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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses and associations.[1] The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations. The Chamber advocates issues of vital concern to the nation's business community and has frequently participated as *amicus curiae* before this Court and the federal courts of appeals. And when misguided decisions of lower courts threaten the interests of the business community and the greater public, the Chamber has supported certiorari petitions for this Court's review. This is such a case.

The proper response to global climate change is an issue of profound concern to the Chamber's members. The Chamber works to discourage ill-conceived climate change policies and measures that could severely damage the security and economy of the United States, and instead encourages positive measures, such as long-term technological innovation and long-term clean technology deployment. The Chamber believes that nuisance suits such as this one, which seek to impose caps and reductions on carbon dioxide emissions in a piecemeal fashion on an arbitrary subset of U.S.

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[1] The parties have filed blanket letters of consent for *amicus* briefs. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this brief. No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund its preparation or submission.

industry, are an especially ill-conceived and constitutionally illegitimate response. A meaningful and politically legitimate response to climate change must be national, indeed global, in nature, and must be fashioned by the politically accountable branches. The Chamber thus has a vital interest in ensuring that courts do not usurp the roles of the executive and legislative branches by entertaining this type of lawsuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs seek to hold six American utility companies jointly and severally liable for "contributing" to global climate change caused by innumerable sources under vague and far-reaching federal and state common law theories of "nuisance." Compl. 49, No. 04-5669 (S.D.N.Y. July 21, 2004). They asked a lone district court to immediately "cap" defendants' carbon dioxide emissions and then reduce them by an unspecified percentage "each year for at least a decade." *Id.* The district court sensibly rejected that request, recognizing that how best to address the complex issues implicated by global climate change is a question that can only be resolved by the political branches. Pet.App.171a-187a.

The Second Circuit reversed, however, and permitted this suit to proceed. Pet.App.1a-170a. Because that decision is based on a profoundly misguided conception of the role of the courts in our constitutional government and has potentially disastrous implications for the U.S. business community as well as this nation's efforts to address the phenomenon of global climate change, the Chamber

and its members have a strong interest in this Court granting review and reversing its judgment.

This Court's guidance is urgently needed. Since *Massachusetts v. EPA*, 549 U.S. 497 (2007), an "emerging category of litigation over greenhouse-gas emissions" has developed "implicat[ing] myriad plaintiffs and defendants." Tennessee Valley Authority (TVA) Br. 10. If the decision of the Second Circuit is not reversed, this suit and the others that inevitably follow will destabilize our economy and undermine our democratic process. The debate over the appropriate response to climate change affects every business concern and implicates virtually every facet of daily life. This complex political dialogue belongs in the political arena, not the courthouse. Only the elected branches are authorized and equipped to develop our nation's response to climate change and undertake any necessary reforms. With such important and pervasive national issues at stake, the country can ill afford to await further percolation in the lower courts.

The Acting Solicitor General—speaking through the TVA—agrees that this Court's intervention is warranted now, and that the decision below should be vacated. He suggests, however, that the Court should remand for consideration of the TVA's "prudential standing" argument and for further consideration of the displacement issue. TVA Br. 10-11. Such a remand is unnecessary. While it comes with a new heading, the "prudential standing" argument is based on largely the same considerations that already inform the standing and political question issues that were decided below. The TVA may advance that argument in this Court if it wishes to do so. But a remand is not necessary to

address it. Nor is there any particular reason to believe that the court of appeals would be receptive to the argument given what it has already said about the underlying concerns in its comprehensive, 139-page decision. The same goes for the displacement issue, which was already decided below. While the TVA's unusual GVR proposal is certainly preferable to a denial of certiorari, the fact that the Acting Solicitor General has even floated this request underscores the magnitude of the problems created by the decision below.

The Second Circuit's decision offends three fundamental limitations on judicial power. *First*, the court overstepped its authority by creating new federal common law to accommodate plaintiffs' claims. This Court has made clear that courts are not to create or extend judge-made causes of action, and, despite their appellation, plaintiffs' claims in this case do not look remotely like previously recognized traditional "nuisance" claims. Nuisance suits have been allowed to proceed under federal common law only as necessary to permit states to protect the land and air within *specific geographic regions* against harm directly caused by a *discrete set of defendants* who were discharging *obviously noxious substances* such as sewage, trash, and toxic fumes. Plaintiffs' suit asks the courts to assess fault for injuries caused by apparently harmless emissions from literally billions of sources worldwide over the last "several centuries." Compl. ¶87. The common law is ill-equipped to address such staggeringly complex—and "unprecedentedly broad," TVA Br. 11—nuisance claims.

