* v. *TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010). The Fourth Circuit reversed and remanded with instructions to dismiss the action, in part because it was "unwilling to sanction the least predictable and the most problematic method for resolving interstate emissions disputes..." *Id.* at 16.

The Second Circuit's open invitation for courts to entertain climate-related claims would destroy any semblance of the federal government's national policy for addressing global climate change. By establishing their own *ad hoc* climate change policies, courts would fail to show due respect to the comprehensive and economy-wide obligations that consistently have been the goal of the representative branches. National climate change policy would be replaced by judicial remedies targeted at specific companies or industry sectors selected by plaintiffs.

Ongoing U.S. climate change efforts are "political" in every sense. They reflect the opinions, interests, and needs of individuals, business entities, labor groups and governments around the globe. Balancing the interests of all parties is, in all large-scale policymaking, an arduous process. Resolution of such matters by the political branches ensures that all interested parties' concerns are adequately considered, thus requiring the judicial branch to exercise restraint.

II. COURTS LACK JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR FASHIONING EFFECTIVE REMEDIES TO CLIMATE CHANGE.

The Second Circuit reasoned that the nuisance allegations raised by plaintiffs do not require courts to "decide overarching policy questions...or determine how across-the-board emissions reductions would affect the economy..." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 329 (2d Cir. 2009). However, the Second Circuit failed to distinguish the court's ability to grant the *relief* sought from its ability to fashion an effective *remedy*, and thereby failed to fully discern that a court is unable to discover and manage standards to achieve that remedy.

A. Courts Can Order Relief But Cannot Fashion Effective Remedies For Injuries Alleged in Climate Change Nuisance Actions.

The Second Circuit's conclusion that it can fashion an effective remedy in this case turns on the view that this matter is like other "complex public nuisance issues" such as cases involving the discharge of pollutants into waterways, and tort actions asserting damages resulting from interstate air pollution. *Id.* at 326-29. The only functional similarities between the examples used by the Second Circuit and the current climate change allegations

are that all the actions have been brought as nuisance or other tort claims and that they are, in a broad sense, "complex." However, courts are compelled to perform a much more discriminating analysis before reaching conclusions, and should focus on the overall "difficulty of fashioning relief." *Nixon v. United States*, 506 U.S. 224, 236 (1993). This analysis requires an evaluation of whether the issues at hand are "delicate [and] complex, and involve large elements of prophecy...and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Here, the relief sought by the Respondents appears on its face simple enough: "an order (i) holding each of the Defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming, and (ii) enjoining each of the Defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade." *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 270 (S.D.N.Y. 2005). Yet the Court cannot limit its inquiry regarding its abilities to whether it can grant the specific relief sought. Rather, *Baker* requires the Court to consider whether it can fashion an effective remedy for the underlying injury in the case. *Baker*, 369 U.S. at 232.

In the present case, remedying the alleged injury requires authorities that differ greatly from those vested in the courts by the Constitution. An effective remedy would require the court to gather information on and to develop answers to difficult scientific, technological, and political issues, many of which involve speculation about the actions or inactions of third parties not before the court, such as: 1) how should the quantity of Petitioners'

GHG emissions and the relative impact of those emissions on climate change be measured?; 2) how should the impacts of future GHG emissions from developing nations that are not yet part of any formal international climate mitigation agreement be measured, and how does uncertainty about the rate of increase of these emissions affect the benefits of any court-ordered reductions of Petitioners' emissions?; 3) is technology commercially available that would permit Petitioners to reduce their GHG emissions, without jeopardizing jobs and the reliability of the nation's electricity supply?; and 4) would a reduction in GHG emissions by the Petitioners result in a reduction in global temperatures or sea level rise sufficient to remedy alleged damages, or would it result in "leakage" of carbon dioxide emissions to other regions or countries? These are the types of questions being considered by the political branches in their efforts to fashion effective remedies to global climate change. Courts lack the ability to conduct this sort of undertaking and the authority to resolve claims based on the speculative, *ad hoc* determinations required.

B. Courts Lack the Ability to Develop Discoverable and Manageable Standards Because Only a Comprehensive Climate Policy Can Remedy Alleged Impacts of Climate Change.

The representative branches recognize that crafting climate change solutions is uniquely challenging and must be done comprehensively. Neither the causes of, nor the solutions to, global climate change can be identified or implemented by litigation that focuses on individual emissions or emitters. As the Chairman of the President's Council on Environmental Quality ("CEQ") recently noted,

> Because climate change is a global problem that results from global GHG emissions, there are more

> sources and actions emitting GHG (in terms of both absolute numbers and types) than are typically encountered when evaluating the emissions of other pollutants. From a quantitative perspective, there are no dominating sources and fewer sources that would even be close to dominating total GHG emissions. The global climate change problem is much more the result of numerous and varied sources, each of which might seem to make a relatively small addition to global atmospheric GHG concentrations.

Memorandum from Nancy H. Sutley, Chair, Council on Environmental Quality to Heads of Federal Departments and Agencies, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*, (Feb. 18, 2010) at 2.

Respondents here ask courts to substitute judicial doctrines for years of data collection and the analyses of experts working to understand what, if any, link exists between emissions from a particular source or group of sources and climate change impacts. This is a task that the coordinate branches have considered and rejected because it is impractical, unnecessary, and inefficient. As CEQ points out, "it is not currently useful...to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular project or emissions, as such direct linkage is difficult to isolate and to understand." *Id.* at 3.

