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 Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether States and private parties have standing to seek judicially fashioned caps on greenhouse gas emissions by five utilities for their alleged contribution to damage claimed to arise from global climate change, where there are billions of independent sources of greenhouse gas emissions, which persist in the atmosphere for centuries.

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INTEREST OF *AMICUS CURIAE*

Founded in 1977, the Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C. with supporters in all fifty states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly participates as an *amicus curiae* in this Court and lower federal and state courts in cases concerning environmental issues to address the harmful effect that frivolous litigation has on the business community.

In particular, WLF filed an *amicus* brief in *Massachusetts v. EPA*, 549 U.S. 497 (2005), arguing that Congress did not authorize the EPA, under the Clean Air Act, to regulate carbon dioxide emissions for climate-change purposes. Although the Supreme Court held otherwise, its decision—that the Clean Air Act in fact does authorize the EPA to regulate greenhouse gases—actually undermines the appeals court's holding in this case. WLF also filed an amicus brief in *Native Village of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir., July 7, 2010; dec. pending), demonstrating that global warming "liability" presents a nonjusticiable political question.

In addition, WLF's Legal Studies Division has published policy papers and conducted seminars

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF and its counsel, provided financial support for the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged in the Court's docket.

critical of the use of common law public nuisance claims to address global warming. *See, e.g.,* Laurence H. Tribe, Joshua D. Branson, & Tristan L. Duncan, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (WLF Working Paper, January 2010); Peter L. Gray & J. Benjamin Winburn, *Climate Change Tort Suits: Hot or Cold?* (WLF Legal Backgrounder, June 13, 2008).

WLF supports each of the arguments made by Petitioners in support of reversal, but writes separately to argue that allowing the injunctive relief sought by Respondents in this lawsuit would not be in the public interest. Granting the relief demanded here would set a precedent that would expose not only Petitioners but virtually all business enterprises to the prospect of limitless liability, and would threaten the viability of entire industrial sectors, even though those industrial sectors admittedly are only minor contributors to global greenhouse gas levels, their emissions of greenhouse gases are entirely lawful, and they undoubtedly provide services of great social utility. Under such circumstances, this lawsuit presents a nonjusticiable political question, the Respondents lack standing to bring their claims in this action, and this Court should reverse the decision of the Second Circuit Court of Appeals.

STATEMENT OF THE CASE

This is a common law action seeking to restrict the greenhouse gas emissions of *certain* enterprises as claimed relief for the effects of global warming,

notwithstanding existing federal legislation and regulation in this field and ongoing legislative and executive actions to address these issues.

Respondents in this case — eight States, three nonprofit land trusts, and a municipality — seek to hold Petitioners "jointly and severally liable for . . . global warming." Pet. App. 178a. Respondents claim that Petitioners emit carbon dioxide, which contributes to elevated atmospheric levels of greenhouse gases, which in turn contributes to climate change, which in turn contributes to a wide range of alleged future risks, including "increase[s] in . . . respiratory problems," "more droughts and floods," "wildfires," and "widespread disruption of ecosystems [and] reduce[d] biodiversity." *Id.* at 11a. Respondents describe climate change as a "public nuisance," purportedly actionable under federal common law, and demand an order "enjoining each of the Petitioners to . . . cap[] its emissions of carbon dioxide and . . . reduc[e] those emissions by a specified percentage each year for at least a decade." *Id.* at 178a. They note that several States have adopted legislative restrictions on emissions of carbon dioxide by facilities within their borders, and claim that, through federal judicial decree, they can force facilities nationwide to reduce their emissions.

The district court dismissed the claims as presenting non-justiciable political questions. *Id.* at 187a. It reasoned that, because climate change is a global phenomenon attributed to global greenhouse gas emissions, a court could not resolve the claims without first determining an acceptable global level of greenhouse gas emissions and then determining which particular sectors and individual industries

