No. 10-174

IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN ELECTRIC POWER COMPANY, INC., *ET AL.*
Petitioners,

v.

STATE OF CONNECTICUT, *ET AL.*
Respondents.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AND CROPLIFE AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners in all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA files *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

CropLife America ("CLA") is a nationwide trade association representing manufacturers, formulators, and distributors of crop protection and pest control products. Its members produce and sell virtually all

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[1] The parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

the active compounds used in crop protection products registered for use in the United States.

Each of the *amici* have a substantial interest in ensuring that courts follow constitutional and traditional tort law principles. The nature of this case extends far beyond the Defendants and Plaintiffs. It represents an effort to circumvent legislative and executive branches on environmental policy issues, and has national and international implications. Should the Second Circuit ruling stand and subject utilities and other businesses engaged in lawful conduct to liability for alleged global climate change impacts, *amici*'s members would be adversely affected.

STATEMENT OF THE CASE

Amici adopt Defendants' Statement of the Case.

SUMMARY OF ARGUMENT

The Second Circuit's ruling represents an unprecedented and unwise expansion of federal common law. In addition to constitutional errors highlighted by Defendants, the Second Circuit also wrongly attempts to import into what it deems the federal common law a truncated version of the tort of public nuisance. It removes two of the tort's four essential elements, the requirements that Defendants engaged in unreasonable or wrongful conduct and that such wrongful conduct caused the injuries alleged. *See* Restatement (Second) of Torts § 821B cmt. a (1979) (defining the distinct elements and purpose of the centuries old tort). If the Court permits this interpretation of public nuisance law to stand – as a matter of federal law – the result will be, for all practical purposes, a defenseless federal "super tort" subject-

ing American businesses to liability for nearly any alleged environmental or social harm.

For the past forty years, advocates of such a "catch-all" tort have been seeking this breakthrough. Previous cases have largely been tried under state common law, ranging from attempts to subject businesses to liability for smog in Los Angeles to gun violence in cities to lead paint in people's homes. *See Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2009). Most of these cases have failed. State judges, as well as federal judges applying state law, schooled in the character and elements of the 700-year-old tort have dismissed them for failure to state a claim. In the four recent climate change cases, all of the federal trial judges dismissed the cases on political question grounds, and some also dismissed on standing grounds. *See Connecticut v. Am. Elect. Power Co., Inc.,* 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 2726871 (N.D. Cal. Sept. 17, 2007); *Comer v. Murphy Oil Co.*, 585 F.3d 855, 860 n.2 (5th Cir. 2009) (reciting district court's bench ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

Both state and federal judges, therefore, have widely recognized that removing wrongdoing and causation from public nuisance theory is as extreme as removing breach and causation from negligence; the result would be a "monster that would devour in

one gulp the entire law of tort." *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001); *see also In re* Lead Paint Litig., 924 A.2d 484, 502 (N.J. 2007) ("[T]he suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability."). As one court warned, if these theories become law, "[a]ll a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 96 (N.Y. App. Div. 2003).

As discussed herein, Plaintiffs acknowledge that this litigation is an attempt to use the threat of such unyielding liability to force Defendants to change their practices or acquiesce to the Plaintiffs' regulatory or legislative preferences, regardless of the merits of those policies. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328-29 (2008) (explaining that tort duties "directly regulate" conduct). They chose the courts to advance this political agenda because the reductions in emissions they seek had been tried and denied in Congress, and at the time the suit was filed, by the then-existing Administration. Prominent legal scholar Robert Reich, who served as Secretary of Labor under President Clinton, termed lawsuits with such a purpose "regulation through litigation." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22. While initially favoring these actions as means of advancing one's political agenda, he realized their danger,

concluding they amounted to "faux legislation, which sacrifices democracy." *Id.*

The additional wrinkle this suit presents is that Plaintiffs filed their claims under federal common law, presumably as an attempt to avoid the plethora of state law decisions rejecting their expansive theories. This Court has not specifically rejected the novel theories in this case, and the Second Circuit used this perceived blank canvass to paint an unprecedented view of public nuisance law. The panel held that whenever courts determine that "regulatory gaps exist, [federal common law public nuisance can fill] those interstices." *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 330 (2d Cir. 2009). Unless the Court reverses the Second Circuit's ruling, federal public nuisance litigation will become the preeminent tool for state attorneys general, private plaintiffs and issue groups to advance political agendas outside of the checks and balances of the political process. *See Native Vill. of Kivalina*, 663 F. Supp. 2d at 877 ("Plaintiffs are in effect asking this Court to make a political judgment[.]").

This brief urges the Court to not sanction such an unsound leap in the federal common law. In addition to the fact that similar efforts have largely been rejected in the states, allowing such an action would spur a rapid expansion of federal litigation to fill "gaps" and advance political agendas in many substantive areas of the law.