Put simply, even if Plaintiffs could prove that specific GHG emissions contribute to climate change to some degree, that proof is insufficient to support a claim that limiting those emissions would result in a concomitant reduction in global temperatures, sea level changes, or other environmental effects. As the Organization for Economic Cooperation and Development ("OECD") has explained:

> We need to move towards a global carbon market, involving as many countries, industries and emission sources as possible, to reach even a moderately ambitious GHG-concentration target at a manageable cost. Reducing global GHG emissions is a shared goal for both developed and developing countries. Even if developed countries brought their emissions to zero, their efforts alone would not be sufficient to meet this goal due to expected emissions growth in the major emerging economies by 2050.

OECD, TACKLING CLIMATE CHANGE AND GROWING THE ECONOMY, http://www.oecd.org/dataoecd/28/18/44287948.pdf.

A process of case-by-case court-ordered reductions in emissions cannot fashion an effective strategy for remedying either the causes or effects of climate change. Courts would be faced with complex and inherently political policy decisions if they attempted to draft standards directed at mitigating climate change. Fundamental issues would arise such as the availability of technology, primary and secondary economic impacts, and likely shifts of industries and emissions to other locations in the U.S, or to locations abroad where they would not be subject to the jurisdiction of U.S. courts.

III. U.S. EPA REGULATION OF GREENHOUSE GAS EMISSIONS REFLECTS THE DISPLACEMENT BY FEDERAL STATUTORY LAW OF COMMON LAW NUISANCE CLAIMS.

While Congress continues to debate prospective climate change legislation, and the UN FCCC process considers new global approaches for reducing GHG emissions by industrial and developing nations, the broad framework of GHG regulations for mobile and stationary sources being established by U.S. EPA under the authori-

ty of the Clean Air Act reflects Congress's displacement of federal common law nuisance cases. EPA's greenhouse gas control regulations will constitute, by definition, a nationally applicable program for addressing GHG emissions from new and existing stationary and mobile sources.

The Second Circuit's speculation about EPA's response to this Court's decision in *Massachusetts* is indicative of the flawed reasoning underlying the court of appeals' decision in this case:

> A proposed finding has no effect in law that would affect any rights at issue here. After reviewing public comments EPA might legitimately determine—subject to the requirements of administrative law—that its proposed finding is unwarranted or that regulation of greenhouse gases is otherwise inappropriate under the terms of the Act.. ...
>
> In sum, at least until EPA makes the requisite findings, for the purposes of our displacement analysis the CAA does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources. Accordingly, the problem of which Plaintiffs complain certainly has not "been thoroughly addressed" by the CAA. *Milwaukee II*, 451 U.S. at 320. We express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA, if and when such regulation should come to pass, would displace Plaintiffs' cause of action under the federal common law.

Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 379, 381 (2d Cir. 2009)

Amicus respectfully submits that the Second Circuit's "if and when" speculation is not relevant; that the regulation of greenhouse gas emissions has been committed to

U.S. EPA by the Clean Air Act, as recognized by this Court's decision in *Massachusetts*; that EPA is acting aggressively to regulate such emissions under the Clean Air Act; and that Congress's commitment of greenhouse gas regulatory decision-making to EPA displaced any common law nuisance claims such as those urged by Respondents. As this Court emphasized in its seminal decision in *Milwaukee II*, "The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *City of Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981). To hold otherwise in this or similar cases would enable plaintiffs to use federal common law nuisance claims to seek climate change remedies that depart from the regulatory approaches developed by EPA based on its interpretation of federal statutory law. This result would vitiate the displacement doctrine articulated in *Milwaukee II* by requiring that EPA's greenhouse gas regulations embrace every conceivable remedy arguably available under common law.

IV. CONCLUSION

Courts lack the competence to do what the representative branches are grappling with: fashioning effective remedies to climate change while accounting for economic trade-offs, the costs of technologies to reduce GHG emissions, job and consumer impacts, and international obligations. By deciding individual nuisance cases, courts would intervene in climate policy decision-making and interfere with existing legislative, regulatory, and diplomatic efforts to remedy any alleged damages.

The federal government's decisions on climate policy will affect labor, consumer and business interests through higher energy costs and economic impacts on energy- and trade-sensitive industries. The loss of employment would be exacerbated if emissions reductions are not made as part of an economy-wide and inter-

national program to mitigate greenhouse gas emissions. Fashioning comprehensive solutions to global climate change resulting from hundreds of years' of GHG emissions from widely dispersed sources in industrial and developing nations is not the province of the judiciary, and certainly would not provide "[a]nother example of the federal courts' masterful handling of complex public nuisance issues..." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 327 (2d Cir. 2009).

Respectfully submitted,

LAURENCE J. COHEN*
SHERMAN, DUNN, COHEN,
LEIFER & YELLIG, P.C.
900 SEVENTH STREET, N.W.,
SUITE 1000
WASHINGTON, D.C. 20001
TELEPHONE: (202) 785-9300
FAX: (202) 775-1950

*COUNSEL OF RECORD

EUGENE M. TRISKO
ATTORNEY AT LAW
P.O. BOX 47
GLENWOOD, MD 21738-0047
TELEPHONE: (301) 639-5238
FAX (410) 489-9483

OF COUNSEL