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 OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR 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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BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar is an international organization of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness,

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[1] Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from DRI, its members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Counsel consented to the brief's filing in letters that are on file with the Clerk's office.

and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of defense attorneys, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system more fair, efficient, and—when national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases, like this one, that raise issues important to its membership, their clients, and the judicial system.

DRI members are widely experienced in litigating federal public nuisance cases and understand the issues raised by such cases in a wide variety of contexts. They also bring deep expertise in applying the Court's justiciability standards in public nuisance and similar cases.

DRI members are familiar with the burdens of defending such inchoate allegations as Respondents urge upon the courts here. DRI and its members seek to promote a level playing field and fundamental fairness for corporate business interests in civil litigation. Nothing could be more unfair than to be called to defend in federal court claims that do not belong in the courts at all. DRI members have demonstrated the inappropriateness of judicial resolution of such climate change tort claims in scholarly publications. *See, e.g.*, Earl L. Hagström and Dennis E. Raglin, *Climate Change*: *The Next 'Hot' Topic in Product Liability Litigation*, FOR THE DEFENSE, Dec. 2008, at 30-34, 78-79.

This Court should reverse the Second Circuit's judgment in order to bring fairness, consistency, and predictability to public nuisance litigation seeking to redress alleged climate change injuries.

SUMMARY OF ARGUMENT

Although Respondents' goal of reducing global climate change is laudable, pursuing a federal common law public nuisance action against a handful of arbitrarily-selected energy-generating targets is an improper use of the courts in achieving that end. If Respondents seek redress for their alleged injuries and urge establishment of standards governing greenhouse gas emissions, the more appropriate avenues are Congress and the EPA, not the federal courts, at least in the first instance. Four federal district courts faced with similar claims have found as much.

First, Respondents' complaint fails to state a claim for federal common law public nuisance because Respondents are unable to satisfy the tort's requirements, including the requirements of causation, control, location, and unreasonable interference with a public right, and because no court can order effective abatement of global warming, and no defendant or any number of defendants can perform such abatement.

Second, Respondents lack Article III standing to pursue their claims, failing to plead facts that demonstrate the well-established requirements of causation and redressability.

Third, Respondents' claims raise non-justiciable political questions for which the federal courts are ill-suited, as the courts lack judicially discoverable and manageable standards for evaluating Respondents' claims, would be forced to make impermissible initial policy determinations, and would inevitably create multifarious pronouncements leading to potential embarrassment.

ARGUMENT

I. RESPONDENTS FAIL TO STATE A CLAIM UNDER FEDERAL COMMON LAW NUISANCE.

A. While the Federal Common Law Public Nuisance Claim Exists to Fill Jurisdictional Interstices Where State Common Law Public Nuisance Cannot Lie, As a Matter of Substantive Law, the Federal Claim is No Different From its State Common Law Counterparts.

Federal common law exists "in a 'few and restricted' instances" where "Congress has not spoken to a particular issue" and there exists a "'significant conflict between some federal policy or interest and the use of state law,'" and it is therefore "necessary . . . to develop federal common law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) ("*Milwaukee II*") (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) and *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). One of these "few and restricted instances" is a federal common law public nuisance claim that applies in certain limited circumstances where a public nuisance condition is alleged to exist but no state can reach or remedy the nuisance condition through its own public nuisance laws, e.g., where an interstate nuisance condition implicates the rights of states. *See North Dakota v. Minnesota*, 263 U.S. 365, 373-74 (1923); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-39 (1907) ("*Tennessee Copper I*"); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("*Missouri I*").

While the federal common law public nuisance claim originated in cases brought under the Court's original jurisdiction, in *Illinois v. Milwaukee*, 406

U.S. 91 (1972) ("*Milwaukee I*"), the Court determined that a state plaintiff could bring a federal common law public nuisance action in federal district court to abate the discharge of untreated sewage into Lake Michigan. *Id*. at 93, 104-07. But the federal common law public nuisance claim is viable only where, among other things, it fills jurisdictional interstices in which state nuisance law cannot lie. *See Milwaukee II*, 451 U.S. at 313 n.7 ("In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case. If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.").

Aside from this jurisdictional distinction, however, the elements of a federal common law public nuisance claim do not differ from those of its state common law public nuisance counterparts. Both state and federal common law public nuisance claims derive from the same ancient common law roots and are governed by the same common law principles. This is apparent from examination of the Court's early public nuisance cases, which cite to and build upon cases that were decided under state common law public nuisance principles. *See North Dakota*, 263 U.S. at 372-74; *Missouri I*, 180 U.S. at 243-47. Accordingly, a viable federal common law claim for public nuisance must fit within the substantive parameters of any other traditional common law public nuisance claim.

B. The Parameters of a Common Law Public Nuisance Claim.

Common law public nuisance is a widely misunderstood and frequently denigrated tort. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 774 (2003) ("In torts, a field of law where vague definitions, rules, and doctrines abound, no other tort is as vaguely defined or poorly understood as public nuisance."). In an article, Dean Prosser famously labeled public nuisance as "a sort of legal garbage can" that has "been used to designate anything from an alarming advertisement to a cockroach baked in a pie." William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (footnotes omitted).[2] In the same article, Prosser illustrated the wide variety of human activities that the common law had branded as being public nuisances:

> It might involve interference with the public health, as in the case of a hogpen, a malarial pond, the keeping of diseased animals, or the pollution of a watercourse; with the public safety, as in the case of the storage of explosives, or the shooting of fireworks in the streets; with public morals, as by houses of prostitution, gaming establishments, lotteries, endurance contests, the illegal sale of liquor, or public profanity; with the public peace, as by loud and disturbing noises; with the public comfort, as in the case of bad odors, smoke, dust, or vibration; with public

[2] *See also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) ("[O]ne searches in vain, I think, for anything resembling a principle in the common law of nuisance.") (Blackmun, J., dissenting).

