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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AMERICAN CHEMISTRY COUNCIL, AMERICAN COATINGS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND PUBLIC NUISANCE FAIRNESS COALITION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The court of appeals held that governmental and private plaintiffs may pursue public nuisance actions under federal common law to cap defendants' greenhouse gas emissions at judicially-determined levels. This brief addresses the following questions:

1. Whether climate change tort claims are non-justiciable "political questions" because courts lack the resources and tools to resolve them in a principled manner.

2. Whether plaintiffs lacked standing to pursue such claims without pleading specific allegations of conduct traceable to each particular defendant and which plausibly demonstrated both the necessity and efficacy of abatement.

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AMICI CURIAE BRIEF

Amici Curiae American Chemistry Council, American Coatings Association, National Association of Manufacturers, National Petrochemical and Refiners Association, Property Casualty Insurers Association of America, and Public Nuisance Fairness Coalition, respectfully submit this *amici curiae* brief, on behalf of themselves and their members, in support of Petitioners. Pursuant to Supreme Court Rule 37.2(a), this *amici curiae* brief is filed with the consent of all the parties.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amicus Curiae American Chemistry Council ("ACC"), represents the leading companies engaged in the business and science of chemistry to make innovative products and services that make people's lives better, healthier and safer. *See* ACC's website, http://www.americanchemistry.com. *Amicus Curiae* American Coatings Association ("ACA") represents both

[1] Pursuant to Supreme Court Rule 37, letters indicating the intent to file this *amici curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. All parties have issued blanket consents to the filing of *amicus* briefs. Finally, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, or made a monetary contribution specifically for the preparation or submission of this brief.

companies and professionals working in the paint and coatings industry. *See* ACA's website, http://www.paint.org. *Amicus Curiae* the National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. *See* the NAM's website, http://www.nam.org/. *Amicus Curiae* National Petrochemical and Refiners Association ("NPRA") is a national trade association, representing nearly 500 members of the domestic refining industry. *See* NPRA's website, http://www.npra.org. *Amicus Curiae* Property Casualty Insurers Association of America ("PCIAA") is a national trade association comprised of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. *See* PCIAA's website, http://www.pciaa.net/. *Amicus Curiae* Public Nuisance Fairness Coalition ("PNFC") is a coalition composed of major corporations, industry organizations, legal reform organizations and legal experts concerned with the growing misuse of public nuisance lawsuits. *See* PNFC's website, http://www.publicnuisancefairness.org.

Amici curiae are coalitions and trade organizations whose members include organizations and companies doing business in the United States including some companies that are both directly and indirectly affected by the public nuisance litigation governed by this Court's decisions. *Amici* share the concerns expressed by the parties and, in particular, those stated by the Solicitor General, namely, that

the courts are inappropriate forums to address the complex issues raised by global warming.[2] As regulated entities, *Amici's* members are especially concerned by the intrusion of standardless public nuisance litigation into areas traditionally reserved for the political branches of government. Such forays threaten the regulatory clarity and predictability necessary for successful business planning and operations.

SUMMARY OF THE ARGUMENT

Amici curiae submit this brief to highlight particular problems raised by the Second Circuit's decision that merit this Court's review, particularly the application of the "political question" doctrine in public nuisance cases involving climate change. The history of public nuisance reflects a clear reluctance to approve its use when liability criteria are not constrained by geographical boundaries and are not governed by definitive standards. Similar reasoning applies to the "political question" doctrine, which requires dismissal of claims not subject to judicially discoverable and manageable standards. As this action is framed, these principles are inseparably intertwined. Far from being an "ordinary tort suit,"

[2] *See* Brief for the Tennessee Valley Authority in support of Petitioners, *Am. Elec. Power Co. v. Connecticut,* No. 10-174 (2010).

this expansive claim sits squarely at the "crossroads" of substantive law and justiciability.

The extraordinarily broad and standardless public nuisance claims alleged here involve issues where courts lack the tools and resources to reach results that are principled, rational, and based upon reasoned distinctions. When such political questions are raised, courts must decide whether they have the technical and scientific expertise necessary to create standards and rules to resolve the controversy justly. Such inquiries go to the very heart of the political question analysis. In public nuisance cases of global dimension, courts should defer to the political branches of government – branches that, unlike the judiciary, are equipped to amass and evaluate vast amounts of data bearing upon complex and dynamic issues and to engage in the international diplomacy necessary to deal with an inherently global phenomenon – to set and adjust, if warranted, the standards and rules by which courts judge the reasonableness of defendants' actions.

