

No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC POWER CO. 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 *AMICI CURIAE* CONSUMER ENERGY
ALLIANCE; NATSO, INC.; AMERICAN TRUCKING
ASSOCIATIONS; PETROLEUM MARKETERS
ASSOCIATION OF AMERICA; PEABODY ENERGY
CORPORATION; AND INTERNATIONAL LIQUID
TERMINALS ASSOCIATION IN SUPPORT
OF PETITIONERS URGING REVERSAL**

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QUESTION PRESENTED

Whether the political question doctrine renders nonjusticiable the claims asserted in this case under federal common law alleging that defendants – in this case, five electric utilities – have created a “public nuisance” by contributing to alleged global warming, and seeking injunctive relief capping defendants’ carbon dioxide emissions at judicially determined “reasonable” levels, based on a court’s weighing of the potential risks of climate change against the socio-economic utility of defendants’ conduct.

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**BRIEF OF *AMICI CURIAE* CONSUMER
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*INTEREST OF AMICI CURIAE***

Amici curiae and their members are active participants in the ongoing climate change debate before the political branches and have a strong interest in ensuring that the judiciary does not improperly arrogate to itself matters of national and international policy that are reserved for the legislative and executive branches.¹ *Amici* represent a cross-section of views on these policy issues, but they are united in their belief that courts should not allow public nuisance litigation to dictate these policy issues.

Amici include Consumer Energy Alliance, a nonprofit, nonpartisan organization that supports the thoughtful utilization of energy resources to help ensure improved domestic and global energy security and stable energy prices for consumers; NATSO, Inc.,

¹ This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

a national trade association representing the travel plaza and truckstop industry, whose members run the gamut from small mom-and-pop stores and family-run businesses to medium and larger sized corporations; American Trucking Associations, a national trade association representing the interest of the trucking industry; the Petroleum Marketers Association of America, a federation of 47 state and regional trade associations representing approximately 8,000 independent petroleum marketers nationwide, the majority of which are small businesses; Peabody Energy Corporation, the world's largest private-sector coal company; and the International Liquid Terminals Association, an international trade association representing 81 commercial operators of bulk liquid terminals, aboveground storage tank facilities, and pipeline companies, as well as suppliers of goods and services to the bulk storage industry.

Amici curiae have an important interest in this case, which threatens to disrupt business practices, jeopardize predictable energy supplies, and trigger substantial job losses, at a time when the nascent economic recovery can ill afford such shocks.



SUMMARY OF ARGUMENT

The political question doctrine bars the federal courts from creating unprecedented common law liability for contributing to alleged global warming

and establishing de facto national emissions standards.

A. In deciding whether to create a public nuisance claim for contributing to alleged global warming, a court would need to undertake a host of political tasks of a kind clearly reserved for nonjudicial discretion, including balancing incommensurable social costs and benefits and designing a method to implement plaintiffs' requested remedy of reducing defendants' emissions "by a specified percentage each year for at least a decade." Joint Appendix ("J.A.") 110, 153. Such judicial action is foreclosed by the fact that Congress has already authorized the Environmental Protection Agency (EPA) to regulate those emissions.

B. There are no judicially manageable standards to govern plaintiffs' claims. This Court has opined, in recognizing EPA's regulatory jurisdiction, that the judiciary has "neither the expertise nor the authority to evaluate [climate change] policy judgments. . . ." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). The Solicitor General has similarly observed that "Plaintiffs' common-law nuisance claims are quintessentially fit for political or regulatory – not judicial – resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both plaintiffs and defendants." Brief of the Tennessee Valley Authority at the Cert. Stage in Support of Petitioners, No. 10-174, at 13.

Justiciability turns on the judiciary's competence to apply coherent legal principles to the specific dispute before it, rather than on plaintiffs' ability to affix a common-law label to their claims. Although misleadingly couched as a garden-variety public nuisance action, plaintiffs' claim that defendants should be held liable for contributing to global climate change is actually a radical departure from traditional common-law torts. It is completely different from a nuisance action alleging that a particular point source emitted particles or gases of pollution that found their way onto another's property. Here, plaintiffs' utterly unprecedented claim is that the climate of planet Earth has been altered through the long-term cumulative interaction of greenhouse gases with various global feedback mechanisms. Plaintiffs' claim is unparalleled not simply because the causal paths at stake are quantitatively longer and more circuitous, or because computer climate models are inherently more speculative and incomplete (though these differences are important), but because the very nature of the alleged "harm" – a changed global climate – is of a qualitatively different kind.

A court lacks the power to address such deeply systemic and global allegations by judicial devices that are every bit as likely to exacerbate the situation as to improve it. Public nuisance claims would create vague and inconsistent standards, denying courts a manageable test and posing a very real danger of economic disruption. Even if one accepts the premises of alleged global warming and that emission

reductions could address climate change,² public nuisance suits could well prove counterproductive, because of risk-risk tradeoffs, technology lock-in, and other unintended side effects. For example, a shift from coal-fired to natural gas power plants could increase leakages of methane, another gas identified as a “greenhouse gas.”

In any event, public nuisance law is a wholly inappropriate basis for plaintiffs’ claims, which are premised on an obsolete conception of federal common law and ignore the modern approach embodied in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*).

