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 RESPONDENTS

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QUESTION PRESENTED

Is this common law nuisance suit non-justiciable under the political question doctrine?

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INTEREST OF AMICI CURIAE

Amici curiae, listed below, are law professors who teach, research, and write about environmental law, constitutional law, and torts. They have an interest in preserving the courts' traditional authority to adjudicate common law claims involving the environment. Most participated as amici in two similar nuisance cases in the Courts of Appeals, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), appeal dismissed, 607 F.3d 1049 (5th Cir. 2010), and *Native Village of Kivalina v. ExxonMobil Corp.*, appeal pending, No. 09-17490 (9th Cir.). Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.[1]

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici, their counsel, and their institutions, made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

I. Under the political question doctrine, certain *constitutional* issues are reserved to the political branches for decision. The doctrine has no application to common law claims like the one in this case. The Court should reject petitioners' invitation to extend the doctrine far beyond its traditional limits.

A. In every case in which the Court has found federal jurisdiction lacking because of the political question doctrine, the plaintiff's claim has been founded on the Constitution. Meanwhile the Court has addressed a great many common law issues over the years, without ever suggesting, much less holding, that any of them might be political questions. This sharp distinction is not a mere matter of labeling. It is a fundamental divide necessitated by the very nature of the political question doctrine, which is rooted in the Constitution's separation of powers. The six formulations established in *Baker v. Carr*, 369 U.S. 186 (1962), are tools for dividing constitutional claims between the competence of the courts and the political branches. They have never had any bearing on common law claims, which are always within the competence of courts.

B. Whenever a constitutional issue that is nonjusticiable under the political question doctrine has arisen *within* a lawsuit under the common law, the Court has deferred to the political branches' resolution of the constitutional issue, but has nevertheless always retained jurisdiction over the common law case and decided it on the merits. In such cases the

Court has never decided that the common law claim itself is non-justiciable.

C. There is no reason to accept petitioners' invitation to expand the political question doctrine far beyond its traditional confines. A legal issue is not converted into a political question simply because one might have policy grounds for preferring that it be resolved by another branch of government. Even if this nuisance suit will be as novel and complex as petitioners allege, their concerns can be addressed the way such concerns have always been addressed, through the courts' interpretation of the common law of nuisance.

II. Even if the political question doctrine applied to non-constitutional issues, this nuisance claim would not be a political question. None of the six *Baker* formulations is inextricable from this case. The authority to resolve common law nuisance claims is neither textually nor implicitly committed to either Congress or the President.

A. This nuisance claim is not textually committed to the political branches. The Constitution does not commit to the political branches the exclusive power to resolve nuisance claims, to adjudicate environmental disputes, or to address the question of climate change. If there is any constitutional text authorizing one of the branches to decide this case, it is Article III, which explicitly provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity."

B. This nuisance claim is governed by judicially discoverable and manageable standards. Petitioners argue that because the law of nuisance incorporates a broad reasonableness standard rather than a set of precise rules, there will be no "right" or "wrong" answers in this case. But that is an argument that would make political questions out of all nuisance cases, not just this one. Indeed, all of the Court's prior nuisance cases were governed by the very same standards that petitioners claim are undiscoverable in this case.

An issue does not become non-justiciable merely because it is governed by a broad standard like reasonableness. An issue is non-justiciable when it is governed by no standard at all. When the applicable standard is merely broadly worded or incapable of being reduced to bright line rules, the Court has consistently refused to hold that an issue is a political question.

C. This nuisance claim can be decided without an initial policy determination of the kind clearly for nonjudicial discretion. This *Baker* formulation prevents courts from making only those policy determinations that are clearly within the exclusive power of the executive branch, involving matters like which nation has sovereignty over disputed territory, and it proscribes only decisions explicitly setting forth the policy of the United States on a particular matter. It does not bar courts from making the implicit policy judgments they traditionally make in common law cases.

D. None of the remaining *Baker* formulations is inextricable from this case. A court applying the common law would not express any lack of the respect due to the political branches. The common law of nuisance cannot override any decisions already made by the political branches. And there is no possibility of inconsistent pronouncements by the judiciary and another branch, because the other branches can always displace the common law of nuisance.

ARGUMENT

The political question doctrine limits judicial review of certain constitutional claims that are committed to the political branches. The Court has never held, or even suggested, that the doctrine forecloses judicial review of common law claims like the one in this case. And even if the political question doctrine limited judicial consideration of common law claims, the claim in this case would not be a political question.

I. The Political Question Doctrine Has No Application to Issues of Common Law.

The political question doctrine has no application to issues of common law, like the nuisance claim in this case. The doctrine is a judicial gloss on the Constitution's separation of powers, under which there are certain *constitutional* issues that the Constitution reserves, textually or implicitly, to the political branches for decision. The common law, by contrast, is the province of the judiciary, which is the only branch with the authority to interpret the common law.

