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 *AMICI CURIAE* OF TORT LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici—Jules L. Coleman, Jon Hanson, Scott Hershovitz, Heidi M. Hurd, Gregory C. Keating, Douglas A. Kysar, Thomas O. McGarity, and Jane Stapleton—are law professors who have taught, written about, and practiced tort law. *Amici* have an interest in seeing that the Court is fully informed regarding the history, structure, and function of tort law, including the federal common law of nuisance. *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their institutions, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

At the heart of this dispute is a debate over whether tort law represents an implicit regulatory device or a traditional private law system for the pursuit of civil justice. Petitioners and their supporters adopt the regulatory view, arguing that courts using common law principles and judicial remedies are ill-equipped to combat the enormity of the climate change problem. Their argument begs an essential question, for whether or not courts appear inferior to other institutions in addressing the climate change problem depends first on how one constructs "the problem."

The most appropriate construction of the problem raised by the instant litigation is one that can be addressed *only* by courts: Have the actions of Petitioners violated the common law entitlement of Respondents to be free from unreasonable injury? The other branches of government can speak to the judiciary's institutional limitations by taking on the myriad regulatory tasks that are necessitated by climate change *as a public policy problem*, but it remains emphatically the role of the courts to interpret core common law principles in relation to the particular parties and disputes before them, even when those disputes arise against the backdrop of a complex phenomenon like climate change. In that respect, standing and political question doctrines must play a different and more narrow role in the instant case than they do in public law litigation. Most importantly, the "private law-model of public law" litigation—which utilizes analogues to common law recovery requirements in order to ensure that parties challenging legislative or

administrative action hold a sufficient interest to satisfy the case or controversy demands of Article III—should not be uncritically carried over into common law litigation itself.

Allowing tort claims to proceed to the merits—where they face a variety of substantive obstacles, many of which anticipate and, indeed, provide the model for justiciability limitations on public law litigation—maintains an appropriate division of labor between governmental institutions, ensuring that courts fulfill their obligation to hold open the common law as a site for the airing of grievances unless and until they are addressed through other lawful means. Concern over any potentially undesirable effects of such litigation is most responsibly addressed through judicial management of the substantive standards of tort law themselves. Layering the "private law-model of public law" litigation back onto the private law to achieve such an end is confusing and unnecessary.

ARGUMENT

I. THE PURSUIT OF COMMON LAW REMEDIES IS IMPORTANTLY DISTINCT FROM PUBLIC LAW LITIGATION

An influential view holds that tort law is best understood as a form of implicit regulation. From legal realist accounts of tort law as a tool of social engineering to contemporary economic accounts of tort law's incentive effects, this "public law" model has at times dominated judicial and scholarly understandings of the field. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917, 921-25 (2010). The problem with such accounts is that they fail to explain central features of tort law's history, practice, and structure. *See* Jules L. Coleman, *The Structure of Tort Law*, 97 Yale L.J. 1233 (1988) (book review); Ernest J. Weinrib, *Understanding Tort Law*, 23 Val. U. L. Rev. 485 (1989); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973). Seen properly, tort law is a pillar of private law whereby parties are empowered to seek redress from their wrongdoers using the authority of the state:

> To study torts is to learn what sort of conduct our legal system defines as wrongfully injurious toward another such that, when committed, the victim is entitled to exact something from the wrongdoer. This is the domain of law that was born centuries ago with the recognition of the writ of *trespass vi et armis* and that today is defined by state and federal common law.

Goldberg & Zipursky, *supra* at 919.

Far from a general purpose regulatory device, tort law adjudicates claims of specific victims that they have been injured by the conduct of one or more specific wrongdoers. Such a mechanism helps: (1) to constitute an ongoing principled determination of the content of our primary duties of harm avoidance, Gregory C. Keating, *Is Tort a Remedial Institution?*, U.S.C. Law Legal Studies Paper No. 10-10 (July 1, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633687; (2) to repair the harmful effects of wrongful conduct according to tenets of corrective justice, Jules L. Coleman, *Risks and Wrongs* (2002); Ernest J. Weinrib, *The Idea of Private Law* (1995); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 Iowa L. Rev. 449 (1992); (3) to reinforce ideals of social equality and individual responsibility, Arthur Ripstein, *Equality, Responsibility, and the Law* (2001); and (4) to afford a vital procedural mechanism whereby parties express their mutual answerability to one another, Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 Stan. L. Rev. 67 (2010).