C. The task of deciding whether and how to limit greenhouse gases in coping with alleged global climate change is textually committed to the political branches. To be sure, there is no explicit “Climate Change Clause” in the Constitution, but that is hardly the appropriate test. Rather, this Court may infer a textual commitment to the political branches. Here, the controlling constitutional postulates mark the functions in question as ones that only Congress or the President could discharge competently.

The judgment should be reversed.



² *Amici* do not uniformly accept these premises and nothing in this brief shall be construed as an admission of these premises by any party.

ARGUMENT

The political question doctrine famously originated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where Chief Justice Marshall opined that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” *Id.* at 170. The political question doctrine is “a function of the separation of powers,” which diffuses governmental power in order to secure liberty. *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 456 (1992).

The doctrine helps to protect the political branches from improper judicial intrusion. Thus, in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), this Court dismissed a trespass action that presented a political question committed to Congress because a court must “take care not to involve itself in discussions that properly belong to other forums.” *Id.* at 47; *see also Gilligan v. Morgan*, 413 U.S. 1, 7-10 (1973) (civil rights action nonjusticiable because case involved the appropriate organization and discipline of the National Guard, which was exclusively committed to the political branches).

The political question doctrine also prevents the judicial branch from becoming enmeshed in matters beyond the practical competence of courts to address or manage successfully. *See Gilligan*, 413 U.S. at 10 (applying the political question doctrine where “it is difficult to conceive of an area of governmental activity in which the courts have less competence”); *Vieth*

v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality) (dispute nonjusticiable due to the absence of judicially manageable standards).

This case implicates the core purposes of the political question doctrine. Plaintiffs ask the judiciary to make unprecedented policy determinations of breathtaking scope and to impose them as a matter of judicial fiat without judicially manageable standards. Plaintiffs specifically ask the federal courts to (1) legislate a cause of action for contributing to alleged global warming, (2) establish liability standards that would retroactively determine whether particular emissions of greenhouse gases were permissible, and (3) impose permanent injunctive relief requiring defendants to cap and then reduce their emissions “by a specified percentage each year for at least a decade.” J.A. 110, 153.

Plaintiffs’ claim would require a court to strike a balance between social costs and benefits so far-reaching and global in character, and so ungrounded in any preexisting body of binding rules or principles, that it would clearly entail *making* rather than *applying* law. Any court attempting to resolve the complex and inextricable policy issues presented by plaintiffs’ claim would be acting as “a sort of junior-varsity Congress.” *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

Plaintiffs’ action thus runs afoul of the central purposes of the political question doctrine. It also

fails all of the tests for political questions set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

A. PLAINTIFFS' CLAIMS RAISE "AN INITIAL POLICY DETERMINATION OF A KIND CLEARLY FOR NONJUDICIAL DISCRETION."

1. The Decision Whether To Create A Public Nuisance Claim For Alleged Climate Change Raises A Political Question.

Plaintiffs' claim presents a host of political determinations "of a kind clearly for nonjudicial discretion. . . ." *Id.* at 217. A court would first need to consider the utility of recognizing a greenhouse gas cause of action at all, given that Congress has already authorized EPA to regulate that very subject. *See Massachusetts*, 549 U.S. at 532-33.

In 2009, EPA found that greenhouse gas emissions from motor vehicles contribute to air pollution that endangers public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA has exercised its regulatory authority under the Clean Air Act and propounded, *inter alia*, a final regulation governing greenhouse gas emissions from light duty vehicles, 75 Fed. Reg. 25,324 (May 7, 2010), and rules addressing greenhouse gas emissions from stationary sources, *e.g.*, 75 Fed. Reg. 31,514 (June 3, 2010), including the facilities operated by defendants in this case.

Any argument that a common-law claim is "necessary" to address alleged climate change is, in essence, an invitation to the courts to fashion a

regulatory regime different from what Congress has authorized³ and to enforce it by remedies that Congress has not provided. The federal courts have no authority to accept such an invitation, “no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

“[T]his Court has recently and repeatedly said that the decision to create a private right of action is one better left to legislative judgment,” because it entails quintessential policy judgments in balancing public costs and benefits. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). For example, in *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), this Court refused to craft a federal common-law rule establishing a right to contribution in anti-trust cases because “[t]he choice we are urged to make is a matter of high policy . . . which in our democratic system is the business of elected representatives.” *Id.* at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). Sound policy judgments require “the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.” *Id.*

³ *Amici* do not concede that EPA has properly exercised its authority. Whether EPA has properly found that greenhouse gases cause endangerment, and otherwise properly interpreted the Clean Air Act in its regulation of greenhouse gases, is the subject of numerous appeals currently pending in the U.S. Court of Appeals, D.C. Circuit.

In *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), this Court held that federal courts are prohibited from imposing novel duties enforced by liability rules, even in domains of uniquely federal interest. *Standard Oil* was a common-law tort action brought by the Government for losses incurred as a result of the defendant's actions injuring a soldier. This Court opined that the case presented a matter of such inherently federal interest that it was governed by federal law. *See id.* at 305. However, even though federal common law applied, the Court adopted a no-liability rule, reasoning that the development of a liability regime lay beyond the practical and constitutional competence of the federal courts. *See id.* at 313. The requisite policy judgments, and their "conversion into law," were "a proper subject for congressional action, not for any creative power of ours. . . ." *Id.* at 314. "To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise, in view of the settled contrary practice, which action by Congress would avoid, not only here but in the many other cases we are told may be governed by the decision." *Id.* at 316.

