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 FOR THE PETITIONERS

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QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially-determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

PARTIES TO THE PROCEEDINGS

Defendant-appellees below were American Electric Power Company, Inc.; American Electric Power Service Corporation; Cinergy Corporation (merged into Duke Energy Corporation); Southern Company; Xcel Energy Inc.; and the Tennessee Valley Authority.

Plaintiff-appellants below were State of Connecticut; State of New York; People of the State of California; State of Iowa; State of New Jersey; State of Rhode Island; State of Vermont; State of Wisconsin; City of New York; Open Space Institute, Inc.; Open Space Conservancy, Inc.; and Audubon Society of New Hampshire.

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The Second Circuit's opinion is reported at 582 F.3d 309, and reproduced at Petition Appendix ("Pet. App.") 1a-170a. The Second Circuit's orders denying rehearing or rehearing en banc are reproduced at Pet. App. 188a-191a. The opinion of the United States District Court for the Southern District of New York is published at 406 F. Supp. 2d 265, and reproduced at Pet. App. 171a-187a.

JURISDICTION

The court of appeals entered judgment on September 21, 2009, Pet. App. 1a, and denied timely petitions for rehearing or rehearing en banc on March 5 and 10, 2010, *id.* at 188a-191a. On June 28, 2010, Justice Ginsburg granted an extension of the time for filing a petition for writ of certiorari to and including August 2, 2010. The petition was filed on August 2, 2010, and granted on December 6, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution provides, in pertinent part, that "[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority … [and] to Controversies … between a State and Citizens of another State [or] between Citizens of different States." U.S. Const. art. III, § 2, cl. 1.

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401, 7409, 7411, 7413, 7475, 7477, 7502, 7521,

7601, 7602, 7604, 7607, 7661-7661d, are reproduced at Pet. App. 192a-214a and at Add-13 to Add-72 of the addendum to this brief. Relevant provisions of the 1970 version of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151, 1160, are reproduced at Add-1 to Add-13 of the addendum.

INTRODUCTION

The Second Circuit in this case held that there exists a federal common law nuisance cause of action for contributing to climate change. Such a claim could be pursued by anyone who claims to be affected by climate change against any source of greenhouse gas emissions. It would empower courts to determine the "reasonable" level of global greenhouse gas emissions, allocate them among economic sectors, and order individual actors to conform their emissions to the court's judgments. These lawsuits would thus allow federal judges, acting without statutory authority or guidance, to adjudicate competing claims about appropriate global, national, and industry-wide emission levels by making policy decisions and tradeoffs that the Constitution commits to the political branches and over which Congress by statute has delegated significant authority to the Environmental Protection Agency (EPA).

Greenhouse gas regulation and climate change are issues of exceptional complexity and extraordinary importance to the Nation, implicating fundamental economic and security concerns and affecting every sector and industry—and every individual—in the country. These issues are wholly inappropriate for resolution by "an unelected, unrepresentative judiciary," *Allen* v. *Wright*, 468 U.S. 737, 750 (1984), under the "vague and indeterminate nuisance concepts" of the common law, *City of Milwaukee* v.

Illinois, 451 U.S. 304, 317 (1981) (*Milwaukee II*). The judgment of the Second Circuit should be reversed.

STATEMENT OF THE CASE

This is one of several climate change tort lawsuits that have been brought in federal courts across the country. These common law actions seek to restrict the greenhouse gas emissions of certain enterprises or to impose monetary liability on those entities as remedies for claimed effects of global warming. In each case, a district court dismissed the claims as presenting non-justiciable political questions and sometimes for lack of standing, based on the inherent unsuitability of a common law approach to issues of such socioeconomic complexity and sensitivity as greenhouse gas regulation and climate change.[1]

1. The claims in this case are based on specific current and future effects alleged to be the result of centuries of accumulation in the atmosphere of greenhouse gases which "trap[ ] solar energy and retard[ ] the escape of reflected heat." *Massachusetts* v. *EPA*, 549 U.S. 497, 505 (2007); see also, *e.g.*, Nat'l Research Council, *Climate Change Science* 1-10 (2001). The phrase "greenhouse gases" refers to a broad group of substances present in the atmosphere, including both man-made chemicals like chloro-fluorocarbons and many naturally occurring

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[1] Pet. App. 187a; *California* v. *Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009); *Comer* v. *Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011); *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

substances. Nat'l Research Council, *supra*, at 1-10. The most pervasive greenhouse gas emitted by anthropogenic activities is carbon dioxide. *Id.* at 9-10.