should be held responsible for reducing their emissions and by what amounts to achieve that acceptable global level. *Id.* at 183a-185a. These decisions, the district court found, necessarily involve a number of "policy determination[s]" of the type properly reserved for Congress, including "the implications of [emissions reductions] on the United States' ongoing negotiations with other nations concerning global climate change . . . [and] on the United States' energy sufficiency and thus its national security." *Id.* at 182a-184a. In light of this conclusion, the district court found it unnecessary to address whether the Respondents had standing or whether federal common law provided a valid basis for their claims. *Id.* at 180a n.6, 187a.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed. *Id.* at 3a. Characterizing this case as an "ordinary tort suit," it held that courts could rely on the Restatement's "reasonableness" standard to adjudicate the claims and that, because the case involved only "six domestic coal-fired electricity plants," courts would not have to address the broader policy concerns identified by the district court. *Id.* at 26a, 34a, 119a. The panel further held that, in light of the interstate effects of carbon dioxide emissions on climate change, federal common law should supply the rule of decision. *Id.* at 88a. Finally, as to standing, the panel found that Respondents' bald allegation that Petitioners "contribute[d]" to climate change was adequate to satisfy constitutional standing. *Id.* at 67a-73a.

The Second Circuit denied petitions for rehearing or rehearing en banc. *Id.* at 188a-191a.

SUMMARY OF THE ARGUMENT

Respondents demand that Petitioners be held jointly and severally liable for "contributing to an ongoing public nuisance, global warming." J.A. 58-59. But Respondents freely concede that Petitioners are only five of literally countless worldwide contributors to global warming, and that Petitioners' contribution to global anthropengic carbon dioxide emissions in a single year is only approximately 2.5%. And that number does not account for the temporal phenomenon, which Respondents also concede, that "emissions persist in the atmosphere for several centuries, and thus have a lasting effect on climate." *Id.* at 81. Nor is there any allegation that Petitioners' emissions are unlawful or unpermitted. Indeed, the emissions about which Respondents complain are *lawful* emissions made by companies that provide energy services of great social utility, and Petitioners are "power companies" already subject to extensive regulation. Respondents further concede that emissions of greenhouse gases, whether by Petitioners or anyone else, merge into an undifferentiated mass in the atmosphere before causing any alleged harm. Nevertheless, Respondents make the purely conclusory allegation that Petitioners' emissions are the proximate cause of Respondents' alleged present and future global-warming injuries.

Under these circumstances, it was error for the Second Circuit Court of Appeals to rule that Respondents have standing to bring this lawsuit, because they have not alleged and cannot allege facts from which one could conclude that their injuries are fairly traceable to the Petitioners' conduct. To avoid

facing the bedrock standing requirement of causation, the Second Circuit adopts a strict-liability argument that Petitioners face responsibility for *all* of Respondents' alleged present and future harm merely because their lawful emissions "contribute," albeit unquantifiably, to global warming. The appeals court below takes the position that there is a "principled" basis for assessing liability against these Petitioners, but those "principles" are "contribution" principles borrowed from traditional public nuisance law principles, developed (and invariably applied) only where a strong geographic and temporal nexus exists among the area allegedly polluted, the alleged victims of that pollution, and the alleged polluters.

That is not *this* case, where Respondents admittedly seek relief from only a handful of alleged "contributors" to global warming, and where emissions of greenhouse gases from anywhere in the world concededly merge in the atmosphere – where they may linger for centuries – and may travel to, and may allegedly result in damage in, any other part of the world. Under Respondents' theory, therefore, a potentially unlimited number of plaintiffs exist globally – all of which would be able to sue in U.S. courts these same Petitioners or any other randomly chosen handful of emitters for any and all of their alleged harm. The Second Circuit fails to identify any principle that would permit such unbounded liability, untethered to actual fault, nor is there any such principle to be located in the nuisance cases on which the court relies. Indeed, faced with similar lawsuits that may lead to unlimited liability, courts – applying the same principles identified by the circuit court – have refused to find liability where, as here, the nexus among plaintiff, defendant, and pollution is

simply too remote.

ARGUMENT

I. RESPONDENTS DEMAND THAT PETITIONERS BE HELD JOINTLY AND SEVERALLY LIABLE FOR GLOBAL WARMING, EVEN THOUGH PETITIONERS ALLEGEDLY EMIT ONLY 2.5 PERCENT OF ANNUAL WORLD-WIDE CARBON DIOXIDE EMISSIONS

Respondents are eight states, three land trusts, and New York City. J.A. 56-57. They allege that global warming has injured, or may injure in the future, their property or the welfare of their residents, and they "seek[] an order requiring [Petitioners] to reduce their emissions of carbon dioxide, thereby abating their contribution to global warming, a public nuisance." *Id.* at 57.