> convenience, as by obstructing a highway or a navigable stream, or creating conditions which make travel unsafe.

Id. at 411-12 (footnotes omitted). Given this seeming grab bag of disparate acts constituting public nuisances, it is hardly surprising that this Court described public nuisance concepts as being "vague and indeterminate." *Milwaukee II*, 451 U.S. at 317.

The tort of public nuisance nevertheless does have principled and definable parameters. *See State v. Lead Indus. Ass'n, Inc*. 951 A.2d 428, 446-52 (R.I. 2008) (identifying and discussing the "principal elements that are essential to establish public nuisance"); *In re Lead Paint Litigation,* 924 A.2d 484, 494 (N.J. 2007) ("By carefully examining the historical antecedents of public nuisance and by tracing its development through the centuries, clear and consistent parameters that define it as a cognizable theory of tort law become apparent."); Gifford, *supra*, 71 U. CIN. L. REV. at 790 ("[C]areful historical analysis of the nearly one-thousand year history of public nuisance in Anglo-American law helps to define the parameters of the tort—even when applied in the most contemporary contexts.").

These parameters are perhaps best understood by keeping in mind a public nuisance action's primary purpose. "The core concept behind public nuisance is the right of public authorities to *end defendant's conduct* that harms the public, through remedies of either injunctive relief or criminal prosecution." Gifford, *supra*, 71 U. CIN. L. REV. at 814 (emphasis added and footnote omitted). *See also Lead Indus*., 951 A.2d at 449 ("[T]he principal remedy for the harm caused by the nuisance is abatement."); *In re Lead Paint Litigation*, 924 A.2d at 494-95 ("Originally,

public nuisance was created as a criminal offense, . . . which was used to allow public officials, acting in the place of the sovereign, to prosecute individuals or require abatement of activities considered to be harmful to the public[.]"). The activities itemized in the Prosser quotation *supra* all fit within this core concept. Each involved activity that was immediately harmful to the public, which could be effectively terminated by either an injunction of abatement against (or by criminal prosecution of) the defendant-source. The parameters and boundaries that courts have recognized in public nuisance actions all further this purpose of terminating conduct that is harmful to the public.

1. Public nuisance requires a defendant's unreasonable interference with a public right.

As an essential element, a public nuisance must implicate a right common to the *general public*. *See Lead Indus.*, 951 A.2d at 447; *In re Lead Paint Litigation*, 924 A.2d at 496-97; *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1113-16 (Ill. 2005); RESTATEMENT (SECOND) OF TORTS § 821B; Gifford, *supra*, 71 U. CIN. L. REV. at 814-15. This requirement flows naturally from public nuisance's core purpose of providing public authorities with a vehicle for ending conduct that harms the public. The right must be common to the public as a whole. As the Restatement explains:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in

> nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.

Id., cmt. g. Furthermore, in this context, the term "public right" is not coextensive with the concept of "public interest." *Lead Indus.*, 951 A.2d at 448. In the words of one commentator:

> That which might benefit (or harm) 'the public interest' is a far broader category than that which actually violates 'a public right.' For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job).

Gifford, *supra*, 71 U. CIN. L. REV. at 815.

Furthermore, not all conduct that interferes with a public right is actionable in public nuisance. Much activity that ostensibly interferes with public rights is tolerated—even encouraged—because the activity bestows benefits and utility that outweigh the corresponding interference. This helps explain why public nuisance has historically been limited to use against activity that is either criminal or quasi-criminal in nature. As Dean Prosser categorically stated, in its origins, "public nuisance was always a common law crime." Prosser, *supra*, 20 TEX. L. REV. at 411. *See also Sabater v. Lead Indus. Ass'n, Inc.*, 704 N.Y.S.2d 800, 806 (N.Y. Sup. Ct. 2000) ("Public nuisance . . . at common law was always a crime and punishable as such."). While this is no longer a complete statement of the law as it exists today, nevertheless, "civil liability traditionally has been an incidental aspect of public nuisance." Gifford, *supra*, 71 U. CIN. L. REV. at 781.

Again, this is in keeping with "[t]he primary purpose of public nuisance [which] has been as a vehicle to enable public authorities to terminate conduct found to be harmful to the public health or welfare." *Id.* (footnote omitted). Consequently, "[c]riminal prosecutions against those maintaining public nuisances and injunctions brought by public authorities historically have been and remain the principal means of addressing public nuisances." *Id.* (footnotes omitted). The modern test for evaluating whether an interference is reasonable or unreasonable is an outgrowth of public nuisance's historic criminal/quasi-criminal roots and "will depend upon the activity in question and the magnitude of the interference it creates." *Lead Indus.*, 951 A.2d at 448.

2. Defendant's conduct must proximately cause the nuisance and defendant must have control over the nuisance such that it can be abated.

