No. 10-174

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER CO., ET AL.,

Petitioners,

v.

CONNECTICUT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

ANDREW G. MCBRIDE
MEGAN L. BROWN*
BRENDAN T. CARR
EMILY F. SCHLEICHER
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

**Counsel of Record*

232139

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Second Circuit decision undermines the separation of powers by opening federal courts to suits against any entity that allegedly "contributes" to global warming, and by approving the judicial creation of national environmental and economic policy through the development and imposition of caps on carbon dioxide emissions.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Cited Authorities

Page

MISCELLANEOUS

INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs. This case presents an opportunity to clarify the distinction between law and policy, a concept vital to the separation of powers. Cato is concerned that allowing courts to determine policy issues—instead of legal ones—would dramatically expand the role of the federal courts, thereby relieving the legislative and executive branches of political accountability for sweeping changes to national economic and social policy.

SUMMARY OF REASONS TO GRANT THE PETITION

Respondents ask a federal judge to order six national energy companies with operations in 20 states to "abate" their "contribution[s]" to global warming "by

---

1 Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters of consent have been lodged with the Clerk, and counsel for Cato transmitted letters of intent to file this brief to counsel for all parties in this case on August 18, 2010.

requiring [them] to cap [their] carbon dioxide emissions and then reduce them by a specific percentage each year for at least a decade." Compl. ¶ 186.[2] Respondents seek this relief not to compel compliance with any binding emissions standard—no rules exist. Rather, they seek judicial intervention because, in their view, no satisfactory rule has been provided by the Article I and II Branches, which presently are debating emissions caps, perhaps the most controversial element of the many policy disputes about global warming.

In finding jurisdiction, the panel opinion conflicts with necessary limitations on federal courts' power. As every district court confronting these cases has concluded, they have neither the policy-making authority, the technical expertise, nor the constitutional responsibility to address the fundamental policy concerns implicated by this case. Permitting Respondents to obtain regulation in court will encourage the political branches—unable to reach consensus or unwilling to take unpopular action—to dodge difficult policy questions by letting the courts do their dirty work. Respondents' requested relief, and their novel and highly attenuated theory of liability thus present a fundamental challenge to the separation of powers that requires this Court's attention.

In its effort to legitimize the delegation of raw policy-making power, the panel trivializes the economic and political consequences of this case and ignores the

---

2 As used herein, "Compl." refers to the Complaint filed by State Plaintiffs-Respondents, *Connecticut, et al. v. Am. Elec. Power Co., et al.*, No. 04-05669 (S.D.N.Y. July 21, 2004).

dangers this enterprise poses to the separation of powers. Like an ostrich with its head in the proverbial sand, the panel asserts that Respondents "do not ask the district court to decide overarching policy questions" or "balanc[e] . . . broad interests" because the court would *only* be required to adjudicate the liability of the named defendants. Pet.App. 34a. This conclusion does not withstand scrutiny. While this case names only six defendants, a court cannot determine their liability without deciding overarching policy questions and engaging in the type of balancing that even the panel acknowledges would be beyond an Article III court's jurisdiction. As the United States explains, this case and others like it "are quintessentially fit for political or regulatory—not judicial—resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both plaintiffs and defendants." Brief for the Tennessee Valley Authority in Support of Petitioners at 13, *Am. Elec. Power. Co., et al. v. Connecticut, et al.*, No. 10-174 (Aug. 24, 2010) ("United States' Br.").

In finding jurisdiction, the panel makes several errors. Of those, Cato focuses on two: the panel's analysis of standing and the political question doctrine. First, the panel virtually eliminates Article III's causation requirement by permitting any entity affected by climate change to sue any alleged carbon-emitter—nearly every individual and business on the globe—that could "contribute to" the alleged and speculative consequences of hundreds of years of greenhouse gas emissions. Second, the panel eviscerates the political question doctrine by directing the district court to make complex policy judgments of far-reaching impact,

unguided by any standard from the politically accountable branches.

This Court should grant certiorari to correct these errors and provide guidance on the judiciary's proper role in this increasingly litigated area of national policy. It should act now to ensure prompt resolution of these questions of national importance, which are sure to recur.

