No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER CO., ET AL.,

Petitioners,

v.

CONNECTICUT, ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF CATO INSTITUTE IN SUPPORT OF PETITIONERS

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

MEGAN L. BROWN
Counsel of Record
BRENDAN T. CARR
J. MICHAEL CONNOLLY
ARI MELTZER
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

February 7, 2011

234551

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

QUESTION PRESENTED

Whether Article III permits any entity claiming injury from climate change to seek judicial relief for such claims against any person or entity that it alleges "contributes to" global warming.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

CONSTITUTION AND STATUTES

RULES AND REGULATION

MISCELLANEOUS

Cited Authorities

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 important but limited role federal courts play in our system of government. Cato believes that assigning courts the role of resolving policy disputes—instead of legal ones—would dramatically expand the judicial role, thereby relieving the legislative and executive branches of political accountability for sweeping changes to national economic and social policy.

SUMMARY OF THE ARGUMENT

Respondents seek a federal court injunction ordering five energy companies with operations across the nation to "abate" their "contribution[s]" to global warming "by requiring [them] to cap [their] carbon dioxide emissions

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 intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk.

and then reduce them by a specified percentage each year for at least a decade." Complaint filed by State Plaintiffs at 49, ¶ 6, *Connecticut v. Am. Elec. Power Co.,* No. 04-05669 (S.D.N.Y. July 21, 2004) (hereinafter "Compl."). Respondents do not seek this remarkable judicial action to compel compliance with any binding standard for Petitioners' carbon dioxide emissions—no such rules exist. Instead, they invoke the jurisdiction of the federal courts by pleading common law nuisance claims, and they do so *because* no specific emissions limit has been provided by the Congress or the EPA. Those branches have been vigorously debating and considering caps on carbon dioxide emissions, which are the most controversial aspect of the many possible policy responses to concerns about global warming, and have thus far not taken what Respondents deem satisfactory action.

Though Respondents lack standing and present sweeping policy questions suitable only for the political branches, a panel of the Second Circuit deemed this case cognizable. In permitting this case to go forward, the Court of Appeals' decision subverts important structural and prudential limitations on federal courts' authority. As every district court to confront this sort of "global warming" nuisance litigation has concluded, federal courts simply do not have the policy-making authority, the technical expertise, or the constitutional responsibility to address the fundamental policy questions necessarily implicated by this case.[2] Simply put, the factual and

2. There have been four major "global warming" nuisance suits, including this lawsuit. 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 Southern District of Mississippi dismissed the case

causation issues presented do not come close to the sort of case or controversy that is properly decided by an Article III judge.

This Court should reverse the Second Circuit and make clear that this case and other global warming nuisance suits are nonjusticiable. A decision to the contrary would encourage the democratically accountable branches to abdicate their responsibility for national policies, require unmanageable judicial guesswork with sweeping impact on national (and international) affairs, and ossify federal responses to the controversial and fluid economics and science of climate change.

* * *

Our government's power is divided among three co-equal branches. This structure protects each branch

---

based on the political question doctrine and a lack of standing. *See Comer v. Murphy Oil USA, Inc.*, No. 05-436, 2007 WL 6942285 (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), petition for writ of mandamus denied, No. 10-294 (U.S. Jan. 10, 2011). 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 Northern District of California dismissed the claims under the political question doctrine and for lack of standing. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). A fourth case, a 2007 nuisance suit against automakers, was dismissed 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. These novel suits test the bounds of federal court's authority and represent a conscious effort to draw federal courts into the climate change debate.

from encroachment by the others and assigns essential functions of government to the organ best suited to the task. Public policy disputes are appropriately resolved by a representative and democratically accountable legislature; law enforcement and national defense demand swift action by a unitary executive; and the interpretation of law requires the dispassion of judges removed from the vagaries of politics. The mission of the federal courts, then, is not to resolve policy disputes but to interpret the laws that arise from the political branches' resolution of those disputes.

To ensure fidelity to this separation, the Framers confined judicial review to "cases" and "controversies." U.S. Const. art. III, § 2. This limitation "preclud[es] debilitating entanglements between the Judiciary and the two political Branches" by limiting the judicial power to "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). Courts thus "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).

The discipline imposed by Article III's standing requirements 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 Coll. v. Ams. United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *accord Lujan v. Defenders of Wildlife*, 504

U.S. 555 (1992). Similarly, the political question doctrine "is 'essentially a function of the separation of powers,' existing to restrain courts 'from inappropriate interference in the business of the other branches of Government,'" *Nixon v. United States*, 506 U.S. 224, 252-53 (1993) (Souter, J., concurring in the judgment) (citations omitted).

