

No. 10-

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IN THE  
**Supreme Court of the United States**

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

v.

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

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

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**PETITION FOR A WRIT OF CERTIORARI**

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F. WILLIAM BROWNELL  
NORMAN W. FICHTHORN  
ALLISON D. WOOD  
HUNTON & WILLIAMS LLP  
1900 K Street, N.W.  
Washington, D.C. 20006  
(202) 955-1500

*Counsel for Petitioner  
Southern Company*

PETER D. KEISLER\*  
CARTER G. PHILLIPS  
DAVID T. BUENTE JR.  
QUIN M. SORENSON  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
pkeisler@sidley.com  
(202) 736-8000

*Counsel for Petitioners*

August 2, 2010

\* Counsel of Record  
[Additional Counsel Listed On Inside Cover]

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---

SHAWN PATRICK REGAN  
HUNTON & WILLIAMS LLP  
200 Park Avenue  
52nd Floor  
New York, N.Y. 10166  
(212) 309-1000

*Counsel for Petitioner  
Southern Company*

MARTIN H. REDISH  
NORTHWESTERN  
UNIVERSITY SCHOOL OF  
LAW  
375 East Chicago Avenue  
Chicago, Illinois 60611  
(312) 503-8545

*Counsel for Petitioners*

DONALD B. AYER  
KEVIN P. HOLEWINSKI  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
(202) 879-3939

THOMAS E. FENNELL  
MICHAEL L. RICE  
JONES DAY  
2727 North Harwood Street  
Dallas, Texas 75201  
(214) 220-3939

*Counsel for Petitioner Xcel  
Energy Inc.*

## 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).

### **PARTIES TO THE PROCEEDINGS**

Defendant-appellees below were American Electric Power Company, Inc.; American Electric Power Service Corporation; Cinergy Corporation (merged into Duke Energy Corporation); Southern Company; Xcel Energy Inc.; and the Tennessee Valley Authority.

Plaintiff-appellants below were State of Connecticut; State of New York; People of the State of California; State of Iowa; State of New Jersey; State of Rhode Island; State of Vermont; State of Wisconsin; City of New York; Open Space Institute, Inc.; Open Space Conservancy, Inc.; and Audubon Society of New Hampshire.

**RULE 29.6 STATEMENT**

American Electric Power Company, Inc. is a publicly traded company. There is no publicly traded company owning 10% or more of its stock.

American Electric Power Service Corporation is a wholly-owned subsidiary of American Electric Power Company, Inc.

Cinergy Corporation merged into Duke Energy Corporation. Duke Energy Corporation is a publicly traded company. There is no publicly traded company owning 10% or more of its stock.

Southern Company has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Xcel Energy Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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## **PETITION FOR A WRIT OF CERTIORARI**

American Electric Power Company Inc., American Electric Power Service Corp., Cinergy Corp., Southern Company, and Xcel Energy Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

### **OPINIONS BELOW**

The opinion of the Second Circuit is reported at 582 F.3d 309, and reproduced at Petition Appendix (“Pet. App.”) 1a-170a. The Second Circuit’s orders denying rehearing or rehearing en banc are reproduced at Pet. App. 188a-191a. The opinion of the United States District Court for the Southern District of New York is published at 406 F. Supp. 2d 265, and reproduced at Pet. App. 171a-187a.

### **JURISDICTION**

The court of appeals entered judgment on September 21, 2009, Pet. App. 1a, and denied timely petitions for rehearing or rehearing en banc on March 5 and 10, 2010, Pet. App. 188a-191a. On June 28, 2010, Justice Ginsburg granted an extension to and including August 2, 2010, of the time for filing a petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The United States Constitution provides, in pertinent part, that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their

Authority ... [and] to Controversies ... between a State and Citizens of another State [or] between Citizens of different States.” U.S. Const. art. III, § 2, cl. 1.

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, are reproduced at Pet. App. 192a-214a.

## INTRODUCTION

This petition raises the important, recurring question whether States and private plaintiffs have standing to seek, and whether federal common law provides authority for courts to impose, a *non-statutory*, judicially-created regime for setting caps on greenhouse gas emissions based on “vague and indeterminate nuisance concepts.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (“*Milwaukee II*”). This Court recognized “the unusual importance of the underlying issue” in granting review in *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007), and construing the *statutory* scheme authorizing the Environmental Protection Agency (EPA) to regulate greenhouse gases. This petition asks this Court to decide whether judges, too, may regulate greenhouse gas emissions at the behest of States and private parties and, if so, under what standards. At stake is the financial health and security of numerous sectors of the economy. See Vanessa Holder, *Climate Change Could Be the Next Legal Battlefield*, *Fin. Times* (London), July 14, 2003, at 10 (“The potential compensation for climate change impacts would make the tobacco pay-outs look like peanuts.”); Daniel Hays, *Climate Claims Are The ‘New Asbestos,’ Swiss Re Suggests*, *Nat’l Underwriter Prop. & Cas.*, May 29, 2009 (“[C]limate change-related liability will develop more quickly than asbestos-related claims ....”).

The importance of this Court's intervention in this case flows directly from the extraordinary breadth and consequences of the Second Circuit's decision. It permits federal common law claims seeking to hold companies that emit carbon dioxide liable for the alleged consequences of global climate change and authorizes federal courts to impose prospective caps on their emissions. Those caps would be based not on any statute or regulation, such as those that govern the parallel administrative proceedings at EPA in response to *Massachusetts*, but instead would depend on each court's own assessment of what is "reasonable" in light of its "weighing of the gravity of the harm against the utility of the conduct." Restatement (Second) of Torts § 821B cmt. e (1979).

The ramifications of this holding, if it is allowed to stand, are staggering. A single judge could set emissions standards for regulated utilities across the country—or, as here, for just that subset of utilities that the plaintiffs have arbitrarily chosen to sue. Judges in subsequent cases could set standards for other utilities or industries, or conflicting standards for these same utilities. See *North Carolina v. TVA*, No. 09-1623, 2010 WL 2891572, at \*6 (4th Cir. July 26, 2010) (cautioning that allowing judges to impose emissions caps based on common law nuisance standards, "whose content must await the uncertain twists and turns of litigation[,] will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country").

