

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 FOR AMERICAN CHEMISTRY COUNCIL;
AMERICAN COATINGS ASSOCIATION; NATIONAL
ASSOCIATION OF MANUFACTURERS; PROPERTY
CASUALTY INSURERS ASSOCIATION OF AMERICA;
AND PUBLIC NUISANCE FAIRNESS COALITION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

—◆—
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QUESTION PRESENTED

The court of appeals held that governmental and private plaintiffs may pursue public nuisance actions under federal common law to cap defendants' greenhouse gas emissions at judicially-determined levels. This brief addresses the third issue specified by the Court in its order granting the petition for certiorari, namely:

Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion."

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HORACE WOOD, THE LAW OF NUISANCES iii (3d ed. 1893)	13
J. R. Spencer, <i>Public Nuisance: A Critical Examination</i> , 48(1) CAMBRIDGE L.J. 55 (1989)	13
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William Prosser, <i>Nuisance Without Fault</i> , 20 TEX. L. REV. 399 (1942).....	13

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OTHER AUTHORITIES

Charles H. Mollenberg, Jr., <i>No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy</i> , 7 EXPERT EVIDENCE REPORT 474 (Sept. 24, 2007)	10
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Eckardt C. Beck, <i>The Love Canal Tragedy</i> , EPA JOURNAL (Jan. 1979).....	10
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P. Forster, <i>et al.</i> , CHANGES IN ATMOSPHERIC CONSTITUENTS AND IN RADIATIVE FORCING, IN: CLIMATE CHANGE 2007: THE PHYSICAL SCI- ENCE BASIS, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (S. Solomon, <i>et al.</i> eds. Cambridge Univ. Press 2007).....	18
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RESTATEMENT (SECOND) OF TORTS § 821B	7
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AMICI CURIAE BRIEF

Amici Curiae American Chemistry Council, American Coatings Association, the National Association of Manufacturers, the Property Casualty Insurers Association of America, and Public Nuisance Fairness Coalition, respectfully submit this *amici curiae* brief, on behalf of themselves and their members, in support of Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amici curiae* brief is filed with the consent of all the parties.¹

**IDENTITY AND INTERESTS
OF AMICI CURIAE**

Amicus Curiae American Chemistry Council (“ACC”), represents the leading companies engaged in the business and science of chemistry to make innovative products and services that make people’s lives better, healthier and safer. *See* ACC’s website, <http://www.americanchemistry.com>. *Amicus Curiae* American Coatings Association (“ACA”) represents both companies and professionals working in the

¹ Pursuant to Supreme Court Rule 37, all parties have issued blanket consents to the filing of *amicus* briefs. *Amici Curiae* affirm that no counsel for a party authored this brief in whole or in part, or made a monetary contribution for the preparation or submission of this brief. No persons other than *amici*, their members, or their counsel made a monetary contribution to this brief’s preparation or submission.

paint and coatings industry. *See* ACA’s website, <http://www.paint.org>. *Amicus Curiae* The National Association of Manufacturers (the “NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. *See* the NAM’s website, <http://www.nam.org/>. *Amicus Curiae* Property Casualty Insurers Association of America (“PCIAA”) is a national trade association comprised of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. *See* PCIAA’s website, <http://www.pciaa.net/>. *Amicus Curiae* Public Nuisance Fairness Coalition (“PNFC”) is a coalition composed of major corporations, industry organizations, legal reform organizations and legal experts concerned with the growing misuse of public nuisance lawsuits.

Amici Curiae are coalitions and trade organizations whose members include organizations and companies doing business in the United States including some companies that are both directly and indirectly affected by the public nuisance litigation governed by this Court’s decisions. As regulated entities, *amici*’s members are especially concerned by the intrusion of standardless public nuisance litigation into areas traditionally reserved for the political branches of government. Such forays threaten the regulatory clarity and predictability necessary for successful business planning and operations.



SUMMARY OF THE ARGUMENT

Amici Curiae submit this brief to highlight particular problems in the Second Circuit’s decision regarding the “political question” doctrine. *Amici* focus on the second test stated in *Baker v. Carr*, 369 U.S. 186 (1962), namely, whether courts lack “judicially discoverable and manageable standards” for resolving public nuisance cases involving global climate change. *Id.* at 278. In this brief, *amici* will show that such cases raise quintessential “political questions” because their standardless nature requires policy judgments that courts have “neither the expertise nor the authority” to make. *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007).

The history of public nuisance, especially under federal common law, reflects that its use has never been approved when the proscribed conduct and other liability criteria are not constrained by geographical boundaries and defined circumstances. Similar reasoning applies to the “political question” doctrine, which requires dismissal of claims not subject to judicially discoverable and manageable standards. As this action is framed, these principles are inseparably conjoined. Far from being an “ordinary tort suit,” this expansive claim sits squarely at the “crossroads” of substantive law and justiciability.

Some controversies, such as the extraordinarily broad and standardless public nuisance claims alleged here, require the resolution of questions that courts lack the tools and resources to adjudicate in a way

that is principled, rational, and based upon reasoned distinctions. When such political questions are raised, courts must decide whether they have the technical and scientific expertise necessary to create standards and rules to resolve the controversy justly. Such inquiries go to the very heart of the political question analysis. In public nuisance cases of global dimensions, courts should defer to the political branches of government to set and adjust, if warranted, the standards and rules by which courts judge the reasonableness of defendants' actions.