A defendant is not liable for public nuisance unless it proximately caused the nuisance condition. *Lead Indus.*, 951 A.2d at 450-51; *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113-15 (Mo. 2007); *City of Chicago*, 821 N.E.2d at 1127-28; *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 201 (N.Y. App. Div. 2003). A distinct, but related, requirement is that the defendant have control over the nuisance-creating instrumentality or instrumentalities. *See, e.g., Lead Indus.*, 951 A.2d at 449 ("As an additional prerequisite to the imposition of liability for public nuisance, a defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*."); *In re Lead Paint Litigation*, 924 A.2d at 501 (rejecting plaintiffs' nuisance theory that "would separate

conduct and location and thus eliminate entirely the concept of control of the nuisance"); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) ("For the interference to be actionable, the defendant must exert a certain degree of control over its source.").

Linking public nuisance liability with defendant's "control" over the nuisance is sensibly premised upon the fact that "without control a defendant cannot abate the nuisance." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993). *See also Lead Indus.*, 951 A.2d at 449 ("Indeed, control at the time the damage occurs is critical in public nuisance cases, especially because the principal remedy for the harm caused by the nuisance is abatement.").[3] Largely for this reason, courts have rejected the argument that liability for public nuisance can be premised upon a defendant's mere *contribution* to a condition that allegedly gives rise to a public nuisance. *See Lead Indus.*, 951 A.2d at 449-50; *City of St. Louis*, 226 S.W.3d at 115-16. These decisions simply recognize the obvious: a court cannot order a defendant to abate—*i.e.*, to end or

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[3] Thus, courts routinely dismiss public nuisance claims brought against defendants who lack control over the instrumentality that allegedly gives rise to the nuisance. *See Lead Indus.*, 951 A.2d at 455; *In re Lead Paint Litigation*, 924 A.2d at 501; *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002); *Camden County Bd.*, 273 F.3d at 541; *Tioga*, 984 F.2d at 920; *Detroit Bd. Of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 522 (Mich. Ct. App. 1992); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H. 1984); *County of Johnson v. United States Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

terminate—a public nuisance over which the defendant is, at most, a "contributor."

3. The parameter of location.

A final recognized parameter of a viable public nuisance claim is a recurring attribute of location. "A common feature of public nuisance is the occurrence of a dangerous condition at a specific location." *State v. Lead Indus. Ass'n, Inc*., 951 A.2d 428, 452 (R.I. 2008). *See also In re Lead Paint Litigation*, 924 A.2d at 495 ("[P]ublic nuisance has historically been tied to conduct on one's own land or property as it affects the rights of the general public."). As one commentator has explained:

> [A] finding of public nuisance historically involved the use of land. In most cases, the harm resulting from the public nuisance arose from the defendant's ownership, possession, or use of land and flows directly from the history of public nuisance law, and specifically the requirement that the defendant be in control of the instrumentality causing the harm. Again, the principal focus of public nuisance law generally has been to provide a means of abating or ending defendant's continuing conduct that is harming the public safety or welfare.

Gifford, *supra*, 71 U. CIN. L. REV. at 832 (footnotes omitted).

C. Respondents' Public Nuisance Allegations Do Not Satisfy Public Nuisance Parameters; Accordingly, Respondents Fail to State a Viable Federal Public Nuisance Claim.

Analyzed through these well-accepted public nuisance parameters, Respondents' global warming nuisance claim fails to state a claim on which relief can be granted.

1. Respondents' allegations do not satisfy the requirements of causation and control.

Petitioners cannot be liable for public nuisance under Respondents' global nuisance theory. By Respondents' own admission, Petitioners have not caused global warming. By Respondents' own admission, Petitioners do not control the instrumentalities that have caused global warming. Petitioners cannot successfully "abate" global warming. Nor can a federal district court order the successful abatement of global warming. Assuming *arguendo* that a district court granted the injunctive relief requested by Respondents, relief from the alleged harm would remain illusory. Unlike an agency and legislature, which have jurisdiction to address the problem further through later incremental steps, a court, which has control over the parties before it as litigants, would be impotent to solve the problem. The problem is simply too big for common law public nuisance to resolve.

In their complaints, Respondents cannot truthfully allege, and therefore do not allege, that Petitioners have proximately caused global warming. Instead, Respondents merely allege that Petitioners have

"contributed" to global warming. *See* J.A. 57, 118. According to Respondents, Petitioners "allegedly account for 2.5% of man-made carbon dioxide emissions." *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 347 (2d Cir. 2009), *cert. granted*, 2010 WL 4922905 (U.S. Dec. 6, 2010).[4] Stated otherwise, and viewing these allegations in the light most favorable to Respondents, Petitioners allegedly contribute 2.5 percent of all worldwide man-made carbon dioxide emissions, and have caused and can control *just 2.5 percent of the anthropomorphic instrumentalities that cause the purported global warming public nuisance*. Respondents do not identify the actors that have caused and exercise control over the remaining 97.5 percent of the alleged nuisance-creating instrumentalities.

As a matter of law, these allegations are insufficient to establish the causation element of a viable public nuisance claim. This point is illustrated by the legal authorities cited in Section I.B.3, *supra*. More importantly, this conclusion is dictated by the Court's own public nuisance cases. Repeatedly in cases arising under this Court's original jurisdiction,

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[4] In their complaints, Respondents allege that electrical power plants located within the United States annually emit approximately 2.6 billion tons of carbon dioxide. *See* J.A. 85, 136. These emissions allegedly constitute "approximately forty percent of all carbon dioxide emitted by human activities in the United States and approximately ten percent of worldwide carbon dioxide emissions from human activities." *Id*. Petitioners, in turn, are alleged to annually emit "approximately 650 million tons of carbon dioxide," which "constitutes one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately 10 percent of all anthropogenic [i.e., of or related to the influence of human beings] carbon dioxide emissions in the United States." *Id*. at 57, 84, 118, 136.

the Court has rejected public nuisance claims where the plaintiff could not demonstrate that the defendant's conduct caused the alleged nuisance. In *Missouri v. Illinois*, 200 U.S. 496 (1906) ("*Missouri II*"), the Court rejected Missouri's claim that Illinois' discharge of waste into the Mississippi River had caused an increase in the incidence of typhoid fever in the City of St. Louis. *Id*. at 522-23. The Court rejected this claim because the evidence as to the source of typhoid *bacilli* in the river was equivocal, with evidence pointing to Missouri as the source of much of the *bacilli*. *Id*. at 525-26.

