No. 07-60756

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ned Comer, Brenda Comer, Eric Haygood, Brenda Haygood, Larry Hunter, Sandra L. Hunter, Mitchell Kisielweski, Johanna Kisielweski, Elliott Roumain, Rosemary Roumain, Jury Olson, David Lain,

Plaintiffs-Appellants

v.

Murphy Oil USA, Universal Oil Products, Shell Oil Company, ExxonMobil Corp., AES Corp., Allegheny Energy, Inc., Alliance Resource Partners, L.P., Alpha Natural Resources, Inc., Arch Coal, Inc., BP America Production Company, Cinergy Corp., ConocoPhillips Company, Consol Energy Inc., The Dow Chemical Company, Duke Energy Corp., BP Products North America, Inc., Eon Ag, E.I. Dupont De Nemours & Co., Entergy Corp., Firstenergy Corp., Foundation Coal Holdings, Inc., FPL Group, Inc., Honeywell International Inc., International Coal Group, Inc., Massey Energy Company, Natural Resource Partners L.P., Peabody Energy Corporation, Reliant Energy, Inc., Tennessee Valley Authority, Westmoreland Coal Company, Xcel Energy, Inc., Chevron USA Inc., The American Petroleum Institute,

Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of Mississippi

EN BANC BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLEES

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May 7, 2010

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities, as described in Local Rule 28.2.1, have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualifications or recusals.

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Eric Haygood
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Universal Oil Products
Shell Oil Company
ExxonMobil Corp.
AES Corp.
Allegheny Energy Inc.
Alliance Resource Partners LP
Alpha Natural Resources Inc.
Arch Coal Inc.
BP America Production Company
Cinergy Corp.
Conocophillips Company
Consol Energy Inc.
The Dow Chemical Company
Duke Energy Corp.
BP Products North America Inc.
Eon Ag
E. I. Dupont De Nemours & Co.
Entergy Corp.
Firstenergy Corp.
Foundation Coal Holdings Inc.
FPL Group Inc.
Honeywell International Inc.
International Coal Group Inc.
Massey Energy Co.
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Peabody Energy Corp.

Reliant Energy Inc.
Tennessee Valley Authority
Westmoreland Coal Co.
Xcel Energy Inc.
Chevron USA Inc.
The American Petroleum Institute

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IDENTITY, INTEREST AND AUTHORITY OF AMICUS CURIAE

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. The instant case squarely presents an opportunity to clarify the distinction between law and policy, a concept that Cato has long advocated. Cato is concerned that allowing courts to rule on policy issues—instead of legal ones—would open the door to judges legislating from the bench, as well as decreeing entitlements to an assortment of positive "rights."

Cato files this brief pursuant to Federal Rule of Appellate Procedure 29, solely on behalf of itself. Consistent with Fifth Circuit Rule 29.2, no person or party has made a monetary contribution to the preparation or submission of this brief. Cato seeks leave of court to file this brief pursuant to Federal Rule of Appellate Procedure 29 and has filed a motion for leave contemporaneously herewith.[1]

[1] Counsel for Cato has contacted counsel for all parties and sought consent to file this *amicus* brief. Counsel for the Plaintiffs-Appellants has stated that it does

PRELIMINARY STATEMENT

The fundamental premise of our constitutional structure is the division of responsibilities between three co-equal branches of government. By providing Congress the power to make law, the Executive to enforce law, and the Judiciary to interpret law, "the Constitution diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Framers understood that so separating the powers of the federal apparatus not only protected each branch from encroachment by another, but also assigned the essential functions of government to the organ best suited to the task. Public policy disputes are best resolved by a representative and democratically accountable body; law enforcement and national defense require the swift action of a single hand; and the evenhanded interpretation of law demands the dispassion of judges removed from the vicissitudes of politics. The mission of the federal courts, then, is not the resolution of policy disputes; the judiciary instead interprets whatever laws ultimately arise from the political branches' resolution of those disputes.