ARGUMENT

I. THIS CASE IS AN UNPRECEDENTED STEP IN THE DECADES-LONG PURSUIT TO TURN THE TORT OF PUBLIC NUISANCE INTO A CATCH-ALL ENVIRONMENTAL "SUPER TORT"

A. Public Nuisance Law Has Distinct Elements and Boundaries

The tort of public nuisance has centuries of jurisprudence defining its purpose, elements and boundaries. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003) (describing how the tort originated in 12th Century English common law to enable the King to enjoin infringements on its land and force the repair any damages). In general terms, a public nuisance is an "unreasonable interference with a right common to the general public." *City of Milwaukee v. Illinois*, 451 U.S. 304, 348-49 (1981) (Blackmun, J., dissenting) (citing to the Restatement (Second) of Torts § 821B). While common law courts have applied the tort in slightly different ways, the essence of public nuisance liability has remained largely consistent, requiring four time-honored elements: (1) the existence of a "public right"; (2) unreasonable conduct by the alleged tortfeasor in interfering with that public right; (3) control of the nuisance; and (4) proximate cause between defendant's unreasonable conduct and the public nuisance, and any alleged injury. *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 452-53 (R.I. 2009) (calling the four elements "essential to establish" a public nuisance claim).

For more than 200 years of American jurisprudence, the tort has been applied to a very narrow set of circumstances, namely when defendants are engaged in common law crimes. *See Tull v. United States*, 481 U.S. 412 (1987) (public nuisance provides "a civil means to redress a miscellaneous and diversified group of minor criminal offenses") (internal quotation omitted). When applied in the courts, the inquiry starts with whether there has been an injury to a public right and works backward to determine if a responsible party exists. If the four elements of the tort can be proved, the defendant must stop from engaging in the objectively wrongful behavior, and when appropriate, abate the nuisance. Abatement liability, therefore, can be unbounded.

The quintessential public nuisance is a barrier that stops the general public from being able to use a public road or pollution that infects a public waterway. If a person blocks the road for a reasonable purpose, such as landing a distressed plane, there is no liability. "If the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it." Restatement (Second) of Torts § 821A cmt c. (1979). But, if a person unreasonably interferes with the public road, for example as part of an unauthorized protest, the *government* can enjoin the person from blocking the road and require him or her to abate any damage caused to the road. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 570 (2006).

In concert with the tort's origins, governments generally are the only parties who can bring a public

nuisance action.[2] Further, their remedies are limited to injunctive relief and abatement. *See In re Lead Paint Litig.*, 924 A.2d 484, 498-99 (N.J. 2007). While the issue has yet to arise here, "there is no right either historically, or through the Restatement (Second) of Tort's formulation, for the public entity to seek to collect money damages" in public nuisance suits. *Id.* at 498-99 (citing Restatement (Second) of Torts § 821C(1)) (noting public nuisance actions are not compensatory or punitive in nature).

By contrast, private plaintiffs, such as the land trusts in the instant case, generally cannot bring public nuisance claims. The exception is only for when the public nuisance causes a special injury to a plaintiff that is "different [in] kind from that suffered by other persons exercising the same public right." Restatement (Second) of Torts § 821C cmt. b (1979). Even the most severe harm, if of the same type as suffered by the general public to a much lesser degree, is not actionable. *See id.* ("It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree."). To subject a defendant to liability for one's special damages, a private plaintiff must show that the defendant is liable for the public nuisance by proving the tort's four elements and, in addition, that she has suffered a different-in-kind injury. Further, the only remedy available in such actions is compensation for the special injury. Private plaintiffs, including the Plaintiff land trusts, cannot seek injunctive relief or require a

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[2] Because public nuisance is a government tort, *parens patriae* standing is not needed. Whether Plaintiffs here have constitutional standing to bring this action is a separate inquiry and thoroughly discussed in the Defendants' brief.

defendant to abate a public nuisance. Those remedies are exclusive to the government.

As discussed herein, under these long-standing tenets of law none of the Plaintiffs can state a public nuisance claim. Each Defendant's GHG emissions are lawful, not unreasonable, and are not a proximate cause of Plaintiffs' alleged injuries. Further, the trusts have no cause of action because, even if their allegations are true, they have not sustained a harm different in kind than any other landowner.

B. There Has Been a Campaign to Recast Public Nuisance into a "Super Tort"

In the 1960s and 1970s, environmental interest group attorneys sensed the potential power of public nuisance law and campaigned to transform the tort from a restrained government enforcement tort into a tool for requiring businesses to remediate environmental conditions, regardless of fault. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). They tried to capitalize on the amorphous nature of the word "nuisance." *See* W. Page Keeton *et al*., Prosser & Keeton on Torts 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people."). The tort also was associated with environmental harms, it had not been used much in the post-industrialized era, and many judges did not have a view of how to apply the tort in modern times.

When Professors William Prosser and John Wade captured public nuisance doctrine in the Restate-

ment (Second) Torts § 821B (1979), several plaintiff environmental lawyers pursued changes to the Restatement's public nuisance chapters that would have, in their words, "[broken] the bounds of traditional public nuisance." Antolini, *supra*, at 838. Three of those changes are embodied in this case. First, they tried to remove the wrongful conduct requirement so courts could establish liability and set their own standards even when federal, state and local laws permit the underlying conduct. *See id.* Second, they sought to get rid of the special injury rule so that "severe" harms would be compensable even when not different-in-kind from harms to the public. *See id.* Finally, they wanted private plaintiffs, including interest groups, to be able to form class actions and seek injunctive relief and abatement costs. *See id.*

Although fully presented, none of these specific changes were included in the black letter of the Restatement (Second). While some ambiguities appear in the Restatement (Second)'s comments, the vast majority of courts, as the next section will show, have rejected these changes.