Furthermore, because virtually every entity and industry in the world is responsible for some emissions of carbon dioxide and is thus a potential defendant in climate change nuisance actions under the theory of this case, the issues presented are

certain to recur. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31597 (June 3, 2010) (explaining that, unless permitting obligations are deferred by the agency, “over six million [stationary] sources” of greenhouse gas emissions would be subject to permitting requirements under the Clean Air Act—in “[s]ectors ... includ[ing] electricity, industrial, energy, waste treatment, agriculture, commercial and residential”). Each case gives rise to a new opportunity for federal judges to make regulatory judgments that conflict with those of the political branches and eventually with regimes imposed by other judges.

In this case, the named defendants—four private utilities and the Tennessee Valley Authority (TVA)—operate facilities in 21 States and provide electricity to millions of individuals and enterprises. If they must limit their output or shut down facilities to comply with court-mandated emissions caps, such judicial directives could transform the way the United States produces and obtains energy, limit its supply, dramatically raise its cost, and jeopardize reliable service to the public.

Cases seeking relief under similar common law theories have been filed in the Second, Fifth, and Ninth Circuits against defendants from the electric utility, oil, automotive, coal, and chemical industries. As these cases illustrate, the scope of potential allegations of injuries caused by global warming is limitless—ranging from severe weather-related events such as Hurricane Katrina, see *Comer v. Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), to the relocation of entire villages, see *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 879-80 (N.D. Cal. 2009),

to flooding, erosion, wildfires, see *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), and beyond. The threat of such litigation and the indeterminate exposure to monetary and injunctive relief that it entails will substantially impede and alter the future investment decisions and employment levels of all affected industries, and ultimately every sector of the economy.

The Second Circuit called this an “ordinary tort suit,” see Pet. App. 34a, but it plainly is not. Advocacy groups have responded to the decision below by stating they now intend to “ramp up” their litigation efforts whenever the legislative process is “mired down.” Anthony Lacey, *GHG Ruling Boosts Push for ‘Intense’ New Environmental Tort Claims*, Inside EPA Weekly Report (Inside Wash. Publ’rs., Arlington Va.), Oct. 2, 2009. The author of the Second Circuit’s opinion himself acknowledged (in subsequent public remarks) his hope that, even if the plaintiffs cannot ultimately succeed in their legal claims, their “nuisance action by nuisance action” approach to seeking emissions reductions may “help in a political sense” by providing an “impetus” for further regulatory and legislative action. *Key Judge Downplays Prospects for Successful Climate Damages Suits*, Clean Air Report, Mar. 2, 2010, <http://carboncontrolnews.com/20100302102610/Carbon-Control-Daily-News/News/key-judge-downplays-prospects-for-successful-climate-damages-suits/menu-id-202.html>.

Thus, far from “ordinary,” this litigation seeks to transfer to the judiciary standardless authority for some of the most important and sensitive economic, energy, and social policy issues presently before the country. Indeed, climate change has received such



intense focus by the political branches, and has been the subject of long and contentious international negotiation, precisely because the issues it presents will reverberate through both the national and world economies. This Court should grant certiorari to address the important and highly consequential separation of powers issues this case presents.

### STATEMENT OF THE CASE

This is one of several “climate change” lawsuits that have been brought in federal courts across the country. These common law actions seek to restrict the greenhouse gas emissions of certain enterprises, or to impose monetary liability on those entities, as claimed relief for effects of global warming, notwithstanding existing federal legislation and regulation in this field and ongoing legislative and executive actions to address these issues.

1. The complaints in this case, brought by eight States, three nonprofit land trusts, and a municipality, seek to hold the five named defendants “jointly and severally liable for ... global warming.” Pet. App. 178a. They assert that these defendants emit carbon dioxide, which contributes to elevated atmospheric levels of greenhouse gases, which in turn contributes to climate change, which in turn contributes to a wide range of alleged future risks, including “increase[s] in ... respiratory problems,” “more droughts and floods,” “wildfires,” and “widespread disruption of ecosystems [and] reduce[d] biodiversity.” *Id.* at 11a. The plaintiffs describe climate change as a “public nuisance,” purportedly actionable under federal common law, and demand an order “enjoining each of the defendants to ... cap[] its emissions of carbon dioxide and ... reduc[e] those emissions by a specified percentage each year for at

least a decade.” *Id.* at 178a. They note that several of the State plaintiffs have adopted legislative restrictions on emissions of carbon dioxide by facilities within their borders, and claim that, through federal judicial decree, they can force facilities nationwide to reduce their emissions. See Br. for Appellants at 10, No. 05-5104 (2d Cir. Dec. 16, 2005).

The district court dismissed the claims as presenting non-justiciable political questions. Pet. App. 187a. It reasoned that, because climate change is a global phenomenon attributed to global greenhouse gas emissions, a court could not resolve the claims without first determining an acceptable global level of greenhouse gas emissions and then determining which particular sectors and industries, and individual entities, should be held responsible for reducing their emissions and by what amounts to achieve that global level. *Id.* at 183a-185a. These decisions, the district court found, necessarily involve a number of “policy determination[s]” of the type properly reserved for Congress, including “the implications of [emissions reductions] on the United States’ ongoing negotiations with other nations concerning global climate change ... [and] on the United States’ energy sufficiency and thus its national security.” *Id.* at 182a-184a. In light of this conclusion, the district court found it unnecessary to address whether the plaintiffs had standing or whether federal common law provided a valid basis for their claims. *Id.* at 180a n.6, 187a.

A two-judge panel of the Second Circuit reversed. Pet. App. 3a.<sup>1</sup> Characterizing this as an “ordinary tort suit,” it held that courts could rely on the Restatement’s “reasonableness” standard to adjudicate the claims and that, because the case involved only “six domestic coal-fired electricity plants,”<sup>2</sup> judges would not have to address the broader “policy” issues identified by the district court. *Id.* at 26a, 34a, 119a. The panel further held that, in light of the transboundary effects of carbon dioxide emissions and climate change, federal common law should supply the rule of decision. *Id.* at 88a. Finally, addressing standing, the panel found the allegation that these defendants “contribute[d]” to climate change was adequate to satisfy constitutional requirements. *Id.* at 67a-73a.