Respondents seek that relief from only five Petitioners – five "electric power corporations" – alleging that they are "substantial contributors to elevated levels of carbon dioxide and global warming." *Id.* at 56-57, 61-67. But Respondents concede that the five Petitioners are only "*among* the largest [emitters of carbon dioxide] in the world," and only "major emitters" of carbon dioxide. *Id.* at 57, 84 (emphasis supplied).

Indeed, Respondents' own Complaints make clear that "other emitters," are legion, *id.* at 102, and those emitters are not before this Court. Respondents allege that Petitioners "together emit approximately 650 million tons of carbon dioxide each year," but

they also allege that that amount is only "one quarter of the U.S. electric power sector's carbon dioxide emissions," and only "ten percent of all anthropogenic carbon dioxide emissions in the United States." *Id.* at 84. Respondents allege that the entire U.S. electric power sector "constitute[s] . . . approximately ten percent of worldwide carbon dioxide emissions from human activities." *Id.* at 85. Accordingly, Respondents have alleged that Petitioners are responsible for emitting only 2.5 percent of annual worldwide carbon dioxide emissions.

Moreover, those allegations of Petitioners' contribution to carbon dioxide levels for a single year do not take into account a crucial temporal factor. As Respondents themselves concede, "[c]arbon dioxide emissions persist in the atmosphere for several centuries and thus have a lasting effect on climate," and "past and present emissions will remain in the atmosphere for many decades, or even centuries, into the future." *Id.* at 86, 135. Thus, on its face, the Complaints sustained below show that, given existing levels of carbon dioxide in the atmosphere, much of which may have been there for centuries, the impact on global greenhouse gas levels in a single year in the 21st century must be less than a simple percentage calculation for that one year.

On these bare allegations, Respondents sue just five companies that allegedly "contribute" to global warming, seeking an order "holding each of the [Petitioners] jointly and severally liable for contributing to an ongoing public nuisance, global warming." *Id.* at 58-59.

But the Complaints also allege that Petitioners emit greenhouse gases at diverse locations, and that

"[c]arbon dioxide emissions and global warming are inherently interstate in nature. [Petitioners'] emissions of carbon dioxide, from any state where their electric generation operations may be located, rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon dioxide worldwide." *Id.* at 104.

And Respondents' allegations that Petitioners *cause* global warming – or that they caused Respondents' alleged injuries or may cause any such injury in the future – are bald conclusions. For example, Respondents allege that Petitioners' "carbon dioxide emissions are a direct and proximate contributing cause of global warming and of the injuries and threatened injuries to the plaintiffs, their citizens and residents, and their environment, from global warming," *id.*, and that Petitioners "are substantial contributors to global warming and to the injuries and threatened injuries claimed herein." *Id.*

As shown below, those conclusory causation allegations are not sufficient to support the imposition of joint and several liability on this group of Petitioners, who make only a 2.5% alleged "contribution" to aggregate annual carbon dioxide emissions that, according to Respondents' own theory, is but one part of the asserted cause of global warming. These Petitioners were apparently targeted for litigation because they may, in Respondents' view, be amenable to the jurisdiction of the U.S. Courts, or because such a lawsuit against them is likely to generate significant attention from the public and the press, as well as from state legislatures and Congress.

II. THE APPEALS COURT ERRED IN HOLDING THAT RESPONDENTS HAVE STANDING TO ASSERT THEIR CLAIMS

It is well established that Article III standing requires a plaintiff to show (1) a concrete injury; (2) that the injury is "fairly traceable" to defendant's alleged actions; and (3) that the court can redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And *Lujan* applies here notwithstanding that the Respondents are suing as *parens patriae*, as well as in their proprietary capacity.[2] The seminal cases articulating *parens patriae* standing that are cited in the Second Circuit's opinion – *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), and its progeny – predate this Court's decision in *Lujan*. And the Second Circuit's opinion acknowledges that *Massachusetts v. EPA*, 549 U.S. 497, 520-26 (2007), "called into question" the "view that states' *parens patriae* standing sufficed for Article III standing." Pet. App. 50a. Indeed, the *Massachusetts* Court – even as it analyzed *parens patriae* standing and held that States were entitled to "special solicitude" in the standing inquiry – nevertheless performed a *Lujan* standing analysis of injury in fact, causation, and redressability. *See Massachusetts*, 549 U.S. at 520-26. As Chief Justice Roberts observed in dissent, "[r]elaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our

