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 CHEVRON U.S.A. INC., SHELL OIL COMPANY, CONOCOPHILLIPS, E.I. DU PONT DE NEMOURS & COMPANY, AND EDISON INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

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INTEREST OF *AMICI CURIAE*[1]

Amici Chevron U.S.A., Inc., Shell Oil Company, and ConocoPhillips are leaders in the energy industry. These companies (or their affiliates) are engaged in every aspect of the oil and natural gas industry, including exploration and production; refining, marketing, and transportation; and chemicals manufacturing and sales. *Amicus* E.I. du Pont de Nemours and Company is a science company, operating in approximately 80 countries. DuPont offers a wide range of products and services for markets including agriculture, nutrition, electronics, communications, safety and protection, home and construction, transportation, and apparel. *Amicus* Edison International is the parent of Southern California Edison Company, which is one of the Nation's largest electric utilities. Edison International is also the parent of Edison Mission Group, which, through various subsidiaries and affiliates, owns or operates independent generating facilities in Illinois, Pennsylvania, California, and several other States.

Amici have a particular interest in this case because they have witnessed first hand the aggressive misuse of *Massachusetts v. EPA*, 549 U.S. 497 (2007), by enterprising lawyers, state attorneys

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

general, and environmental groups seeking to recover massive damage awards and to enmesh the courts in disputes that raise political questions. In particular, *amici* have been singled out as defendants in one or more other actions—including *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 879 (N.D. Cal. 2009), and *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus petition denied sub. nom. In re Comer,* No. 10-294 (U.S. Jan. 10, 2011)—merely because they are alleged to have contributed to the global phenomenon of climate change. The same allegation, of course, could be made against any other company—or person—in the world. In the particular case before the Court, as in all of these related cases, the identity of the defendants is largely a matter of the plaintiffs' caprice in formulating the caption of their complaint.

Amici thus have a strong interest in having the Court resolve this case on a ground that goes to the fundamental defects with the broader litigation of which this case is a piece, and not on any narrow or case-specific ground that can be easily circumvented. In particular, although the Second Circuit's decision below could be reversed on any of several grounds, *amici* urge the Court to take this opportunity to clarify that the decision below cannot be reconciled with either bedrock principles of Article III standing or the properly limited role of courts asked to adjudicate political questions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is but one part of a broader series of lawsuits that have been filed against discrete groups of defendants for alleged injuries purportedly resulting from the global phenomenon of climate change. Some of these lawsuits seek to obtain a windfall in the form of damage awards, while others aim to accomplish regulatory objectives not achievable through ordinary political processes. But all of these lawsuits share two critical features in common: *First*, they depend on an unjustifiably expansive reading of *Massachusetts v. EPA* to overcome traditional limits on judicial authority. *Second*, they seek to inject the courts into disputes that are not justiciable, at least absent prior action by the political branches to provide judicially manageable standards.

In the *Kivalina* litigation, for example, a village of Inupiat Eskimo, with a population of approximately 400, sued 24 oil, energy, and utility companies seeking $400 million in claimed damages resulting from thinning sea ice, which plaintiffs contend was caused by global climate change. *See* 663 F. Supp. 2d at 868–69. Similarly, in *Comer*, plaintiffs brought a putative class action on behalf of owners of land along the Mississippi Gulf coast alleging nuisance claims against certain oil and energy companies on the theory that their emission of greenhouse gases contributed to global climate change, which in turn added to the ferocity of Hurricane Katrina, which in turn destroyed plaintiffs' property.

This case, like these other related lawsuits, has a number of fatal flaws, but most importantly, it fails at the threshold of the basic Article III requirements for a controversy well-met for judicial resolution. First and foremost, this case should not go forward because plaintiffs cannot possibly satisfy the minimum requirements for Article III standing. In particular, plaintiffs cannot satisfy the requirement that their alleged injury "has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Lujan v. Defenders of* Wildlife, 504 U.S. 555, 560 (1992) (internal quotation and alteration marks omitted).[2] As described in more detail below, the Second Circuit's decision in this case, finding that plaintiffs have standing, is based on a fundamental misreading of *Massachusetts v. EPA* and a misapplication of precedent interpreting the Federal Water Pollution Control Act ("Clean Water Act"), Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1376). *Massachusetts* charted a narrow path for sovereign states to force federal action pursuant to a statute that provided an express procedural right to seek judicial review. The case should not be stretched to eviscerate constitutional standing requirements, especially in

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[2] The "irreducible constitutional minimum of standing contains three elements": (1) an injury in fact; (2) that is "fairly traceable to the challenged action of the defendant"; and (3) that would likely be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal quotation and alteration marks omitted).

circumstances where, as here, Congress has not established any such statutory and procedural right for parties to bring such an action in court.

In addition to rejecting the Second Circuit's novel doctrinal innovations, the Court should affirm that a mere contribution to a global phenomenon (like climate change) cannot satisfy the fair traceability requirement of Article III. In particular, because every living, breathing organism contributes to climate change by emitting carbon dioxide, and because greenhouse gases (like carbon dioxide) are undifferentiated and disperse evenly throughout the atmosphere, plaintiffs cannot show that their alleged harms were specifically caused by any particular emitter or group of emitters. Their claims instead rely on precisely the type of generalized grievance that, under this Court's precedents, has never been viewed as susceptible to resolution through the judicial system.