The Second Circuit denied timely petitions for rehearing or rehearing en banc. Pet. App. 188a-191a.

2. This case is one of four brought thus far asserting common law claims based on allegations that particular defendants “contributed” to climate change. In each case, the district court dismissed the claims as presenting non-justiciable political questions and in two of the cases dismissed for lack of standing as well.

*California v. General Motors Corp.* (N.D. Cal.) involved a claim for monetary damages by the State of California (also a plaintiff here) against six large

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<sup>1</sup> The original panel included then-Judge Sotomayor, who was appointed to the Supreme Court on August 8, 2009, before the panel opinion issued. Pet. App. 2a n.\*.

<sup>2</sup> In fact, the complaints identify dozens of facilities owned or operated by the defendants in more than 20 States. See Compl. ¶¶ 167-186, No. 04-5669 (S.D.N.Y. July 21, 2004); Compl. ¶¶ 107-126, No. 04-5670 (S.D.N.Y. July 21, 2004).

automakers. 2007 WL 2726871, at \*1-2. The State alleged that climate change constituted a “public nuisance” under federal and state common law, and demanded a declaratory judgment “for future monetary expenses and damages incurred by the State of California in connection with the nuisance of global warming.” *Id.* The district court found that resolution of the claims would require an initial policy determination “as to what is unreasonable in the context of carbon dioxide emissions,” and therefore dismissed the claims as presenting non-justiciable political questions. *Id.* at \*6-16. An appeal was filed, but voluntarily dismissed on June 24, 2009. See No. 07-16908 (9th Cir.).

In *Native Village of Kivalina v. ExxonMobil Corp.* (N.D. Cal.), the governing bodies of an Alaskan tribal village brought suit against 24 oil, energy, and utility companies seeking compensation for costs to be incurred in relocating their village. 663 F. Supp. 2d at 868-69. They alleged that climate change has reduced sea ice around the village, threatening the village with imminent destruction from storms that erode the coastline. *Id.* As in *General Motors*, the plaintiffs in *Kivalina* styled their case as a “nuisance” cause of action. *Id.* The district court held the claims presented non-justiciable political questions and the plaintiffs lacked standing because they could not trace their alleged injuries to any of the named defendants’ emissions. *Id.* at 871-82. An appeal, filed on November 5, 2009, is pending. See No. 09-17490 (9th Cir.).

Finally, in *Comer v. Murphy Oil USA* (S.D. Miss.), a group of Mississippi residents and property owners (on behalf of a similarly situated putative class) sought compensatory and punitive damages from dozens of oil, coal, chemical, and utility companies for

harms caused by Hurricane Katrina. 585 F.3d 855, 857-60 (5th Cir. 2009). They alleged that Katrina was “fueled and intensified” by higher temperatures attributable to climate change, that the defendants had contributed to climate change through their greenhouse gas emissions, and that those entities should be held responsible for Katrina’s effects. *Id.* The district court dismissed the claims as presenting political questions and for lack of standing. *Id.* A three-judge panel of the Fifth Circuit initially reversed, see *id.*, but a grant of rehearing en banc subsequently vacated the panel opinion, see 598 F.3d 208 (5th Cir. 2010). Thereafter, due to an intervening recusal, the Fifth Circuit concluded it had lost its quorum and dismissed the appeal, leaving the district court’s decision (dismissing the lawsuit) to stand. See 607 F.3d 1049 (5th Cir. 2010).

3. These common law claims are being pursued against a backdrop of existing and expanding legislation and federal regulation. The Clean Air Act, passed by Congress in 1963 and amended several times thereafter,<sup>3</sup> created a “comprehensive national program” to address air pollution in the United States. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). In *Massachusetts v. EPA*, this Court held that greenhouse gases, including carbon dioxide, qualify as “air pollutants” under the Act, and directed EPA to consider whether they should be regulated. 549 U.S. at 528-29 (citing 42 U.S.C. § 7602(g)).

In 2009, EPA found that greenhouse gas emissions from motor vehicles “endanger public health or welfare” and should be regulated under the Clean Air

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<sup>3</sup> Pub. L. No. 88-206, 77 Stat. 392 (1963); Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2399 (1990).

Act. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009). It thereafter issued a final rule establishing emissions standards for motor vehicles, requiring (among other mandates) that new models meet an estimated combined average emissions level of 250 grams of carbon dioxide per mile. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010); see also White House, *Presidential Memorandum Regarding Fuel Efficiency Standards* (May 21, 2010) (directing EPA to consider greenhouse gas restrictions on “heavy-duty” vehicles).

EPA has since issued rules addressing greenhouse gas emissions by “stationary sources,” like facilities operated by the defendants in this case. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010). Those rules establish the contours of a permitting program that will require facilities emitting threshold quantities of greenhouse gases to secure a permit from EPA or an approved local regulatory authority when constructed or substantially modified and to meet permitting prerequisites such as emissions limits. *Id.* The program will later be extended to additional sources that emit lower levels of greenhouse gases. *Id.*

Other legislative and executive efforts to address greenhouse gas emissions and climate change have occurred both before and after *Massachusetts*,<sup>4</sup>

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<sup>4</sup> *E.g.*, National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601; Energy Security Act of 1980, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75; Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat.

including diplomatic discussions concerning international limits on greenhouse gas emissions. See *Climate Talks Continued: Son of Copenhagen*, *Economist*, June 17, 2010, at 48.

### **REASONS FOR GRANTING THE PETITION**

The questions presented by this case are recurring and of exceptional importance to the Nation, and warrant review by this Court. The Second Circuit relied on federal common law to create an unprecedented new cause of action—to impose caps on greenhouse gas emissions of individual enterprises as relief for alleged future risks of global climate change—without any supporting statutory authority and despite the fact that the Clean Air Act addresses the same subject matter. This holding expands the judiciary’s role far beyond constitutional bounds, directing courts to adjudicate claims where no causal connection exists between the challenged conduct and alleged harm, where the relief requested would not redress the alleged harm, and where adjudicating the claims would implicate fundamental policy issues reserved for the political branches.

