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 THE STATES OF INDIANA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

*Counsel of Record

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER HAGAN MCVEIGH
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Amici *States*

(Additional counsel listed inside cover)

ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General
State of Alabama

DEREK SCHMIDT
Attorney General
State of Kansas

JOHN J. BURNS
Attorney General
State of Alaska

JACK CONWAY
Attorney General
State of Kentucky

THOMAS C. HORNE
Attorney General
State of Arizona

JAMES D. "BUDDY" CALDWELL
Attorney General
State of Louisiana

DUSTIN MCDANIEL
Attorney General
State of Arkansas

CHRIS KOSTER
Attorney General
State of Missouri

JOHN W. SUTHERS
Attorney General
State of Colorado

JON BRUNING
Attorney General
State of Nebraska

PAMELA JO BONDI
Attorney General
State of Florida

WAYNE STENEHJEM
Attorney General
State of North Dakota

SAMUEL S. OLENS
Attorney General
State of Georgia

MICHAEL DEWINE
Attorney General
State of Ohio

LAWRENCE G. WASDEN
Attorney General
State of Idaho

E. SCOTT PRUITT
Attorney General
State of Oklahoma

ADDITIONAL COUNSEL (cont'd)

WILLIAM H. RYAN, JR.
Acting Attorney General
State of Pennsylvania

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

MARK L. SHURTLEFF
Attorney General
State of Utah

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

BRUCE A. SALZBURG
Attorney General
State of Wyoming

QUESTION PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging 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 question presented that the *Amici* States address is:

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 THE *AMICI* STATES

The justiciability of climate change lawsuits under federal common law is an issue of extraordinary importance to the 22 *Amici* States. To permit federal adjudication of claims seeking damages for past emissions and injunctions curtailing future emissions would disrupt carefully calibrated state regulatory schemes devised by politically accountable officials. Federal courts should not use the common law to confound the political branches' legislative and administrative processes by establishing emissions policy (more likely, multiple *conflicting* policies) on a piecemeal, *ad hoc*, case-by-case basis under the aegis of federal common law.

States have an especially strong interest in this case because the list of potential defendants is limitless. Plaintiffs' theory of liability involves nothing more specific than prosecuting the emission of carbon dioxide ("CO_2"). As utility owners, power plant operators, and generally significant CO_2 emitters (through facilities, vehicle fleets and highway construction, among other functions), states and their political subdivisions could be future defendants in similar actions.

SUMMARY OF THE ARGUMENT

Respondents invoke the power and prestige of federal courts to remedy global climate change. They assert that several power plants, by emitting too much CO_2, have broken the law. Not law enacted by a legislature, promulgated by a

government agency, or negotiated by a President, however. Rather, the law Respondents invoke is the common law—vague, consensus-presuming, case-by-case common law. They say that excessive CO_2 emissions by six particular electric power companies sufficiently contribute to global warming as to constitute a "public nuisance" that the federal judiciary should enjoin. They invoke public nuisance law despite the fact that, as Judge Posner has put it, "no one thinks that nuisance law has ever had a big impact on pollution." Richard A. Posner, *Economic Analysis of Law* 70 (5th ed. 1998). The unsurprising inefficacy of the common law in this regard led to "the enactment of extensive statutory regulation of pollution" that "has displaced the nuisance remedy in the major areas of pollution controversy." *Id.*

Respondents' claims thus seek to roll back the administrative state and exalt the courts in terms of how society regulates emissions, as if some judicially enforceable public consensus existed on that subject. The political question doctrine, however, shields federal courts and the rest of the country from exactly this sort of politics-by-other-means lawsuit. It arises from the irrefutable proposition that there are some disputes unsuitable for judicial resolution, where the arguments of lawyers simply cannot lead to legitimate resolution. Where a court cannot reasonably identify useful, neutral principles to apply, where it faces an impossible task in terms of gathering sufficient information to make a decision, and where any decision it renders necessarily makes policy choices, the question before it is political and off limits.

Cooperative federalism and international treaty-making in the environmental policy arena underscore the political nature of emission control regulation. Each defendant utility operates under state-issued pollution control permits, as do all power plants and large pollution emitters (except to the extent the facility is in one of the few areas of the country not covered by a state permitting program approved by the U.S. Environmental Protection Agency). Meanwhile, succeeding presidents and congresses have undertaken varying commitments in international agreements respecting greenhouse gas emissions.