The Court has always adhered to this distinction between constitutional claims and common law claims. In every case in which the Court has found federal jurisdiction lacking because of the political question doctrine, the plaintiff's claim has been founded on a provision of the Constitution. The Court has decided many common law issues, but it has never suggested that any of them were non-

justiciable under the political question doctrine. Perhaps the clearest evidence of this sharp distinction can be found in the cases in which a non-justiciable constitutional issue has arisen *within* a lawsuit under the common law, as an element of the plaintiff's or the defendant's case. In such cases, the Court's consistent practice has been to defer to the political branches' resolution of the constitutional issue, but nevertheless to retain jurisdiction and to decide the common law issue on the merits. Common law issues are never political questions.[2]

There is no reason to accept petitioners' invitation to expand the political question doctrine far beyond its traditional confines. Petitioners' concerns can be addressed the traditional way, through the courts' interpretation of the common law of nuisance.

A. This Court Has Never Found a Common Law Claim Non-Justiciable Under the Political Question Doctrine.

In every case in which the Court has found federal jurisdiction lacking because of the political question doctrine, the plaintiff's claim has been a constitutional claim. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (Article I and

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[2] Respondent Tennessee Valley Authority is only half right in observing that "this case differs from most cases presenting a political question: Plaintiffs are not asking the courts to enforce a constitutional or another external standard or norm that is typically in the domain of nonjudicial actors." TVA Br. at 39-40. In fact, this case differs from *all* of this Court's prior such cases.

Equal Protection Clause); *Nixon v. United States*, 506 U.S. 224 (1993) (Impeachment Trial Clause); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (Due Process Clause); *Coleman v. Miller*, 307 U.S. 433 (1939) (Article V); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74 (1930) (Guarantee Clause); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (Tenth Amendment); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (Guarantee Clause); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (Guarantee Clause); *Kiernan v. City of Portland*, 223 U.S. 151 (1912) (Guarantee Clause); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (Guarantee Clause); *Taylor v. Beckham*, 178 U.S. 548 (1900) (Guarantee Clause and Due Process Clause); *Georgia v. Stanton*, 73 U.S. 50 (1867) (Constitutional challenge to Reconstruction Acts).

Common law issues, by contrast, are never political questions. The Court has addressed a great many questions of common law over the years, without any suggestion that any of them might be nonjusticiable as political questions. Many of these have been common law nuisance cases. Some have involved disputes that raised scientifically complex and politically sensitive questions of environmental policy, including the appropriate levels of pollution in the Atlantic Ocean, the Great Lakes, and the Mississippi River. *New Jersey v. City of New York*, 283 U.S. 473 (1931) (Atlantic Ocean); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (Lake Michigan); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971) (Lake Erie); *Missouri v. Illinois*, 180 U.S. 208 (1901) (Mississippi River). Yet the Court has never even

suggested, much less held, that these common law nuisance claims might be political questions. Rather, the Court has affirmed that the federal courts have jurisdiction to decide them. *Illinois v. Milwaukee*, 406 U.S. at 98, 108; *Ohio v. Wyandotte Chems.*, 401 U.S. at 495-96; *New Jersey v. New York*, 283 U.S. at 476; *Missouri v. Illinois*, 180 U.S. at 241.

As the Court held in *Ohio v. Wyandotte Chemicals*, in light of this long history, "precedent leads almost ineluctably to the conclusion that we are empowered to resolve this dispute." 401 U.S. at 496. The case involved Ohio's effort to stop several Canadian and American chemical companies from dumping mercury into streams that reached Lake Erie. It involved extraordinarily difficult factual questions concerning whether Ohio residents had experienced any actual harm and the extent to which the defendants had contributed to that harm. "We already know," the Court explained,

> that Lake Erie suffers from several sources of pollution other than mercury; that the scientific consensus that mercury is a serious water pollutant is a novel one; that whether and to what extent the existence of mercury in natural waters can safely or reasonably be tolerated is a question for which there is no firm answer; and that virtually no published research is available describing how one might extract mercury that is in fact contaminating water.

Id. at 503-04. The Court recognized that "Ohio is raising factual questions that are essentially ones of first impression to the scientists." *Id.* at 504. The Court acknowledged that it lacked jurisdiction over suits "that seek to embroil this tribunal in 'political questions.'" *Id.* at 496. Nevertheless, the Court concluded, "[t]hat we have jurisdiction seems clear enough." *Id.* at 495. The Court declined to exercise its discretionary *original* jurisdiction – not because the case presented a political question, but because an ordinary trial court would be better suited to adjudicate the case in the first instance. *Id.* at 505. *See also Illinois v. Milwaukee*, 406 U.S. at 108 (declining to exercise original jurisdiction over nuisance suit, but remitting the case "to an appropriate district court whose powers are adequate to resolve the issues").