The standing and political question doctrines thus complement and reinforce each other: they require a 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).

Respondents' claims are nonjusticiable. First, their theory of causation cannot satisfy Article III. Due to the undifferentiated nature of carbon dioxide emissions by billions of businesses, activities, and individuals around the globe—the alleged harms are untraceable to particular actions of these defendants. The notion that traceability can be established simply by asserting that a defendant "contributes to" global warming, thereby playing some part in sea level changes and other ecological effects present the world over, misreads and improperly extends this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and cannot be squared with this Court's settled jurisprudence. This case fails to satisfy Article III's standing requirement.

This case is further nonjusticiable under the political question doctrine. The political branches have not provided any judicially manageable standards of conduct to govern

adjudication of the lawfulness of Petitioners' activities. The remarkable relief here requested—a judicial abatement order imposing at least a decade of specific emissions caps on national energy companies—starkly demonstrates that this dispute is suitable only for the political branches. Global warming litigants have made plain their claims' political nature: "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, *Comer v. Murphy Oil Co.*, No. 1:05-cv-00436, ¶¶ 20, 39 (S.D. Miss. Apr. 19, 2006). Here, the litigants were, in the words of one state Attorney General, "'trying to compel measures that will stem global warming regardless of what happens in the legislature.'"[3] But dissatisfaction with the political process does not create a judicially-cognizable grievance.

For these reasons, district courts across the country have correctly and uniformly determined that these types of claims are nonjusticiable. In disagreeing, the Second Circuit has dramatically expanded the judicial role, and foisted upon trial courts the tasks of, among other things: (1) evaluating the existence, degree, and causes of global climate change, (2) judging the impact and utility of Petitioners' activities vis-à-vis all others around the globe allegedly contributing to climate change, and (3) divining and imposing a regulatory remedy that will dramatically reshape how energy is produced and sold in this country.

---

3. Editorial, *The New Climate Litigation: How About If We Sue You for Breathing?*, The Wall Street Journal, Dec. 28, 2009, at A16 (quoting Connecticut Attorney General Richard Blumenthal, now a U.S. Senator, speaking to trade publication Carbon Control News).

This "regulation by litigation" will remove fundamental policy disputes from the democratic process and encourage the politically accountable branches to abdicate their responsibilities to craft policy solutions that have democratic legitimacy. 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).

This Court should reject the Second Circuit's decision and protect the federal judiciary from being conscripted into federal policymaking for which it is institutionally and constitutionally ill-suited.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A "CASE OR CONTROVERSY" WITHIN THE MEANING OF ARTICLE III.

A. The Separation of Powers Depends on Fidelity to the Constitution's "Case or Controversy" Requirement.

"The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). This guiding principle "long

predate[d] the American Constitution," and the Framers' concept of separation of powers was "a conglomeration of the ideas of many scholars and the experiences of many governments." Martin H. Redish, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449 (1991). Indeed, "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty" than that "the legislative, executive and judiciary departments ought to be separate and distinct." The Federalist No. 47 (Madison).

Thus was the power of government divided between the legislature, executive, and judiciary. The Constitution gave each branch certain enumerated powers that would allow them, in turn, to check the other branches' powers. *See Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) ("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."). Of these three branches, the Framers found the judiciary least likely to overstep its authority. While the legislature's powers are "more extensive, and less susceptible of precise limits," the judicial branch has clear "landmarks" that precisely define its power. The Federalist No. 48 (Madison).

These landmarks are found in Article III's "Cases and Controversies" requirement. *See* U.S. Const. art III, § 2. Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976).

This Court has long recognized that Article III prevents courts from exercising legislative or executive powers by straying beyond a "case" or "controversy." The judiciary solely "decide[s] on the rights of individuals," and those "[q]uestions, in their nature political . . . can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *see also* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framer's Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 66 (2001) (documenting early Supreme Court decisions that "reaffirmed the Framers' decision to utilize judicial review to restrain the political branches but only within the confines of actual controversies between parties"). John Marshall warned: "If the judicial power extended to every question under the Constitution [and] every question under the laws and treaties of the United States[,] . . . [t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary." *See* Jean Edward Smith, *John Marshall: Definer of a Nation* 260-61 (1996); *see also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229 (1993) ("By properly contenting itself with the decision of actual cases or controversies . . . , the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution.").

Modern Article III standing doctrine "is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Time and again the Court has reaffirmed this fundamental principle. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[Standing] is founded in concern about the proper—and properly

limited—role of the courts in a democratic society."); *Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("[T]he doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political braches."); *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) ("[Standing is] a key factor in dividing the power of government between the courts and the two political branches.").