Even when the political branches have not acted, common law courts are not necessarily free to "fill the void." Irrespective of whether the executive or legislative branches have yet spoken, due respect for their constitutional responsibilities – combined with awareness of the judiciary's own limitations – mandate judicial restraint.



ARGUMENT

I. COURTS CANNOT ENTERTAIN CONTROVERSIES THAT ARE NOT SUBJECT TO JUDICIALLY DISCOVERABLE STANDARDS

In *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny, *see, e.g., Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality), this Court held that lower courts cannot entertain a dispute when it lacks "judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 278 (describing the second, and

one of the most critical, of several tests to determine the existence of a political question). As Justice Scalia stated in *Vieth v. Jubelirer*, “[o]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard, by rule.*” 541 U.S. at 278 (emphasis in original). “Laws promulgated by the Legislative Branch can be inconsistent, illogical, and *ad hoc*; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.” *Id.* (emphasis in original).

Even before *Baker* and *Vieth* were decided, this Court recognized that ascertainable principles were indispensable to justiciability. The “lack of satisfactory criteria for a judicial determination” has historically influenced the Court to defer to the political branches, especially when “considerations of policy, considerations of extreme magnitude” render the controversy “entirely incompetent to the examination and decision of a court of justice.” *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939).

The requirement of guiding “standards” is especially important when federal common law causes of action are alleged. The Court has refused to extend federal common law liabilities when doing so presented serious difficulties in devising workable judicial standards. *See Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (declining to extend liability when the standard “would be endlessly knotty to work out”). This is particularly true where, as here, plaintiffs have “alternative remedies” in the regulatory arena to vindicate their rights and there are “special factors”

that counsel hesitation before authorizing a new federal cause of action. *Id.* at 575 (citing *Carlson v. Green*, 446 U.S. 14, 18-19 (1980)).

For courts to entertain controversies, they must have legal tools that enable them to grant relief that is “principled, rational, and based upon reasoned distinctions.” *Vieth*, 541 U.S. at 278. If they lack those tools, the proceeding presents a “political question” that must be solved by the political branches, which have the resources and authority to redress them.

As *amici* will show below, the tort of public nuisance is extraordinarily subjective and notoriously difficult to define and apply. For that reason, it has always been constrained by defined causal circumstances and geographic limits. If those constraints are abandoned, the tort becomes an impermissibly “standardless,” discretionary, and ultimately, lawless exercise that exceeds legitimate judicial authority. Given the political question doctrine’s insistence on “judicially discoverable and manageable standards,” public nuisance cases based on global conditions are inherently non-justiciable. The possibility that manageable standards may be discovered in the future as a result of Congressional or Executive action does not change the fact that such controversies are “standardless” today. *Id.* at 311.

II. COURTS LACK THE RESOURCES AND TOOLS TO DEVELOP GUIDING STANDARDS FOR RESOLVING PUBLIC NUISANCE CASES INVOLVING GLOBAL CLIMATE CHANGE

A. Using Public Nuisance as an Aggregative Tort Creates “Standardless” Liability That Implicates the Political Question Doctrine

Although the Second Circuit insisted that its expansive application of public nuisance was consistent with the Restatement (Second) of Torts, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 328 (2d Cir. 2009), the court failed to heed a dispositive warning – a warning that is central to determining whether this case presents a “political question.”

In his comments to § 821B, Dean Prosser, the official reporter, warned that “[i]f a defendant’s conduct does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, *the court is acting without an established and recognized standard.*” RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979) (emphasis added). Dean Prosser’s concerns were recently reinforced by one of the reporters for the Third Restatement, Professor James A. Henderson, who warned about the “lawlessness” of expansive tort liability, including public nuisance litigation. James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005). According to Professor Henderson, these amorphous tort

theories have the potential to be lawless not simply because they are non-traditional or court-made, or because the financial stakes are high. Instead, “the lawlessness of these aggregative torts inheres in the extent to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring damages.” *Id.* at 338.

Such paths lead inevitably to controversies where liability is controlled by the discretion of individual courts, rather than by rules of law. If cases like the present controversy are allowed to proceed, judges and juries will be empowered “to exercise regulatory power at the macro-economic level of such a magnitude that even the most ambitious administrative agencies could never hope to possess.” *Id.* In exercising these extraordinary regulatory powers via tort litigation, courts (including juries) “exceed the legitimate limits of both their authority and their competence.” *Id.* Although the Second Circuit stressed that tort cases rarely involve political questions, *Am. Elec. Power Co.*, 582 F.3d at 326-29, aggregative torts, such as public nuisance, raise unique “lawlessness” concerns that transcend routine tort cases and cross the political question threshold. *See Henderson*, at 338.

Dean Prosser’s wise advice, as well as Professor Henderson’s concerns about “lawlessness,” are substantiated by the history of public nuisance – a history that underscores the limitations of the law of public nuisance. In the early twentieth century, litigants argued that public nuisance should be expanded to

address activities that were not criminal and that did not implicate property rights or enjoyment. *People v. Lim*, 118 P.2d 472, 475 (Cal. 1941) (noting that courts justified “public nuisance” abatement because “public and social interests, as well as the rights of property, are entitled to the protection of equity”). Proponents of this expansion argued that the “end justified the means” by highlighting the tort’s remarkable effectiveness and claiming “that [otherwise] there is no adequate remedy provided at law.” See Edwin S. Mack, *Revival of Criminal Equity*, 16 HARV. L. REV. 389, 400-03 (1903); see also Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 974-75 (2007) (chronicling the reemergence of these arguments as governmental authorities employ public nuisance litigation to address complex problems such as urban violence and public health issues).