Importantly, even in a federal common law nuisance suit involving states as parties, these classical aspects of tort law remain and must be respected. *See* Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw. U. L. Rev. 551 (2008). Rather than an attempt to obtain in the courtroom what has not been won through legislation or regulation, a tort action seeks instead to hold actors accountable for alleged violations of common law duties. Notwithstanding the dramatic factual backdrop of climate change, the present suit remains unequivocally a tort action inasmuch as Respondents

seek only to demonstrate that Petitioners have wrongfully harmed them according to longstanding principles of federal common law. Adjudication of Respondents' claim would serve all of the purposes described above: (1) it would clarify through reasoned analysis whether the duty to avoid creating or contributing to a nuisance extends to the emission of greenhouse gases; (2) it would confirm the responsibility of the courts to provide a remedy in the event that a tortious wrong has occurred between the specific parties at bar; (3) it would acknowledge that the principles of liberty and security sometimes conflict and therefore demand forthright, respectful arbitration in order to reinforce our ideals of equality and responsibility; and (4) it would enable those who are suffering harm and those who have contributed to that harm to face one another in a process that is dignifying to both rather than being denigrating to either.

In contrast to this traditional understanding, the "public law" view of tort is evidenced in the briefs of Petitioners and their supporters through numerous descriptions of this suit as seeking to "regulate" greenhouse gas emissions. Referring to climate change nuisance actions, Petitioners maintain that "[e]ach case gives rise to a new opportunity for federal judges to make regulatory judgments." Petition for a Writ of Certiorari at 4. On behalf of the Tennessee Valley Authority, the Acting Solicitor General proclaims that "[t]his case concerns the methods by which the United States will regulate carbon-dioxide emissions." Brief for the Tennessee Valley Authority in Support of Petitioners at 2 ("TVA Brief"). The Chamber of Commerce of the United States worries that upholding the decision below of

the Second Circuit "will invite a potentially endless barrage of common law suits and produce a patchwork of judge-made regulation." Brief Amicus Curiae of the Chamber of Commerce of the United States in Support of Petitioners at 25 ("Chamber Brief").

Such contentions ignore tort's long history as a forum for the self-presentation of grievances by parties within a classical liberal framework of government. A bedrock feature of the Anglo-American legal tradition has been the entitlement of injured parties to seek to persuade impartial courts that they hold a right of action against their wrongdoers. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 558-60 (2005). Though its import may seem hard to glean today, Chief Justice Marshall clearly embraced such a view in *Marbury v. Madison*, when he stated that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). For centuries, the essential manner in which government has fulfilled this duty to provide a venue for the airing of grievances has been through the common law. As such, the implications of the present case extend far beyond the rights of climate change litigants, to all parties who seek recognition and rectification of their injuries in an impartial judicial venue.

It is significant to note that this private law understanding of tort applies also to states and their ability to invoke federal common law. Just as citizens are afforded civil recourse in recognition that "[t]he rule of law forbids private retribution when [] invasions of rights occur," Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand. L. Rev. 1, 85 (1998), states too are afforded access to the federal courts in recognition that they are otherwise "[b]ound hand and foot by the prohibitions of the Constitution" in their attempts to address adversaries. *Kansas v. Colorado*, 185 U.S. 125, 144 (1902) (quoting *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838)). As Justice Holmes put it,

> [w]hen the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

Georgia v. Tenn. Copper Co, 206 U.S. 230, 237 (1907). *See also Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy.").

Allowing the airing of grievances before an impartial judiciary in this manner "accord[s] States the dignity that is consistent with their status as

sovereign entities." Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 Stan. L. Rev. 1921, 1923 (2003) (quoting *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002)); *see also Alden v. Maine*, 527 U.S. 706, 714 (1999) ("The federal system established by our Constitution . . . reserves to [the States] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."). Thus, whether private or governmental, a litigant who invokes the protection of the common law holds a fundamental dignitary interest in having the claim heard. Allowing individuals and states to press grievances in this manner furthers the projects of both liberal individualism and federalism by respecting litigants as agents who can assert rights, make arguments, and demand redress, rather than merely as passive beneficiaries of protective regulations imposed from above. Any contrary approach would require states not only to listen to Congress's every instruction in far-reaching areas of national authority, but also to stand by passively and impotently when their core interests are violated, anxiously awaiting rescue from the federal government. Such a ruling would be an unprecedented diminishment of the meaning of statehood, stripping states of their basic quasi-sovereign right to pursue legal redress and upsetting central aspects of the constitutional system of divided and stratified governmental power. *Cf.* Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw. U. L. Rev. 551, 578 (2008) ("Our highest constitutional ideals are in fact preserved by the articulation of a federal common law of nuisance for interstate

disputes that survives quite nicely the administrative controls of the modern welfare state.").

