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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

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

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

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

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioners American Electric Power Co., *et al.*

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

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

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

global warming public nuisance cases in the Fifth and Ninth Circuit Courts of Appeals, as well as in this case in support of the Petition for Certiorari. *See Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010); *Native Vill. of Kivalina v. ExxonMobile Corp.*, No. 09-17490 (9th Cir.). PLF believes that this case raises important public interest questions about the country's response to global climate change, and the extent to which that response can be controlled or dictated by enterprising litigants through the judicial system.

SUMMARY OF ARGUMENT

Respondents State of Connecticut, *et al.* (States), have brought public nuisance tort claims against Petitioners American Electric Power Co., *et al.* (Energy Companies), for harms allegedly caused by the Energy Companies' greenhouse gas emissions. These claims should be rejected for the following reasons.

First, the States lack standing to pursue their claims in federal court. Their global warming related injuries are not fairly traceable to the Energy Companies' emissions, as they must be. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010) ("Standing under Article III of the Constitution requires that an injury be . . . fairly traceable to the challenged action . . . ."). Moreover, the States' requested relief cannot redress their injuries because even completely eliminating the Energy Companies' emissions would not affect or change any phenomenon of global warming. *Cf. id.* Nothing in *Massachusetts* dictates a different conclusion.

Second, the States have raised a nonjusticiable political question. Courts cannot apply traditional common law tort theories equitably to redress injuries

related to climate change. There are no judicially manageable standards for extending those theories to hold a handful of greenhouse gas emitters liable for their *de minimis* contribution to the collective emissions of all humanity. To hold the Energy Companies—or similarly situated defendants—liable, courts would have to establish a policy in contravention of the existing congressional policy of nonregulation.

I

THE STATES LACK STANDING TO PURSUE THEIR GLOBAL WARMING PUBLIC NUISANCE TORT ACTIONS IN FEDERAL COURT

A. The Energy Companies' Emissions Are Not a But-for Cause of the States' Injuries, and Therefore Are Not Fairly Traceable to Those Injuries

To establish standing to sue in federal court, a plaintiff must show that his injury is fairly traceable to the allegedly wrongful action of the defendant. *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant . . . .") (internal quotation marks omitted). The fair traceability requirement naturally implies a but-for causation test, *i.e.*, a plaintiff's injury is fairly traceable to the defendant's allegedly wrongful act if the injury would not have occurred but for the wrongful act. *See, e.g.*, *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973) ("[F]ederal plaintiffs must allege some threatened or actual injury *resulting from* the

putatively illegal action before a federal court may assume jurisdiction.") (emphasis added). *Cf.* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 26 (2010) ("Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."), *quoted in* Steve C. Gold, *The More We Know, the Less Intelligent We Are?—How Genomic Information Should, and Should Not, Change Toxic Tort Causation Doctrine*, 34 Harv. Envtl. L. Rev. 369, 422 n.327 (2010).

To establish but-for causation, a plaintiff need not show that his harm was foreseeable, or that the causal links from the defendant's actions to the proffered injury are knowable with metaphysical certitude; but what the plaintiff must show is that the causal path between action and injury exists at all. *See* W. Page Keeton, *et al.*, Prosser & Keeton on The Law of Torts 266 (5th ed. 1984) ("The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct . . . .").

1. The States Cannot Establish That the Energy Companies' Emissions Are a But-for Cause of Their Injuries or Any Increment Thereof

The States cannot meet fair traceability's but-for standard of causation. For, even assuming that global warming is happening and will cause injury to the States' territories, it is impossible to trace the injuries resulting from such climatological changes to the Energy Companies' emissions. In other words, it is impossible for the States to establish that the Energy Companies' emissions, taken individually or in the aggregate, are a but-for cause of the States' injuries or any identifiable increment of those injuries. *See*

Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293, 297 (2005) ("[T]he entire operations of all six defendants are responsible at most for 2.5% of the world's greenhouse gases. This makes it difficult to say that they are in any sense the cause of the problem."). It is not known, for example, what quantity of greenhouse gases is necessary to cause (or accelerate) the various climatologically related injuries that the States advance.

Even if such a quantity can be known, the States cannot show that this quantity of greenhouse gas emissions, absent the Energy Companies' contributions, is unreachable. *See id*. at 298 ("Even if [the Energy Companies'] CO2 discharges were declared illegal and completely enjoined, it is most doubtful that this would end the injuries threatened to flow from global warming. Granting the injunction [the States and the other Petitioners] seek—which would phase out [the Energy Companies'] emissions over time—would not even put a dent in the inexorable rise in world temperatures caused by the long-term accumulation of greenhouse gases."); Victor E. Schwartz, *et al.*, *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 Tenn. L. Rev. 803, 835-36 (2010) ("[L]awsuits alleging global climate change harms . . . . seek . . . to change the way the world makes and consumes energy. Given the millions, or potentially billions, of sources for the gases at issue in these lawsuits, no defendant, or even handful of defendants, can be deemed the factual cause of the alleged harms.") (footnote omitted). In short, the States cannot demonstrate that the Energy Companies' emissions are a but-for cause of their injuries or any increment of those injuries.

