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 AMERICAN PETROLEUM INSTITUTE AND NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CHARLES FRIED
Counsel of Record
1545 MASSACHUSETTS AVENUE
CAMBRIDGE, MA 02138
(617) 495-4636
fried@law.harvard.edu

Counsel for Amici Curiae

PETER SACRIPANTI
MCDERMOTT WILL & EMERY LLP
40 MADISON AVENUE
NEW YORK, NY 10173-1922
(212) 547-5400

JEFFREY BATES
SUSAN COOKE
MCDERMOTT WILL & EMERY LLP
28 STATE STREET
BOSTON, MA 02109
(617) 535-4000

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTERESTS OF *AMICI CURIAE*

The American Petroleum Institute (API) and the National Petrochemical and Refiners Association (NPRA) are national trade associations, each of which represent more than 450 member companies. API members are dedicated to meeting environmental requirements while developing and supplying economic energy resources for consumers. API members are involved in all aspects of the oil and natural gas industry and provide the fuels that keep America running. NPRA member companies include virtually all U.S. refiners and petrochemical manufacturers. NPRA members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, asphalt products, and the chemicals that serve as "building blocks" in making plastics, clothing, medicine, and computers. Like many industrial sectors, API and NPRA members are subject to regulation of greenhouse gas emissions.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' greenhouse gases (GHGs) do not remain in areas near their source of emissions but are instead globally mixed with naturally-occurring GHGs

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[1] The parties have filed blanket consents for *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici* and their counsel, made a monetary contribution intended to fund its preparation or submission.

and the emissions of all other human activity. We will show in this brief that the decision of the Court of Appeals for the Second Circuit to apply public nuisance concepts under federal common law to GHG emissions is a misuse of tort litigation and of federal common law, and it disregards the role assigned by national legislation and international agreements ratified and implemented by the United States to agencies within the Executive Branch. We also will show that it is inappropriate, unreasonable, and unlawful for the Second Circuit to resolve such a question when the issues go far beyond the reach of any court and instead should be addressed by national and global decision makers.

The Petitioners and other *amici curiae* address issues relating to standing, political question, administrative law, and the proper scope of federal common law and the tort doctrine of public nuisance. We will discuss a common thread running through all of these issues, that is, the unsuitability of litigation-driven adjudication in the ordinary courts of law to resolve complex and interrelated policy and social issues, with which other institutions—such as EPA—having greater responsibilities, regulatory authority, and representation of the electorate are grappling.[2] Such unsuitability is magnified when addressing, or even progressing toward addressing, these issues also depends on the cooperation of other countries over whom a national court has no jurisdiction in this area, and can only be reached by diplomacy.

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[2] *See* n. 46, *infra*, on the U.S. Environmental Protection Agency (EPA or Agency) "Tailoring Rule."

In this brief, we show that (I) tort litigation (and, particularly, tort litigation under the aegis of the public nuisance doctrine) is singularly inapt for addressing climate change; and (II) legislation, international negotiations and agreements, and reasonable and proper agency regulation are the only available modes for rationally addressing GHG emissions and climate change. These arguments provide the common thread for the fundamental cases cited by the Petitioners on Constitutional standing, *Lujan v. Defenders of Wildlife* (three factors: injury in fact and not conjectural or hypothetical; not the result of third parties not before the court; and not a speculative injury that could be redressed by a favorable decision);[3] prudential standing, *Elk Grove Unified Sch. Dist. v. Newdow* (limitations preclude courts from adjudicating generalized grievances more appropriately addressed in the representative branches);[4] federal common law, *Tex. Indus. v. Radcliff Materials, Inc.* (federal common law highly restricted);[5] displacement of federal common law, *City of Milwaukee v. Illinois* (when Congress addresses the problem previously governed by federal common law);[6] and non-justiciable political question, *Vieth v. Jubelirer* (claims that would cast judges upon a "sea of imponderables").

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[3] 504 U.S. 555, 560–561 (1992).