Further evidence that the political question doctrine applies only to constitutional issues can be found in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986), a case in which wildlife conservation groups alleged that federal statutes required the Secretary of Commerce to take action against Japan for exceeding its annual quota of whales under an international treaty. The defendants argued that the issue – although statutory rather than constitutional – was a non-justiciable political question because it was so closely connected with foreign relations. The Court disagreed; it held that an issue of statutory interpretation does not present a political question. "[I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts,"

the Court explained. "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. *See also Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (finding no political question where "[t]he parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court"). The interpretation of the common law, like the interpretation of statutes, is a traditional and characteristic function of the courts. Only constitutional issues can be political questions.[3]

For this reason, the Court has described the doctrine as one that can deprive a federal court of jurisdiction over *constitutional* claims, not other kinds of claims. *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992) ("In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable"); *Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (Scalia, J., dissenting) ("we have found

[3] In *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), the Court determined that the Civil Aeronautics Act did not authorize judicial review of certain orders of the Civil Aeronautics Board regarding overseas air transportation. While the Court cited some of the same separation-of-powers concerns that motivate the political question doctrine, *id.* at 111, the decision rested on the Court's interpretation of the statute, not on the political question doctrine. *Id.* at 106 ("This Court long has held that statutes which employ broad terms to confer powers of judicial review are not always to be read literally").

some constitutional claims to be beyond judicial review because they involve 'political questions'").

Commentators have likewise consistently described the political question doctrine as one that applies only to constitutional issues. Laurence Tribe, for example, summarizes the political question doctrine as one that requires "federal courts to determine whether constitutional provisions which litigants would have judges enforce do in fact lend themselves to interpretation as guarantees of enforceable rights." Laurence H. Tribe, *American Constitutional Law* 385 (3d ed. 2000). As Tribe explains, "[a]n issue is political not because it is one of particular concern to the political branches of government but because the constitutional provisions which litigants would invoke as guides to resolution of the issue do not lend themselves to judicial application." *Id.* at 370.

See also Charles Alan Wright, Arthur R. Miller, et al., 13C *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3534.3 (3d ed.) ("Challenges to official action or inaction are the stuff of the separation-of-powers concerns that underlie political-question reasoning"); Erwin Chemerinsky, *Federal Jurisdiction* 147 (5th ed. 2007) (defining the doctrine as requiring "that certain allegations of unconstitutional government conduct should not be ruled on by the federal courts"); Jesse H. Choper, "The Political Question Doctrine: Suggested Criteria," 54 *Duke L.J.* 1457, 1458 (2005) (defining the doctrine as stating "that courts should abstain from resolving constitutional issues that are better left to

other departments of government"); Rachel E. Barkow, "More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy," 102 *Colum. L. Rev.* 237, 239-40 (2002) ("Underlying the political question doctrine . . . is the recognition that the political branches possess institutional characteristics that make them superior to the judiciary in deciding certain constitutional questions"); Mark Tushnet, "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine," 80 *N.C. L. Rev.* 1203, 1207 (2002) ("For the political question doctrine, the 'issue,' in the Court's sense, is: Who gets to decide what the right answer to a substantive constitutional question is?"); Martin H. Redish, "Judicial Review and the 'Political Question,'" 79 *Nw. U. L. Rev.* 1031, 1031 (1985) ("The so-called 'political question' doctrine postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution"); Louis Henkin, "Is There a 'Political Question' Doctrine?", 85 *Yale L.J.* 597, 599 (1976) ("a political question is one in which the courts forego their unique and paramount function of judicial review of constitutionality"); Tribe, *supra*, at 367 ("Professor Henkin is clearly right that one should not accept lightly the proposition that there are provisions of the Constitution which the courts may not independently interpret").

Amici Law Professors try to avoid this sharp distinction between constitutional issues and common law issues by insisting that all of the Court's "cases

presenting political questions are predicated on causes of action that are, like tort actions, justiciable in other instances." Brief for Law Professors as Amici Curiae in Support of Petitioners at 23. What they do not mention is that every such political question has involved a constitutional claim. The fact that some constitutional claims are non-justiciable has no bearing on whether any common law claims are non-justiciable.

Petitioners rely heavily on language from *Baker v. Carr*, 369 U.S. 186 (1962), Pet. Br. at 46, but they have plucked that language out of context. In *Baker*, the Court lists several "formulations" describing when prior cases had found an issue non-justiciable. Among these are "a lack of judicially discoverable and manageable standards for resolving it," and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217. These "formulations," however, are relevant to deciding which *constitutional* questions should be deemed nonjusticiable. They have no bearing on questions of common law. The Court makes that clear in the very next paragraph of *Baker*, which explains that courts should refer to these formulations in determining "whether some action denominated 'political' exceeds constitutional authority." *Id.* *Baker* itself involved a claim under the Equal Protection Clause. All the Court's subsequent cases applying the *Baker* formulations have likewise involved constitutional claims. *Vieth*, 541 U.S. 267 at 277-78 (plurality opinion) (Article I and Equal Protection Clause); *Nixon*, 506 U.S. at 228 (Impeachment Trial Clause); *United States Dep't of*

Commerce, 503 U.S. at 456 (Article I); *United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990) (Origination Clause); *Davis v. Bandemer*, 478 U.S. 109, 121-22 (1986) (Equal Protection Clause); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248-50 (1985) (Indian Commerce Clause); *INS v. Chadha*, 462 U.S. 919, 940-42 (1983) (Article I); *Powell v. McCormack*, 395 U.S. 486, 518-19 (1969) (Article I). The *Baker* formulations are a tool for dividing constitutional claims between the competence of courts and the political branches. They have no relevance to common law claims, because common law claims are always within the competence of courts.