Under controlling Supreme Court authority, even when the political branches have not acted, common law courts are not necessarily free to "fill the void." Irrespective of whether the executive or legislative branches have yet spoken, due respect for their constitutional responsibilities – combined with awareness of the judiciary's own limitations – should motivate judicial restraint. Although the ancients

concluded that "nature abhors a vacuum,"[3] there are circumstances in the law, as here, where uncharted voids should be eschewed.

ARGUMENT

I. Political Question Analyses Require Courts To Consider Whether They Have The Resources And Tools To Render Principled Judgments

In *Baker v. Carr*,[4] and its progeny,[5] this Court held that lower courts should not entertain a dispute when it lacks "judicially discoverable and manageable standards for resolving it."[6] As Justice Scalia stated in *Vieth v. Jubelirer*, "[o]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*."

[3] Attributed to Aristotle, *see generally*, PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC (2008) at 551-52. The saying perhaps offers wisdom for public nuisance cases. As Thoreau observed, "Nature abhors a vacuum, and if I can only walk with sufficient carelessness, I am sure to be filled." HENRY DAVID THOREAU, EARLY SPRING IN MASSACHUSETTS (1881) at 34-35. In the absence of guiding principles, errors are as likely to fill the jurisprudential void as wisdom.

[4] 369 U.S. 186 (1962).

[5] *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality).

[6] This requirement is one of the most critical tests listed in *Baker v. Carr*. *See id.* at 278 ("These tests are probably listed in descending order of both importance and certainty").

541 U.S. at 278. "Laws promulgated by the Legislative Branch can be inconsistent, illogical, and *ad hoc*; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.* (emphasis in original). Thus, the crux of the political question inquiry is not whether the case is unmanageable because it is too large, complicated, or otherwise difficult from a logistical standpoint. Rather, the inquiry is whether the court has the legal tools to grant relief in a way that is "principled, rational, and based upon reasoned distinctions."[7] At this time, courts lack those tools.[8]

II. Courts Lack The Resources And Tools To Develop Guiding Standards For Resolving Public Nuisance Cases Involving Global Climate Change

A. Only the Political Branches Are Adequately Equipped to Resolve this Complex and Dynamic Issue

In a "political question" inquiry, respect for the political spheres is critical. In public nuisance cases based upon global climate change, where no standards presently exist to assess or measure responsibility or

[7] As Justice Scalia observed, "it is the function of the courts to provide relief, not hope." *Vieth*, 541 U.S. at 304.

[8] The possibility that manageable standards may be developed as a result of Congressional or Executive action does not change the fact that they do not exist today. *Id*. at 306 (Kennedy, J., concurring).

to determine appropriate reductions in greenhouse gas emissions, "political question" arguments necessarily require a comparative evaluation of the resources needed to craft appropriate rules.

Through the Clean Air Act,[9] Congress found that air pollution prevention control are "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). The greenhouse gases involved in this case are considered "air pollutants"[10] under the broad language of the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007). In response to this Court's decision in *Massachusetts v. EPA*, the executive branch has found that greenhouse gas emissions "endanger public health and welfare" and should be regulated. EPA has actively promulgated rules necessary to establish a program to regulate these pollutants – including those emitted by sources involved in this case.[11]

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[9] 42 U.S.C. 7401 *et seq*.

[10] The Clean Air Act defines "air pollutant" to include "any air pollution agent or combination of such agents, . . . emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g).

[11] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FED. REG. 66496 (Dec. 15, 2009); *see also* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 FED. REG. 25324 (May 7, 2010); White House, *Presidential Memorandum Regarding Fuel Efficiency Standards* (May 21, 2010); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FED. REG. 31514 (June 3, 2010).

The executive and legislative branches of the federal government have a lengthy and comprehensive record of regulating air pollutants. Given EPA's regulatory scheme to control air pollution, as well as its recent endangerment finding and regulatory efforts crafted to limit greenhouse gas emissions, interstate public nuisance suits stand as "'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (quoting *Hillsborough County v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713 (1985), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The *Ouellette* court admonished against the "tolerat[ion]" of "common-law suits that have the potential to undermine this regulatory structure," *id*. at 497, and singled out nuisance standards in particular as "vague" and "indeterminate." *Id*. at 496 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)) (internal quotation marks omitted); *see also North Carolina v. TVA*, No. 09-1623, 2010 WL 2891572, at *7 (4th Cir. July 26, 2010).