In light of this framework, the Constitution's authors viewed the federal judiciary as the least likely to invade the province of its coordinate branches. "[I]n a government in which [the branches] are separated from each other, the judiciary,

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not oppose the motion. No counsel for Defendants-Appellees has expressed opposition to the motion.

from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . . It may truly be said to have neither FORCE nor WILL, but merely judgment[.]" The Federalist No. 78 at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). But the Framers also had the wisdom not to leave it to chance. The Constitution confines the power of judicial review to an enumerated set of "cases" and "controversies." U.S. Const., Art. III, sec. 2. Article III's "case or controversy" limitation "help[s] to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches, and 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). "[W]hile it executes firmly all the judicial powers intrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution." *Muskrat v. United States*, 219 U.S. 346, 355 (1911) (citations and quotations omitted).

A dispute is not "judicial in its character" when, among other reasons, the plaintiff does not have "standing" or the claim raises a "political question." The requirement that a plaintiff have standing, *i.e.*, a "personal injury fairly traceable to

the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief," *Allen v. Wright*, 468 U.S. 737, 751 (1984), ensures that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472 (1982). And the political question doctrine, for which "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations," *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939), isolates the judiciary from policy disputes the Constitution assigns to the democratic process. The standing and political question doctrines thus are mutually reinforcing: both require a federal plaintiff to "claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government—a complaint that the political institutions are awry." *Baker v. Carr*, 369 U.S. 186, 287 (1962) (Frankfurter, J., dissenting).

Plaintiffs' lawsuit violates both of these justiciability doctrines. A lawsuit seeking to regulate greenhouse gas emissions because of their alleged environmental impact is quintessentially political in character. Indeed, to their

credit, Plaintiffs have not attempted to disguise the political nature of this case: they candidly allege that "the political process has failed" to adequately respond to climate change because "state and Federal Governments . . . [have] refused to regulate greenhouse gas emissions." Third Amended Complaint at ¶¶ 20, 39, *Comer v. Murphy Oil Co., et al.*, No. 1:05-cv-00436 (S.D. Miss. April 19, 2006) ("TAC"). Plaintiffs thus have asked a federal court to remedy their dissatisfaction with the political process—what they term a "dearth of meaningful action," *id*. at ¶ 20—by awarding monetary damages to individuals allegedly harmed by global warming. In their view, "Article III resolution is the only viable choice here as the branches of government authorized by Articles I and II of the U.S. Constitution have refused to act." *Id*. at ¶ 18 n. 13. But dissatisfaction with the political process does not create a judicially-reviewable grievance.

Plaintiffs' proffered theory of causation also reveals the generalized and utterly untraceable nature of their grievance—failing to connect (because it cannot) the defendants' specific actions to the plaintiffs' particular harms. According to Plaintiffs, the undifferentiated greenhouse gas emissions made by Defendants—a cherry-picked group of companies with an alleged presence in Mississippi—have "increas[ed] . . . concentration of these gases in Earth's atmosphere," TAC at ¶ 3, which has "increase[d] the amount of solar energy trapped by Earth's atmosphere," *id.* at ¶ 4, which has "result[ed] in warmer air and water temperatures," *id.*, which

has accelerated the "melting of . . . glaciers," *id.* at ¶ 5, which has led to a "rapid rise" in the global "sea level," *id.*, which has influenced the "frequency and intensity of storms known as hurricanes," *id.* at ¶ 6, which has caused the destructive force of Hurricane Katrina, *id.* at ¶ 9. This theory is reminiscent of Dry Bones, the old children's song: "Oh, your ankle bone connected to your leg bone, your leg bone connected to your thigh bone, your thigh bone connected to your hip bone." The only difference is that the connections here are not remotely so direct or clear. The idea that a federal court would arrest the legislative process by pronouncing that a select group of companies caused global temperature to rise to the point of influencing—indeed causing—particular catastrophic weather events in the Gulf Region is unfathomable. Plaintiffs' theory of causation simply cannot satisfy the traceability prong of Article III's standing requirement and cannot support the exercise of the judicial power.