II. LAYERING THE "PRIVATE-LAW MODEL OF PUBLIC LAW" LITIGATION ONTO THE COMMON LAW ITSELF THROUGH STANDING AND POLITICAL QUESTION DOCTRINES IS CONFUSING AND UNNECESSARY

The modern development of standing and political question doctrines occurred in response to very specific problems unique to public administrative and constitutional law. Analogizing to various limitations on recovery traditionally imposed on private parties in the common law context, this Court developed what has been called a "private-law model of public law" litigation in order to ensure that parties challenging action by the federal government fulfill the case or controversy requirement of Article III. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1436 (1988). Petitioners now demand that these public law doctrines migrate without justification or precedent to a private law context in which they are wholly inappropriate. In essence, Petitioners and their supporters seek to layer the "private-law model of public law" back onto the common law itself, a confusing and wholly unnecessary exercise.

Modern standing jurisprudence developed in response to the wave of public interest lawsuits triggered by widespread Congressional authorization of "citizen suits" in the late 1960's and 1970's. *See*

Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 194 (1992). Within this context, the Court began to articulate standards to limit the capacity of citizens to subject executive agencies to review. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The aim was to minimize what the Court reasoned to be an "amorphous general supervision of the operations of government." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Jurisdictional limits were important in this public law setting as a mechanism to prevent the courts from reaching any and all actions of the federal government, and exercising plenary power over policy making and implementation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (noting that standing doctrine is necessary to avoid allowing "Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'").

The central concern of modern constitutional standing doctrine is, thus, to prevent the overreach of the judiciary into areas constitutionally committed to other branches of government. Petitioners now ask the Court to apply this doctrine, with its emphasis on injury, causation, and redressability, in a context radically different to the one in which it originated. *See* Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* 69 (6th ed. 2002) ("The law of standing is almost exclusively concerned with public-law questions involving determinations of constitutionality."). They offer no justification as to why restrictive standing rules should apply to private suits, which do not involve the federal

government as a challenged party. Indeed, questions of harm, causation, and remedy go precisely to the *merits* of a common law tort case, the burdens that Respondents must meet through conventional means of litigation to ultimately prevail. Yet Petitioners now ask that judges use a *presumption* of climate change's complexity as a policy problem to dismiss Respondents' claim, without hearing any of the evidence that would allow them to properly adduce the extent of that complexity and the way in which it interacts with principles of common law recovery.

In truth, Petitioners and their supporters seize on the *Lujan* factors as a way of raising Respondents' burden even higher than the legal standards that govern their underlying claim. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (rejecting such an attempt "to raise the standing hurdle higher than the necessary showing for success on the merits"). The "traceability" requirement, for instance, becomes a strict but-for causation test in the hands of some amici, *see, e.g.,* Brief for Pacific Legal Foundation as Amicus Curiae in Support of Petitioners at 4 ("Pacific Brief"), without acknowledgement that the common law does in appropriate circumstances consider defendant's conduct a factual cause even if it was neither necessary nor sufficient to bring about plaintiff's harm. *See* Jane Stapleton, *Factual Causation*, 38 Fed. L. Rev. 467, 474-476 (2010). The "redressability" requirement is interpreted by Petitioners and their supporters to mean that courts somehow must be able to "solve" global warming in order for Respondents to have standing. Pacific Brief at 19. This interpretation is absurd: in the private law context, redress occurs—and is complete—when

plaintiffs receive an award against the tortfeasor they have sued. The "injury" to be redressed in the instant suit is not the phenomenon of global climate change itself, but rather the far more narrow and tractable "wrong" that Respondents allege is being committed against them by Petitioners. For purposes of standing analysis, it is hard to fathom how redressability could require anything more than an inquiry into whether the court holds the power to award the specific relief sought, at least not without drastically confusing and distorting what it means to adjudicate a common law claim.

Moreover, the Court in *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) already granted standing to litigants in a climate change suit that challenged misfeasance by the Environmental Protection Agency, a classic public law standing case. The Court reasoned that the "special solicitude" owed to states and the fact that automobile emissions contributed to the harm suffered by Massachusetts were enough to meet Article III standing requirements. *Id.* at 520. Petitioners oddly argue that the standing analysis should be stricter in this case than in *Massachusetts* because Respondents are not bringing a statutory claim. Brief of Petitioner at 13. Their reasoning completely reverses the traditional role of standing doctrine, which aims to limit challenges to actions by the political branches rather than invocations of core judicial functions. No reason exists why litigants seeking to hold an executive agency accountable for failing to regulate third parties should be granted *more* access to the federal courts than litigants seeking to hold those third parties themselves directly accountable for

alleged harms under traditional federal common law principles.