This lawsuit urges a court to cap CO_2 emissions that federal and state law would otherwise permit (either because the law has not heretofore defined CO_2 as an endangering pollutant or because future emission limits will be set higher than a federal court's common law standard). It would undermine the entire state-federal regulatory scheme, not to mention the trade-offs incorporated into relevant international political obligations. State political branches have struck balances between economic development and environmental protection that exist within national and international regulatory frameworks, all of which demonstrate the political nature of the emissions regulation, and all of which deserve respect in federal court. The adversarial legal system is ill-equipped for this most political of debates.

ARGUMENT

I. Nonjusticiable Political Questions Arise In Any Case Not "Fit For The Wrangling Of Lawyers"

While the Court has had only a handful of occasions to apply the political question doctrine, its origins lie within the American tradition of judicial review itself. The doctrine carries out the Constitution's structural requirement of judicial modesty and restraint. It reflects an abiding concern for practical limits on courts in terms of gathering information about complex public policy issues, appreciating long-term consequences that might flow from nearly immutable judicial decisions, and the lack of accountability for judges who make decisions based on something other than neutral principles. These concerns all arise in this case and command judicial forbearance.

1. The political question doctrine received its judicial imprimatur in the very case that establishes the power of judicial review. In *Marbury v. Madison*, Chief Justice Marshall stated 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." 5 U.S. (1 Cranch) 137, 170 (1803). These questions, Marshall wrote, "respect the nation, not individual rights . . . ." *Id.* at 166.

Even before *Marbury*, Marshall espoused the virtues of judicial restraint concerning political issues as a member of the House of Representatives.

In a speech before the House, Marshall explained that "[b]y extending the judicial power to all cases in law and equity, the constitution had never been understood to confer on that department any political power whatever." Speech of the Honorable John Marshall (Mar. 7, 1800), in 18 U.S. (5 Wheat.) app. note I, at 17 (1820). Indeed, "[i]f the judicial power extended to every question under the constitution, it would involve almost every subject proper for legislative discussion and decision." *Id.* at 16. At such point, "[t]he division of power . . . could exist no longer, and the other departments would be swallowed up by the judiciary." *Id.*

Marshall also enumerated political questions that would be unfit for judicial resolution. For example, a court could not determine the boundary line between the American and British dominions, whether to extradite a fugitive under a treaty with Britain, or whether a vessel was legally captured. *Id.* at 17, 25-26, 28. For reasons of institutional competence, Marshall stated, these issues were fit only for resolution by the executive, not the judiciary. With respect to the extradition issue, for example, Marshall stated that the executive is the "department whose duty it is to understand precisely the state of the political intercourse and connection between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the Union." *Id.* at 28.

On such questions, the federal courts, by contrast, lack the information necessary to make

sound judgments about the national interest, lack the power to enforce such decisions effectively, and lack the political accountability necessary to speak on behalf of the nation. Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 Green Bag 2d 367, 372 (1999).

Thus, Marshall, the original champion of judicial review, was equally concerned with ensuring that courts avoid issues beyond their institutional competence.

Marshall's basic respect for the limits of meaningful and practical judicial authority remains at the heart of the matter. More than 150 years after *Marbury*, Alexander Bickel echoed the Great Chief Justice's concerns when he described the political question doctrine as founded on "the Court's sense of lack of capacity." Alexander M. Bickel, *The Least Dangerous Branch* 184 (2d ed. 1986). Bickel's observation proceeds from the premise that federal courts provide the institution that "stands altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned with principle." *Id.* at 25. The "sense of lack of capacity" that Bickel identified at the center of the doctrine relates to the Court's need to identify neutral principles for its decisions, and, as Bickel describes it, is "compounded in equal parts" of the following:

> (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be

> ignored, as that perhaps it should but will not be; (d) finally . . . the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Id. at 184.