The standing doctrine requires judicial humility: courts must "put aside" what may be a "natural urge to proceed directly to the merits" and, instead, "carefully inquire as to whether [the plaintiffs] have met their burden" of establishing standing. *Raines v. Byrd*, 521 U.S. 811, 820 (1997). While a court may be tempted to stray into the legislative and/or executive sphere, "[t]he Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring).

By adhering to Article III's requirements, courts ensure that core questions about how society will be ordered are decided in the *political* branches, where the Constitution assigns them. No matter how "[s]low, cumbersome, and unresponsive . . . the traditional electoral process may be thought at times," *United States v. Richardson*, 418 U.S. 166, 179 (1974), the legitimacy of representative government depends on this process. Indeed, "[a]ny other conclusion would mean that the Founding Fathers intended 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." *Id.*;

see Schlesinger vs. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (warning against "government by injunction"); *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").

When the judiciary properly limits its actions to "cases" and "controversies," it "recogni[zes] the strengths as well as the hazards that go with our kind of representative government," and ensures that "[t]he powers of the federal judiciary will be adequate for the great burdens placed upon them." *Schlesinger*, 418 U.S. at 222 (quoting *Flast v. Cohen*, 392 U.S. 83, 131 (1968) (Harlan, J., dissenting)).

B. The Traceability Element Is Critical to Standing, and the Second Circuit's Analysis Eviscerates Its Demands.

This Court has distilled the foundational separation of power principles into a single, modern test. This test establishes "the irreducible constitutional minimum of standing [and it] contains three elements." *Lujan*, 504 U.S. at 560. *First*, "a plaintiff must show that he is under threat of suffering 'injury in fact'"—which this Court has further defined as an invasion of a legally protected interest that is (a) "concrete and particularized," and (b) "actual and imminent, not conjectural or hypothetical." *Summers*, 129 S. Ct. at 1149; *see also Lujan*, 504 U.S. at 560. *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 . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). *Third*, it must be "likely," not merely "speculative," that the injury can be "redressed by a favorable decision." *Id.* at 561. This three-pronged 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 (internal quotation marks and citations omitted). Because these elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561.

Although the first element, injury-in-fact, has garnered more judicial attention, the "causation aspect" of standing, which includes both the traceability and redressability prongs, 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). It helps "prevent the virtually limitless spread of judicial authority." *Id.* Thus, "'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. This "Court's decisions about causation rest upon something more than mere estimates of probabilities," *id.* at 803—they are "at least as much a matter of constitutional principle," *id.* at 806.

Cognizant of the important separation of powers concerns underlying the traceability requirement, this Court requires a plaintiff to make at least two related showings to satisfy this prong of the standing inquiry. These requirements demonstrate that some fact patterns, while theoretically possible, can be simply too attenuated to satisfy Article III. The Second Circuit's "contributes to" standard does not account for the Constitution's limits on highly-attenuated theories of causation.

First, a plaintiff must show there is a "substantial likelihood" that the defendant's conduct caused his injury. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 (1978). "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; *see also 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.'" (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159, 1161 (10th Cir. 2005))). If it is "purely speculative" that an individual plaintiff's injury can be traced to a particular defendant's action, there is no standing. *Simon*, 426 U.S. at 42-43.

Second, traceability requires that the plaintiff's asserted injury must not "result[] from the independent action of some third party not before the court." *Id.* at 41-42; *see also Lujan*, 504 U.S. at 561. In sum, Respondents "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).

This Court has applied the traceability requirement in three major cases—*Warth*, *Simon*, and *Allen*. *Warth* involved a challenge to the lawfulness of a town's zoning regulations on the grounds that the regulations harmed persons of low and moderate income by preventing them from being able to afford to live in the town. The Court dismissed the action for lack of standing because "the facts alleged fail to support an actionable causal relationship." *Id.* at 507. While the zoning regulations may have contributed "substantially" to the cost of housing, Article III traceability was nonetheless missing because the lack of affordable housing was also attributable to the actions of a third party—the builders' unwillingness to construct low-cost housing. *Id*. at 506-07.

Similarly, in *Simon*—an action brought by indigents to challenge a decision of the Treasury Department that conferred favorable tax treatment on hospitals—this Court held that the plaintiffs lacked standing because, even assuming that the challenged decision encouraged hospitals to refrain from providing certain services to the poor, "[i]t is 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. *Simon*, 426 U.S. at 42-43.

