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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 LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are law professors with an interest and expertise in constitutional, administrative, environmental, and regulatory law. Each believes that the challenges posed by global climate change are complex and multi-faceted and, as an initial matter, beyond the competence of the courts. For that reason, many have participated as amici to this Court in support of the Petition for a Writ of Certiorari and to courts of appeals that have considered public nuisance actions brought against emitters of greenhouse gases or conventional pollutants, including the proceedings below and those in *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), and *North Carolina v. TVA*, 615 F.3d 291 (4th Cir. 2010).[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici represents that it entirely authored this brief and no party, its counsel, or any other entity but amici and their counsel made a monetary contribution to fund the brief's preparation or submission. All parties have consented to the filing of this brief. Letters reflecting their consent are filed with the Clerk. Amici's institutional affiliations are provided for identification purposes only.

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SUMMARY OF THE ARGUMENT

The decision below presents this Court with the choice of whether to allow states and private entities to sidestep the political process and to conscript the Judiciary into regulating greenhouse gas emissions from American industry based on "the same principles we use to regulate prostitution, obstacles in highways, and bullfights." *North Carolina*, 615 F.3d at 301.

Petitioners are electric utilities, and are alleged to be the five largest greenhouse gas emitters in the United States. Petitioners are heavily regulated entities that are subject to the Clean Air Act's comprehensive pollution control scheme and to state duty-to-serve laws that require the production of

reliable and affordable energy. Respondents are a collection of States that have pressed, unsuccessfully as a rule, for federal legislative and administrative action with regard to global climate change and similarly situated environmental groups. Respondents' action is part of a broader push for judicial regulation of greenhouse gas emissions and is mirrored by suits brought by Gulf Coast residents, *see Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (dismissing appeal), Native Americans, *see Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir. Nov. 5, 2009), officious intermeddlers, *see Korsinsky v. EPA*, No. 05-cv-859 (NRB), 2005 U.S. Dist. LEXIS 21778 (S.D.N.Y. Sept. 29, 2005), and groups of states, including certain Respondents, *see California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007). Respondents' stated goal is to force Petitioners into making "*their share* of the carbon dioxide emission reductions," J.A. 102 (emphasis added), as determined by the courts rather than the political branches.

Respondents lack Article III standing to enlist the federal courts as regulators. Article III standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It prevents courts from being "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions. . . ." *Id.* at 500.

To have Article III standing, Respondents must plausibly allege a legally cognizable injury that is fairly traceable to the actions they challenge, and which can be redressed by a judicial decree. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). Here, Respondents' alleged harm is caused by greenhouse gas emission concentrations that have accumulated over the last several centuries, Pet. App. 9a, making it impossible for Respondents to demonstrate a "substantial likelihood" that Petitioners' emissions, rather than emissions from the billions of "third part[ies] not before the court," *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976), caused their alleged injuries. The impossibility of determining traceability is underscored by the sister actions in *Kivalina*, *General Motors*, and *Comer*, where primarily different (but some common) plaintiffs allege that different defendants are legally responsible for the injuries purportedly caused by the same global phenomenon.

Nor would the most aggressive judicial decree redress Respondents' purported injuries. Petitioners' emissions are alleged to account for only 10 percent of current United States emissions. Pet. App. 8a. Where alleged injury is caused by hundreds of years of accumulated greenhouse gas emissions, Pet. App. 9a, it is wholly speculative to assume that "relief from the injury" would be "'likely' to follow from a favorable decision." *See Allen*, 468 U.S. at 751. Irrespective of whether *Congress* may create an incremental legislative scheme that creates standing for procedural injuries, *see Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007), Respondents have no standing to

demand that the Judiciary exercise such policy-making functions.

Respondents' claims similarly present a non-justiciable political question. Like standing, the political question doctrine "originate[s] in Article III's 'case' or 'controversy' language," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), and precludes federal courts from deciding certain actions in the absence of antecedent legal principles reflecting the political branches' policy judgments.

The court below disregarded the political question doctrine because it believed that this action is simply an "ordinary tort suit." Pet. App. 34a. The Second Circuit's inappropriate "semantic cataloguing," *Baker v. Carr*, 369 U.S. 186, 217 (1962), ignores the fact that all actions presenting political questions are predicated on causes of action that are, like tort actions, regularly adjudicated by courts. If that were not the case, there would be no need for a political question doctrine at all – suits would simply be dismissed for the lack of a cause of action. The political question doctrine should bar suit here because answering Respondents' invitation to consider their claims would require the Court to make the non-judicial policy determinations that Petitioners' conduct, providing safe, affordable energy, carries attendant externalities that outweigh its social benefit, and that Petitioners alone should be required to control their greenhouse gas emissions and to remediate Respondents' alleged injuries.