To be sure, some measure of "strangeness," "momentousness," "anxiety," and "self doubt" may arise in many cases of unquestioned justiciability. Yet, said Bickel, "the differences of degree can on occasion be satisfyingly conclusive." *Id.* Thus, "it is quite plain that some questions are held to be political pursuant to a decision on principle that *there ought to be discretion free of principled rules*." *Id.* at 186 (emphasis added). That is, there are some areas where "no principled judgment circumscribing a desirable area of discretionary power is possible." *Id.* at 187. At bottom, the question becomes whether the issue before the Court is "fit for the wrangling of lawyers." *Id.* at 185 (internal quotation omitted).

2. The Court's political question precedents bear out this assessment. The early political question decisions are grounded both in constitutional text and in concerns about whether judicial intervention without a clearly delineated rule to apply would be prudential. Even after *Baker v. Carr*, considerations of practical limits on judicial power and the inconsistency between unlimited policy discretion and the judicial role have continued to be central to the Court's analysis.

In *Luther v. Borden*, 48 U.S. 1, 42-43 (1849), the Court relied on both practical and textual considerations in holding that only Congress was in a position to interpret the Guarantee Clause and recognize one of two competing claims to the governance of Rhode Island. Foremost in the Court's mind was the practical effect of a judicial decision bestowing sovereign power. Such a decision would have far reaching practical consequences, such as invalidating the laws and taxes of the illegitimate sovereign and nullifying its courts' judgments. *Id*. at 38-40. "When the decisions of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction." *Id*. at 39.

In *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 137 (1912), the Court refused to decide whether Oregon lacked a republican government because its constitution allowed citizens to legislate by initiative and referendum. The Court again pondered the vast, essentially unknowable consequences of such a decision, noting that it would open the door for every citizen to challenge taxes by questioning in court the legitimacy of the state while also absolving citizens from any obligation to support or obey the laws of established state government. *Id*. at 141-42. Moreover, the Court stated, "as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one . . . ." *Id*. at 142. Faced with the prospect of having to build an entirely new state government from the ground up,

the Court concluded that it had no authority to decide the question presented.

Concern for the practical limits of judicial decisionmaking remained vital in *Coleman v. Miller*, 307 U.S. 433 (1939), where the Court eschewed the question whether there is a limited "reasonable" time period for states to ratify constitutional amendments. A plurality took an absolutist approach, stating that the amendment process is "not subject to judicial guidance, control or interference at any point." *Id.* at 459. Writing for himself and two other justices, however, Chief Justice Hughes disclaimed judicial involvement in part because it would require "an appraisal of a great variety of relevant conditions, political, social, and economic." *Id.* at 453-54.

Over the next decade, the Court employed the political question doctrine both out of concern for its practical ability to divine "standards of fairness for a representative system," *Colegrove v. Green*, 328 U.S. 549, 553 (1946), and to make decisions about foreign affairs "without the relevant information" that has been "properly held secret," *Chicago & S. Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Here, again, doctrinal strains related to the limited practical competencies of the judiciary prompted the Court to forbear.

The *Chicago and Southern Airlines* case also impelled the Court to comment on its limited capacity to make proper decisions in political contexts, even assuming access to sufficient information. "[T]he very nature of executive

decisions about foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy." *Id*. Thus, "[t]hey are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id*.

The Court refined the political question doctrine in *Baker v. Carr*, 369 U.S. 186 (1962), where it disavowed the outcome in *Colegrove* by finding a state unequal-apportionment claim justiciable, but nonetheless reaffirmed six basic practical and textual considerations that underlay the political question precedents. The factors articulated in *Baker* most salient to this case are "a lack of judicially discoverable or manageable standards for resolving" the issue, and "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion." *Id*. at 217.

Using the *Baker* formulation, the Court in *Gilligan v. Morgan*, 413 U.S. 1 (1973), rejected an invitation to "assume continuing regulatory jurisdiction over the activities of the Ohio National Guard," which would have included a nearly unlimited role in "establish[ing] standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard." *Id*. at 5-6. The Court dismissed the lawsuit both for reasons of constitutional text and because "[t]he complex subtle, and professional decisions as to the composition, training, equipping, and control of a

military force are essentially professional military judgments . . . ." *Id.* at 10. *See also id.* at 14 (Blackmun, J., concurring) ("[t]he relief sought by respondents . . . is beyond the province of the judiciary [because] judicially manageable standards are lacking."). In short, military regulation is not what judges do.

