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 *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses and associations.[1] The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations. At least 98% of the Chamber's members are small businesses with 100 or fewer employees. The Chamber advocates issues of vital concern to the nation's business community and has frequently participated as an *amicus curiae* before this Court and other courts. And when misguided lower court decisions threaten the interests of the business community and the greater public, the Chamber has supported challenges asking this Court to overturn those decisions. This is such a case.

The proper response to global climate change is an issue of profound concern to the Chamber's members. The Chamber works to discourage ill-conceived climate change policies and measures that could severely damage the security and economy of the United States, and instead encourages positive measures, such as long-term technological innovation and long-term clean technology deployment. The Chamber believes that common law suits such as this one, which seek to impose caps and reductions on carbon dioxide emissions in a piecemeal fashion on an arbitrary subset

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[1] The parties have filed blanket letters of consent 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 *amicus* and its counsel, made a monetary contribution intended to fund its preparation or submission.

of U.S. industry, are an especially ill-conceived and constitutionally illegitimate response. A meaningful and politically legitimate response to climate change must be national—indeed global—in nature, and must be fashioned by the politically accountable Branches.

The Chamber has a vital interest in ensuring that courts respect their constitutional role—and do not usurp the roles of the executive and legislative Branches in fashioning a politically accountable response to the global phenomenon of climate change.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs in this action, a consortium of states and private interests, seek to hold five American utilities jointly and severally liable for "contributing" to global climate change caused by billions of sources around the world over the course of centuries under a vague and far-reaching federal common law theory of "nuisance." Compl. 49, No. 04-5669 (S.D.N.Y. July 21, 2004), J.A. 110. Their suit asks the federal courts to "cap" defendants' carbon dioxide emissions and then reduce them by an unspecified percentage "each year for at least a decade." *Id.* The district court sensibly rejected that extraordinary request, recognizing that how best to address the complex issues implicated by global climate change is a question that can only be resolved by the political Branches. Pet.App.171a-187a.

The Second Circuit reversed, however, and permitted this unprecedented common law action to proceed. Pet.App.1a-170a. That decision is based on a profoundly misguided conception of the role of the courts in our constitutional democracy and has potentially disastrous implications for the U.S.

business community as well as this nation's efforts to address the phenomenon of global climate change. The United States agrees that the decision below cannot stand and that plaintiffs' action must be dismissed. *See generally* Tennessee Valley Authority Br (Jan. 31, 2011) (TVA Br.). The Chamber urges this Court to reverse the decision below and make clear that well-established limits on the exercise of judicial power prevent the courts from attempting to superintend the phenomenon of global climate change in the piecemeal and haphazard fashion urged by plaintiffs.

The court of appeals' decision offends three fundamental limits on the Judicial power. *First*, the court overstepped its authority by creating new federal common law to accommodate plaintiffs' claims. In recent times, this Court has repeatedly stressed that—with rare exception—the courts' days of federal common law making have passed. Despite their appellation, plaintiffs' claims bear scant resemblance to traditional "nuisance" claims. For centuries, public nuisance suits generally have been limited to situations where a discrete set of defendants allegedly directly caused harm by releasing obviously toxic or dangerous substances in a particular and nearby locale. Plaintiffs' suit, in stark contrast, asks the courts to assess fault for injuries caused by greenhouse gas emissions from literally billions of sources worldwide over the last "several centuries." Compl. ¶ 87, J.A. 81-82. The common law is ill-equipped to address such staggeringly complex—and "unprecedentedly broad" (TVA Br. 13)—nuisance claims. And there is no reason for this Court to invoke the very common law authority that the Court has repeatedly disavowed in modern

times to fashion a new common law action for such an indeterminate and diffuse phenomenon.

Second, the court of appeals erred in failing to appreciate that the global nature of climate change and the necessity in any bid for redress to balance an enormously vast array of interrelated interests are ill-suited to the *ad hoc* and piecemeal nature of litigation. The political question doctrine prohibits courts from acting where, as here, there are no judicially manageable standards and any adjudication would inevitably require initial policy decisions reserved to the political Branches on matters (to name only a few) such as the appropriate level of global emissions, the parties that should bear the costs of limiting emissions, and foreign policy and economic ramifications of attempting to address global climate change. Indeed, as the United States has explained, "plaintiffs' common-law nuisance suits present serious concerns regarding the role of an Article III court under the Constitution's separation of powers—especially in light of the representative Branches' ongoing efforts to combat climate change by formulating and implementing domestic policy and participating in international negotiations." TVA Br. 13. These matters are not just exceptionally complex or difficult—they have no "right" jurisprudential answers. Under our Constitution and this Court's precedents, such matters are reserved for the political Branches.