For these reasons, the district court correctly determined that it lacked subject-matter jurisdiction. By disagreeing, the panel dramatically expanded the judicial office beyond its constitutional parameters. The panel effectively relieved Plaintiffs of the need to show a traceable connection between their injury and the Defendants' conduct, inviting anyone dissatisfied with the pace of regulation or legislation to press their agenda in federal court. Under the panel's approach, no policy dispute is beyond the domain of the judiciary; indeed, the decision allows

judges to set "reasonable" standards of care, in this case for greenhouse gas emissions, despite the fact that the political branches have not established any legal duty. Such "regulation by litigation" improperly removes fundamental policy disputes from the democratic process and will inevitably embroil the judiciary in political controversies.

Time and again, the Supreme 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, 192-193 (1974) (Powell, J., concurring). This settled precedent "reflect[s] a wise view of the need for judicial restraint if we are to preserve the Judiciary as the branch 'least dangerous to the political rights of the Constitution.'" *Id*. (quoting The Federalist No. 78 at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). But if Plaintiffs' extravagant claim about the root cause of Hurricane Katrina is deemed a controversy suitable for to judicial review, then the federal judiciary is a far greater danger to liberty than the Framers imagined.

ARGUMENT

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

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

The central feature of our republican form of government is the division of the legislative, executive, and judicial functions into coordinate branches. "Their union under the Confederation had not worked well, as the members of the convention knew. Montesquieu's view that the maintenance of independence, as between the legislative, the executive and the judicial branches, was a security for the people had their full approval." *Myers v. United States*, 272 U.S. 52, 116 (1926) (citations omitted). Indeed, after "examining the particular structure" of government proposed in the Constitution, James Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47 at 301 (James Madison) (Clinton Rossiter ed., 1961). The Supreme Court has explained, therefore, that

> The essence of the separation of powers concept formulated by the Founders from the political experience and philosophy of the revolutionary era is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others is essential to the liberty and security of the people. Each branch, in its own way, is the people's agent, its fiduciary for certain purposes.

MWAA v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) (citations and quotations omitted). Put simply, the separation of power is "essential to a free government." The Federalist No. 48 at 308 (James Madison) (Clinton Rossiter ed., 1961).

Article III vindicates the Framers' vision by confining judicial review to specifically enumerated "Cases" and "Controversies." U.S. Const. Art. III, § 2; *Allen*, 468 U.S. at 750 ("[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."). The "case or controversy" requirement ensures that federal courts will "exercise no executive prerogative . . . nor any legislative function." The Federalist No. 47 at 303 (James Madison) (Clinton Rossiter ed., 1961). As one court aptly noted, "the phrase 'case or controversy' as used in the Constitution has a specialized meaning that is different from the everyday use of those terms: it is really shorthand for the 'kind of dispute suitable for resolution through the courts rather than the political process.'" *Harris v. United States*, 447 F. Supp. 2d 208, 211 (D. Conn. 2005).

By limiting judicial review to particularized disputes over the force and effect of extant law, the Framers thus declined to "set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418

U.S. at 179. Indeed, "[t]he most impassioned public policy arguments cannot eliminate the case or controversy requirement from the Constitution. If anything, the appeal to public policy should highlight . . . the separation of powers rationale from which the case or controversy doctrine flows." *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 444 (3d Cir. 1998). "Adjudicating actual controversies, not legislating social policy, is the province of the judiciary." *Id*.