Greenhouse gases are emitted by a wider variety of sources than any other "air pollutant." *Id.*; see 73 Fed. Reg. 44354, 44402-03 (July 30, 2008). These sources include nearly every utility, factory, and motor vehicle in the United States, and virtually every home, office building, and farm. Nat'l Research Council, *supra*, at 1-10. For this reason, regulating greenhouse gas emissions presents a particularly complex, difficult, and consequential regulatory challenge. *Id.* This is especially true for the regulation of emissions from the combustion of fossil fuels. Because more than 80% of electricity in the United States is generated from fossil fuels, see U.S. Energy Info. Admin., *Annual Energy Review 2009*, at 9 tbl. 1.3 (Aug. 2010), any such regulation carries potentially massive and cascading consequences for the economic productivity and security of the Nation.

Predicting the long- and short-term effects of greenhouse gas regulation on global climate change is, moreover, extremely complex. Nat'l Research Council, *supra*, at 9-10. Greenhouse gases are unique in that they are both well-mixed and long-lived in the atmosphere, so that concentrations of greenhouse gases at a given time are determined by the emissions of all greenhouse gas sources worldwide over centuries, rather than by emissions from local, contemporaneous sources. See 75 Fed. Reg. 31514, 31529 (June 3, 2010). This means that, unlike regulation of most other pollutants, regulation of greenhouse gas emissions in one area or Nation or from one source or set of sources has no effect on greenhouse gas levels that is specific to that area or

Nation, and may even have no effect on global greenhouse gas levels because other sources (including those in other countries) may increase their own emissions. *Id.*; see also, *e.g.*, *North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291, 302 (4th Cir. 2010).

2. The enormous complexities of these issues, both scientific and socioeconomic, are reflected in legislative and executive efforts regarding climate change in the United States. Those measures implement and rely on interagency collaboration and research to develop a gradual but comprehensive system of domestic greenhouse gas emissions standards, through statutes and regulations, while also seeking to negotiate a worldwide approach.

a. As early as 1978, Congress established a "national climate program," with the purpose of improving understanding of global climate change through research and international cooperation. National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601. Through the 1980s and 1990s, Congress enacted a series of statutes mandating further study of the impact of greenhouse gases and trends in climate change, Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, § 1601, 106 Stat. 2776, 2999; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; Energy Security Act of 1980, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75, and directing executive officials to coordinate international negotiations concerning global climate change, Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat. 1407. In the Energy Independence and Security Act of 2007, Congress established nationwide greenhouse gas reduction targets to be satisfied through modified biofuel production methods, as implemented by EPA. Pub.

L. No. 110-140, 121 Stat. 1492. In 2008, Congress formally directed EPA to "develop and publish a … rule … to require mandatory reporting of [greenhouse gas] emissions above appropriate thresholds in all sectors of the economy of the United States." Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2128.

Recently, EPA has been pursuing greenhouse gas regulation under the Clean Air Act. First passed by Congress in 1963, and amended several times thereafter,[2] the Act is "a lengthy, detailed, technical, complex, and comprehensive response" to air pollution in the United States. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848 (1984). The Act governs the regulation of "air pollutants," defined broadly to encompass "any physical, chemical, [or] biological … substance … [which] enters the ambient air." 42 U.S.C. § 7602(g). In *Massachusetts*, this Court held that greenhouse gases, including carbon dioxide, qualify as "air pollutants" under the Act. 549 U.S. at 528-29, 532.

Three parts of the Act—Titles I, II, and V—are particularly relevant for these purposes. Title I addresses the regulation of emissions of air pollutants from stationary sources. For any category of stationary sources that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," EPA issues a "standard of performance" requiring "the degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a), (b). EPA may then,

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[2] Pub. L. No. 88-206, 77 Stat. 392 (1963); Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2399 (1990).

in appropriate circumstances, require States to submit plans to control designated pollutants at existing facilities in light of those standards. *Id.* § 7411(d).

Title II of the Act addresses the regulation of mobile sources of air pollutants. It requires EPA to determine whether emissions of a pollutant from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7521(a)(1). If EPA makes an affirmative "endangerment" determination, it prescribes standards controlling these emissions. *Id.*

Title V sets forth permit requirements for operating major sources of air pollutants. It requires States to administer a comprehensive permit program for sources emitting air pollutants, as necessary to satisfy applicable requirements for each source under the Act. *Id.* § 7661c; see also *id.* § 7661a. Permits must indicate how much of which regulated air pollutants a source is allowed to emit, and the standards to which it is subject. *Id.* A source must prepare a compliance plan and certify compliance with applicable requirements, *id.* § 7661b; and state authorities must notify contiguous and other nearby States of permit applications that may affect them, *id.* § 7661d(a)(2). Affected States and others may petition EPA to object to a permit application, a step that may lead to EPA rejection of the permit. *Id.* § 7661d(b)(2). Denial of such a petition is subject to review in federal court. *Id.* § 7607(b).