Legal commentators and authorities objected, however, when public authorities sought to use public nuisance to address broad societal problems such as over-reaching monopolies, restraint of trade activities, prevention of criminal acts, and labor controversies such as strikes. Mack, 16 HARV. L. REV. 397-99 (noting that the expanding boundaries of public nuisance law made courts of equity of that time period careless of their traditional jurisdictional limits). They warned that this “solution” was planting the seeds of abuse that would ultimately weaken the judicial system. *Id.* at 400-03.

Finally, when public nuisance was used as a precursor to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) to address environmental contamination in the Love Canal controversy, a decade of nuisance litigation failed to produce a solution. *See* Eckardt C. Beck, *The Love Canal Tragedy*, EPA Journal (Jan. 1979) (“no secure mechanisms [were] in effect for determining such liability”); Charles H. Mollenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 EXPERT EVIDENCE REPORT 474, 475-76 (Sept. 24, 2007). Thereafter, arguments urging expansion were increasingly rejected, most notably in California, where the state’s Supreme Court ultimately deferred to the legislature’s “statutory supremacy” to define and set standards for determining liability. *See Lim*, 118 P.2d at 475. Significantly, the court did so because judicial creativity would otherwise result in “standardless” liability. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal.), *cert. denied*, 521 U.S. 1120 (1997).

There is plainly an overlap between this jurisprudential principle and the “political question” doctrine. Although the concepts are inextricably linked, their conjunction has been inexplicably overlooked. *See generally*, Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 MO. ENVTL. L. & POLICY REV. 1, 10-21 (2011).

Just as courts have traditionally resisted invitations to expand public nuisance liability in the absence of clear boundaries and guiding principles,

courts also must resist deciding political question controversies where they cannot devise definitive standards and rules for their adjudication. Each principle informs courts when advocates invite creative excursions, and in both contexts, respect for the legislative and executive spheres and the constitutional limits of judicial power is essential. Because of this confluence, it is important to understand how the Second Circuit's decision departed from the traditional constraints under which public nuisance has been applied.

B. Traditional Public Nuisance Cases Avoided Standardless Liability by Addressing Only Discrete and Localized Grievances

Public nuisance has always been a “local tort.” It has been limited to controversies caused by identifiable actors and to situations circumscribed by discrete geographic limits. Typically, public nuisance cases are localized and linked to impairment of property, or to injuries resulting from such effects. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 830-33 (2003). These limits assisted courts in managing the tort's notorious subjectivity and naturally minimized the risk of “standardless liability.”

1. The Subjectivity of Public Nuisance

The law of public nuisance is ancient – and its vagueness has vexed courts and litigants throughout

its history. The tort's origins can be traced to the English feudalism of the Middle Ages. It was used by the English crown to stop "quasi-criminal" conduct such as blocking a public road or waterway – actions that were deemed unreasonable because they could injure persons exercising common societal rights. *See* Faulk & Gray, 2007 MICH. ST. L. REV. at 948-49; *see also* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 543-45 (2006).

Historically, public nuisance generally was not regarded as a tort, but rather as a basis for public officials to prosecute crimes or to seek injunctions to abate harmful conduct. Only rarely was a tort remedy made available to a citizen, and apparently never to a state or municipality. Gifford, 71 U. CIN. L. REV. at 745-46. The "quasi-criminal" nature of public nuisance persists to this day, particularly where, as here, contempt is employed as an enforcement mechanism. For that reason, some scholars believe that the tort's subjectivity implicates prohibitions against unconstitutional vagueness. *See id.* at 787.

Confusion regarding liability standards for public nuisance is as ancient as the tort itself. The foundation of common law nuisance lies in the legal maxim "*sic utere tuo ut alienum non laedas*" which means that property is held subject to the condition that its use should not injure the equal rights of others or impair the community's public right. *See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 433-34 (1989); *Village of Euclid*

v. Amber Realty Co., 272 U.S. 365, 387 (1926); *Camfield v. United States*, 167 U.S. 518, 522-23 (1897).

Since its creation, this principle, as well as others coined to govern liability, have proven difficult to explain and apply. As a result, public nuisance historically has “meant all things to all people.” W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS 616 (5th ed. 1984); see also J. R. Spencer, *Public Nuisance: A Critical Examination*, 48(1) CAMBRIDGE L.J. 55, 56 (1989) (Because of its vagueness and mutability outside of defined boundaries, public nuisance has even been characterized as a “chameleon word”).

When Horace Wood published the first American treatise on nuisance in 1875, he described public nuisance as a “wilderness of law.” HORACE WOOD, THE LAW OF NUISANCES iii (3d ed. 1893). William Prosser, reporter for the Restatement (Second) of Torts, described nuisance law as an “impenetrable jungle,” and as a “legal garbage can” full of “vagueness, uncertainty and confusion.” William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942). By 1949, the tort’s boundaries were so “blurred” that public nuisance had become a “mongrel” tort that was “intractable to definition.” F. H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949). Additional time and experience have not clarified the situation. See, e.g., Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 984 (1952) (a “mystery”); John E. Bryson and Angus Macbeth, *Public Nuisance, the Restatement*

(*Second*) of Torts, and *Environmental Law*, 2 ECOLOGY L.Q. 241, 241 (1972) (a “quagmire.”).

Given this subjectivity, it is not surprising that courts have confessed “bewilderment” regarding the tort’s boundaries. *See, e.g., Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 520 (Mich. Ct. App. 1992) (“Suffice it to say that, despite attempts by appellate courts to rein in this creature, it, like the Hydra, has shown a remarkable resistance to such efforts”).