Further, there are several good reasons for the Court not to abandon the fair traceability standard just to accommodate public nuisance suits based on global warming.

First, standing must impose *some* causal burden, however minimal, else the Court would be unfaithful to its tradition, based on the mandate of Article III, that the judiciary does not exist to settle abstract controversies or to allow litigants to vindicate a generalized citizenship or monetary interest. *See, e.g.*, *Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."); *Massachusetts v. Mellon*, 262 U.S. 447, 484 (1923) ("It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law.") (quotation marks omitted); *id*. at 488 ("We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.").

Second, relaxing the fair traceability standard would invite lawsuits orchestrated by litigants who have little real interest in the underlying legal issues. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) ("The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have alleged such a

personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.") (quotation marks omitted).

Third, maintaining the fair traceability standard of but-for causation is a reasonable compromise between the extremes of no causation and some form of proximate causation. *Cf.* Keeton, *supra*, at 273 ("The term 'proximate cause' is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established."). *Cf.* Restatement (Second) of Torts § 430 (discussing "legal cause").

The States cannot prove that the Energy Companies' emissions are a but-for cause of their injuries. That failure means, under this Court's standing jurisprudence, that the States' injuries are not fairly traceable to the Energy Companies' alleged wrongdoing.

2. This Court Should Not Adopt the "Cause or Contribute" Rationale Used by Some Circuit Courts To Justify Standing in Pollution Abatement Cases

To support their standing, the States, as well as litigants in similar global warming public nuisance actions, have relied on case law holding that a single polluter can be held liable for public nuisance so long as the polluter "contributed to," although did not solely cause, the nuisance. Whatever the merits of the "cause or contribute" rationale, the theory has no application here, for two reasons.

First, all of these "contribution" cases concerned instances where the alleged polluter was worsening, to some degree, a discrete geographical area, *i.e.*, not the entire Earth. *See, e.g.*, *Pub. Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 68 (3d Cir. 1990) (Clean Water Act challenge to pollution in Kill Van Kull, a regulable waterbody); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000) (en banc) (same as to a manmade lake and the Edisto River); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 550 (5th Cir. 1996) (same as to Galveston Bay); *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 976 (4th Cir. 1992) (same as to the Savannah River)). Because the defendants were allegedly polluting a geographic region of limited scope, these courts of appeals could entertain the benign presumption that such alleged pollution would worsen the plaintiffs' injuries (which were a direct function of the geographical area's polluted status). The "contribution" cases do not, however, stand for the proposition that causation is irrelevant for fair traceability. Instead, they hold that causation may be reasonably presumed where the plaintiff is injured by the polluted status of a discrete geographical area, and the defendant's actions worsen that polluted status.

These "contribution" cases do not offer a useful means of analysis in this case because the twin bases for the presumption of causation—a discrete geographical area and a discrete set of potential polluters—are absent. Rather, here the geographical area is the entire Earth's atmosphere, and the set of potential polluters includes every emitter of greenhouse gases. Under such circumstances, it would be unreasonable to maintain the presumption of

causation, and nothing in these "contribution" cases would support fair traceability for the States.

Second, in the "contribution" cases there was a direct causal link and correlation between the defendants' polluting activities and the plaintiffs' injuries—the more pollution added, the greater the harm. But here there is no similar correlation. The addition of greenhouse gases to the atmosphere does not necessarily harm the States. Rather, their alleged injuries are a function of the change in climate, which itself is alleged to be a function, at least in part, of greenhouse gas emissions. The causal chain advanced by the States "includes four basic links: emissions of GHG --> increased GHG in atmosphere--> global warming --> effects of global warming." Susan Muller, *Unprecedented Harm: Will the Roberts Court Recognize the Distinction Between Global Warming and Its Effects?*, 44 New Eng. L. Rev. 317, 335-36 (2010). Of these, the "first and second links . . . have become familiar to courts through traditional environmental cases," such as the "contribution" cases. *Id.* at 336. In the "traditional" case, "emissions or discharges of a pollutant into a common resource, such as air or water, lead to elevated levels of that pollutant in the common resource." *Id.* Thus, "the first two links are followed by a third and final link that directly connects the elevated levels of the pollutant in the common resource to a harm allegedly suffered by the plaintiff." *Id.* The causal chain in a global warming case is different, however, because of "the presence of a third link that is *not* the site of any alleged harm." *Id.* That third link is global warming, "an intermediary effect, which in turn is a cause of other effects, and it is among these *effects* of global warming that the harms alleged in litigation are to be found." *Id.*