Recognizing how anomalous it would be to dismiss Respondents' complaint on Article III standing grounds, given the holding in *Massachusetts*, the Acting Solicitor General urges this Court to dismiss instead on prudential standing grounds, including especially the principle that courts should refrain from adjudicating "generalized grievances more appropriately addressed in the representative branches." TVA Brief at 21 (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984))). Prudential standing doctrine, however, is an inappropriate vehicle for vindicating such concerns in the common law context. It cannot be the case that "other governmental institutions may be more competent to address the questions" raised in a common law tort suit, *id.* at 12 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)), because the very question raised in such a suit is whether an aggrieved party has a viable claim *at common law*. No other governmental institution is empowered to answer this question, as courts are the exclusive custodians of the body of tort law that is held out to parties as a venue for pursuing civil recourse. Likewise, one cannot know whether "judicial intervention may be unnecessary to protect individual rights," *id.*, until one has addressed the underlying tort law question of whether the plaintiff in fact holds a right of protection against the challenged conduct. Invoking prudential standing in this context is nothing less than a category mistake.

Petitioners and their supporters also commit a category mistake in their treatment of the political question doctrine. Here Petitioners ask the Court to apply the doctrine to a common law claim, something it has never done in over 200 years.[2] Not only are common law claims *not* constitutionally delegated to another branch of government, the judiciary is the *only* institution with the authority to interpret the common law. Petitioners once again transpose the language of a canonical holding, in this instance *Baker v. Carr*, 369 U.S. 186 (1962), without understanding its deeper meaning. *Baker* stood for judicial restraint in a narrow range of cases that raise separation of powers concerns, *not* judicial abdication in areas that have historically been the sole province of the courts. Indeed, *Baker* was careful to separate "political questions" from "political cases," lest courts too hastily abstain from their obligation to consider and decide actual cases and controversies. *Id*. at 217.

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[2] *See* Brief of Law Professors as Amici Curiae in Support of Respondents. Extreme scenarios in which the political question doctrine has been applied to a common law suit are the exceptions that prove the rule. In *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), for instance, plaintiffs pressed a negligent entrustment theory against the manufacturer of demolition equipment that had been used by Israeli Defense Forces to destroy homes in Palestinian Territories. Because the equipment in question had actually been purchased by the U.S. government on Israel's behalf as part of U.S. foreign policy, the court concluded that the suit presented a nonjusticiable political question. Even in that case, however, the court could as easily have held that sponsorship of the sale by the political branches rendered the activity not unreasonable and therefore nontortious as matter of law.

Petitioners and their supporters advance a view that leads to lawlessness. When a court dismisses on political question grounds a case about impeachment, *Nixon v. United States*, 506 U.S. 224 (1993), the training of the National Guard, *Gilligan v. Morgan*, 413 U.S. 1 (1973), or the President's capacity to withdraw from treaties, *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979), a separate branch of government has answered, or will answer, the question at issue. The court in such cases simply refuses to subject that answer to further review—to make itself the ultimate arbiter. However, when the question posed is whether a plaintiff has a remedy at common law for an alleged harm, the question can only be answered by the judiciary. Perhaps this is why "the Supreme Court has never applied the 'lack of judicially manageable standards' prong [of the political question doctrine] to disputes between private parties," *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 684 (E.D. La. 2006), and why leading commentators treat the doctrine as exclusively concerned with constitutional adjudication, *see, e.g.,* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274 (2006). If a court rejects a nuisance suit as non-justiciable, the legislature cannot issue a substitute opinion that the plaintiff had a valid claim *at common law*. To be sure, the legislature can create a cause of action for the plaintiff by statute, but doing so will not directly answer the common law question. Because no other branch can truly affirm that plaintiff already had a successful *common law* cause of action, it is wrong to suggest that dismissing climate change cases as non-justiciable political questions merely passes them on to a more suitable

branch. Instead, dismissal constitutes a backdoor rejection of the substance of plaintiff's claim without appropriate consideration of its merits.