Third, the court of appeals erred in finding that plaintiffs have Article III standing to maintain this action. That defect provides a threshold basis for dismissing this action. The likelihood of redressability in this suit against a finite and arbitrary set of carbon-emitting entities is so remote and so speculative that

the ruling here would permit literally anyone alleging climate-change based damages to sue any entity or natural person in the world—an absurd result that highlights once again just how inapt the judicial forum is for addressing such inherently global concerns. *Massachusetts v. EPA*, 549 U.S. 497 (2007), does not dictate a contrary conclusion. The principles animating that decision—which focused on the ability of *Congress* to relax the Article III inquiry in the context of a statutory provision for challenging agency action—are inapplicable in this common-law context. Finding standing in this case would require a significant expansion of *Massachusetts* and (given the absence of the congressional action on which this Court relied in *Massachusetts* to find standing) put the courts well ahead of the democratic process in this area. It would also require the Court to disregard the prudential limits that the Court itself has imposed on judicial review of "'generalized grievances more appropriately addressed in the representative branches.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

The astounding practical implications of the decision below underscore the separation-of-powers problems with allowing this unprecedented common law action to proceed. Especially since *Massachusetts*, an emerging category of litigation over greenhouse-gas emissions has developed implicating countless plaintiffs and defendants. If the decision of the Second Circuit is affirmed, this suit—and the countless others that inevitably follow—will destabilize our economy, undermine our democratic process, and impact sensitive foreign policy considerations. The debate over the appropriate response to climate change affects

every business concern and implicates virtually every facet of daily life. This complex political dialogue belongs in the political arena, not the courthouse—much less in scores if not hundreds of *different* courthouses across America as suits like plaintiffs' proliferate. Only the elected Branches are authorized and equipped to develop our nation's response to climate change and undertake any necessary reforms.

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss this unprecedented and ill-founded action.

ARGUMENT

I. FUNDAMENTAL CONSTITUTIONAL AND PRUDENTIAL LIMITS BAR PLAINTIFFS' UNPRECEDENTED COMMON LAW SUIT AGAINST GLOBAL CLIMATE CHANGE

Throughout history this Court has time and again recognized that there are limits to the exercise of Judicial power in our constitutional democracy. The unprecedented common law action in this case transgresses several of those fundamental limits. It asks the federal courts to recognize a new breed of "public nuisance" action that has no analogue in our common-law tradition and no discernable limits in terms of its reach. It asks the federal courts to adjudicate among the most complex scientific, political, and international controversies in history, in the absence of any judicially manageable standards. And it asks the courts to do so where the plaintiffs themselves have pointed to no concrete and redressable interest—and no congressionally identified injury or interest. For any one of these reasons—or all of them—the Court should once again affirm that the Judicial power

does not extend to every alleged grievance, and hold that plaintiffs' unprecedented common law action against global climate change must be dismissed.

Although the United States agrees that this action should be dismissed, it goes to great—and at times perplexing—lengths to urge this Court to decide this case on the basis of "prudential standing," in particular. TVA Br. 13. Indeed, at times the government's brief seems to be at odds with itself. *Compare*, *e.g.*, *id.* at 14-15 (arguing that this action presents "generalized grievances" unfit for judicial review) *with id.* at 28-30 (arguing that same alleged grievances are fit for review). The Chamber agrees with petitioners that prudential standing is an appropriate basis for reversing the decision below. *See* Petitioners Br. 30-31 (Jan. 31, 2011) (Pet. Br.). But as explained below and by petitioners, this action contravenes several accepted limits on the power of the courts. Lack of Article III standing provides a threshold basis for dismissing this action. *See infra* at 20-24. But as explained next, even if this Court concludes that plaintiffs have standing to maintain this action, the Court should hold that the action must be dismissed on that grounds that there is no basis for the federal courts to create the novel public nuisance action that plaintiffs have advanced, and that this action presents a non-justiciable political question.

A. The Court Should Decline Plaintiffs' Request To Make New Common Law

1. This Court has long understood that creating federal common law raises fundamental separation of powers concerns. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (refusing to fashion federal criminal common law). And, it is "needless to state that we are not in the free-wheeling days ante-dating

Erie R. Co. v. Tompkins." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). In the modern era, this Court has declared that it has generally gotten out of the business of making new federal common law, *see Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981), "sworn off the habit of venturing beyond Congress's intent," *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), and stressed that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Even in new situations that are arguably analogous to established common law actions, this Court has made clear that federal courts do not have unchecked "freedom to create new common-law liabilities." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 313 (1947). It has further cautioned the courts to be particularly hesitant where judicial standards "would be endlessly knotty to work out" and liability is more properly addressed "through legislation." *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007). The flip side of this restraint is that when the legislature *does* articulate "new rights of action that do not have clear analogs in our common-law tradition," the courts are "sensitive to the articulation of [such] new rights of action." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., joined by Souter, J., concurring in part and concurring in the judgment).

In this way, the courts ensure that they do not get ahead of the political process in addressing new harms or concerns. Respecting these limits is particularly important when it comes to addressing novel and exceptionally complex harms or issues—such as global climate change—which are most likely to benefit from

debate and consideration as part of the political process and most likely to engender controversy if the courts were to get ahead of that process in addressing such issues. To paraphrase Judge Friendly, the "spectacle of federal judges" making substantive common law in place of the political Branches to address such novel and complex issues is not "a happy one." Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 395 (1964).