This distinction between constitutional issues and common law issues is not a mere matter of labeling or "semantic cataloguing," *Baker*, 369 U.S. at 217. It is a fundamental divide necessitated by the very nature of the political question doctrine. At bottom, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* at 210. The Constitution's text commits certain tasks to branches other than the judiciary. Its structure may so commit others. But the adjudication of common law cases is at the core of the judiciary's constitutional role. It is committed to the judiciary both textually, in the words of Article III ("The judicial Power shall extend to all Cases, in Law and Equity"), and structurally, in the relationship of Article III to Articles I and II, neither of which authorizes the other branches to do anything remotely similar. As the Court has explained, "[t]he judicial Power" created by Article III is "the power to act in the manner traditional for English and American

courts." *Vieth*, 541 U.S. at 278 (plurality opinion). Nothing could be more traditional than the adjudication of a common law case, the judiciary's core function since long before the Constitution was enacted.

There are two sound prudential reasons for this clear line between constitutional and common law issues. First, when courts interpret the Constitution, they are the final arbiters. The political branches cannot undo what the courts have done. The separation-of-powers concerns underlying the political question doctrine are thus at their strongest, because the political branches cannot provide a check on judicial action. When courts interpret the common law, by contrast, the political branches can override their rulings at any time. In such cases, the political branches themselves can police the judiciary. The separation-of-powers concerns that lie behind the political question doctrine are substantially weaker.

Second, if the political question doctrine applied to all issues, not just constitutional issues, the doctrine would cease to be "a delicate exercise in constitutional interpretation," *Baker*, 369 U.S. at 211. If the doctrine were to lose its constitutional grounding, it would lack any limiting principle. It would become a free-floating discretionary power of federal courts to disclaim jurisdiction over factually complex or politically sensitive cases. But of course federal courts have no such power. They must hear even the most difficult cases brought before them. *Union Pac. R.R. Co. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584, 590 (2009); *Marshall v. Marshall*, 547

U.S. 293, 298 (2006); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

B. When a Non-Justiciable Constitutional Issue Has Arisen *Within* a Common Law Claim, the Court Has Always Taken Jurisdiction and Decided the Common Law Claim on the Merits, After Deferring to the Political Branches' Resolution of the Constitutional Issue.

Constitutional issues sometimes arise *within* lawsuits brought under the common law, as parts of either the plaintiff's or the defendant's case. Sometimes those constitutional issues are non-justiciable as political questions. In such cases, the Court's uniform practice has been to defer to the political branches' resolution of the non-justiciable constitutional issue, but nevertheless to take jurisdiction and decide the common law claim on the merits. The Court has never decided that the common law claim itself is non-justiciable.

The best-known example is *Luther v. Borden*, 48 U.S. 1 (1849). Although *Luther* is usually remembered for holding that Guarantee Clause claims are non-justiciable, the case itself was an action for trespass, for breaking and entering a house. *Id.* at 34. The plaintiff was one of the participants in the Dorr Rebellion; the defendants were officers of the established "charter" government of Rhode Island, which was attempting to suppress the rebellion. *Id.* As part of the plaintiff's case, he argued that the charter government lacked lawful power – that the rebel

government was the real one – and that the defendants thus had no authority to enter his house. *Id.* at 38. It was this particular argument that the Court found non-justiciable, on the ground that the political branches have the sole power to determine whether a state government is genuine. *Id*. at 39-43. But the Court did not find the case non-justiciable as a whole. The Court did not dismiss the case for want of jurisdiction. Rather, the Court decided the case on the merits. The case had been tried below to a jury, which had returned a verdict for the defendants. *Id*. at 18. This Court affirmed that judgment. *Id*. at 47. The plaintiff's argument about the true government of Rhode Island was non-justiciable, but his common law action for trespass *was* justiciable.[4]

Every time a political question has arisen within a common law case, the Court has likewise deferred to the political branches on the political question but has decided the case on the merits. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (suit for replevin decided on the merits, after deferring to the political branches as to which was the legitimate government of Mexico, an issue the Constitution exclusively commits to the political branches); *Juilliard v. Greenman*, 110 U.S. 421 (1884) (suit for breach of contract decided on the merits, after deferring to the political branches on the question of whether to make treasury notes legal tender, an issue the Con-