This is a perverse result. It appears doubly so when one considers what it would mean for a common law suit to be not yet preempted or displaced, but nevertheless non-justiciable for posing a political question. That a common law cause of action has not been preempted means that the other branches have left it in place—either explicitly, as through a savings clause in legislation, or implicitly, by not speaking directly to the question. Dismissing a common law claim on political question grounds would be nonsensical in such a case because the dismissal would merely redirect the question back to a branch that has already declined or failed to supplant the common law claim. Petitioners' contrary political question logic amounts to an outright rejection of federal common law, even in those areas such as interstate nuisance where its existence has been firmly established in the absence of congressional displacement. Through their justiciability arguments, Petitioners conflate the crucial distinction between whether federal regulation actually exists that might displace the common law and whether, as a theoretical matter, federal regulation might be preferable to the common law as a "policy tool." *Hypothetical* regulation—even hypothetical regulation that might be superior to the common law from the perspective of regulatory efficacy—cannot strip the courts of jurisdiction. Unless and until legislation and implementing regulations actually displace the common law, Respondents are guaranteed access to the federal courts to press their nuisance claim. *See*

City of Milwaukee v. Illinois & Michigan, 451 U.S. 304 (1981).

A similarly radical effect would follow if Petitioners' standing arguments prevailed in the common law context. In essence the plaintiff would be told that he has come to the wrong branch of government, even though no other branch is capable of addressing the crux of his claim: the assertion that he has a grievance actionable *at common law*. In contrast, when a litigant seeks abstract review of the constitutionality of a statutory provision or the legitimacy of agency action but is turned away for lack of standing, there is a strong argument to be made that the issue already has been addressed by at least one branch of government, and the court is simply refusing additional review. The result in the common law context, in contrast, is the creation of a vacuum in which the rule of law has essentially disappeared, given that in the Anglo-American tradition access to a system of civil recourse is one of the essential premises of a rule of law system.

This problem is distinct to the common law context. When courts invoke political question or standing doctrine to prevent common law adjudication, they self-negate in a way that is fundamentally inconsistent with the historical role of tort law as a locus for the airing of grievances. Curiously, they apply the "private-law model of public law" to private law itself, perhaps out of a sense that tort actions may sometimes have effects and implications on the scale of public law. In doing so, however, they substitute a Potemkin version for the law of civil wrongs that they are entrusted to steward, leaving the core of that law at risk of

rotting from neglect. To the extent that the judiciary refuses its traditional duty to identify and reinforce norms of appropriate behavior, uncertainty therefore is not avoided, it is created—by failing to articulate decisively whether greenhouse gas emissions do or do not violate the duty to avoid imposing unreasonable harms on others.

III. THE SUBSTANTIVE LAW OF TORT ADDRESSES PETITIONERS' CONCERNS AND GUARDS AGAINST THE HARMFUL OUTCOMES THAT THIS LITIGATION SUPPOSEDLY THREATENS

It is a commonplace view among legal scholars that justiciability rulings often reflect the opinions of judges on the merits of underlying claims. *See* Richard Fallon, *The Linkage Between Justiciability and Remedies – And Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 634 (2006) (gathering citations). Whatever the appropriateness of such indirect merits resolution in the public law context, the approach is misplaced in the private law context because ample doctrinal resources exist within the common law itself to grapple with any complex or troublesome features Respondents' claim might hold. Indeed, courts have always addressed the boundaries of acceptable enforcement of common law rights by individuals and states through the construction of common law doctrines themselves, rather than externally through justiciability doctrines. *See* Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 441-42 (1974) ("[O]ne cannot transform substantive rules of law, elements of a cause of action, into procedural or

preliminary principles of access to a court. The natural common law method simply reveals that rules of standing are an integral part of a claim for relief."). This ability of common law jurists to identify and craft appropriately adjudicable claims is hardly surprising given that the "private-law model of public law" originates from the substantive rules of the private law itself.

Most fundamentally, any successful tort plaintiff must establish something more than a mere causal connection between the plaintiff's harm and the defendant's conduct. Generally, the plaintiff must demonstrate that the defendant's conduct constituted a wrong in relation to the plaintiff himself. As Justice Cardozo famously wrote, mere "negligence in the air . . . will not do." *Palsgraf v. Long Island Railroad Company*, 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, J.). Even those jurisdictions that follow Judge Andrews's more expansive notion of duty—"Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others," *id.* at 103 (Andrews, J., dissenting)—nevertheless curtail the impact of that expansive obligation through principles of proximate causation, including the all-important touchstone of foreseeability that Cardozo used to more narrowly fix the bounds of duty.