Similarly, in *New York v. New Jersey*, 256 U.S. 296 (1921), the Court rejected the State of New York's claim that New Jersey threatened to create a public nuisance by its plan to discharge 120 million gallons of sewage per day into Upper New York Bay. *Id*. at 313. As in *Missouri v. Illinois*, the evidence of record demonstrated that New Jersey was far from the sole source of sewage contamination in New York Bay; indeed, New York City and its environs alone were responsible for the daily discharge into the bay of several hundred million gallons of sewage. *Id*. at 309-10. Faced with this evidence, the Court concluded that New York had not established that New Jersey's threatened sewage discharge would create an actionable public nuisance. *Id*. at 312-13.

Thereafter, in *North Dakota v. Minnesota*, 263 U.S. 365 (1923), the Court rejected North Dakota's claim that Minnesota had created a public nuisance "by constructing cut-off ditches and straightening [a local river]" which "increased the speed and volume of its flow into [a nearby lake], and thereby raised the level of the lake, causing its outlet [stream] . . . to overflow and greatly to injure a valuable farming area in

North Dakota." *Id*. at 371. Once again, the claim failed for want of causation, particularly given Minnesota's compelling evidence of heavy rainfalls as an alternative source of the complained-of flooding. *Id*. at 386-87.

By contrast, where the Court has found that a defendant's conduct caused a public nuisance, and ordered that the nuisance be abated, the evidence clearly established that the defendant was *the* source of the nuisance-causing instrumentality, and by enjoining the defendants' conduct the court could abate the nuisance. Thus, in the *Tennessee Copper* cases, the Court ordered abatement where the public nuisance could be solely traced to the defendants' conduct of "smelting copper ores in Polk county, East Tennessee, near the Georgia line." *Georgia v. Tennessee Copper Co*., 237 U.S. 474, 475 (1915) ("*Tennessee Copper II*"). Likewise, in *New Jersey v. City of New York*, 283 U.S. 473 (1931), the Court enjoined the defendant from "dumping garbage into the ocean or waters of the United States off the coast of New Jersey and from otherwise polluting its waters and beaches." *Id*. at 476-77. In that case, the evidence established both that the defendant's dumped garbage was "driven and carried by winds and water to and upon the shores of the plaintiff, and constitute the objectionable materials thereon and in the adjacent water," and that "whatever garbage reaches the plaintiff's shores from vessels and other dumpings than those of the defendant was negligible in comparison with that constantly being dumped by the defendant." *Id*. at 480, 481.

Here, unlike the cases discussed above, there is no need to receive evidence as to whether Petitioners' emissions have proximately caused global warming

or whether global warming is a condition subject to Petitioners' control and power to abate. Respondents' own allegations establish that Petitioners have caused and exercise control over, at most, 2.5 percent of the anthropomorphic segment of the instrumentality that ostensibly creates the claimed global warming public nuisance. As a matter of law, this causation allegation is woefully and fatally insufficient.

Moreover, Respondents' global warming public nuisance theory is divorced from common law nuisance's historic nexus "to defendant's ownership, possession, or use of land." Gifford, *supra*, 71 U. CIN. L. REV. at 832. The carbon dioxide that results in global warming does not arise from a distinct location or even from an ascertainable number of different locations. Every automobile, aircraft, train, ship—indeed, every human being—on the planet is a source of carbon dioxide emissions. In the aggregate, these mobile sources emit massive amounts of carbon dioxide, and do so without being anchored to any particular location or locations.

Confronted with these fatal defects, Respondents do not allege that Petitioners are capable of abating the alleged global warming nuisance—at least as the term abatement has been historically understood as "ending defendant's continuing conduct that is harming the public safety or welfare." Gifford, *supra*, 71 U. CIN. L. REV. at 832. Instead, Respondents merely allege that "[r]eductions in the carbon dioxide emissions of [Petitioners] will contribute to a reduction in the risk and threat of injury to [Respondents] and their citizens and residents from global warming." *See* J.A. 102; *see also id*. at 145 ("Reducing carbon dioxide emissions is necessary to postpone, avert or reduce the injuries described above.")). Reduction

and postponement, however, do not equal abatement; thus, Respondents tacitly concede that the District Court cannot order the successful abatement of the alleged public nuisance. Nor, for that matter, could any court located anywhere on the planet.