Congress also entrusted EPA with the responsibility for obtaining and making scientific and other judgments necessary to reduce air pollution. 42 U.S.C. § 7408(b)(1). Courts should respect both Congress' decision and EPA's ability to fulfill its properly delegated authority. "As an institution, . . . Congress

is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon [complex and dynamic issues]."[12] Unlike courts, the political branches can consider all pertinent issues in their entirety either through hearings or during required notice and comment periods. *See, e.g.*, 42 U.S.C. §§ 7409(a)(1)(B), (b)(1) & (2), 7426(a)(1). As a result, policy choices can strike fair and effective balances between competing interests because they can be based on broader perspectives and ample information rather than being limited to issues raised only by litigants.[13] Moreover, in contrast to courts, which lose jurisdiction upon rendition of final judgment, political branches have continuing authority to revisit statutes and rules to modify or tailor their provisions.[14]

Political branches are also better equipped to deal with broad issues because they, unlike trial and appellate courts, represent a quorum of the people. While the process of enacting a statute is "perhaps not always perfect, [it] includes deliberation and an

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[12] *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 665-66 (1994) (Kennedy, J., plurality).

[13] *See Helvering v. Davis*, 301 U.S. 619, 642-44 (1937) (Cardozo, J); *see also* Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 12 CONN. L. REV. 1247, 1271 (2000).

[14] *See Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001) (Breyer, J. concurring).

opportunity for compromise and amendment and usually committee studies and hearings." *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995). Before any law is enacted, it must garner the support of a majority of the people's elected representatives and then is subject to executive veto and judicial review. These "checks and balances" ensure the efficacy of our democracy. When courts bypass these safeguards to implement their own common law solutions, the judiciary – the least political branch of government – declares policy unilaterally and the "will of the people" is expressed not through their elected representatives, but through a plebiscite of jurors or a single fact-finder judge.[15]

Courts and juries play an enormously important role in our system of government, but they are not a substitute for decisions by democratically-elected representatives. As the Fourth Circuit recently observed: "[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider. 'Courts are expert at statutory construction, while agencies are

[15] As Justice Linde explained in his critical article, the court must "identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well [as] or better than legislators, but it cannot derive public policy from a recital of facts." Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994).

expert at statutory implementation.'" *North Carolina v. TVA*, 2010 WL 2891572, at *11. (quoting *Negusie v. Holder*, 555 U.S. ___, 129 S. Ct. 1159, 1171 (2009)). For these reasons, it is crucial that courts respect the strengths of the rulemaking processes in which Congress placed its imprimatur. Unlike *ad hoc* lawsuits, regulations and permits provide opportunities for predictable, adjustable standards that are scientifically grounded. *Id*.

In the public nuisance context, these considerations call for judicial deference – not "common law" policy making. They expose "the limits within which courts, lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems. . . ."[16] Given the planetary scope of this controversy, the depth of the inquiries needed to develop fair standards for its resolution, the comparative resources available to the judiciary and the political branches, and the extreme difficulty, if not impossibility, of fair adjudication – the primacy of political solutions is apparent. Indeed, as Professor Tribe recently wrote, "[w]hatever one's position in the . . . debate over the extent or . . . reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding or at least strongly incentivizing, all involved parties,

[16] Linde, *supra* note 15, at 853.

are the only ones constitutionally entitled to fight that battle."[17]

B. Global Climate Change Claims Exceed the Boundaries of Traditional Public Nuisance Litigation

The Second Circuit trivializes the significance and scope of this action by proclaiming it to be an "ordinary tort suit" – no more complex than the localized discharge of raw sewage into a river or a lake, the kind of simple nuisance claim that courts have adjudicated for years under our existing legal framework.[18] Far from an "ordinary tort suit," this case frames wholly new claims – and asks the judiciary to bypass international and Congressional deliberations by setting emissions standards unilaterally.

These allegations are plainly extraordinary – and labeling them otherwise is not a helpful exercise.[19]

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[17] *See* Laurence H. Tribe, *et al*., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine,* WASH. LEGAL FOUND. CRITICAL ISSUES SERIES (Jan. 2010) at 23.