Whether due to the limitation of tort responsibilities under the rubric of duty or to the liability-containing principles of proximate causation, it is simply not the case that tort law aims to be a "ubiquitously useful device[] for making the world a better place." Laurence H. Tribe et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global*

Warming, and the Political Question Doctrine, Wash. Legal Found. Critical Legal Issues Series No. 169 (Jan. 2010), at 2. Instead, tort law aims to address a carefully delineated set of wrongs done between parties, empowering aggrieved individuals to seek redress against their particular wrongdoers. This requirement of a tight nexus between the plaintiff's harm and the defendant's conduct has been aptly described as one of "substantive standing," i.e., a rule that only those owed a particularized duty under tort law principles may demand redress from a wrongdoer. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, *supra* at 16. It features also in the important distinction drawn between "wrongs" (which are relational) and "wrongdoing" (which need not be). Jules Coleman, *Doing Away with Tort Law*, 41 Loy. L.A. L. Rev. 1149, 1155-59 (2008). Only the former give rise to a specific duty of repair under tort law. Thus, if one person owes a duty to another and in breaching that duty, injures a third, the third person generally may not recover unless she identifies an independent duty owed directly to her. *Sinram v. Pa. R.R. Co.*, 61 F.2d 767, 769-71 (2d Cir. 1932) (Hand, J.).

Respondents' complaint seeks to do no more than resolve whether they are entitled to the specific relief sought against the specific parties named for the specific grounds alleged. That the causal mechanism involved is climate change does not somehow transform this suit into a regulatory action that demands judicial forbearance. Indeed, rather than counseling against common law adjudication, the complexity and enormity of the climate change problem counsel in its favor, simply in order that baseline norms of responsibility—whatever their

content—may be more clearly specified as public and private actors embark on what undoubtedly will be a centuries-long struggle to deal with greenhouse gas emissions and their impacts. A central task of tort law is to articulate our responsibilities to avoid certain forms of harm infliction and rights violation, a task that arguably exists logically and normatively prior to the task of repairing wrongs. *See e.g.*, Keating, *supra*. Thus, until the content of tort law's primary duties with respect to harm-causing through greenhouse gas emissions are clearly elucidated, the question of redressability does not even arise. Perhaps this is why tort law does not have—nor need—a separate set of standing requirements.

The fears of calamitous and ubiquitous liability raised by Respondents and their supporters ignore this basic point. Whether any party owes a duty to another with respect to greenhouse gas emissions is an open question, one that demands judicial attention. *See* David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Litigation*, 155 U. Pa. L. Rev. 1741 (2007). The long history of federal common law adjudication of interstate pollution disputes suggests that contributions to climate change *could* be cognizable as tortious wrongs. *See, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (sewage released into Lake Michigan); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (garbage dumped into Atlantic Ocean); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (air pollution emitted across state borders); *Missouri v. Illinois*, 180 U.S. 208 (1901) (sewage discharged into Mississippi River). More generally, the fact that common law courts have used public

and private nuisance doctrine for centuries to assess whether newly emergent forms of harm are actionable suggests at the least that courts are institutionally equipped to consider the climate change context. Petitioners' supporters insist that federal common law only governs claims based on "discrete lines of causation from individual sources to their alleged injuries that unfolded in a specified distance and time," Brief of Law Professors as Amici Curiae in Support of Petitioners, at 34, and that Respondents in turn are seeking the creation of a "new common law action." Chamber Brief, at 4. Their statements, however, only posit the conclusion to a merits analysis, rather than conduct one.

If an actual merits analysis were conducted, one would find numerous ways in which the common law itself addresses the concerns raised by Petitioners and their supporters. Under state tort law, the sheer geographic and temporal scale of harmful activity sometimes leads courts to declare that no duty to avoid the activity exists. *See, e.g.*, *Barasich v. Columbia Gulf Transmission Company*, 467 F. Supp. 2d 676 (E.D. La. 2006) (deciding under Louisiana law that destruction of protective coastal marshland, which exacerbated property damage from Hurricanes Katrina and Rita, did not give rise to trespass or nuisance liability because the duty to avoid harm in Louisiana applies only between closely proximate "neighbors"). One primary reason for such limitations is the basic fairness argument that a defendant should not be held liable unless the plaintiff's harm was reasonably foreseeable such that the defendant could have avoided causing it. *See* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 Wake Forest L. Rev.

1247, 1267 (2009). Whether an activity gives rise to foreseeable pathways of harm in this manner is a case-specific, context-sensitive judgment. In contrast to the *Barasich* court, for instance, the court in *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 697 (E.D. La. 2009), found that actions by the Army Corps of Engineers over several decades in negligently constructing and maintaining the Mississippi River Gulf Outlet proximately caused a portion of plaintiffs' harm during the Hurricane Katrina disaster. Such particularized holdings are entirely appropriate as tort law continues its traditional role of identifying and enforcing norms of appropriate conduct between parties.