C. Courts Have Rejected Efforts to Transform Public Nuisance Into a Catch-All "Super Tort"

Public nuisance has proven not to be a tort without boundaries. The first test case, *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971), presented a scenario similar to the case at bar as plaintiffs pursued corporations for emitting gases that, when mixed together, allegedly contributed to smog in Los Angeles. Plaintiffs sued for billions of dollars in compensatory and punitive damages.

The California court, in dismissing the claims, appreciated their inconsistency with traditional public nuisance law, the political nature of the underlying issues, and the proper role of the legislature, not the judiciary, in making regulatory decisions: plaintiffs were "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the court." *Id.* at 645. The court noted that granting relief would "halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent." *Id.* at 644.

During the 1980s and 1990s, several public attorneys and contingency fee lawyers attempted to morph public nuisance theory into a catch-all tort for their high-stakes, high-publicity lawsuits when no other tort would work. They have had occasional successes,[3] such as with the Second Circuit here, but all major attempts to morph public nuisance into a "super tort" have failed. In asbestos litigation, for instance, courts rejected cases from municipalities and school districts asserting state public nuisance claims against manufacturers to abate asbestos from public and private properties. *See, e.g., Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th

[3] For example, a court allowed a pollution claim against a business that did not contribute to the pollution and never controlled the polluted land. *See State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971 (Sup. Ct. 1983). The court admitted that determining responsibility was "a political question to be decided in the legislative arena," but allowed the claim, saying "[s]omeone must pay to correct the problem." *Id.* at 977.

Cir. 1993) (public nuisance would "give rise to a cause of action . . . regardless of the defendant's degree of culpability"). In state attorney general litigation against tobacco manufacturers, the only court to address the public nuisance claim rejected it. *See Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997). Such claims were also unsuccessful in a variety of other contexts, such as harms caused by guns, lead paint, and drunk driving. *See*, *e.g.*, *City of Chicago*, 821 N.E.2d at 1099; *Lead Indus. Ass'n*, 951 A.2d at 428; *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *Goodwin v. Anheuser-Busch, Inc.,* No. BC310105, 2005 WL 280330, at *8 (Cal. Super. Ct. order Jan. 28, 2005).

Most of the rejected claims were filed by states, municipalities and other governments, and some by interest groups and private individuals.

II. PLAINTIFFS CANNOT STATE A VIABLE PUBLIC NUISANCE CLAIM UNDER THE FEDERAL COMMON LAW

As with the cases above, Plaintiffs have tried to amputate elements from public nuisance doctrine instead of pleading a case under its existing principles. The wrinkle Plaintiffs added, though, was to file their public nuisance claims under federal common law – an avenue around the growing body of state common law decisions rejecting their theories.[4]

[4] For another attempt to use federal common law public nuisance to regulate emissions see *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010).

A. Plaintiffs' Version of Public Nuisance is Unfounded in Federal and State Law

This Court should not permit the federal common law to be changed in the fundamental ways Plaintiffs suit requires in order to proceed beyond a motion to dismiss. First, the state attorneys general, municipal attorney and private land trusts all seek to eliminate the unreasonable conduct element of the tort. Second, they all seek to effectively eliminate causation, diluting this requirement so that mere contribution, regardless of amount, is sufficient to establish public nuisance liability. Third, the private trusts' claims violate the special injury rule. Their claims are based on future injuries, not actual special injuries, allege severe harm, not different harm, and seek injunctive relief, not damages.

1) Defendants Have Not Engaged in Objectively Wrongful Conduct

The Second Circuit misunderstood the "unreasonable interference" element of public nuisance theory. It removed any consideration of Defendants' conduct, holding that any known, continuing significant or long-lasting impact on a public right becomes unreasonable. *See AEP*, 582 F.3d at 352-353. The wrongfulness, acceptability or utility of the Defendants' conduct, therefore, is irrelevant to establish

federal liability.[5] In this way, the Second Circuit takes a giant leap from the tort's historical application that public nuisance liability arises only when a *defendant's conduct* is "contrary to common standards of decency" and akin to a "common law crime." *See* Restatement (Second) of Torts §821B cmt. b.[6]

Similar to removing the element of breach from negligence claims, removing unreasonable conduct from public nuisance theory broadly expands the federal tort and an actor's potential liability. *See City of Chicago v. Am. Cyanamid Co.*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003) (noting plaintiffs will "deliberately frame[] [their] case as a public nuisance action" to get around constraints of the American legal system). It also removes a fun-

[5] In *Kivalina*, plaintiffs further stray from the unreasonable conduct requirement, arguing that the unreasonableness determination "is not one of whether the defendant's conduct is reasonable or unreasonable but rather one of who should bear the cost of that conduct." Brief of Appellants, *Native Village of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir. Mar. 10, 2010) at *25.