REASONS FOR GRANTING THE PETITION

I. THE RESULT BELOW ENCOURAGES THE ARTICLE I AND II BRANCHES TO ABDICATE RESPONSIBILITY AND UNDERMINES THE SEPARATION OF POWERS.

This case is one of several seeking to impose liability for and achieve judicial abatement of the activities allegedly responsible for the warming of Earth's climate.[3] Out of the billions of individuals and businesses

3 Including this case, three major "global warming" suits against the energy industry are proceeding. In *Comer v. Murphy Oil*, Mississippi residents sued dozens of oil and gas companies for damages from Hurricane Katrina, which allegedly was intensified by global warming. The district court dismissed the case based on the political question doctrine and a lack of standing. *See Comer v. Murphy Oil USA et al.*, No. 05-436 (S.D. Miss. Aug. 30, 2007), rev'd, 585 F.3d 855 (5th Cir. 2009), vacated on grant of reh'g en banc, 598 F.3d 208 (5th Cir. 2010), appeal dismissed, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010). In *Kivalina*, an Alaskan village sued two dozen oil, energy, and utility companies for $400 million for Alaskan coastal erosion allegedly caused by global warming. The district court dismissed the claims under the political question doctrine and for lack of standing. *See Native Vill. of Kivalina v.* (Con't)

worldwide that emit carbon dioxide and other greenhouse gases, Respondents have sued six companies, asking the Southern District of New York to "permanently enjoin[] each Defendant to abate its contribution" to global warming by capping and reducing its carbon dioxide emissions over at least a decade. Compl. ¶ 186. Because the novel theory of liability and the sweeping relief requested will require "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility," *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948), this case promises to drag the federal courts far beyond "the proper—and properly limited—role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

As this Court has observed, "Congresses have eschewed enacting binding emissions limitations to combat global warming." *Massachusetts v. EPA*, 549 U.S. 497, 530 (2007). And pursuant to *Massachusetts v. EPA*, the EPA itself is currently addressing these issues, having previously observed that "[i]t is hard to imagine any issue . . . having greater 'economic and political significance' than regulation of activities that might lead to global climate change." *Control of Emissions From New Highway Vehicles and Engines,* Notice of Denial of Pet. for Rulemaking, 68 Fed. Reg. 52,922, 52,928

(Con't)
ExxonMobil Corp., 663 F. Supp 2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir. 2010). A fourth case, in which automakers were sued under nuisance theories, in 2007 met the same fate—dismissal under the political question doctrine. *See California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept 17, 2007). The appeal was voluntarily dismissed.

(Sept. 3, 2003). It is into this breach that this case calls the judiciary. If allowed to proceed, this case and others like it will require federal judges to assume the role of environmental, industrial, and economic policy czars, forcing them to act as Article III administrators over some of the most hotly-contested and momentous issues of our time.

Certiorari is manifestly appropriate. The panel's conclusions, which conflict with decisions reached by district courts confronting similar cases,[4] will have far-reaching impact. Not only are other suits pending, more litigation will follow if this Court does not withdraw the invitation to bring complex policy disputes to the courts. Under the panel's approach—which dramatically relaxes Article III's standing requirement and ignores the political question doctrine—virtually any policy dispute is within the judiciary's domain. The decision permits, and may require, a judge to set "reasonable" standards of care for greenhouse gas emissions, despite the fact that the political branches have not established any duty. Such "regulation by litigation" will pretermit administrative decisionmaking, remove fundamental policy disputes from the democratic process, and embroil the judiciary in political controversies.

---

4 These district courts' conclusions on justiciability are noteworthy, because the "discriminating inquiry" demanded by *Baker v. Carr*, 369 U.S. 186, 217 (1962), requires a court to "analyze [an] appellant's claim as it would be tried, to determine whether a political question will emerge," *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1281 (11th Cir. 2009) (citation omitted). The district courts are uniquely suited to this inquiry; they would bear the burden of finding facts about global warming, determining liability under plaintiffs' novel theories, apportioning responsibility, and, here, setting and enforcing emissions caps.