[4] Amici Consumer Energy Alliance et al. summarize *Luther* incorrectly. Brief of Amici Curiae Consumer Energy Alliance et al. at 21. The Court did not hold that the common law trespass claim in *Luther* was non-justiciable. The Court decided that issue on the merits.

stitution exclusively commits to the political branches); *Doe v. Braden*, 57 U.S. 635 (1853) (suit for ejection decided on the merits, after deferring to the political branches as to the validity of a treaty, an issue the Constitution exclusively commits to the political branches); *Williams v. Suffolk Ins. Co.*, 38 U.S. 415 (1839) (action of assumpsit decided on the merits, after deferring to the political branches as to which government had jurisdiction over the Falkland Islands, an issue the Constitution exclusively commits to the political branches). As the Court explained in *Juilliard*, the wisdom of using one sort of currency or another "is a political question, to be determined by congress when the question of exigency arises, and not a judicial question." 110 U.S. at 450. Nevertheless, the Court held, "[t]here can . . . be no doubt of the jurisdiction of this court" over the breach of contract claim. *Id.* at 436.

When a political question arises within a non-constitutional case, the Court's consistent practice has thus been to take jurisdiction of the case, despite deferring to the political branches on the political question. The Court explained this consistent practice in *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918). *Ricaud* was a suit in equity to recover lead bullion imported from Mexico. One element of the plaintiff's case was the allegation that the ostensible government of Mexico, the source of the defendant's title, was in fact not the legitimate government of Mexico. The Court held that because the United States had recognized that government as legitimate, the judiciary could not decide the question anew. It was a question constitutionally committed

to the political branches. The Court continued: "This last rule, however, does not deprive the courts of jurisdiction once acquired over a case." The resolution of the political question by the political branches "must be accepted by our courts as a rule for their decision." Nevertheless, "[t]o accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it." *Id*. at 309. The Court proceeded to decide the case on the merits.

Amicus Chamber of Commerce correctly notes that the Court has "refused to adjudicate political questions even when such questions arise in the context of private litigation involving common law." Brief Amicus Curiae of the Chamber of Commerce at 17. The important thing, however, is that when a political question has arisen within a common law case, the Court has not dismissed the case for lack of jurisdiction. The Court has exercised jurisdiction and decided the case on the merits.

An issue of common law, therefore, can never be non-justiciable under the political question doctrine. Only constitutional claims can be non-justiciable as political questions. Because the present case involves a common law claim of nuisance, the political question doctrine is no bar to the federal courts' exercise of jurisdiction.

C. There is No Reason to Expand the Political Question Doctrine to Include Common Law Claims.

Petitioners are not arguing that there is a constitutional provision requiring federal courts to defer to the political branches on some element of the case, such as the validity of a treaty or the authenticity of a government. Rather, they are arguing that the entire case itself is non-justiciable. They are urging the Court to expand the political question doctrine far beyond its traditional confines. But even if this nuisance suit will be as novel and complex as petitioners allege, such a radical departure from precedent is hardly necessary. Petitioners' concerns can be addressed the traditional way, through the courts' interpretation of the common law of nuisance.

A legal issue is not converted into a political question simply because one might have policy grounds for preferring that it be resolved by another branch of government. Those policy concerns can be addressed in many other ways, none of which would require twisting the political question doctrine beyond recognition. As the leading treatise on the federal courts explains:

> Traditional use of the political-question label stops short of embracing all the myriad circumstances in which courts conclude that a particular problem is better addressed by another branch. A decision not to create a new common-law cause of action, for example, may well rest on a sense that the subject

> is better suited to legislative or even administrative action, without even pausing to think of political-question doctrine.

Charles Alan Wright, Arthur R. Miller, et al., 13C *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3534.3 (3d ed.). If there are pressing reasons respondents should not prevail in their nuisance suit, they are reasons of nuisance law, and they can be addressed by a decision on the merits. There is no need for a drastic expansion of the political question doctrine. Petitioners' own amici demonstrate that the courts have had no trouble rejecting innovative nuisance suits on the merits, by applying the substantive law of nuisance. Brief of Amici Curiae National Federation of Independent Business Small Business Legal Center et al. at 10-12. And if Amici's arguments are correct, the courts will have no trouble doing the same here. *Id.* at 12-27.

Under the common law of nuisance, respondents will have to prove that the pollution produced by petitioners "is an unreasonable interference with a right common to the general public." *Restatement (Second) of Torts* § 821B(1). If the questions of causation and harm in this case are in fact as intractable as petitioners allege, respondents will not be able to prove their case. Among the circumstances a court will have to consider are "[w]hether the conduct involves a significant interference with the public health" and "whether the conduct . . . has produced a permanent or long-lasting effect." *Id.*, § 821B(2). If such matters are as fraught with uncer-

tainty as petitioners contend, respondents will not be able to sustain their burden of proof.