All district courts that have considered these extraordinary common law claims have properly rejected them, see *supra* pp. 8-10, but the Second Circuit’s decision opens the door for more litigation against an endlessly expanding group of defendants, as these and other plaintiffs attempt to set national climate change policy through federal judicial policymaking. This Court should intervene now to address the demonstrable conflicts between the opinion below and the decisions of this and other

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1407; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, § 1601, 106 Stat. 2776, 2999.

Courts, and to prevent the unquestionably harmful consequences that further litigation in this case and others may bring.

**I. THE DECISION BELOW IS ERRONEOUS AND CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS REGARDING STANDING, FEDERAL COMMON LAW, AND THE POLITICAL QUESTION DOCTRINE.**

Three sets of legal doctrines—those that define the scope of federal standing (encompassing both “core” constitutional and “prudential” considerations), the limits of federal common law, and the categories of non-justiciable political questions—foreclose use of the judicial power to adjudicate the plaintiffs’ claims and to grant their requested relief. The decision below would establish a policymaking role for the judiciary of extraordinary breadth, transgressing each of these vital constitutional boundaries.

**A. The Plaintiffs Cannot Show “Global Warming” Injuries Traceable To The Actions Of, Or Redressable By Injunctions Against, The Five Defendants.**

To establish standing to bring a claim in federal court, a plaintiff must show an “injury in fact” attributable to the defendant and redressable by relief against that defendant. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiffs in this case cannot meet this standard. Climate change is not traceable to any of these defendants, and would not be redressed by the imposition of carbon dioxide emissions caps on them. See, *e.g.*, *Ctr. for Bio. Diversity v. Dep’t of Interior*, 563 F.3d 466, 478-79 (D.C. Cir. 2009); *Kivalina*, 663 F. Supp. 2d at 879-80. Rather, according to the



plaintiffs' allegations, climate change results from greenhouse gas emissions from billions of independent sources over centuries—emissions that have mixed in undifferentiated fashion in the atmosphere to gradually increase average global temperatures. See Pet. App. 9a-10a, 174a-175a. Indeed, according to the plaintiffs, the injunction they seek would merely “achieve the [defendants'] *share* of the ... reductions necessary to significantly slow the rate and magnitude of warming.” Compl. ¶ 148, No. 04-5669 (S.D.N.Y. July 21, 2004) (emphasis added); see Pet. App. 178a. In other words, under the plaintiffs' own theory, the relief they request would not by itself redress the harms alleged in the complaint.

Where, as here, the claimed injuries result from the actions of third parties—the innumerable others that have emitted carbon dioxide and other greenhouse gases over centuries—and redressing those injuries would depend upon reaching those third parties, there is no standing. See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (“the ‘case or controversy’ limitation of Art. III ... requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court”); see also, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (“[P]rudential standing encompasses ... ‘the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches ....’”) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

The Second Circuit nonetheless allowed the claims to proceed, holding that a party asserting harms relating to climate change need allege only that the

defendant “contribute[d]” to global warming. Pet. App. 69a-70a. The consequence of that holding is to permit any plaintiff claiming global-warming injuries to sue virtually any entity in the world, limited only by the reach of personal jurisdiction. The court of appeals reached that erroneous conclusion by misapplying both the standing analysis of *Massachusetts v. EPA* and the “contributor” standing theory developed in circuit cases in the context of the Clean Water Act, following *PIRG v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990). These opinions, by their terms, do not support standing here, and their unwarranted extension to climate change nuisance cases merits this Court’s review.

1. The Second Circuit held that *Massachusetts* supported the plaintiffs’ standing in this case because that decision upheld claims regarding reductions in carbon dioxide emissions to address future risks of climate change. *E.g.*, Pet. App. 75a (concluding that “*Massachusetts* disposed of [the] argument” that the lack of redressability in this case defeats standing); *id.* at 72a-73a (finding it “[t]elling” that *Massachusetts* upheld standing even though the State in that case, like the States here, “[could not] allege that [defendants’] emissions would alone cause any future harms”) (emphasis in original). But, whatever similarities may exist between the climate change allegations in this case and those in *Massachusetts*, the court of appeals ignored the fundamental difference between the *statutory* cause of action to challenge agency decisions at issue in *Massachusetts* and the *non-statutory* cause of action asserted here.

The petitioners in *Massachusetts*, which included States as well as private parties, sought judicial review of EPA’s denial of a rulemaking petition

seeking regulatory restrictions on carbon dioxide emissions from motor vehicles. 549 U.S. at 516-21. They relied on a provision of the Clean Air Act that granted them an express “right to challenge agency action unlawfully withheld.” *Id.* at 517 (citing 42 U.S.C. § 7607(b)(1) (authorizing “[a] petition for review of action of the Administrator ... under this chapter”)).

This Court held that, because the claims were brought by a State pursuant to a right of judicial review expressly conferred by Congress in the Clean Air Act, a less rigorous standing analysis applied and Massachusetts could bring the claims “without meeting all the normal standards for redressability and immediacy.” *Id.* at 515-18.<sup>5</sup> Indeed, the Court described that provision as being “of critical importance to the standing inquiry.” *Id.* at 516. “Congress,” it explained, “has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.* at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). By contrast, no statute grants any right to bring the action here, and the rationale of *Massachusetts* is inapplicable.

By extending *Massachusetts* to this common law nuisance case, the Second Circuit also ignored the fundamental difference between claims challenging governmental regulatory decisions and those seeking

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<sup>5</sup> Even under these relaxed standing requirements, *Massachusetts* upheld standing only as to the State and did not apply those standards to the private plaintiffs, citing the “special solicitude” owed to States. 549 U.S. at 518, 520. By contrast, the Second Circuit here held that the private as well as State plaintiffs have standing to maintain their lawsuits, thus defining a potentially limitless set of potential plaintiffs in such cases. Pet. App. 97a-112a.

to impose individual liability on a particular defendant. Responding to EPA's argument in *Massachusetts* that the emissions of the entire domestic motor-vehicle sector were too small a fraction of total greenhouse gas emissions to show traceability and redressability, the Court observed that regulation generally proceeds through a series of "incremental step[s]" with which an agency may "whittle away" at a "massive problem[]" "over time." *Id.* at 524-26. It would "doom most challenges to regulatory action[s]," the Court explained, if their incremental nature itself foreclosed judicial review. *Id.*

Claims seeking to impose individual liability, however, stand on an entirely different footing. A court is not a regulator and may not enter relief against a particular defendant where the plaintiff's injury is not traceable to that defendant and where relief against the defendant would not redress that injury. Where, as here, the plaintiffs are instead seeking each defendant's "share" of a set of broader reductions they desire from a larger category of entities, including non-parties, *supra* p. 14, and the claimed injuries cannot plausibly be redressed by relief against any of these defendants individually (or even collectively), the plaintiffs have no standing. See *Lujan*, 504 U.S. at 560-61.