Plaintiffs' effort to have the courts take the lead in addressing the global phenomenon of climate change faces an additional threshold objection: Plaintiffs ask the courts to play a role that is inappropriate in the absence of an initial political judgment by the political branches. This Court's political question doctrine makes clear that some disputes are nonjusticiable unless and until the political branches act to create judicially manageable rules that would then allow the courts to act. That is the case here, because the invocation of common-law notions of "reasonableness" are wholly inadequate to allow the courts to make the inherently political judgments as to who in the world should be held liable—and with what consequences—for allegedly

contributing (along with everyone else) to the global phenomenon of climate change. The point is thus not that global climate change issues can *never* be suitable for judicial resolution. The point is that absent a congressional enactment that provides a specific right to judicial review of agency action in the context of substantive statutory provisions that guide the agency's exercise of discretion, global climate change disputes are simply not suited for judicial resolution. *Cf. Vieth v. Jubilerer,* 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment). As explained below, plaintiffs' federal common law nuisance claims raise nonjusticiable political questions because, absent "an initial policy determination of a kind clearly for nonjudicial discretion," there are no "judicially discoverable and manageable standards" for deciding the "reasonableness" of any particular defendant's alleged contribution to global warming. *Baker v. Carr*, 369 U.S. 186, 217, 300 (1962).

Finally, by clarifying the requirements of Article III standing and reaffirming the continued vitality of the venerable political question doctrine, the Court should take this opportunity to nip this problematic litigation in the bud. Courts are not properly equipped to deal with the difficult issues raised in the context of litigation seeking to impose judicial remedies for the indeterminate harms allegedly attributable to the global phenomenon of climate change. Any litigation is bound to result in *de facto* and *ad hoc* judicial regulation of carbon emissions, thereby imposing arbitrary burdens on a subset of contributing parties and producing inequitable results. It is precisely for this reason that the

Constitution's unchanging case or controversy requirement preserves the judiciary's proper role by precluding lawsuits where plaintiffs cannot identify any particularized injury fairly traceable to any specific defendant. And the political question doctrine likewise protects the judiciary's proper role by ensuring that litigants do not do what the plaintiffs in these cases have sought to do—*viz.*, thrust the courts into disputes that cannot be resolved by the application of rules that are "principled, rational, and based upon reasoned distinctions," but that instead call for an initial set of "ad hoc" political judgments. *Vieth*, 541 U.S. at 278.

ARGUMENT

I. Article III Standing Requirements Preclude Efforts To Hold A Discrete Group Of Individual Companies Responsible For A Global Phenomenon.

The Second Circuit found Article III standing satisfied based on the defendants' alleged status as a mere "contributor" to global climate change—a status that is shared by virtually every living, breathing organism. That novel and misguided approach renders the constitutional standing requirements a complete nullity. If not corrected, the lower court's decision threatens to thwart fundamental separation-of-powers principles that are designed to prevent "courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). And it opens the federal courts to precisely the types of litigation abuses that this Court's precedents have sought to curtail, with common law tort suits against

emitters of any quantity of greenhouse gas limited only by the plaintiffs' caprice in naming defendants and a court's ability to exercise personal jurisdiction.

While the Second Circuit's approach to standing is novel and unique, this litigation is unfortunately not unique. To the contrary, relying on erroneous and expansive interpretations of *Massachusetts v. EPA*, enterprising lawyers and environmental groups have filed a series of suits across the Nation seeking—not discrete regulatory action as in *Massachusetts*—but massive damages awards. Other suits have been filed seemingly to advance a regulatory agenda—through *de facto* regulation by the courts—that could not otherwise be achieved through ordinary political processes. While there are certainly other legal defects with the instant action, this case presents an opportunity for the Court to put an end to this abuse by reaffirming the basic standing principles that have long undergirded its precedents. In particular, the Court should dispose of this case by holding that plaintiffs cannot satisfy the requirements for constitutional standing because they cannot show that their alleged injuries are "fairly traceable" to the conduct of the specific defendants in this case, as opposed to the conduct of billions of past and present emitters of greenhouse gases over a period of many decades, if not centuries. *Lujan*, 504 U.S. at 560 (identifying traceability as one of the three elements of the "irreducible constitutional minimum of standing").

The novel theory adopted by the court below—that plaintiffs' alleged injuries are fairly traceable to the named defendants merely because those defendants have allegedly contributed in some

measure to an inarguably global phenomenon—is flatly inconsistent with precedent and rests on a flawed analogy to inapposite cases. The causal chain purportedly linking defendants' emissions to plaintiffs' claimed harm is simply too attenuated to satisfy the basic requirements for constitutional standing.

A. The Second Circuit's Decision Is Based On A Fundamental Misreading Of *Massachusetts v. EPA*.

The starting point for the Second Circuit—and enterprising lawyers elsewhere seeking to recover money damages for alleged "contributions" to global climate change—is a seriously flawed interpretation of this Court's decision in *Massachusetts*. While that decision certainly relaxed standing in the circumstances presented there, 549 U.S. at 536–37 (Roberts, C.J., dissenting), it was nonetheless a relatively narrow decision. The Court's opinion repeatedly emphasized not just the special status of States, but also the importance of congressional action in enacting *both* the substantive provisions of the Clean Air Act and its statutory procedural rights to challenge agency decisions in court. *See* 42 U.S.C. §§ 7401 *et seq*. In those unique circumstances, the Court's decision allowed the States, and the States alone, to seek judicial review, via the administrative review provisions of the Clean Air Act, in order to force regulatory action under that Act concerning greenhouse gas emissions. Because the result of the judicial proceeding would be only to force regulatory action, concerns with redressability and traceability were substantially reduced.