One of the key "landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—'serv[ing] to identify those disputes which are appropriately resolved through the judicial process,'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Lewis v. Casey*, 518 U.S. 343, 350 (1996) (explaining that standing is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches"); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (describing the standing doctrine as "a key factor in dividing the power of government between the courts and the two political branches"); James Leonard &

Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framers' Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 6 (2001) (explaining that the standing requirement "carr[ies] out the Framers' design for a balanced government because it separates those whose claims are essentially political, and thus should be addressed to the legislature or executive branch, from others whose claims are" cognizable in federal court). As the Supreme Court has explained, "the law of . . . standing is built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752.

At base, then, the standing doctrine responds to "'an idea . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Id.* at 750 (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)); *see also Warth v. Seldin*, 422 U.S. 490, 498 (1975) (explaining that the standing doctrine is "founded in concern about the proper—and properly limited—role of the courts in a democratic society"). The requirement that litigants have standing to sue stops the judiciary from invading the province of the political branches and deciding issues that are best left to the democratic process.

Indeed, only by honoring Article III's standing requirement can federal courts thwart the "overjudicialization of the processes of self-governance." Antonin Scalia, *The Doctrine of Standing As An Essential Element of The*

Separation of Powers, 17 Suffolk U. L. Rev. 881, 881 (1983). "One of the chief faculties of the judiciary . . . is that . . . the judgment of courts may be had in concrete cases that exemplify the actual consequences of legislative or executive actions . . . . The concepts of 'standing' and 'case and controversy' tend to ensure this." Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 115 (2d ed. 1986). By granting the Plaintiffs standing, the panel expanded the judicial function and thus violated the separation of powers.

B. This Case Illustrates the Importance of Traceability to the Standing Doctrine

The Supreme Court has "established that the irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. First, the plaintiff must have suffered an "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.'" *Id.* (citations omitted). 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. *Id.* Third, it must be "likely," not merely "speculative," that the injury can be "redressed by a favorable decision." *Id.* at 561. The standing 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—the traceability and redressability requirements—are no less important to the preservation of separation of powers. This "causation aspect" of standing 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). And because the standing requirement 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 two related showings to satisfy the causation requirement. First, he must show that there is a "substantial likelihood" that the defendant's conduct caused the plaintiff's injury-in-fact. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 (1978); *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) ("Causation, or 'traceability,' examines whether it is substantially probable that the challenged acts of the defendant . . . will cause the particularized injury of the plaintiff." (citations omitted)). Under

this standard, "if 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. As a result, a federal court must dismiss a lawsuit for lack of traceability where "[t]he links in the chain of causation between the challenged . . . conduct and the asserted injury are far too weak for the chain as a whole to sustain [plaintiffs'] standing." *Id.* at 759. Where it is "purely speculative" that an injury can be traced to a defendant's action, there is no standing. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976).

Second, a plaintiff must show that his asserted injury does 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). Plaintiffs, 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). *Warth*, *Simon*, and *Allen* supply three particularly instructive examples where the Supreme Court has applied this component of the traceability requirement.

Warth involved a challenge to a town's zoning regulations on the ground that they harmed persons of low and moderate income by making it unaffordable for them to live in the town. *Id.* at 493. The Court concluded that plaintiffs failed

to trace their injury to the regulations because the lack of affordable housing was also attributable, *inter alia*, to builders' unwillingness to construct low-cost housing. *Id.* at 506-07 (dismissing case for lack of standing even though the regulations might have contributed "substantially" to the cost of housing). As the Court explained, plaintiffs "rel[ied] on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief." *Id.* at 507.

Similarly, in *Simon*—an action brought by indigents to challenge a Treasury Department decision that conferred favorable tax treatment on hospitals—the Court declared it to be "purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by" third parties not before the court. 426 U.S. at 42-43 (finding a lack of standing even assuming that the challenged decision encouraged hospitals to refrain from providing certain services to the poor). As the Court explained, "unadorned speculation will not suffice to invoke the federal judicial power." *Id.* at 44-45; *see also id*. at 45 ("Speculative inferences are necessary to connect their injury to the challenged actions of petitioners.").