2. Plaintiffs have brought this action not under any congressionally conferred right, but by asserting a violation of the federal common law of "public nuisance." Public nuisance indeed has a long pedigree in the common law. But plaintiffs' staggeringly broad claims, implicating every greenhouse gas emitter on the planet and attempting to grasp the current and future global impact of such emissions, bear little resemblance to the actions recognized throughout the centuries-old field of public nuisance law—especially not that subset ultimately incorporated into *federal* common law. Accordingly, while they attempt to sell this nuisance suit as old hat, sanctioning this common law action in fact would require creating a *new* federal common law action to address highly generalized and indeterminate phenomena or harms that have never previously been adjudicated at common law.

As a general matter, a public nuisance is "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979) ("Restatement"); *see, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (1992) (applying Restatement); *United States v. Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110, 120 (D. Vt.) (same), *aff'd without op.*, 487 F.2d 1393 (2d Cir. 1973).

As this Court has explained, public nuisance law "ordinarily entails" analysis of, among other things, the "degree of harm" posed by the activities, the "social value" of the activities, and their "suitability to the locality in question." *Lucas*, 505 U.S. at 1030-31; *see* Restatement §§ 821B, 826-31. The inquiry is typically guided by the "community standards of relative social value prevailing *at the time and place*." Restatement § 828 cmt. b (emphasis added); *see also id.* § 828 cmt. g.

Tracing its roots back centuries in England, public nuisance law has long been used to address discrete and obvious harms in geographically specific and definable areas. For example, one of the oldest known public nuisance statutes, from the 14th Century, outlaws casting "Dung and Filth of the Garbage and Intrails as well of Beasts killed" and "other Corruptions" into "Ditches, Rivers, and other Waters" around London and "other Cities, Boroughs, and Towns, through the Realm of England." Statute of 12 Rich. II, c. 13 (1389); *see* William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. Fla. L. Rev. 27, 35 (1948).

Other traditional examples include obstructing a public way with ditches, logs, or other barriers, *see, e.g.*, *Iveson v Moore*, 91 Eng. Rep. 16 (1702); *Fowler v. Sanders*, 79 Eng. Rep 382 (1617); *Fineux v. Hovenden*, 78 Eng. Rep. 902 (1599); failure to maintain a public ferry, *see Payne v Partridge*, 91 Eng. Rep. 12 (1696); failure to hold Mass in a public chapel, *see Williams's Case*, 77 Eng. Rep 164 (1592); "making great noises in the night with a speaking trumpet, to the disturbance of the neighborhood," *Dominus Rex v. Smith*, 93 Eng. Rep. 795 (1725); "interference with the operation of a public market," Restatement § 821B cmt. a; and

"smoke from a lime-pit that inconvenienced a whole town," *id.* There is no simply historical analogue for the use of public nuisance law to address the sort of generalized and ubiquitous harm alleged here—a warming of the Earth due to greenhouse gases emitted by *billions* of different sources worldwide over the course of hundreds of years.

As Blackstone summarized in the mid-18th Century, the types of public nuisances at common law—all necessarily limited in scope—traditionally included annoyances in highways and rivers (including purprestures), offensive trades, disorderly houses, lotteries, fireworks, eavesdroppers, and common scolds. 4 William Blackstone, *Commentaries* *167-69,; *see also id.* at *167 ("Where there is an house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture* ….").

Similarly, after English common law was imported into American law at the founding, public nuisance common law was consistently used to address discrete disturbances in particular, decidedly non-global areas. *See, e.g.*, *People v. Detroit White Lead Works*, 46 N.W. 735, 735 (Mich. 1890) ("unwholesome, offensive, and nauseating odors, smells, vapors, and smoke" emitted by factory harmed people "in the neighborhood"); *McAndrews v. Collerd*, 42 N.J.L. 189 (N.J. 1880) (explosives stored in shed exploded and damaged houses within 1200-foot radius); *Wesson v. Washburn Iron Co.*, 95 Mass. (13 Allen) 95, 104 (Mass. 1866) ("noisome smells and noxious vapors" emitted by factory harmed the vicinity); *Mills v. Hall & Richards*, 9 Wend. 315, 316 (N.Y. Sup. Ct. 1832) (malarial pond

caused "disease and death through the neighborhood"); *Barr v. Stevens*, 4 Ky. 292, 293 (1808) ("fell[ing] trees in the highway" could cause "annoyance of the passengers").

When this Court incorporated a subset of public nuisance doctrine into federal common law, it was likewise inherently limited. In particular, primarily early in the last century, this Court recognized narrow instances in which states can bring "simple type" public nuisance claims under federal common law to enjoin interstate environmental harms. *See, e.g.*, *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923). Plaintiffs insist—and the Second Circuit agreed—that their nuisance suit fits comfortably within that paradigm. Compl. ¶¶ 152-64, J.A. 103-05; Pet.App.78a-95a. But the "simple type" public nuisance actions previously recognized by this Court—which are among the "'few and restricted'" (*Texas Indus.*, 451 U.S. at 640 (citation omitted)) instances in which this Court has recognized any federal common law cause of action—do not support the Second Circuit's decision.