The lack of judicially enforceable standards also underlay the decision in *Vieth v. Jubelirer*, 541 U.S. 267, 305-06 (2004) (plurality opinion), where the Court rejected a political gerrymandering claim as nonjusticiable because no discernible and manageable standards for addressing that claim existed. *See id.* at 305-06. *See also id.* at 306-07 (Kennedy, J., concurring) (stating that gerrymandering claims suffer from a "lack [of] comprehensive and neutral principles" for judicial resolution and the "absence of rules to limit and confine judicial intervention."); *Nixon v. United States*, 506 U.S. 224, 226, 228-29 (1993) (rejecting a collateral attack on impeachment proceedings while observing "the lack of judicially manageable standards," a factor that "may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch").

The Court's long-time concerns for lack of judicially enforceable standards, unfettered policymaking and inability to know or control practical consequences flowing from judicial intervention are particularly relevant here. There are no judicially enforceable common law nuisance standards that can apply here, or any practical limitation on the policymaking role courts would

have to assume in this case. Federal judges are not in a position to master the science and economics of ubiquitous industrial and human CO_2 emissions, nor, without guidance from Congress or the EPA, is pollution regulation what judges do.

II. Whether And How To Address Climate Change Is Not A Matter "Fit For The Wrangling Of Lawyers" In Federal Court

Chief Justice Marshall said that nonjusticiable political questions "respect the nation, not individual rights." *Marbury*, 5 U.S. at 166. It is difficult to conceive of a case having less to do with individual rights and more to do with the nation than one seeking to fashion national emissions policy from the common law of nuisance. The issues wrapped up in this case have been the subject of acute political battles for decades, both across the country and around the world. And if political debates related to global climate change seem intractable, that should tell the Court all it needs to know about the lack of neutral principles available to resolve the legal issue Respondents bring to the table.

1. Perhaps the most definitive proof that emissions regulation is a matter reserved for political wrangling rather than judicial directive is that it has been subsumed within the broad rubric of "cooperative federalism," a regulatory approach that maximizes the participation of politically accountable public officials. Cooperative federalism refers to a style of regulation that has grown increasingly common since the 1970s, in which the federal government creates federal standards and

leaves the implementation of these standards to the states. *See* Phillip Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 668-70 (2001). It allows states significant discretion and power and, as a consequence, encourages multiple levels of political debate, negotiation, and resolution. *See id.* at 671-73.

This style of regulation is especially valuable when economic trade-offs and regional variation are important, as with environmental law. *See generally, e.g.,* Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 Ariz. L. Rev. 799 (2008). The most significant political instrument to address the consequences of air emissions, the Clean Air Act, 42 U.S.C. § 7401 *et seq*., requires the United States Environmental Protection Agency ("EPA") to establish national health-based air quality standards to protect against common environmental pollutants, but assigns states a significant role in implementing and enforcing them. States adopt their own State Implementation Plans for compliance with National Ambient Air Quality Standards within three years of EPA promulgation of such standards. *See* 42 U.S.C. § 7410(a). While such plans must meet basic requirements and are subject to EPA approval, they are adopted with public input and thereby adapted to the particular circumstances of each state. *Id.* States choose how to meet federal requirements and may impose more stringent standards than the basic federal mandate. *See* 42 U.S.C. § 7416. As a

consequence, no State Implementation Plans are identical.

The Clean Air Act showcases cooperative federalism's politics-maximizing benefits and on many levels shows how regulation of CO_2 emissions is an inherently political undertaking. Succeeding administrations took different positions as to whether the Clean Air Act defines CO_2 as an air pollutant. When in 2003 the Bush administration said it did not, a group of states (EPA's partners in Clean Air Act enforcement) sued to force EPA to consider designating CO_2 a pollutant. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court concluded that Congress, as part of its political solution to emissions control problems, allowed EPA to review whether CO_2 qualified as an endangering pollutant, and it remanded for EPA to consider the issue.