And in *Allen*, the Court found that parents lacked standing to sue the IRS for failing to fulfill its obligation to deny tax-exempt status to racially discriminatory

private schools because their injury was not "fairly traceable" to the challenged conduct. *Allen*, 468 U.S. at 756-66. "The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions *only if* there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an *appreciable difference* in public school integration." *Id.* at 758 (emphasis added). But, in *Allen*, the chain of causation between IRS conduct and the asserted injury involved numerous third parties, representing links "too weak for the chain as a whole to sustain [plaintiffs'] standing." *Id.* at 759.

In sum, to satisfy Article III's causation requirement Plaintiffs must establish a "substantial likelihood" that the Defendants' conduct caused their injury *and* that their injury was not caused by third parties not before the court. The panel's decision to apply a less rigorous standard—under which the traceability requirement is satisfied if the complaint alleges that the defendant's conduct merely "contributes" to the types of injuries alleged and devoid of any inquiry into the role third parties may have played, *Comer v. Murphy Oil USA*, 585 F.3d 855, 866 (5th Cir. 2009),—cannot stand. As the Defendants write, "To assert, as the panel did, that Plaintiffs have standing to sue anyone who allegedly 'contribute[d]' to the inherently *global* phenomenon of global warming is to conclude that

Plaintiffs may sue anyone with a carbon footprint—which is to say everyone." Petition for Rehearing *En Banc* of Defendants-Appellees Murphy Oil USA *et al.*, at 12 (Nov. 30, 2009) (internal citation omitted). The causation aspect of standing does not allow litigation to proceed based on a limitless chain of inferences. Article III requires far more.

The panel also rejected the "substantial likelihood" traceability standard because, in its view, the test "essentially calls upon [the court] to evaluate the merits of plaintiffs' cause of action." *Id.* But the same charge could be leveled at the panel's own test for traceability—*i.e.*, whether the emissions "contributed" to Plaintiffs' injuries. For that matter, given that the Supreme Court has required at least *some* evaluation of causation at the standing stage, any test for determining whether a plaintiff can meet the traceability aspect could be accused of conflating standing with the merits. As the Supreme Court has explained, however, "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). The Defendants' objection is not the panel's refusal to determine whether Plaintiffs have established a proximate relationship between greenhouse gas emissions and Hurricane Katrina's damage. Instead, Defendants have objected to

the meager standard the panel set for determining whether it is "arguable" that *their* emissions caused *Plaintiffs'* injuries.

Thus, neither the panel's test nor the "substantial likelihood" test approximate the tort standard for causation. The only difference between the two is their comparative fidelity to Article III of the Constitution. A "substantial likelihood" standard ensures that Plaintiffs have presented a "case or controversy" susceptible to judicial review. *See*, *e.g.*, *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) ("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.") (internal citations and quotations omitted)). The panel's "contributes" standard, by contrast, simply cannot be squared with the "case or controversy" requirement's traceability aspect.[2]

[2] Like the panel's misplaced concern that a proper causation inquiry would improperly reach the merits, Plaintiffs' suggestion that this Court cannot question whether their attenuated chain of causation meets the "substantial probability" standard at the motion to dismiss stage, Pl. Supp. Brief at 10, is contrary to the bedrock standing law. In *Allen*, for example, the Supreme Court evaluated the claims at the motion to dismiss stage as part of its constitutional obligation to determine standing—despite the dissent's criticism of that approach. *Compare Allen*, 468 U.S. at 756-59, *with id.* at 775 (Brennan, J., dissenting); *U.S. v. SCRAP*, 412 U.S. 669, 688 (1973) ("[P]leadings must be something more than an ingenious academic exercise in the conceivable."). Here too, Plaintiffs' theory of liability must be subject to preliminary examination at the motion to dismiss stage in order to determine whether they can establish standing.