2. The Second Circuit's decision also is inconsistent with cases from other circuits addressing the "contributor" standing theory in the context of the Clean Water Act. These cases, although relied upon by the Second Circuit, see Pet. App. 69a-72a, actually confirm that the plaintiffs lack standing.

The Clean Water Act cases, drawing on the Third Circuit's opinion in *Powell Duffryn*, hold that, when a defendant has discharged a pollutant "in

concentrations greater than allowed by its permit,” a court can presume for purposes of standing that the defendant’s emissions likely contributed to any harms of a type generally attributed to that pollutant that occur in the same waterway. 913 F.2d at 71-72. In particular, the cases establish a threshold three-part test for standing in a “contributor” case, requiring a plaintiff to “show[] that a defendant has (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) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.” *Id.*; see also, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc) (adopting *Powell Duffryn*); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 & n.24 (5th Cir. 1996) (same).

The Second Circuit acknowledged that the defendants’ emissions here do not exceed levels set by federal permit—federal law currently imposes no relevant restrictions on their emissions—and therefore the first prong of the *Powell Duffryn* test could not be met. Pet. App. 70a-71a. Nevertheless, it held that *Powell Duffryn* still supported standing because “[t]he first prong is inapplicable [when] there is no statute governing carbon dioxide emissions.” *Id.* at 71a.

This conclusion is plainly inconsistent with *Powell Duffryn* and other Clean Water Act opinions. Those opinions explained that they were defining the outer bounds of standing under Article III, see *Gaston Copper*, 204 F.3d at 152 (noting that the Clean Water Act confers standing “to the full extent allowed by the Constitution”), and found standing in those cases

only *because* the defendant's alleged discharge exceeded federally mandated limits, allowing the courts to presume that the challenged discharge could have "caused" related injuries in the relevant area. *E.g.*, *Cedar Point*, 73 F.3d at 557; *Powell Duffryn*, 913 F.2d at 72. The lack of an emissions limit does not render the prerequisite *inapplicable*, as the Second Circuit suggested, but rather means that the prerequisite *is not satisfied* and that standing therefore cannot be established based on mere "contribution." See, *e.g.*, *Powell Duffryn*, 913 F.2d at 72-73; see also *Kivalina*, 663 F. Supp. 2d at 879-80 & n.7 ("The tripartite test articulated in *Powell Duffryn* ... is stated in the conjunctive, not the disjunctive as concluded by the *AEP* court.... [I]t is illogical to conclude that the mere contribution of greenhouse gases into the atmosphere is sufficient to establish that a plaintiff's injury is fairly traceable to a defendant's conduct."). Indeed, to interpret *Powell Duffryn* to support standing in the absence of an alleged statutory violation ignores that the fundamental basis for the presumption of causation applied in that opinion—indeed, the *sole* basis—was that Congress had defined certain levels of discharge as harmful, allowing courts to infer that discharges above that level "cause" any harms that are associated with that pollutant and that are suffered by entities in the relevant geographic area. 913 F.2d at 68-72; accord *Massachusetts*, 549 U.S. at 516 (noting that Congress can affect constitutional standing analysis in particular classes of cases by exercising its "power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before").

The decision by the court of appeals to extend contributor standing to the claims at issue

dramatically expands the availability of private litigation asserting claims based on any alleged “contribution” to global warming and seeking imposition of a judicially-fashioned series of piecemeal regulatory regimes. This Court should review this unprecedented extension of standing in this exceptionally important area of law and policy.

**B. Federal Common Law Does Not Support A Climate Change Nuisance Cause Of Action.**

The Second Circuit upheld the claims in this case under federal common law even though they have no basis in any federal statute and, indeed, address a subject—carbon dioxide regulation—that is separately addressed by the comprehensive legislative scheme of the Clean Air Act. The consequence of this holding is that, while EPA is actively exercising its authority to regulate greenhouse gas emissions under the Clean Air Act, courts will be addressing precisely the same questions “through application of vague and indeterminate nuisance concepts and maxims of equity jurisprudence.” *Milwaukee II*, 451 U.S. at 317. This approach conflicts with *Milwaukee II* and recent decisions of this Court and other courts delineating the narrowly circumscribed scope of federal common law.

1. In *Milwaukee II*, this Court held that a federal common law “nuisance” claim to enjoin trans-boundary water pollution had been displaced by the “comprehensive legislative scheme” of the Clean Water Act. The Court emphasized that federal common law may be invoked only in “‘few and restricted’ instances,” and only where “the Court is compelled to consider federal questions ‘which cannot be answered from federal statutes alone.’” *Id.* at 313-14 (citations omitted); see also *id.* at 314 (“[W]hen

Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”). The Court noted that “[t]he invocation of federal common law ... in the face of congressional legislation ... is peculiarly inappropriate in areas as complex as water pollution control,” the problems of which are “particularly unsuited to the [ad hoc adjudicative] approach inevitable under a regime of federal common law.” *Id.* at 325.

The same is true of the claims in this case. Carbon dioxide is an “air pollutant” within the meaning of the Clean Air Act, see *Massachusetts*, 549 U.S. at 532 (citing 42 U.S.C. § 7602(g)), and the Act has been interpreted to provide EPA with authority to consider restrictions on greenhouse gas emissions from new and existing sources, including “stationary sources” in categories that include those of these defendants. See 75 Fed. Reg. 31514. Accordingly, through the Clean Air Act, Congress has established a legislative scheme that “speaks directly” to the alleged problem identified in the complaint, rendering resort to federal common law not only unnecessary but improper. See *Milwaukee II*, 451 U.S. at 314, 325; see also *Middlesex County Sewage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 10, 21 (1981).