3. Plaintiffs' suit likewise bears no resemblance to the traditional federal nuisance actions previously recognized by this Court. Plaintiffs' claims implicate non-toxic substances emitted by billions of sources worldwide over "several centuries," Compl. ¶ 87, J.A. 81-82, caused by everyone in every corner of the globe and—if plaintiffs' claims are to be believed—ultimately creating generalized harms worldwide. By contrast, the public nuisance cases that this Court has sanctioned involved allegations that a discrete set of defendants directly caused harm with obviously toxic or dangerous substances in a particular locale. *See, e.g.*, *Missouri v. Illinois*, 200 U.S. 496 (1906) (Chicago

sewage harmed cities along Mississippi River); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (toxic chemicals emitted by Tennessee companies harmed air quality in five Georgia counties).[2] As the government recognizes, the traditional nuisance cases "involved only localized rather than global effects." TVA Br. 18 n.6; *see id.* at 17 ("The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere—making it impossible to consider the sort of *focused and more geographically proximate effects* that were characteristic of traditional nuisance suits targeted at particular nearby sources of water or air pollution." (emphasis added)).

Far from the historically modest application of existing tort principles to a discrete nuisance, plaintiffs advance claims that are "unprecedentedly broad" (TVA Br. 13) and seek to have the courts dictate the substance and implementation of federal climate change policy—with profound and inevitable effects on American businesses, jobs, and individuals. Indeed, because everyone still breathing on the planet contributes to greenhouse gas emissions, if plaintiffs' claims are permitted to go forward, all businesses—and, indeed, all individuals—will, overnight, become subject to unpredictable and open-ended *joint-and-several* liability. *See* TVA Br. 17 ("[A]ny potential

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[2] *See also, e.g.*, *New York v. New Jersey*, 256 U.S. 296 (1921) (sewage discharged by New Jersey harmed Upper New York Bay); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (drainage system altered by Minnesota caused flooding in North Dakota); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (garbage dumped by New York City harmed New Jersey shore); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*") (pollution discharged by Wisconsin cities harmed Lake Michigan).

plaintiff could claim to have been injured by any (or all) of the potential defendants."). Such an extraordinarily broad assertion of common law liability is unheard of.

Such a novel and unbounded conception of a "public nuisance" is also incompatible with the longstanding nature of the common law cause of action for public nuisance. For example, as noted, the conventional "public nuisance" inquiry is guided by the "community standards of relative social value prevailing *at the time and place*." Restatement § 828 cmt. b (emphasis added); *see Lucas*, 505 U.S. at 1030-31; Restatement § 828 cmt. g. But that targeted "time and place" inquiry into "community standards" is simply unworkable when it comes to a *global* harm caused over the course of *centuries* by literally *billions* of different sources around the entire world.

The "exercise of judicial power" to expand "traditionally established" causes of action to the novel and pervasive problem of global climate change would impermissibly "intrud[e] within a field properly within Congress' control." *See Standard Oil*, 332 U.S. at 311-17 (refusing government's request to impose federal common law tort liability on defendant for loss of a services of injured soldier); *Texas Indus.*, 451 U.S. at 638-47 (refusing to create federal common law cause of action for contribution from antitrust conspirators, where sheer "range of factors to be weighed" in deciding whether to create such an action "demonstrate[d] the inappropriateness of judicial resolution"). "Whatever the merits of the policy" advocated by the plaintiffs in this case, "its conversion into law is a proper subject for congressional action, not for any creative power of [the courts]." *Standard Oil*, 332 U.S. at 314. And, as explained below, the

political process is active and ongoing when it comes to addressing global climate change.

As this Court has explained, "[t]he enactment of a federal rule in an area of national concern … is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981) ("*Milwaukee II*"). That principle should be the beginning and end of this unprecedented "nuisance" suit: If ever there were an area "better left to legislative judgment," this case presents it. Global climate change presents exceptionally complex issues of enormous political, economic, and foreign policy significance. The customary restraint that this Court has long exercised in refusing to extend the common law in new ways is especially warranted here.[3]

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[3] The Second Circuit also held that, notwithstanding this Court's decision in *Massachusetts* and the robust political response, the Clean Air Act (CAA) does not displace federal common law nuisance claims. Pet.App.137a-44a. The Chamber does not believe that *Massachusetts* permits EPA to "shoehorn greenhouse gas emissions controls into the existing [CAA]," for doing so would lead to "absurd" results, *see* Petition for Reconsideration, No. EPA-HQ-OAR-2009-0171, at 3, 10-19 (Mar. 15, 2010), *denied*, 75 Fed. Reg. 49,556 (Aug. 13, 2010), *pet. for review pending*, No. 10-1235 (D.C. Cir. Aug. 13, 2010), as EPA itself has elsewhere acknowledged, *see* 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009) (applying entire CAA statutory scheme to greenhouse gas emissions would produce "absurd results"). EPA's ill-considered decision, manifested in a series of interrelated rulemakings spanning more than 600 pages in the Federal Register, to invoke the blunt instrument of the CAA to regulate the complex problem of climate change is subject to an ongoing array of litigation brought by states, industry, and public interest organizations. *See*, *e.g.*, Non-State Petitioners' Joint

B. Plaintiffs' Suit Raises Non-Justiciable Political Questions

Consistent with the Framers' tripartite scheme, courts have no authority to decide questions that are "in their nature political." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). "It is therefore familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts*, 549 U.S. at 516 (citing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)). While it curiously goes to great lengths to avoid the label of "political question" (repeatedly insisting on using "prudential standing" instead), the United States itself recognizes that this action raises the core concerns addressed by the political question doctrine and, indeed, that a confluence of factors, including "the lack of judicial manageability," "demonstrates that plaintiffs' concerns should be resolved by the representative Branches, not federal courts." TVA Br. 20; *see id.* at 33-42.