[18] *See Connecticut v. Am. Elec. Power Co.,* 582 F.3d 309, 330-31 (2d Cir. 2009). *See generally,* Richard O. Faulk & John S. Gray, *Premature Burial? The Resuscitation of Public Nuisance Litigation*, 24 TOXICS L. REPT. 1231 (Oct. 22, 2009).

[19] *See* Laurence H. Tribe, *et al*., *supra* note 17, at 13-14 ("The political question doctrine is about more than word-play. . . . [T]he Second Circuit – essentially confusing a label with an argument – concluded that it was an 'ordinary tort suit' and therefore justiciable").

The judiciary has no experience dealing with public nuisance litigation created by a *global* phenomenon resulting from the release of greenhouse gases by millions, if not billions, of sources (including natural events) worldwide – very few of which are subject to the jurisdiction of American courts or under the control of these defendants. The judiciary's past experience provides no guidance for determining what standards and rules should be applied to resolve this controversy in a principled, rational and reasoned manner.

Viable public nuisance cases, even those involving interstate issues, have always been contained within well-defined geographic borders. They are localized and linked to impairment of property, or to injuries resulting from such effects.[20] Significantly, each precedent upon which the court of appeals relied are within that tradition. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 326-29. Although the Second Circuit cited authorities that noted that nuisance actions were "the common law backbone of modern environmental law," *id*. at 328, it failed to recognize that each of those cases involved acts that occurred within a circumscribed "zone of discharge," affected defined geographic locations, and the full range of defendants was either known or could be identified.[21]

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[20] *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 830-33 (2003).

[21] *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F.Supp. 2d 863, 875 (N.D. Cal. 2009) ("The common thread

(Continued on following page)

Unlike here, the alleged nuisance in each case was entirely man-made and created over a relatively short period of time.[22]

Global climate change, by contrast, is boundless and, according to scientists, is caused by a universal and unlimited range of actors and events that allegedly began more than 150 years ago at the start of the Industrial Revolution.[23] Nothing in the law of public nuisance allows plaintiffs to single out these few defendants and require them to "abate" their "contributions" to a condition that spans the globe and jointly took the entire industrialized world – in combination with natural forces – more than 150 years to create. Currently, it is impossible to distinguish one exhalant's contribution from vehicular or industrial emissions today, much less since the start of the Industrial Revolution. There are also no processes to calculate and account for the impact of biological emissions by the trillions of organisms which inhabit the planet. Nor can the role of titanic

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running through each of those cases is that they involved a discrete number of 'polluters' that were identified as causing a specific injury to a specific area").

[22] *See generally*, Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 949-50, 955-57 (2007).

[23] *See generally,* Richard O. Faulk & John S. Gray, *A Lawyer's Look at the Science of Global Climate Change,* 44 WORLD CLIMATE CHANGE REPORT 2 (BNA, Mar. 10, 2009) (providing scientific references regarding the climate change phenomenon).

natural forces, such as volcanism, be calculated reliably. Moreover, no method exists to account for the myriad of confounding forces that impact the relative degree of liability attributable to these or any potential defendants – such third-parties that have effected changes to forests and seas which absorb emissions.[24] Given climate change's extraordinary causal chain,[25] it is difficult to see how *ad hoc* common law decisions will lead to "judicially discoverable and manageable standards" that will guide courts to decisions that are "principled, rational, and based upon reasoned distinctions."[26]

Both "political question" considerations and the substantive law of public nuisance wisely preclude courts from resolving controversies when fair standards cannot be devised to resolve amorphous claims. For example, the law of public nuisance requires more than an "injury in fact" to justify recovery. To be a nuisance, a defendant's interference with the public right must be "substantial." It cannot be a "mere annoyance," a "petty annoyance," a "trifle," or a "disturbance of everyday life."[27] The defendant's

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[24] *See generally, id.* at 12-14 (providing discussion and references regarding absorption roles of forests and oceans).

[25] *See Kivalina,* 663 F.Supp. 2d at 876 (describing the climate change's causal chain).

[26] *Vieth*, 541 U.S. at 278; *Kivalina*, 663 F.Supp. 2d at 876 (noting the lack of guidance "that would enable the court to reach a resolution of this case in any 'reasoned' manner").