But all three elements of *Massachusetts* were critical: the States, the judicial review provisions of the Clean Air Act, and the substantive obligations created by that statute. The rationale of the court below expanded that decision to encompass a radically different context where only one of those critical elements—the presence of States seeking judicial relief—is present. Other decisions have done the court below one better and allowed private suits for monetary damages when none of these three factors was present. *See Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated by*, 598 F.3d 208 (en banc), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). This case gives the Court a critical opportunity to clarify the narrow scope of the standing decision in *Massachusetts* and to reaffirm that basic standing principles foreclose efforts to misuse tort theories to foist responsibility for a truly global phenomenon on a few handpicked defendants.

1. *Massachusetts v. EPA* Does Not Support The Decision Below.

The Second Circuit's decision concludes that the plaintiff-States likely have *parens patriae* standing and that, in any event, all plaintiffs satisfy the requirements for Article III standing. Relying heavily on *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603 (1982), the decision suggests that States do not have to comply with any of the traditional standing requirements of Article III as long as they are seeking to protect a quasi-sovereign interest.

This gets the analysis exactly backwards. The purpose of the *parens patriae* test is to ensure that a

State is defending a quasi-sovereign interest and asserting an interest "apart from the interests of particular private parties." *Snapp*, 458 U.S. at 607. The test does not displace the traditional "case or controversy" requirements of Article III. The constitutional requirements serve not only as a practical limit on a State's ability to bring suit but, more importantly, as a constraint on the federal judiciary—a constraint that has nothing to do with the State's special sovereign interests. As this Court has put it, Article III standing is not only about a litigant's rights, it is "about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984).

Attempting to avoid this conclusion, the Second Circuit's decision places heavy emphasis on *Massachusetts*, where the Court found that Massachusetts, by virtue of its special status as a State, had standing to challenge EPA's decision not to initiate a rulemaking in response to a request to regulate greenhouse gas emissions. Although it discussed the State's special status, the Court emphasized that point only in the context of acknowledging the existence of a congressionally conferred procedural right under the Clean Air Act to challenge agency action unlawfully withheld. 549 U.S. at 519–20.

As the Court explained, "'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 "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'" standing. 549 U.S. at 516–17 (quoting *Lujan*, 504 U.S. at 572 n.7, 580 (1992) (Kennedy, J., concurring in part and in the judgment)). Accordingly, when "a litigant is vested" by statute "with a procedural right, the litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518. Congress's action alleviated concerns that the judiciary was overstepping its bounds because Congress had ordered EPA to protect Massachusetts (and others) by taking action to determine whether emissions endanger public health and welfare. In that context, because Congress had conferred a procedural right, and had given Massachusetts a "stake in protecting its quasi-sovereign interests," the Commonwealth was "entitled to special solicitude" in the Court's standing analysis. *Id.* at 520.

The court below failed to explain how any of the analysis in *Massachusetts* is relevant absent a statutory grant of a procedural right to bring suit. Indeed, it is undisputed that Congress has not created any procedural right to bring a nuisance suit in tort to recover for alleged injuries purportedly resulting from global climate change. Nor has it taken any other action to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." 549 U.S. at 516 (citation and quotation omitted). Unlike in *Massachusetts*, where the alleged injuries were at least arguably traceable to EPA's failure to initiate

rulemaking proceedings, and a statutorily authorized petition for judicial review would prompt the federal regulatory agency to act, here there is no plausible link between any specific defendant's emissions and any specific plaintiff's injuries, and the relief sought is equally unconnected to plaintiff's alleged injuries. In short, Congress has never conferred any procedural right on the States to bring common law claims seeking to regulate climate change and, in the absence of any such right, there plainly is no fairly traceable link between a State's alleged injuries and the greenhouse gas emissions of any specific defendant.

2. Decisions Interpreting The Clean Water Act Do Not Support The Decision Below.

In addition to misinterpreting *Massachusetts*, the lower court's standing analysis relies on cases applying the citizen suit provisions of the Clean Water Act. These cases are also readily distinguished.

Under the Clean Water Act, Congress created a framework of rights and liabilities, including conferring a procedural right for private citizens to bring suit, *see* 33 U.S.C. § 1365, that has a direct effect on the relevant standing analysis. Courts have held that, in the Clean Water Act context, a plaintiff can show a substantial likelihood that a defendant's conduct caused its alleged injury if the "defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which [a] plaintiff[] ha[s] an interest that is or may be adversely affected by the

pollutant, *and* that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiff[]." *Public Interest Research Grp. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (emphasis added); *see also Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360–61 (5th Cir. 1996).

These cases recognize that federal permits are established under the Clean Water Act "at the level necessary to protect the designated uses of the receiving waterways" and it is therefore reasonable to conclude that a defendant's violation of the permit levels "necessarily means that these uses may be harmed" by the defendant's excessive discharges. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157 (4th Cir. 2000); *see also Kivalina*, 663 F. Supp. 2d at 879. These cases thus present a paradigmatic example of a situation in which the Article III standing analysis rests on Congress's exercise of the "power to define injuries and articulate chains of causation" so as to "give rise to a case or controversy where none existed before." *Massachusetts*, 549 U.S. at 516 (quotation omitted).