Even if the Court were to determine that it had Article III jurisdiction to decide Respondents' claims, it should not countenance a federal common law cause of action arising from global climate change. Petitioners' claims are unlike any other federal common law public nuisance claims, and adjudicating them raises significant separation of powers concerns and threatens to undermine the legitimacy of the Judicial Branch. Moreover, the Clean Air Act plainly displaced any possible federal common law remedy. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

ARGUMENT

I. Respondents Lack Standing To Assert Nuisance Claims Against Emitters Of Greenhouse Gases

"[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers." *Allen*, 468 U.S. at 752. In its vesting of power on the three federal departments, the Constitution does not define the terms "legislative," "executive," and "judicial," but "depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). That understanding is shaped largely by the "case" or "controversy" requirement of Article III, which, through standing and other doctrines, "serv[es] to identify those disputes which are appropriately resolved through the judicial process." *Id*. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

To establish Article III standing, Respondents "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. Absent a statutorily authorized procedural right, Respondents are not excused from meeting "the normal standards for redressability and immediacy." *Massachusetts*, 549 U.S. at 517. Even assuming Respondents properly alleged an actual or imminent *parens patriae* or proprietary injury, they did not and could not demonstrate either that their alleged injuries were traceable to Petitioners' emissions or that reducing Petitioners' emissions would redress their injuries. Pet. App. 41a-76a.

Respondents' disregard of the basic principles of standing in their attempt to employ the courts "as a convenient forum for policy debates," *Massachusetts*, 549 U.S. at 546 (Roberts, C.J., dissenting), infects every aspect of their claims, from their arbitrary selection of defendants to their inherently political demand that the Judicial Branch fashion relief by limiting Respondents to "*their share* of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of global warming." *See* J.A. 102 (emphasis added). *See also Valley Forge Christian College v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982) ("The federal courts were simply not constituted as ombudsmen of the general welfare.").

The Court should hew to Article III's limitations on the judicial power and reverse the decision below

that Respondents have adequately pleaded Article III standing.

A. Respondents Have Not Established Fair Traceability

"Since [the elements of Article III standing] are not mere pleading requirements but rather an indispensible part of the plaintiff's case, each element must be supported in the *same way as any other matter* on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of litigation." *Lujan*, 504 U.S. at 561 (emphasis added). Plaintiffs must plead non-conclusory factual allegations that "plausibly give rise to an entitlement to relief" to survive a motion to dismiss, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009),[2] and make such a showing for each of the three elements that comprise the "irreducible constitutional minimum" of standing. *Lujan,* 504 U.S. at 560.

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[2] The Second Circuit's application of a "lowered bar for standing at the pleading stage," Pet. App. 43a (citing pre-*Iqbal* Supreme Court case law), is inconsistent both with this Court's statement in *Lujan* and the case law of at least two other Circuit Courts of Appeals. *See White v. United States*, 601 F.3d 545, 551-52 (6th Cir. 2010) (citing *Iqbal* as pleading standard for elements of Article III standing); *Ramirez-Lebron v. Int'l Shipping Agency, Inc.*, 593 F.3d 124, 127-28 (1st Cir. 2010) (same); *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009) (same).

A plaintiff therefore must plead factual allegations that make plausible the conclusion that its injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court" to demonstrate Article III standing. *Lujan*, 504 U.S. at 561 (internal quotation marks and citation omitted). An injury is traceable only where a plaintiff distinctively ties its injuries to the defendant's challenged conduct, as opposed to that of third parties or other competing causal factors. *See Bennett v. Spear*, 520 U.S. 154, 167 (1997). In the absence of specific factual allegations making plausible the conclusion that the plaintiff's injury "resulted, in any concretely demonstrable way," from a defendant's acts, the plaintiff has "failed to satisfy its burden." *Warth*, 422 U.S. at 504.

Thus, in *Allen v. Wright*, the Court held that causation was "attenuated at best," 468 U.S. at 757, where the plaintiffs, who alleged tax breaks to private schools engaging in racial discrimination stymied integrated public schooling, were unable to show that, in the absence of the tax exemption, "a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools." *Id*. at 758. This chain of logic was "pure speculation" and therefore unable to support standing. *Id*.

Respondents' causal theory contains too many links, with connections too attenuated to the claimed injury, and relies on the conduct of too many parties

over too long a period of time and dispersed over too wide a geographic area, to satisfy the requirements of standing. Respondents alleged that climate change is a product of the combined effect of accumulated greenhouse gases in the atmosphere over the course of "several centuries." Pet. App. 9a. Respondents' concessions about the cumulative nature of harm resulting from greenhouse gas emissions make it impossible, however, to show a "substantial likelihood" that it was the carbon dioxide emissions from the defendants – and not the billions of "third part[ies] not before the court," *Simon*, 426 U.S. at 42 – that caused plaintiffs' alleged injuries.