1. Article III does not authorize "*whatever* judges choose to do" but, instead, the "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). Under the familiar *Baker* framework, when a case presents no judicially

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Briefing Proposal at 1-2, *Coalition for Responsible Regulation, Inc. v. U.S. EPA*, Nos. 09-1322, 10-1073, 10-1092 (D.C. Cir. Jan. 11, 2011). In light of those substantial challenges, this Court should decide the antecedent question whether federal common law can even accommodate a public nuisance tort of the nature suggested by plaintiffs in this case before considering whether displacement of such federal common law has in fact occurred. However, if the CAA did give EPA such authority, the Chamber agrees with petitioners that the common law claims presented here would be displaced under *Milwaukee II* and its progeny. Pet. Br. 40-46.

manageable standards by which a court (or jury) can make a rational decision or requires an initial policy judgment (*Baker* factors 2 and 3), it must be left to the elected Branches. *Baker v. Carr*, 369 U.S. 186, 210-11, 217 (1962). The political question doctrine also bars adjudication where there is a textual commitment to another Branch, a danger of disrespect to other Branches, a need to adhere to a political decision already made, or the potential for embarrassing other Branches (*Baker* factors 1 and 4-6). *Id.*

In this case, the Second Circuit recognized a new and categorical exception to those established principles. According to the Second Circuit, "where a case 'appears to be an ordinary tort suit,'" there is no political question bar. Pet.App.38a (citation omitted); *see* Pet.App.27a-41a. That approach cannot be squared with the careful, "case-by-case inquiry" that this Court requires (and that other lower courts have undertaken) to determine whether the question posed "lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

The courts have repeatedly refused to adjudicate political questions even when such questions arise in the context of private litigation involving common law and tort claims. *See, e.g.*, *Luther*, 48 U.S. (7 How.) at 39-40 (trespass); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc) (defamation), *cert. denied*, 79 U.S.L.W. 3419 (U.S. Jan. 18, 2011) (No. 10-328); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-84 (9th Cir. 2007) (public nuisance and wrongful death). This Court thus emphasized in *Baker* that the political question doctrine applies "even in private litigation which directly implicates no feature of separation of powers" and "though in form simply [a common law] action." 369 U.S. at 214, 218.

Accordingly, it is well-settled that a plaintiff cannot "clear the political question bar" simply by "'recasting'" a claim "'in tort terms.'" *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 843 (citation omitted).

2. Plaintiffs' "nuisance" claims present no judicially manageable standards and their resolution requires myriad initial policy determinations reserved to the political Branches. *See* TVA Br. 37-38. In *Massachusetts*, this Court found no political question in assessing "the proper construction of a congressional statute," 549 U.S. at 516, but there is no such legislative guidance here. And contrary to the Second Circuit's suggestion, this case cannot be adjudicated under the "well-settled tort rules" found in prior nuisance cases and the Restatement, Pet.App.27a-35a, because neither source provides the necessary judicially manageable standards or obviates the need for an initial policy determination.

As noted above, public nuisance law "ordinarily entail[s]" analysis of various factors, including the "degree of harm" posed by the activities, the "social value" of the activities, and their "suitability to the locality in question." *Lucas*, 505 U.S. at 1030-31. In traditional tort cases, however, these are merely *incremental* determinations of policy, which courts appropriately make against a backdrop of well-established common law, without trespass on the political domain. But in this case the policy decisions necessary to resolve plaintiffs' claims are not incremental in nature. In the guise of a routine nuisance action, plaintiffs ask a single district court to balance the myriad environmental, economic, and geopolitical factors implicated by global climate change and make from whole cloth policy decisions that

continue to be the subject of intense political debate within our political Branches and with other nations through international diplomatic channels.

The Second Circuit characterized this as a "discrete domestic nuisance" case that does not require a court to fashion "across-the-board" domestic or international emissions limits or a "comprehensive and far-reaching solution to global climate change." Pet.App.25a-26a. But there is nothing remotely "discrete" about a nuisance action that tries to tackle the phenomenon of *global* climate change and necessarily requires the court to value these defendants' emissions against those of every other entity in the world. Given the global nature of greenhouse gases, the imposition of caps on any given enterprise (or handful of enterprises) is necessarily arbitrary. And, as the government has observed, "[p]laintiffs' theory of liability could provide virtually every person, organization, company, or government with a claim against virtually every other person, organization, company or government, presenting unique and difficult challenges for the federal courts," playing out in potentially hundreds of different courtrooms across the country. TVA Br. 37.

Because, as alleged, *every* enterprise—indeed *every breathing organism*—worldwide over the last several centuries is to some degree complicit in greenhouse gas emissions, this line-drawing is not just "difficult" for a court. The initial policy judgment about who should bear the cost of the harm is so complex and intimately entwined with every sector of the economy and every facet of daily life that it is the quintessential example of "'a matter of high policy'" that must be "'resol[ved] within the legislative process after the kind of investigation, examination, and study that legislative

bodies can provide and courts cannot.'" *Texas Indus.*, 451 U.S. at 647 (citation omitted).