The separation-of-powers principles that mandated a no-liability rule in *Standard Oil* would apply *a fortiori* to plaintiffs' asserted cause of action here. The issues raised by global warming entail balancing competing policy interests and thus are "a proper subject for congressional action, not for any creative power of" the federal courts. *Id.* at 314.

Indeed, plaintiffs' claims would unquestionably "involve a possible element of surprise, in view of the settled contrary practice," *id.* at 316, that could, potentially, raise concerns of fundamental fairness under the Takings and Due Process Clauses. *Cf. Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (imposition of large, unanticipated, and disproportionate liability based on past conduct violates the Constitution); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Protection*, 130 S. Ct. 2592, 2601 (2010) ("It would be absurd to allow a State to do by judicial decree what the Taking Clause forbids it to do by legislative fiat."). Because a judicial taking would trigger just compensation obligations and thus implicate federal fiscal interests, this Court should avoid any construction of the common law that might expose the Treasury to liability not expressly authorized by Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 631-32 (1952) (Douglas, J., concurring) (arguing that Presidential power to take over operation of steel mills should be narrowly construed because it could give rise to rights to compensation); *id.* at 655 (Jackson, J., concurring) (same); *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (narrowly construing agency order to avoid taking).

2. The Elements Of A Public Nuisance Claim Also Raise Political Questions.

Plaintiffs argued below that their claim is justifiable because the political branches supposedly have

already made an initial policy judgment to reduce greenhouse gas emissions. Such an argument is far too facile. Even if a court could identify an “official” U.S. policy that greenhouse gas emissions should be reduced, it is an altogether distinct policy question whether the creation of a public nuisance action for contributing to alleged global warming is a desirable mechanism for achieving such reductions. The court would need to consider whether the availability of public nuisance suits would abet or retard efforts to address the issue of global warming – a topic that is very much open to debate, even among those who concur about the need to take vigorous action.

The elements of a public nuisance claim raise a host of legislative questions. In fact, the Restatement would *require* the court to employ a cost-benefit balancing that is a form of policy-making. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979) (“A public nuisance is an *unreasonable* interference with a right common to the general public.”) (emphasis added). “But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.” *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955). “The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . .” *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984).

A court hearing a public nuisance claim would be required to ask whether some carbon-emitting activities are more “reasonable” than others and to decide

how to consider and weigh in principled fashion countless perspectives to determine what is “reasonable.” The court would need to determine how to trade off economic productivity against the alleged harms, and resolve whether it would be reasonable for a defendant to conclude that, absent politically negotiated international climate agreements, unilateral reductions of greenhouse gas emissions in the United States would have been ineffective in reducing any alleged harm and, accordingly, that unilateral, economically costly emission-reducing measures are not mandated by a sensible balance of costs and benefits.

Plaintiffs’ requested relief also illustrates the inherently legislative character of their claim. Plaintiffs expressly request injunctive relief requiring defendants to cap and then reduce their emissions “by a specified percentage each year for at least a decade.” J.A. 110, 153. The court would need to confront such critical questions as the extent to which greenhouse gases should be curbed; how the specified percentage should be measured; which firms and individuals should be targeted; and the manner in which the emissions should be reduced.

Courts have no competence to perform the standard-setting and allocative functions required to develop a federal cause of action for contribution to alleged global warming. As this Court explained in *O’Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), in the course of declining to fashion a rule of federal common law to govern claims by the Federal Deposit

Insurance Corporation (FDIC), as receiver for failed savings and loans, “[w]hat sort of tort liability to impose . . . involves a host of considerations that must be weighed and appraised” and is “more appropriately for those who write the laws, rather than for those who interpret them.” *Id.* at 89 (internal quotations and citations omitted). That lesson is squarely applicable here.

B. THERE ARE NO “JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR RESOLVING” PLAINTIFFS’ CLAIMS.

As this Court has recognized, the “nuisance concepts” under which plaintiffs ask the judiciary to create liability for contributing to alleged climate change are “vague and indeterminate,” even as applied to relatively traditional cases. *Milwaukee II*, 451 U.S. at 317. In this extraordinary case, which involves some of the most profound and complex policy questions now confronting Congress, the President, and the international community, “vague and indeterminate” nuisance concepts fall far short of furnishing judicially manageable standards.

Indeed, the common law of public nuisance is *structurally* deficient in terms of its ability even to conceptualize plaintiffs’ claims in the appropriate way. Public nuisance actions conceived as devices to combat alleged climate change most certainly are not within the institutional competence of individual courts, each acting on the record compiled in a

lawsuit brought by some self-selected collection of individuals and entities alleging that they are adversely affected by what they call man-made climate change, designating as defendants whichever carbon emitters they choose to target.

As this Court has explained, “judicial action must be governed by *standard*, by *rule*,” and “must be principled, rational, and based upon reasoned distinctions.” *Vieth*, 541 U.S. at 278 (emphases in original). The claims asserted by plaintiffs fail this standard.