In its decision below, the Second Circuit candidly acknowledged that the test for standing articulated in cases involving the Clean Water Act does not apply in the context of nuisance suits seeking redress for harms allegedly caused by global climate change. *See* Pet. App. 71a (noting that there is no comparable statute governing carbon dioxide emissions). It also recognized that the first two prongs of the *Powell Duffryn* test could not apply except in the Clean Water Act context. That should have been the end of its analysis. When two of a

test's three prongs are wholly inapplicable, it is a strong signal that the test is inapposite. The Second Circuit ignored that signal and held that merely because plaintiffs satisfy the third prong of the test, they also satisfy the requirements for Article III standing.

As other courts have recognized, this distortion of the three-part test, which "is stated in the conjunctive, not the disjunctive," is utterly "illogical." *Kivalina*, 663 F. Supp. 2d at 880 n.7. It also directly contravenes well-established precedent that, even in the Clean Water Act context, Article III's fair-traceability requirement requires a *geographic proximity* between the defendant's excessive emissions and the affected waters that give rise to the plaintiff's alleged injury. *See Texas Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005) (en banc) (to "satisfy the 'fairly traceable' causation requirement, there must be a distinction between 'the plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot be fairly traced to that defendant'"); *Crown Cent.*, 95 F.3d at 361 (18-mile distance between place of discharge and place of alleged impact was "too large to infer causation" for standing purposes). Of course, there is no geographic proximity between the inherently worldwide phenomenon of global climate change and any of its alleged particular effects.

B. Mere Contribution To A Global Phenomenon Cannot Satisfy Article III's Fair Traceability Requirement.

Because *Massachusetts* is readily distinguishable, plaintiffs' claims here must stand or fall based on this Court's traditional requirements for Article III standing. Applying those traditional tests, this action and the other tort suits seeking to obtain relief from mere contributors to a global phenomenon fail at the Article III threshold. As this Court has recognized, standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. This essential prerequisite to suit is not merely a constraint on the rights of litigants. To the contrary, it reflects bedrock principles enshrined in the Constitution's text and structure that are designed to preserve our "democratic form of government." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (quotation marks and citation omitted). Constitutional standing requirements are "crucial in maintaining" the Constitution's "'tripartite allocation of power'" by ensuring 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) (quotation omitted).

To satisfy the minimum requirements for Article III standing, a plaintiff must show that it has suffered an injury-in-fact that is both caused by the defendants' conduct and likely to be redressed by the relief sought. *Lujan*, 504 U.S. at 560–61. Accordingly, at a minimum, there must be a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly …

trace[able] to the challenged action of the defendant." *Id*. at 560. The plaintiff must thus demonstrate a "substantial likelihood" that the defendant's challenged conduct, as opposed to the conduct of third parties not before the court, caused its alleged harm. *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 75 n.20 (1978); *see also Bennett v. Spear*, 520 U.S. 154, 167 (1997). And the plaintiff must show that it is pursuing a grievance that is not generalized and "common to all members of the public." *Lujan*, 504 U.S. at 575–76 (internal quotation marks omitted).

As with any other element of a claim, to establish standing a plaintiff must plead sufficient facts "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted); *see also United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973) (allegations of standing "must be something more than an ingenious academic exercise in the conceivable"). At the pleading stage, courts are obliged to carefully examine a complaint's allegations to ensure that the judiciary is not overstepping its proper role and that the plaintiff is "entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752.

These principles make clear that plaintiffs in this case cannot satisfy the basic requirements for constitutional standing. Unlike a conventional common-law nuisance suit, in which a defendant releases a noxious substance that travels directly to a neighbor's property and causes immediate injury in a defined area, plaintiffs' alleged injuries have occurred because of a global phenomenon that is the

result of an undifferentiated worldwide accumulation of carbon dioxide and other greenhouse gases from billions of sources over a period of centuries. Because greenhouse gases are undifferentiated and disperse evenly throughout the atmosphere, climate change caused by greenhouse gas emissions is a global phenomenon that involves virtually every sector of the world economy.

Given these undeniable facts, plaintiffs' complaint faces at least two fundamental and insurmountable standing problems. *First*, because every living, breathing organism contributes to the global phenomenon of climate change, and because greenhouse gases mix evenly in the atmosphere, plaintiffs cannot show that their injuries were caused by any particular emitter or group of emitters. *See Cuno*, 547 U.S. at 346; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976) (standing does not exist when "[s]peculative inferences are necessary to connect [parties'] injury to the challenged actions"). Plaintiffs can no more show that defendants' conduct caused plaintiffs' alleged injuries than they can show that those injuries were caused by emissions from other sources, including rapidly accelerating emissions from developing countries, such as China and India, or even from other emissions from decades ago. Any effort to tease apart the nearly infinite, intertwined, and attenuated strands of causation devolves into hopeless speculation. And the complaint fails to allege "facts from which it reasonably could be inferred" that, absent the defendants' conduct, there is a "substantial probability" that the plaintiffs

would not have suffered the alleged injury-in-fact. *Warth v. Seldin*, 422 U.S. 490, 504 (1975).