A bald assertion that the Energy Companies have added greenhouse gases to the atmosphere cannot establish fair traceability under the "contribution" cases' logic because, as explained above, the States' injuries are not a direct function of the quantity of greenhouse gases in the atmosphere. They are instead a function of the effects of unknown quantities of such gases on climate-related phenomena. *See* Michael Duffy, *Climate Change Causation: Harmonizing Tort Law and Scientific Probability*, 28 Temp. J. Sci. Tech. & Envtl. L. 185, 189 (2009) ("[C]limate change is not simply a process of cause and effect, but rather is a result of causal chains. For example, emissions from certain human activities alter the balance of energy entering and exiting the atmosphere; this imbalance—combined with other human and natural factors—produces changes in global average temperature, which can cause a variety of local and regional climate effects.") (footnote omitted). Were the causal requirement to be relaxed, then the States could establish fair traceability as against any human being, whose daily expiration of carbon dioxiode "contributes" to the total amount of greenhouse gases in the atmosphere—an untenable outcome. *Cf. Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009) ("[I]t is entirely irrelevant whether any defendant 'contributed' to the harm because a discharge, standing alone, is insufficient to establish injury.").

3. Fair Traceability Cannot Be Sustained on an "Alternate Causation" Theory

Some global warming public nuisance litigants in other cases have argued that their standing can be

based on an "alternate causation" theory, a doctrine derived from tort law ensuring that a wrongdoer cannot escape liability on the grounds that there are other actors who, standing alone, could have caused the same injury.[2] *See* Keeton, *supra*, at 268 ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result . . . .").

An example of the doctrine at work is a hunting party, where two hunters negligently shoot a third member of their group, having mistaken him for a deer.[3] The shots from either of the two hunters would

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[2] The doctrine is a close cousin of the "indivisible injury" rule. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1979) (observing that "the common law . . . allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident").

[3] The example is based on the facts of *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). One important difference between the facts here and those in *Tice* is that in *Tice* both hunters were found to be negligent but the plaintiff could not prove which hunter actually caused his injury. *See id*. at 4. The court nevertheless held that the burden was appropriately placed on the negligent hunters to prove that one of them was *not* a cause of the plaintiff's injuries. *See id*. *See generally* Restatement (Second) of Torts § 433B(3) (codifying *Tice*). This variation of alternate causation is even less helpful to the States than that set forth in the text because it would require them first to establish the Energy Companies' negligence, *i.e.*, unreasonableness, before proving causation. That cannot be done in the context of global warming litigation because the mere emission of greenhouse gases harms no one and hence cannot be unreasonable. Such emission can only be unreasonable if it is tied to an actual injury, which requires some proof of

(continued...)

have been sufficient to kill the third hunter; but that does not mean that the two hunters can thereby escape liability for the third hunter's death. Key to the doctrine's applicability is the requirement that each of the alleged wrongdoers be a potential but-for cause of the injury. In other words—A and B are alternate causes of harm X if, but only if, A or B could cause X where the other putative causes ceased to exist. Put in terms of the hunting party example, hunter A can be an alternate cause of fellow hunter X's death if, but only if, death would still ensue notwithstanding the absence of hunter B.

The doctrine of alternate causation does not apply here. Assuming that there exist one or more greenhouse gas emitters who could have caused, or contributed to, the States' injuries, the States still cannot prove that the Energy Companies are among that class of emitters. Rather, the Energy Companies would have to be among that class of emitters that has a meaningful impact on climate change, *not* just a measurable impact on the national or world contribution of greenhouse gases. *See* Merrill, *supra*, at 298. After all, although "an injunction halting John Doe from driving his car to work 'would slow the pace of global emissions increases,'" "no one could argue that suing Mr. Doe would 'redress' a climate-related harm." Matthew Edwin Miller, Note, *The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 Mich. L. Rev. 257, 284 (2010) (quoting *Massachusetts*, 549 U.S. at

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[3] (...continued)
causation. Thus, the States could not use the *Tice* version of alternate causation to establish their standing to sue without begging the question.

526). *Cf. Massachusetts*, 549 U.S. at 525 ("Judged by any standard, U.S. motor-vehicle emissions make a *meaningful* contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.") (emphasis added).

Nevertheless, one might argue that, because the class of all automobile emitters like Mr. Doe *does* make a meaningful contribution of greenhouse gases (according to *Massachusetts*), it follows that a global warming plaintiff might have standing under an alternate causation theory to sue such a class directly. The suggestion is problematic, however, for at least three reasons.

First, creating such a defendant class would not solve the problem of causation; that John Doe has been sued along with his many fellow automobile drivers does not change the fact that none of the drivers is a but-for cause of any global warming related injury. The plaintiffs in *Massachusetts* had standing to sue EPA in part because EPA had legal authority over a meaningful class of emitters, including legal authority *to regulate the emissions* of that class. Neither John Doe, nor any of his fellow drivers, standing alone, causes any harm to plaintiffs. His being joined with other *de minimis* emitters does not give him authority, or responsibility, over the aggregate emissions of his fellow defendants, which he must have if he is to be deemed the cause of a global warming plaintiff's injuries.