Fidelity to the separation of powers here is not mere formalism. Judicial vigilance is particularly necessary where the coordinate branches of government might not simply acquiesce to, but may welcome judicial action that relieves them of the need to make—or be held accountable for—decisions resolving difficult questions of national policy. Indeed, "[t]he more this court interferes in policymaking . . . the more we allow the Legislature to avoid difficult questions, and the more our citizens get accustomed to turning to the courts for solutions rather than to their elected officials." *Hancock v. Comm'r of Educ.*, 443 Mass. 428, 472-73 (Ma. 2005) (Corwin, J., concurring). When the judiciary "assume[s] policymaking authority . . . [r]ather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

The Article I and II Branches of government are presently wrestling with whether and how to address climate change; their debates center on the very emissions caps sought here. *See, e.g.*, *With a Whimper*, N.Y. Times, Editorial, July 23, 2010, *available at* http://www.nytimes.com/2010/07/23/opinion/23fri1.html (lamenting failure of a "stripped-down version [of climate legislation] that caps only emissions from power plants."). There is even disagreement over which of those two branches is the appropriate source of any caps. *See, e.g.*, Juliet Eilperin, *Effort to block EPA from regulating greenhouse gases fails in Senate*, Wash. Post

June 10, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/10/AR2010061004088.html (in Senate vote, "central question was whether Congress or the administration would set the rules for curbing carbon dioxide."). While accountable officials may prefer to have controversial carbon caps imposed by the branch that does not face the ballot box, this Court should not permit the judicial function to be improperly expanded as a means of relieving the coordinate branches of their responsibilities.[5]

Time and again, this Court has rejected "efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." *United States v. Richardson*, 418 U.S. 166, 192-93 (1974) (Powell, J., concurring). This Court should grant certiorari to reaffirm the judiciary's limited role relative to the other branches—a role that does not include crafting major economic and environmental policies out of whole cloth. "[A] court is likely to lose its way if it strays outside the modest bounds of its own special competence and turns the duty of adjudicating only the legal phases of a broad

---

5 Activists and litigants appear to be using the courts to extort concessions they perceive as politically unattainable. *See, e.g.*, Kristen H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. Penn. L. Rev. 1563, 1564 and 1573 n. 29 (2007) ("climate change litigation fills a niche created by the . . . absence of federal action" and "opens up the possibility of a quid pro quo: industry accepts federal mandatory emissions limits in exchange for immunity from liability").

social problem into an opportunity for formulating judgments of social policy." *Williams v. North Carolina*, 317 U.S. 287, 307 (1942) (Frankfurter, J., concurring).

II. THIS DISPUTE OVER GLOBAL WARMING IS NOT A "CASE OR CONTROVERSY" WITHIN THE MEANING OF ARTICLE III.

A. The "Case or Controversy" Limitation on Judicial Action Is Indispensible to the Separation of Powers.

Our government is premised on the division of the legislative, executive, and judicial functions into coordinate branches. "The Framers . . . knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers." *Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989).

Article III vindicates this vision by confining judicial review to "Cases" and "Controversies." U.S. Const. art. III, § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded."). This limitation "prevent[s] the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes traditionally thought to be capable of resolution through the judicial process." *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (citations and quotations omitted).

Standing "'is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2768 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). It "prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 350 (1996); *see also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (explaining that where standing "does not exist, allowing courts to oversee legislative or executive action would significantly alter the allocation of power . . . away from a democratic form of government") (citations and quotations omitted). The standing requirement thus prevents the judiciary from invading the province of the political branches or being forced to decide issues properly left to the democratic process.

B. The Decision Below Misapplies The "Causation" Aspect Of Standing, A Crucial Limitation On Article III Power.

The panel concludes that Respondents establish causation for standing purposes by alleging that Petitioners' conduct "contributes" to global climate change. Pet.App. 72a. This analysis misapplies the causation element of standing, is inconsistent with Article III, and warrants correction by this Court.