In making these determinations, courts will be doing what they have always done: they will be adapting the common law of nuisance to new problems. New technologies have always given rise to new and difficult questions of nuisance law, and courts have always been able to develop the common law, case by case, in response to these new questions. When the earliest railroads were assailed as nuisances, for example, courts did not dismiss the suits for lack of jurisdiction, on the theory that only the political branches were equipped to make the difficult policy determinations of how many railroad lines the nation should have and where they should be located. When the railroads won, they won on the merits. *E.g.*, *Lexington & Ohio R.R. Co. v. Applegate*, 38 Ky. 289 (1839). Industrialization did not cause courts to treat nuisance suits against factories as political questions, on the theory that industrial policy was a new and complex subject best left to the political branches. When the factories won, they won on the merits. Paul M. Kurtz, "Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions – Avoiding the Chancellor," 17 *Wm. & Mary L. Rev.* 621 (1976). When air pollution first became an important policy concern, courts did not dismiss nuisance suits against polluters, on the theory that there were no right or wrong answers to the question of how clean the air ought to be. *E.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). When the polluters won, they won on the merits. These were issues that in their day were just as controversial

and just as difficult, in both a legal and a scientific sense, as climate change is today. Yet courts were able to perform their traditional task of accommodating the law of nuisance to new circumstances.

In the end, petitioners' argument concerning the political question doctrine is, as Justice Holmes put it in a similar context, "little more than a play on words." *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). Climate change *is* a "political question" in the colloquial meaning of the phrase, in the sense that it is a question that has produced political controversy. But so were school desegregation, and abortion, and capital punishment, and scores of other issues over which the federal courts have exercised jurisdiction. It is this colloquial sense of the phrase that Tocqueville had in mind when he wrote that "[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question." Alexis de Tocqueville, *Democracy in America* 257 (Harvey C. Mansfield and Delba Winthrop eds., 2000). The legal definition of a "political question," however, is much narrower than its colloquial definition. Under the legal definition, a common law claim of nuisance has never been considered a political question, and there is no reason to start doing so now.

The Court should instead hew closely to the political question doctrine's limited reach. After all, the doctrine is a creation of the courts themselves. The only boundaries to the doctrine are found in the Court's own cases. Once those boundaries are burst,

there would be no principled limit to the doctrine's expansion.

II. This Nuisance Claim Would Not Be a Political Question Even if the Political Question Doctrine Applied to Issues of Common Law.

Petitioners' argument rests on the erroneous assumption that the political question doctrine applies to non-constitutional issues. Pet. Br. at 46-51. But even if their assumption were correct, the nuisance claim in this case would not be a political question.

The Court's political question jurisprudence has consisted of careful, case-by-case inquiries into "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker*, 369 U.S. at 198. In *Baker*, the Court analyzed its prior cases and found six common "formulations" among the issues it had found to be political questions. *Id.* at 217. "Prominent on the surface of any case held to involve a political question," the Court determined, is either:

> [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 independent resolution without expressing 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.

Id. Dismissal is warranted only if at least one of these six elements is "inextricable" from the case. *Id.*

A plurality of the Court has suggested that these formulations "are probably listed in descending order of both importance and certainty." *Vieth*, 541 U.S. at 278 (plurality opinion).

None of the six *Baker* formulations is "inextricable" from this case.

A. This Nuisance Claim is Not Textually Committed to the Political Branches.

The most important and easily discernible of the *Baker* formulations is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. This *Baker* formulation requires explicit constitutional language, not inference from the Constitution's structure or from the capacities of the three branches.

The text of the Constitution does not assign the resolution of common law nuisance claims like this one to the legislative or executive branches. Petitioners do not even try to argue that it does. Articles I and II say nothing about any exclusive power of the political branches to resolve nuisance claims (or indeed any common law claims), to adjudicate environmental disputes, or to address the question of climate change. The Commerce Clause has never been understood to deprive federal courts of jurisdiction over cases involving interstate or international commerce. Article III, by contrast, explicitly states that "[t]he judicial Power shall extend to all Cases, in Law and Equity." U.S. Const. art. III, § 2. If the Constitution textually commits this issue to any branch, it is the judiciary.

This case is very different from the only two cases since *Baker* in which the Court has found issues textually committed to the political branches. In *Nixon*, the Court determined that the trial of impeachments is textually committed to the Senate, and thus that the Senate's choice of impeachment procedure is a political question. *Nixon*, 506 U.S. at 229-33. The basis for this decision was Article I, Section 3, Clause 6, which says very clearly that "[t]he Senate shall have the sole Power to try all Impeachments." *Id.* at 229. There is no comparable constitutional text in this case.