Second, the requirements of due process would likely render the certification of such a large and broadly dispersed class a logistic impossibility. *Cf. In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 291-92 (N.D. Cal. 1978) ("[I]n the context of defendant class actions

due process requires notice to each class member and the exercise of jurisdiction only in circumstances fundamentally fair to absent non-litigating class members."); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434, 439 (7th Cir. 1998) ("[T]he due process rights of unnamed class members of a defendant class are entitled to special solicitude . . . .").

Third, such a class is *not* present here. *Compare* Merrill, *supra*, at 297 (observing that the energy companies' emissions amount at most to 2.5% of world totals) to *Massachusetts*, 549 U.S. at 524 (observing that the U.S. transportation sector emits about 6% of world totals).

Thus, to determine whether the Energy Companies fall within the class of meaningful contributors would require the implausible showing that, absent other greenhouse gas emitters but with the Energy Companies, the States' injuries would have occurred (or would have been worsened). *Cf.* Schwartz, *supra*, at 836 ("No one source, or even a handful of sources, could directly impact the earth's weather or its climate."). The doctrine of alternate causation allows a plaintiff to get around the problem of an injury caused by different persons or entities; it does not transform an independently irrelevant action into a but-for cause of the plaintiff's injury.

B. The States Cannot Establish Likelihood of Redress

In addition to fair traceability, standing doctrine requires that "it must be likely, as opposed to merely speculative, that the [plaintiff's] injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). For their

remedy, the States seek a court order capping and reducing the Energy Companies' emissions. This remedy cannot meet the requirements of likelihood of redress.

As explained in the previous section, there is no direct correlation between greenhouse gas emissions and global warming related injuries. The mere emission of greenhouse gases does not injure the States. *See* David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. Land Use & Envtl. L. 451, 457 (2000) ("Unlike local or regional air pollution, where the emissions impose noxious consequences on downwind victims, . . . greenhouse gases are either inert, useful or harmless when emitted. It is only their slow accumulation in the atmosphere which changes the climate broadly.") (footnote omitted). Rather, the correlation between emissions and the States' injuries depends upon how greenhouse gases, in various quantities, affect weather and other climatological patterns that in turn negatively affect the States' territories. *See* Duffy, *supra*, at 189. Although it is not speculative whether a cap and reduction order would reduce the Energy Companies' emissions, it *is* entirely speculative whether such a cap and reduction would measurably change the quality or quantity of the States' alleged global warming related injuries. *See* Merrill, *supra*, at 298.

Massachusetts v. EPA does not help the States, because that decision's standing discussion does not apply to common law claims brought against actors who do not have regulatory control over large classes of emitters.

First, the redressability issue in *Massachusetts* concerned whether forcing EPA to make a decision on the Commonwealth's request that the agency regulate greenhouse gases under the Clean Air Act would remedy, to any extent, the Commonwealth's global warming related harms. *See* 549 U.S. at 525. The Court answered yes: although such a remedy would not reverse global warming, the Court nevertheless possessed "jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it." *Id.* The Court addressed the standing inquiry in the context of the legal action before it—a challenge to the failure to respond fully to a rulemaking request. In circumstances such as those, it was a simple task to affirm the existence of that which is absent from this case: the one-to-one correlation of emissions reduction to injury amelioration. The Commonwealth was procedurally injured by EPA's failure to regulate to reduce emissions; an order from the Court that could lead to such regulation would remedy the procedural injury. That conclusion was easy for the Court to adopt because the requirements of redressability are relaxed in a procedural standing case. *See id.* at 517-18 ("[A] litigant to whom Congress has accorded a procedural right to protect his concrete interests—here, the right to challenge agency action unlawfully withheld, § 7607(b)(1)—can assert that right without meeting all the normal standards for redressability and immediacy.") (internal quotation marks and citation omitted). The States, however, have no such benefit because they advance no procedural right but rather a substantive right based on their legal or sovereign interests in their territories.

This procedural/substantive right distinction for standing is crucial to understanding why

Massachusetts does not support the standing of litigants who bring common law public nuisance claims to remedy global warming related injuries. The Court relaxes the demands of standing for procedural injuries because, otherwise, many violations of procedural rules might go unreviewed and unremedied. Indeed, in *Lujan*, where the Court first gave explicit approval to the doctrine of procedural standing,[4] the Court explained that a homeowner living adjacent to a proposed dam site "has standing to challenge the licensing agency's failure to prepare an environmental impact statement [under the National Environmental Policy Act (NEPA)], even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered." *Lujan*, 504 U.S. at 573 n.7. Because NEPA imposes only procedural obligations, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008), a NEPA plaintiff could rarely if ever meet the but-for standard of fair traceability because he could never show that, but for the NEPA violation, the agency's decision would have been different. *See* Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 Colum. J. Envtl. L. 1, 37 (2009) ("Without the relaxed [standing] standards . . . , NEPA plaintiffs generally could not establish standing because the government could cancel a proposed project for any number of reasons."). Such a result, which would routinely deny judicial review, would largely render NEPA and other procedural statutes (including the rulemaking petition process at issue in *Massachusetts*) dead letters.