Plaintiffs' pleading requirements are increased where the causal chain "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.). *See also Simon*, 426 U.S. at 41-42. There, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation." *Lujan*, 504 U.S. at 562. Respondents have failed to plead any facts that would allow the Court to conclude that Petitioners' activities are causally responsible for a phenomenon they concede is centuries in the making and global in scope.

Respondents' selection of defendants highlights its failure to allege proper causation. Respondents

have selected a subset of U.S. industry allegedly responsible for approximately 10 percent of current U.S. anthropogenic emissions (and a far smaller percentage of historic emissions), to the exclusion of billions of other emitters dating back centuries and millions of current emitters. Pet. App. 8a (naming four electric utilities and Tennessee Valley Authority). But other plaintiffs, *including one of the Respondents in this action*, have pointed to different defendants as legally responsible for the same precise global phenomenon. *See Kivalina*, 663 F. Supp. 2d 863 (naming select oil companies and utilities and a single coal company); *Comer v. Murphy Oil USA,* 607 F.3d 1049 (5th Cir. 2010) (naming select oil, utility, coal, and chemical companies and TVA); *General Motors*, 2007 U.S. Dist. LEXIS 68547 (naming six automakers only). The fact that overlapping groups of plaintiffs have spent the last several years in federal court making alternate factual allegations about what parties are legally responsible for the same precise global phenomenon discredits the decision below that Respondents have identified and pleaded a particularized injury fairly traceable to the specific defendants before the Court.[3] The Court may properly take notice of these prior lawsuits. *See Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 344 U.S. 1, 3 (1952) (taking judicial notice of filed and pending cases).

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[3] Respondents' selection of defendants demonstrates the infinite universe of potential defendants (and potential lawsuits) if the Second Circuit's opinion were allowed to stand.

B. Respondents Have Not Established Redressability

Respondents' requested judicial cap on defendants' emissions cannot satisfy the redressability requirement for Article III standing. The decision below that redressability exists so long as a court "[can] provide some measure of relief," Pet. App. 75a, is contrary to this Court's established case law and must be reversed.

Respondents' pleadings are not only inadequate to demonstrate redressability, but they effectively concede that their requested relief will fail to redress their injuries. Respondents allege that "[r]eductions in the carbon dioxide emissions of the defendants *will contribute to a reduction in the risk and threat of injury* to the plaintiffs and their citizens and residents from global warming. For example, by reducing emissions by approximately three percent annually over the next decade, the defendants would achieve *their share* of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of global warming." J.A. 102. *See also* J.A. 145 ("[r]eductions in Defendants' . . . emissions will reduce all injuries and risks of injuries to the pubic"). Respondents thereby concede that their requested relief, limitations on Petitioners' emissions alone, will fail "to significantly slow the rate and magnitude of global warming." To achieve redress, they therefore assume, without so much as asserting, commensurate actions by third-party emitters who are not party to this litigation, among them entities in China, India,

and other jurisdictions who are wholly beyond the Court's jurisdiction, as foreign entities without ties to the United States, and, in some instances, as instrumentalities of foreign sovereigns. *See* 28 U.S.C. § 1604.

As such, Respondents plainly fail to allege proper redressability. The Court's jurisprudence unambiguously requires that a plaintiff "must allege specific, concrete facts demonstrating . . . that he personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 491. *See Allen*, 468 U.S. at 751 ("relief from the injury must be 'likely' to follow from a favorable decision"). Instead, Respondents request relief they acknowledge would not, in itself, cause them tangible benefit, absent action by numerous third parties not before the Court, necessarily coordinated by the political branches.

That aspect of Respondents' purported theory of redressability – the assumption that a favorable judgment will coerce political action that, in turn, redresses their alleged injuries – further underscores the threat to limitations on the judicial power posed by their claims. "It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case." *Whitmore*, 495 U.S. at 161. In the absence of requested relief that would itself bring redress to their alleged injuries, Respondents necessarily premise standing on the pressure that a favorable decision would exert on the political branches to adopt nation- or world-wide emissions limitations similar to those

that would be imposed on Petitioners. In this scheme, the Court is a political actor, weighing the likely political impact of its judgments in order to determine the scope of its jurisdiction. This approach to redressability would open the door to all manner of judicial intervention in legislative and political affairs, the very thing standing exists to prevent. *See DaimlerChrysler*, 547 U.S. at 353.