Allen is to the same effect. There, parents alleged that the IRS had failed to fulfill its obligation to deny tax-exempt status to racially discriminatory private

schools. However, the plaintiffs lacked standing because their injury was not "fairly traceable" to the defendant's challenged conduct. *Allen*, 468 U.S. at 756-66. The Court stated that "[t]he 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). However, the Court concluded that the plaintiffs lacked standing because "[t]he chain of causation . . . involves numerous third parties [and their] . . . independent decisions." *Id.* at 759. In other words, "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury [we]re far too weak for the chain as a whole to sustain respondents' standing." *Id.*

Respondents' chain of causation fails both aspects of this Court's core teachings: they are too attenuated and they rest inextricably on the activities of third parties not before the Court.

Respondents' alleged chain of "causation" is too attenuated because it 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.* ¶ 98; (3) in the Earth's atmosphere, Petitioners' carbon dioxide emissions mix with the other 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.* ¶ 87, and other global greenhouse gases, *id.* ¶ 85; (4) increased gases raise atmospheric temperatures 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 the concentration of gases and atmospheric warming, *id.* ¶ 90; (5) the gases thus accumulated are predicted to warm the Earth's atmosphere by some unspecified temperature at some unspecified time, *id.* ¶ 91; (6) the resulting warmer atmosphere may cause various ecological effects, including sea level rise, *id.* ¶ 113, on the one hand, and at the same time may "lower the water levels of the Great Lakes" *id.* ¶ 122; and (7) these effects may (in the case of sea level rise) cause flooding, which may erode beaches and harm tourism, *id.* ¶ 117, or may (in the case of lake levels falling) adversely affect boat docks, requiring the extension of municipal water intakes, damaging wetlands, *id.* ¶ 125.

Such a chain of causation is inadequate for purposes of Article III and calls to mind the "butterfly effect" which, in a case like this, "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). "[I]f 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." *Id.*

Respondents' chain of causation is also too dependent on natural phenomena and third parties to satisfy the "substantial likelihood" standard. Because carbon dioxide mixes in an undifferentiated manner in the atmosphere with other gases, is emitted by virtually every individual, animal, method of transportation, and business worldwide,

and has been accumulating for at least centuries, there is not a "substantial likelihood" that these defendants have caused or will cause Respondents' asserted injuries. By Respondents' own allegations, Petitioners' emissions constitute approximately ten percent of all anthropogenic carbon dioxide emissions in the United States, Compl. ¶ 2, which represents an even smaller fraction of global greenhouse gas emissions and a vanishingly small percentage of the gases accumulating in the atmosphere for millenia. Respondents simply cannot say that, absent these particular emissions, there is a "substantial probability" that they would be spared their alleged global warming-created injuries. *Warth*, 422 U.S. at 504.

Under the panel's approach, however, any person or business on the planet that can be alleged to "contribute to" global warming can be potentially liable—and any person allegedly harmed thereby can sue—for abatement. Though the panel concluded that evaluation under the tort standard for causation was improper at this stage, it does not follow that the panel's "contributes to" standard is appropriate. Article III requires more. "[P]leadings must be something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP*, 412 U.S. 669, 688 (1973). Otherwise, every emitter, large and small, could be put through "the rigors of evidentiary proof." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 347 (2d Cir. 2009). Indeed, this Court has rejected claims on causation grounds at the motion to dismiss stage. *See Allen*, 468 U.S. at 756-59.

Nor does *Massachusetts v. EPA* support standing here. *Massachusetts* did not mark a broad relaxation of traditional standing doctrine, or even a special carve-out for coastal States to bring suit as to land threatened

by climate change, and over which they were both "sovereign" and the "owner," as the United States argues in its curious position on standing. *See* Brief of United States at 27, 28.[4] Instead, in *Massachusetts*, the Court confronted the specific context of a challenge by several States to the EPA's decision not to regulate greenhouse gas emissions under the Clean Air Act, where that federal statute granted a right to judicial review. Treating the existence of a statutory basis for the claim as "of critical importance," *Massachusetts*, 549 U.S. at 516, the Court concluded that at least one State had standing. The Court determined that "Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards" for auto emissions, and that "Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition." *Id.* "Given that procedural right *and* Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis." *Id.* at 520 (emphasis added).

Nothing in the Court's decision held or hinted that in cases lacking such a statutory basis, the Court was prepared to dispense with the traditional demands of Article III. The Second Circuit's and the Acting Solicitor General's application of *Massachusetts* reads far more into the Court's decision than is justified. Respondents here creatively proceed under the purported federal common law of nuisance. They ask a federal court to use that federal common law to craft and enforce a standard of care for greenhouse gas emissions that the political

4. Though the Acting Solicitor General concludes that "at least some" of the state Respondents have Article III standing, he notes that "the question is not free from doubt." United States' Br. at 25.

branches have never "prescribed," and for which no right to review has ever been "recognized" by Congress. *Id.* at 519, 520. Thus, this case is missing the very authorization the Court deemed "of critical importance to the standing inquiry." *Id.* at 516.