2. Traditional Common Law Constraints

Notwithstanding these problems, courts devised practical ways to manage and resolve public nuisance cases. For example, Justice George Sutherland, writing for this Court, once described a public nuisance as “merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.” *Euclid*, 272 U.S. at 388. Justice Sutherland’s statement is more than a colorful illustration. He explained that whether a particular thing is a nuisance cannot be determined by “abstract considerations,” but rather “by considering it *in connection with the circumstances and the locality.*” *Id.* (emphasis added).

The Court’s insistence on defined “circumstances and locality” is important because it identifies the objective criteria essential to a public nuisance finding. Indeed, every public nuisance case decided in this Court’s history has involved limited geographic locales. Without that limitation, there is no standard

by which the effect of the alleged nuisance can be measured. Similarly, each of the Court's prior public nuisance decisions involved defined circumstances where the controversy could actually be resolved by an abatement order. In the absence of defined circumstances that can be meaningfully redressed, there is no standard by which an equitable remedy can be designed, and no basis for projecting or evaluating its efficacy. *See* Faulk, 18 MO. ENVTL. L. & POLICY REV. at 14-15; Gifford, 71 U. CIN. L. REV. at 830-33.

Significantly, all of the pollution-based public nuisance precedents upon which the Second Circuit relied are within that narrow tradition. *See Am. Elec. Power Co.*, 582 F.3d at 326-29. Each concerned a localized controversy traceable to specific actions by identifiable defendants,² such as the discharge of sewage or chemicals into waterways,³ emission of noxious fumes from copper foundries that destroyed forests, orchards, and crops;⁴ dumping garbage into the ocean

² *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009) ("The common thread running through each of those cases is that they involved a discrete number of 'polluters' that were identified as causing a specific injury to a specific area"), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

³ *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"); *New York v. New Jersey*, 256 U.S. 296 (1921) (one bay); *Missouri v. Illinois*, 200 U.S. 496 (1906) (one water system); *Missouri v. Illinois*, 180 U.S. 208 (1901) (same).

⁴ *See Georgia v. Tenn. Copper Co.*, 240 U.S. 650 (1916) (two copper smelters near state line); *Georgia v. Tenn. Copper Co.*,
(Continued on following page)

that fouled beaches;⁵ irrigation projects that contributed to flooding;⁶ construction bridges that interfered with navigation;⁷ and pollution of lakes by vessels transporting oil.⁸ Although the Second Circuit identified these nuisance actions as “the common law backbone of modern environmental law,” *Am. Elec. Power Co.*, 582 F.3d at 328, it failed to acknowledge and address two important distinctions.

First, the harm claimed to have been caused by the alleged unreasonable conduct occurred within a circumscribed “zone of discharge,” the conduct affected defined geographic locations, and all of the actors whose conduct had to be reached in order to effect a complete abatement of the nuisance were before the court. *Cf. Kivalina*, 663 F. Supp. 3d at 881 (stressing that conduct creating the public nuisance must occur within a specified “zone of discharge” to satisfy standing requirements). Likewise, each localized grievance resulted solely from human activity and was created over a relatively short period of time. None of these

237 U.S. 474 (1915) (same); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (same).

⁵ *New Jersey v. City of New York*, 283 U.S. 473 (1931) (one city’s actions).

⁶ *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (state’s project that harmed downstream land).

⁷ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (state’s decision to build a bridge).

⁸ *United States v. Bushey & Sons*, 363 F. Supp. 110, 120-21 (D.Vt. 1973), *aff’d without opinion*, 487 F.2d 1393 (2d Cir. 1973) (vessels owned by two corporations and operating on one lake).

conditions exists here. Instead, under Respondents' theory, the "zone of discharge" is global and the "defined geographic location" is universal. The few defendants sued in this matter could not possibly redress such a condition. According to the Respondents' allegations, contribution from non-human, natural forces as well as anthropogenic sources is undeniable, and the alleged condition arose, at a minimum, over hundreds of years.

Second, when the earlier cases were decided, there were no laws regulating or prohibiting pollution. Consequently, the only redress available was a public nuisance lawsuit. The cases cited by the Second Circuit therefore predate the alternative administrative methods created by Congress to address pollution. Indeed, the last time this Court recognized a federal common-law pollution-based public nuisance claim was *before* Congress passed the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1972). *See Milwaukee I*, 406 U.S. 91 (1972).

Much has changed since 1972. Today's local, state and federal pollution laws have largely eliminated the need for pollution-based public nuisance litigation, except in those particular instances where the political branches have expressly defined specific situations, activities and behaviors as nuisances. *See, e.g., Lim*, 118 P.2d at 476 ("In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity"); *Acuna*, 929 P.2d at 606

(stating that “[t]his lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a ‘public nuisance’”).

Despite this history, Respondents demand that objective constraints be abandoned. In their place, Respondents propose that courts create *ad hoc* common law standards to regulate the perceived threat of global climate change. By expanding public nuisance beyond its traditional boundaries, however, and by entrusting regulation solely to subjective judicial discretion, Respondents not only forsake centuries of sound jurisprudence, but also abandon the rule of law.