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. First, "[t]o seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact'"—an invasion of a legally protected interest which is (a) "concrete and particularized," and (b) "actual or

imminent, not conjectural or hypothetical." *Summers*, 129 S. Ct. at 1149. Second, there must be a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant," and not the product of the independent action of some third party not before the court. *Lujan*, 504 U.S. at 560. Third, it must be "likely," not merely "speculative," that injury can be "redressed by a favorable decision." *Id.* at 561. This inquiry "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752.

Although the injury-in-fact requirement has garnered more judicial attention, the "causation aspect" of standing—traceability and redressability—is equally vital. This "causation aspect" is "properly understood as designed to confine federal courts to their 'properly limited' function." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 805 (D.C. Cir. 1987). Because standing prevents the virtually limitless spread of judicial authority, "'causation' in this context is something of a term of art, taking into account not merely an estimate of effects but also considerations related to the constitutional separation of powers as that concept defines the proper role of courts in the American governmental structure." *Id.* at 801.

A plaintiff must make at least two related showings to satisfy the causation requirement. First, he must show that there is a "substantial likelihood" that the defendant's conduct caused his injury-in-fact. *Duke*

Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75 (1978). "[I]f the line of causation between the illegal conduct and the injury is too attenuated," the traceability requirement will not be met. *Allen*, 468 U.S. at 752. Second, his asserted injury must not "result[] from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41-42; *see also Lujan*, 504 U.S. at 561 (incorporating *Simon*'s third party requirement into the traceability prong of standing). Respondents, therefore, "must allege facts from which it reasonably could be inferred that, absent the [challenged conduct] . . . there is a *substantial probability* that they would" not have suffered their alleged injury-in-fact. *Warth*, 422 U.S. at 504 (emphasis added).

Respondents' chain of causation is fatally flawed because it fails to meet either requirement: it is too speculative and the harms alleged are inextricably tied to the actions and inactions of third parties and diverse natural phenomena.

The alleged chain of "causation" here involves at least the following links: (1) Carbon dioxide has existed in the Earth's atmosphere for 20 million years, and the levels have been rising since at least the 18th century, Compl. ¶ 88; (2) Petitioners allegedly emit 10% of "anthropogenic carbon dioxide emissions in the United States," *id*. at ¶ 98;[6] (3) In the Earth's atmosphere, Petitioners' carbon dioxide emissions mix with the other

6 No allegation is made as to what percentage of *global* emissions this constitutes, which would seem critical to understanding contributions to *global* warming.

90% of U.S. carbon dioxide emissions, the emissions of the rest of the world, carbon dioxide that has been in the atmosphere for "several centuries," *id*. at ¶ 87, and other global greenhouse gases, *id*. at ¶ 85; (4) Increased gases raise atmospheric temperature which, among other things, allegedly makes oceans "less efficient at removing carbon dioxide from the atmosphere, thus causing even more carbon dioxide to accumulate" in turn accelerating further the concentration of gases and atmospheric warming, *id*. at ¶ 90; (5) The gases thus accumulated are predicted to warm the Earth's atmosphere by some unspecified temperature at some unspecified time, *id*. at ¶ 91; (6) The predicted warmer atmosphere may cause various ecological effects, including sea level rise, *id.* at ¶ 113, on the one hand, and at the same time may "lower the water levels of the Great Lakes" *id.* at ¶ 122; (7) These effects may (in the case of sea level rise) cause flooding, which may erode beaches and harm tourism, *id*. at ¶ 117, or may (in the case of lake levels falling) adversely affect boat docks, requiring the extension of municipal water intakes, damaging wetlands, *id*. at ¶ 125.

Such an attenuated and speculative chain of causation is inadequate for purposes of Article III and calls to mind the "[t]he Butterfly Effect" which, in this case, "becomes an engine for judicial intervention." *Conn v. City of Reno*, 591 F.3d 1081, 1090 (9th Cir. 2010) (Kozinksi, C.J., dissenting from denial of rehearing en banc) ("if judges can draw attenuated causal connections of the sort at issue in this case, they can expand their authority to encompass a much larger sphere of activity").