[6] Unreasonable harm is a concept limited to the state common law tort of *private nuisance*, which is an action in equity always between conflicting uses of neighboring private properties. The injury is the intentional interference with the use of the property. No public right or collective harm is involved. *See* Restatement (Second) § 829A cmt. a (1979) (this rule "applies to conduct that results in a private nuisance"); W. Page Keeton, et al., Prosser and Keeton on Torts 651-52 (5th ed. 1984) (when the interference "affect[s] the plaintiff in a substantial way," it "constitute[s] a private nuisance"). Private and public nuisances are distinct torts; they "are quite unrelated except in the vague general way that each of them causes inconvenience to someone" and the two share a "common name." William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966).

damental requirement for all tort law: that defendants have notice that they are engaged in conduct that could give rise to liability and, accordingly, could take measures to avoid such liability. *See Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to common law liability); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998) ("severe retroactive liability on a limited class of parties that could not have been anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience" stretches constitutional limits). In prototypical public nuisance cases, determining whether conduct is "reasonable" or "unreasonable" is rarely controversial because public nuisances have little to no public benefit. *See* Restatement (Second) of Torts § 821 cmt. e (1979).

Under an unreasonable conduct analysis, it becomes clear that Defendants cannot be liable in public nuisance law, which is presumably why Plaintiffs are trying to manipulate the tort. Conduct that is permitted by a regulatory framework is *per se* reasonable because it reflects the policy judgment of the legislature. For example, claims filed against railroads for noise and air pollution affecting the communities near tracks often fail for this reason.[7]

As Defendants and the Second Circuit have detailed, Congress and administrations have long considered climate change allegations along with affordability, national security and the many other issues

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[7] "[T]he operation of the railroad . . . in accordance with the expectations of the legislature," is not an unreasonable conflict with a public right. Gifford, *supra*, at 803.

that shape America's energy policy. *See* Pet. Brief at *5-10 (observing that Presidents George H.W. Bush, Clinton and Obama negotiated treaties on global emissions and Congress has considered numerous climate-related bills); *AEP,* 582 F.3d at 381-88. The Second Circuit, however, states with frustration that none of the legislative or executive actions resulted in binding emission caps. *See AEP,* 582 F.3d at 381-88 (requiring "research, planning and strategizing technology development, assessments, and monitoring, but no real action to abate emissions"). It concludes that "until" Congress or EPA caps GHG emissions, plaintiffs have a viable claim. *See id.* at 388.

The Second Circuit fails to recognize, however, that Congress and federal regulators have considered emission caps for thirty years and have thus far declined to impose them. *See City of Milwaukee*, 451 U.S. at 320 ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner."). For example, in 1997 the United States Senate unanimously (95-0) voted that "the United States should not be a signatory to any protocol. . . which would (A) mandate new commitments to limit or reduce greenhouse gas emissions." S. Res. 98, 105th Cong. (1997). More recently, members of Congress in both political parties said they "would not be inclined to support any bill that attached a cost to carbon emissions." Jessica Dye, *Senate Punts Climate Bill to Fall, Puts Focus on BP*, Law 360, July 22, 2010 (reporting that legislation seeking a 17 percent reduction over ten years – nearly half that sought here – did not have support of Congress); Jessica Dye, *Lugar Floats New Energy Plan Minus Cap-And-Trade*, Law 360, March 10,

2010 (noting Congress is "scrap[ping] greenhouse gas emission reduction goals").

As Defendants also explain, since the Second Circuit's ruling, there has remained an active, continuing debate in Congress and the EPA regarding GHG emissions. These efforts are a testament to the complexity of setting such standards and the appropriateness of developing such limits, if at all, through the political process after adequate research and development. The activities underlying global climate change lawsuits involve producing energy necessary to modern life. The public relies on this energy for turning on lights, heating homes, running appliances, and meeting their most basic transportation needs. Balancing the benefits of producing energy with the cost of that energy is part of the delicate balancing in which Congress and administrative agencies engage when determining appropriate energy regulations.[8]

Plaintiffs clearly do not agree with Defendants' operations, but whether Defendants' conduct is unreasonable in the context of public nuisance law is not determined by Plaintiffs' personal preferences. There also is nothing objectively reasonable about the caps on carbon dioxide that the Plaintiffs seek.

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[8] If energy prices included "costs" of alleged weather-related harms, the average American's utility bills would skyrocket. *See* Affordable Power Alliance, Potential Impact of EPA Endangerment Finding on Low Income Groups and Minorities, at 92 (Mar. 2010). When gasoline soared past $4 per gallon in 2008, many people could not afford to drive to work, lost considerable income, or were laid off. *See* Congressional Budget Office, 110th Cong., Effects of Gasoline Prices on Driving Behavior and Vehicle Markets (2008).

See AEP, 582 F.3d at 318 (seeking to "cap[] carbon dioxide emissions" and "reduc[e]emissions by a specified percentage each year for at least ten years"). Judicial intervention to set emission standards under the mantle of federal common law "gap-filling," regardless of current efforts in Congress and the EPA, is directly contrary to the other two branches' long and detailed history in this area.

2) Plaintiffs' Allegations Belie Causation Between Defendants' Emissions and Plaintiffs' Injuries

The Second Circuit's ruling effectively eliminates the causation element from public nuisance doctrine. In order to allow the claim to continue, the Second Circuit ruled that any contribution to a public nuisance, regardless of how small, can be the basis for a federal common law public nuisance action. *See AEP*, 582 F.3d at 356 (citing Restatement (Second) of Torts § 840D that "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution"). This misinterpretation of the Restatement violates the fundamental tort law principle that "there [must be] some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *See* Keeton, *supra*, at § 41, 263.