The Second Circuit's decision that *Massachusetts* supported Respondents' standing is erroneous. *Massachusetts* held only that states could exercise the procedural right created by the Clean Air Act to sue to compel the Environmental Protection Agency to consider setting carbon dioxide limits even though those limits could not "reverse global warming." 549 U.S. at 517-18. The Court's decision was premised explicitly on the fact that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' . . . 'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* (emphasis added) (quoting *Lujan*, 504 U.S. at 572 n.7). It was also bolstered by the Court's conclusion that, unlike for the Judiciary, it is the business of agencies to "whittle away at [problems] over time" to achieve ultimate result, *Massachusetts*, 549 U.S. at 524, and they must be permitted the latitude to do so in the most appropriate fashion under the circumstances. As such, *Massachusetts* did not purport to upend the "irreducible constitutional minimum" of standing, *Lujan*, 504 U.S.

at 560, but merely to recognize injuries to States' quasi-sovereign interests. 549 U.S. at 519. Respondents are claiming rights under federal common law, not exercising a statutorily created procedural right, so no "special solicitude," *id.*, applies here.

C. Respondents' Claims Implicate Serious Separation-Of-Powers Concerns

Respondents' alleged theory of causation and their request that the Court require Petitioners to do "their share" under a new, judicially-created national climate policy do not establish Article III standing. Nor should they. Standing "is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a law-suit which a party desires to have adjudicated." *Valley Forge*, 454 U.S. at 476.

Rather, the standing requirement is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth*, 422 U.S. at 498. As Chief Justice Marshall explained,

> If the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary.

4 Papers of John Marshall 95 (C. Cullen ed. 1984) (quoted in *DaimlerChrysler*, 547 U.S. at 341). The result, which the Framers labored to prevent, would be judicial tyranny.

Even lesser encroachment, though, strains the constitutional fabric, and must be avoided. Thus the standing requirement "help[s] to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches." *Mistretta v. United States*, 488 U.S. 361, 385 (1989). It also operates to avoid "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government," which threaten "the public confidence essential to the former and the vitality critical to the latter." *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). Ultimately, it serves to enforce the "limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring).

Respondents would have the Court cast off those limits and set itself on a collision course with the political branches of government. This is evident in their theory of traceability, in which no breathing individual or energy-consuming enterprise the world over is free from potential liability. And it is apparent in their demand that the courts limit Petitioners to "*their share* of the carbon dioxide emission reductions necessary to significantly slow the rate and

magnitude of global warming," J.A. 102 (emphasis added), a formulation which implies that further arbitrary collections of defendants will follow in subsequent cases.

A theory of standing that empowers the courts to arbitrarily restrict the productive activity of any individual or entity is no limitation on judicial power at all, but a massive intrusion on the power of the political branches and, ultimately, on democratic self-rule. Most of all, it is not a theory of *judicial power*, "in the sense in which judicial power is granted by the Constitution to the courts of the United States." *Valley Forge*, 454 U.S. at 471 (quotation omitted). And it would render the courts not merely "roving commissions assigned to pass judgment on the validity of the Nation's laws," *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973), but roving commissions to make law as they see fit.

II. Respondents' Claims Present A Non-Justiciable Political Question

The decision below improperly decided non-justiciable political questions. Respondents' suit suffers from numerous infirmities, including that its adjudication would require the Court to make "initial policy determination[s] of a kind clearly for non-judicial discretion" and that "judicially discoverable and manageable standards for resolving" it claims do not exist. *Baker*, 369 U.S. at 217. Far from being an "ordinary tort suit," Pet. App. 38a, Respondents'

claims would require the Court to exercise non-judicial, political functions to advance aims that the political branches have refused.

A. The Political Question Doctrine Is A Core Aspect Of The Judicial Power

The Article III judicial power is limited: federal courts "'possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.'" *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (quoting *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)). "[J]udges can exercise no executive prerogative . . . nor any legislative function, though they may be advised with by the legislative councils." *The Federalist No. 47*, at 224 (James Madison) (Hallowell ed. 1842). Rather, "[t]he courts must declare the sense of the law . . . [for] if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body." *The Federalist No. 78*, at 358 (Alexander Hamilton) (Hallowell ed. 1842).

The political question doctrine "originate[s] in Article III's 'case' or 'controversy' language." *DaimlerChrysler*, 547 U.S. at 352.[4] An Article III "case or

[4] At times, the Supreme Court has described the political question doctrine as a matter of justiciability but not jurisdiction. *See Powell v. McCormack*, 395 U.S. 486, 512 (1969). In either case, there is no dispute that the doctrine delineates

(Continued on following page)

controversy" requires the existence of legal principles that define the relationship among parties, which in turn allows the allocation of liability and the fashioning of remedies. *See*, *e.g.*, *Muskrat v. United States*, 219 U.S. 346, 361 (1911). Where responsibility cannot be assigned or an injury remedied absent the antecedent legal principles reflecting particular policy judgments, the matter falls beyond the judicial power as authorized by Article III. *See* Laurence H. Tribe, et al., *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 3 (Wash. Legal Found., Working Paper No. 169, 2010) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), and *Baker*, 369 U.S. at 217). Similarly, questions "beyond areas of judicial expertise" are outside the judicial power. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

The Supreme Court in *Baker* notably illustrated six circumstances where an action presents a political question and is outside Article III jurisdiction:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking

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limits on the Article III judicial power that are required by the separation of powers and by judicial competence.