Respondents' chain of causation simply is too attenuated and too dependent on natural phenomena and third parties to satisfy the "substantial likelihood" standard. Because carbon dioxide mixes in an admittedly undifferentiated manner in the atmosphere with other gases, *id*. at ¶ 85, is emitted by virtually every individual and business worldwide, Pet.App. 72a., and has been accumulating for at least centuries, Compl. ¶ 87, there simply cannot be a "substantial likelihood" that these defendants have caused or will cause Respondents' asserted injuries. Indeed, by Respondents' own allegations, Petitioners emit only 10% of U.S. carbon dioxide emissions, which is an even smaller fraction of global greenhouse gas emissions, and a vanishingly small percentage of the gases accumulating in the atmosphere for hundreds, even millions, of years. Respondents simply cannot say that, absent these companies' emissions, there is a "substantial probability" that they would *not* suffer their alleged global warming-created injuries. *Warth*, 422 U.S. at 504.

Under the panel's quite different approach, however, any person or business on the planet that allegedly "contributes" to global warming can be potentially liable—and any person allegedly harmed thereby can sue—for damages or abatement. Though the panel concluded that evaluation under the tort standard for causation was improper at this stage, Pet.App. 69a-70a, it does not follow that the panel's "contributes" standard is appropriate. Indeed, such a standard cannot be squared with the "case or controversy" requirement's causation aspect. Article III requires more. The "substantial likelihood" standard ensures that Respondents have presented a "case or controversy"

susceptible to judicial review, rather than some abstract and attenuated theory of potential harm. "Although the 'traceability' of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation, Article III does require proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) (internal citations and quotations omitted)). Without such a requirement, the federal courts would become venues for adjudication of all manner of generalized grievances and speculative theories, so long as the alleged activity arguably "contributes to" some lengthy chain of causation. But the case or controversy requirement exists to ensure that "a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant," *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976), not the actions and inactions of billions of third parties and independent natural phenomena over millennia. *See* United States' Br. 15 ("The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere.").

At bottom, Respondents have failed to satisfy Article III and cannot establish standing. Only by deviating from the "substantial likelihood" test could the panel find a "case or controversy" based on the facts alleged. This is error and, if left unchecked, will cause lasting harm to the separation of powers.

III. A REQUEST FOR JUDICIALLY-CREATED EMISSIONS CAPS PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

Even if Respondents could establish standing, their lawsuit nevertheless is nonjusticiable. The political question doctrine

> excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (internal quotation marks omitted).

Courts have traditionally declined to resolve cases that "lack . . . judicially discoverable and manageable standards for resol[ution]," or are brought "without an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217. "[U]nder our Constitution, there are some questions that cannot be answered by the judicial branch. Out of due respect for our coordinate branches and recognizing that a court is incompetent to make final resolution of certain matters, these political questions are deemed 'nonjusticiable.'" *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). While judges should not hide behind the

political question doctrine to avoid deciding legal questions that happen to be politically sensitive, this case asks courts to venture far beyond constitutional and prudential limitations on their power. Put simply, this Court must ask, "[w]ould resolution of the question demand that a court move beyond areas of judicial expertise?" *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring). Here the answer is undoubtedly "yes."

A. This Case Demands Judicial Action Unguided By Any Standard or Rule.

In concluding that the trial court erred when it dismissed these cases under the political question doctrine, the panel observed that "[f]ederal courts have long been up to the task of assessing complex scientific evidence in cases where the cause of action was based either upon the federal common law or upon a statute. They are adept in balancing the equities and in rendering judgment." Pet.App. 35a. The panel's restatement of the judiciary's general competence is no response to the uniquely global, complex, and political nature of the regulatory decisions and oversight demanded here. *Accord* United States' Br. 15. The panel has vastly oversimplified the undertaking that would be required to decide this case and erred in concluding that the issues presented are within the ken of the judiciary. The trial court correctly determined that this case turns on questions that must be addressed, if at all, by the other branches. And those branches are in fact responding to global warming concerns and considering the same issues and remedies being championed here. *See id.* at 15-17.