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[4] *See* Brian J. Gatchel, *Informational and Procedural Standing after* Lujan v. Defenders of Wildlife, 11 J. Land Use & Envtl. L. 75, 91 (1995).

But the Court has no reason to fear underenforcement of, for example, federal nuisance law, because where a nuisance exists, its cessation will necessarily have "real world" effects (unlike compliance with a wholly procedural obligation) that will satisfy traditional standing requirements. That expectation is consistent with the Court's general standing concerns of discouraging lawless agency behavior and mitigating against factional bias. *See* Gatchel, *supra*, at 87-88 & n.83 (citing Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 16.11 (3d ed. 1994)). The "real world" value of a procedural or informational right may not be significant enough to expect private party enforcement, and thus relaxed standing that allows the functional equivalent of private attorney general enforcement makes sense. *See* Gatchel, *supra*, at 87-88. Similarly, few agencies' mandates are focused on procedure or information dissemination, and thus relaxed standing "to those concerned with evaluating the values that Congress desires to protect" in procedural statutes reduces the risk of agency capture by "narrow parochial interests." *Id*. at 88. Neither of these concerns, however, is implicated by a public nuisance suit seeking to remedy alleged injuries to real property. Although the absence of real world effects in procedural rights cases may justify the relaxation of certain standing requirements, that justification is not present here.

Second, the States cannot establish, as they must under *Massachusetts*, that their requested relief would provide them *meaningful* redress. "[T]he small degree of redress in *Massachusetts* satisfied the majority in part because federal agencies tackle regulatory hurdles incrementally." Miller, *supra*, at 284. In other words, "the EPA could acceptably 'whittle away' at global

warming, refining its approach as it adopts more stringent regulation." But here, "the logic of agency experimentation and refining is inapposite." *Id.* A capping and reduction of the Energy Companies' emissions either "redresses the alleged injuries . . . or does not; it would not spur a domino effect of additional redress." *Id.* Granting relief to the States would not lead to the "initiat[ion of] procedures that could require nationally systemic [greenhouse gas] reductions and transform the federal regulatory paradigm, as in *Massachusetts*." *Id.*

Third, the States' requested relief would not solve what one commentator has called the "leakage" problem. *See id.* at 286. That is, the States have sued a discrete and small subset of the nation's greenhouse gas emitters. Even assuming that this subset is responsible for a nontrivial quantity of the world's anthropogenic greenhouse gas emissions, there is absolutely nothing in the States' requested remedy that can stop other Energy Companies from "picking up the slack," as it were, and emitting more greenhouse gases precisely because the Energy Companies sued here cannot. *See id.* at 287 ("Unless the defendants' consumers were somehow precluded from acquiring energy from non-party competitors or other power sources—whether those consumers relocate or remain in place—climate nuisance plaintiffs cannot show beyond a speculative level that capping several defendants' emissions would translate into any slowing or reduction of climate change, given the possibility of energy source substitution or supplementation."). In contrast, in *Massachusetts* leakage was not a problem because EPA had in theory regulatory control over all emitters in the country.

The States cannot demonstrate that their injuries are fairly traceable to the Energy Companies' greenhouse gas emissions, nor can they show that a capping and reduction of those emissions would remedy their injuries. For these reasons, the States lack standing to pursue their public nuisance tort claims in federal court.

II

THE STATES' CLAIMS DO NOT RAISE JUSTICIABLE QUESTIONS

A. Litigants Raise a Nonjusticiable Political Question If There Are No Discoverable and Manageable Standards for Resolution

The States have raised a novel question as to whether the public nuisance doctrine may be used to hold private entities liable for their *de minimis* and undifferentiated contribution to the Earth's greenhouse gas load. The States contend that these contributions are causing climate change, which has injured their territories and properties. The States argue that this question is justiciable, but they fail to explain how a court can address their claims without making prohibited political judgments.

The political question doctrine provides that some issues are beyond the purview of the federal courts. *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). The doctrine bars federal courts from considering novel questions which do not lend themselves to principled resolution. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). As Chief Justice Marshall explained: "It is emphatically the

province and duty of the judicial department to say what the law is," but it is beyond the province of the courts to consider "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 170 (1803).

Some questions are nonjusticiable by their very nature. *Marbury*, 5 U.S. at 165 ("If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction."). Thus, in determining whether a question is justiciable, a court must look to the nature of the question presented. *Baker*, 369 U.S. at 211-12. This Court's decision in *Baker v. Carr* provides that there are six considerations relevant in the determination of whether a particular question is barred by the political question doctrine. *Baker*, 369 U.S. at 217.