EPA's resulting 2009 "endangerment finding," while problematic under the standards and review requirements of the Clear Air Act, itself reveals many of the policy considerations that inherently arise when any government body undertakes to address climate issues. *See* 74 Fed. Reg. 66,496, 66,497 (2009).[1] The endangerment finding, though

[1] In addition to the endangerment finding and the "tailoring rule" (referred to in text *infra*), EPA issued greenhouse gas emission standards for light-duty vehicles and interpreted this action as requiring stationary sources, such as electric generating and industrial facilities, to comply with the Clean Air Act's prevention of significant deterioration ("PSD") and Title V permitting programs with respect to their greenhouse gas emissions.

presented as purely scientific, of necessity confronts the possible effects, as characterized by EPA, of greenhouse gas emissions on public health and welfare, resource availability, and the national economy. *See id.* at 66,498, 66,510-12, 66,515-16, 66,523-35; *see also* 75 Fed. Reg. 31,514, 31,595-31,610 (2010).

For example, EPA claims that it has, pursuant to congressional authorization, weighed the possibility of benefits resulting from greenhouse gas emissions against the possibility of harms from such emissions. *See* 74 Fed. Reg. at 66,498, 66,525, 66,527-28. EPA's

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See 75 Fed. Reg. 17,004, 25,324 (2010) (interpreting light duty vehicle emission standards as triggering PSD and Title V requirements for stationary sources). These actions have generated legal challenges from states (including *Amici* States Alaska, Florida, Indiana, Kentucky, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, and Utah), industry groups, and independent organizations. *See Coalition for Responsible Regulation, et al. v. EPA*, No. 10-1092 (and consolidated cases) (D.C. Cir.) (consolidating 16 separate challenges to the new light-duty vehicle standards); *Coalition for Responsible Regulation v. EPA*, No. 10-1073 (and consolidated cases) (D.C. Cir.) (consolidating 43 separate challenges to the tailoring rule and EPA's action on its interpretation that regulation of greenhouse gas emissions from motor vehicles triggers regulation of greenhouse gas emissions from stationary sources under the PSD and Title V programs); *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (and consolidated cases) (D.C. Cir.) (consolidating 26 challenges to the greenhouse gas endangerment finding and EPA's denial of petitions for reconsideration of that finding).

endangerment finding thus identifies a host of policy issues.

Addressing issues related to climate change requires determining what limits on emissions, and for how long, are appropriate, which in turn demands examination of competing scientific and economic data. *See id.* at 66,514-16, 66,522-23. While judges may properly evaluate whether an EPA decision is supported by science (as required by statute), judges have no particular ability to make scientific determinations themselves or to balance costs and benefits of various courses of action suggested by scientific findings. *Cf. id.* at 66,514-16. Judges, being "electorally irresponsible," Bickel, *supra*, at 184, do not possess the right to make such complex and disputed cost-benefit assessments for society.

EPA's actions since publishing its endangerment finding (and related rules) further highlight the political nature of this debate. First, EPA decided that 13 states' Clean Air Act implementation plans were non-compliant with the new greenhouse gas rules.[2] *See* 75 Fed. Reg. 77,698, 77,705 (2010). EPA advised these states that, if they did not revise their plans before the greenhouse gas rule took effect on January 2, 2011, EPA would institute a construction

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[2] These states are: Arizona (excluding Maricopa County, Pima County, and Indian Country), Arkansas, California (Sacramento Metropolitan AQMD), Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada (Clark County), Oregon, Texas, and Wyoming. *See* 75 Fed. Reg. 77,698, 77,708-12 (2010).

moratorium because the non-compliant states would be unable to issue valid permits under the Clean Air Act. *See generally, e.g., id.* at 77,708-12. EPA allowed each of these states between three weeks and 12 months to become compliant, informing them that, if they did not do so, EPA would take over implementation of the Clean Air Act for that state. *See, e.g., id.* at 77,705. The State of Texas initiated litigation seeking to overturn EPA's December 13, 2010, finding of non-compliance, and challenging the threatened moratorium, the requirement of plan revisions, and EPA's attempts to impose its own implementation plan. *State of Texas v. EPA*, No. 10-60961 (5th Cir. 2010); *see also State of Texas v. EPA*, No. 10-1425 (D.C. Cir. 2010) (challenging a separate but related EPA "interim final rule" specifically for Texas that imposes a federal implementation plan for that state immediately (75 Fed. Reg. 82,430 (2010))).

The seven states with the shortest deadline (December 22, 2010) did not submit revised plans by that date. *See* 75 Fed. Reg. 81,874 (2010). EPA judged these states to have failed to comply with the Clean Air Act and followed this judgment immediately with its own federal implementation plan. *See id*. at 82,246. When the next jurisdiction did not meet its deadline, EPA issued a new plan on the same day it determined failure. *See* 76 Fed. Reg. 2,581, 2,591 (2011).