1. Plaintiffs’ Global Warming Claims Are Qualitatively Different From Other Public Nuisance Claims.

Plaintiffs seek to frame alleged climate change as a traditional pollution problem. In fact, it is anything but. Plaintiffs assert that climate change is simply a bigger version of a classic air pollution problem and that the nuisance doctrine is therefore equipped to manage it. That assumption is fatally flawed. There is a dramatic difference in *kind* between global warming litigation and other pollution cases to which nuisance law has been applied in the past.

In *Massachusetts*, the Court determined that carbon dioxide is a “pollutant” under the Clean Air Act, but even so, it plainly is not a *traditional* “pollutant.” The injuries associated with alleged climate change stem only from the overall worldwide concentration of carbon dioxide, irrespective of source, anthropogenic or natural; therefore, it is referred to

by some as a “stock pollutant.”⁴ *See Massachusetts*, 549 U.S. at 529 n.26 (“greenhouse gases permeate the world’s atmosphere rather than a limited area near the earth’s surface”). The alleged relationship between carbon emissions and climate change “does not operate like the kind of simple, short-term, more linear relationship between cause and effect that most people . . . assume is at work when they contemplate pollution.” Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1164 (2009).

As a result, plaintiffs’ claims have a uniquely and inescapably global and systemic character. There is simply no cause-and-effect relationship between the actions of any individual defendant and the alleged injury of any specific plaintiff. Further, the types of harms plaintiffs claim could potentially be alleged by virtually any landowner – and, ultimately, by virtually any citizen in the United States or indeed the world. The range of possible defendants is equally limitless. Plaintiffs’ complaints name a handful of entities that happen to operate power plants in some 20 states. But these entities represent a mere fraction

⁴ None of the following arguments requires any additional judicial fact-finding inappropriate for the pleading stage of the litigation. “Stock pollutant” description of carbon dioxide merely clarifies what the plaintiffs have already alleged, as it is the scientific theory upon which their allegations rely. *See* J.A. 56, Complaint, paras. 87-94.

of the power industry, and other sectors of the economy produce substantial greenhouse-gas emissions as well. EPA has noted that “important sources” of such emissions include motor vehicles, “industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management.” 75 Fed. Reg. at 31,514.

The limitless range of potential parties, the nebulous nature of public nuisance claims, and the inherently global nature of climatic interactions, combine to produce something that is different in kind from traditional pollution cases. As the Solicitor General has observed:

The problem is not simply that many plaintiffs could bring such claims and that many defendants could be sued. Rather, it is that essentially any potential plaintiff could claim to have been injured by any (or all) of the potential defendants. 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 limited effects characteristic of traditional nuisance suits targeted at particular nearby sources of water or air pollution.

Brief of the Tennessee Valley Authority at the Cert. Stage in Support of Petitioners, No. 10-174, at 15.

It is as though the defendants were accused, through their combined activities, of causing an aggregate shift of the Earth’s axis in a potentially

dangerous direction, through a complex interaction of the effects of what the defendants were doing in emitting certain gases and of what tens of millions of others, not parties to the lawsuit, were doing in addition to naturally-occurring emissions of those same gases. Unlike the situation in which specific, identifiable pollution sources discharge some noxious material onto a plaintiff's home – a situation in which it would of course be helpful, even if only marginally so, to order each of those sources to emit less of the noxious gas – the notion that the Earth's tilt would be helpfully corrected, at least a little, by telling each of the tens of millions of emitters just to do a little less of what is currently being done would be sheer fantasy, demonstrating more about the institutional limits of the judicial process than about the problem of global tilt.

In a traditional nuisance abatement case, the Restatement's balancing test provides a vague (but perhaps tolerable) basis for telling a polluting neighbor what to do vis-à-vis the injured neighbor down the road. But when the resolution of the claims being pressed and evaluated through the Restatements' balancing test would result in the "balancing" of innumerable costs against innumerable benefits, with no readily discernable pattern linking one to the other, the question of what constitutes a "nuisance" cannot be defined against any traditional baseline.

Because a linear cause and effect relationship is absent here, any attempt to fashion a remedy is even less amenable to reasoned adjudication than

attempting to “balance” interests that “are incommensurate.” In that context, Justice Scalia wrote that “balancing” interests that “are incommensurate” is “more like judging whether a particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). Here, the very *concept* of balancing the cost and benefit of each incremental reduction in carbon emissions from a particular point source is beside the point, because there is no way for a court to reason that reducing emissions from a given source to a specifiable degree would translate into some corresponding “improvement” in global climate, or even some measurable reduction in the degree of purportedly adverse climate change, that one could proceed to “balance” against the costs of requiring that degree of emission reduction – even if we knew which precise climate changes could rightly be deemed “adverse” and which might be innocuous or even beneficial. Here, the “balancing” called for is more like judging whether changing the angles of some of the lines between the heavier and the lighter rocks in a limited landscape would alter the course of the shifting tectonic plates that contribute to earthquakes and tsunamis.