Under *Baker*, courts consider whether: (1) there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) there is "a lack of judicially discoverable and manageable standards for resolving" the question; (3) resolution will require an initial policy decision; (4) a judicial resolution would express a lack of respect for a coordinate branch of government; (5) there is "an unusual need for unquestioning adherence to a political decision already made," and (6) there is potential for "embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217.

Though all six of the considerations set forth in *Baker* may be relevant in determining whether a

matter is a nonjusticiable political question, this Court has since indicated that the second consideration is particularly important: if a reviewing court finds a lack of judicially manageable standards, it will hold the question to be nonjusticiable. *Vieth*, 541 U.S. at 277-78. Such a question is quintessentially a political question in nature because its resolution demands the exercise of political judgment; it would be impossible for a court to resolve the question without being arbitrary in its proclamation of the law, or making an initial policy decision. Either way the court would be making positive law, rather than interpreting existing law. For this reason, the political question doctrine provides that such matters are reserved for the Legislative and Executive Branches. *See*, *e.g.*, *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) (holding that the question of whether Rhode Island had established a new government was inherently political and unsuited for judicial resolution).

A court cannot presume that an issue is justiciable simply because it is raised within the context of a traditional tort claim, and has not been expressly committed to another branch of government. The Second Circuit held below that the nuisance doctrine provides such standards, but the opinion fails to explain how those standards can be applied in a judicially manageable way to resolve the novel questions presented in this case without making impermissible political judgments. As set forth below, courts cannot extend the nuisance doctrine to address the problem of climate change without exercising

political judgment and making impermissible policy decisions.

B. There Are No Judicially Manageable Standards for Determining the Reasonableness of the Energy Companies' Emissions, or for Proving Relief in an Equitable Manner

The political question doctrine bars a court from considering issues where there are no judicially manageable standards for resolution, regardless of whether the issues are raised in the context of a familiar cause of action. *See Baker*, 369 U.S. at 211-12. In this case, the States seek to extend the common law public nuisance doctrine in a new and unprecedented manner, but the doctrine does not afford courts the tools necessary coherently to manage the problem of climate change.[5] Laurence H. Tribe, *et al.*, Wash. Legal Found., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-20 (2010).[6]

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[5] This is not to say that courts are categorically barred from entertaining novel claims, but courts cannot resolve issues without judicially manageable standards. *See Vieth*, 541 U.S. at 277-78. The common law grows through reasoned application of existing standards to new situations, which may require logical extensions, but never mere promulgation, of rules. *Id.* ("[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions," for judicial action must be "governed by *standard*, by *rule*.").

[6] *Available* at http://www.wlf.org/publishing/publication_detail.asp?id=2132 (last visited Feb. 3, 2011).

The public nuisance doctrine is based upon an already vague standard that completely breaks down when one seeks to extend it to international climate issues. *See* Keeton, *supra*, at 616 (concept of nuisance "has meant all things to all people."); *see also* F.H. Newark, *The Boundaries of Nuisance*, 65 L. Q. Rev. 480, 480 (1949) (the public nuisance tort is "intractable to definition" because "[t]he boundaries of the tort of nuisance are blurred"). In traditional public nuisance cases, courts determine the reasonableness of an interference with a right common to the public by weighing the social utility of the challenged action against the gravity of the injury suffered. *See* Restatement (Second) of Torts § 827. This is a manageable task because there is always a direct connection between the challenged action and the injury alleged, allowing a reasoned and nonattenuated assessment of the propriety of the challenged action. *See* Tribe, *supra*, at 15; *see*, *e.g.*, *Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 477-78 (1915) (public nuisance doctrine applied to hold a smelter liable for noxious emissions causing direct injury to surrounding properties).

Yet that standard of review cannot be extended to address the international issue of climate change, because, unlike traditional nuisance actions, the assignment of liability in a suit over global warming would not be based on a reasoned consideration of the defendant's direct impact on the plaintiff, but upon a weighing of political judgment as to the "best" or "preferable" means of addressing the international problem of climate change, and who should bear the burden of curbing global emissions. *California v. GMC*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at *46 (N.D. Cal. Sept. 17, 2007) ("The Court is

left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change . . . ."). Because almost every human action may be said to contribute to the world's emissions, there must be some threshold at which liability attaches under the States' theory. Stuart Buck, *Common Law Environmental Protection: The Common Law and the Environment in the Courts*, 58 Case W. Res. 621, 642 (2008) ("[W]e all emit carbon in some form, even if only exhaling. . . . So if there is to be a lawsuit over global warming, the most basic question is: who should sue whom?"). But the establishment of such a threshold would represent both an impermissible policy choice as to what level of emissions is acceptable, and a political decision as to who should bear the burden of curbing emissions. *GMC*, 2007 U.S. Dist. LEXIS 68547, at *19-*20 (global warming cases require an initial policy decision entailing a balancing of competing social costs, which our system commits to the elected branches).