What this history demonstrates is a series of policy judgments following political battles fought in Congress, before EPA, and in the States. Federal court litigation has followed, to be sure, but that

litigation exists in the context of interpreting the law as produced by political branch conflicts. It does not ask the judiciary itself to decide optimal policy trade-offs or to declare the law independent of political-branch decisions.

Simply put, Congress's grant of authority to EPA and similar agencies to regulate certain subjects is a political decision. Those agencies then exercise that authority through the rule-making process, which is also, in part, political. Then, and only then, does the federal judiciary enter the scene and ensure that throughout this political process, Congress and the regulating agency follow the law in making their political decisions. If a challenge reaches the judiciary prior to action by the political branches, the Administrative Procedures Act requires remand to allow such action.

Here, Respondents ask the Court to circumvent that careful process and substitute its policy judgment for that of the political branches. However, examining emissions regulation in the context of a public nuisance lawsuit would render pointless the process of interpreting and applying the political resolution of policy disputes over emissions. This is an area of law that demands "discretion free of principled rules," as Bickel put it, and as such must necessarily be left for the political branches, notwithstanding legal disputes that arise regarding what those branches have decided.

2. The cooperative federalist model has also produced various regional compacts entered into by groups of states, each of which tailors its response to

the perceived threat of climate change to the affected region and its members. These compacts—each the result of yet more politics—further demonstrate the unsuitability of judicially fashioned CO_2 regulation.

Each compact varies in its emission reduction target. For example, the Regional Greenhouse Gas Initiative ("RGGI") aims to reduce CO_2 emissions from 2009 levels by 10% by the year 2018, whereas the Midwestern Greenhouse Gas Reduction Accord ("MWGGRA") seeks to reduce emissions by 20% from 2005 levels by the year 2020. *Compare Regional Greenhouse Gas Initiative*, http://www.rggi.org, *with Midwestern Greenhouse Gas Reduction Accord*, http://midwesternaccord.org. Another compact, the Western Climate Initiative ("WCI"), has targeted a 15% reduction from 2005 levels by the year 2020. *See Western Climate Initiative*, http://westernclimate initiative.org.

These programs share a "cap and trade" methodology, combined with technology investments and offsets, in order to allow regional economic growth while pursuing environmental goals. *Compare RGGI, with MWGGRA, and with WCI.* Despite this similarity, each differs in its particular implementation based on the aggregate conditions—both economic and ecologic—of the region.

Thus, some compacts place mandatory requirements on their member states; compliance with others is strictly voluntary. *Compare RGGI, with MWGGRA* ("The recommendations are from the advisory group only, and have not been endorsed or approved by any state. States' views may vary on

individual aspects of the recommendations."). This variance also works to adapt each compact to the needs of its members and region.

This is not to say that such policies are implemented solely on federal and regional levels. At least 21 states have designed individual regulations addressing those sources of greenhouse gases of greatest concern, in a way consistent with their local priorities. *See Pew Center on Global Climate Change*, http://www.pewclimate.org/states-regions (providing a dynamic map of state and regional activities in the United States). California has its own cap and trade program, requires power companies to acquire 33% of their electricity from renewable sources, and requires greenhouse gas emission reporting, among other regulations. *See California Air Res. Bd.*, http://www.arb.ca.gov/cc/cc.htm. In contrast, Nebraska invests in research on the effectiveness of using agricultural land for carbon sequestration. *See, e.g., Nebraska Carbon Sequestration Adv. Comm'n*, http://www.carbon.unl.edu/index.htm. Virginia has committed to a 30% reduction in greenhouse gas emissions from 2007 levels by 2025, driven by energy conservation and renewable energy usage. *Virginia Governor's Comm'n on Climate Change*, http://www.deq.state.va.us/info/climatechange.html. Arizona has adopted energy efficiency standards that are among the most aggressive in the nation, requiring public utilities to achieve annual energy savings of at least 22% by 2020. *See Energy Efficiency – Electricity and Gas*, http://www.cc.state.az.us/divisons/administration/energyefficiency.asp. Additionally, Arizona requires regulated utilities to generate 15% of their energy

from renewable sources by 2021, creating market demand for clean, renewable and efficient energy supplies while reducing emissions of greenhouse gases. *See Renewable Energy Standard & Tariff*, http://www.cc.state.az.us/divisions/utilities/electric/environmental.asp. Each state's decision implicitly reflects a balancing of the costs of climate change regulation weighed against the benefits likely to accrue from it.