Plaintiffs' causation requirement under federal public nuisance law is the same as for any other federal or state common law cause of action. *See Camden County*, 273 F.3d at 541 (rejecting plaintiff's argument that proximate cause and remoteness are not essential to public nuisance claims). Plaintiffs must be able to show both factual and legal causation: but-for Defendants' emissions the alleged injuries would

not have occurred, and the injuries are closely related such that a reasonable person would see it as a likely result of her conduct. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 380 (1996); *cf.* Fowler V. Harper, *et al.*, The Law of Torts § 20.2 (1986). As discussed below, Plaintiffs cannot meet either burden.

Plaintiffs' Rube Goldberg-esque causation allegations can be summarized as follows: each Defendant released GHGs; those GHGs combined with the many other sources of GHGs around the world and have accumulated in the earth's atmosphere for more than a century; this accumulation has formed a barrier that traps in the sun's heat; and, as a result, the earth's air and water temperatures have increased, thereby causing the alleged public nuisance of global climate change. *See AEP*, 582 F.3d at 314. The other half of Plaintiffs' causation allegations are that global climate change caused environmental and weather events that will cause a wide range of alleged future risks, including "increases in respiratory problems," "more droughts and floods," "wildfires," and "widespread loss of species and biodiversity." Pet. Brief at *10 (citing Plaintiffs' allegations).

Even taking Plaintiffs' causation allegations as true, no Defendant could be a cause of their alleged harms. First, the release of GHGs, which include carbon dioxide, methane, and other gases is not particular to any specific company or industry. *See Kivalina*, 663 F. Supp. 2d at 877 n. 4 (If "combustion of fossil fuels is causing global warming, it is evidence that any person, entity or industry which uses or consumes such fuels bears at least some responsibility for Plaintiffs' harm"). Numerous human activities and natural occurrences release these gases. *See*

Gen. Motors, 2007 WL 2726871, at *15 (observing "multiple worldwide sources of [GHGs] across myriad industries and multiple countries."). Man-made sources include fossil fuel combustion, power plants, manufacturing, and auto and airplane exhaust throughout the world. *See* Jane A. Leggett *et al.*, Cong. Research Serv. Rep. for Congress, China's Greenhouse Gas Emissions and Mitigation Policies 8 (2008) [hereinafter CRS Report]. Natural sources include volcanic outgassing, animal releases of gas, and breathing of all living aerobic organisms. *See* Natural Sources and Sinks of Carbon Dioxide, Climate Change – Greenhouse Gas Emissions, Environmental Protection Agency, *at* http://www.epa.gov/climatechange/emissions/co2_natural.html. Thus, no defendant can be a "but for" cause or even a substantial factor[9] of climate change or weather-related harms.

Second, based on the foregoing there also can be no proximate cause. When mixed in the earth's atmosphere, GHGs from one source cannot be distinguished from others, let alone from any other time period. *See AEP*, 582 F.3d at 345. Just taking a snapshot of current emissions, sources originating outside the United States constitute an estimated 83% of the world's GHG emissions. *See* CRS Report, *supra*, at 8, fig. 2. Plaintiffs' alleged harms are far too remote from any of the Defendants' emissions. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992) ("harm flow[ed] merely from the mis-

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[9] The substantial factor test requires that "each of two separate causal chains [were] sufficient to bring about the plaintiff's harm." Restatement of the Law (Third) of Torts: Liab. for Physical & Emotional Harm § 26 cmt. j (2010).

fortunes visited upon a third person by the defendant's acts [are] generally said to stand at too remote a distance to recover"). Consequently, no Defendant could have reasonably foreseen Plaintiffs' alleged injuries such that it "should have avoided the injury" by acting differently on its own. Dan B. Dobbs, *The Law of Torts* § 180, 444 (2000) (stating requirements for proving proximate causation); John L. Diamond, Cases and Materials on Torts 256 (West Grp., 1st ed. 2001) (discussing superseding factors).

Presumably in recognition of these facts, Plaintiffs seek to replace traditional causation standards with a mere "contribution" test that is unsupported by state tort law or prior explanations of federal common law. *See, e.g., Texas Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris*, *Inc.*, 21 F. Supp. 2d 664, 668 (E.D. Tex. 1998) (In industry suits, "the nexus between cause and effect [for each defendant] is too attenuated to justify liability"). This mere contribution test may have some surface level appeal, but much like other less conventional causation theories as the "single indivisible injury" test and burden-shifting theories as market-share, risk contribution, or enterprise liability, it must be rejected. *See* Restatement (Second) of Torts § 432 (1979). Such experimental theories, which have been disallowed by most common law courts, have very limited application even in the small handful of jurisdictions where they have been accepted. *See id.*; *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031 (E.D. Wis. 2010) (risk contribution test violates constitutional due process rights). They have only been applied where a discrete, identifiable number of independent actors caused a discrete, identifiable harm or when defendants are uniquely positioned to excul-

pate themselves from liability. *See, e.g., Landers v. E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952); *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980); *but see Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245-46 (Mo. 1984).