> independent resolution without expressing the lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. The instant matter falls beyond the proper reach of the judiciary in any of these circumstances. *See Vieth v. Jubelirer,* 541 U.S. 267, 277 (2004) (plurality); *INS v. Chadha*, 462 U.S. 919, 941 (1983). As with all applications of the case or controversy principle, the Court must undertake a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, to determine the existence, *vel non*, of a political question.

B. The Court Below Improperly Made Non-Judicial Initial Policy Determinations

"Federal courts have neither the expertise nor the authority to evaluate . . . policy judgments" concerning whether and how to regulate greenhouse gas emissions. *Massachusetts*, 549 U.S. at 533; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature") (quotations omitted). Rather than look to the determinations that need to be made, as the political question

doctrine clearly requires, the court below looked merely to the form of the suit, declaring that "where a case appears to be an ordinary tort suit, there is no impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." Pet. App. 38a-39a (internal quotations omitted).

The Second Circuit proceeded from the flawed assumption that the Respondents "need not await an 'initial policy determination' in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century." Pet. App. 38a. In so doing, the court below ignored the Court's admonition that it is impossible to resolve the political doctrine question's applicability "by any semantic cataloguing." *Baker*, 369 U.S. at 217. It also ignored contrary authority stating that tort suits may, in fact, present political questions. *See Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009) (political question doctrine precluded court from deciding tort claims arising from automobile accident); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (political question doctrine precluded court from deciding torts claims in violation of international law); *Antolok v. United States*, 873 F.2d 369, 383 (D.C. Cir. 1989) (Sentelle, J.) (stating that a tort action presented a political question where "the political nature of" the issues raised were of the type where "the Judiciary has no expertise."); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petrol.*, 577 F.2d 1196, 1203 (5th Cir. 1978) (political question doctrine barred

tortious conversion claims); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 738 (S.D.N.Y. 1986) ("Even though awarding tort damages is a traditional function for the judiciary, it is apparent that there is a clear lack of judicially discoverable and manageable standards for arriving at such an award."), *aff'd*, 819 F.2d 1129 (2d Cir. 1987), *cert. den'd*, 484 U.S. 1004 (1988).

In fact, all cases presenting political questions are predicated on causes of action that are, like tort actions, justiciable in other instances. For example, *Vieth* involved a Section 1983 suit against the Commonwealth of Pennsylvania and various executive and legislative officials, and sought a ruling that Pennsylvania's redistricting plan violated Article I of the Constitution and the Fourteenth Amendment's equal protection clause because it was a partisan gerrymander. 541 U.S. at 271. Similarly, *Nixon v. United States* involved a suit against the United States for injunctive relief under 28 U.S.C. § 1331 and declaratory relief under 28 U.S.C. § 2201, alleging that his impeachment and conviction violated Article I of the Constitution. 506 U.S. 224, 228 (1993). Like "tort suits," claims under these constitutional provisions have been adjudicated in the federal courts for many years. Unlike the court below, however, the Supreme Court undertook a "discriminating inquiry into the precise facts," *Baker*, 369 U.S. at 217, of the "garden variety" claims asserted in these cases and determined that they constituted political questions.

Stripped of its reliance on the purported "ordinariness" of Respondents' claims, the decision below would require the district court to balance competing interests on an inherently national and international scale and to make initial policy judgments the political branches have struggled for decades to make:

- The initial policy determination as to whether Petitioners' methods for providing affordable, reliable energy (or the frequency with which they use those methods) are less socially beneficial than the harms to which the Petitioners are alleged to contribute, considered in the context of millions or billions of contributing emitters beyond the Court's control.[5]
- The initial policy determination as to whether greenhouse gas emission limits could be imposed on the five Petitioners but not their competitors or other industries, requiring the district court to balance the social utility and costs of industrial, agricultural, and individual activities throughout the nation, if not the globe, that are only remotely related (if at all) to the alleged harm.[6]

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[5] *See Kivalina*, 663 F. Supp. 2d at 876 (finding the need for an initial policy determination because adjudication "requires balancing the social utility of Defendants' conduct with the harm it inflicts").