2. Respondents' allegations do not demonstrate unreasonable interference with a public right.

In their complaints, Respondents allege that Petitioners have unreasonably interfered with Respondents' "right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world." *See* J.A. 103-04; *see also id*. at 146-47 ("the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world"). Whether these assertions sufficiently allege a right common to the general public is, at best, debatable; the claimed public rights sound suspiciously like public interests, which are not actionable. *See Lead Indus*., 951 A.2d at 448; Gifford, *supra*, 71 U. CIN. L. REV. at 815. Courts have viewed with skepticism similarly vague and amorphous statements of purported public rights. *See Lead Indus*., 951 A.2d at 453 (allegation that defendants have interfered with the "health, safety, peace, comfort or convenience of the residents of the [s]tate"); *City of Chicago*, 821 N.E.2d at 1114 ("a common right to be free from conduct that creates an unreasonable jeopardy to the public's health, welfare and safety, and to be free from conduct that creates a disturbance and reasonable apprehension of danger to person and property").

But even if it is assumed that Respondents have sufficiently alleged a public right, as a matter of law,

they have failed to allege that Petitioners have unreasonably interfered with that public right. As discussed earlier, public nuisance has historically targeted activity that is either criminal or quasi-criminal in nature. *Sabater*, 704 N.Y.S.2d at 806; Prosser, *supra*, 20 TEX. L. REV. at 411. Balancing the "activity in question and the magnitude of the interference it creates," *Lead Indus.*, 951 A.2d at 448, could a principled court deem Petitioners' conduct of providing bulk electric power the equivalent of the criminal and quasi-criminal activities that the common law of public nuisance has historically condemned? Can providing affordable electric power to hundreds of millions of people nationwide possibly be branded as an unreasonable interference with a public right?

Amicus curiae frames these as rhetorical questions because they are, indeed, rhetorical. Historically, common law public nuisance was never designed or intended to cover activities such as Petitioners' here. It does not cover Petitioners' conduct today.

Innumerable and insurmountable practical problems would result if Respondents' claims are permitted to proceed, underscoring Petitioners' contention that the tort of public nuisance should not be expanded as advocated by Respondents. Under Respondents' broad theory of liability for public nuisance claims based on climate change, defendants seeking to demonstrate their non-liability would be forced to undertake vast amounts of discovery, including, *inter alia*, (1) locating and deposing experts on global climate change from around the world at considerable expense, (2) examining the effect that other global emitters, which include every individual and business on Earth, have on climate change, and (3) obtaining

discovery materials regarding the global phenomena of climate change while world-wide scientific debate and international negotiations addressing the issue remain ongoing. In addition, the courts would be overwhelmed with both the number and complexity of the issues surrounding global climate change, such that expedient and fair adjudication of claims would be almost impossible. Finally, should claims such as Respondents' survive, every case will likely involve extensive counterclaim and third-party practice as defendants try to obtain offsetting redress from some or all of the contributors of the other 97.5% of climate change-causing carbon dioxide emissions. Thus, this Court must maintain and enforce the existing parameters of the tort of public nuisance, including causation, control, and location, against Respondents' proposed expansion and hold that Respondents have failed to state a claim for public nuisance in the present case.

In *New York v. New Jersey*, *supra*, this Court spoke in terms that are particularly salient in this case:

> We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted.

256 U.S. at 313. While in so speaking, the Court was viewing the issue solely through the prism of the requisites of common law public nuisance, its admonition is apropos to the serious problems of

constitutional justiciability that are raised by Respondents' purported public nuisance claim. It is to these justiciability concerns that *amicus curiae* now turns.

II. RESPONDENTS MAY NOT PURSUE COMMON LAW PUBLIC NUISANCE CLAIMS AGAINST CERTAIN TARGETED DEFENDANTS FOR GENERALIZED INJURIES CAUSED IN LARGE PART BY ABSENT PARTIES.

If this Court determines that Respondents possess Article III standing, the federal courts will be flooded with endless litigation over injuries due to whatever weather issues can be alleged to be ascribed to global climate change against any alleged "contributor." To prevent overwhelming the federal courts with such inchoate litigation, and to insulate potential defendants, particularly American businesses, from having to mount costly and time-consuming defenses to these actions, this Court should enforce the well-established requirements of Article III standing and reject the Second Circuit's relaxed standing analysis for climate change public nuisance cases. Respondents are unable to satisfy at least two of this Court's traditional standing requirements, namely, causation and redressability.

The Second Circuit's curtailed standing requirement in this case provides a ready example of the mischief soon to follow upon anything but a rigorous application of the Court's standing criteria. Who among us would not have a cognizable injury under the Second Circuit's opinion? And when all share standing, will the truly injured even be able to be heard amidst the clamor of more motivated advocates?

A. This Court Has Established Three Requirements That Must Be Satisfied to Obtain Article III Standing.

Article III of the United States Constitution limits federal-court jurisdiction to "Cases" and "Controversies." U.S. CONST., art. III, § 2, cl. 1. The concept of standing "is an essential and unchanging part of th[is] case-or-controversy requirement." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

This Court has set out three constitutional requirements for Article III standing: (1) injury in fact, *i.e.*, "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; (2) causation, such that "the injury [is] fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party"; and (3) redressability, that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (internal quotation marks and citations omitted). Respondents have failed to satisfy the causation and redressability prongs of this inquiry.

B. The Constitutional Standing Requirements of Causation and Redressability Weigh Heavily Against Finding Article III Standing Here.

To possess Article III standing, Respondents must demonstrate that their alleged injuries are "fairly traceable" to Petitioners' conduct. The Second Circuit below found sufficient to satisfy this requirement that "[Respondents] assert that [Petitioners'] continued emissions of carbon dioxide contribute to global warming, which harms them now and will harm

them in the future in specific ways." *Connecticut*, 582 F.3d at 345. In doing so, the Circuit Court relied heavily upon *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, wherein the Third Circuit had set forth a three-part test to determine whether, under the Clean Water Act, an injury was "fairly traceable" to a defendant's discharge. 913 F.2d 64, 72 (3d Cir. 1990). That test requires that the defendant "1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id*.