Nor does *Massachusetts* constitute a sea change in the traditional demands of Article III, including causation. Having earlier concluded that States deserved special solicitude to enforce Congress' statutory command, the Court concluded that the causation element was satisfied. The Court concluded that "EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries." *Id.* at 523. This statement cannot be taken out of context and read as a general endorsement of a relaxed "contributes to" standard for causation in the global warming or any other context. It must be understood in the context of the regulatory action Massachusetts was trying to force the EPA to take. The Court found "a 'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce . . . risk [to Massachusetts and other coastal states]." *Id.* at 521 (internal citations omitted).

The Court's analysis was informed by its apparent understanding that the EPA would use its expertise, national jurisdiction, and regulatory flexibility to regulate "the United States transportation sector" and "reduc[e] domestic automobile emissions," a step it characterized as "hardly [] tentative," though perhaps incremental. *Id.* at 524. Under the Second Circuit's approach, piecemeal and potentially inconsistent emissions caps and damage awards will be imposed on cherry-picked companies and industries, based solely on allegations that they "contribute to" global warming. This Court's causation standard is designed to filter out this type of speculative

and generalized claim. *Massachusetts* did nothing to disturb that foundational principle.

At bottom, Respondents have failed to establish Article III standing. Only by deviating from the "substantial likelihood" test, or extending *Massachusetts* well beyond its boundaries, could the panel find a cognizable "case or controversy" based on the facts alleged. If left unchecked, this error will cause lasting harm to the separation of powers and allow limitless numbers of plaintiffs to put countless defendants to the task of litigating speculative and attenuated claims.

II. THIS LAWSUIT WOULD FORCE A FEDERAL COURT TO MAKE POLICIES PROPERLY ADOPTED ONLY BY THE POLITICAL BRANCHES.

A. This Case Presents Nonjusticiable Political Questions.

Under the federal Constitution's separation of powers, "[i]t is emphatically the province and duty of the judicial department to say what the law *is*," *Marbury*, 5 U.S. at 177 (emphasis added), not what the law *should be*. The political question doctrine effectuates this core principle of the separation of powers.

Under the political question doctrine, courts wisely decline 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. These principles ensure that "[q]uestions, in their nature political, or which are, by the constitution

and laws, submitted to the executive, can never be made in this court." *Marbury*, 5 U.S. at 170.

While judges should not exploit the political question doctrine to avoid deciding questions that happen to be politically sensitive, this case asks courts to venture far beyond constitutional and prudential limitations on their power. Respondents' attempt to conscript the judiciary into serving as a proxy Congress—while consistent with the calls of commentators, academics, and the plaintiffs' bar to seek change through the courts[5]—runs afoul of constitutional limits on judicial power.

---

5. *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 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."); *see also* Mary Christina Wood, Atmospheric Trust Litigation, chapter in *Adjudicating Climate Change: Sub-National, National, And Supra-National Approaches,* 129 (William C.G. Burns & Hari M. Osofsky, eds. 2009), *available at* http://law.uoregon.edu/faculty/mwood/docs/atmospheric.pdf ("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."). Indeed, observers noted years ago that the plaintiffs' bar was likely to capitalize on global warming: "[a]s with tobacco, plaintiffs are trying out a variety of legal theories, some quite speculative." John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, BusinessWeek Online (Oct. 30, 2006), *available at* http://www.businessweek.com/magazine/content/06_44/b4007044.htm. Noting pending suits, the authors observed that "[e]ven more litigation could be in the offing." *Id.*

Key to determining whether the judiciary has power to act is the presence of judicially discoverable and manageable standards. It is precisely the lack of such standards that led Respondents to seek judicial resolution of this matter. Making the requested determination of liability, whether at summary judgment or after trial, will necessarily require the district court to consider and decide, among other contested matters: whether global warming is an actual phenomenon; whether it is man-made; and whether it contributes to public health injuries, damage to coastal resources, contaminated water supplies, and reduced agricultural output.[6] The court will then 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 regarding the countless countervailing concerns of both national and international interests; assess the reasonableness of Defendants' particular emissions and activities in light of the benefits derived therefrom; and balance the trade-offs that come with establishing the standard of care of a greenhouse gas emitter. It will also have to impose, enforce and oversee its prescribed remedy for "at least a

6. Despite Respondents' claims that such questions are the subject of "clear scientific consensus," Compl. ¶ 1, a growing number of international scientists, including many current and former participants on the United Nations Intergovernmental Panel on Climate Change, dispute some or all of these "consensus" claims. Senate Minority Staff Report for S. Env't and Pub. Works Comm., *More than 700 International Scientists Dissent Over Man-Made Global Warming Claims*, at 2 (2009), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=83947f5d-d84a-4a84-ad5d-6e2d71db52d9&CFID=74865098&CFTOKEN=32819534.

decade." Compl. ¶ 6. These tasks are squarely within the zone of activities which, if they are to be undertaken at all, are the responsibility of the legislative and executive branches.