[27] *See generally,* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 557-58 (1941); *see also* Denise E. Antolini,

(Continued on following page)

interference must also be objectionable to the ordinary reasonable person, and one that materially interferes with the ordinary physical comfort of human existence according to plain, sober, and simple notions.[28] In a global context, where countless untraceable and unquantifiable natural, biological, and anthropogenic emissions allegedly act cumulatively over centuries to produce harm, determining whether any particular emissions constitute a "substantial interference" is objectively impossible.

Simply stated, the immeasurable scope of the controversy matters. Using public nuisance to redress global climate change far exceeds the tort's common law boundaries – and while venturing beyond those fences may be intellectually adventurous, there are no standards or rules that guarantee that such explorations will result in justice.[29] Such a standardless exercise is not jurisprudential. The proceeding

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Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 ECOLOGY L. Q. 755, 772 (2001).

[28] William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1002-03 (1966); *see also* Antolini, *supra* note 27, at 772 n.57 (citing FRANCIS HILLIARD, THE LAW OF TORTS FOR PRIVATE WRONGS 631 (2d ed. 1861)).

[29] *See Vieth*, 541 U.S. at 278. (" 'The judicial Power' created by Article III, § 1, of the Constitution is not whatever judges choose to do . . . "). Indeed, the Supreme Court has already warned that it has "neither the expertise nor the authority" to evaluate the many policy judgments involved in climate change issues. *Massachusetts v. EPA,* 549 U.S. 497, 533-34 (2007).

requested by Plaintiffs may be "called a trial, but it is not."[30]

C. Using Public Nuisance as an Aggregative Tort Creates "Standardless" Liability and Is Barred by the Political Question Doctrine

Despite the Second Circuit's reasoning that their rulings were consistent with the Restatement (Second) of Torts, *Connecticut v. Am. Elec. Power Co.,* 582 F.3d at 328, it failed to heed Dean Prosser's stern warning in his comments to § 821B: "[I]f a defendant's conduct . . . does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, *the court is acting without an established and recognized standard*."[31]

Dean Prosser's concerns were recently reinforced by one of the reporters for the Third Restatement, Professor James A. Henderson, who warned about the

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[30] *See In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) ("The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more. We are persuaded on reflection that the procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not").

[31] RESTATEMENT (SECOND) OF TORTS § 821B cmt. e. (1979) (emphasis added); J.R. Spencer, *Public Nuisance: A Critical Examination*, 48(1) CAMBRIDGE L. J. 55, 56 (1989).

"lawlessness" of expansive tort liability.[32] According to Professor Henderson, these new tort theories are not lawless simply because they are non-traditional, or court-made, or because the financial stakes are high. Instead, "the lawlessness of these aggregative torts inheres in the extent to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring recovery."[33] Such paths lead inevitably to limitless and universal liability. If the Court allows this controversy to proceed, it will be "empower[ing] judges and juries to exercise regulatory power at the macro-economic level that even the most aggressive administrative agencies could never hope to possess. In exercising these extraordinary regulatory powers via tort litigation, courts (including juries) exceed the legitimate limits of both their authority and their competence."[34]

Dean Prosser's wise advice, as well as Professor Henderson's concerns about "lawlessness," are substantiated by the history of public nuisance – a history where courts have refused to expand liability

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[32] *See* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005).

[33] *Id*. at 338.

[34] *Id*. Although the Second Circuit stressed that tort cases rarely involve political questions, *Connecticut v. Am. Elec. Power Co.,* 582 F.3d at 326-29, aggregative torts, such as public nuisance, raise unique "lawlessness" concerns that transcend routine tort cases and cross the political question threshold. *See* Henderson, *supra* note 32, at 338.

because of concerns over "standardless" liability. In the early 20th century, litigants argued that public nuisance should be expanded to address activities that were not criminal and which did not implicate property rights or enjoyment.[35] Proponents of this expansion argued that the "end justified the means" by highlighting the tort's remarkable effectiveness and claiming "that [otherwise] there is no adequate remedy provided at law."[36]

Legal commentators and authorities, however, objected when public authorities sought to use public nuisance to address broad societal problems such as over-reaching monopolies, restraint of trade activities, prevention of criminal acts, and labor controversies such as strikes.[37] They warned that this "solution" was planting the seeds of abuse that would ultimately weaken the judicial system.[38] Finally, when public nuisance was used as a precursor to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to address

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[35] *People v. Lim*, 118 P.2d 472, 475 (Cal. 1941).