Second, the court of appeals erred in failing to appreciate that the global nature of climate change and

the necessity in any bid for redress to balance an enormously vast array of interrelated interests are ill-suited to the *ad hoc* and piecemeal nature of litigation. The political question doctrine prohibits courts from acting where, as here, there are no judicially manageable standards and any adjudication would inevitably require initial policy decisions reserved to the political branches. What is the appropriate level of global emissions? Who should bear the costs of limiting emissions? Should developed nations act even if developing nations do not? These questions are not just complex or difficult—they have no "right" jurisprudential answers.

Third, the court of appeals erred in finding that plaintiffs have Article III standing. The likelihood of redressability in this suit against a finite and arbitrary set of carbon-emitting entities is so remote and so speculative that the ruling here would permit literally anyone alleging climate-change based damages to sue any entity or natural person in the world—an absurd result that highlights once again just how inapt the judicial forum is for addressing such inherently global concerns. Contrary to the lower court's opinion, the principles animating *Massachusetts*—which depended on the ability of *Congress* to relax the Article III inquiry in the context of a *statutory* provision for challenging agency action—are inapplicable here.

As this Court has observed, "[d]etermining that a matter before the federal courts is a proper case or controversy under Article III … assumes particular importance in ensuring that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation

omitted). Certiorari is warranted to make clear that adjudication of the growing wave of common law nuisance claims directed against alleged culprits of global climate change exceeds the "the proper—and properly limited—role of the courts in a democratic society."

This Court should grant review and reverse the judgment of the court of appeals.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE OF THE EXTRAORDINARY IMPORTANCE OF THE QUESTIONS PRESENTED

This Court has not hesitated to intervene promptly to decide important issues of federal law when awaiting further percolation in the lower courts would jeopardize important national interests. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Medellin v. Texas*, 552 U.S. 491 (2008); *Massachusetts*, 549 U.S. 497. In *Massachusetts*, this Court granted the writ because of the "unusual importance of the underlying issue." 549 U.S. at 506. Prompt review is even more critical in this case, given the staggering breadth of the potential economic, social, and political implications of the lower court's ruling. This Court should grant the petition and provide necessary guidance on the questions presented without delay.

A. The Decision Below Has Staggering Economic Implications

If not reversed, the decision below will impose punishing costs on businesses and consumers that will only be exacerbated as this "emerging category of litigation" (TVA Br. 10) sweeps the nation's courts.

First, allowing multiple district courts to act as mini-EPAs will lead to a host of new suits and, inevitably, inconsistent outcomes.[2] Indeed, there have already been at least three other public nuisance common law suits against arbitrarily-selected greenhouse gas emitters across several industries. Pet. 8-10.[3] In those cases, plaintiffs sought damages from various groupings of automobile, oil, coal, chemical, energy, and utility companies. Although none of those plaintiffs has (yet) been successful, *see id.*, the Second Circuit's decision, which permits suit against any emitter, will invite a continuing barrage and produce a patchwork of regulation.

The resulting conflicting standards and regulatory uncertainty will impose serious costs on our economy. Businesses large and small will face intractable challenges in assessing future capacity—not knowing when, whether, and to what degree a lone district court might impose emissions caps (or damages). *See North Carolina v. TVA*, --- F.3d ----, 2010 WL 2891572, at *1, *10 (4th Cir. July 26, 2010) (application of "vague public nuisance standards" to emissions leaves companies "unable to determine [their] obligations ex ante"). And, as a result, firms will "become more cautious in

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[2] Under plaintiffs' theory of personal jurisdiction, *any* carbon emitters could be sued in *any* district court in the country. *See* Compl. ¶38; Mem. in Opp. to Mot. to Dismiss 13-14.

[3] *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.); *Comer v. Murphy Oil USA*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc); *California v. Gen. Motors Corp.*, No. C06-05755-MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009).

responding to business conditions," resulting in decreased hiring, investment, and productivity. Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 Econometrica 623, 625 (2009).[4] This Court's guidance is immediately necessary to remove the cloud of uncertainty that will otherwise stunt economic growth and prevent businesses from efficiently ordering their affairs.