Contrary to the Second Circuit's opinion, the *Powell Duffryn* test is inapplicable to the case at bar. On its face, the test requires that the defendant's discharge be greater than its permit allows; here, however, greenhouse gas emissions are not alleged to be limited through permitting at this time and, accordingly, there can be no allegation of exceeding of any permit limit. *Amicus curiae* submits that this fact negates inherently the applicability of the *Powell Duffryn* test in non-statutory tort contexts such as this, and asserts that the Second Circuit's excusing the first prong here was without persuasive justification. In addition, unlike in Clean Water Act cases such as *Powell Duffryn*, where the waterway has a defined geographic scope, climate change tort actions allege that the defendant's emissions are released into the air at large and react with incalculable other sources of emissions from across the globe and throughout past centuries to cause global climate change, such that a presumption of causation would be irrational. Finally, the *Powell Duffryn* court

recognized that causation requires a "'*substantial likelihood'* that defendant's conduct caused plaintiff's harm," 913 F.2d at 72 (emphasis in original), a showing absent here, as Respondents allege that Petitioners contribute less than three percent of anthropomorphic emissions. As such, the Second Circuit's reliance on the *Powell Duffryn* test is misplaced.

Although the District Court below did not address the standing issue, in *Native Village of Kivalina v. ExxonMobil Corp*., the United States District Court for the Northern District of California, considering a damages claim theorizing that defendants' greenhouse gas emissions contributed to climate change that allegedly resulted in erosion of sea ice surrounding plaintiffs' village, rejected flatly the test of causation adopted by the Second Circuit below. 663 F. Supp. 2d 863, 879-80 (N.D. Cal. 2009). Specifically, the district court observed:

> There is a critical distinction between a statutory water pollution claim versus a common law nuisance claim. Under the Clean Water Act, the amount of effluent that may be legally discharged is strictly regulated . . . . [W]here the plaintiff shows that a defendant's discharge *exceeds* Congressionally-prescribed federal limits, it is presumed for purposes of standing that there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm . . . . Only then is it permissible for the plaintiff to rely on the notion that the defendant "contributed" to plaintiff's injury . . . . In contrast, there are no federal standards limiting the discharge of greenhouse gases. As a result, no presumption arises that there is a substantial likelihood that any defendant's conduct harmed plaintiffs.

Id. (internal quotation marks and citations omitted) (emphasis in original); *see also id*. at 881 ("[I]t is not plausible to state which emissions—emitted by whom and at what time in the last several centuries and at what place in the world—'caused' Plaintiffs' alleged global warming related injuries.").

Adopting the Second Circuit's theory of causation would subject potentially every "contributor" to global climate change, *i.e*., every individual, business, and other entity, to claims for injuries caused allegedly by climate change and essentially eliminate the necessity that plaintiffs demonstrate causation in such cases. Rather, this Court should adopt the reasoning in *Kivalina* and hold that Respondents failed to allege facts that could satisfy the causation requirement of Article III standing.

Similarly, Respondents did not plead facts that would support a conclusion that a favorable court decision would likely redress their alleged injuries. As noted *supra*, in their complaint, Respondents admit that Petitioners' emissions make only a small contribution to the alleged harm. The alleged effects of global climate change are, according to Respondents' claims, caused in large part by the independent actions of third parties worldwide, over which the federal courts may never obtain jurisdiction. As such, issuance of injunctions against Petitioners would not result in any demonstrable relief for Respondents because Petitioners do not have the power to abate the asserted "public nuisance" of global climate change.

For the foregoing reasons, Respondents fail to satisfy the causation and redressability prongs of the *Lujan* Article III standing inquiry.[5]

III. RESPONDENTS SHOULD PURSUE THEIR POLICY CONCERNS BEFORE THE APPROPRIATE LEGISLATIVE AND REGULATORY BODIES.

Determination of the appropriate "remedy" in response to global climate change is a political question, requiring a delicate balancing of vast competing environmental, social, and economic interests, which the federal courts are ill-equipped to address in the first instance. Rather, any potential remedy for Respondents' concerns, if one exists, should be sought first in the legislative and regulatory arenas of government, not the courts. These "political" branches of government are outfitted to design a comprehensive policy solution to the dynamic issue of climate change. Respondents' dissatisfaction with the current progress made in those branches on this issue does not negate the inherently political nature of the

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[5] In concluding that Respondents possessed Article III standing, the Second Circuit relied on *Massachusetts v. EPA*, 549 U.S. 497 (2007). There, however, the Court considered Article III standing in the context of an EPA decision not to regulate greenhouse gas emissions—a decision the reversal of which, according to the claims of the petitioning parties in that case, could offer the possibility of some relief to those parties—coupled, critically, with an *express statutory grant of judicial review* in such cases. *Id.* at 516-18 (noting that the statutory right of review was "of critical importance to the standing inquiry," such that plaintiffs' claims could proceed "without meeting all the normal standards for redressability and immediacy" (internal quotation marks omitted)). Here, no such statutory grant justifies relaxation of the well-established constitutional standing requirements.

problem. That events in those other branches have moved apace during the pendency of this suit underscores the "political" nature of the questions sought to be addressed here.