For some states, a large part of this regulation consists of limiting motor vehicle greenhouse gas emissions in particular. California adopted regulations with even stricter limits than EPA's federal vehicle regulations. *See California Air Res. Bd.*, http://www.arb.ca.gov/cc/ccms/ccms.htm. Other states, such as Vermont, also adopted these standards. Vermont Agency of Transportation, *VTrans Climate Change Action Plan*, http://www.aot.state.vt.us/TechServices/EnvPermit/NewEnvirHomepage.htm. Each of these states pursues these efficiencies differently. *Compare id.* (bio-fuels, vehicle efficiency, and improved public transit), *with California Air Res. Bd.* (investing in research toward "zero emission" vehicles and fuel efficiency).

At least six other states are engaged in administrative or legislative inquiries into possible additional greenhouse-gas regulation. *See, e.g., Alaska Climate Change Sub-Cabinet*, http://www.climatechange.alaska.gov/; *Kentucky Climate Action Plan Council*, http://www.kyclimatechange.us; *North Carolina Climate Action Plan Advisory Group*, http://www.ncclimatechange.us/; *Pennsylvania Dep't*

of Env. Prot., http://www.portal.state.pa.us/portal/server.pt/community/climate_change_advisory_committee/10412. These commissions examine the approaches taken to climate change in other states and recent scientific data in the context of the particular circumstances of the inquiring state.

In some states, inquiries of this sort result in "action plans," which contain policy recommendations for the state governor and legislature. *See, e.g.,* North Carolina Climate Action Plan Advisory Group, *CAPAG Final Report* (2008), *available at* http://www.ncclimatechange.us/capag.cfm. Though these reports do not have the force of law, they provide a foundation upon which the state can make judgments about whether and how to develop legislation or regulations on the issue.

Thus, through the cooperative federalism model, states use their political bodies to secure environmental benefits for their citizens without sacrificing their livelihoods, and each does so in a different fashion—a natural result of the social, political, environmental, and economic diversity that exists among states. A plan to modify greenhouse gas emissions that is acceptable to California and Vermont may be unacceptable to Indiana, Georgia, Ohio, or Nebraska, for example.

Respondents' public nuisance claims dismiss this state and regional diversity and the differing results of political skirmishes across the country. By asking a federal judge in New York to impose emission limits on defendant companies, each of which is presumably compliant with the regulations of each

state in which it operates, Respondents are attempting to export their preferred environmental policies, and those policies' economic effects, to other states. Allowing them to do so would be detrimental to state innovation and regional approaches that have prevailed to date through the actions of political branches of government.

In fact, one of the most glaring flaws of Respondents' lawsuit is its lack of respect for the sovereignty of the states in which the defendant companies are based. The decision below is effectively an invitation for federal courts to undertake collateral review of state environmental policies that have followed from Congress's own policy decisions on the subject. This lawsuit invokes a legal tradition (the common law) that depends for legitimacy upon wide consensus, yet invites judges to decide the case irrespective of environmental policies that the people, through the political processes, have managed to agree upon. This case simultaneously epitomizes both "a lack of judicially discoverable or manageable standards for resolving" the nuisance issue, and "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker,* 369 U.S. at 217.

3. If these multi-level domestic approaches to air-emissions policy were not enough to demonstrate the political nature of this case, the very description of the problem Respondents seek to address surely resolves any remaining doubt. Respondents are worried not about *national* warming, but about *global* warming. *See* Br. Opp. Cert. 1 ("respondents .

. . sued petitioners . . . alleging that carbon dioxide emissions from petitioners' and TVA's power plants had contributed to global warming, creating a public nuisance . . . ."). And, indeed, the global nature of concerns over anthropogenic climate change has spawned a variety of treaties and other international initiatives aimed at addressing air emissions. This activity has been multifaceted, balancing a variety of economic, social, geographic, and political factors and emphasizing multiparty action rather than arbitrarily focusing on a single entity or small group of entities.