[6] *See* Pet. App. 183a-184a (district court found that it would be required to "determine and balance the implications of such

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- The initial policy determination as to whether Petitioners should be the parties to bear the burden of doing "their share" to remedy harms that Respondents allege were caused by cumulative greenhouse gas emissions.[7]

Congress has made numerous legislative enactments regarding climate change over the last two decades, none of which required emission reductions from existing emission sources like those allegedly operated by the Petitioners. *See infra* p. 35-36.[8] A fact

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relief on [ongoing international negotiations]," to "assess and measure available alternative energy sources," and to "determine and balance the implications of such relief on national energy sufficiency and thus its national security"); *Kivalina*, 663 F. Supp. 2d at 876-77 (adjudicating common law claims regarding greenhouse gas emissions requires the court to make a policy judgment of a legislative nature about what kind of emissions limits should have been imposed, rather than to resolve the dispute through legal and factual analysis).

[7] *See Kivalina*, 663 F. Supp. 2d at 877 ("Plaintiffs are . . . asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming . . . the allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance.").

[8] The Second Circuit suggests that "[i]t is [ ] fair to say that the Executive branch and Congress have not indicated they favor increasing greenhouse gases." Pet. App. 38a. The authority for this statement, the Global Climate Protection Act of 1987, states that the U.S. should "slow[ ] the rate of increase" of concentrations, i.e., reduce the carbon intensity of emissions, not that U.S. emitters or any other party decrease emissions or hold them constant. And to the extent any statute did stand for that

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finder cannot properly, effectively, and reasonably fill this legislative "gap" and determine an appropriate level of emissions such as requested in this suit simply asking what is "reasonable." *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (refusing to create federal common law tort malpractice liability standards because "[w]hat sort of tort liability to impose on lawyers and accountants . . . who provide services to federally insured financial institutions . . . 'involves a host of considerations that must be weighed and appraised'" and "'is more appropriately for those who write the laws, rather than for those who interpret them'") (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 n.41 (1981)). This inherently open-ended policy determination is akin to "judging whether a particular line is longer than a particular rock is heavy," *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., dissenting), and should not be the federal courts' to make.

C. There Are No Judicially Manageable Standards For Deciding Respondents' Claims

"Judicial action must be governed by *standard*, by *rule*." *Vieth*, 541 U.S. at 278 (emphases in original). "Laws promulgated by the Legislative Branch

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proposition, it too would serve to displace the federal common law that the court below invoked.

can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.* Courts are without guidance for resolving questions that are "delicate, complex, and involve large elements of prophecy," *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), or that would plunge them into a "sea of imponderables," *Vieth*, 541 U.S. at 290 (plurality). As such, the lack of judicially discoverable and manageable standards is a "dominant consideration[ ]" in determining the existence of a political question. The decision below is erroneous because there are no "judicially discoverable and manageable standards for resolving" this dispute. *Baker*, 369 U.S. at 217.

The Second Circuit held that there were judicially manageable standards for deciding this suit because "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing [Respondents'] claims and the federal courts are competent to deal with these issues." Pet. App. 34a. The authority the Court cites for this statement is the *Restatement (Second) of Torts* (1979), Pet. App. 32a-35a, but the *Restatement* is clear that "the court is acting without an established and recognized standard" where, as is the case with greenhouse gas emissions, the underlying act does not constitute a common law crime. *See Restatement (Second)* § 821B cmt. e. *See also North Carolina*, 615 F.3d at 302 ("[W]hile public nuisance law doubtless encompasses environmental concerns,

it does so at such a level of generality as to provide almost no standard of application."); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting) (stating that one may "search[ ] in vain . . . for anything resembling a principle in the common law of nuisance").

Thus, the Court would be required to assess the "reasonable" level of emissions for defendants' contributions to the "sum of carbon dioxide in the Earth's atmosphere." *California*, 2007 U.S. Dist. LEXIS 68547, at *46. It would have to evaluate "the energy producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business." *Kivalina*, 663 F. Supp. 2d at 874. It would then have to balance "the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of" the alleged harm. *Id.* at 874-75. Any lower level of emissions must not have been offset, or even exceeded, by foreign competitors' increased emissions. *See* Tribe, *supra*, at 17-18. There is no indication that these considerations were paramount in any of the Supreme Court's prior suits involving water pollution, nor were they present in *Georgia v. Tennessee Copper*, 206 U.S. 230, 236 (1907). Greenhouse gas emissions should not be regulated in accordance with "the same principles we use to regulate prostitution, obstacles in highways, and bullfights." *North Carolina*, 615 F.3d at 301.

The "difficulty of fashioning relief" also bespeaks the lack of judicially discoverable and manageable standards. *Nixon*, 506 U.S. at 236. The Court would not be able to issue effective relief, as it may not bind the non-parties (some gone for centuries) who are responsible for the vast majority of the emissions that have allegedly harmed the Respondents. This inability "automatically makes [courts] institutionally ill-suited to entertain lawsuits concerning problems [as] irreducibly global and interconnected in scope" as global climate change. Tribe, *supra*, at 21. In rendering relief, the Court would also need to accommodate the Petitioners' duty to serve its customers, and would be engaged in judicial oversight of technical issues outside the judicial expertise. These considerations further evidence the political question presented by this action.