[2] There is no question that *Lujan* applies to states suing in their proprietary capacity. *See Wyoming ex. rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (finding that Wyoming had standing in light of "the familiar three-pronged standing analysis").

jurisprudence . . . . Nor does the case law cited by the Court provide any support for the notion that Article III somehow implicitly treats public and private litigants differently . . . . Nothing about a State's ability to sue in [its *parens patriae*] capacity dilutes the bedrock requirement of showing injury, causation, and redressability to satisfy Article III." *Id.* at 536-38 (Roberts, C.J., dissenting).

A. The Appeals Court Identifies No Principle by Which Petitioners, Among All Global Emitters, Should Be Subject to Potential Liability for Global Warming Without Respect to Causation

As shown above, Respondents themselves allege that Petitioners are only some of the people and entities worldwide that emit greenhouse gases, and that they emit only approximately 2.5% of worldwide emissions of but one of the greenhouse gases (carbon dioxide) that are generated from human activity in a single year, emissions that "persist in the atmosphere for several centuries." J.A. 81, 84-85, 102.

Acknowledging that Petitioners' carbon dioxide emissions could not be more than a small part of the source of the harm that Respondents allege, the Second Circuit holds that it is sufficient that Petitioners "contribute" to the alleged nuisance. Pet. App. 68a – 73a. And the Second Circuit also states that "well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing [Respondents'] claims." Pet. App. 34a. It is correct, of course, that the district court must have "appropriate guidance" to adjudicate Respondents' claims – which are based on the *lawful*

emission of greenhouse gases – but the only principles to which the appeals court adverts are "principles of tort and public nuisance law." *Id.* at 34a -35a.

As shown below, however, traditional tort principles of nuisance law, developed in radically different contexts, fall far short of providing principled standards to determine liability for emission of greenhouse gases.

B. Contribution Principles Developed in Air and Water Pollution Cases and Under Various Statutes Are Inadequate to Determine Liability for Global Warming

The Second Circuit rejected Petitioners' arguments that the Respondents could not demonstrate *Lujan*'s causation requirement, holding that Respondents "sufficiently alleged that their injuries are 'fairly traceable' to the actions" of Petitioners whose "continued emissions of carbon dioxide contribute to global warming." *Id.* at 69a. And the appeals court further held that Petitioners' arguments "must be evaluated in accordance with the standard by which a common law public nuisance action imposes liability on contributors to an indivisible harm." *Id.*

But the Second Circuit's own authorities show that such a standard was developed in air and water pollution cases where a clear nexus existed linking the area affected by the pollution, the alleged polluters, and the plaintiffs' alleged injury. In particular, *because of that nexus*, the group of

plaintiffs – *and the group of potential defendants* – were finite and capable of determination.

Indeed, it is not difficult to identify a principled basis for assessing joint and several liability, on a "contribution" basis, where the plaintiffs' residential neighborhoods were adjacent to two illegal dumps, and where the "contributing" defendants were the owners of those dumps and the government agencies that should have been policing them. That is precisely the factual situation in *Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2001), the first case the appeals court cites in support of the proposition that "contributors" are liable whether or not all other contributors to the same alleged harm are joined in a particular action. Pet. App. 69a.

And the same pattern appears in case after case cited by the Second Circuit. *See, e.g., Natural Resources Defense Council, Inc. v. Watkins,* 954 F.2d 974, 980 (4th Cir. 1992) (holding that plaintiffs may have standing to assert claim for water pollution in the Savannah River where the alleged contributor was a nuclear reactor located on the Savannah River); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 555-58 (5th Cir. 1996) (finding standing where plaintiffs alleged that defendant, whose oil operations were located on Galveston Bay, contributed to the pollution of Galveston Bay); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 150 (4th Cir. 2000) (finding same where plaintiff, "who owns a lake only four miles downstream from Gaston Copper's facility," alleged that Gaston Copper contributed to the pollution of its lake); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn*