Second, even if the chain of causation between defendants' conduct and plaintiffs' alleged injuries were not so weak and attenuated, plaintiffs still would lack standing because they cannot trace their injuries to any particularized defendant or group of defendants. Their claims are too generalized; they rely on the type of generalized grievance against societal harms writ large that have never been thought to be susceptible of resolution through the judicial system. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102 (1998) ("We have always taken [the case-or-controversy requirement] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."). Although this Court's cases have typically focused on whether a plaintiff has alleged a sufficiently concrete, particularized injury, *see Lujan*, 504 U.S. at 573, constitutional standing also requires that a plaintiff trace its injury to a particularized defendant or group of defendants. Where, as here, there are so many entities (living, dead, human, and non-human) that, according to plaintiffs' allegations, have contributed to their alleged injuries, the judicial system could not adjudicate the claims in any non-arbitrary fashion and, accordingly, the grievance is too generalized to meet the minimum requirements of Article III standing.

In allowing this generalized grievance to proceed, the Second Circuit jettisoned the essential requirements for constitutional standing. In particular, the court of appeals concluded that identifying a mere "contributor" to climate change is

sufficient to satisfy Article III's causation requirements. Because all persons and entities emit some measure of greenhouse gases, the lower court's decision means that any person can be sued for any injury that might possibly be connected to any natural force or occurrence conceivably affected by climate change. That rule of standing would impose no limits at all on the judiciary's authority in this highly politicized arena.

That approach is also directly contrary to this Court's precedents. In *Allen v. Wright*, for example, the Court held that the plaintiffs lacked standing to challenge the Internal Revenue Service's non-enforcement of a policy denying tax-exempt status to racially discriminatory private schools, because the plaintiffs' alleged injuries were not "fairly traceable to the Government conduct respondents challenge[d] as unlawful." 468 U.S. at 757. In reaching that conclusion, the Court noted that the asserted injury—the inability of the plaintiffs' children to attend integrated schools—depended not only on the agency's conduct but also on decisions of numerous third parties, such as school officials and parents. *Id.* at 756–59. Accordingly, the Court concluded that the "links in the chain of causation between the challenged Government conduct and the asserted injury" were "far too weak for the chain as a whole to sustain" plaintiffs' standing. *Id.* at 759. Similarly, in *Warth v. Seldin*, the Court held that plaintiffs lacked standing to bring suit against a town and its board members on grounds that the town's zoning ordinances contributed to a shortage of low-income housing. Even though defendants' conduct "contributed, perhaps substantially, to the cost of housing,"

that was not sufficient to satisfy the fair-traceability requirement. 422 U.S. at 504. To the contrary, as the Court explained, the low-income housing shortage could also have been attributable to the conduct or decisions of third parties, including builders' unwillingness to build low-cost housing, and was therefore not "fairly traceable" to defendants.

Significantly, both *Allen* and *Warth* involved a finite number of third parties that theoretically could have been identified and required to join the lawsuit. Here, in contrast, plaintiffs' claims implicate the conduct of literally millions, if not billions, of other individuals and entities around the world, each of which emits or has emitted its own quantities and concentrations of greenhouse gases over varying periods of time. Because standing did not exist in *Allen* and *Warth*, there plainly can be no standing here. It is simply not possible to disentangle defendants' emissions from the emissions made by billions of third-parties over the preceding centuries, all of which have under plaintiffs' theory contributed to the global phenomenon of climate change.

C. This Court's Guidance Is Needed To Prevent Open-Ended And Abusive Litigation.

That the Court should take this opportunity to reconfirm the requirements of Article III standing is underscored by the mounting problem of climate-change-related litigation. This case presents an opportunity for the Court to put a stop to abusive litigation, reaffirm important separation-of-powers

principles that limit the judiciary's role to justiciable cases or controversies, and ensure that concerns about climate change do not become fuel for the fire of litigation abuse.

This Court has recognized the problems of abusive litigation in a wide variety of contexts. *See*, *e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. 148 (2008) (securities litigation); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (class actions); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (antitrust); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 558 (1996) (tort law). Although intended to provide justice, the American litigation system may also create opportunities that, "if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

The danger of abusive litigation is especially acute in the context of litigation seeking to recover for indeterminate harms allegedly incurred as a result of climate change. In courts across the country, enterprising lawyers, including states attorneys general and environmental groups, are filing lawsuits seeking to collect a windfall in money damages or to force preferred regulatory changes that could not be achieved through ordinary political processes. *See Kivalina*, 663 F. Supp. 2d at 868 (Native Alaskan tribe and municipality seeking an award of money damages); *Comer*, 2007 WL 6942285, at *1 (private Mississippi residents seeking money damages); *California v. General Motors Corp.* ("*GMC*"), No. C06-05755 MJJ, 2007 WL 2726871, at

*1 (N.D. Cal. Sept. 17, 2007) (lawsuit by California seeking money damages). Even where, as here, the merits of the lawsuit are exceedingly weak, the *in terrorem* threat posed by the prospect of burdensome injunctions or staggering monetary damages awards is enough to extract potentially large settlements from companies unwilling to risk a loss in court.

Moreover, the burdens imposed are entirely arbitrary. In this case, for instance, plaintiffs decided to sue five major utilities. But there is no legal basis for distinguishing these defendants from any of the millions of other sources. Indeed, the arbitrariness inherent in a legal theory that allows defendants to be picked in the plaintiffs' discretion is underscored by a comparison of this suit to other climate-change-related tort litigation. In each action, the plaintiffs have selected varying subsets of particular U.S. industries. *Compare* Pet. App. 1a (naming five utilities) *with GMC*, 2007 WL 2726871, at * 1 (naming only six automakers); *Comer*, 2007 WL 6942285, at * 1 (naming the Tennessee Valley Authority and select oil, utility, coal, and chemical companies); *Kivalina*, 663 F. Supp. 2d at 863, 868 n.1 (naming oil companies and utilities). When different plaintiffs point to different defendants as legally responsible for the same global phenomenon, it is a sure sign that plaintiffs are pursuing a generalized grievance that does not involve a particularized injury fairly traceable to any specific defendant. And if the Second Circuit's "contribution to a phenomenon that contributed to injury" standard is not reversed, there is no reason any individual would not have standing to sue anyone with a carbon footprint.