In *Gilligan*, the Court found that the organization and discipline of the National Guard is textually committed to Congress. *Gilligan*, 413 U.S. at 6-9. The basis for this decision was Article I, Section 8,

Clause 16, which says that Congress has the power "[t]o provide for organizing, arming, and disciplining, the militia." *Id.* at 6. There is no comparable constitutional text to govern this case. None, that is, except for Article III, which commits the issue to the courts.

B. This Nuisance Claim is Governed by Judicially Discoverable and Manageable Standards.

Petitioners rely almost entirely on the second *Baker* formulation, whether there is "a lack of judicially discoverable and manageable standards," *Baker*, 369 U.S. at 217, for resolving this case. Pet. Br. at 46-51. They argue that because the law of nuisance is governed by a reasonableness standard rather than a set of precise rules, there will be no "right" or "wrong" answers in a nuisance case. *Id.* at 48. But an issue does not become a political question merely because it is governed by a broad standard like reasonableness. An issue is a political question when it is governed by no standard at all.

This nuisance case is a political question, petitioners argue, because the judge who decides it will "'search[ ] in vain . . . for anything resembling a principle in the common law of nuisance.'" Pet. Br. at 48 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)). Amici Consumer Energy Alliance et al. likewise worry that "[p]ublic nuisance law operates at such a high level of generality as to provide no meaningful notice or consistent standard of applica-

tion." Brief of Amici Curiae Consumer Energy Alliance et al. at 28.

But this is an argument that would make political questions out of *all* nuisance cases, not just this one. A legal issue does not transform into a political question simply because it is governed by a reasonableness standard. If it did, not only would every nuisance case become a political question, but so would the vast swaths of the law – from negligence to the Fourth Amendment – that also require courts to determine what is reasonable. So would the great many constitutional issues that involve equally broad standards, like whether punishment is "cruel and unusual," or whether congressional action is "necessary and proper." The fact that the law of nuisance cannot be reduced to a set of discrete principles, *see* Pet. Br. at 48, or an algorithm that spits out "right" and "wrong" answers, *see id.*, is thus utterly beside the point. The law of nuisance may be broadly worded, but it is hardly undiscoverable or unmanageable.

The standards that will govern this case *are* in fact discoverable. They can be discovered very easily, by reading the Restatement of Torts. Courts have been applying them for centuries, without any suggestion that courts have been exceeding their jurisdiction all the while. Indeed, all the Court's prior nuisance cases – none of which presented political questions – were governed by the very same standards that petitioners claim are undiscoverable in this case. *See, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Georgia v. Tennessee Copper Co.*, 206

U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906).[5]

An issue does not become a political question under this *Baker* formulation merely because it is governed by a broad standard like reasonableness. An issue is a political question when it is governed by no standard at all. In *Vieth*, for instance, the plurality determined that political gerrymandering claims are non-justiciable, not because they require courts to apply a broad standard like reasonableness, but because courts had been unable to articulate any meaningful standard whatsoever. *Vieth*, 541 U.S. at 278-90 (plurality opinion). In *Coleman*, the Court found that a claim under Article V was non-justiciable, not because it was governed by a broad standard like reasonableness, but because it was not governed by any standard at all. *Coleman*, 307 U.S. at 450-54. *See also Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring in the judgment) (concluding that a Senator's challenge to the President's abrogation of a treaty is non-

[5] Amici Law Professors argue that the Restatement provides no standards where the alleged nuisance does not constitute a common law crime. Brief for Law Professors as Amici Curiae in Support of Petitioners at 27. Now that common law crimes are virtually nonexistent, however, this is an argument that would make political questions out of virtually all nuisance cases. The TVA argues that only the political branches can provide standards for resolving common law nuisance cases. TVA Br. at 39 n.17. But this is an oxymoron: if courts were applying standards prescribed by another branch, they would no longer be applying the common law. In common law cases, whether nuisance or any other kind, courts have always discovered the applicable standards within the common law itself.

justiciable, because while the Constitution sets forth the manner in which the Senate participates in the ratification of treaties, it provides no standards for the Senate's participation in their abrogation).

Where the governing standard is merely broadly worded or incapable of being reduced to bright line rules, by contrast, the Court has consistently refused to hold that an issue is a political question. In *Munoz-Flores*, for example, the government argued that claims under the Origination Clause are political questions, because it would be impossible for courts to fashion manageable standards to govern the issue. *Munoz-Flores*, 495 U.S. at 395. This Court disagreed. "[T]he Government suggests no reason that developing such standards will be more difficult in this context than in any other," the Court explained. "Surely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges." *Id.* at 395-96. These are issues governed by standards at least as broad as the law governing nuisance, yet there has never been doubt that federal courts have jurisdiction to decide them. *See also Baker*, 369 U.S. at 226 (finding reapportionment claims justiciable because "[j]udicial standards under the Equal Protection Clause are well developed and familiar").

This nuisance claim might involve a more complex chain of causation than others, but this is a difference that has nothing to do with the existence of judicially discoverable standards. The standards that will be applied to this case are exactly the same as the ones that courts have always applied to nuisance cases. A more complex chain of causation might make this nuisance case more difficult to prove under the substantive law of nuisance, but the substantive law is no different.