C. Global Climate Change Claims Transcend the Rational Boundaries of Traditional Public Nuisance Litigation

The predicate for Respondents’ lawsuit is climate change, a form of air pollution caused by the emission of greenhouse gases from countless manmade and natural sources all around the world. Scientists suggest that anthropogenic greenhouse gas pollution began more than 250 years ago at the start of the Industrial Revolution. *See generally*, P. Forster, *et al.*, CHANGES IN ATMOSPHERIC CONSTITUENTS AND IN RADIATIVE FORCING, IN: CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE

INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 137 (S. Solomon, *et al.* eds. Cambridge Univ. Press 2007); *see also* Richard O. Faulk and John S. Gray, *A Lawyer's Look at the Science of Global Climate Change*, 44 WORLD CLIMATE CHANGE REPORT 2 (BNA, Mar. 10, 2009) (providing scientific references).

Given climate change's extraordinary causal chain, it is impossible to distinguish one exhalant's contribution from vehicular or industrial emissions today, much less since the start of the Industrial Revolution. *See* Faulk and Gray, 44 WORLD CLIMATE CHANGE REPORT at 16 (citing figure 8, causation diagram by H.J. Schellnhuber, NATURE 402 suppl. C21 (1999)). There are no processes to differentiate, calculate and account for the impact of biological emissions from the trillions of organisms which inhabit the planet. Nor can the role of titanic natural forces, such as volcanism, be calculated reliably. Moreover, no method exists to account for the myriad confounding forces that impact the relative degree of liability attributable to these or any potential defendants – such as events responsible for changes to forests and seas which absorb emissions. *See generally, id.* at 12-14.

Nothing in the history of the law of public nuisance allows Respondents to single out these few defendants and require them to “abate” their “contributions” to a condition that spans the globe and jointly took the entire industrialized world – in combination with natural forces – more than 150 years to create. Yesteryear's pollution-based public nuisance

cases simply do not provide “judicially discoverable and manageable standards” to guide courts to decisions that are “principled, rational, and based upon reasoned distinctions” in this scenario. *Vieth*, 541 U.S. at 278.

This controversy differs profoundly from the “simple” public nuisance cases cited as precedent by the Second Circuit. *See, e.g., Milwaukee I*, 406 U.S. 91, 106, n.8 (1972) (describing interstate water pollution scenario as “a public nuisance of simple type for which a State may properly ask an injunction”). In each of those cases, the nuisance could be abated by enjoining the offending activity. Here, Respondents cannot secure meaningful relief. At best, the rate of global warming may be slowed infinitesimally. Consequently, any relief awarded in this case will be merely symbolic – a gesture of speculative hope rather than a definitive solution. *Vieth*, 541 U.S. at 304 (observing that “it is the function of the courts to provide relief, not hope”). As one scholar concluded, “climate change litigation is unlikely to play a significant role in arresting global climate change. In the end, the bulk of the work in reducing greenhouse gases must be undertaken by nation states and international agreements.” Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 701-02 (2008).

Such vain pursuits are not consistent with equitable maxims – which preclude idle gestures. *See New York Times Co. v. United States*, 403 U.S. 713, 744

(1971) (“It is a traditional axiom of equity that a court of equity will not do a useless thing . . . ”); *Foster v. Mansfield*, 146 U.S. 88, 101-02 (1892) (“A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice, or to compel the defendants to buy their peace”). While the requested injunction will not impact climate change in any measurable manner, it will significantly impact Petitioners because massive amounts of time, effort and resources will be wasted in litigation where the ultimate “relief” is merely symbolic, not efficacious. See Reimund Schwarze, *Liability for Climate Change: The Benefits, the Costs, and the Transaction Costs*, 155 U. PA. L. REV. 1947, 1947 (2007) (“claims for climate change-related damages could become crushingly expensive and cause high transaction costs”).

If public nuisance can be used to redress climate change symbolically, then this case is merely the first wave of an impending litigation flood. Here, Petitioners merely sued a handful of entities that operate power plants – a “drop in the bucket” compared to countless activities in the national economy that emit greenhouse gases, to say nothing of emissions by international sources. See EPA, *Mandatory Reporting of Greenhouse Gases*; Final Rule 74 FED. REG. 56260, 56363 (Oct. 30, 2009) (estimating that there are 54,229 known facilities that annually emit more than 1,000 tons of greenhouse gases (in carbon dioxide equivalents) in the United States alone). Indeed, every living creature, corporation, special interest,

and governmental entity that is potentially affected by climate change is also an emissions source. Under Respondents' theory in this case, the types and numbers of potential litigants, whether plaintiffs or defendants, is limited only by the ingenuity of lawyers and the tolerance of the judiciary.

For this reason, the Second Circuit's characterization of this case as an "ordinary tort suit," *Am. Elec. Power Co.*, 582 F.3d at 329, trivializes the significance and scope of Respondents' climate change allegations. Climate change allegations are plainly extraordinary – and labeling them otherwise is not a helpful exercise. See Laurence H. Tribe, *et al.*, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine*, WASH. LEGAL FOUND. CRITICAL ISSUES SERIES (Jan. 2010) at 13-14 (observing that the Second Circuit "essentially confus[ed] a label with an argument" and "the political question doctrine is about more than wordplay"); see generally, John S. Gray, *The Use of Public Nuisance Suits to Address Climate Change: Are These Really "Ordinary Tort Cases"?* in *THE LEGAL IMPACT OF CLIMATE CHANGE* 127 (2010). In fact, the judiciary has no experience dealing with public nuisance litigation stemming from a global phenomenon putatively caused by the release of greenhouse gases by millions, if not billions, of sources (including natural events) worldwide – very few of which are subject to the jurisdiction of American courts or under the control of these defendants. The judiciary's past experience provides no guidance for determining

what standards and rules should be applied to resolve this controversy. See Faulk, 18 MO. ENVTL. L. & POLICY REV. at 14-17.