Second, the judicial imposition of emissions caps on these utility industry defendants (and, inevitably, on other emitters in other cases) will dramatically increase U.S. energy prices. As the President has previously acknowledged, "capping greenhouse gasses" means "electricity rates would necessarily skyrocket."[5] And the "vast majority" of the burden of increased energy costs will fall on residential consumers.[6]

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[4] *See also* Darren Samuelsohn, *Rockefeller Finds It's Better to Negotiate on Climate Than Sit on Sidelines*, N.Y. Times, Sept. 14, 2009 (because there is "'no predictability,'" Wall Street "'lends no money to people trying to build power plants'" (quoting Sen. Rockefeller)); Kenneth Green *et al.*, *Climate Change: Caps vs. Taxes*, American Enterprise Institute Environmental Policy Outlook, June 2007, at 2-3 (uncertainty of energy costs and fuel availability can lead to spikes in fuel prices).

[5] *San Francisco Chronicle*, Editorial Board, *An interview with Sen.* Barack Obama *at* 40:39 (Jan. 17, 2008), *available at* http://www.sfgate.com/cgi-bin/blogs/opinionshop/detail?entry_id=23562. *See also, e.g.*, Trevor Houser *et al.*, *Assessing the American Power Act: The Economic, Employment, Energy Security, and Environmental Impact of Senator Kerry and Senator Lieberman's Discussion Draft*, Peterson Institute for International Economics Policy Brief, May 2010, at 13 (caps would increase household electricity, heating, and gasoline prices); Bernie Woodall, *U.S. carbon cap to raise power prices: Moody's*, Reuters.com, Mar. 25, 2009.

[6] Woodall, *supra*.

Third, those higher energy costs will drive up the cost of all manufactured goods and transportation.[7] As even emissions-capping advocates acknowledge, "most of the cost of the programme will be borne by consumers, facing higher prices of products, including electricity and gasoline."[8] And the compound effect is to threaten hundreds of thousands of jobs and depress wages, as companies downsize or relocate.[9] While legislators are able to consider the competing economic interests and tailor schemes to mitigate such hardships (e.g., through tax breaks or other incentives), courts cannot similarly ameliorate the unintended consequences of their mandates.

B. The Decision Below Will Undermine the Ongoing Political Process

For decades, the legislative and executive branches have struggled with global climate change. *See Massachusetts*, 549 U.S. at 507-09 (recounting prior legislation and treaties); Pet.App.145a-58a. They have long recognized that controlling greenhouse gas emissions involves a complex interrelation of environmental, economic and geo-political issues requiring a comprehensive, coordinated approach.[10] To

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[7] *See*, *e.g.*, Houser, *supra* at 12; Robert Stavins, *Addressing climate change with a comprehensive US cap-and-trade system*, 24 Oxford Review of Econ. Pol'y 298, 312-14 (2008).

[8] Stavins, *supra*, at 313.

[9] *See* Houser, *supra*, at 12 (predicting 479,000 lost jobs from 2011-20).

[10] *See*, *e.g.*, 42 U.S.C. §13381 (directing study of the "economic, energy, social, environmental, and competitive implications, including implications for jobs"); U.N. Framework Convention on Climate Change, prmbl. at 1 (1992) ("[T]he global nature of climate

date, statutes and treaties have focused primarily on research and reporting requirements, and the U.S. has not adopted any sweeping international agreements to limit greenhouse gas emissions. *See Massachusetts*, 549 U.S. at 507-09; Pet.App.145a-58a.

In *Massachusetts*, this Court recognized that the politically accountable branches must take the lead on regulating global climate change because the courts have "neither the expertise nor the authority to evaluate" the myriad policy judgments. 549 U.S. at 533. And that decision has spurred the delicate political dialogue that is ongoing. This Court should rein in, sooner rather than later, lower courts that seek to hijack and preempt this active process by inventing new common law claims.

The business community has ordered its affairs on the reasonable assumption that it will continue to be an important stakeholder with a voice in the ongoing democratic process, as the elected branches seek equitable and effective solutions. The court of appeals' decision threatens to eliminate that opportunity for debate, subvert the democratic process, and impose piecemeal court-ordered mandates in lieu of balanced, comprehensive legislative solutions. American businesses will not be the only losers. The nation's effort to address global climate change will suffer too.