C. This Nuisance Claim Can Be Decided Without an Initial Policy Determination of the Kind Clearly for Nonjudicial Discretion.

Petitioners claim, in a single sentence, that deciding this case will require "initial policy decisions" by judges. Pet. Br. at 51. Amici Law Professors argue that judges will have to make implicit policy judgments about the social benefits of various methods of producing energy, about the fairness of imposing emission limits on petitioners but not their competitors, and about whether petitioners should bear the burden of doing their share to remedy a harm also caused by many others. Brief for Law Professors as Amici Curiae in Support of Petitioners at 24-25.

Under *Baker*, however, a political question is one that requires judges to make a particular *kind* of policy decision – the kind "clearly for nonjudicial discretion." 369 U.S. at 217. As *Baker* made clear, such policy decisions involve matters such as which na-

tion has sovereignty over disputed territory, or whether a war has ended. *Id.* at 212-13. Policy decisions like these are clearly for the executive branch, not the judiciary. And as *Baker* made equally clear, the Court was referring to *overt* policy decisions, decisions explicitly setting forth the policy of the United States on a particular matter, like whether to recognize a foreign government. *Id.* The Court was not referring to the implicit policy decisions courts make while deciding common law cases.

This case will not require judges to make policy decisions that purport to represent the official policy of the United States on any matter, much less policy decisions that are clearly reserved to the political branches. Judges will have to decide only a legal question: whether petitioners are committing a common law nuisance harmful to respondents. That alone is enough to render this *Baker* formulation inapplicable.

Nor will this case require judges to step out of their judicial role to make implicit policy decisions that are "clearly for nonjudicial discretion." The policy determinations required by common-law decision-making are ones that have traditionally been within the province of the courts: they are not "clearly" relegated to "nonjudicial discretion." Many legal issues have policy implications of one kind or another. At least since Oliver Wendell Holmes (and probably well before), it has been commonplace to observe that judges, in the course of deciding cases, are in effect making policy decisions, even if they do not explicitly say that is what they are doing. In that

sense, judges deciding all nuisance cases can be said to make policy decisions. In even the simplest of nuisance cases, such as a suit to enjoin a factory from polluting, a judge might have to weigh the harm from pollution against the cost to the community of the lost employment from the factory. Such judgments are not the kind of policy decisions "clearly for nonjudicial discretion." They are the kind of policy decisions judges make every day. If this case involves a political question, so does much of the normal work of the courts.

It is thus hardly surprising that neither petitioners nor their amici can cite a single case in which this Court has found a political question simply because an issue has important policy implications. There are no such cases. It is breathtakingly overbroad to suggest that the courts lack jurisdiction whenever Congress has authority – even untapped – to regulate a matter of interstate or international commerce. *See* Brief Amicus Curiae of Pacific Legal Foundation at 28-32; Brief Amicus Curiae of Cato Institute at 26-28. If that were true, federal judges would have very little to do.

This case may involve a more complex chain of causation than the typical nuisance case. But that difference has nothing to do with whether the case requires "an initial policy determination of a kind clearly for nonjudicial discretion." Rather, it has to do with the burden respondents will have to shoulder under the substantive law of nuisance. The fact that petitioners are not the only entities causing the alleged harm, for example, is a fact that a court will

have to consider on the merits, in deciding whether respondents have sustained their burden of proof. It is not a fact that has any bearing on whether this issue is a political question.

The same is true of the fact that this nuisance suit will have a greater geographical scope than others the Court has adjudicated. Cf. Brief for American Chemistry Council et al. at 14-18. That might make this case harder to prove on the merits, but it has no bearing on whether the federal courts have jurisdiction to decide it. The political question doctrine is about the nature of the issues in a case, not about the scope of the litigation or the number of parties to it. The mere size and complexity of a case do not have constitutional relevance. If they did, the political question doctrine would have no principled limit: it would swallow all kinds of complex litigation.

D. None of the Remaining *Baker* Formulations Is Present.

Petitioners do not assert the existence of the fourth, fifth, or sixth *Baker* formulations. None is inextricable from this case. A court applying the common law would not express a "lack of the respect due coordinate branches of the government." *Baker*, 369 U.S. at 217. Any common law decision a court reaches could effectively be undone by the political branches. A decision in this case would be no more disrespectful to the other branches than a decision in any other common law case.

For the same reasons, this case does not involve "an unusual need for unquestioning adherence to a political decision already made," or "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* The common law of nuisance cannot override any decisions already made by the political branches. And there is no possibility of embarrassment from inconsistent pronouncements by the judiciary and another branch, because the other branches can always displace the common law of nuisance.

Because none of the six *Baker* formulations is "inextricable" from this case, this nuisance claim would not be a political question even if the political question doctrine applied to issues of common law.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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