Restatement Section 840D, which the Second Circuit took out of context, was never intended to dilute causation along these lines. Rather, it sought to assure that a tortfeasor cannot escape liability just because a limited number of others contributed to the harm, particularly when the tortfeasor was aware of those contributions. As the Restatement (Second) explains, otherwise "there may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule may cause disproportionate hardship to defendants." Restatement (Second) of Torts § 433B cmt. e (1979). The Restatement continues: "[I]f a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable . . . because he cannot show the amount of his contribution may perhaps be unjust." *Id.* Here, Plaintiffs allege that billions of potential sources for GHGs over decades caused global climate change. Basic justice would be subverted if anyone were deemed responsible for the acts of all others.

Because cause-in-fact and legal causation cannot be established in this case, regardless of discovery, this case must be dismissed as a matter of law. *See Lead Indus. Ass'n*, 951 A.2d at 435 ("[T]he trial justice erred by denying defendants' motion to dismiss. . . . The state has not and cannot allege facts that would fall within the parameters of what would

constitute public nuisance."). The Court should not permit the Second Circuit to perfunctorily put off consideration of causation until summary judgment simply because causation is generally considered an issue of fact. *See AEP*, 582 F.3d 347. Unlike traditional litigation, these cases will not hinge on discovery or dramatic testimony, as Plaintiffs can uncover no facts during discovery that can lead to a finding that any single source, or collection of sources, is the cause of global climate change and the alleged injuries upon which the lawsuits are based. *See Kivalina*, 663 F. Supp. 2d at 880 ("[T]here is no realistic possibility of tracing any particular alleged effect of global climate change to any particular emissions by any specific person, entity, [or] group at any particular point of time.").

When causation can never be shown, forcing parties to spend years producing time-consuming, expensive discovery requests so that plaintiffs' can go on fishing expeditions in dry river beds makes no sense. This was the policy behind the rulings of the United States Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which require plausible evidence that a case can succeed even at the motion-to-dismiss stage. As this Court can appreciate, for politically driven lawsuits such as this one, simply getting past a motion to dismiss and into discovery can be the victory Plaintiffs seek.

3) The Trusts' Claims Violate the Special Injury Rule

In delving further into the nuances of public nuisance doctrine, the Court should hold that the

claims filed by the nongovernmental Plaintiffs fail because they violate the special injury requirement for standing to bring a public nuisance claim. "The Trusts do not allege any current injury," only potential future injury, *i.e.*, "the ecological value of their properties will be diminished" by climate change. *AEP*, 582 F.3d at 341-42.

The Restatement (Second) and centuries of jurisprudence on the special injury rule dictate that a private plaintiff can recover for its special injuries only if it has *already* suffered those injuries. *See* Restatement § 821C ("one *must have suffered* harm") (emphasis added); Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359, 362-63 (1990). Without the injury, there is no basis for assessing one's special damages. Expanding special injury liability to include speculative future damages would go beyond even the doctrine's broadest assertions. *See U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 13 (Fla. 1974) (nonprofit seeking to stop business conduct had not suffered a special injury).

Further, even if the harm alleged were to occur, diminished future property value does not qualify as a special damage unique to the trusts. Large and small owners of properties of all kinds and in all places would be affected by climate change in the same way the trusts allege. The fact that the trusts own a significant amount of land only means that they may be more severely injured than some, not that they have a harm that is different-in-kind. The Second Circuit evades this fact by suggesting that §821C allows severe harm, even if not special, to

form the basis of a special injury claim. *See AEP*, 582 F.3d at 367. Courts have widely held that severity alone is not a surrogate for the "different in kind" requirement. *See, e.g., Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196, 1198 (9th Cir. 1997) ("spill may have affected Alaskan Natives more severely than other members of the general public, [but] their right to [culture and lifestyle] is shared by all Alaskans.").

Again, the Second Circuit has taken common law public nuisance down unwise paths not endorsed by the majority of state common law judges. Its ruling is not a slight extension of a single element to account for facts not previously considered. *See generally* Victor E. Schwartz, *et al.*, *Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. Rev. 317 (2006) (discussing parameters when common law courts depart from precedent). It fundamentally misstates foundational elements of public nuisance law.

B. Federal Common Law Does Not Provide a Basis for Plaintiffs' Public Nuisance Claims

Plaintiffs' casting of their claims in federal common law should be rejected. *See* Theodore J. Boutrous, Jr. and Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance,"* 35 Ecology L. Currents 80, 87-88 (2008). The Second Circuit's notion of a robust federal common law for gap-filling federal statutes violates this Court's long-standing disposition against expansive federal tort actions. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1186 (10th Cir. 2002) (stating the "reluctance to create common law is a core feature of federal court jurisprudence").

As this Court held in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), "there is no federal general common law." *See also City of Milwaukee*, 451 U.S. at 314 n.7 ("If state law can be applied, there is no need for federal common law."). In the post *Erie*-era, the Court has identified only a few areas in which federal common law can develop, namely admiralty and maritime cases, interstate disputes, and cases concerning international relations or the legal relations and proprietary interests of the United States. *See* Jack H. Friedenthal *et al*., Civil Procedure 223 (1985). Accordingly, federal public nuisance cases have largely involved disputes between governments where constitutional necessity requires that neither of the states' public nuisance laws should apply to the dispute. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 104 (1972) (Illinois sought to require Wisconsin cities to abate a nuisance in interstate waters); Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 N.W.U. L. Rev. 551, 562-63 (2008) (federal common law is used if it is inappropriate to apply one state's law over another).