Furthermore, for a court to pick a number and tell an individual plant to cut its emissions by that amount – and pretend to have any idea how effective that individual cap would be or indeed to pretend to know that such a cap would make a positive rather than a negative contribution to the policy objective –

is unwise to the point of irrationality. This Court itself recognized the futility of judicial management of these issues in *Massachusetts*, when it noted that the “EPA said that a number of . . . programs already provide an effective response to the threat of global warming [and] . . . curtailing motor-vehicle emissions would reflect an inefficient, piecemeal approach.” 549 U.S. at 533 (internal quotation omitted). EPA possesses “significant latitude as to the manner, timing, content, and coordination of its regulations. . . .” *Id.* A court lacks all of these advantages.

2. Affixing A Recognizable Common-Law Label Does Not Render Plaintiffs’ Claims Justiciable.

Plaintiffs have attempted to establish the justiciability of their claims by arguing that they represent traditional common-law actions. However, the determination of whether a dispute is amenable to sufficiently principled resolution to comply with the Article III conception of the “judicial power” requires a “discriminating analysis of the particular question posed” and in particular “the possible consequences of judicial action.” *Baker*, 369 U.S. at 211-12. *Baker* explained that courts may not rely on mere “semantic cataloguing” when evaluating whether a case presents political questions. *Id.* at 217.

Plainly, the justiciability of a claim cannot depend on the label assigned by a litigant or a court to that claim. Otherwise, resourceful attorneys could

routinely circumvent the political question doctrine, merely by pleading a common-law label. Proper pleading “requires more than labels and conclusions, and a mere formulaic recitation of the elements of a cause of action will not do. . . .” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (“plaintiff armed with nothing more than conclusions” is subject to dismissal).

A claim’s justiciability must instead turn on the issues underlying the claim, including those that will emerge during the course of the litigation. *See United States v. Munoz-Flores*, 495 U.S. 385, 386, 394 (1990) (argument about the identity and character of the parties to the case “is simply irrelevant to the political question doctrine”).

In *Luther v. Borden*, 48 U.S. (7 How.) 1, 4 (1849), for example, this Court held that a common-law trespass claim presented a nonjusticiable political question, because the underlying issues were for Congress to decide, even though the tort pleaded by the plaintiff was a longstanding one.

In *Gilligan v. Morgan*, 413 U.S. 1, 7-10 (1973), this Court held that a civil rights action under the Fourteenth Amendment presented a nonjusticiable political question because it requested injunctive relief seeking the judicial creation and supervision of new standards for militia discipline – a matter that was for Congress to decide, even though civil rights actions are familiar federal claims.

And in *Vieth v. Jubelirer*, 541 U.S. 267, 296-97 (2004), this Court held that an equal protection challenge was a political question due to lack of judicially manageable standards for determining when a political gerrymander goes “too far,” despite the fact that equal protection claims are ordinarily justiciable. *See id.* at 290-91 (distinguishing the “easily administrable standard” provided by the Equal Protection Clause in one-person, one-vote cases from the more problematic standards proposed for partisan gerrymandering cases).

In arguing that the Restatement (Second) of Torts supplies judicially manageable standards, plaintiffs suggest that any nuisance case is justiciable. But the Restatement’s introduction acknowledges that courts “regard the law of torts as a dynamic set of norms, inviting adaptation as social conditions and prevailing values change, [but] *within the limits of the judicial function.*” HERBERT WECHSLER, *Introduction to RESTATEMENT (SECOND) OF TORTS, VOL. 4*, at viii (1979) (emphasis added). Plaintiffs ignore the Restatement’s own restrictions on the common-lawmaking power. The Restatement instructs that courts should root their judgments of “unreasonableness” in nuisance cases in “community standards,” because, apart from community standards “there is often no uniformly acceptable scale or standard of social values to which courts can refer.” RESTATEMENT (SECOND) OF TORTS § 828 cmt. b. But no “community standards” exist in this case. The judgments of national and international policy that plaintiffs ask the

judiciary to make in this case lie far beyond the scope of properly judicial common-law decision making. A court could not proceed without making uncabined policy judgments that even the Restatement recognizes courts should eschew as outside the limits of the judicial function. *See generally* JESSE DUKMINIER ET AL., PROPERTY 665 (6th ed. Aspen Publishing 2006) (“[N]uisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems.”).

3. In Any Event, The Law Of Public Nuisance Represents An Inappropriate Basis For Federal Common-Law Claims.

Plaintiffs’ unprecedented public nuisance claims fly in the face of the fundamental principle that “[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.” *Milwaukee II*, 451 U.S. at 312 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Although federal common law exists in a few enclaves in which it is “necessary to protect uniquely federal interests,” *Texas Indus.*, 451 U.S. at 640, there is no federal common law cause of action for contributing to alleged global warming, and the federal courts have no authority to legislate one.

In the pollution context, this Court last recognized a federal common-law cause of action nearly four decades ago, in *Illinois v. City of Milwaukee*, 406

U.S. 91 (1972) (*Milwaukee I*), during “the heady” but now bygone “days in which th[e] Court assumed common-law powers to create causes of action.” *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

However, a decade after *Milwaukee I*, this Court held that the water-pollution claims asserted in that case had been displaced by later statutory amendments. See *Milwaukee II*, 451 U.S. at 313, 315 n.8. In reasoning that is fully apposite here, this Court explained that “[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.” *Id.* at 312-13.

Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.

Id. at 317.