Courts also sometimes curtail tort liability out of the same kinds of judicial manageability concerns that motivate the Petitioners' misplaced desire to apply political question analysis to a judicially-created body of law. In *Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (N.Y. 1985), for instance, the New York Court of Appeals shielded Consolidated Edison from liability to a plaintiff who was injured from a stairway fall during the 1977 electricity blackout in New York City. Despite the acknowledged gross negligence of Consolidated Edison and despite the ready foreseeability of plaintiff and his injury in relation to such conduct, the court nevertheless stressed its "responsibility to define an orbit of duty that places controllable limits on liability." *Id.* at 38. The point here is not to endorse or criticize the holding, but rather simply to emphasize that fears of "crushing exposure to liability," *id.* at 36, can and should be addressed through the substantive law of tort itself, rather than indirectly through doctrines devised for an entirely different legal context.

The requirements for recovery under a public nuisance cause of action further winnow the class of potential plaintiffs, avoiding the specter of universal liability raised by Petitioners and their supporters. It is not the case that Respondents' claims could be pursued "by virtually any landowner, and to an extent, by virtually any person, in the United States (and, indeed, in most of the world)." TVA Brief at 15. Rather, only those parties who "have suffered harm of a kind different from that suffered by other members of the public," or who are authorized to speak for the public may bring a public nuisance claim. Restatement (Second) of Torts § 821C (1979). This longstanding "special injury" rule under public nuisance doctrine represents the principled way in which liability for public nuisances is kept to manageable levels, much as proximate causation principles serve to contain negligence liability. One can readily detect that such requirements developed within the common law precisely out of the kinds of concerns that motivate prudential standing doctrine. As noted above in Part II, however, standing doctrine is an unnecessary and inappropriate vehicle for vindicating such concerns in the instant litigation.

Nor would a court necessarily be dragged into intractable weighing of complex social interests, assuming that a basic duty to avoid contributions to climate change was first identified. To begin with, some jurisdictions hold that a heavily regulated and licensed activity cannot constitute an actionable public nuisance as matter of law. *See id.* at § 821B cmt. f. ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not

subject the actor to tort liability."). Such a rule was relied upon by the Fourth Circuit Court of Appeals as an alternate ground for dismissing a recent common law suit involving certain strictly regulated air pollutants. *North Carolina ex. rel. Cooper v. TVA*, 615 F.3d 291, 309-10 (4th Cir. 2010). Thus, although the court criticized nuisance law as lacking "any manageable criteria" for addressing complex pollution suits, *id.* at 302, the court nonetheless found a principled doctrine responding precisely to the court's justiciability concerns within the very body of jurisprudence that it otherwise disparaged as "an ill-defined omnibus tort." *Id*; *see also New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981) ("Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government."). *Amici* take no position on whether Petitioners could avail themselves of this protective rule, given the relative dearth of regulations directed toward greenhouse gas emissions. The point instead is simply to underscore the sensibility of the common law, notwithstanding vigorous attempts to portray it as otherwise.

Even in those jurisdictions that would not afford complete tort immunity for heavily regulated and licensed activities, the ensuing public nuisance analysis would not inexorably drag a court into "far-reaching technological, economic, scientific, and policy issues." TVA Brief at 19. Petitioners and their supporters quote selectively from the Restatement (Second) of Torts (1979) to suggest that in the climate change nuisance context "the court is acting without an established and recognized standard." Brief for American Chemistry Council et al. in

Support of Petitioners at 20 ("ACC Brief") (quoting Restatement (Second) of Torts § 821B cmt. e (1979)). Immediately after the quoted Restatement text, however, Dean Prosser went on to emphasize that in the absence of criminal or legislative standards of culpability, "[t]he analysis set forth in §§ 826-831 [of the Second Restatement] then becomes more significant," as those sections provide the relevant standards of liability. Restatement (Second) of Torts § 821B cmt. e (1979).

Critically, not all of those Restatement standards require courts to engage in a far-reaching weighing of social costs and benefits. In a damages action, for instance, liability may be premised on the more manageable basis that "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." *Id.* at § 826(b) (1979). The general rules for public nuisance likewise focus on factors such as "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," or "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." *Id.* at § 821B(2). The kind of analysis suggested by these Restatement sections is quintessentially judicial in nature: it pertains not to the construction of an ideal greenhouse gas emissions regulatory scheme, but rather to the specification and enforcement of rights grounded in fairness and held by particular parties before the court.