Far from an “ordinary tort suit,” this case frames wholly new claims that are unbounded by any rational constraints. As the Fourth Circuit recently observed in *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 302 (4th Cir. 2010):

[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. If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bullfights, see [W. Page Keeton, *Torts* at 643-45], we will be hard pressed to derive any manageable criteria.

Both “political question” considerations and the substantive law of public nuisance wisely preclude courts from resolving controversies when fair standards cannot be devised to resolve amorphous claims. For example, the law of public nuisance requires more than an “injury in fact” to justify recovery. To be a nuisance, a defendant’s interference with the public right must be “substantial.” It cannot be a “mere annoyance,” a “petty annoyance,” a “trifle,” or a “disturbance of everyday life.” See generally WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 71, at 557-58 (1941); see also Denise E. Antolini, *Modernizing*

Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 *ECOLOGY L.Q.* 755, 772 (2001). The defendant's interference must also be objectionable to the ordinary reasonable person, and one that materially interferes with the ordinary physical comfort of human existence according to plain, sober, and simple notions. William L. Prosser, *Private Action for Public Nuisance*, 52 *VA. L. REV.* 997, 1002-03 (1966); *see also* Antolini, 28 *ECOLOGY L.Q.* at 772 n.57 (citing FRANCIS HILLIARD, *THE LAW OF TORTS FOR PRIVATE WRONGS* 631 (2d ed. 1861)).

Under these authorities, the alleged causal link must be more than conjectural or hypothetical, and merely speculative connections between the defendant's conduct and the alleged injury are insufficient. In a global context, where countless untraceable and unquantifiable natural, biological, and anthropogenic emissions allegedly act cumulatively over centuries to produce harm, determining whether any particular emissions constitute a "substantial interference" is objectively impossible. As one scholar has observed:

Unless the suit brings in all the major greenhouse gas emitters in the world, it will be impossible for the plaintiff to show (or even really allege) that it is more likely than not that the defendants' emissions, and in [sic] of themselves, caused the warming that allegedly caused or will cause the harm to the state. Greenhouse gas emissions, individually, do not translate into warming or indeed any identifiable harm at all. Moreover, it will be impossible to show that the

defendants' emissions were even part of the total emissions that caused the alleged harm, since even in the absence of the defendants' emissions, it will be plausible to suppose that the same degree of warming would have occurred or will occur.

David A. Dana, *The Mismatch between Public Nuisance Law and Global Warming* 3, 10 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 08-16, Law & Econ., Paper No. 08-05, 2008), *available at* <http://ssrn.com/abstract=1129838>. For these reasons, “climate change is best conceptualized as an over-exploitation-of-a-commons problem . . . and public nuisance law has never been touted as, or served to effectively address, the tragedy of the commons.” *Id.* at 11-12.

Simply stated, the immeasurable scope of the controversy matters. Using public nuisance law in an attempt to redress alleged harms from global climate change far exceeds the tort's common law boundaries – and while venturing beyond those fences may be intellectually adventurous, there are no standards or rules that guarantee that such explorations will result in justice. *See Vieth*, 541 U.S. at 278. (“The judicial Power’ created by Article III, § 1, of the Constitution is not whatever judges choose to do . . .”). Indeed, this Court has already warned that it has “neither the expertise nor the authority” to evaluate the many policy judgments involved in climate change issues. *Massachusetts*, 549 U.S. at 533-34.

The Court must not dispense with objective standards by abandoning the issue of “substantial interference” to the factfinder’s subjective speculations. Such a standardless exercise is not jurisprudential. Instead, it transforms courts across the United States into regulatory agencies, requires them to devise *ad hoc* standards for each case, applies *ex post facto* rules to impose liability, and then mandates enforcement using the threat of contempt to motivate compliance. Such a proceeding may be “called a trial, but it is not.” See *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (“The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more. We are persuaded on reflection that the procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not”).

D. A Comparative Analysis Demonstrates that the Political Branches Are Far Better Equipped to Craft Standards Governing Climate Change

The nonjusticiability of a political question is “primarily a function of the separation of powers.” *Baker*, 369 U.S. at 210. To determine whether a matter has been committed to a particular branch of government, or whether that branch exceeds whatever authority has been committed, is a “delicate exercise” that needs a “case-by-case” inquiry. *Id.* at 201-11. In public nuisance cases based upon global climate change, where no standards presently exist to

assess or measure responsibility or to determine appropriate reductions in greenhouse gas emissions, “political question” arguments necessarily require a comparative evaluation of the resources needed to craft appropriate rules. When such an evaluation is conducted here, the balance weighs decisively in favor of the political branches.

Congress enacted the Clean Air Act (“CAA”) to generally address air pollution in the United States. Nathan Richardson, *et al.*, *The Return of an Old and Battle-Tested Friend, The Clean Air Act*, 166 RESOURCES 25, 29 (Fall 2010). This Court has already held that the CAA is applicable to greenhouse gases. *Massachusetts*, 549 U.S. at 528-29. Through the Clean Air Act (“CAA”), 42 U.S.C. § 7401 *et seq.*, Congress established a comprehensive framework for regulating air pollution. Congress found that “air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3).