II. Plaintiffs' Global-Warming Claims Raise Nonjusticiable Political Questions.

There is a further (and equally fatal) threshold problem with these global-warming nuisance lawsuits. Although the Second Circuit characterized this case as simply the next in a "long line of federal common law of nuisance cases," Pet. App. 30a, nothing could be further from the truth. Like the proverbial new wine poured into old wineskins—which "bursts the skins" (*Mark* 2:2)—plaintiffs' effort to squeeze the enormous "complexity of the initial global warming policy determinations" into the substantive rubric of ordinary tort law stretches the judicial function well past its breaking point and squarely into the realm of political questions. *GMC*, 2007 WL 2726871 at *6.

The problem with plaintiffs' claims goes beyond the particular allegations of this suit, the specific defendants that they have (arbitrarily) chosen to sue, or the kind of relief they have sought. Rather, the nonjusticiability of this suit stems from a more fundamental problem. As explained below, plaintiffs' federal common law nuisance claims raise nonjusticiable political questions because, absent "an initial policy determination of a kind clearly for nonjudicial discretion," there are no "judicially discoverable and manageable standards" for deciding the "reasonableness" of any particular defendant's alleged contribution to global climate change. *Baker*, 369 U.S. at 217, 300. Adjudication of this suit would thus improperly require the courts to address fundamental questions of "'national polic[y]'" that are "'not legal in nature'" and can only be resolved by a political judgment of the political branches. *Japan*

Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (citation omitted). By contrast, in *Massachusetts*, this Court found the case was justiciable precisely because (unlike this case), the suit was brought pursuant to a "congressional statute" and the limited claim asserted there—a challenge to agency action—turned simply on the "proper construction" of that statute. 549 U.S. at 516.

A. A Case Presents A Nonjusticiable Political Question If Any One Of The Six *Baker v. Carr* Tests Is Satisfied.

From its earliest days, this Court has acknowledged that certain disputes raise "political questions" that are not the proper domain of the courts. *See Baker*, 369 U.S. at 210–17 (collecting cases). Indeed, this venerable doctrine can trace its origins to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and beyond. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260 (1796) (Opin. of Iredell, J.) (whether Great Britain had breached treaty raised "considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a Court of Justice"). This doctrine of "nonjusticiable" or "political questions" is rooted in several distinct aspects of the Constitution's separation of powers. *Vieth*, 541 U.S. at 277–78.

The Constitution's grant of certain discretionary powers to the political branches, rather than to the courts, means that a case whose resolution calls for the "exercise of [such] a discretion" is nonjusticiable. *Baker*, 369 U.S. at 211; *Nixon v. United States*, 506

U.S. 224, 237–38 (1993) (Senate has constitutional power to determine manner of trying an impeachment). But even absent an affirmative grant of power to a political branch, Article III's limitation of the "judicial Power" to "Cases or Controversies" also means that the courts may not proceed to decide a case where there is a "'lack of satisfactory criteria for a judicial determination.'" *Baker*, 369 U.S. at 210 (citation omitted); *see also Vieth*, 541 U.S. at 278. Thus, the fact that a question has not been exclusively committed by the Constitution to a political branch is *not* sufficient to render it justiciable; the matter must also be one that is suitable for resolution by the *judiciary*, acting "in the manner traditional for English and American courts." *Vieth*, 541 U.S. at 278; *see also Marbury*, 5 U.S. at 166 (distinguishing between discretionary acts that are unreviewable and ministerial acts pursuant to a duty that "the legislature proceeds to impose"). In addition to these limitations arising directly from the Constitution's allocation of specific powers, the political question doctrine also rests in part on "prudential concerns calling for mutual respect among the three branches of Government." *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring); *see also Nixon*, 506 U.S. at 253 (Souter, J., concurring) (political question doctrine "deriv[ed] in large part from prudential concerns about the respect we owe the political departments").

Acknowledging the multiple concerns that animate the political question doctrine, the Court has distilled that doctrine, not into a single test, but into six alternative tests expressly framed in the

disjunctive. *Baker*, 369 U.S. at 217. A case is nonjusticiable if there is:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. If any "*one* of these formulations is inextricable from the case at bar," the suit should be dismissed as nonjusticiable on the ground that it presents a political question. *Id.* (emphasis added); *see also Vieth*, 541 U.S. at 277 (plurality opinion) (*Baker* establishes "*six independent tests* for the existence of a political question") (emphasis added).

To be sure, these six formulations overlap, *see Nixon*, 506 U.S. at 228–29, but they are not simply six ways of saying the same thing. Because each of the *Baker* tests reflects a distinct combination of separation-of-powers concerns, the various tests, in practice, will often capture different types of cases. For example, the first-*Baker*-test typically (but not

always) captures questions as to which the courts can *never* have any role in resolving, precisely because they are "textually committed" by the Constitution exclusively to a political branch. *E.g.*, *Nixon*, 506 U.S. at 237–38 (procedure for impeachment trial); *United States v. Pink*, 315 U.S. 203, 229 (1942) (recognition of foreign government). But the political question doctrine reaches beyond such all-or-nothing cases, and extends also to cases in which the judiciary's ability to play a role is *contingent* upon what the political branches have or have not done with the powers textually committed to them.