While Respondents attempt to frame their case as governed by run-of-the-mill nuisance principles, at their core the Complaints seek to use common law doctrines in unprecedented ways to achieve fundamental changes to national environmental, industrial, and economic policies. This is what makes this case unlike the many complex tort cases over which the judiciary has exercised jurisdiction in the past. *See id.* at 13-15.

Though the Complaints do not expressly ask these particular questions, this case demands answers to these, or variants thereof: should Petitioners' greenhouse gas emissions be regulated out of concern for their impact on Earth's climate? Given the utility of emitting activities, what emissions levels are appropriate? How should limits be phased-in and/or subsidized? What oversight is necessary? How would judicial emissions caps operate if the EPA or Congress set their own restrictions?

Respondents do not simply seek a determination that Petitioners' greenhouse gas emissions are unlawful, though that would take the courts well beyond their constitutional role. Respondents seek far more. They ask that a court, based on a record created within the confines of the judicial process, evaluate evidence of global phenomena dating back millions of years, determine complex facts about climate change, and balance a virtually endless array of competing interests to develop and impose emissions limits to reduce Petitioners' contributions by "a specifi[c] percentage," over "at least a decade." Compl. ¶ 6. This "is a broad call on judicial power to assume continuing regulatory jurisdiction . . . This far-reaching demand for relief

presents important questions of justiciability." *Gilligan*, 413 U.S. at 5; *cf. North Carolina v. Tennessee Valley Auth.*, No. 09-1623, 2010 WL 2891572, at *1 (4th Cir. July 26, 2010) (reversing injunction setting emissions caps because "[i]f allowed to stand, the injunction 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").[7] As this Court has observed in other contexts, "complicated factfinding" and "debatable social judgment[s] are not wisely required of courts unless for some reason resort cannot be had to the legislative process" which is a "preferable forum for comprehensive investigations and judgments of social value." *Pegram v. Herdrich*, 530 U.S. 211, 221 (2000). "Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (plurality opinion).

These lawsuits seek to embroil federal courts in momentous policy choices well before the political branches have decided upon any standard of care arising from greenhouse gas emissions. But "[o]ne of the most obvious limitations imposed by [Article III] is that judicial action must be governed by *standard*, by *rule*." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). The political question doctrine applies with full

---

7 Although abatement acutely presents justiciability issues, damages are also problematic. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

force where, as here, a court is asked to adjudicate tort claims "without any manageable standards for making reasoned determinations regarding the[] fundamental elements of [the] claims." *Carmichael*, 572 F.3d at 1288; *see Baker*, 369 U.S. at 216; *cf. North Carolina v. Tennessee Valley Auth.*, 2010 WL 2891572, at *9 (explaining use of nuisance suit to set emissions caps "would reorder the respective functions of courts and agencies"). Respondents seek to have the Southern District of New York make up emissions rules under the rubric of common law nuisance, and then mandate and oversee compliance. And they seek this precisely because the political branches have not provided what they deem adequate standards. This case thus presents the quintessential political question.

B. The Panel Trivializes The Significant, Intended Consequences Of This Case.

The panel takes comfort that it is only dealing with the routine nuisance liability of six named defendants, and dismisses the notion that it would be regulating "emission sources not before the court." Pet.App. 34a. But the conclusion that this case does not require a court to "determine how across-the-board emissions reductions would affect the economy and national security" is willful blindness. *Id.* If successful, Respondents will achieve—as they seek—dramatic changes to the production and sale of energy nationwide, and the panel decision will have substantial impacts on pending and future cases.

The panel's treatment of this case as involving the routine application of the common law to a narrow set of defendants overlooks the dramatic, intended effect that emissions caps will have on the national economy. For these six large energy corporations, a single judge may create, impose, and enforce years of restrictions requiring fundamental changes to operations in at least 20 states. Compl. ¶ 166-186. This will directly and irrevocably affect how energy is produced and sold, which is Respondents' stated goal. *See id.* at ¶ 5 (explaining desirability of Defendants' implementation of "practical" options such as "changing fuels" and "increasing generation from . . . wind, solar" and other sources that will "reduc[e] carbon dioxide emissions without *significantly* increasing the cost of electricity" to consumers (emphasis added)). Nor does the panel satisfactorily account for the dozens of companies presently facing similar suits, or the untold other "contributors" to global warming that will be sued under the panel's relaxed requirements. *Accord* United States' Br. 14-15.