III. The Court Should Not Recognize A Federal Common Law Public Nuisance Cause Of Action For Greenhouse Gas Emissions

Assuming *arguendo* that Respondents have demonstrated Article III standing and that this action is not barred by the political question doctrine, the Court should not recognize a federal common law cause of action arising from global climate change. The Clean Air Act displaced any federal common law that could exist in this area. And even if it did not, the Court should not exercise its discretion to recognize a federal common law cause of action arising from global climate change because of the difficulty

addressing such claims, risk of adverse policy consequences, and risk that such a decision would facilitate "gaming" of judicial recusals by plaintiffs.

A. The Clean Air Act Displaced Any Federal Common Law Of Public Nuisance For Greenhouse Gas Emissions

Congress' "establishment of a comprehensive regulatory program supervised by an expert administrative agency" displaces federal common law. *Milwaukee*, 451 U.S. at 317. The Clean Air Act is a comprehensive regulatory scheme designed "to encourage or otherwise promote reasonable Federal, State, and local government actions, consistent with the provisions of this chapter, for pollution protection." 42 U.S.C. § 7401(c). It broadly applies to air pollutants, 42 U.S.C. § 7602(g), a term that includes greenhouse gases, *see Massachusetts*, 549 U.S. at 528-30, The Clean Air Act also recognizes that maximum pollution control is not desirable, and seeks "to protect and enhance the quality of the Nation's air quality resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); *see also* 42 U.S.C. § 7470(3) (Clean Air Act provision stating the purpose of the Prevention of Significant Deterioration program: "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources").

The Environmental Protection Agency's ("EPA") regulation under the Clean Air Act clearly supports this view. The court below stated, "EPA has yet to make any determination that such emissions are subject to regulation under the [Clean Air] Act, much less endeavor *actually* to regulate the emissions." Pet. App. 144a. That statement was incorrect when it was made, and is obsolete in light of EPA's regulatory actions. EPA has finalized numerous rules regulating greenhouse gas emissions from stationary sources of the type allegedly operated by Petitioners. *See* Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,264 (Oct. 30, 2009); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("endangerment finding" determining that greenhouse gases may reasonably be anticipated to endanger public health or welfare); Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (determining that the PSD stationary source program applies as of January 2, 2011); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) ("tailoring rule" rewriting Congress' emission rate standards for the prevention of significant deterioration and Title V permitting programs to allow for regulation of greenhouse gases). EPA has entered into settlement agreements with states and environmental groups, including certain Respondents, mandating the Agency to promulgate existing

source performance standards from Petitioners, as well as other industrial sources. *See Am. Petr. Inst. v. EPA*, No. 08-1277 (D.C. Cir. filed Aug. 21, 2008); *New York v. EPA*, No. 06-1322 (D.C. Cir. filed Sept. 13, 2006). EPA has also regulated mobile source emissions from light-duty motor vehicles. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

The only reasonable conclusion that may be reached from the Clean Air Act is that Congress has spoken directly to the harm caused by air pollutants, displacing any extant federal common law. *See Milwaukee*, 451 U.S. at 325.

B. The Court Should Not Recognize A Federal Common Law Public Nuisance For Greenhouse Gas Emissions

The Court should not exercise its discretion to recognize a federal common law of public nuisance arising from greenhouse gas emissions or for harm caused by global climate change. "It is emphatically the duty of the Judicial Department to say what the law is," and not what it ought to be, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and legislative power is vested in Congress, not the Judiciary. *See* U.S. Const. Art. I, § 1. Federal common law accordingly is disfavored, and "cases in which judicial creation of a special federal rule would be justified . . . are few and restricted." *O'Melveny & Myers*, 512 U.S.

at 87. Following the Supreme Court's rejection of a general common law in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), the Court has recognized federal common law only in limited enclaves of distinct federal interest. *See Tex. Indus. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981).

The Court has, of course, in the past recognized a federal common law of public nuisance for some environmental claims and stated in dicta that it exists "[w]hen we deal with air and water in their ambient or interstate aspects[ ]." *Illinois v. Milwaukee*, 406 U.S. 91, 103 (1972). The decision to recognize federal common law in some interstate pollution contexts is not, however, a mandate that the Court must exercise it in any purported interstate pollution dispute. The Court allows federal remedies for violations of customary international law that have "definite content and acceptance among civilized nations" equivalent to "the historical paradigms familiar when" the Alien Tort Statute, 28 U.S.C. § 1350, was enacted, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), but does not allow a federal common law suit based on less definite and specific norms. Similarly, the Court recognizes a federal common law damages remedy for constitutional violations by certain federal actors, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), but has consistently refused to extend that remedy "to any new context or new category of defendants." *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67-68 (2001).