It may be that this Court would agree with the Second Circuit that this new breed of litigation is appropriate and consistent with the fundamental limits on the exercise of judicial power (although, as explained next, such a ruling would be unprecedented).

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change calls for the widest possible cooperation by all countries ….").

But the last thing that should happen is for this Court to deny review in this case and allow this decision and the others that will inevitably follow to inflict untold damage on the U.S. economy and efforts of the political branches to fashion a comprehensive response to global climate change—only to grant review in another case years from now and hold that this litigation was constitutionally unfounded all along.

II. REVIEW IS WARRANTED TO DETERMINE WHETHER SEPARATION OF POWERS PRINCIPLES BAR PLAINTIFFS' GLOBAL WARMING SUIT

A. Plaintiffs Have Not Stated a Claim Under Federal Common Law

This Court has long understood that creating federal common law raises fundamental separation of powers concerns. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (refusing to fashion federal criminal common law). And, it is "needless to state that we are not in the free-wheeling days ante-dating *Erie R. Co. v. Tompkins*." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). In the modern era, this Court has "sworn off the habit of venturing beyond Congress's intent," *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), and stressed that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). Even in new situations that are arguably analogous to established common law actions, this Court has made clear that federal courts do not have unchecked "freedom to create new common-law liabilities." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 313 (1947). It has cautioned the courts to be particularly hesitant

where judicial standards "would be endlessly knotty to work out" and liability is more properly addressed "through legislation," *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

In limited instances, primarily early in the last century, this Court recognized that states can bring "simple type" public nuisance federal common law claims to enjoin interstate environmental harms. *See, e.g.*, *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923). Plaintiffs insist—and the Second Circuit agreed—that their nuisance suits fits comfortably within that paradigm. Compl. ¶¶152-64; Pet.App.78a-95a. But the "simple type" public nuisance actions previously recognized by this Court, which are among the "'few and restricted'" instances in which this Court has recognized any federal common law cause of action,[11] do not support the Second Circuit's decision.

Plaintiffs' suit bears no resemblance to those traditional nuisance actions—each of which involved allegations that a discrete set of defendants directly caused harm with obviously toxic or dangerous substances in a geographically definable area, *e.g.*, *Missouri v. Illinois*, 200 U.S. 496 (1906) (Chicago sewage harmed cities along Mississippi river)—and permitting it to advance would extend the federal courts' common law-making power far beyond the limited authority this Court has previously recognized. Plaintiffs' claims implicate non-toxic substances emitted by billions of sources worldwide over "several centuries," Compl. ¶87, caused by everyone in every corner of the globe and—if plaintiffs' claims are to be

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[11] *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citation omitted).

believed—causing generalized harms worldwide. As Professor Tribe has explained, "[u]nlike traditional pollution cases, where discrete lines of causation can be drawn from individual polluters to their individual victims," climate change suits describe a "non-linear, collective impact of millions of fungible, climactically indistinguishable, and geographically dispersed emitters." *See* Laurence H. Tribe *et al.*, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 15 (Washington Legal Found. Critical Legal Issues Series, Working Paper No. 169, 2010).

Far from the historically modest application of existing tort principles to a discrete nuisance, plaintiffs advance claims that are "unprecedentedly broad" (TVA Br. 11) and seek to have the courts dictate the substance and implementation of federal climate change policy—with profound and inevitable effects on American businesses, jobs, and individuals. Indeed, because everyone still breathing on the planet contributes to greenhouse gas emissions, if plaintiffs' claims are permitted to go forward, all businesses—and, indeed, all individuals—will, overnight, become subject to unpredictable and open-ended *joint-and-several* liability. Such an extraordinary broad assertion of common law liability is unheard of.

The "exercise of judicial power" to expand "traditionally established" causes of action to the novel and pervasive problem of global climate change would impermissibly "intrud[e] within a field properly within Congress' control." *See Standard Oil*, 332 U.S. at 311-17 (refusing government's request to impose federal common law tort liability on defendant for loss of a services of injured soldier); *Texas Indus.*, 451 U.S. at

638-47 (refusing to create federal common law cause of action for contribution from antitrust conspirators, where sheer "range of factors to be weighed" in deciding whether to create such an action "demonstrate[d] the inappropriateness of judicial resolution"). "Whatever the merits of the policy" advocated by the plaintiffs in this case, "its conversion into law is a proper subject for congressional action, not for any creative power of [the courts]." *Standard Oil*, 332 U.S. at 314.