For precisely these reasons, every district court to consider common law claims seeking redress for global warming has found them to raise political questions beyond judicial purview. *See supra* note 6. The unanimity of *trial* judges on this point is telling. These judges are on the front lines and must deal first-hand with the limits of judicial competence to manage such actions. The appellate courts that have disagreed with that conclusion, including the court of appeals below, have lost sight of the fundamental separation-of-powers principles underlying the political question doctrine and this Court's precedents.[4] And the fact that the political Branches have jumped into the debate and are actively seeking to implement a coordinated response to the phenomenon of global climate change underscores that there is no reason for this Court to push the settled limits on Judicial power by sanctioning the unprecedented common law action at issue.

C. Plaintiffs Lack Standing

As both petitioners (Pet. Br. 16-31) and the government (TVA Br. 13-24) have explained, settled limits on the standing of parties to maintain actions in federal court also provide a threshold—and entirely sufficient—basis for dismissing this action.

1. Article III's limitation to cases and controversies likewise "is crucial in maintaining the 'tripartite allocation of power' set forth in the

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[4] *See* Pet.App.1a-170a; *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049, 1055 (5th Cir. 2010) (en banc), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011).

Constitution" and ensures that the judiciary "respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations omitted). In giving effect to that limitation, this Court has long held that plaintiffs must show they have suffered an injury-in-fact, caused by defendants' conduct and likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Court has also recognized prudential limits on the exercise of Article III jurisdiction—in effect creating a buffer zone at the outer reaches of Article III to ensure that the proper role of the federal courts is respected. *See Elk Grove Unified Sch. Dist.*, 542 U.S. at 12.

2. In finding that plaintiffs have standing to maintain this action, the court of appeals relied primarily on this Court's decision in *Massachusetts v. EPA*. But *Massachusetts* is distinguishable in critical respects. *Massachusetts* involved standing to enforce a *congressionally-conferred procedural* right. 549 U.S. at 516-20. This Court emphasized that Congress "'has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before'" and that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' … 'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)), 517-18 (quoting *Lujan*, 504 U.S. at 572 n.71). The Court therefore declared at the outset of its standing inquiry that the fact that the claim in *Massachusetts* turned on "the proper construction of a congressional statute, a question eminently suitable to resolution in federal

court," was "of critical importance to the standing inquiry." *Id.* at 516.

As this Court has previously explained, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). Indeed, "[a]s Government programs and policies become more complex and far reaching, [courts] must be sensitive to [Congress's] articulation of new rights of action that do not have clear analogs in our common-law tradition." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Even then, however, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id.*

Of course, Congress cannot confer jurisdiction that does not otherwise exist under Article III. But when Congress creates a legal right, the denial of that right may well give rise to an injury that is cognizable and concrete for purposes of Article III. And (assuming the requirements of Article III and this Court's prudential limits are met), allowing suits to enforce congressionally conferred rights respects the political process that led to the creation of such rights. *See Warth v. Seldin*, 422 U.S. 490, 500-01 (1975).

Moreover, in *Massachusetts*, the challenge was to an *EPA action*, as opposed to suits against some subset of individual emitters. 549 U.S. at 516 (Congress had "authorized [that] type of challenge *to EPA action*" (emphasis added)). The Court explained that agencies implement regulatory schemes incrementally, "whittl[ing] away" at the underlying problem over time, such that the procedural relief at issue (requiring EPA to reconsider its refusal to regulate) might well

trigger systemic, nationwide regulation to address the asserted underlying injuries. *Id.* at 524. In that regard, the Court concluded that allowing the *Massachusetts* action to proceed could be viewed as giving effect to a statutory and regulatory scheme.

Those considerations do not support standing here. Plaintiffs invoke no congressionally-conferred procedural right and the redress they seek is not connected to any future agency action. Instead, they ask the courts to fashion and enforce an abstract common law nuisance action, and then assume judicial responsibility for redressing the alleged nuisance without any involvement of the political Branches—and, indeed, if the political response is not viewed as sufficient as a matter of public nuisance law, perhaps even at odds with the decisions of the political Branches. Finding standing here would therefore require a considerable *extension* of *Massachusetts*. As petitioners have explained, there is no reason for the Court to take that step. *See* Pet. Br. 24-29.

3. The government takes a seemingly schizophrenic view of standing—strenuously arguing that the Court should hold that plaintiffs *lack* prudential standing because the alleged grievances are so generalized but then maintaining that plaintiffs nevertheless *have* Article III standing under *Massachusetts*. Given the important distinctions between this case and *Massachusetts*, the government is wrong when it comes to Article III standing. But the Chamber agrees with the government and petitioners that plaintiffs lack prudential standing as well. Prudential standing principles preclude courts from adjudicating "'generalized grievances more appropriately addressed in the representative branches.'" *Elk Grove*

Unified Sch. Dist., 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751). Plaintiffs plainly seek to pursue just such a "generalized grievance" here, "simultaneously implicat[ing] many competing interests of almost unimaginably broad categories of both plaintiffs and potential defendants." TVA Br. 15-16.