Thus, for example, the fourth *Baker* test reflects the recognition that an otherwise justiciable civil suit may be rendered nonjusticiable if adjudication would "express[] [a] lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217.[3] Conversely, the third *Baker* test reflects the fact that there are areas in which the judiciary *might* play a role, but only if the political branches have *first* created the necessary legal framework in the exercise of their textually-

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[3] *See*, *e.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) (plaintiffs' tort claims would require court to second-guess congressional foreign-aid decision); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 70 (2d Cir. 2005) (dismissing expropriation claims against Austria under fourth *Baker* test, based on Executive Branch statement that dismissal would facilitate implementation of agreement with Austria).

committed constitutional powers.[4] The political question doctrine thus extends beyond that class of controversies in which judicially manageable standards can *never* be devised and also includes those cases where such standards must first be, but have not yet been, established by the responsible political branch. *Cf. Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment) (because "there are *yet* no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards" for evaluating claim that partisan gerrymander impermissibly burdened representation rights) (emphasis added).

B. Plaintiffs' Global-Warming Nuisance Claims Raise Nonjusticiable Political Questions Under Several of the *Baker* Tests.

Determining whether a case involves a nonjusticiable political question requires a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, and an evaluation of "the particular question

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[4] *See*, *e.g.*, *Japan Whaling*, 478 U.S. at 230 (once political branches' policy choices are reflected in treaties, executive agreements, and statutes, courts may construe those enactments without running afoul of political question doctrine); *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed'n Republic of Yugoslavia*, 218 F.3d 152, 155 (2d Cir. 2000) (until Executive Branch made policy judgment about liability of successor states to Yugoslavia, courts could not resolve an otherwise "garden-variety landlord-tenant dispute" over consulate).

posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211–12. The "discriminating inquiry" mandated by *Baker* confirms that global-warming nuisance claims are nonjusticiable under several of the *Baker* tests.

1. The Second Circuit erred in concluding that application of the common law of nuisance to the problem of global climate change provides sufficient judicially manageable standards to obviate the need for an initial legislative judgment and to avoid entangling the courts in broader policy judgments that would invade the constitutionally committed authority of the political branches. Pet. App. 27a–39a. On the contrary, the law of nuisance does not *resolve* the political questions at the heart of this case but merely restates and highlights them. *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) (the "recasting" of political questions "in tort terms does not provide standards for making or reviewing [such] judgments").

The substantive law of nuisance (were it applicable here) would instruct a court to decide the "reasonableness" of a given interference with a public right, which entails a "weighing of the gravity of the harm against the utility of the conduct." RESTATEMENT (SECOND) OF TORTS § 821B, cmt. e (1979). Application of those standards provides no difficulty in an ordinary nuisance case involving "a discrete number of 'polluters' that were identified as causing a specific injury to a specific area." *Kivalina*, 663 F. Supp. 2d at 875; *see also Ohio v.*

Wyandotte Chems. Corp., 401 U.S. 493, 495–96 (1971) (garden-variety nuisance claim involving mercury pollution in Lake Erie did not raise a political question). But the balancing that would be required here is of an entirely different nature and order of magnitude from those presented by any nuisance cause of action that courts have recognized.

The "balancing" required in these nuisance cases would require the courts to assess the significance of any contribution to global climate chage from the emissions of the (arbitrarily selected) group of companies or industries sued and then to weigh that against a number of countervailing fundamental national and international policy concerns. These latter concerns include: the importance of the defendants' activities to the particular sector of the economy involved (*e.g.*, energy, manufacturing, agriculture), as well as the importance of that sector to the overall national economy, and even to national security; the concern that *de facto* or *de jure* emissions caps (established by a determination that emissions were "unreasonable") would have dramatic consequences for multiple sectors of the national economy; the probability that imposing legal fault for global climate change on one particular industry (rather than others, such as the agricultural, manufacturing, transportation, or myriad other industries) would have additional, equally dramatic consequences for energy users; and the harm to the Nation's foreign policy that would be caused by judicially-imposed unilateral domestic emissions caps, which could impede the Executive Branch's foreign policy efforts, over decades, to obtain

multilateral reduction agreements. *Kivalina*, 663 F. Supp. 2d at 874–76.

Moreover, this balancing of competing concerns could not be done in isolation. Because the plaintiffs' theory in all of these global-warming cases inherently rests on the premise that *all* greenhouse gas emissions from *all* sources mix in the worldwide atmosphere and produce injury only as a result of that worldwide accumulation over centuries, any inquiry into whether a particular set of defendants' emissions were "reasonable" would be a *comparative* judgment. In other words, one must consider the emissions of all sectors of the economy, not only the energy sector, and from all regions of the world, not only the United States.

Contrary to what the Second Circuit held here, adjudication of global-warming nuisance lawsuits thus *would* "involve assessing and balancing the kind of broad interests that a legislature or a President might consider in formulating a national emissions policy." Pet. App. 34a. As this Court itself recognized in *Massachusetts*, the courts have "neither the expertise nor the authority" to resolve such broad and fundamental policy questions. 549 U.S. at 533.