[36] *See* Edwin S. Mack, *Revival of Criminal Equity* 16 HARV. L. REV. 389, 400-03 (1903). These same arguments are resurfacing as governmental authorities employ public nuisance litigation to address complex societal problems. *See* Faulk & Gray, *supra* note 22, at 974-75.

[37] Mack noted that the expanding boundaries of public nuisance law made courts of equity of that time period careless of their traditional jurisdictional limits. Mack *supra* note 49*,* at 397.

[38] *Id.* at 400-03.

environmental contamination in the Love Canal controversy, a decade of nuisance litigation failed to produce a solution.[39] Thereafter, arguments urging expansion were increasingly rejected, most notably in California, where the state's Supreme Court ultimately deferred to the legislature's "statutory supremacy" to define and set standards for determining liability.[40] Significantly, the court did so because judicial creativity would otherwise result in "standardless" liability.[41]

There is plainly an overlap between this jurisprudential principle and the "political question" doctrine. Although these concepts are inextricably linked, their conjunction has been inexplicably overlooked. Just as courts have traditionally resisted invitations to expand public nuisance liability in the absence of clear boundaries and guiding principles,

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[39] *See* Eckardt C. Beck, *The Love Canal Tragedy,* EPA Journal (Jan. 1979) ("no secure mechanisms [were] in effect for determining such liability"). *See generally,* Charles H. Mollenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy,* 7 EXPERT EVIDENCE REPORT 474, 475-76 (Sept. 24, 2007).

[40] *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal.), *cert. denied*, 521 U.S. 1120 (1997) (stating that "[t]his lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance' ").

[41] *Id*. *See also People v. Lim*, 118 P.2d 472, 475 (Cal. 1941) ("In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity").

courts also must resist deciding political question controversies where they cannot devise definitive standards and rules for their adjudication. Each principle informs courts when advocates invite creative excursions, and in both contexts, respect for the legislative and executive spheres, and the constitutional limits on judicial power is critical. History's experience with public nuisance as a tort traditionally circumscribed by geographic limits and caused by identifiable actors, coupled with the pronounced concerns of wise legal scholars and courts regarding the dangers of entertaining controversies without guiding adjudicative principles, demonstrates the present impossibility of rendering judgments in climate change cases that are "principled, rational, and based upon reasoned distinctions."

D. Lack of Action by the Political Branches Does Not Empower Common Law Creativity

Contrary to the Second Circuit's claims, legislative and regulatory silence are not dispositive of whether courts are competent to decide climate change controversies. Indeed, there has been "a longstanding resistance, as a matter of law, to the idea that legislative inaction or silence, filtered through a judicial stethoscope, can be made to sound out changes in the law's lyrics – altering the prevailing patterns of rights, powers, or privileges that

collectively constitute the message of our laws."[42] Moreover, this Court has condemned reliance on congressional silence as "a poor beacon to follow."[43] More pointed – and remarkably similar to the concerns of Dean Prosser and Professor Henderson – is Justice Frankfurter's warning that "*we walk on quicksand* when we try to find in the absence of . . . legislation a controlling legal principle."[44]

The absence of action by the political branches does not empower common law adventures. This is especially true in public nuisance cases based upon global climate change, where there are no "controlling legal principles" to frame the controversy, fully investigate the issues, adjudicate liability or allocate responsibility. In such cases, courts must decide whether they have the resources to investigate and devise a proper remedy, and whether they are capable of creating definitive standards and rules to resolve the controversies fairly. This question goes to the very

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[42] Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 516, 522 (1982) (quoting Thomas Reed Powell, *The Still Small Voice of the Commerce Clause*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (Ass'n of American Law Schools, 1938)).

[43] *Zuber v. Allen*, 396 U.S. 168, 185 (1969). *See also Cleveland v. United States*, 329 U.S. 14, 22 (1946) (Rutledge, J., concurring) (noting that "[t]here [are] vast differences between legislating by doing nothing and legislating by positive enactment . . . ").

[44] *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (emphasis added).

heart of the political question doctrine.[45] Unless this inquiry is answered correctly, the judiciary, the parties, and the public interest will be sacrificed to the shifting sands of "standardless" liability.