The Second Circuit recognized that the Clean Air Act provides EPA with authority to regulate carbon dioxide emissions, but held that the Act does not displace federal common law claims because EPA had not fully exercised that authority. Pet. App. 137a-142a. The relevant question in assessing displacement, however, is not whether or to what extent an agency has exercised its regulatory authority but whether Congress has addressed the subject in a legislative scheme. See *Milwaukee II*, 451 U.S. at



314, 325. Once Congress legislates on the subject and delegates authority to an agency to make regulatory decisions implementing Congress's basic policy choices, federal common law claims are displaced regardless of whether and how the agency chooses to exercise its authority. *Id.* As this Court explained in *Milwaukee II*, “[d]emanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner.” *Id.* at 324.

Likewise here, the Clean Air Act delegates regulatory authority over carbon dioxide emissions to EPA, and thus displaces federal common law claims addressing those emissions without regard to whether or how the agency has exercised its authority. To hold, as the Second Circuit did, that there are still “interstices” for courts to “fill,” Pet. App. 37a, is “no different from holding that the solution Congress chose is not adequate. This [a court] cannot do.” *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

Indeed, the First Circuit previously rejected precisely the theory that the Second Circuit embraced here. In *Mattoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992), the First Circuit held that federal common law nuisance claims by city residents who had allegedly become ill from drinking contaminated water were displaced by the Safe Drinking Water Act (“SDWA”), 42 U.S.C. §§ 300f *et seq.* 980 F.2d at 2-5. Relying on *Milwaukee II*, the court found that the SDWA “indicates that Congress meant to reserve the governance of public drinking water standards to federal administrative regulation rather than [nui-

sance law].” *Id.* at 4-5. The First Circuit expressly rejected the argument—the same presented by the plaintiffs in this case—that their common law actions were not displaced because “EPA did not regulate [the pertinent type of] contamination,” *id.* at 5, explaining that “[t]he comprehensiveness of the legislative grant is not diminished, nor is the congressional intent to occupy the field rendered unclear, merely by reason of the regulatory agency’s discretionary decision to exercise less than the total spectrum of regulatory power with which it was invested.” *Id.*; accord *Illinois*, 680 F.2d at 478.

Moreover, while the displacement inquiry turns on Congress’s decisions—and not EPA’s—EPA’s actions confirm there is no room here for judge-made common law. EPA has formally found that carbon dioxide emissions “endanger” the public and has promulgated regulations under the Clean Air Act. It has imposed limits on greenhouse gas emissions by motor vehicles, see 75 Fed. Reg. 25324 (effective Jan. 2, 2011), and established a permitting program for construction or modification of “stationary sources” of greenhouse gas emissions, including facilities in categories of sources that encompass those owned or operated by these defendants, see 75 Fed. Reg. 31514. Those regulations are subject to judicial review under the Clean Air Act, and there is no basis for a court to make separate, competing assessments under tort law.

This was, in fact, the holding of the Fourth Circuit in a recent decision. In *North Carolina v. TVA*, the court held that common law nuisance claims brought by a State seeking to limit emissions of certain air pollutants by facilities operated by TVA (also a defendant here) were preempted by the “comprehensive” scheme of the Clean Air Act. 2010 WL

2891572, at \*3. Noting that “[t]he contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark,” the court concluded that “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 ... judicially managed nuisance decrees,” and thus the common law claims (in that case, brought under state law) were preempted. *Id.* at \*7, \*9. These considerations, which supported preemption of the state common law claims in *North Carolina*, confirm displacement of the federal common law claims here.

2. To imply a new common law cause of action to address climate change, when no statute supports that claim, also reflects a fundamental misunderstanding of the nature of federal common law. The precedent on which the Second Circuit relied originated more than a century ago, see, *e.g.*, *Missouri v. Illinois*, 180 U.S. 208 (1901), when the Constitution was thought to preclude any branch of government other than the judiciary from addressing interstate pollution and federal common law remained a “brooding omnipresence,” see, *e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 722 (2004). Even then, the Court stressed that such claims must be examined with “caution,” *Georgia v. Tenn. Copper Co.* 206 U.S. 230, 237 (1907), and that it would recognize only “some such demands,” *id.* (emphasis added). Indeed, it was only “a public nuisance of simple type” that could be the subject of such common law actions. *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923).

Thus, all of those cases involved immediately noxious or harmful substances that caused severe,

localized harms directly traceable to an out-of-state source. The claims here—which allege that the defendants’ emissions of carbon dioxide combine with emissions from countless other activities around the globe that have been accumulating for centuries to create a worldwide problem—bear no resemblance to those cases or any other previous tort claim. To state the obvious, they are not of a “simple type.”

The Court’s more recent jurisprudence underscores that any federal common law authority over “nuisance” that may remain is tightly constrained, and that courts may not use that “limited” and “restricted” authority to make significant policy decisions. *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Federal courts therefore cannot, for example, create a federal common law right to contribution in antitrust actions because such a right is “a matter of high policy for resolution within the legislative process.” *Id.* at 647. Nor may courts design federal common law tort standards for advisers to federally-insured thrift institutions, because weighing the relevant factors is “for those who write the laws, rather than for those who interpret them.” *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994).

The Second Circuit’s holding that wherever “regulatory gaps exist ... common law fills the interstices,” Pet. App. 37a, and that courts may therefore create federal common law to govern resolution of the sweeping and consequential policy issues raised by global climate change, departs dramatically from this jurisprudence. Cf. *Massachusetts*, 549 U.S. at 532-34 (upholding right of action when claims were brought pursuant to statutory cause of action created by Congress). Review by this Court is necessary to clarify the

limited nature of federal common law, and to confirm that, where Congress has addressed a subject by delegating responsibility to an administrative agency, a court may not assume common law authority over the same subject matter, regardless of whether it may view the agency's execution of that responsibility as incomplete or inadequate.