Terminals Inc., 913 F.2d 64, 70-73 (3d Cir. 1990) (finding same where plaintiffs alleged that defendant operating on land adjacent to the Kill van Kull contributed to the pollution of the Kill van Kull).[3]

But that is not *this* case, where Petitioners are but five of innumerable worldwide emitters of greenhouse gases, and where greenhouse gas emissions, wherever they are made, "will remain in the atmosphere for many decades, or even centuries, into the future." J.A. 86. Indeed, the panel opinion observes that "[n]owhere in their complaints do [Respondents] ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches." Pet. App. 25a – 26a. Respondents do not make such a request because it would be impossible; the theory underlying Respondents' claims – that the Petitioners, because they emit greenhouse gases into the undifferentiated world concentration of greenhouse gases in the atmosphere, are liable for any harm caused *anywhere* by that global concentration of greenhouse gases – necessarily means that there are thousands of other plaintiffs just like them, all of whom could sue

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[3] *Powell Duffryn* is also a case where, unlike here, the plaintiff alleged that the defendant had violated permits for the discharge of pollutants. *Id.* at 68. Inapposite for the same reason is another of the appeals court's cases, *Northwest Environmental Defense Center v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Ore. 2006). Equally inapposite factually are *Barbour v. Haley*, 471 F.3d 1222 (11th Cir. 2006), where inmates were held to have standing to make claims based on inadequate counsel, and *Nader v. Democratic Nat'l Committee*, 555 F. Supp. 2d 137 (D.D.C. 2008), where a presidential candidate had standing to sue defendants for pursuing court actions that distracted and defeated his political aspirations.

Petitioners alleging the same or similar claims.

The panel's opinion sweeps such problems aside with the statement that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century." Pet. App. 28a. But if this lawsuit is allowed to proceed under Respondents' theory of liability – based on common-law nuisance principles derived from the California gold rush, untethered to any principle of proximity or geographic nexus – the result is that thousands of plaintiffs could swamp the American court system with lawsuits against these same five Petitioners and/or others, even on the same claims. In short, Petitioners and countless other greenhouse-gas emitters who are amenable to U.S. jurisdiction could be sued in the American courts by, and may be liable to, virtually any person, place, or entity claiming damage due to global warming.

As Laurence Tribe has observed:

> Unlike traditional pollution cases, where discrete lines of causation can be drawn from individual polluters to their individual victims, climate change results only from the non-linear, collective impact of millions of fungible, climatically indistinguishable, and geographically dispersed emitters. Given this fact, granting a plaintiff relief from the coastline-changing or other adverse consequences of global climate change bears no genuine resemblance to identifying a responsible defendant . . . . To the contrary, worldwide climate change is a systemic phenomenon that is intractable to anything but a systemic political solution, one that the

> adversarial and insulated model of nuisance litigation is structurally incapable of providing.

Laurence H. Tribe, Joshua D. Branson, & Tristan L. Duncan, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine*, at 15 (WLF Working Paper, January 2010). The D.C. Circuit, rejecting an environmental claim under the National Environmental Policy Act ("NEPA") for lack of standing, observed that the "federal judiciary is not a back-seat Congress nor some sort of super-agency." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 672 (D.C. Cir. 1996). And the Ninth Circuit has observed that the "eagerness of judges to expand the horizons of tort liability is symptomatic of a more insidious disease: the novel belief that any problem can be ameliorated if only a court gets involved." *OKI Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 316 (9th Cir. 1989) (Kozinski, J., concurring). That is particularly true where, as here, there is "the risk of exotic new causes of action and incalculable damages." *Id.* (citation omitted).

This lack of principled legal standards to determine liability was central to the recent decision in *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), a similar global warming case in which the district court held that traditional nuisance cases

> do not provide the Court with [a] legal framework or applicable standards upon which to allocate fault or damages, if any, in this case. The Court is left without guidance in determining what is an unreasonable

> contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result[s] from multiple sources around the globe.

Id., 2007 WL 2726871, at *15. That lack of principled guidance led the *General Motors* court to hold that the plaintiffs' claims presented a nonjusticiable political question. *Id.* at *16. For similar reasons, the district court below also held, correctly, that Respondents' claims present a nonjusticiable political question, because the "resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests," which "'uniquely demand [a] single-voiced statement of the Government's views.'" Pet. App. 187a.