For similar reasons, the *amicus* brief of certain "senior legal scholars" does not merit serious consideration. Brief of *Amici Curiae* David E. Adelman *et al*., No. 07-60756 (filed Apr. 7, 2010). It too urges the Court to adopt an unprecedented approach to Article III standing and argues that Plaintiffs need not even establish standing because this is a private common law action, not a public law dispute. *Id.* at 6-9. But the three-part *Lujan* test is the "irreducible constitutional minimum of standing" that must be satisfied before a federal court can adjudicate the merits of *any* dispute—there is no "private common law action" exception to these constitutional requirements. *Int'l Primate Protection League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) ("[S]tanding is gauged by the specific *common-law*, statutory or constitutional claims that a party presents.") (emphasis added); *see also Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) (plaintiff with viable state court action under state law may be foreclosed from bringing the same case in federal court, if he cannot demonstrate "the requisite injury"). In any event, even a cursory review of the Third Amended Complaint reveals that Plaintiffs' case is inextricably intertwined with and dependent upon resolution of public law issues. *See, e.g.*, TAC ¶ 18 n.13.

At bottom, there can be no question that Plaintiffs have failed to satisfy Article III's causation requirement.[3] Only by deviating from the "substantial likelihood" test can Plaintiffs and their *amici* attempt to establish a "case or controversy" based on the facts they plead. As fully explained in the petitions for rehearing and the Defendants' *en banc* briefs, Plaintiffs' incredible theory of causation does not even come close to establishing a substantial likelihood that *these* defendants caused *these* alleged injuries. Nor does the Third Amended Complaint show that Plaintiffs' alleged injuries did not result from the many independent and intervening actions of third parties not before the Court. Accordingly, Plaintiffs' Third Amendment Complaint should be dismissed.

II. PLAINTIFFS' LAWSUIT ASKS A FEDERAL COURT TO MAKE FUNDAMENTAL POLICY CHOICES THAT THE CONSTITUTION HAS ALLOCATED TO THE POLITICAL BRANCHES

Even if Plaintiffs had Article III standing, their lawsuit nevertheless would be nonjusticiable under the political question doctrine. That doctrine

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[3] As explained more fully in Defendants' petitions for rehearing *en banc*, the panel's standing analysis was erroneous for at least two additional reasons. First, the panel relied on a standing test that the Fifth Circuit applies only in Clean Water Act cases. While Congress may have the power to dictate the standing inquiry by "defin[ing] injuries and articulat[ing] chains of causation that will give rise to a case or controversy where none existed before," *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007), it has not done so here. Second, the panel incorrectly relied on the standing analysis used in *Massachusetts* because the Court's holding there cannot be extended to situations where (1) the plaintiff is not a sovereign State, and (2) Congress did not authorize the action by statute and articulate a chain of causation.

> 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, 47 U.S. 221, 230 (1986) (internal quotation marks omitted).

As Justice Frankfurter warned, "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 social problem into an opportunity for formulating judgments of social policy." *Williams v. N.C.*, 317 U.S. 287, 307 (1942) (Frankfurter, J., concurring). Accordingly, 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).

This case presents a quintessentially political question: should federal and state governments regulate greenhouse gas emissions out of concern for their impact on Earth's climate? In particular, Plaintiffs seek a federal court determination that Defendants' greenhouse gas emissions—which are made by every human being and business on the planet—were unlawful. And Plaintiffs seek this conclusion not because Defendants violated any federal or state statute capping emissions or because Defendants failed to observe some EPA guideline or emissions limitation—there are no such rules or regulations. Instead, Plaintiffs urge a federal court to declare Defendants' emissions unlawful precisely *because* the legislature and executive have not done so. *See, e.g.*, TAC at ¶ 18 n.13.