At bottom, the panel fails to confront the enterprise in which these litigants are engaged. This case answers the call of commentators and activists for "heroic litigation to go beyond the bounds of traditional doctrine and try to promote public good through creative use of common law theories like public nuisance" to address "the climate change crisis." Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 Conn. L. Rev. 591, 626-27 (2008).

Global warming litigants in similar cases have been remarkably candid in their motives—dissatisfied with the other branches' responses to these inherently political questions, they have turned to the courts. They seek judicial action because "State and Federal Governments . . . [have] refused to regulate greenhouse gas emissions." Third Amended Complaint ¶ 39, *Comer v. Murphy Oil*, No. 05-436 (S.D. Miss. April 19, 2006). They assert that "Article III resolution is the only viable choice here as the branches of government authorized by the Articles I and II of the U.S. Constitution have refused to act." *Id*. at ¶ 18 n. 13. But alleged legislative or regulatory inaction does not change the fact that, under our system of government, "judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). Indeed, inaction by the political branches is itself a political fact for which they are properly held accountable. By ordering the lower courts to fill a void they are institutionally and constitutionally ill-suited to enter, the panel has thrown the "caution" inherent in the political question doctrine to the wind. The panel has invited a wave of litigation that promises to shift responsibility for fundamental policy decisions away from the democratic branches and into the hands of private litigants and judges. This course trivializes the political question doctrine, violates the separation of powers, and will inflict long term damage on our system of government.

IV. THIS IS THE APPROPRIATE TIME AND VEHICLE FOR THE COURT TO ADDRESS THESE QUESTIONS.

In light of the conflict of authorities, the important and recurring nature of the issues, and the procedural posture of other "global warming" cases, this is the right time and vehicle to reaffirm the core justiciability principles that give meaning to the separation of powers.

This Court should not wait for or link this case to other "global warming" cases, which might needlessly delay and complicate adjudication of the justiciability issues here. *Comer*, the next case to reach this Court, suffers from several flaws. It was correctly decided by the district court, but presents complex procedural questions. Due to the way the case was pled, the Fifth Circuit panel decision reversing the district court was vacated by a diminished *en banc* court that subsequently lost its quorum due to a remarkable *ninth* recusal before briefing concluded. Plaintiffs there have taken the extraordinary step of seeking a writ of mandamus from this Court "directing the United States Court of Appeals for the Fifth Circuit to reinstate Petitioners' appeal and return it to the panel for final adjudication." Pet. for Writ of Mandamus 6, *In re Comer et al.*, No 10-294 (Aug. 30, 2010). These procedural complexities render *Comer* a poor vehicle in comparison to this case.

Nor should this Court await the Ninth Circuit's resolution of similar justiciability issues in *Kivalina*. Plaintiffs there do not seek emissions caps, and in any event, a reviewable decision there is years away, as the

case has not been fully briefed. As the United States explains, *see* United States' Br. 9-10, much mischief can be accomplished in the Second Circuit, in litigation and adjudication of this case and filing of others like it, while this Court awaits a reviewable Ninth Circuit decision. Given that the issues are jurisdictional, allowing these cases to proceed is inconsistent with judiciary's responsibility to police its own jurisdiction.

Cato urges swift and certain action here. The Court must protect the Article III power and must act now to prevent federal judges from being forced to settle disputed and complex questions of national environmental, industrial, and economic policy that are properly the province of their coordinate branches of government.

CONCLUSION

For the reasons set forth herein and in the Petition, the Court should grant the writ of certiorari.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

ANDREW G. MCBRIDE
MEGAN L. BROWN*
BRENDAN T. CARR
EMILY F. SCHLEICHER
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

**Counsel of Record*