### **C. This Case Presents Non-Justiciable Political Questions.**

A claim presents non-justiciable political questions if its adjudication would not be governed by “judicially discoverable and manageable standards” or would require “an initial policy determination of a kind clearly for non-judicial discretion.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). The Second Circuit held that the claims in this case, premised on the allegations that these defendants' emissions are “unreasonable,” are justiciable because courts could determine the “reasonable” level of emissions by applying the Restatement (Second) of Torts.

But invoking the Restatement serves only to highlight the problem rather than solve it. The Restatement provides that courts in nuisance actions are to “weigh[] ... the gravity of the harm against the utility of the conduct.” Restatement (Second) of Torts, § 821B cmt. e. To apply such a standard to a climate change case and define a “reasonable” emissions level for these five utilities, a court would need not only to assess any potential environmental benefits that might result from imposing caps, but also to compare the social and economic value of the services these defendants provide, as well as services provided by all the other pertinent industry sectors that allegedly contribute to global climate change (including manufacturing, transportation, agriculture, petroleum, chemical, and many others).

The law provides no “right answer” to these questions: they involve policy tradeoffs that turn on how the public values different potential economic, social, and environmental risks and benefits.<sup>6</sup> *North Carolina*, 2010 WL 2891572, at \*7 (“[W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application.”). These are precisely the kinds of decisions that are reserved for the political branches and that cannot legitimately be made by the judiciary in the first instance.

1. The Second Circuit found that this case did not present a political question because the claims are framed as common law “nuisance” actions, which traditionally have been adjudicated by courts under the “reasonableness” standard. Pet. App. 27a-34a. This conclusion—that the justiciability of a claim may be judged by its title—conflicts with this Court’s approach to the political question doctrine.

*Baker* recognized that, to assess whether a claim presents a political question, courts must engage in a “discriminating inquiry into the precise facts and posture of the particular [claim].” 369 U.S. at 217. The relevant question is not whether the suit relies superficially on commonly recognized causes of action or standards, but whether one or more of the particular *issues* that must be resolved would involve the judiciary in matters properly reserved for the political branches. The Second Circuit, in concluding

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<sup>6</sup> Indeed, the fundamental importance and sensitivity of those tradeoffs are among the many reasons Congress has properly considered adopting new legislation on climate change, rather than relying upon the existing provisions of the Clean Air Act and the EPA.

that the claims in this case were justiciable because they are framed as “nuisance” claims and “nuisance” claims are generally justiciable, “essentially confus[ed] a label with an argument.” Laurence H. Tribe, et al., Wash. Legal Found., Critical Legal Issues Series No. 169, *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-14 (Jan. 2010) (noting that “the political question doctrine is about more than wordplay”).

It is clear, when one conducts the “discriminating inquiry” required by *Baker*, that the claims in this case would be governed not by “judicially discoverable and manageable standards” but instead by “policy determination[s] of a kind clearly for non-judicial discretion.” 369 U.S. at 216-17; see *Kivalina*, 663 F. Supp. 2d at 874-77. Because climate change is a *global* phenomenon, allegedly caused by centuries of global accumulations of carbon dioxide and other greenhouse gases, to determine a “reasonable” emissions level for a single defendant, a court would first need to determine the globally “reasonable” level of emissions in light of the global risks of climate change, and the global costs and benefits of emissions-producing activities and associated reduction measures. Moreover, even if the court could determine a “reasonable” global emissions level, it would then need to decide the “reasonable” emissions level for these particular defendants, requiring it to tailor emissions levels on a nation-by-nation, industry-by-industry (if not entity-by-entity and facility-by-facility) basis by weighing the gravity of harm to the plaintiffs against the utility of each defendant’s conduct. With no “principled” or “reasoned” standards to guide its decision, the court would necessarily rely on “ad hoc” and therefore

inherently arbitrary policy judgments. See *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality); *North Carolina*, 2010 WL 2891572, at \*7 (“If we are to regulate smokestack emissions by the same [nuisance] principles we use to regulate prostitution, obstacles in highways, and bullfights, we will be hard pressed to derive any manageable criteria.”) (citation omitted).

The decision in *Massachusetts* confirms that these claims present non-justiciable political questions. *Massachusetts* addressed a provision in the Clean Air Act requiring EPA to set “standards applicable to the emission of any air pollutant” which in EPA’s “judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 549 U.S. at 532-34 (quoting 42 U.S.C. § 7521(a)(1)). Because at that time EPA had not yet undertaken to evaluate the statutory “endangerment” criterion in the context of greenhouse gases, and had failed to ground its decision to deny the rulemaking petition at issue in considerations established by the statute, this Court remanded the decision to EPA for further consideration in light of the Court’s construction of the governing statute. *Id.* at 534-35.

The claim in *Massachusetts* was justiciable only because Congress had established a statutory standard governing the agency’s conduct, by which the Court could gauge the agency’s compliance with the statute without itself weighing and resolving the merits of the policy considerations that necessarily underlie that statutory standard. *Id.* at 516. Indeed, with respect to the policy considerations identified by EPA as counseling against regulation, the Court acknowledged that it had “neither the expertise nor the authority to evaluate these policy judgments.” *Id.*



at 533-34 (referring to a “laundry list” of policy judgments that would be involved in assessing such a claim). These are the very sorts of policy considerations that would have to be addressed if the claims in this case were adjudicated.

2. The Second Circuit also held that, because Congress could displace through legislation any judicially-imposed restrictions on carbon dioxide emissions, “there is no need for the protections of the political question doctrine.” Pet. App. 41a. As discussed above, see *supra* pp. 20-24, Congress already has done precisely that. In any case, the Second Circuit’s holding is not only unprecedented, but conflicts with this Court’s decision in *Vieth*.

In *Vieth*, this Court held that courts could not adjudicate claims challenging a State legislature’s “political gerrymandering” in the drawing of congressional legislative districts due to the absence of “judicially discoverable and manageable standards.” 541 U.S. at 278-80; see also *id.* at 307-08 (Kennedy, J., concurring in the judgment). The plurality opinion noted that it was “significant” that the Constitution provides Congress with authority to “make or alter” legislative districts, meaning that Congress could by legislation displace a district drawn by a State (or one re-drawn by a court in response to litigation) if it disagreed with the district’s contours or purpose. *Id.* at 275. Congress’s authority to address this issue further confirmed that it was properly reserved for the political branches. See *id.* at 285.