Plaintiffs' lawsuit seeks to embroil a federal court in momentous and contested scientific, economic, and policy choices well before the political branches have decided upon any standard of care that might give content to potential common law duties arising from greenhouse gas emissions. Allowing this lawsuit to proceed would violate the separation of powers and would ignore the superior democratic accountability and institutional competence of the coordinate branches of government.[4]

[4] The respect for democratic accountability and institutional competence that animate the political question doctrine also find expression in complementary doctrines of administrative deference and primary jurisdiction, both of which "account[] for the different institutional competencies of agencies and courts." *Negusie v. Holder*, 129 S. Ct. 1159, 1171 (2009); *Nader v. Allegheny Airlines, Inc.*,

Even a cursory review of Plaintiffs' complaint reveals the overtly political nature of their claims. In Plaintiffs' view, the democratically accountable branches have "refused to regulate," TAC at ¶ 38, or have "tak[en] the wrong actions in those instances where they have acted," *id*. at ¶ 18 n. 13, or have failed to act because of "the substantial gap in political power between the people who cause global warming . . . and the interests most affected by global warming," *id.* at ¶ 14. This unabashed attempt to conscript the judiciary into serving as a proxy EPA may well answer the impassioned call of commentators, academics (including some *amici* in this case), and the plaintiffs' bar to seek social change through the courts. *See, e.g.*, 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) ("Desperate times call for desperate measures. In light of the climate change crisis . . . there is a need for

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426 U.S. 290, 303 (1976). Administrative agencies are politically accountable; unlike a federal court, "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984). And the agency's policymaking authority is complemented by the expertise necessary to fulfill its statutory duties. *See Wilderness Soc'y v. Morton*, 479 F.2d 842, 866 (D.C. Cir. 1973) ("Perhaps the primary rationale behind the doctrine of deference is the idea of administrative expertise."). By recognizing the institutional competence of administrative agencies, these doctrines acknowledge "the complementary roles of courts and administrative agencies in the enforcement of law" and ensure that "the limited functions of review by the judiciary are more rationally exercised." *Far E. Conference v. United States*, 342 U.S. 570, 575 (1952).

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."); Mary Christina Wood, Atmospheric Trust Litigation, in Adjudicating Climate Change: Sub-National, National, and Supra-National Approaches (William C.G. Burns & Hari M. Osofsky, eds.) (2009, Cambridge University Press) ("[J]udges have become so accustomed to issuing rulings within the detailed confines of statutory law that many may have lost the imagination to construct meaningful remedies under traditional common law. At a time in history when thinkers across the world are calling for new, innovative technologies and practices to address climate crisis, lawyers should pioneer promising, if untested, legal constructs to address carbon loading of the atmosphere"). But answering this call cannot be reconciled with constitutional limits on the judicial power.

For similar reasons, this case presents the type of generalized grievance that courts consistently find improper for judicial resolution: the gravamen of Plaintiffs' complaint is that they, like all people worldwide, have been injured by the political branches' failure to adopt comprehensive global warming policies. Federal courts are wisely reluctant to entertain lawsuits where, as here, the asserted individual interest is "comparatively minute and indeterminable." *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). Plaintiffs' grandiose theory of causation illustrates the generalized nature of any allegedly harmful activities or asserted

injuries. Some of the many links in their attenuated chain of causation are global "sea level rise," TAC at ¶ 30, and "a marked increase in global temperature." *Id.* at ¶ 40. These global effects, they allege, cause "increases in the frequency and magnitude of tropical cyclones . . . and other severe weather conditions, plus damage to many natural ecosystems." *Id*. at ¶ 9. Despite their request for damages only on behalf of Mississippians, Plaintiffs clearly seeks to vindicate interests shared by all inhabitants of the planet. Plaintiffs' lawsuit "respect[s] the nation, not individual rights," *g v. Madison*, 5 U.S. 137, 166 (1803), and is thus clearly outside "the competence of the Judiciary," *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 458 (1992).