Finally, Petitioners and their supporters question why any individual defendant or group of defendants might be singled out for liability, given the pervasiveness of greenhouse gas emissions. *See, e.g.,* Brief of Business Roundtable as Amicus Curiae in Support of Petitioners at 16. Although this concern is not without justification, the common law of tort itself addresses the problem and, in fact, provides through its actual and proximate causation doctrines much of the analytical foundation for the "traceability" prong of modern standing principles. For purposes of standing analysis, where barriers of injury, causation, and redressability should not be raised higher than the underlying cause of action itself, the court below appropriately referenced "a federal common law of nuisance case[s] involving air pollution, where the ambient air contains pollution from multiple sources and where liability is joint and several." *Connecticut v. American Elec. Power Co.*, 582 F.3d 309, 349 (2d Cir. 2009).

When the actual merits are addressed, however, the court will need to consider more fully whether the rule of joint and several liability applies for harms that follow from climate change. To begin with, it is certainly the case that Petitioners' actions can be considered a factual cause of Respondents' injuries even if they only contribute to a harmful phenomenon rather than constitute its but-for cause, and even if Respondents' injuries might still have occurred in the absence of Petitioners' actions. *See, e.g.*, Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 ill. 3 (2009); *see also* Stapleton, *supra*, at 475 (noting that "[t]his is typically the situation in pollution cases"). Extensive caselaw in the pollution context supports this

proposition, particularly when the relief sought is equitable rather than monetary in nature. *See, e.g.*, *Illinois ex rel. Scott v. City of Milwaukee*, No. 72 C 1253, 1973 U.S. Dist. LEXIS 15607, at *20–*22 (N.D. Ill. Nov. 1, 1973) ("The correct rule would seem to be that any discharger who contributes an aliquot of a total combined discharge which causes a nuisance may be enjoined from continuing his discharge. Either that is true or it is impossible to enjoin point dischargers."), *aff'd in relevant part and rev'd in part sub nom.*, *Illinois v. City of Milwaukee*, 599 F.2d 151, 177 (7th Cir. 1979), *vacated on other grounds*, 451 U.S. 304, 332 (1981); Restatement (Second) of Torts § 840E (1965) (stating with respect to both private and public nuisance that "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution"); *Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001) (gathering sources). As Judge Posner wrote for the Seventh Circuit Court of Appeals, "[i]n all these cases the requirement of proving causation is relaxed because otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury." *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 697 (7th Cir. 2008) (*en banc*).

On the other hand, the peculiar nature of climate change makes it possible for parties to seek to quantify any individual defendant's contribution to the overall climate change phenomenon and, by extension, plaintiff's injuries. In a damages action—which is *not* the case before the Court—judges might well use such evidence to conclude that the defendant's activities represent such a small

contribution to the overall phenomenon of climate change that they no longer should form a basis for liability. *Cf.* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 36 (2005) ("When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm" there is no liability); Restatement (Second) of Torts § 834 cmt. d (1979) (noting with respect to public and private nuisance that "[w]hen a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it").

Although these doctrines do not bear directly on a suit for injunctive relief, similar considerations do sometimes enter into the calculus of whether and how to issue an injunction. *See* Restatement (Second) of Torts § 941 (outlining various equitable factors that go into assessing the "relative hardships" to plaintiff and defendant that would flow from injunctive relief); *Illinois ex rel. Scott*, 1973 U.S. Dist. LEXIS 15607 at *22 (observing, in dicta, that "[t]here may be a discharge so small that, as a practical matter, it can be regarded as *de minimis*, even though as a logical matter it is still part of the whole"); *Harley v. Merrill Brick Co.*, 48 N.W. 1000, 1002 (Iowa 1891) (noting, in dicta, that "there might be a contribution to [a pollution nuisance] so slight and inconsequential that the law would not take notice of it"). The point is not to state whether or how these various caveats should apply to climate change tort suits, including especially the instant one. Rather the point simply is to note that the common law is quite cognizant of the multiple causation problem raised by Petitioners and their

supporters. Again, the common law of tort hardly appears as the unprincipled and underequipped body of law Petitioners and their supporters make it out to be.

In sum, critics of climate change lawsuits misconstrue the aim and structure of tort law, arguing that the inability of courts to bind all relevant greenhouse gas emitters "automatically makes them institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope." Tribe et al., *supra*, at 21. Such a view ignores the fact that courts are well-suited—indeed *uniquely* suited—to address the narrow, manageable, and traditional issues of right and responsibility that are raised by the instant litigation. Moreover, even if the critics' view was valid, it would not support the invocation of standing and political question doctrines to guard against potential judicial overreaching, as courts have ample means of addressing any such concerns within the law of tort itself. There is no reason why preliminary justiciability filters are necessary or desirable as an additional gatekeeper against unmanageable, would-be common law claims, above and beyond the quite significant power of courts to manage the requirements of legal sufficiency within the common law framework itself.

The sky is warming, but it is not falling.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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