[4] 542 U.S. 1, 12 (2004).

[5] 451 U.S. 630, 640–641 (1981).

[6] 451 U.S. 304, 314–315 (1981).

ARGUMENT

I. TORT LITIGATION, AND PARTICULARLY THE PUBLIC NUISANCE DOCTRINE, ARE INAPT FOR ADDRESSING THE NATURE AND SCOPE OF CLIMATE CHANGE

With regard to the forms and limits of tort litigation, as noted years ago by Lon L. Fuller, courts cannot resolve certain complex situations that he identifies as "polycentric" by their accustomed modes of adjudication, whether in tort or in other common law causes of action. Those polycentric situations with their numerous interests require a solution taking account of all of them.[7] Such numerous interests,

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[7] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). In this article, Fuller introduces the concept of the polycentric task, a situation that engages numerous interests and any solution of which will affect all of them, by way of a spider's web, where "[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions." This polycentric situation is "many centered," each crossing of strands constituting a distinct center for distributing tensions. *Id.* at 394–395. Although there are degrees to which a situation is polycentric, it is Fuller's central insight that the more polycentric a situation is, the less amenable it is to definitive resolution by adjudication. As the situation becomes more polycentric, it becomes more difficult and, finally, impossible to bring all the affected interests before a judge, and more difficult and, finally, impossible for the judge to render a stable judgment that—even if it were possible to take into account all interests—would retain balance for any but the shortest time. Such issues can only be reasonably addressed by other means: negotiation, legislation—usually framework

which can be satisfactorily addressed only by a variety of non-common law approaches, are clearly presented here. Some, but not all, of those interests were listed by EPA's Administrator in her final endangerment finding (Endangerment Finding) following the Court's decision in *Massachusetts v. EPA*,[8] in which she "recognize[d]":

> that human-induced climate change has the potential to be far-reaching and multi-dimensional, and in light of existing knowledge, that not all risks and potential impacts can be quantified or characterized with uniform metrics.[9]

The Administrator then "determined" that certain GHGs result from both natural causes and human

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legislation—and measured and flexible regulation by responding agencies.

[8] 549 U.S. 497 (2007). It is noteworthy that this finding was made only after extensive public comments. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). Such comments were voluntarily submitted by multiple parties to an administrative agency which has been delegated rule-making authority by Congress, and some of the interests listed in that finding were opposed. *See id.* at 66,500. It is also noteworthy that this Court in *Massachusetts v. EPA* certainly did not attempt to resolve the issues around GHG emissions but, rather, remitted the matter to the EPA for consideration as part of its regulatory agenda. By contrast, in this case the Second Circuit took the first step in a process that would place the district court in the same role as an agency upon issuance of its decree.

[9] 74 Fed. Reg. at 66,497.

activities[10] and that a global GHG "pool" leads to impacts not only on the United States but all over the globe.[11] The Administrator found that "the global nature of the air pollution problem and the breadth of countries and sources emitting greenhouse gases means [sic] that no single country and no single source category dominate or are even close to dominating on a global scale,"[12] and thus "addressing a global air pollution problem may call for many different sources and countries to address emissions even if none by itself dominates or comes close to dominating the global inventory."[13]

In 1992, long before the Administrator's Endangerment Finding, the United States Senate advised and consented to ratification of the United Nations Framework Convention on Climate Change (UNFCCC),[14] and the United States Government has since then been an active participant in the UNFCCC meetings and Conferences of the Parties (COP) held over the last sixteen years. With respect to GHGs, Article 4.2(a) in the UNFCCC states that the United States, as a "developed country," "shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its

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[10] *Id.* at 66,499.

[11] *Id*. at 66,522.

[12] *Id.* at 66,538.

[13] *Id*.