Permitting Respondents to sue certain arbitrarily-selected defendants for their alleged contributions to global climate change would be unfair and unjust, particularly to American businesses, the most likely targets of any such future actions. In addition to the cost and time involved in mounting defenses, American businesses would be forced to navigate a confusing, and potentially conflicting, patchwork of emissions regulations handed down by various federal district courts. Such an outcome emphasizes the need for a political, rather than judicial, "solution" to global climate change issues. A number of federal district courts have reached this very conclusion, namely, that such claims simply are inappropriate for judicial resolution.

A. *Baker v. Carr* Sets Forth the Criteria for Determining Whether a Non-Justiciable Political Question Exists in a Given Case.

The political question doctrine is "primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), "exclud[ing] from judicial review those controversies which revolve around policy choices and vague determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

This Court has identified six indicators of non-justiciable political questions: (1) "a textually demonstrable constitutional commitment of the issue to a

coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. Three of these indicators—the lack of judicially discoverable and manageable standards, the impossibility of deciding without an initial policy determination, and the potential for embarrassment from multifarious pronouncements—are present in this case.

B. The Second Circuit's Emphasis on the "Reasonableness" Standard of Public Nuisance Law Highlights the Problem of Courts Making Broad Policy Determinations Based on Narrow Notions of Reasonableness Under the Facts.

In the Second Circuit's opinion, "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing [Respondents'] claims." *Connecticut*, 582 F.3d at 329. *Amicus curiae* submits respectfully that the Second Circuit is mistaken in this regard.

At least three other federal courts, including two federal district courts on the front lines of such politically-sensitive issues, have concluded that courts lack judicially discoverable and manageable standards for evaluating climate change tort actions. For example, in *Comer v. Murphy Oil USA*, the United

States District Court for the Southern District of Mississippi considered a damages claim alleging that defendants' emissions contributed to global warming and added to the ferocity of Hurricane Katrina, which damaged plaintiffs' property. *See* 585 F.3d 855, 859 (5th Cir. 2009) (panel decision reversing the district court's holding that plaintiffs' complaint posed a non-justiciable political question), *panel decision vacated by grant of en banc reh'g*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *pet. for writ of mandamus denied*, __ U.S. __, __ U.S.L.W. (Jan. 10, 2011). The district court found that plaintiffs' claims concerned essentially the broader political debate regarding the appropriate response to global climate change, which "ha[d] no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this court can measure conduct." *Id*. at 860 n.2. Similarly, in *Kivalina*, the district court determined that general public nuisance law provided no guidance as to gauging the "reasonableness" of defendants' conduct with regard to "the energy-producing alternatives that were available in the past," such that the court was without standards to render a decision "that is principled, rational, and based upon reasoned distinctions." 663 F. Supp. 2d at 874-75. Finally, in *North Carolina v. Tennessee Valley Authority*, the Fourth Circuit reversed an injunction requiring immediate installation of emissions controls at four TVA electricity generating plants in response to plaintiffs' public nuisance claims, finding that the injunctions would "encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air" and noting that, "while public nuisance law

doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application." 615 F.3d 291, 296, 302 (4th Cir. 2010).

Despite the Second Circuit's confidence in the abilities of the federal district courts, the vague and undefined "reasonableness" standard of the Restatement (Second) of Torts, characterized by the Second Circuit as providing a sufficient standard upon which to determine what constitute "reasonable" emissions levels by Petitioners, provides no principled basis upon which to resolve Respondents' claims. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (observing that "nuisance standards often are 'vague' and 'indeterminate'"). Determining a "reasonable" level of emissions requires policy considerations of the effects of global climate change, the ability of certain industries to lessen those effects through emissions limitations, and the social and economic impact of any such limitations. There is simply no "correct" resolution of those matters. Rather, emissions standards are designed and implemented by Congress and the EPA, which are equipped and authorized to balance all competing interests and create a broad regulatory scheme for reducing greenhouse gas emissions applicable to all regulated entities. This stands in stark contrast to courts that are permitted to adjudicate only the relative rights of the litigants in a pending suit before it. Only against those politically-created standards may a court gauge the "reasonableness" of a defendant's conduct. Circumventing legislative and regulatory authority by permitting cases such as this to proceed through the federal courts in the first instance would lead to the imposition of arbitrary emissions caps set by various district courts based upon each court's

independent resolution of the vague and indeterminate "reasonableness" standard of public nuisance law.

In sum, the lack of judicially discoverable and manageable standards as to the "reasonable" level of emissions renders the present case a non-justiciable political question.

C. Courts Cannot Adjudicate Respondents' Claims or Provide the Relief Requested Without Making Policy Trade-Offs Requiring Judgments Properly Reserved for the Legislative and Executive Branches.

Adjudication of the present dispute would require the District Court to make an "initial policy determination of a kind clearly reserved for non-judicial discretion," namely, a determination of the proper balance among competing environmental, social, and economic concerns related to the reduction of greenhouse gas emissions. As such, the present case presents a non-justiciable political question.

Observing the "transcendently legislative nature of this litigation," the District Court found that Respondents' claims "touch[] on . . . many areas of national and international policy." *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 2010 WL 4922905 (U.S. Dec. 6, 2010). Specifically, Respondents' requested relief would, at a minimum, require the court to "determine the appropriate level at which to cap the carbon dioxide emissions"; "determine the appropriate percentage reduction to impose"; "create a schedule to implement those reductions"; "determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate

change"; "assess and measure available alternative energy resources"; and "determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security." *Id*. Thus, the District Court determined that Respondents' claims presented a non-justiciable political question requiring the court to make "an initial policy determination." *Id*. at 274.