The Second Circuit casually dismissed such concerns, reasoning that courts could turn to "familiar public nuisance precepts" or "common law tort principles" for standards to apply in this case. *Am. Elec. Power Co.*, 582 F.3d at 327-28. But such common law principles—derived from Restatements, treatises and case law—are inadequate to resolve the complex scientific, political, and foreign policy questions that this case presents. "One of the most obvious limitations imposed by [Article III, § 1, of the Constitution] is that judicial actions must be governed by *standard*, by *rule*." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (emphasis in original). In our system of government, the standards and rules necessary for judicial action are provided by the coordinate branches of government, not the judiciary. This is why federal courts generally eschew the creation of federal common law, and in particular are loathe to craft federal common law rights of action: "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Respondents cloak their political grievances in the language of common law nuisance to coax the courts into taking action that the political branches have thus far declined to take. In actuality, the courts cannot adjudicate this case without first making initial determinations about environmental policy. This is not an easy task. Congress and the EPA have been grappling with the

appropriate approach, if any, to climate change. The EPA years ago 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. 52,922, 52,928 (Sept. 8, 2003). Respondents have and should continue to seek action from Congress. That the desired action has not been forthcoming or has not been what the Respondents want is not cause for regulation by the judiciary.

The remedy sought here confirms that this case presents a nonjusticiable political question. Respondents ask a court, based on a record created within the confines of the judicial process, to 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, impose and enforce specific emissions limits to reduce Petitioners' contributions by "a specifi[c] percentage" over many years. Compl. ¶ 6. "[R]equests for injunctive relief can be particularly susceptible to justiciability problems, for they have the potential to force one branch of government—the judiciary—to intrude into the decisionmaking properly the domain of another branch—the executive." *Gordon v. Texas*, 153 F.3d 190, 194 (5th Cir. 1998); *see also Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995) ("We recognize that the difficulty in fashioning a remedy for an alleged wrong can result in a case being nonjusticiable.").

While equitable relief obviously can have a proper place in the constitutional function of the judiciary, the duration and extent of the court's ongoing involvement can and should be relevant in determining whether the judiciary has an appropriate role in a particular case. *Cf. Marble Co. v. Ripley*, 77 U.S. (1 Wall) 339, 358-59 (1870)

("If performance be decreed, the case must remain in court forever . . ."). Considering the remedies sought, the contrast between the present case and *Massachusetts v. EPA* becomes readily apparent. While the Court in *Massachusetts* performed its familiar role of construing a statute, it was the EPA that had the burden on remand of evaluating the scientific and other issues arising from the petition for rulemaking at issue in that case. 549 U.S. at 534-35. Respondents here would instead have the district court not only make those evaluations itself, but continuously oversee, evaluate and even order adjustments to Petitioners' emissions-generating activities to ensure that they adhere to judicially-established standards. These are exactly the kind of "policy choices and value determinations" that this Court has determined "[t]he Judiciary is particularly ill suited to make." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

B. Global Warming Nuisance Suits Will Encourage the Politically Accountable Branches to Abdicate Their Duties.

Under the Second Circuit's approach, virtually any policy dispute is justiciable and subject to continued judicial oversight. If allowed to stand, the decision may require a single federal judge to craft, order, and oversee specific reductions in greenhouse gas emissions—a remedy strikingly similar to the regulatory and congressional actions considered and, to date, not enacted. Such "regulation by litigation" in the federal courts will embroil the judiciary in political controversies, pretermit administrative decisionmaking, and remove fundamental policy disputes from the democratic process.

The separation of powers is not an anachronism, and should not be casually overlooked in the pursuit of desired policy outcomes. Vigilance and humility are essential where, as here, the Article I and II branches might not simply acquiesce to, but may embrace the possibility that a judicial order will relieve them of the need to answer or be held accountable for difficult questions of national policy. When the judiciary resolves difficult questions of policy, "Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide." *Cannon*, 441 U.S. at 743 (Powell, J., dissenting). "[T]he more we allow the Legislature to avoid difficult questions, . . . 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 (2005) (Corwin, J., concurring). "When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned." *Cannon*, 441 U.S. at 743 (Powell, J., dissenting).