[14] UNFCCC, May 9, 1992, 1771 U.N.T.S 107, S. Treaty Doc. No. 102-38.

anthropogenic emissions of greenhouse gases." Pursuant to the Convention, the 16th Conference of the Parties (COP 16) which was held in Cancun, Mexico during December 2010, concluded, in an adopted cooperative text, that the shared "vision [of the Parties to the Convention] addresses mitigation, adaptation, finance, technology development and transfer, and capacity-building in a balanced, integrated and comprehensive manner to enhance and achieve the full, effective and sustained implementation of the Convention, now, up to and beyond 2012."[15]

Thus EPA, as well as the United States Government and the global community as a whole, are grappling with the issue of climate change and GHG emissions. Identifying possibly effective global actions to this polycentric situation is distinctly challenging. The United States' role in any global GHG emission reduction efforts requires sophisticated legislation, measured and flexible agency action, and cooperative diplomacy. Quite obviously, no federal district court has either the institutional capacity or the jurisdictional reach to formulate and enforce a solution while claiming to be acting only under the aegis of the common law. Were a court to attempt this, it would certainly unbalance any carefully crafted efforts taken

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[15] http://unfccc.int/meetings/cop_16/items/5571.php. This text is set forth in this adopted document in a provision entitled "A shared vision for long-term cooperative action," which "*Affirms* that climate change is one of the greatest challenges of our time and that all Parties share a vision for long-term cooperative action in order to achieve the objective of the Convention under its Article 2."

at the legislative, regulatory, and diplomatic levels to address climate change.

When faced with numerous interests that must be addressed, and the fact that global actions lie beyond the capacity of ordinary adjudication, federal and state court decisions have recognized the inappropriateness of using the common law, and particularly the doctrine of public nuisance, to address the novel and diffuse elements of an issue such as this. A review of some of those decisions, from the general to the specific, is offered below.

In *United States v. Standard Oil of California*—a case seemingly far removed from the grand issues presented here—this Court declined to create under the rubric of federal common law a novel cause of action whereby the United States could recover the cost of caring for a soldier negligently injured by the defendant. The Court determined that "the exercise of judicial power to establish the new liability . . . would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action." The Court went on to note that "making the liability effective in this case . . . would involve a possible element of surprise, in view of the settled contrary practice." The Court also explained that "[t]he only question is which organ of the Government is to make the determination that liability exists." The Court concluded that it was for "Congress, not for the courts," to make that decision, and until it was made, "this Court and others should

withhold creative touch."[16] The Second Circuit did not do so.

In *Metro-North Commuter Railroad Co. v. Buckley*, this Court examined tort law developed under the Federal Employers' Liability Act and reversed the Second Circuit's decision on expanding that law.[17] The majority opinion noted "the potential systemic effects of creating a new, full-blown, tort law cause of action," including "the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." "The reality," as the Court stated, "is that competing interests are at stake—and those interests sometimes can be reconciled in ways other than simply through the creation of a full-blown, traditional, tort law cause of action."[18] In addition, the Court noted that the statistics relevant to the plaintiff's claim of injury were controversial and uncertain, and that "neither . . . judges or juries are experts in statistics." Apropos of the case at bar, the Court then stated that "[t]he large number of those exposed and the uncertainties that may surround recovery suggest what *Gottshall* called the problem of 'unlimited and unpredictable liability.'"[19]

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[16] 332 U.S. 301, 316–317 (1947).

[17] 521 U.S. 424 (1997).

[18] *Id*. at 443–444.

[19] *Id*. at 435 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994)).