Plaintiffs ignore the sea change represented by *Milwaukee II* and subsequent cases. Bluntly put, plaintiffs’ approach to federal common law is hopelessly obsolete. See *Sosa*, 542 U.S. at 726 (recognizing that “along with, and in part driven by,” modern understandings of the nature of “common law has

come an equally significant rethinking of the role of the federal courts in making it”); *Alexander*, 532 U.S. at 286-87 (declining to “revert in this case to the understanding of private causes of action that held sway 40 years ago” under “the *ancien regime*”).

Moreover, even in its pre-*Milwaukee II* decisions involving relatively simple, ordinary nuisances with localized rather than global effects, this Court has expressed unease about the quasi-legislative aspect of its role. See, e.g., *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) (“History reveals that the course of this Court’s prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth.”); *New York v. New Jersey*, 256 U.S. 296, 313 (1921) (“The grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted.”). The instant action is infinitely more complex.

Still other features of the common law of public nuisance make it an especially unsuitable source for deriving plaintiffs’ sweeping and unprecedented claim. Public nuisance suits arose in close connection to criminal law. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 645 & n.33 (5th ed. 1984) (“PROSSER AND KEETON”) (“At common law, a public nuisance was always a crime, and punishable as such. . . . No case has been found of tort liability

for a public nuisance which was not a crime.”). This history means that public nuisance claims are particularly unlikely candidates for recognition under federal common law, because there is no federal common law with respect to criminal claims. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (under separation of powers, judicial power does not extend to “exercise of criminal jurisdiction in common law cases”).

In addition, public nuisance claims necessarily entail an element of generalized grievance that is incompatible with Article III. See PROSSER AND KEETON at 645 (“To be considered public, the nuisance affects an interest common to the general public, rather than peculiar to one individual, or several.”); RESTATEMENT (SECOND) OF TORTS § 821B(1) (public nuisance involves “a right common to the general public”). Of course, generalized grievances fall outside the “Case or Controversy” requirement of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-75 (1992). This Court’s “refusal to serve as a forum for generalized grievances has a lengthy pedigree.” *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam).

The generalized grievance element of a public nuisance claim “would open the Judiciary to an arguable charge of providing ‘government by injunction.’” *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 612 (2007) (citations omitted). And government by injunction is neither accountable to majority will nor a product of the consent of the governed.

4. Recognizing Public Nuisance Claims Here Would Create Vague And Inconsistent Standards.

Public nuisance claims pose further dangers. As this Court has observed, “nuisance standards often are vague and indeterminate,” *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (citation omitted), creating the very real danger that confusing and inconsistent judicial mandates could disrupt vital sectors of the American economy and cost significant numbers of jobs.⁵ “[T]he ancient common law of public nuisance is not ordinarily the means by which such major conflicts among governmental entities are resolved in modern American governance.” *North Carolina, ex rel. Cooper v. TVA*, 615 F.3d 291, 301 (4th Cir. 2010) (“TVA”).

Public nuisance is an all-purpose tort that encompasses a truly eclectic range of activities. As one

⁵ Disruption would occur within almost every major sector of the American economy. The oil and gas industry, for example, contributes more than \$1 trillion to the national economy or 7.5% of the U.S. gross domestic product and generates over nine million jobs. See American Petroleum Institute, *The Economic Impacts of the Oil and Natural Gas Industry* (Sept. 8, 2009) available at <http://www.api.org/aboutoilgas>. The Trucking industry generates an estimated \$544 billion in revenue annually and employs nearly 7.4 million Americans. See AMERICAN TRUCKING ASSOCIATION, *AMERICAN TRUCKING TRENDS 2009-2010*, 5 (American Trucking Association 2010); AMERICAN TRUCKING ASSOCIATION, *U.S. FREIGHT TRANSPORTATION FORECAST TO 2021*, 34 (American Trucking Association 2010).

authority has noted, “public nuisance” includes such broad-ranging offenses as:

interferences with the public health, as in the case of a hogpen, the keeping of diseased animals, or a malarial pond; with the public safety, as in the case of the storage of explosives, the shooting of fireworks in the streets, harboring a vicious dog, or the practice of medicine by one not qualified; with public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; with the public peace, as by loud and disturbing noises, or an opera performance which threatens to cause a riot; with the public comfort, as in the case of bad odors, smoke, dust and vibration; with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable, or the collection of an inconvenient crowd; and in addition, such unclassified offenses as eavesdropping on a jury, or being a common scold.

PROSSER AND KEETON at 643-45 (citing numerous examples).

Public nuisance law operates at such a high level of generality as to provide no meaningful notice or consistent standard of application. “If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways,

and bullfights, we will be hard pressed to derive any manageable criteria.” *TVA*, 615 F.3d at 302 (internal quotation and citation omitted). “[O]ne searches in vain . . . for anything resembling a principle in the common law of nuisance.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

There could not be a greater contrast than that between the detailed standards of the Clean Air Act and the ill-defined, omnibus tort of public nuisance. Plaintiffs’ approach risks the substantial danger that productive economic activities will be crippled by the inconsistent application of a confusing, open-ended standard by multiple courts in different states. An EPA-sanctioned state permit may set one standard, a judge in a nearby state another, and a judge in another state a third. *See Ouellette*, 479 U.S. at 496 n.17, 497 (warning that “common-law suits” “have the potential to undermine [a] regulatory structure”).