Nor can an answer to those intractable problems of allocation be found in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which was not a suit against the private sector for damages or injunctive relief but an attempt to compel the EPA to regulate greenhouse gas emissions. This Court's holding in that case – which discussed at length the national and international attempts to reach a legislative or diplomatic solution to the effects of global warming, *see Massachusetts*, 549 U.S. at 508-09 – in fact supports the proposition that the remedies for Respondents' alleged injuries should be devised at a legislative or diplomatic level, not through traditional models of tort liability. And is aware of no court's holding that, because this Court has determined that greenhouse gases fit within the definition of "air pollutant" under the Clean Air Act, their lawful

emission is nevertheless *per se* tortious, simply based on their theoretical and unquantifiable "contribution" to global warming when combined with the sum of other sources' contributions worldwide. In this case, Respondents are asking this Court to recognize a new cause of action – cloaked in the centuries-old garb of public nuisance doctrine – that would open the door to unlimited liability.

C. Courts Have Consistently Articulated Principles for Restricting Liability in Pollution Cases Where, as Here, the Nexus Between Plaintiff and Defendant Is Too Remote

It is precisely the specter of unlimited liability, unmoored by any principle that would determine liability in proportion to responsibility, that has led numerous courts, applying the same principles on which the Second Circuit relied, to *refuse* to allow cases to go forward where there is insufficient proximity or geographic nexus. Indeed, as the Fifth Circuit has held, "[a]t some point, . . . we can no longer assume that an injury is fairly traceable to a defendant's conduct solely on the basis of the observation that water runs downstream." *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 359, 362 (5th Cir. 1996) (holding that plaintiff lacked standing to sue because the alleged harm to a lake "18 miles and three tributaries from the source of unlawful water pollution" was not fairly traceable to the defendant's alleged water discharges). In *Texas Independent Producers and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005), the Seventh Circuit held that a plaintiff

lacked standing because the alleged environmental injury was not fairly traceable to the alleged pollution, where, as here, the plaintiff made only conclusory allegations of a connection between alleged sources of pollution and particular locations. And even very authority relied on by the court below acknowledged that "some 'waterways' covered by the [Clean Water Act] may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing." *Cedar Point Oil Co.*, 73 F.3d at 558 n.24.

Courts have reached similar results in cases under NEPA, requiring a "geographic nexus" between a plaintiff and the alleged source of the environmental impact. *See, e.g., Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (finding no standing where the plaintiff, in Utah, "lacks any judicially recognizable nexus to the area that would be affected by mining [in Idaho], . . . approximately 250 miles away"). The Fourth Circuit reached a similar result in another NEPA action, holding that there was no standing because the alleged injury was not fairly traceable to the challenged conduct, in part because – as is the case here, where Petitioners are admittedly just a handful of U.S. and worldwide emitters of greenhouse gases – "'one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts.'" *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324 (4th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

Indeed, the *Ashley Creek* court recognized – when

it observed that "[u]nder [plaintiff's] theory of liability, any owner of a phosphate mine, whether located in Alaska, Utah, or Florida, would have standing to challenge the EIS. Why stop there?" *Ashley Creek*, 420 F.3d at 939 – there must be some principled basis on which to assign blame for an injury, which means that a theory of liability without any limiting principle, such as the traditional contribution principles applied to Petitioners here, cannot be adopted. The Seventh Circuit made a similar observation in another case presenting a novel theory of liability, *Pollack v. D.O.J.*, 577 F.3d 736, 742 (7th Cir. 2009), in which the plaintiff alleged that he was injured by lead pollution because he drinks water from Lake Michigan, adjacent to which the United States operates a gun range that deposits lead bullets in the lake. The court, however, held that the plaintiff lacked standing, noting that, "[t]aken to its extreme, [plaintiff's] argument would permit any person living on or near Lake Michigan to assert that he has been harmed by the bullets, because the lead could potentially have been carried to every part of the lake." *Id.*

D. This Case, and Cases Like It, Present a New and Potentially Limitless Theory of Liability That Requires a New Doctrinal Framework, Just as This Court Has Done in Response to Antitrust and RICO Claims

In at least two similar areas of the law – antitrust and RICO – where courts were facing a theory of potentially limitless liability, this Court has developed limitation-on-liability doctrines that are

both principled and equitable. For example, in *Assoc. General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 521-23 (1983), an antitrust action seeking $25 million in damages where there were 250 members of the defendant association and 1,000 unidentified co-conspirators, this Court observed that a "literal reading of the [Clayton Act] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Id.* at 529.