A similar caution has been shown by state courts asked by ambitious government plaintiffs to invoke, as here, the doctrine of public nuisance, to solve not only the health but also the fiscal problems associated with the widespread use of lead paint in decades long past.[20] In a recent comprehensive review, the Rhode Island Supreme Court reversed a judgment for the state and explained the limits of public nuisance law, as explicated in treatises and other state court decisions, noting particularly the diffuse nature of the harm and the multiple causes contributing to it. After considering applying enterprise liability and public nuisance law to select defendants who were just some of many actors introducing risks "into the stream of commerce," the Rhode Island Supreme Court ruled out such a public nuisance cause of action. In reaching its decision, it cited a number of other state court opinions, including that rendered in an almost identical case by the New Jersey Supreme Court, in which that court stated that "were we to find a cause of action here, 'nuisance law would become a monster that would devour in one gulp the entire law of tort .'"[21]

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[20] *Rhode Island v. Lead Indus. Ass'n, Inc*., 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litigation*, 191 N.J. 405, 924 A.2d 484 (2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *City of Chicago v. American Cyanamid Co.*, 355 Ill. App. 3d 209, 823 N.E.2d 126 (2005).

[21] *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d at 456–457; *see also*, R. Faulk and J. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 953–957; D. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003); R. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 Mo. Envtl. L. & Pol'y

Such caution is particularly in order where the "creative touch" being invoked is not that of a state court developing state common law, but the rarer and more problematical instance of a federal court inventing novel liability under the sparingly invoked rubric of the federal common law.[22] As Justice Breyer noted in his Oliver Wendell Holmes Lectures in 1992:

> Courts also administer a system of tort law which discourages the negligent production of risky substances by forcing producers (or their insurers) to compensate those whom they injure. That system, however, leaves the determination of "too much risk" in the hands of tens of thousands of different juries who are forced to answer the question not in terms of statistical life, but in reference to a very real victim, needing compensation in the courtroom before them. The result is a system much criticized for its random, lottery-like results and its high "transaction costs" (i.e., legal fees) which eat up a large fraction of compensations awards. Whatever its merits and problems, I do not believe the tort system can serve as a substitute for government regulation.[23]

Indeed, exactly these cautions have been brought to bear in resisting other ambitious invocations of the

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Rev. 1 (2010), F.W. Brownell, *State Common Law of Public Nuisance in the Modern Administrative State,* 24 Nat. Resources & Env't 34 (Spring 2010).

[22] *See* n. 16, *supra*; nn. 24–30, 36, 51–60, 62, *infra*.

[23] STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 59 (1994).

federal common law of public nuisance. In *Ohio v. Wyandotte Chemicals Corp.*,[24] Ohio sued companies incorporated in Michigan, Delaware, and Canada which were alleged to have discharged mercury into Lake Erie. In his opinion for the Court, Justice Harlan noted the great difficulty the Court had experienced in identifying a suitable rule of law to govern state air and water pollution controversies due to their complex technical and legal nature, and that "[t]he solution finally grasped" has been "to saddle the party seeking relief with an unusually high standard of proof and the Court with the duty of applying only legal principles 'which [it] is prepared deliberately to maintain against all the considerations on the other side.'"[25]

Justice Harlan went on to note how Court intervention would interfere with agencies and processes specifically authorized to address the issue, citing both multi-state and international studies established under national and international agreements.[26] Accordingly, he reached a conclusion that should serve as the guiding principle here: "In view of all this, granting Ohio's motion for leave to file would, in effect, commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and

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[24] 401 U.S. 493 (1971).

[25] *Id*. at 501–502.

[26] *Id*. at 503.

conciliatory bodies are actively grappling with on a more practical basis."[27]

Finally, there is the Fourth Circuit's decision in *North Carolina v. TVA,* involving the emission of regulated pollutants under the Clean Air Act.[28] In its decision, the Fourth Circuit rejected a claim of state common law nuisance against the Tennessee Valley Authority, which is the Respondent in Support of the Petitioner in this case. Judge Wilkinson's opinion accords with that in the preceding decisions. It notes that trials and private causes of action alleging public nuisance under common law cannot be brought when Congress has expressed its views on the intricate scientific and technical facts and has addressed the matter at hand through legislation that is being implemented by an agency charged with the task.[29]

With respect to the use of public nuisance injunctive remedies in resolving these issues, Judge Wilkinson had this to say:

> Injunctive decrees, of course, are rulemakings of a sort. While expressing the utmost respect for the obvious efforts the district court expended in this case, we doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction

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[27] *Id*; *see also id*. at 498 n. 3 ("an action such as this, if otherwise cognizable in a district court, would have to be adjudicated under state law")

[28] 615 F.3d 291 (4th Cir. 2010).