As this Court has explained, "[t]he enactment of a federal rule in an area of national concern … is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981) ("*Milwaukee II*"). That principle should doom this "nuisance" suit: If ever there were an area "better left to legislative judgment," this is it.[12]

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[12] The Second Circuit also held that, notwithstanding *Massachusetts*, the CAA does not displace federal common law nuisance claims. Pet.App.137a-44a. The Chamber does not believe that *Massachusetts* permits EPA to "shoehorn greenhouse gas emissions controls into the existing [CAA]," for doing so would lead to "absurd" results, as EPA itself has elsewhere acknowledged. *See* Petition for Reconsideration, No. EPA-HQ-OAR-2009-0171, at 3, 10-19 (Mar. 15, 2010), *denied*, 75 Fed. Reg. 49,556 (Aug. 13, 2010), *pet. for review pending*, No. 10-1235 (D.C. Cir. Aug. 13, 2010). EPA's ill-considered decision, manifested in a series of interrelated rulemakings, to invoke the blunt instrument of the CAA to regulate the complex problem of climate change is subject to an ongoing array of litigation brought by states, industry and public interest organizations. In light of those substantial challenges, this Court should decide the antecedent question whether federal common law can even accommodate a public nuisance tort of the nature suggested by plaintiffs in this

B. Plaintiffs' Suit Raises Non-Justiciable Political Questions

Consistent with the Framers' tripartite scheme, courts have no authority to decide questions that are "in their nature political." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Article III does not authorize "*whatever* judges choose to do" but, instead, the "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). Under the familiar *Baker* framework, when a case presents no judicially manageable standards by which a court (or jury) can make a rational decision or requires an initial policy judgment (*Baker* factors 2 and 3), it must be left to the elected branches. *Baker v. Carr*, 369 U.S. 186, 210-11, 217 (1962). The political question doctrine also bars adjudication where there is a textual commitment to another branch, a danger of disrespect to other branches, a need to adhere to a political decision already made, or the potential for embarrassing other branches (*Baker* factors 1 and 4-6). *Id.*

In this case, the Second Circuit recognized a new and categorical exception to those established principles. According to the Second Circuit, "where a case 'appears to be an ordinary tort suit,'" there is no political question bar. Pet.App.38a (citation omitted); *see* Pet.App.27a-41a. That approach cannot be squared with the careful, "case-by-case inquiry" that this Court

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case before considering whether displacement of such federal common law has in fact occurred. However, if the CAA did give EPA such authority, the Chamber agrees with petitioners and the TVA that the common law claims presented here would be displaced under *Milwaukee II* and its progeny. Pet. 20-24; TVA Br. 22-32.

requires (and that other lower courts have undertaken) to determine whether the question posed "lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

This Court and the lower courts have repeatedly refused to adjudicate political questions even when arising in the context of private litigants' common law and tort actions. *See, e.g.*, *Luther v. Borden*, 48 U.S. (7 How.) 1, 39-40 (1849) (trespass); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc) (defamation); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-84 (9th Cir. 2007) (public nuisance and wrongful death). This Court thus emphasized in *Baker* that the political question doctrine applies "even in private litigation which directly implicates no feature of separation of powers" and "though in form simply [a common law] action." 369 U.S. at 214, 218. Accordingly, a plaintiff cannot "clear the political question bar" simply by "'recasting'" a claim "'in tort terms.'" *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 843 (citation omitted).

Here, plaintiffs' "nuisance" claims present no judicially manageable standards and their resolution requires myriad initial policy determinations reserved to the political branches. In *Massachusetts*, this Court found no political question in assessing "the proper construction of a congressional statute," 549 U.S. at 516, but there is no such legislative guidance here. And contrary to the Second Circuit's suggestion, this case cannot be adjudicated under the "well-settled tort rules" found in prior nuisance cases and the Restatement (Second) of Torts, Pet.App.27a-35a, because neither source provides the necessary judicially manageable standards or obviates the need for an initial policy determination.

As this Court has explained, public nuisance law "ordinarily entails" analysis of, among other things, the "degree of harm" posed by the activities, the "social value" of the activities, and their "suitability to the locality in question." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030-31 (1992) (addressing state law). In traditional tort cases, however, these are merely *incremental* determinations of policy, which courts appropriately make against a backdrop of well-established common law, without trespass on the political domain. But in this case the policy decisions necessary to resolve plaintiffs' claims are not incremental in nature. In the guise of a routine nuisance action, plaintiffs ask a single district court to balance the myriad environmental, economic, and geopolitical factors implicated by global climate change and make from whole cloth policy decisions that continue to be the subject of intense political debate within our political branches and with other nations through international diplomatic channels.