III. The Second Circuit's Standing Analysis Conflicts With The Substantive Law Of Public Nuisance And Equitable Maxims

Conflicts with the substantive law of public nuisance also plague the Second Circuit's standing analysis. According to the court, the injuries produced by the nuisance need only be an "identifiable trifle" involving "recreational" or "esthetic interests."[46] In so holding, the court apparently grafted the standing requirements for statutory citizen suits[47] onto the common law tort of public nuisance. Contrary to the Second Circuit's holding, however, common law public nuisance has never justified the abatement of

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[45] This Court clearly recognizes that such scenarios exist. *See Vieth,* 541 U.S. at 277 ("Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches *or involves no judicially enforceable rights*") (emphasis added).

[46] *Connecticut v. Am. Elec. Power Co.,* 582 F.3d at 341.

[47] *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc*., 528 U.S. 167, 183 (2000). To establish standing, plaintiffs must show a "concrete and particularized" injury that is "fairly traceable" to the action of a particular defendant. *Id*. at 180-81.

"trifling" or insignificant conditions that do not, standing alone, disrupt, interfere, impede or impair rights held collectively by citizens.[48] To be a nuisance, a defendant's interference with the public right must be "substantial" and "unreasonable."[49] Surely standing to pursue a claim cannot be justified by allegations that fail to conform to the elements of the underlying tort. Under the Second Circuit's reasoning, it is difficult to imagine anyone who lacks standing to file nuisance claims regarding greenhouse gas emissions.

The same problems – merging tort standards with standing requirements for litigation challenging or enforcing environmental statutes and regulations – infects the Second Circuit's "redressability" discussion. For example, the court relies on this Court's holding in *Massachusetts v. EPA* that parties need not allege that their requested relief will "by itself reverse global warming" but instead, it is sufficient to show that the remedy will "slow or reduce" it.[50] Again, this is a standard that applies in *regulatory* litigation – not tort cases. To show standing in public nuisance cases, claimants must, at a minimum, plead the elements of the tort, including allegations of a substantial interference that can be *meaningfully* abated,

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[48] *See* RESTATEMENT (SECOND) OF TORTS § 821B (defining public nuisance as "an unreasonable interference with a right common to the general public").

[49] *See* Faulk & Gray, *supra* note 22, at 964.

[50] *Massachusetts v. EPA,* 549 U.S. at 525.

not nominally "reduced."[51] There must be specific allegations regarding particular conduct traceable to each particular defendant – allegations that plausibly show both the necessity and efficacy of abatement. In the absence of such a showing, any "redress" ordered by the court will be a hollow remedy. Moreover, massive amounts of time, effort and resources will be wasted in litigation where the ultimate "relief" is merely symbolic, not efficacious. Since the maxims of equity preclude the rendition of vain or useless orders,[52] Respondents surely lack standing to pursue equitable relief that amounts to no more than an idle gesture.

[51] *Cf. Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1938, 1950 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)).

[52] *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 744 (1971) ("It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime"); *Foster v. Mansfield,* 146 U.S. 88, 101-02 (1892) ("A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice, or to compel the defendants to buy their peace").

CONCLUSION

If, as Justice Holmes counsels, the development of the common law should be "molar and molecular,"[53] the transmutation of "public nuisance" concepts to address global climate change requires more rumination and digestion than the judiciary alone can prudently provide. Advocates who tout public nuisance litigation as a universal panacea should pay careful attention to the "rumination" analogy. Despite the tort's ravenous reputation as a potential "monster" capable of devouring time-honored legal precedents in a single gulp,[54] that appetite is constrained by the common law's tendencies to move in a "molar and molecular" fashion – to chew thoroughly – and then to swallow, if at all, only small bits at a time.

Under such circumstances, the limits of judicial competency suggest that forbearance, rather than adventure, is the most principled response. Particularly while Congress and the Executive Branch are in the midst of addressing climate change issues, it is

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[53] *See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J.) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions"). *See also* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) (stating that courts make law only within the "gaps" and "open spaces of the law").

[54] *See In re Lead Paint Litig.,* 924 A.2d 484, 505 (N.J. 2007); *see also Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (originating the quote above).

inappropriate for courts to entertain standardless aggregative controversies.

Accordingly, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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