[29] *Id*. at 304–305.

> of the information that regulatory bodies can consider. . . . In fact, the district court properly acknowledged that "public nuisance principles . . . are less well-adapted than administrative relief to the task of implementing the sweeping reforms that North Carolina desires."[30]

It is noteworthy that the court decisions identified above issued their warnings in common law tort cases having impacts that were far narrower and more limited than this one. In the pollution cases, *Wyandotte* and *North Carolina*, the sources of the alleged pollution were much more geographically limited than in the case before the Court today.[31] Prudence having dictated that federal courts withhold their "creative touch" in those cases, how much more insistently does that counsel of prudence speak here, where the plaintiffs seek to employ a public nuisance claim to "solve" the issue of climate change?[32] Instead, climate change and GHG emissions are far-reaching, multi-dimensional, and global, and they are fraught with scientific, economic, and political elements which

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[30] *Id*. at 305.

[31] In *Wyandotte*, two companies were alleged to have discharged mercury into Michigan and Ontario tributaries that flowed into Lake Erie. 401 U.S. at 494–495. In *North Carolina*, the alleged emitters of air pollutants were located in Tennessee, Alabama, and Kentucky. 615 F.3d at 296. In the current case, the defendants operate, collectively, fossil fuel fired electric power plants in twenty states. Pet. App. 2a.

[32] The "roadmap" for bringing this public nuisance claim would appear to be rooted in D. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1 (2003).

are controversial and rapidly evolving. Unlike the classic federal common law public nuisance cases noted in the Second Circuit's opinion,[33] this is not a case that is focused on the risks associated with individual emission sources, but instead concerns a combination of hundreds of thousands of sources across many states, regions, and countries.

The Second Circuit's opinion is only one in a recent round of climate change lawsuits with public nuisance claims.[34] These represent a marked departure from prior environmental claims in important respects. Traditionally, such public nuisance claims were directed at conditions within defined geographic bounds and were linked to the impairment of property, or to injuries related to such impairment. Furthermore, the defendants causing the tortious conduct were clearly identifiable. Indeed, all the

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[33] *E.g.*, *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (only a single, regional source); *Missouri v. Illinois*, 180 U.S. 208 (1901) (only a single, regional source entity, a municipal sewer district); *Illinois v. Milwaukee*, 406 U.S. 91 (1971) (only regional municipalities); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (regional ditches); *New Jersey v. New York*, 283 U.S. 473 (1931) (only a municipal sewer discharge); *Mugler v. Kansas*, 123 U.S. 623 (1887) (intoxicating liquors); *Ohio v. Wyandotte Chemicals Corp*, 401 U.S. 493 (1971) (mercury into Lake Erie).

[34] *See, e.g.*, *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009); *Comer v. Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

examples referred to in the Second Circuit's decision are so limited.[35] The number and variety of persons affected, the lack of metes and bounds to the alleged harms, and the difficulties in identifying which parties have allegedly caused what harm, present a fundamentally different challenge to fashioning appropriate remedies, a challenge beyond the competence of a district court to meet.

An alleged harm having such intricately interrelated elements, causes, and effects defies—like Fuller's polycentric "spider web"—the application of a single standard to the Petitioners' conduct. The difficulty of establishing a standard is also raised in Section 821B, comment e (*Unreasonable interference*), of the Restatement (Second) of Torts, which notes that when a defendant's conduct does not come within one of the traditional categories of the common law "crime" of public nuisance, or such conduct is not prohibited by a legislative act, a court would be forced to act without an established and recognized standard. Justice Blackmun's admonition against the use of common law nuisance in his dissent in *Lucas v. South Carolina Coastal Council* is entirely apposite: there "is no reason to believe that new interpretations of the hoary common law nuisance doctrine will be particularly 'objective' or 'value free,'" and "one searches in vain . . . for anything resembling a principle in the common law of nuisance."[36]

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[35] See nn. 21 (R. Faulk), 28, *supra*.