In the Chamber's view, to eliminate confusion that led to the standing decision below, it is important for this Court to clarify that the Article III standing analysis in *Massachusetts* does not extend to the situation here, where plaintiffs do not assert a congressionally created procedural right in seeking to spur regulatory action. Nevertheless, whatever terminology the Court chooses to use, it should hold that plaintiffs lack standing to maintain this action for the very reasons that the United States recognizes.

II. THE DRASTIC ECONOMIC AND POLITICAL CONSEQUENCES OF ALLOWING THIS ACTION TO PROCEED UNDERSCORE THE NEED TO RESPECT THE SEPARATION OF POWERS

The important interests at stake—including the vitality of the national economy and the ongoing political and diplomatic efforts to address global climate change—underscore the need to respect the constitutional and prudential limits discussed above.

A. The Potential Economic Implications Of Allowing Actions Like This To Proceed Are Staggering

If allowed to stand, the decision below will impose punishing costs on businesses and consumers that will only be exacerbated as this emerging category of litigation sweeps the nation's courts.

First, allowing potentially hundreds of district courts across the country to attempt to administer global climate change through these types of piecemeal actions will create a hodge-podge of results and, inevitably, competing if not conflicting remedial demands. *See* TVA Br. 37 ("[D]ifferent district courts entertaining such suits could reach widely divergent results ….").[5] Indeed, there have already been at least three other public nuisance common law suits against arbitrarily-selected greenhouse gas emitters across several industries. Pet. Br. 3 & n.1; Petition for Writ of Certiorari 8-10 (Aug. 2, 2010).[6] In those cases, plaintiffs sought damages from various groupings of automobile, oil, coal, chemical, energy, and utility companies. Although none of those plaintiffs has (yet) been successful, the Second Circuit's decision—which permits common law suits against virtually any emitter of carbon dioxide—will invite a potentially endless barrage of common law suits and produce a patchwork of judge-made regulation.

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[5] Under plaintiffs' theory of personal jurisdiction, *any* carbon emitters could be sued in *any* district court in the country. *See* Compl. ¶ 38, J.A. 68; Mem. in Opp. to Mot. to Dismiss 13-14 (S.D.N.Y. Nov. 19, 2004), ECF No. 54.

[6] *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.); *Comer v. Murphy Oil USA*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011); *California v. General Motors Corp.*, No. C06-05755-MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009).

The resulting conflicting standards and regulatory uncertainty will impose enormous costs on the economy. Businesses large and small will face intractable challenges in assessing future capacity—not knowing when, whether, and to what degree a lone district court might impose onerous emissions caps (or damages) on them for alleged emissions or contributions to global climate change. *See North Carolina v. TVA*, 615 F.3d 291, 296, 306 (4th Cir. 2010) (application of "vague public nuisance standards" to emissions leaves companies "unable to determine [their] obligations ex ante"); TVA Br. 37-38 (such suits "lack the certainty and repose that the political Branches can afford through legislative and regulatory action"). Moreover, this potential for judicial mischief exacerbates an already-uncertain regulatory landscape in flux as a result of EPA's increasingly aggressive efforts to curb greenhouse gas emissions. As a result, firms will "become more cautious in responding to business conditions," resulting in decreased hiring, investment, and productivity. Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 Econometrica 623, 625 (2009).[7] The notion that regulatory uncertainty can lead to economic stagnation is hardly new. As the Founders long ago observed: "[G]reat injury results from an unstable government. … What prudent merchant will hazard his fortunes in any new branch of

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[7] *See also* Darren Samuelsohn, *Rockefeller Finds It's Better to Negotiate on Climate Than Sit on Sidelines*, N.Y. Times, Sept. 14, 2009 (because there is "'no predictability,'" Wall Street "'lends no money to people trying to build power plants'" (quoting Sen. Rockefeller)); Kenneth Green *et al.*, *Climate Change: Caps vs. Taxes*, American Enterprise Institute Environmental Policy Outlook, June 2007, at 2-3 (uncertainty of energy costs and fuel availability can lead to spikes in fuel prices).

commerce, when he knows not but that his plans may be rendered unlawful before they can be executed?" The Federalist No. 62, at 190-91 (1788). The lower court must be reversed to remove the cloud of uncertainty that will otherwise stunt economic growth and prevent businesses from efficiently ordering their affairs.

Second, the judicial imposition of emissions caps on utility industry defendants (and, inevitably, on other emitters as well) will dramatically increase U.S. energy prices. As the President has previously acknowledged, "capping greenhouse gasses" means "electricity rates would necessarily skyrocket."[8] And the "vast majority" of the burden of increased energy costs will fall on residential consumers.[9]

Third, those higher energy costs will drive up the cost of all manufactured goods and transportation.[10] As even emissions-capping advocates acknowledge,

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[8] *San Francisco Chronicle*, Editorial Board, *An interview with Sen.* Barack Obama *at* 40:39 (Jan. 17, 2008); *see also, e.g.*, Trevor Houser *et al.*, *Assessing the American Power Act: The Economic, Employment, Energy Security, and Environmental Impact of Senator Kerry and Senator Lieberman's Discussion Draft*, Peterson Institute for International Economics Policy Brief, May 2010, at 13 (caps would increase household electricity, heating, and gasoline prices); Andrew Chamberlain & Feliz M. Ventura, Chamberlain Economic Policy Study No. 2010-06, *Paying for the "American Power Act": An Economic and Distributional Analysis of the Kerry-Lieberman Cap-and-Trade Bill*, at 6 (2010) (capping emissions "forc[es] up consumer prices"); Bernie Woodall, *U.S. carbon cap to raise power prices: Moody's*, Reuters.com, Mar. 25, 2009.