Moreover, there are no manageable standards for resolution of the issues presented in this case because the courts are incapable of redressing the States' injuries in a fair and equitable manner. Incremental relief is inappropriate in the global warming context because it is inherently unfair and inequitable to allow plaintiffs to single out defendants to bear the burden of liability for the collective actions of all humanity. Mathew Hall, *A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 Chap. L. Rev. 265, 275 (2010) ("While an individual

emitter of carbon dioxide is undoubtedly contributing to the problem on some level, any individual contribution is likely so minimal as to have no measurable effect in terms of the injury causing consequences such as warming and sea level rise."); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) (individuals should not be forced to bear public burdens, "which, in all fairness and justice, should be borne by the public as a whole"). Such collective problems require collective resolution in the form of generally applicable rules and regulations, but no court is qualified to promulgate the law in this fashion. Tribe, *supra*, at 14.

Where, as in this case, a plaintiff alleges an injury caused by the collective actions of all humanity, the court is simply incapable of fashioning relief in an equitable manner because it has no power to bind humanity at large. Climate change is a global phenomenon, supposedly caused by the collective actions of millions of emitters throughout the world. Many of these emitters reside beyond the reach of any American court's jurisdiction. Even assuming jurisdiction over all contributors, it would be impractical to join all such defendants in one suit. *See* Buck, *supra*, at 642. Therefore, the issue is judicially unmanageable, for it is both impossible and impractical for any court to provide an equitable remedy to address the asserted cause of the States' injuries.

The only way to resolve the problem of climate change is to coordinate human behavior so as to ensure the reduction of global emissions, but this cannot be done by any court order. Pet. App. 26a (*Connecticut v. Am. Elec. Power*, 582 F.3d 309, 325 (2d Cir. 2009))

("Nor could a court set across-the-board domestic emissions standards or require any unilateral, mandatory emissions reductions over entities not party to the suit."). Human behavior can only be collectively coordinated through the enactment of generally applicable positive laws. While courts lack the power to order human behavior in this manner, our constitutional system of government vests the coordinate branches of government with that power. Congress is vested with enumerated powers to enact such laws in response to important national issues. U.S. Const. art. I, § 8. Likewise, the President has the power to enter into treaties, with the advice and consent of the Senate, in order to address issues affecting the international community. *Id.* art. II, § 2. While the courts are naturally incapable of addressing such collective issues, it remains the prerogative of the democratically elected coordinate branches to address them, as those branches represent the collective body of the sovereign American people. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.").

C. Judicial Resolution of the States' Claims Would Establish National Policy over Politically Charged Subject Matter on Which Congress Has Deliberated, But Has Declined To Regulate

The last four factors in the *Baker* test distill to the proposition that a case presents a nonjusticiable political question if the political branches have already established a policy that may be undermined if a court

were to decide that question. 369 U.S. at 217 (resolution of a political question, by establishment of a policy, would demonstrate a lack of respect for the political branches, would potentially lead to "embarrassment from multifarious pronouncements by various departments," and would be particularly inappropriate where there is "an unusual need for unquestioning adherence to a political decision already made"); *see also* Hall, *supra*, at 280. Where a policy already exists it is impossible for a court to resolve a question implicating that policy without undermining the policy, and thereby demonstrating a lack of respect for those coordinate branches. The resulting conflict between the branches would also be of potential embarrassment to the courts and the coordinate branches. This is all the more likely where the policy question is as politically charged, and of such great national importance, as the global warming issue is.

In this case, the States ask the courts to set policies to control climate change even as the political branches consider the propriety of various regulatory policies. To date, the political branches have established a policy largely of "no regulation" out of concern for the adverse impacts that greenhouse gas regulations would have on the American economy. Congress has evinced this "no regulation" policy by rejecting various legislative proposals to regulate greenhouse gas emissions. It has also demonstrated commitment to this policy through bills and resolutions that prevent the implementation of regulations.

Congress recognizes the importance of the global warming issue, but in weighing the costs of regulation Congress has "found that domestic emissions reduction action should only be taken 'in the context of concerted

international action.'" Hall, *supra*, at 280-81 (quoting H.R. Rep. No. 102-474(I), Purpose and Summary (1992)). Pursuant to that policy, the Executive Branch has worked with the international community to achieve a global solution to the problem of climate change, although the United States has yet to enter into a binding treaty forcing domestic emission reductions. In 1997 President Clinton signed the Kyoto Protocol, which called for mandatory emission reductions. Hall, *supra*, at 281. The treaty was never presented to the Senate for ratification because it was obvious that the Senate would not have ratified the treaty in light of a unanimous Senate resolution, S. Res. 98, 105th Cong. (1997) (Passed 95-0), urging the President "not to sign any [treaty] that did not include emissions restrictions on developing nations, as the Kyoto Protocol failed to contain." Hall, *supra*, at 281. Congress subsequently passed several bills barring the Environmental Protection Agency from enforcing the Kyoto Protocol. *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000). This legislative activity demonstrates an affirmative policy against any emission reduction regulatory scheme outside of a truly global agreement, binding upon developed and developing nations alike.[7] Hall, *supra*, at 282.