The greenhouse gases involved in this case are considered “air pollutants” under the broad language of Section 302(g) of the CAA, 42 U.S.C. § 7602(g). *Massachusetts*, 549 U.S. at 528-29. More importantly, this Court held that EPA has authority to regulate greenhouse gas emissions under Section 202 of the CAA, 42 U.S.C. § 7521(a)(1) if it finds that greenhouse gases cause or contribute to air pollution that

may reasonable be anticipated to “endanger public health or welfare.” *Massachusetts*, 549 U.S. at 528. The CAA also includes other provisions under which EPA has regulated or is contemplating regulating greenhouse gases using different mechanisms.⁹ *See, e.g.*, 42 U.S.C. §§ 7411(b)(1), 7411(d), 7475.

The contrast between the CAA scheme to regulate air pollution and public nuisance – an “ill-defined omnibus tort of last resort” where “one searches in vain . . . for anything resembling a principle” – could not be more stark. *TVA*, 615 F.3d at 302 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)). Attempting to resolve the issue using federal common law at the same time EPA is invoking the CAA’s regulatory structure to address it would be to condone the use of multiple standards. One can imagine situations where facilities are subject to EPA-sanctioned state permits that set one standard, a federal court in a nearby state set

⁹ Endangerment Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FED. REG. 66496 (Dec. 15, 2009); *see also* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FED. REG. 31514 (June 3, 2010); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles: Proposed Rule, 75 FED. REG. 74152 (Nov. 30, 2010); proposed settlement agreement addressing refineries, 75 FED. REG. 82390 (Dec. 30, 2010); proposed settlement agreement, addressing greenhouse gas emissions standards for certain electric generating facilities, 75 FED. REG. 82392 (Dec. 30, 2010).

another, and a federal court in another state sets yet a third. Such a scenario ultimately leads one to question “[w]hich standard is the hapless source to follow?” *Id.* (citing *Ouellette*, 479 U.S. at 496 n.17).

If Respondents are unhappy with how and at what pace EPA regulates emissions of greenhouse gases under the CAA, they may seek to pursue avenues of judicial review pursuant to federal statutory law. *Massachusetts*, 549 U.S. at 516-20. As Judge Wilkinson observed, using the tort of public nuisance to enjoin air pollution would encourage the “use of vague public nuisance standards to scuttle the nation’s carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike.” *TVA*, 615 F.3d at 296.

As an institution, “Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon [‘complex and dynamic’ issues].” *Turner Broadcasting Sys., Inc. v. Federal Communications Comm’n*, 512 U.S. 622, 665-66 (1994); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (acknowledging legislative bodies are “in a better position than the judiciary to gather and evaluate data”). Unlike courts, the political branches can consider all pertinent issues in their entirety through either hearings or required notice and comment procedures. *See, e.g.*, 42 U.S.C. § 7607(d). As a result, political policy choices

can strike fairer and more effective balances among competing interests because they can be based on broader perspectives and ample information rather than being limited to issues raised only by litigants. *See Helvering v. Davis*, 301 U.S. 619, 642-44 (1937) (noting that instead of just improvising a judgment when confronted with a national problem, Congress holds hearings to gather “a great mass of evidence” considering the problem from many perspectives and ultimately “supporting the policy which finds expression in the act”). *See also* Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 12 CONN. L. REV. 1247, 1271 (2000). Moreover, in contrast to courts, which lose jurisdiction upon rendition of final judgment, political branches have continuing authority to revisit statutes and rules to modify or tailor their provisions. *See Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001).

Political branches are also better equipped to deal with broad issues because they, unlike trial and appellate courts, represent a quorum of the people. While the process of enacting a statute is “perhaps not always perfect, [it] includes deliberation and an opportunity for compromise and amendment and usually committee studies and hearings.” *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995). Before any law is enacted, it must garner the support of a majority of the people through their elected representatives. Once enacted, the legislation is subject to executive veto and must judicially pass any constitutional or interpretational challenges. These “checks

and balances” ensure the efficacy of our democracy. When courts bypass these political safeguards to implement their own common law solutions, the judiciary – the least political branch of government – declares policy unilaterally and the “will of the people” is expressed not through their elected representatives, but through a plebiscite of jurors. *See* Hans A. Linde, *Courts and Torts: “Public Policy” Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994) (explaining that the court must “identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well [as] or better than legislators, but it cannot derive public policy from a recital of facts”).

Courts and juries play an enormously important role in our system of government, but they are not a substitute for decision-making by democratically-elected representatives. As the Fourth Circuit recently observed: “[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider. ‘Courts are expert at statutory construction, while agencies are expert at statutory implementation.’” *TVA*, 615 F.3d at 305 (quoting *Negusie v. Holder*, 555 U.S. ___, 129 S.Ct. 1159, 1171 (2009)). For these reasons, it is crucial that in this highly technical arena, courts respect the strengths of the rulemaking processes on which Congress placed its imprimatur. Unlike *ad hoc* lawsuits, regulations and permits provide an opportunity

for predictable standards that are scientifically grounded. *Id.* at 305-06.