[9] Woodall, *supra*.

[10] *See, e.g.*, Robert Stavins, *Addressing climate change with a comprehensive US cap-and-trade system*, 24 Oxford Review of Econ. Pol'y 298, 312-14 (2008).

"most of the cost of the programme will be borne by consumers, facing higher prices of products, including electricity and gasoline."[11] And the compound effect is to threaten hundreds of thousands of jobs and depress wages, as companies downsize or relocate.[12] While legislators are able to consider the competing economic interests and tailor schemes to mitigate such hardships (e.g., through tax breaks or other incentives), courts cannot similarly ameliorate the unintended consequences of their mandates. Changes of such economic magnitude should be left to the legislative process, and this Court should restore the balance of power upset by the lower court's decision.

B. Sanctioning Common Law Actions Like This Case Will Undermine The Active And Ongoing Political Process

For decades, the legislative and executive Branches have struggled with global climate change. *See Massachusetts*, 549 U.S. at 507-09 (recounting prior legislation and treaties); Pet.App.145a-58a. They have long recognized that controlling greenhouse gas emissions involves a complex interrelation of environmental, economic, and geopolitical issues

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[11] Stavins, *supra*, at 313.

[12] *See*, *e.g.*, Chamberlain & Ventura, *supra*, at 44 (predicting that capping scheme would reduce employment by 522,000 jobs in 2015 and reduce total wages earned by $23.9 billion); *see also* S. Res. 98, 105th Cong., at 3 (July 25, 1997) (passed 95-0) (stating that any international capping scheme failing to include developing countries "could result in serious harm to the United States economy, including significant job loss, trade disadvantages, increased energy and consumer costs").

requiring a comprehensive, coordinated approach.[13] To date, statutes and treaties have focused primarily on research and reporting requirements. The United States has not entered into any sweeping international agreements imposing particular limits on greenhouse gas emissions. *See Massachusetts*, 549 U.S. at 507-09; Pet.App.145a-59a.

In *Massachusetts*, this Court recognized that the politically accountable Branches must take the lead on regulating global climate change because the courts have "neither the expertise nor the authority to evaluate" the myriad policy judgments. 549 U.S. at 533. And that decision has spurred a serious political dialogue that is active and ongoing.[14] Allowing litigation like this action to proceed would interfere

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[13] *See, e.g.*, 42 U.S.C. § 13381 (directing study of the "economic, energy, social, environmental, and competitive implications, including implications for jobs"); U.N. Framework Convention on Climate Change, prmbl. at 1 (1992) ("[T]he global nature of climate change calls for the widest possible cooperation by all countries …."); Global Climate Protection Act of 1987, Title XI of Pub. L. 100-204, § 1103(b), (c), 101 Stat. 1331, 1408-09 (codified at 15 U.S.C. § 2901 note) (directing EPA to propose a "coordinated national policy on global climate change" and ordering the Secretary of State to work "through the channels of multilateral diplomacy"); National Climate Program Act, Pub. L. No. 95-367, § 2(5), 92 Stat. 601, 601 (1978) ("International cooperation for the purpose of sharing the benefits and costs of a global effort to understand climate is essential.").

[14] *See, e.g.*, EPA Stationary Source Regulations Suspension Act, S. 231 112th Cong. (introduced Jan. 31, 2011) (proposing to prohibit EPA from regulating stationary source greenhouse gas emissions for two years); Free Industry Act, H.R. 97, 112th Cong. (introduced Jan. 5, 2011) (proposing to amend CAA to explicitly exempt greenhouse gases); American Clean Energy and Security Act, H.R. 2454, 111th Cong. (passed the House on June 26, 2009) (proposing scheme for regulating greenhouse gas emissions).

with this process by permitting virtually anyone to go to the courts to address global warming as a private attorney general against the emitters of greenhouse gases of their choice and enlisting the courts to attempt to fashion a remedy on a haphazard basis and in a manner that unavoidably may conflict with congressional priorities or directives.

The business community has ordered its affairs on the reasonable assumption that it will continue to be an important stakeholder with a voice in the ongoing democratic process, as the elected Branches seek equitable and effective solutions. The court of appeals' decision threatens to eliminate that opportunity for debate, subvert the democratic process, and impose piecemeal court-ordered mandates in lieu of balanced, comprehensive legislative solutions. American businesses will not be the only losers. The nation's effort to address global climate change will suffer too. There is no reason to inflict that blow by permitting this ill-founded and improper action to proceed.

CONCLUSION

The judgment of the court of appeals should be reversed.

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