The Second Circuit characterized this as a "discrete domestic nuisance" case that does not require a court to fashion "across-the-board" domestic or international emissions limits or a "comprehensive and far-reaching solution to global climate change." Pet.App.25a-26a. But there is nothing remotely "discrete" about a nuisance action that tries to tackle the phenomenon of *global* climate change, and given the global nature of greenhouse gases, the imposition of caps on any given enterprise (or handful of enterprises) is necessarily arbitrary.

Such an inquiry must also balance all relevant interests—weighing potential benefits of reduced emissions (even as other developing countries increase

greenhouse gas emissions) against the profound impact on local economic growth and energy costs; ascertaining the availability of alternative fuel sources or new technologies to reduce emissions; and so on. "It is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change." Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

Because, as alleged, *every* enterprise—indeed *every person*—worldwide over the last several centuries is to some degree complicit in greenhouse gas emissions, this line-drawing is not just "difficult" for a court.[13] The initial policy judgment about who should bear the cost of the harm is so intimately entwined with every sector of the economy and every facet of daily life that it is unquestionably "'a matter of high policy'" that must be "'resol[ved] within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.'" *Texas Indus.*, 451 U.S. at 647 (citation omitted). Crafting solutions to greenhouse gas emissions is "so plainly immune to coherent judicial management as to be implicitly entrusted to political processes." Tribe, *supra*, at 24. Courts are "institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope." *Id.* at 21.

For precisely these reasons, every district court to consider common law claims seeking redress for global

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[13] Plaintiffs collectively are complicit in more than the 650 million tons attributed to the defendants. *Compare* EPA, *CO_2 Emissions from Fossil Fuel Combustion, 1990-2007*, *with* Compl. ¶2.

warming has found them to raise political questions beyond judicial purview. *See supra* note 3. The unanimity of trial judges on this point is telling, as they are on the front lines and must deal first-hand with the limits of judicial competence to manage such actions. Although two appellate panels have now disagreed,[14] those courts, with their "quixotic and unyielding faith in nuisance doctrine, … manifestly los[t] their way in the … real thicket of political question doctrine." Tribe, *supra*, at 17, 24. This Court should grant review and guide the courts along the rightful path.

The brief filed by the Acting Solicitor General supports this conclusion. In arguing that the decision below should be vacated, the government specifically emphasizes the "lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made" to adjudicate plaintiffs' nuisance claims on the way to arguing that plaintiffs' claims "are quintessentially fit for political or regulatory—not judicial—resolution." TVA Br. 13, 17. The Acting Solicitor General makes those points in arguing lack of "prudential standing," but the same considerations compel the conclusion that this case should be dismissed under the political question doctrine. Changing the label does not change the result—or the need for this Court's review.[15]

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[14] *See* Pet.App.1a; *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049, 1055 (5th Cir. 2010) (en banc).

[15] The Chamber agrees with the TVA that "prudential standing" is lacking as well. But a remand for the court of appeals to consider that issue seems pointless. Because the "prudential standing" doctrine is motivated by the same considerations as the political question doctrine, it is difficult to see how the court of

C. Plaintiffs Lack Standing

Article III's limitation to cases and controversies "is crucial in maintaining the 'tripartite allocation of power' set forth in the Constitution" and ensures that the judiciary "respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp.*, 547 U.S. at 341 (citations omitted). Thus, this Court has long held that to establish standing plaintiffs must show they have suffered an injury-in-fact, caused by defendants' conduct and likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The Second Circuit fundamentally erred in finding standing because the nature of global climate change prevents plaintiffs from demonstrating either causation or redressability. As plaintiffs acknowledge, greenhouse gasses are undifferentiated, for they "rapidly mix in the atmosphere" and inevitably merge with emissions from the rest of the world. Compl. ¶155. Thus, plaintiffs' alleged injuries are neither fairly traceable to these particular defendants (as opposed to third parties not before the court) nor likely to be redressed by capping their emissions. Although the interrelated requirements of causation and redressability are both lacking, *amicus* focuses here on the latter.