5. Public Nuisance Actions Divorced From Traditional Common-Law Limits Promote Unintended Consequences.

Even assuming *arguendo* that one accepts the premises of alleged global warming and that emission reductions could helpfully address climate change, creating a federal law of public nuisance carries the very real risk of counterproductive judgments. Judge Wilkinson has warned:

[A] patchwork of nuisance injunctions could well lead to increased air pollution. Differing standards could create perverse incentives for power companies to increase utilization of plants in regions subject to less stringent judicial decrees. Similarly, rushed plant alterations triggered by injunctions are likely inferior to system-wide analysis of where changes will do the most good. Injunction-driven demand for such artificial changes could channel a limited pool of specialized construction expertise away from the plants most in need of pollution controls to those with the most pressing legal demands.

TVA, 615 F.3d at 302 (internal citations omitted). Moreover, public nuisance suits run the risk of “locking in” inferior technology, as companies rush to innovate quickly enough to comply with short-term reduction requirements. Once companies commit to overhauling their technological infrastructure in order to achieve compliance with a judicial order, the changes they make are likely to be extremely difficult and costly to reverse. See Michael Toman et al., *The Economics of “When” Flexibility in the Design of Greenhouse Gas Abatement Policies*, 24 ANNUAL REV. OF ENERGY AND THE ENV'T. 431-460 (1999) (warning of the dangers of “haste further lead[ing] to wrong choice of technology”); John P. Weyant and Thomas Olavson, *Issues in Modeling Induced Technological Change in Energy, Environment, and Climate Policy*, 4 ENVTL. MODELING AND ASSESSMENT 67 (1999) (cautioning that “the stochastic nature of the innovation

process” forced by climate change requirements “may lead to technology ‘lock-in,’ even by inferior technologies”).

In addition, judicially established limits on carbon emissions could result in an export of manufacturing activities from the United States to other, less regulated jurisdictions – thereby increasing the overall level of global emissions. See Scott Barrett & Robert Stavins, *Increasing Participation and Compliance in International Climate Change Agreements* (2003) available at http://ksghome.harvard.edu/~rstavins/Papers/Barrett_and_Stavins_2003.pdf (noting that, as a result of this “carbon leakage” phenomenon, “global emissions may increase”).

Further, the inherent limitation of any public nuisance action in addressing a small percentage of overall worldwide anthropogenic and natural emissions only compounds unintended consequences. Any individual case or set of cases will require a myopic focus on one or more limited pieces of a complex and developing scientific puzzle, resulting in potentially self-defeating piecemeal regulation. Legal scholars have argued that regulatory approaches must be more holistic than any one case would allow. See, e.g., Jonathan B. Wiener, *Radiative Forcing: Climate Policy to Break the Logjam in Environmental Law*, 17 N.Y.U. ENVIRO. L.J. 210, 225-26 (2008) (emphasis added); see also Richard B. Stewart & Jonathan B. Wiener, *The Comprehensive Approach to Climate Policy: Issues of Design and Practicality*, 9 ARIZ. J. INT. & COMP. L. 83, 91-92 (1992). These unintended

side effects militate strongly against the reckless creation of public nuisance claims and the imposition of remedies through the blunt instrument of judicial injunctions.

In contrast, the political branches enjoy vast advantages in information and expertise. Legislative and regulatory initiatives can be fine-tuned and adapted over time to minimize pernicious side effects. Far from supplementing such schemes, precipitate judicial action would likely disrupt them. For example, many carbon control proposals being considered by Congress would create a comprehensive national market. If individual courts implemented injunctions placing arbitrary caps upon carbon emissions of individual plants, guided by nothing more than nuisance doctrine, the effect would be to balkanize and severely inhibit this national market.

C. THE TASK OF DECIDING WHETHER AND HOW TO LIMIT GREENHOUSE GASES IS TEXTUALLY COMMITTED TO THE POLITICAL BRANCHES.

As one of the tests for a political question, *Baker* instructs a court to search for “a textually demonstrable commitment of the issue to a coordinate political department.” *Baker*, 369 U.S. at 216. The Constitution is, of course, linguistically silent as to which branch of government is empowered to address “climate change” as such. Needless to say, there is no

“Climate Change Clause” or “Carbon Emissions Clause.”

But a narrow emphasis on a literalist understanding of the Constitution’s individual clauses to control the application of the political question doctrine is misguided, for it ensures that issues involving rapid technological change and policy complexity – the very types of issues that would not have been foreseeable at the time of the Constitution – would be deemed the ones most appropriate for judicial intervention, when of course just the opposite is true.

Accordingly, this Court has explained that the *Baker* criteria are not isolated tests but instead interact with, and support, one another. *See Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (recognizing that “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”). Here, the need for initial policy determinations and the absence of judicially manageable standards help establish that plaintiffs’ claims present a political question under the first *Baker* factor.

This case presents a perfect instance for inferring a textual commitment. There are few, if any, unequivocal instances in the Constitution of explicit textual commitments of particular issues to specific branches, and prior political question cases have employed inferential reasoning regarding delegations of authority. *E.g.*, *Vieth*, 541 U.S. at 275 (“It is significant that

the Framers provided a remedy for such practices in the Constitution.”).