The Second Circuit turned this principle on its head. It found that, because Congress is empowered to address carbon dioxide emissions, and could overturn any limit established by the judiciary in a particular case, the political question doctrine *could*

*not* apply. See Pet. App. 36a-41a. In other words, according to the Second Circuit, an issue that *can* be addressed by the political branches *cannot* be a political question.

Neither this Court nor any other has ever suggested that the political question doctrine is inapplicable simply because Congress could reverse a judicially-adopted policy, or that federal courts have license to exercise full legislative and political authority unless “vetoed” by Congress. The Second Circuit’s re-formulation of the political question doctrine warrants this Court’s review.

## **II. THE JUSTICIABILITY OF CLIMATE CHANGE LAWSUITS UNDER FEDERAL COMMON LAW IS OF EXTRAORDINARY NATIONAL IMPORTANCE.**

Review is warranted in light of the extraordinary significance of these issues. The Court granted certiorari in *Massachusetts v. EPA* because of those issues’ “unusual importance.” 549 U.S. at 506. Its decision then defined the standards and the process through which federal policy in this area would be developed. Under *Massachusetts*, EPA is charged with making regulatory decisions addressing the matter under the Clean Air Act, and parties may then obtain judicial review of its actions pursuant to settled standards of administrative law. The decision below, however, establishes a separate, parallel track for *judges* to decide how to regulate greenhouse gases under the most general and open-ended tort principles, at the behest of virtually any public or private plaintiff claiming injury relating to climate change. That parallel track would bypass entirely the procedural and substantive requirements of the Clean Air Act, relying instead on judge-made common law to impose liability and set emissions levels. The

court of appeals' decision, if allowed to stand, "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," resulting in a "balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *North Carolina*, 2010 WL 2891572, at \*1; see also *id.* at \*16 ("[W]e are unwilling to sanction the least predictable and the most problematic method for resolving interstate emissions disputes, a method which would chaotically upend an entire body of clean air law ...").

The court of appeals acknowledged that "fashion[ing] a comprehensive and far-reaching solution to global climate change" would at least "arguably" fall "within the purview of the political branches." Pet. App. 25a-26a. It downplayed the impact of its own decision, however, as involving only "six ... plants." *Id.* at 26a. But the complaint actually identified dozens of facilities operated by these defendants in more than 20 States. See *supra* note 2. An order directing emissions reductions would affect the entire electricity generating industry throughout multiple regions of the country and transform the manner and cost of supplying electricity to millions of individuals and businesses. Even if the defendants in this case were the only parties whose economic activities were at issue, the potential impact on them and their customers alone would justify this Court's review of the lower court's decision.

Further, there is nothing in the Second Circuit's analysis that limits its impact to these particular defendants. Under the plaintiffs' theory, *all* enterprises on the planet are contributors to, and

therefore share responsibility for, global climate change, and thus all are potential defendants in this or any future climate change lawsuit. The three other such cases that were filed after this one named dozens of defendants from the oil, transportation, chemical, and coal industries; the range of other potential industrial, commercial, and agricultural defendants is virtually limitless. The Second Circuit's decision thus sets a precedent that threatens the basic operations of the broadest possible spectrum of the nation's businesses.

The prospect of claims seeking damages for past emissions heightens the risks and uncertainties for those businesses even further, and increases the lure for plaintiffs to bring more such cases. Each of the other climate change cases, see *supra* pp. 8-10, demands substantial damages. And each would require, as here, that a court (or jury) determine a "reasonable" emissions level in the absence of any statutory standard. Indeed, while the ostensible focus of those other cases is upon compensation for alleged past harms rather than regulatory injunctions of the type sought by the plaintiffs below, "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality) (citation omitted).

The growing number of cases invoking common law tort theories that seek to impose liability for climate change further demonstrates the urgency of certiorari. Such cases will only expand and multiply if the Second Circuit's decision is allowed to stand. And, there are a host of policy and advocacy organizations

that are or may become dissatisfied with the pace or content of action by Congress or EPA, and that will see common law litigation in this and other contexts as a way to circumvent political or legal constraints on the legislative and administrative processes. Others will perceive industry defendants as “deep pockets” to pursue for damages under the same theories. The prospect of federal courts setting nationwide emissions policy—indeed, of different federal courts setting conflicting emissions policies—on an *ad hoc*, case-by-case basis under the aegis of federal common law, at the same time that administrative processes and diplomatic negotiations by the political branches are addressing the same issues, necessitates this Court’s review.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. WILLIAM BROWNELL  
NORMAN W. FICHTHORN  
ALLISON D. WOOD  
HUNTON & WILLIAMS LLP  
1900 K Street, N.W.  
Washington, D.C. 20006  
(202) 955-1500

*Counsel for Petitioner  
Southern Company*

SHAWN PATRICK REGAN  
HUNTON & WILLIAMS LLP  
200 Park Avenue  
52nd Floor  
New York, N.Y. 10166  
(212) 309-1000

*Counsel for Petitioner  
Southern Company*

PETER D. KEISLER\*  
CARTER G. PHILLIPS  
DAVID T. BUENTE JR.  
QUIN M. SORENSON  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
pkeisler@sidley.com  
(202) 736-8000

*Counsel for Petitioners*

MARTIN H. REDISH  
NORTHWESTERN  
UNIVERSITY SCHOOL OF  
LAW  
375 East Chicago Avenue  
Chicago, Illinois 60611  
(312) 503-8545

*Counsel for Petitioners*

DONALD B. AYER  
KEVIN P. HOLEWINSKI  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
(202) 879-3939

THOMAS E. FENNELL  
MICHAEL L. RICE  
JONES DAY  
2727 North Harwood Street  
Dallas, Texas 75201  
(214) 220-3939

*Counsel for Petitioner Xcel  
Energy Inc.*

August 2, 2010

\* Counsel of Record