The United Nations has responded to concerns about the possibility of climate change by creating the United Nations Framework Convention on Climate Change (UNFCCC). This treaty has been joined by 193 nations and 1 regional development group. *See* United Nations Framework Convention on Climate Change, *Status of Ratification*, http://unfccc.int/. The UNFCCC is mostly aspirational, with provisions suggesting that parties "should" attempt to "anticipate, prevent, or mitigate" climate change. *See generally* United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc No. 102-38 (entered into force March 21, 1994). A number of provisions also focus on technology transfers from developed to developing nations and the economic sustainability of environmental policies. *See id.* Countries retain discretion to set their individual policies in pursuit of these goals on the basis of their specific conditions. *See id.* at art. 3, ¶3.

These commitments implicate delicate matters of national and international policy, including relationships between "developing nations" and "developed nations;" the transfer of technology and skills between nations; education; methods of containing climate change; and the timetables involved in doing so. *See id.* at art. 4. Because of the complex nature of these commitments, the member countries of the UNFCCC have met quarterly since 1996 to discuss implementation. *See* United Nations Framework Convention on Climate Change, *Meetings Archive*, http://unfccc.int/. At these quarterly meetings, the attendees discuss implementation of the aspirational commitments contained within the UNFCCC and recent scientific developments. *See generally id.*

Numerous ancillary agreements have resulted, including the Kyoto Protocol to the UNFCCC, 37 I.L.M. 22 (1998), Dec. 10, 1997; the Marrakesh Accords of 2005, UNFCCC, Oct. 29-Nov. 10, Decision 11/CP.7, 7th sess. (2005); and the Copenhagen Accord, UNFCCC, Dec. 7-19, Decision 2/CP.15, 15th sess. (2010). These agreements, unlike the UNFCCC, often have entailed members' assumption of binding commitments. *See, e.g., Kyoto Protocol*.

Notably, President Clinton signed the Kyoto Protocol, which required emission reductions by "developed nations" but not "developing nations," though the United States ultimately did not ratify the treaty. *See Status of Ratification of the Kyoto Protocol*, http://unfccc.int/. Explaining the United States' decision not to ratify the Protocol, President Bush observed that it exempted from its limitations

80% of the world, including India and China, and that he believed it would harm the United States' economy. *See, e.g.,* Michael Weisslitz, *Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 Colo. J. Int'l Envtl. L. & Pol'y 473, 507-08 (2002).

President Obama placed the United States at the forefront of Copenhagen Accord talks in 2009, with the hope that it would ameliorate the flaws of the Kyoto Protocol. *See, e.g.,* Elisabeth Rosenthal, *Obama's Backing Raises Hopes for Climate Pact*, N.Y. Times, March 1, 2009, at A1. The United States has "commit[ted] to implement" the Accord's "quantified economy-wide emissions targets for 2020." *See Copenhagen Accord* at ¶ 4.

The past fourteen years have thus seen three presidencies with widely divergent views of what the United States' foreign policy on climate change and greenhouse gas emissions should be. And the debate on the proper policy of the United States continues at the ballot box. The prospect of a national "cap and trade" system was popular with some in the last Congress, but was not enacted. *See, e.g., Climate and Energy Legislation*, N.Y. Times, Dec. 17, 2010, http://topics.nytimes.com/top/news/business/energy-environment/climate-and-energylegislation/index.html.

Resolving the perceived threat of global climate change is surely a "strange" and "momentous" issue for the federal judiciary—one that ought provoke the

sort of institutional anxiety of which Alexander Bickel wrote nearly 50 years ago. *See* Bickel, *supra*, at 184. A judicial determination inserting the common law of public nuisance into the state, regional, national, and international debates on climate-change policy would be governmentally untenable. It would render moot the results of political debate up to this point and irrevocably define the terms of future debate. Policy determinations of this sort—*i.e.*, ones "intractab[le] to principled resolution," to use Bickel's phrase—must be made by the political branches, by representatives elected to carry out popular will, precisely because popular will is so highly susceptible to change. With "no earth to draw strength from" in this forum, the response to the perceived threat of global climate change is not a matter "fit for the wrangling of lawyers" in federal court.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER HAGAN MCVEIGH
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Amici *States*

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