The Court has exercised its discretion to recognize remedies sparingly, considering both the inherent limits to judicial rulemaking and the need to avoid potential infringement of Congressional or Executive prerogatives. For instance, the Court has exercised highly circumscribed discretion in extending federal common law norms because "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Sosa*, 542 U.S. at 726. A "decision to create a private right of action is one better left to legislative judgment in the great majority of cases," due to the large number of policy determinations that inevitably accompany such a decision and to the likelihood that such judicial determinations, in the absence of guidance by the political branches, "would raise risks of adverse [] policy consequences." *Sosa*, 542 U.S. at 727-28.

Respondents' claims would extend the federal common law of public nuisance far beyond its previous applications in the absence of any indication from Congress that such action is appropriate. In each of those cases, the claims were based on discrete lines of causation from individual sources to their alleged injuries that unfolded in a specified distance and time. *See Georgia*, 206 U.S. at 236 (Georgia alleged that "forests, orchards and crops" were harmed by an open smelting pit several miles from the Tennessee-Georgia border); *Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (Missouri alleged that Illinois directed sewage from Chicago into an artificial channel that flowed into the Mississippi River where it "deposited"

and contaminated property and waterways used for drinking, agriculture and manufacturing); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971) (defendant companies dumped chemicals into streams that flowed directly into Lake Erie, damaging Ohio property); *New Jersey v. New York*, 283 U.S. 473, 476 (1931) (New York released "noxious, offensive and injurious materials . . . into the ocean," and those discrete materials were "cast upon the beaches . . . causing great and irreparable injury"). By contrast, Respondents' claims are not so limited. If litigation is the appropriate response to global climate change, the only appropriate litigation would be the war of all against all, with virtually every natural and corporate person worldwide as simultaneous plaintiffs and defendants.

Other differences between these actions and the cause of action authorized by the decision below counsel against extending a common law remedy. These include the lack of judicially manageable standards for deciding these actions, *see supra* p. 26-29, and the general lack of judicial expertise in the difficult technical questions presented by Respondents' claims.

Similarly, Congress' legislative enactments counsel against extending federal common law to impose emission limitations on individual greenhouse gas emitters. Congress has returned over and again to the subject of greenhouse gas emissions, *see, e.g.*, National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601; Energy Policy Act of 1992, Pub.

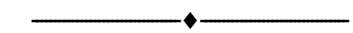
L. No. 102-486, tit. XVI, § 1601, 106 Stat. 2776, 2999; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; Energy Security Act of 1980, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75; Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat. 1407; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492; Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2128, but with the arguable exception of the Clean Air Act's broad provisions, has never restricted greenhouse gas emissions from individual emitters or suggested that liability should attach to greenhouse gas emissions. Even where Congress has considered legislation that would restrict greenhouse gas emissions, it has not considered enacting legislation that in any way resembles a public nuisance remedy. *See, e.g.*, American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (passed House, June 26, 2009); American Clean Energy and Leadership Act of 2009, S. 1462, 111th Cong. (2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009).

C. Recognizing A Federal Common Law Public Nuisance For Greenhouse Gas Emissions Allows Gaming Of Judicial Recusals

Global warming public nuisance cases threaten judicial legitimacy by raising the specter of strategic gaming by plaintiffs to force judicial recusals. In the case of greenhouse gas public nuisance claims, this

problem is uniquely acute, however, because of the lack of substance inherent in the cause of action and the corresponding lack of limitations on the universe of potential defendants – millions of sources in the United States emit significant quantities of greenhouse gases. Plaintiffs may, for example, select defendants in order to force the recusal of certain judges or to defeat the possibility of *en banc* review or even review by this Court. In *Comer*, 607 F.3d 1049, for example, the United States Court of Appeals for the Fifth Circuit dismissed an appeal of a putative class action against a number of corporate defendants that was based on a greenhouse gas public nuisance theory for lack of quorum after one of the judges who participated in the decision to rehear the case *en banc* later recused herself. This Court has faced at least one similar circumstance under a broad theories of liability under the Alien Tort Statute. *See Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

This Court's approval of common law actions against arbitrarily selected collections of defendants would guarantee that mass recusals, possibly motivated by plaintiffs' strategic aims, would arise in future cases. This problem may be unavoidable where courts discharge their duty under federal statute, but the Court should not extend federal common law causes of action where such significant potential for abuse exists.



CONCLUSION

For the foregoing reasons, and those set forth in the Brief for Petitioners, *Amici* urge the Court to reverse the decision below and remand with orders that it be dismissed.

Respectfully submitted,

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