The Article I and II branches of government have been and are presently wrestling with the appropriate governmental response, if any, to climate change. There is controversy over whether Congress or the EPA should be the source of any action, and some of the most contentious choices concern emissions caps of precisely the sort sought here.[7] Congressional votes on capping carbon emissions were the subject of intense election activity in the 2010

7. *See* Juliet Eilperin, *Effort to Block EPA from Regulating Greenhouse Gases Fails in Senate*, Wash. Post, June 10, 2010 (noting that in the Senate, the "central question was whether Congress or the administration would set the rules for curbing carbon dioxide").

mid-term cycle and have been credited with playing a large part in substantial losses by the Democratic Party.[8] On the regulatory side, the EPA is pursuing its own complex and controversial regulations under the Clean Air Act. And, the Administration's environmental policies will generate intense congressional oversight of the EPA: "[w]ith the federal government set to regulate climate-altering gases from factories and power plants for the first time, the Obama administration and the new Congress are headed for a clash that carries substantial risks for both sides." John M. Broder, *Clashes Loom, With E.P.A. Set to Limit Gases*, N.Y. Times, Dec. 31, 2010, at A1.

It should hardly come as a surprise that agreement on a government response to carbon dioxide emissions has been elusive or that the prospects seem dim for a near-term political consensus on carbon caps.[9] Yet it is into precisely that void that the Respondents and the Second Circuit would send the nation's federal courts.

While the legislative inertia that results from political battle may disappoint some, it is a salutary effect of our

---

8. *See* Darren Samuelsohn & Robin Bravender, *Democrats' Day of Reckoning Comes for Climate Vote*, Politico.com, Nov. 3, 2010, *available at* http://www.politico.com/news/stories/1110/44617.html#ixzz19zsF91V0 ("House Democrats who voted for the 2009 bill to cap greenhouse gas emissions – dubbed cap-and-tax by GOP opponents – had a terrible night. Over two dozen lawmakers who favored efforts to clamp down on heat-trapping emissions were swept away.").

9. *See, e.g.*, David A. Fahrenthold & Juliet Eilperin, *White House Takes a More Modest Plan B to Cancun Climate Talks*, Wash Post, Nov. 20, 2010, at A5 ("This is what the 2010 midterm elections will change about U.S. climate policy: Cap-and-trade was dead. Now it will be deader.").

political structure. Elected officials are "forc[ed]" to "negotiate with their opponents before they can pass binding rules that affect our lives, families, and futures. This should be a slow, grinding process. . . . [T]he incremental bipartisan gear that provides for slow and heavily contested progress . . . has a long history of success in building the great American concensus." W. Lee Rawls, *In Praise of Deadlock: How Partisan Struggle Makes Better Laws*, 112, 114 (Woodrow Wilson Center Press 2009). Inaction by the political branches is no mandate for a judicial remedy.

Elected and presidentially appointed officials, activists, and commentators may prefer to have carbon caps and other controversial environmental policies achieved as a result of litigation instead of risky votes or contentious rulemakings.[10] But this Court should not permit the judicial function to be improperly expanded. Doing so will unwisely embroil federal judges in contentious and complex policymaking, and improperly relieve the coordinate branches of the responsibilities assigned to them by our Constitution.

This Court has not been shy in rejecting "efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." *Richardson*, 418 U.S. at 192-93 (Powell,

---

10. *See, e.g.*, Kirsten 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, 1573 n.29 (2007) (noting that climate change litigation "opens up the possibility of a quid pro quo: industry accepts federal mandatory emissions limits in exchange for immunity from liability").

J., concurring). This Court should remind the lower courts of "the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498. That role does not include crafting major economic and environmental policies out of whole cloth. As this Court has observed, "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. North Carolina*, 317 U.S. 287, 307 (1942) (Frankfurter, J., concurring).

C. These Cases Will Burden Federal Courts and Ossify Regulatory Responses to Global Warming.

As noted, Congress and the EPA have been and currently are considering the extent of the threat of global warming and the proper response, if any. Congress first mandated research into air pollution in the Air Pollution Control Act of 1955. Pub. L. No. 84-159, 69 Stat. 322 (1955). The political branches began to address the environment in earnest in 1970, passing the National Environmental Policy Act and the Clean Air Act, creating the Environmental Protection Agency and the President's Council on Environmental Quality, and declaring the first nationwide Earth Day. *See* Richard J. Lazarus, *The Making of Environmental Law* 48 (2004).