In circumstances such as this, political questions must be identified on the basis of the import and structure of the Constitution as a whole and its immanent logic. “Behind the words of the constitutional provisions are postulates which limit and control.” *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). Indeed, the “tacit postulates” of the Constitution “are as much engrained in the fabric of the document as its express provisions.” *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

In this case, the controlling postulates mark functions that only Congress or the President could discharge competently. Article I vests lawmaking power exclusively in Congress, not the federal courts. Thus, the Commerce Clause grants to Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. The Necessary and Proper Clause, in turn, gives Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” U.S. CONST. art. I, § 8, cl. 18. An ad hoc mishmash of common-law regimes would frustrate legislators’ attempts to design coherent and systemic solutions.

In addition, the President is the nation’s chief voice and representative in the domain of foreign affairs. See *United States v. Curtiss-Wright Export*

Corp., 299 U.S. 304, 320 (1936) (recognizing “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”). In particular, it is only the President who can negotiate treaties. U.S. CONST. art. II, § 2, cl. 2. *See, e.g.*, U.S. Dept. of State, *U.S. Climate Action Report 2010*, available at <http://www.state.gov/documents/organization/140636.pdf> (noting efforts to address climate change in international negotiations). By textually committing this power to the President, Article II precludes judicial authority to establish de facto regulatory standards for greenhouse gas emissions that might disrupt a treaty-based or other internationally negotiated response to the inescapably global issue of climate change. “[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.” *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 110-14 (1948); *cf. American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003) (invalidating a state law because it interfered with presidential prerogatives by giving “the President . . . less to offer and less economic and diplomatic leverage” in negotiations with foreign governments) (internal citation and quotation omitted).

Youngstown, though not a political question case as such, is highly relevant to the separation-of-powers issues here. While the instant case involves a

requested judicial order to *shut down* industrial facilities, *Youngstown* concerned an Executive Order compelling steel companies to *continue operations* supplying steel for the war effort. *See generally* 343 U.S. 581. This Court, after examining the President's Article II powers and Congress' Article I authority, concluded that the Executive Order exceeded presidential power and encroached on congressional authority. The Court's analysis of the textual commitments in Articles I and II provides a blueprint for how to proceed in this case.

Starting with the constitutional text, the *Youngstown* Court observed that there was no single textual provision committing the power over the production of steel to a particular branch. However, the Court examined the textual provisions in Article I and Article II to determine whether, in the "aggregate," *id.* at 587, those provisions indicated an implied power for either branch of government to address the issues in the case. In the end, the Court concluded that the Executive Order at issue involved the use of legislative power to *make* law, rather than being an act consistent with the executive's power to *enforce* the law:

[T]he constitution is neither silent nor equivocal about who shall make the laws. . . . [T]he first section of the first article says that '*All legislative powers herein granted shall be vested in a Congress of the United States*'. . . . After granting many powers to the Congress, *Article I goes on to provide that*

Congress ‘may make all Laws which shall be necessary and proper for carrying into Execution the foregoing Power and all other Powers vested by this Constitution in the Government of the United States. . . .’

Id. at 587-88 (emphases added).

The relief sought by the instant plaintiffs, a cap on emissions, has the direct effect of regulating the generation of electricity at power plants, in a manner quite similar to the way that the executive order in *Youngstown* regulated the commercial activities of industrial facilities. The implied textual commitment to Congress is the same in both cases. The only difference is that the plaintiffs in this case seek to have the Judiciary, rather than the Executive Branch, encroach on congressional lawmaking power. But judicial legislation would be every bit as much an affront to the separation of powers. A judicial abatement order would represent a legislative judgment about what the Nation’s carbon emissions policy ought to be, derived from a utilitarian analysis of costs to plaintiffs versus the supposed benefits of continued energy production at current levels. As such, like the policy question in *Youngstown*, it is inherently legislative.

In the context of the uniquely global and systemic nature of alleged climate change, the balancing of competing considerations of costs and utility cannot be performed with any traditional common-law calculus. Indeed, such substantive, non-interstitial, lawmaking in the guise of the common

law unconstitutionally aggrandizes judicial power beyond the Judiciary's law application function and violates separation of powers.

The political question doctrine, like *Youngstown*, is ultimately about much more than simply observing the procedural niceties of an organization chart. The doctrine is concerned with the arbitrary constraints on liberty, unjust deprivations of property, and indefensible denials of equality that arise unless we adhere to the political question doctrine and the separation-of-powers principles it reflects. By proposing that we instead submit ourselves to government by judiciary, the plaintiffs' proposed approach would exact a terrible price. It would permit self-selected plaintiffs, accountable to nobody, to arbitrarily single out their preferred handful of defendants to bear the burdens of addressing global climate change, when there is no reason to believe that the situation would thereby be improved and every reason to believe that, even if it would, the burdens are ones that should be borne by the public as a whole in a far more equitable way. *See id.* at 646 (Jackson, J., concurring). ("That authority [vested by the Constitution in a federal branch] must be matched against words of the Fifth Amendment that 'No person shall be . . . deprived of life, liberty, or property, without due process of law' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a

government of laws, not men, and that we submit ourselves to rulers only if under rules.”)⁶



CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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⁶ The remaining *Baker* factors – which involve the potential for disagreement between the judicial and political branches – plainly are triggered in this case as well, for reasons already discussed.