The Second Circuit relies on the pre-*Erie* case of *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) as the basis for permitting instant action. In that case, the Court resolved a discrete public nuisance claim in which Georgia alleged that pollutants directly attributable to a Tennessee company caused the public nuisance of acid rain that harmed properties in Georgia. *See id.* at 236. While the instant case may optically appear similar to *Tenn. Copper*, the current allegations present a far broader use of federal public nuisance law, both qualitatively and quantitatively, than permitted even before *Erie*. This case

represents much more than a few states suing a half-dozen businesses; global climate change allegations are not jurisdiction or source specific. Every territory and alleged GHG source in the world is equally situated with respect to the claims at bar.

As a result, the subject matter of Plaintiffs' allegations falls far outside of the limited reach of federal common law. This case is a prominent example of how federal common law can become a runaway horse if not properly restrained.

III. THIS LAWSUIT USHERS IN A NEW ERA OF FEDERAL LITIGATION

If this Court were to allow this case to proceed beyond a motion to dismiss it would swing federal courthouse doors wide open to political lawsuits. With respect to global climate change cases, governments would have nearly limitless ability to impose liability on companies associated with energy use and production. Every hurricane, flood, drought, and heat-related condition would spawn federal climate change claims. In addition, the Court's approval of such actions would undoubtedly revive other "political" public nuisance cases, including those already rejected at the state level that have sought "to mandate the redesign of" products and regulate business methods. *Penelas v. Arms Tech., Inc.,* 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001). The result would be the exact catch-all tort that state courts have rejected for decades.

A. Plaintiffs Are Attempting to "Regulate" Emissions Through the Courts

This lawsuit, born out of frustration with the political process, is part of a broader attempt to take the campaign to cap emissions to a new arena: the courts. *See* Environmental Litigation: Law and Strategy 1 (Cary R. Perlman, ed. 2009) ("[F]our years ago, the issue had no significant legal footprint in the United States. Since then, however, the issue has exploded onto the legal scene, resulting in enormous social and economic shockwaves.").

Massachusetts v. EPA, which settled an issue of administrative law, directed the Bush EPA to respond to a rulemaking petition that asked it to consider whether GHG emissions from certain light duty vehicles "endanger public health or welfare" and should be regulated under the Clean Air Act. *See id.* at 529-35 (quoting 42 U.S.C. § 7521(a)(1)). *Massachusetts* did not directly or indirectly endorse regulation through tort litigation subjecting private entities to liability for not adopting the emission preferences of state attorneys general and private land trusts.

Nevertheless, four lawsuits, including this one, have been filed against private sector interests associated with producing and using energy products to adopt such limits. *See generally* Victor Schwartz *et al.*, *Why Trial Courts Have Been Quick to Cool 'Global Warming' Suits*, 77 Tenn. L. Rev. 803 (2010); *see also* John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, Bus. Week, Oct. 30, 2006, at 34 (observing this "ambitious legal war on oil, electric power, auto, and other companies"). In

addition to the instant case, California's attorney general filed *Gen. Motors,* 2007 WL 2726871, against car-makers for making cars that emit exhaust. Two other cases, *Kivalina*, 663 F. Supp. 2d at 877, and *Comer*, 585 F.3d at 855, sought recovery for specific injuries from weather events allegedly caused or made worse by global climate change.

All four federal trial courts recognized the naked political nature and purpose of these suits and dismissed them. *See Kivalina*, 663 F. Supp. 2d at 877 ("allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch"); *Gen. Motors*, 2007 WL 2726871 at *13 (claim "expos[es] automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce"); *Comer*, 585 F.3d at 860 n.2 (citing district court's ruling that the global warming debate "has no place in the court"); *AEP,* 406 F. Supp. 2d at 274 ("Because resolution of the issues presented here requires identification and balancing of environmental, foreign policy, and national security interests, an initial policy determination of a kind clearly for non-judicial discretion is required.") (internal citation omitted). Political cases masquerading as tort suits provide no "judicially discoverable and manageable standards" for assessing liability. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

B. The Litigation's Sponsors Admit this Case Represents Frustration With the Legislative Process

Rather than fight this characterization of their suits, the litigation's sponsors have acknowledged outside of the courtroom that the purpose of these lawsuits are, indeed, political. They are not seeking to win any verdicts, but to leverage the threat of massive liability to pressure Defendants, Congress and the Administration to set emission caps. *See* Robert Meltz, Cong. Research Serv. Rep. for Cong., Climate Change Litigation: A Growing Phenomenon 33 (2008) (Proponents "freely concede that such initiatives are make-do efforts that . . . may prod the national government to act").

Then-Connecticut Attorney General and now United States Senator Richard Blumenthal, the lead plaintiff in the instant case, stated, "this lawsuit began with a lump in the throat, a gut feeling, emotion, that CO_2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. . . . [We were] brainstorming about what could be done." Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, 30 Colum. J. Envtl. L. 335, 339 (2005).

Matthew Pawa, Plaintiffs' lead contingency fee lawyer, explained his reason for picking these Defendants: "The electric power sector is the obvious place to begin such emissions reductions because, economically, it is the low-hanging fruit." Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a*

Public Nuisance: Connecticut v. American Electric Power, 16 Fordham Envtl. L. Rev. 407 (2005).