But this Court concluded that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages." *Id.* at 535. Accordingly, in cases where the alleged injury was "indirect," this Court turns to traditional "judge-made rules circumscrib[ing] the availability of damages recoveries in both tort and contract litigation – doctrines such as foreseeability and proximate cause," because, "despite the broad wording of [the statute], there is a point beyond which the wrongdoer should not be held liable." *Id.* at 532, 534 (citation and internal quotation marks omitted). And those limitations were particularly appropriate where, as here, "the chain of causation . . . contains several somewhat vaguely defined links," *id.* at 540, and where the claim presented "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id.* at 543-44. Accordingly, this Court held that the plaintiffs were without standing to bring their "massive and complex damages litigation." *Id.* at 545.

This Court has applied a similar analysis to

RICO claims, where an "expansive reading" of the statute could lead to similarly unbounded liability. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992). Thus, the Court turned to "'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," which simply "recogni[zes that] claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id.* at 268-69 (citations omitted). *See also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006) ("The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation."); *Hemi Group, LLC v. City of New York*, __ U.S. __, 130 S. Ct. 983, 989 (2010) (same).

Following this Court's lead, other courts, including the Second Circuit, have applied these principles to both antitrust and RICO claims. Indeed, to determine whether an alleged injury is "too remote" for RICO or antitrust liability, courts evaluate (1) whether there are more direct victims of the alleged harm; "(2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." *Or. Laborers-Emp'rs Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963 (9th Cir. 1999); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235 (2nd Cir. 1999) (holding that "to plead a direct injury is a key element of establishing proximate cause.

Thus, the other traditional rules requiring that defendant's acts were a substantial cause of the injury, and that plaintiffs' injury was reasonably foreseeable, are *additional elements*, not substitutes for alleging (and ultimately showing) a direct injury") (emphasis supplied). *See also Ass'n of Wash. Public Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 701 (9th Cir. 2001) ("A direct relationship between the injury and the alleged wrongdoing has been one of the 'central elements' of the proximate causation determination.") (citing *Or. Laborers*, 185 F.3d at 963); *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir. 2008) (finding no RICO standing where the "causal chain would also be difficult to ascertain because there are numerous alternative causes that might be the actual source or sources of [plaintiff's] alleged harm").

There is no dispute that proximate cause is a required element of Respondents' nuisance claims. *See, e.g., Illinois v. Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) (detailing elements under federal nuisance law); J.A. 104-110 (reciting elements under federal and state nuisance law). And those nuisance claims – which are as broad as or broader than any antitrust or RICO claim this Court has ever addressed, and which threaten equally drastic liability even though the alleged causation is, at best, tenuous and uncertain – cry out for the application of principles like the standing principles developed for application to RICO and antitrust actions.

Indeed, a federal court recently addressing a similarly novel claim – a county's action against firearm manufacturers alleging that the manufacturers' negligent marketing policy had

created a public nuisance – expressly looked to *Associated General Contractors* and its principle of antitrust standing to determine whether a principled basis existed for allowing the county's lawsuit to proceed against the manufacturers. *See Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 258 (D.N.J. 2000). The *Camden County* court determined that, as here, "there is a strong likelihood that a trial would involve exceedingly complex apportionment of liability," and held that the plaintiff had no standing to assert its nuisance claim. *Id.* at 264. *See also City of Cleveland v. Ameriquest Mortgage Secs., Inc.*, 615 F.3d 496, 498-99, 502-503 (6th Cir. 2010) (applying *Holmes* standard of proximate causation and affirming grant of motion to dismiss, where plaintiff claimed that defendant financial institutions, as participants in the "subprime lending market," created a "public nuisance," namely the "foreclosure crisis in Cleveland that devastated its neighborhoods and economy").

CONCLUSION

For all of the foregoing reasons, as well as all of the reasons advanced by Petitioners, WLF urges this Court to reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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