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[7] As discussed above, *supra*, Part I.B., *Massachusetts* dealt with an interpretive question over the mandates of a federal statute, not the common law. The Court held that EPA was obligated to consider whether greenhouse gases endanger health and human welfare under the Clean Air Act. The Court observed that Congress had not established a policy barring EPA from regulating greenhouse gases under the Clean Air Act. *Massachusetts*, 549 U.S. at 528-29 ("On its face, the definition

(continued...)

If Congress were sufficiently motivated to enact regulations on greenhouse gases it would do so, as has been demonstrated by other legislative bodies. For example, the California Legislature enacted the Global Warming Solutions Act of 2006 in an effort to begin curbing greenhouse gas emissions. Cal. Health & Safety Code, § 38500, *et seq*. But, Congress has repeatedly considered and rejected similar regulatory proposals.

To date, all such proposals have failed for the same reason that Congress rejected the Kyoto Treaty's emission reductions. Hall, *supra*, at 280-82. Of central concern in this ongoing political debate is the propriety of imposing regulations that will raise energy costs for Americans, placing a particular hardship on the poor, and likely slowing economic growth. *See* Schwartz, *supra*, at 829 (greenhouse gas regulations will raise energy costs, and will have a disproportionate impact on the poor, because the poor must allocate a larger share of their budget for energy expenditures); Toni Johnson, *Economic Challenges for Climate Change Policy*, Council on Foreign Relations (July 7, 2009) ("Finding an approach that manages to cut greenhouse gases without doing serious harm to the U.S. economy, particularly given the global economic downturn,

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[7] (...continued)
embraces all airborne compounds of whatever stripe . . . ."). This observation merely establishes that the Clean Air Act does not foreclose EPA's regulation of greenhouse gases, *not* that Congress also supports the use of federal common law to achieve the same ends. Rather, *Massachusetts* means only that Congress has no objection to EPA regulation of greenhouse gases, in at least some circumstances, under the Clean Air Act.

remains a top concern.").[8] Those concerns were raised with even greater fervor, in light of our now faltering economy, by Republicans in opposition to a renewed—but unsuccessful—push for a national cap and trade scheme in 2010. *See* Ryan Lizza, *As the World Burns*, The New Yorker, Oct. 11, 2010, at 70 (attributing Congress' failure to pass the cap and trade bill to heightened concerns over the possibility that such regulation may lead to another economic downturn).[9] Thus, Congress has weighed, and will re-weigh, the panoply of social and economic considerations entailed in its political judgment as to the best national policy on greenhouse gas emissions. But at this time Congress has determined that the costs of regulation outweigh the benefit of forced domestic reductions, at least in the absence of a global accord binding upon our nation's chief economic competitors, including underdeveloped nations like China and India. Hall, *supra*, at 282.

Should a court then decide to weigh these social and economic considerations differently, so as to hold defendants liable for their otherwise legal emissions, a court would not only be exercising political judgment to establish policy, but would also be contravening Congress' political judgment and its policy choices. This course would open the courts up to public criticism, which would not only question the wisdom of the judiciary's political judgment, but would also charge courts with disrespecting Congress' policy

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[8] *Available at* http://www.cfr.org/publication/16009/economic_challenges_for_climate_change_policy.html (last visited Feb. 3, 2011).

[9] *Available at* http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza?currentPage=1 (last visited Feb. 3, 2011).

of no regulation. Such a judicial decision would not set the issue to rest, but would rather spark a firestorm of political controversy, reinvigorating the global warming debate. This might lead Congress to respond with legislation and, moreover, might potentially undermine American bargaining power as the political branches continue to work with the international community to develop a truly global response to climate change. Hall, *supra*, at 281.

For all of these reasons, there is an unusual need for the Court to respect the political judgment of the coordinate branches. Failure to do so would injure the judiciary because it would likely compromise the judiciary's image, and thereby lead to embarrassment. *See* Joan Biskupic, *Tensions Rise Between Supreme Court, Politicians*, USA Today, Jan. 24, 2011 ("[T]he risk to the court would be a lessening of people's regard for the institution and faith that it is a neutral decision-maker.").[10] Accordingly, all of the last four factors in the *Baker* test weigh against judicial intervention in the global warming debate, and for this reason the States have raised a nonjusticiable political question.

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[10] *Available at* http://www.usatoday.com/news/washington/judicial/2011-01-15-RWcourtpolitics23_ST_N.htm (last visited Feb. 3, 2011).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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