Finally, air emissions from all of the facilities at issue in this case are already permitted and extensively regulated by both federal and state governments. The applicable statutes and regulations addressing air pollution represent decades of thought, work and compromises by legislative bodies and agencies and a vast array of special interests seeking to influence the choices being made. “To say this regulatory and permitting regime is comprehensive would be an understatement. To say it embodies carefully wrought compromises states the obvious.” *Id.* at 298.¹⁰

In the global public nuisance context, these considerations call for judicial deference – not “common law” policy making. They expose “the limits within

¹⁰ The *TVA* decision also recognized yet another reason why the decision below should be reversed, namely, that the “legislative authorization” defense bars a public nuisance suit when the defendants’ air emissions have been authorized by both the current regulations as well as permits. *See TVA*, 615 F.3d at 309 (“[T]here can be no abatable nuisance for doing in a proper manner what is authorized by law”). As regulated facilities operating under existing permits, Petitioners’ operations “while properly conducted and regulated, cannot be deemed to be a public nuisance.” *Richard v. Washington Terminal Co.*, 233 U.S. 546, 551 (1914); *Miller v. Mayor of New York*, 109 U.S. 385, 394 (1883) (similar); *Transportation Co. v. Chicago*, 99 U.S. 635, 640 (1879) (similar); *see also* RESTATEMENT (SECOND) OF TORTS § 821A, cmt. f (“Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability”).

which courts, lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems . . . ” Linde, 28 VAL. U. L. REV. at 853. *See generally*, Joseph Forderer, *State Sponsored Global Warming Litigation: Federalism Properly Utilized or Abused?*, 18 MO. ENVTL. L. & POLICY REV. 23, 49-51 (2011); Dana, (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 08-16, Law & Econ., Paper No. 08-05, 2008) at 3.

Given the global scope of this controversy,¹¹ the depth of the inquiries needed to develop fair standards for its resolution, the comparative resources available to the judiciary and the political branches, and the extreme difficulty, if not impossibility, of fair adjudication – the primacy of political solutions is apparent. Indeed, as Professor Tribe recently wrote, “[W]hatever one’s position in the . . . debate over the extent or . . . reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding or at least strongly incentivizing, all involved parties, are the only ones constitutionally entitled to fight that battle.” *See* Tribe, WASH. LEGAL FOUND. CRITICAL ISSUES SERIES (Jan. 2010) at 23.

¹¹ *See* Kevin A. Baumert, *et al.*, *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy*, WORLD RESOURCES INSTITUTE (2005) at 12 (listing greenhouse gas emissions by country) *available at* http://pdf.wri.org/navigating_numbers.pdf.

E. Lack of Action by the Political Branches Does Not Empower Common Law Creativity

Contrary to the Second Circuit's conclusions, legislative and regulatory silence are not dispositive of whether courts are competent and authorized to decide climate change controversies pursuant to public nuisance law. Indeed, there has been "a longstanding resistance, as a matter of law, to the idea that legislative inaction or silence, filtered through a judicial stethoscope, can be made to sound out changes in the law's lyrics – altering the prevailing patterns of rights, powers, or privileges that collectively constitute the message of our laws." Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 516, 522 (1982) (quoting THOMAS REED POWELL, *The Still Small Voice of the Commerce Clause*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (Ass'n of American Law Schools, 1938)). Moreover, this Court has condemned reliance on congressional silence as "a poor beacon to follow." *Zuber v. Allen*, 396 U.S. 168, 185 (1969). *See also Cleveland v. United States*, 329 U.S. 14, 22 (1946) (noting that "[t]here [are] vast differences between legislating by doing nothing and legislating by positive enactment"). More pointed – and remarkably similar to the concerns of Dean Prosser and Professor Henderson – is Justice Frankfurter's warning that "*we walk on quicksand* when we try to find in the absence of . . .

legislation a controlling legal principle.” *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (emphasis added).

The absence of action by the political branches does not empower common law adventures. This is especially true in public nuisance cases based upon global climate change, where there are no “controlling legal principles” to frame the controversy, fully investigate the issues, adjudicate liability or allocate responsibility. In such cases, courts must consider the question whether they have the resources to investigate and devise a proper remedy, and whether they are capable of creating definitive standards and rules to resolve the controversies fairly. These questions – which for the reasons discussed above, must be answered in the negative – goes to the very heart of the political question doctrine. *See Vieth*, 541 U.S. at 277 (“Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches *or involves no judicially enforceable rights*”) (emphasis added)). Unless this inquiry is answered correctly, the judiciary, the parties, and the public interest will be sacrificed to the shifting sands of “standardless” liability.

* * *

If, as Justice Holmes counsels, the development of the common law should be “molar and molecular,”¹²

¹² *See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J.) (“I recognize without hesitation that judges
(Continued on following page)

the transmutation of “public nuisance” concepts to address global climate change requires more rumination and digestion than the judiciary can prudently provide. Advocates who tout public nuisance litigation as a panacea should pay careful attention to the “rumination” analogy. Despite the tort’s ravenous reputation as a potential “monster” capable of devouring time-honored legal precedents in a single gulp,¹³ that appetite has in the past properly been constrained by the common law’s tendencies to move in a “molar and molecular” fashion – to chew thoroughly – and then to swallow, if at all, only small bits at a time.

Faced with a planetary controversy, this Court should consider whether the judiciary has the resources and tools to investigate, evaluate, and fairly resolve this action. *Amici* urge the Court to consider the unique role of the judiciary in our tripartite system of government, and to decide that the standards and rules necessary to resolve this controversy can be developed justly and reliably only outside the

do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions”). *See also* BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921) (stating that courts make law only within the “gaps” and “open spaces of the law”).

¹³ *See In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (holding that, if public nuisance law expanded beyond its traditional boundaries, it “would become a monster that would devour in one gulp the entire law of tort”); *see also Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (originating the quote above).

judiciary's limited realm. The limits of judicial competency lead to the conclusion that forbearance is the only response that is consistent with the recognized boundaries of federal jurisdiction.

◆

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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