This lawsuit becomes even more troubling when this Court considers how the adjudication of Plaintiffs' claims would proceed. *Carmichael v. Kellogg, Brown & Root Servs., Inc*., 572 F.3d 1271, 1281 (11th Cir. 2009) (explaining that a court "must analyze [an] appellant's claim as it would be tried, to determine whether a political question will emerge"). Making the requested determinations of liability, whether at summary judgment or at trial, will necessarily require the court to consider and decide, among other contested matters, if global warming is a phenomenon, whether and the extent to which it is man-made, whether it contributes to the intensity of global weather events, and whether it exacerbated Hurricane Katrina. The court also will have to evaluate and identify the relative

responsibility shared by individuals and businesses worldwide for what are admittedly undifferentiated greenhouse gas emissions, undertake (or omit) a cost-benefit analysis, assess the reasonableness of Defendants' discrete emissions and activities in light of the benefits derived therefrom, and balance the tradeoffs that come with establishing the standard of care of a greenhouse gas emitter. These tasks are well beyond the ken of the judicial office.

Moreover, Plaintiffs should not be allowed to circumvent the limits of justiciability because they cleverly masquerade their political grievance as a common law nuisance action. The political question doctrine applies with full force where, as here, a federal court has been asked to adjudicate a tort claim "without any manageable standards for making reasoned determinations regarding the[] fundamental elements of negligence claims." *Id*. at 1288. "It is difficult to see how [a court] could impose liability on [Defendants] without at least implicitly deciding the propriety of the United States' decision[s]" regarding environmental policy, which would be effectuated through a complex web of treaties, statutes, and administrative decisions. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007). Despite Plaintiffs' attempt at artful pleading, this case is not about their common law rights—it is about vindicating Plaintiffs' conception of the public interest; Plaintiffs seek to impose substantial costs on particular industries to change behavior they find objectionable because of its alleged contribution to

global environmental phenomena. In other words, Plaintiffs ask the courts to formulate environmental policy by crafting reasonableness standards for the lawfulness of decades of defendants' emissions. But "[o]ne of the most obvious limitations imposed by [Article III] is that judicial action must be governed by *standard*, by *rule*." *Lane*, 529 F.3d at 560 (internal citations and quotations omitted). In our system of government, these standards and rules are provided by the political branches, not the judiciary.

In sum, this Court is "faced with two roads diverging, one leading through the unmarked forest of judicial guesswork and one leading through the clearing of agency expertise." *Am. Trucking Ass'ns, Inc. v. ICC*, 682 F.2d 487, 492 (5th Cir. 1982). Plaintiffs' claims will require the court to balance multifarious economic, environmental, industrial, social, and international interests and policies—tasks properly left to the expertise and democratic accountability of the political branches and administrative agencies. Recognizing this case as nonjusticiable wisely protects the courts from making "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948). Indeed, the broad policy questions raised by this case are precisely the type that the political branches are engineered to answer—and which the judiciary is "specifically *designed* to be bad at." Scalia, 17 Suffolk U. L. Rev. at 896.

Certain disputes are simply not meant to be resolved in the courts. The federal judiciary is

> not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.

Alexander M. Bickel, The Supreme Court and the Idea of Progress 175 (1970).

If there is to be resolution of these questions, it must emerge from the political process. Congress and the EPA have long grappled with the appropriate approach, if any, to climate change. The EPA has stated: "It is hard to imagine any issue in the environmental area having greater economic and political significance than the regulation of activities that might lead to global climate change." 68 Fed. Reg. 52922, 52928 (Sept. 3, 2003). Plaintiffs can and should seek action from Congress and the EPA. That such action has not been forthcoming or has not satisfied Plaintiffs, however, is not cause for regulation by judicial fiat. "Corrections lie with the electoral process"—not in federal court. Leonard & Brant, 54 Rutgers L. Rev. at 55.

CONCLUSION

For all of the foregoing reasons, Cato respectfully urges the Court to affirm the judgment of the district court.

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Dated this 7th day of May, 2010.

s/ William S. Consovoy

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