[36] 505 U.S. 1003, 1055 (1992).

If a court were to expand tort and nuisance law into this climate change area, as Justice Breyer has written in a general discussion of pollution law, such a "decision to shift liability rules" would unquestionably be "difficult to make in practice, "[37] and, he concludes, "reliance upon court-enforced liability rules has not proven adequate to deal with the problem of pollution."[38] Of course courts must eventually be involved in the review and enforcement of the rules and decrees established by appropriate agencies. But in a climate change public nuisance case, with the number and variety of plaintiffs, defendants, statistics, venues, and jurisdictions, and the potential for dissonance in the conclusions of experts, judges, and juries, court adjudication of GHG emission issues, both making up the rules and enforcing them, threatens either a disaster or bonanza depending on one's point of view.[39]

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[37] STEPHEN BREYER, REGULATION AND ITS REFORM 175 (1984).

[38] *Id*. at 177.

[39] *See, e.g., Comer v. Murphy Oil USA*, n. 34, *supra*, where a putative class action filed by residents and owners of lands and property along the Mississippi Gulf coast alleged that defendants' operation of energy, fossil fuels, and chemical industries in the United States caused the emission of greenhouse gases that contributed to global warming that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina so as to destroy the plaintiffs' private property and public property useful to them, with the plaintiffs asserting claims for compensatory and punitive damages based on Mississippi common-law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.

II. LEGISLATION, INTERNATIONAL NEGOTIATIONS AND AGREEMENTS, AND PROPER REGULATION BY AGENCIES ARE THE ONLY AVAILABLE MODES FOR RATIONALLY ADDRESSING CLIMATE CHANGE

In the first two sections of its decision in *Massachusetts v. EPA*, this Court traced the history of climate change and GHG emissions. It stated in that history that Congress, EPA and other agencies, and international agreements would have the responsibility for addressing climate change.[40] The Court indicated that statutory text in the Clean Air Act was "sweeping" in the definition of an air pollutant and "unambiguous" in the inclusion of airborne compounds, and the Court then directed EPA to exercise its regulatory discretion within the limits of the Clean Air Act.[41]

In addition, the Court noted the significant foreign policy elements in any national approach to climate change: "In the Global Climate Protection Act of 1987, Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate."[42] The Court also stated that that Congressional legislation "ordered the Secretary of State to work 'through the channels of multilateral diplomacy' and coordinate diplomatic efforts to combat

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[40] 549 U.S. at 506–514.

[41] *Id*. at 528–529.

[42] *Id*. at 534; *see also* § 1103(c), 101 Stat. 1409.

global warming."[43] Given this legislation that imposes responsibilities upon the Secretary of State, the nonbinding UNFCCC,[44] and the activities and agreements reached in the numerous COP and other meetings attended by representatives of the Executive Branch, the federal courts cannot, without serious unbalancing effects, insert themselves into the foreign policy and diplomatic processes that are mandated to address climate change issues, including those affecting GHG emissions.

As noted in *United States v. Standard Oil of California*, the federal courts should be especially reluctant to innovate under the distinctly problematic aegis of the federal common law without looking first to Congress.[45] Not only is the tort litigation embraced by the Second Circuit in this case spectacularly unsuited to addressing GHG emissions and their relation to climate change, but this is exactly the kind of polycentric situation that requires a legislative mandate and the assignment of an agency to implement that proper mandate and to coordinate with the Executive Branch on the international aspects of such implementation. Such a legislative mandate is necessary because it reflects a general political accommodation of the myriad interests affected by this situation and the myriad interests impacted by any solution to it. An agency can then be

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[43] *Id*. at 508.