Other federal district courts faced with similar claims have concurred with the District Court's opinion. For example, in *Comer*, the district court determined that plaintiffs' complaint asked the court to "balance economic, environmental, foreign policy, and national security interests and make an initial policy determination of a kind which is simply nonjudicial." 585 F.3d at 860 n.2. Similarly, in *Kivalina*, the district court observed that "resolution of Plaintiffs' nuisance claim require[d] balancing the social utility of Defendants' conduct with the harm it inflicts" and involved "a policy decision about *who* should bear the cost of global warming." 663 F. Supp. 2d at 876-77 (emphasis in original). The district court in that case found that "allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Id*. at 877.

The present case is no "ordinary tort action." At its heart, it concerns who should bear the expense of global climate change and how to balance the competing environmental, social, and economic interests surrounding reduction of greenhouse gas emissions. Such issues indisputably require the making of initial policy determinations reserved to the elected branches of government, which are able to consider the interests of all parties and formulate wide-ranging regulatory schemes. More importantly, these elected

officials are, unlike their judicial counterparts, politically accountable.

Respondents' dissatisfaction with the progress of policymakers cannot transform what is a complex policy matter into an action suitable for judicial adjudication. As resolution of the present matter would require the courts to make impermissibly "an initial policy determination," Respondents' claims present non-justiciable political questions.

D. Ongoing Regulatory Efforts Underscore the Political Nature of These Claims.

An extensive and comprehensive regulatory scheme already exists for the purpose of establishing environmental standards and responding to concerns regarding global climate change, obviating the necessity of emissions standards created by public nuisance lawsuits and emphasizing further the political nature of Respondents' claims.

In *TVA*, the Fourth Circuit described generally the overarching and extensive regulatory system governing air quality standards:

> Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with the judicially managed nuisance decrees for which [plaintiff] argues. Indeed, the Act directs the EPA to ensure that its air quality standards "accurately reflect the latest scientific knowledge . . . ." The Clean Air Act's extensive coverage allows regulators with expertise in the relevant scientific fields to use their knowledge to create empirically-based emissions standards. The Act even requires the

> EPA to develop expertise so that it can provide states with information about available emissions controls, including "cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology" . . . .

615 F.3d at 304 (internal citations omitted). In addition, the court observed the potential pitfalls of supplementing the present regulatory scheme with a patchwork of judicial emissions decrees:

> The prospects of forum shopping and races to the courthouse, the chances of reversals on appeal, the need to revisit and modify equitable decrees in light of changing technologies or subsequent enactments, would most assuredly keep matters unsettled. Congress opted instead for an expert regulatory body, guided by and subject to congressional oversight, to implement, maintain, and modify emissions standards . . . .

Id. at 306.

Rather than rely on vague public nuisance standards of "reasonableness," the Fourth Circuit in *TVA* determined that the comprehensive regulatory scheme enacted by Congress and implemented by the EPA was the proper means for any potential redress of plaintiffs' alleged grievances in the first instance. The present case is no different. If Respondents are dissatisfied with the current status of greenhouse gas emissions standards, a carefully-crafted regulatory system is in place to address those concerns. That Congress elected not to have emissions standards designed by the federal courts on a case-by-case basis through public nuisance actions, opting rather for a comprehensive regulatory scheme, reinforces the

conclusion that such issues are political in nature and ill-suited to judicial resolution. *See Connecticut*, 406 F. Supp. 2d at 268-70. In truth, the present litigation "amounts to nothing more than a collateral attack on the system" with which Respondents are dissatisfied. *TVA*, 615 F.3d at 301 (internal quotation marks omitted).

E. This Issue Presents Squarely a Likelihood of "Embarrassment" from Multifarious and Inconsistent Pronouncements from the Different Engaged Branches of Government.

In *TVA*, the Fourth Circuit explained that granting the plaintiffs' requested relief would create "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Id*. at 296. Similarly, the court noted that, "[i]f courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern." *Id*. at 298. The Fourth Circuit's concerns in this regard are well-founded. Permitting claims such as Respondents' to proceed to adjudication would result in multifarious and inconsistent pronouncements as to what constitutes "reasonable" emissions standards.

Federal courts are incapable of "resolving" the problem of global climate change or redressing Respondents' alleged injuries—at most, the courts can target a discrete number of "contributors" and enforce against them judicially-created emissions restrictions based on amorphous "reasonableness" standards, with each "pronouncement" creating yet another square in the confusing nationwide pat-

chwork of fixes that defendants would have to navigate. Such a system presents a considerable likelihood of embarrassment, as varying district court emissions standards conflict inevitably, and as congressional and regulatory attempts to implement new standards governing greenhouse gas emissions run up against existing judicially-created standards. This likely scenario underscores the fact that global climate change requires a comprehensive political solution only Congress or the EPA can achieve. *See id*. at 305 (noting that administrative rulemaking "enables uniform application across industries, lessens the likelihood of distortions caused by the influence of individualized facts in cases, and also makes the resulting rules readily accessible in a single location"). For all of these reasons, adjudication of Respondents' claims would require the District Court to attempt impermissibly to answer inherently political questions.

CONCLUSION

Amicus curiae DRI—The Voice of the Defense Bar urges respectfully that this Court reverse the Second Circuit's judgment because Respondents fail to state a claim for federal common law public nuisance, lack Article III standing, and present non-justiciable political questions that are beyond the reach of judicial resolution.

Respectfully submitted,

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