Even Second Circuit Judge Peter Hall, who authored the opinion allowing this case to continue, has since conceded that "[y]ou really don't want a district judge supervising your relief in all of this stuff" but "[t]o the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense." *Key Judge Downplays Prospects for Successful Climate Change Suits*, Clean Air Report, Vol. 21 Iss. 5, Mar. 2, 2010.

These comments echo those made by plaintiff attorneys in the other global climate change cases. *See, e.g.,* Mark Schleifstein, *Global Warming Suit Gets Go-Ahead*, Times-Picayune, Oct. 17, 2009 (quoting Gerald Maples, lead plaintiffs' attorney in *Comer*, that his "primary goal was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol"); *Symposium*, *supra*, at 343 (quoting Maine Attorney General Rowe: "[I]t's a shame that we're here . . . trying to sue [companies] . . . because the federal government is being inactive").

Such end-games may entice those sympathetic to a particular political agenda, but they do not give rise to federal common law liability. Article III does not provide federal courts with authority to settle the national climate change policy debate.

C. The Court Should Not Change the Tort of Public Nuisance to Allow State Attorneys General to Bring Political Lawsuits

Political agendas over whether to cap emissions, and if so, by how much, should not sway the Court to expand federal common law in ways that would allow the state attorneys general to bring this lawsuit. *See* Phil Goldberg, *Why Progressives Should Cool to "Global Warming" Lawsuits*, Progressive Pol'y Inst., Nov. 2010. In permitting Massachusetts to pursue an administrative law remedy in *Massachusetts v. EPA*, the Court "stress[ed] . . . the special position and interest" of the state "for the purposes of invoking federal jurisdiction." *See* 549 U.S. at 498, 518. The dynamics that may have been present in *Massachusetts v. EPA* do not exist in a case over private sector liability. Federal common law liability should not be broadly expanded in the name of addressing a societal issue just because a defendant violates a government attorney's own moral judgment that an activity should be condemned. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972) (stating even when a government has standing to file a lawsuit, it must have a legitimate cause of action).

When state and local government attorneys argued that their states' public nuisance laws should be relaxed to aid their lawsuits, the state high courts said, "No." For example, the Rhode Island Attorney General argued that it should not have to satisfy the traditional proximate cause requirement because its suit was for injuries to the public as a whole, not for a specific person's injury. *See State v. Lead Indus. Ass'n*, C.A. No. PC 99-5226, 2007 R.I. Super. LEXIS

32, at *24–25 (Feb. 26, 2007). He tried to further justify the case's legal shortcomings by stating that the state and its residents "incurred costs and ha[ve] suffered harms due to" defendants' conduct and that "many of those harms will go uncompensated." *Id.* at *172. The City of St. Louis based its lead-paint lawsuit on a similar premise. *See City of St. Louis v. Benjamin Moore & Co.*, No. ED-87702, 2006 WL 3780785, at *3 (Mo. Ct. App. Dec. 26, 2006) (summarizing government's position that "while perhaps private individuals should not be permitted to rely on market-share evidence, perhaps governmental entities bringing public nuisance claims should be"). As detailed earlier, the courts rejected these theories.

These courts appreciated that "public risk" cases, even when brought by governments, expose the weakness of the judiciary to administer cases where there is no objectively wrongful conduct. *See* 2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991). Government attorneys may have a political incentive to target specific companies, such as producers of lead paint, firearms, and energy, because they are considered unpopular by some constituencies or their services or products have external costs.

Here, the state attorneys general made a *political* decision to blame global climate change on Defendants. As Mr. Pawa said, they were the "low-hanging fruit." Yet, as Defendants explain in their brief, even if they scrupulously adhered to Plaintiffs' emissions caps, the alleged public nuisance would not be abated and Plaintiffs' alleged future injuries would not be avoided. *See* Pet. Brief at *23. Thus, they are no differently situated than anyone else.

See Kivalina, 663 F. Supp. 2d at 887 n. 4 (calling the selection of defendants "seemingly arbitrary").

If this Court were to allow state attorneys general to disregard these facts and alter a federal cause of action to impose new duties on American companies, it would create limitless, unpredictable liability. State attorneys could convert almost any perceived environmental or social harm into a liability event, deciding who to "tax" through federal public nuisance litigation to remediate those harms. Future government tort actions, for example, could require alcohol beverage manufacturers to pay for drunk driving costs, pharmaceutical companies for mental-health programs for prescription-drug abuse, and the food industry for health care costs related to obesity, tooth-decay and heart conditions.

Weighing costs, benefits and social value of producing and using essential resources and factoring in any adverse effects of their production or use is part of the delicate balancing for which only Congress and administrative agencies are suited. They can conduct public hearings, commission research, engage in meaningful discourse with foreign nations, and consider all the stakeholders' interests – not just the state attorneys general and the parties they chose to bring into the lawsuit. The other government branches also have the constitutional authority and tools to investigate the impact of their decisions, transition to new regulatory schemes, and, in this instance, put emission limits into the broader context of a cohesive national energy policy. They could then determine whether emissions should be reduced, by how much, and for which industries.

Liability can complement this regime by holding companies responsible if they cause harm by operating outside of those duly enacted laws.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court find that Plaintiffs, in addition to not having constitutional grounds for this lawsuit, have failed to state a federal cause of action.

Respectfully submitted,

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Dated: February 7, 2011