The Second Circuit reached its errant conclusion based on *Massachusetts*. But *Massachusetts* is

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appeals could come out differently on prudential standing given what it has already said in rejecting petitioners' political question argument. In any event, as the TVA acknowledges (Br. 22), this Court may address the prudential standing argument in reviewing the judgment below.

distinguishable in two critical respects. *First*, *Massachusetts* involved standing to enforce a *congressionally-conferred procedural* right. 549 U.S. at 516-20. This Court emphasized that Congress "'has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before'" and that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' … 'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)), 517-18. *Second*, Congress had "authorized [that] type of challenge *to EPA action*." *Id.* at 516 (emphasis added). The Court explained that agencies implement regulatory schemes incrementally, "whittl[ing] away" at the underlying problem over time, such that the procedural relief at issue (requiring EPA to reconsider its refusal to regulate) might well trigger systemic, nationwide regulation to address the asserted underlying injuries. *Id.* at 524.

Those considerations do not support standing here. Plaintiffs invoke no congressionally-conferred procedural right and the redress they seek is not connected to any future agency action. Instead, they ask the courts to fashion and enforce an abstract common law nuisance action, and then assume judicial responsibility for redressing the alleged nuisance without any involvement of the political branches.

Contrary to the Second Circuit's opinion, plaintiffs cannot establish that it is "'likely,' as opposed to merely 'speculative,'" that a favorable decision will redress their alleged injuries, *Lujan*, 504 U.S. at 561 (citation omitted), for at least two reasons.

First, any marginal relief plaintiffs hope to gain by an injunction is purely "speculative" because it is based on conjecture about energy markets and the decisions of innumerable third parties. In particular, capping the emissions of these particular defendants is "as likely to exacerbate as to ameliorate" the allegedly injurious effects of climate change as corporations shift operations elsewhere to avoid regulation and access more favorable fuel prices. Tribe, *supra*, at 17. Redressability has been found lacking in far less speculative scenarios. *See, e.g.*, *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (plurality) (Kennedy, J.) (redress was "pure speculation" where taxpayers challenged law allegedly depriving State of educational funds because State might shift funds rather than pass savings along to constituents).

Second, even if capping these defendants' emissions would incrementally reduce global emissions, there is no reasonable possibility that the change would perceptibly diminish plaintiffs' alleged injuries. *See* Tribe, *supra*, at 19 ("[A] stringent injunction will have no statistically significant impact on global temperatures ….") After all, defendants' carbon emissions only constitute roughly one percent of worldwide emissions—and *falling* due to the accelerating increases in the developing world.[16]

Plaintiffs' standing is based on the notion that *every* reduction in emissions (no matter how slight) marginally "reduces the risks of injury." Compl. ¶4. But Article III requires more than conjecture and statistically insignificant generalities. *See, e.g.*, *Lujan*,

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[16] *See* Compl. ¶2; I.P.C.C., *2007 Synthesis Report* 16; Energy Information Administration, U.S. Department of Energy, *International Energy Outlook 2009*, at 109–11 (May 2009).

504 U.S. at 571 (plurality) (redressability lacking where cutting 10% of funding for allegedly harm-producing development project would not necessarily "do less harm to [endangered] species"); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 186-87 (2000) (deterrent value of fines for excessive discharge of extremely toxic chemicals could at some point become so insignificant that they cease to provide "sufficient deterrence to support redressability"). Of course, on the margin, every molecule of CO_2 eliminated *theoretically* slows the centuries-long cumulative effects of CO_2, but if that were enough to establish redressability, plaintiffs could "wield the hammer of federal common law against any emitter of their choosing," regardless of how trivial its emissions. Tribe, *supra*, at 16. Taken to its logical conclusion, this would permit suit to remove a single car from the road or turn off a lone light bulb.

If the traditional redressability inquiry means anything, it cannot be satisfied simply by seeking *any* amount of reduction in defendants' emissions—no matter how small relative to worldwide emissions and regardless of offsets by predictable shifts to non-capped energy sources. As this Court has repeatedly stressed, "[s]tanding is not 'an ingenious academic exercise in the conceivable.'" *Lujan*, 504 U.S. at 566 (citation omitted). Plaintiffs here have not shown that relief is remotely "likely." And the absence of likely redressability—and thus Article III standing—underscores that the courts are an inappropriate forum to address the extraordinarily complex and manifestly global and political issues raised by climate change.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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