[44] *See id*. at 549 U.S. at 509 (UNFCCC is a nonbinding agreement); *Medellin v. Texas*, 552 U.S. 491, 504–506 (2008) (a nonbinding agreement may not be a part of federal law).

[45] *See* n. 16, *supra*.

assigned the task of properly and legally implementing that general accommodation in concrete, flexible ways, in a constantly changing physical, technological, economic, and political environment. In this regard, agencies must comply with their mandates under the legislation, which can be a difficult and polycentric process,[46] and which no court can do.

As Richard Stewart, one of the leading scholars in environmental and administrative law, has explained:

> [S]ome advocates of public interest representation have forthrightly asserted that it "is the job of the court" to decide "where the public welfare in balance lies." In addition to straining courts' competence to resolve policy questions involving complex scientific and economic issues, such an expansion of judicial power would give the courts a degree of across-the-board responsibility for social and economic policy-making that is wholly inconsistent with our received constitutional premises, under which the legislature remains free, subject to the minimal requirements of the doctrine against delegation of legislative power, to delegate a discretionary power of choice to agencies so long as the agencies stay within

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[46] *See, e.g.*, EPA's "Tailoring Rule," 75 Fed. Reg. 31514 (June 3, 2010), issued under the Clean Air Act with respect to the phase-in of GHG emission standards for stationary sources. The preamble to that rule refers to the "doctrines" of "absurd results," "administrative necessity," and "one-step-at-a-time," *id*. at 31516, to justify its action, in contradiction to the provisions of the Clean Air Act, underscoring the complexity and difficulty of this polycentric task undertaken by EPA.

> statutory bounds and observe appropriate procedural safeguards. The expansion of participation rights to affected interests in itself provides no justification for abandoning these traditional premises. Indeed, the more the question of agency choice comes to resemble a political process of weighing the claims of competing interest groups the less the apparent justification for judicial revision of Congress' delegation of choice to the agency.[47]

Despite these court precedents and the admonitions of leading scholars, the Respondents have urged this Court to invoke the federal common law of public nuisance because, as they believe, EPA has yet to issue regulations covering the Petitioners' GHG emissions. Given the Court's admonition in *United States v. Standard Oil of California* with respect to judicial intrusion in areas properly within Congress' control, given the Court's conclusion in *Massachusetts v. EPA* that Congress provided a statutory text in the Clean Air Act conferring authority upon EPA on whether to regulate GHGs, and given the concerns raised by scholars such as Stewart about judicial expansion into policy areas that strain a court's competence, the Respondents' insistence on a solution ultimately to be imposed and administered by a single federal district judge is contrary to both reason and precedent.

In the present case, the Second Circuit has referred a number of times to *County of Oneida v. Oneida*

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[47] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1786–1787 (1975).

Indian Nation of N.Y. State[48] for the proposition that the Indian Nonintercourse Act of 1793 did not displace the federal common law.[49] Thus, the Second Circuit said that the Clean Air Act must not be taken to preclude the fashioning of both liability and remedy under federal common law. However, the analogy is inapposite, since the statute in *Oneida* was enacted over 200 years ago, was based on aboriginal title rights, did not provide a comprehensive plan for dealing with those rights,[50] and did not include any of the statutory text that this Court emphasized with respect to the Clean Air Act provisions on GHG emissions as air pollution in *Massachusetts v. EPA*.[51] Indeed, in *International Paper Co. v. Ouellette*, decided *after Oneida*, and which like *Oneida* was authored by Justice Powell, this Court stated that the *comprehensive* amendments to the Clean Water Act "now occupied the field, pre-empting all *federal* common law."[52]

The First Circuit reached the same conclusion, in *Conner v. Aerovox, Inc.*, with respect to public nuisance claims brought under federal maritime tort law and the admiralty jurisdiction.[53] Even though the Clean

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[48] 470 U.S. 226 (1985).

[49] *Connecticut v. American Elec. Co.*, 582 F.3d 309, 386 (2d Cir. 2009).