The third *Baker* test is therefore satisfied, given that the necessary balancing of these competing interests requires an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Balancing these competing and incommensurate interests, on an inherently national and international scale, requires a *legislative* judgment—one that the political branches have

grappled with for decades. The second *Baker* test is likewise met, because a generic invocation of nuisance principles leaves the courts without the "'judicially discoverable and manageable standards'" for resolving the case in a manner that is "principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 277–78 (plurality opinion). And because the powers to make the requisite initial policy determinations were all textually committed by the Constitution to the political branches, the first *Baker* test is met as well. *GMC*, 2007 WL 2726871 at *13–*14. Accordingly, plaintiffs' reliance upon public nuisance principles does not avoid or resolve the political question at the heart of this lawsuit, but merely begs the political question.

Contrary to what some courts have suggested, *see Alperin v. Vatican Bank*, 410 F.3d 532, 552–53 (9th Cir. 2005), the *practical* "difficulty of fashioning relief" is an additional factor that may demonstrate a lack of judicially manageable standards. *Nixon*, 506 U.S. at 236; *see also Kelberine v. Societe Internationale*, 363 F.2d 989, 995 (D.C. Cir. 1966) (suit over thousands of World War II claims was not "susceptible of judicial implementation" because, *inter alia*, dispute was "too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed"); *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098, 1114 (C.D. Cal. 2003) (noting that *Kelberine* has been followed "[f]or over thirty years") (collecting cases). This consideration further strongly confirms that *Baker*'s second test applies here. Although the Second Circuit sought to

trivialize the magnitude and implications of this extraordinary lawsuit by wrongly suggesting that this was merely a limited dispute about "six domestic coal-fired electricity plants," Pet. App. 26a, the court of appeals' endorsement of a legal theory under which any of the innumerable persons allegedly injured by global warming can arbitrarily choose to sue almost anyone else in the world—and those defendants, in turn, can assert that innumerable other persons are also (or more) responsible—is the very definition of unmanageability.

The utter arbitrariness and unmanageability of the global-warming nuisance theory at the heart of this case is starkly confirmed by again considering the wide range of other such cases that have been filed. As noted, one suit was filed against more than twenty defendants from the coal, oil, and electric industries, seeking to hold them liable for erosion at a remote Alaskan village. *Kivalina*, 663 F. Supp. 2d at 868. Another was filed against more than thirty defendants from the electric, coal, oil, and chemical industries seeking to hold them liable for purportedly exacerbating the intensity of Hurricane Katrina (and the plaintiffs in that case had sought leave to add more than *one hundred additional defendants*). *Comer*, 585 F.3d at 859–60. And yet another was filed against six automobile manufacturers. *GMC*, 2007 WL 2726871 at *1. The randomness of these choices of defendants underscores the standing difficulties addressed *supra*. But the sheer numerosity of these defendants, and the fact that all of them—and also countless more—could be named in any one suit underscores that the suits are simply

too unmanageable for judicial resolution given the absence of a prior action of the political branches to bring order to chaos. Indeed, it is telling that *every* district judge that has confronted such global-warming nuisance claims—that is, every front-line judge who would actually have to figure out *how* possibly to adjudicate such claims—has concluded that it cannot be done without antecedent determinations by the political branches. *Kivalina*, 663 F. Supp. 2d 863; *Comer*, 2007 WL 6942285, at *1; *GMC*, 2007 WL 2726871, at *1; Pet. App. 171a.

2. As noted earlier, the justiciability problem in these global-warming nuisance cases is not that the courts can *never* have a role in adjudicating such matters. Rather, the problem is contingent—unless and until the political branches create a valid legal framework of clearly defined and judicially enforceable obligations and duties with respect to past, present, and future greenhouse gas emissions, the courts lack "rules to limit and confine judicial intervention." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). To proceed to adjudicate global-warming suits in the absence of such standards would exceed the proper limits of the judicial role and "would risk assuming political, not legal, responsibility" for the matter. *Id.*

The critical role that an "initial policy determination" of the political branches can play in determining the justiciability of a controversy, *Baker*, 369 U.S. at 217, is confirmed by this Court's decision in *Massachusetts v. EPA*. As noted above, in *Massachusetts*, a group of States, among others, sought judicial intervention in an effort to require the EPA to reconsider its decision not to regulate

greenhouse gas emissions from new motor vehicles. 549 U.S. at 505. The Court concluded that the case was justiciable, because "[t]he parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court." *Id.* at 516. Indeed, the challenge brought by the petitioners in that case was explicitly authorized by statute. *Id.*

By contrast, plaintiffs here seek to invoke question-begging notions of "reasonableness" in order to enmesh the courts in making "policy determination[s] of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Moreover, they seek to do so *without* guidance from Congress or the Executive—if not in positive disregard of the choices to regulate or not to regulate that the political branches have made or may make. The court of appeals downplayed its decision as merely holding that "common law fills th[e] interstices" left by the political branches, Pet. App. 36a–37a, but that reflects a serious misunderstanding of the unique and severe justiciability concerns raised by tort suits over global climate change. Under our constitutional system, it is Congress and the Executive, not the courts, that have the responsibility for making the initial *political* decision as to what the proper policy should be. *See Japan Whaling*, 478 U.S. at 230 ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."). The Second Circuit ignored these principles in erroneously concluding that plaintiffs

may adjudicate their global climate change tort claims under the aegis of federal common law.

CONCLUSION

For these reasons, the Court should reverse the judgment below.

Respectfully submitted,

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