Recent efforts to address climate change, including the so-called "cap and trade" bill, have disappointed activists who seek urgent action. But the pace of regulatory action is not surprising. Climate change is an extremely complex topic that depends on evolving science. Commenting on

the various efforts under consideration, a senior Obama administration official recently wondered, "Can we get it right? . . . Or is this just too big a challenge, too complex a legal, scientific, political and regulatory puzzle?" Broder, *supra*. Illustrating the complexity of fact-finding related to global warming, federal research alone on this topic spans the executive branch, with no fewer than thirteen departments and agencies contributing to annual research about climate change. U.S. Global Change Research Program, *Our Changing Planet* 4-5 (2010), *available at* http://downloads.globalchange.gov/ocp/ocp2010/ocp2010.pdf. These agencies spent a combined $2.4 billion on climate change research in 2009 and more than $6 billion between 2008 and 2010. *See id.* at 148. This massive commitment of resources to understand the nature of and possible responses to global warming underscores both the absurdity and the impossibility of a federal court determining and ordering abatement of Petitioners' contributions to global climate change.

The EPA's experience after the Supreme Court's decision in *Massachusetts* illustrates the unmanageability of the undertaking sought here—the complexity involved in crafting the very standards needed to reach a ruling that is principled, rational, and based on reasoned distinctions. After the Court instructed the EPA to reconsider the petition for rulemaking and, if appropriate, to determine whether to regulate automobile emissions under the Clean Air Act, it took more than two years for the EPA to publish proposed findings. 74 Fed. Reg. 18,886 (Apr. 24, 2009). The EPA received more than 380,000 public comments. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,500 (Dec. 15, 2009). The

agency's response to the 11,000 comments addressing scientific, technical, legal, and procedural issues filled eleven volumes spanning more than 620 pages. *See* EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, http://www.epa.gov/climatechange/endangerment.html#comments (last visited Jan. 6, 2011).

The issues implicated here are scientifically and politically controversial, and it is not absurd to think that they would implicate complexities like the EPA confronts. While anything approaching a similar influx of information would overwhelm a district court, the absence of such a thorough presentation about evolving and disputed facts would undermine the credibility of any judicial order predicated on fact-finding about global warming.

Not only would this particular case drain resources and convert the Southern District of New York into a mini-Congress or proxy EPA, this type of litigation will burden the judiciary by inviting a flood of cases by virtually any plaintiff against any conceivable source of emissions, from electric utilities to livestock farmers. But district court judges already are "burdened with extraordinary caseloads." John G. Roberts, *2010 Year-End Report on the Federal Judiciary* 8 (2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf. This case alone would linger, by design, for at least ten years after the initial order. Others like it would further burden the judicial system.

Beyond logistical challenges, the judiciary's deferential approach to administrative decisionmaking reinforces the impropriety of action here. Agency action is desirable both

for its "expertise, uniformity, wide-spread consultation, and resulting administrative guidance" and to "avoid the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J., concurring). Those same considerations counsel against compelling federal courts to take the place of Congress and the EPA.

Finally, principles of judicial finality illustrate why an administrative or legislative response to climate change is preferable. Appeals of trial court fact-finding are highly deferential, and judicial decisions in particular cases, once "final," are not easily changed. Further, obligations imposed by injunction are not lightly lifted. Federal courts are confined by myriad finality and related doctrines that, in combination with the Federal Rules, will make it exceedingly difficult to revisit judicial decisions assigning responsibility for global warming and ordering abatement of activities that might contribute thereto.

By contrast, legislatures can act "one step at a time." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). And agencies "do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967); *accord Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 863-64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed

rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").[11]

As this Court has explained in a different context, "the judiciary is well advised to refrain from imposing . . . inflexible . . . restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions . . . and to keeping abreast of ever-changing conditions." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973). So too here. The judiciary is ill-equipped to make the detailed fact and policy findings necessary to determine whether global warming exists, what parties contribute to it and how much, the amount of injury global warming inflicts upon Respondents, and whether, how, and to what degree Petitioners' emissions-producing activities should be curtailed.

---

11. The Acting Solicitor General agrees that the judicial system is ill-suited to handle global warming nuisance suits, though based on a different consequence of these same judicial finality principles. He points out that a binding judicial decision in one case may not assure a final resolution for particular defendants because other plaintiffs would not be bound by the earlier judgment. United States' Br. at 37. The risk of conflicting judgments and duplicative lawsuits involving the same activities or industries is real and should give this Court concern.

CONCLUSION

For the above reasons and to protect the traditional separation of powers between the political branches and the judiciary—which is both institutionally and constitutionally ill-suited for the role the Respondents seek to assign it—this Court should reverse the Second Circuit.

Respectfully submitted,

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

MEGAN L. BROWN
Counsel of Record
BRENDAN T. CARR
J. MICHAEL CONNOLLY
ARI MELTZER
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

February 7, 2011