[50] 470 U.S. at 237–238.

[51] 549 U.S. at 528–529.

[52] 479 U.S. 481, 489 (1987).

[53] 730 F.2d 835 (1st Cir. 1984).

Water Act did "not provide a compensatory remedy for losses of the type complained of here," the First Circuit stated that the "Supreme Court has emphasized, however, the comprehensiveness of the policy implemented in [the Clean Water Act] *rather than the adequacy of the implementation*."[54] It then concluded that there was no maritime tort remedy, based on federal common law in the area of water pollution that "is entirely preempted," and would "encompass all federal judge-made law of nuisance whether maritime or general federal law."[55]

The First Circuit next stated that it also rejected any common law of nuisance claims under admiralty law. In response to the plaintiffs' argument that the district court, sitting in admiralty, could "borrow from state law to fashion a theory of liability for the instant dispute," the court responded by saying that "the source of the borrowed law would be irrelevant" because a "damage claim based on common-law nuisance principles is precluded whether under maritime or other federal jurisdiction."[56]

The First Circuit cited its opinion in *Conner* in rejecting a public nuisance case under the federal Safe Drinking Water Act (SDWA). In *Mattoon v. City of Pittsfield*,[57] where the plaintiffs justified their claim on the grounds that there was no regulation issued by

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[54] *Id.* at 840–841 (emphasis added).

[55] *Id*. at 842.

[56] *Id*.

[57] 980 F.2d 1 (1st Cir. 1992).

EPA under the SDWA for the contaminant of concern, the First Circuit noted that they "misapprehend[ed] the nature of the comprehensiveness inquiry required under *Milwaukee v. Illinois*, which turns on 'whether the field has been occupied, not whether it has been occupied in a particular manner.'"[58] As the court noted, "'once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution.'"[59] As explained by the First Circuit:

> The comprehensiveness of the legislative grant is not diminished, nor is the congressional intent to occupy the field rendered unclear, merely by reason of the regulatory agency's discretionary decision to exercise less than the total spectrum of regulatory power with which it was invested.[60]

CONCLUSION

The adventure on which the Second Circuit would cause the federal courts to initiate a disastrous disregard of separation of powers principles, and would replace or unbalance not only the agency regulatory process but most palpably the international negotiations indispensable to any satisfactory solution.

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[58] *Id*. at 5 (quoting *Conner*, 730 F.2d at 841 (quoting *Milwaukee*, 451 U.S. at 324)).

[59] *Id*. (quoting *People of State of Illinois v. Illinois Outboard Marine*, 680 F.2d 473, 478 (7th Cir.1982)).

[60] *Id*. at 5 (emphasis added).

An uncoordinated remedial injunction by a United States district court might simply lead—in a process similar to Fuller's spider's web—to an uncoordinated and piecemeal approach to GHG emissions that is, at best, ineffective at the national level and disruptive at the international level. Judge Wilkinson got it right when he said that upholding an injunction based on common law public nuisance principles "would encourage courts to use 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."[61]

Judicial intervention, under the rubric of the tort of public nuisance, in the highly complex issues surrounding greenhouse gas emissions would overrun tort law, swamp the courts, and undercut the proper organs of public policy in the United States and abroad. The words of Benjamin N. Cardozo are an apt reproof to the Second Circuit's dramatic intervention in this matter:

> The judge . . . is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy,

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[61] *North Carolina*, 615 F.3d at 296.

> disciplined by system, and subordinated to the "primordial necessity of order in the social life."[62]

This Court should overrule the Second Circuit's decision.

Respectfully submitted,

Charles Fried
Counsel of Record
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138

Peter Sacripanti
McDermott Will & Emery LLP
40 Madison Avenue
New York, NY 10173-1922

Jeffrey Bates
Susan Cooke
McDermott Will & Emery LLP
28 State Street
Boston, MA 02109

Counsel for Amici Curiae

February 7, 2011

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[62] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).