In recent years, and continuing to this day, Congress has considered additional greenhouse gas legislation. The House of Representatives passed greenhouse gas "cap-and-trade" legislation in 2009, see H.R. 2454, 111th Cong. (2009), but the Senate did

not vote upon the measure. Most recently, several bills have been offered that would modify EPA's authority to regulate greenhouse gases. *E.g.*, S. 3072, 111th Cong. (2010). None of these proposals has been adopted.

b. Over the last two years, and in response to this Court's decision in *Massachusetts*, EPA has issued a series of findings and rules regarding greenhouse gas emissions.

EPA formally found in 2009 that greenhouse gas emissions from new motor vehicles contribute to air pollution that "endangers" public health and welfare and should be regulated under the Clean Air Act. 74 Fed. Reg. 66496 (Dec. 15, 2009). It issued a final rule establishing greenhouse gas emissions standards for certain model-year light-duty motor vehicles. 75 Fed. Reg. 25324 (May 7, 2010). Since then, EPA also has proposed greenhouse gas emissions standards for certain heavy-duty vehicles, 75 Fed. Reg. 74152 (proposed Nov. 30, 2010), and announced its intent to issue further, more stringent standards for other model-year light-duty vehicles, 75 Fed. Reg. 62739 (Oct. 13, 2010).

Shortly after finalizing the motor vehicle standards, EPA issued rules addressing greenhouse gas emissions by new or modified major stationary sources. 75 Fed. Reg. 31514. Those rules would potentially impose new Clean Air Act obligations on millions of sources throughout the United States, including facilities operated by these defendants; however, in recognition of the massive economic impact of such action, EPA included "tailoring" provisions intended to "phase-in" the regulatory scheme over five years. *Id.* These provisions define the "greenhouse gases" that are regulated in terms of the quantities emitted or increased by a source, and

in their initial phases apply to certain sources already subject to permitting requirements and, later, those emitting threshold quantities of greenhouse gases (generally, at least 75,000 or 100,000 tons per year of "carbon dioxide equivalent," reflecting adjustments accounting for the "global warming potential" of the particular greenhouse gas). *Id.* Regulated sources are required to obtain construction and operating permits from EPA or the appropriate state authority and otherwise to comply with relevant emissions restrictions. *Id.* EPA expects to propose, by July 2011, additional performance standards and guidelines for greenhouse gas emissions from new, modified, and existing electric utility facilities, including those operated by defendants, and to take final action by May 2012 on the proposed standards and guidelines. 75 Fed. Reg. 82392 (Dec. 30, 2010) (announcing proposed settlement agreement, addressing greenhouse gas emissions standards for certain electric generating facilities); see also 75 Fed. Reg. 82390 (Dec. 30, 2010) (announcing proposed settlement agreement addressing refineries).

c. In addition to these domestic measures, the United States has pursued international negotiations to address a worldwide approach to greenhouse gas emissions and climate change. The United States is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC), *adopted* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38, which established a multinational coalition to develop a coordinated approach to these issues. In 1997, member nations negotiated the Kyoto Protocol, *adopted* Dec. 11, 1997, 37 I.L.M. 22, which called for mandatory reductions in greenhouse gas emissions by developed nations. The protocol was

not, however, formally joined by the United States. See S. Res. 98, 105th Cong. (1997).

More recently, as a result of meetings in Copenhagen in 2009, the United States pledged to cut nationwide greenhouse gas emissions by 17 percent from 2005 levels by the year 2020. Letter from Todd Stern, U.S. Special Envoy for Climate Change, to UNFCCC (Jan. 28, 2010). Additional negotiations were held in December 2010 in Cancún, Mexico, and more talks are scheduled for the coming year in Durban, South Africa. John M. Broder, *Climate Talks End With Modest Deal on Emissions*, N.Y. Times, Dec. 12, 2010.

3. The complaints in this case were not filed pursuant to the Clean Air Act, or any other statute or regulation. J.A. 103-05, 145-47. Rather, they seek to impose emissions reductions on these defendants—which own and operate facilities that are among those subject to EPA's greenhouse gas regulations—based on claims that would be created and adjudicated under federal common law. *Id.*

Eight States, three nonprofit land trusts, and a municipality brought these complaints, seeking to hold these defendants "jointly and severally liable for … global warming." *Id.* at 56-59, 117-19. The complaints allege that defendants operate facilities that emit carbon dioxide, which contributes to elevated atmospheric levels of greenhouse gases, which in turn contribute to climate change, which in turn contributes to a wide range of alleged future risks, including "increases in respiratory problems," "more droughts and floods," "wildfires," and "widespread loss of species and biodiversity." *Id.* at 57-58, 99-100. The pleadings describe climate change as a "public nuisance," purportedly actionable under federal common law, and demand an order "enjoining

each of the defendants to … cap[ ] its emissions of carbon dioxide and … reduc[e] those emissions by a specified percentage each year for at least a decade." *Id.* at 59, 110, 153.

The district court dismissed the claims as presenting non-justiciable political questions. Pet. App. 187a. It reasoned that a court could not resolve the claims without first determining an acceptable global level of greenhouse gas emissions and then determining which particular sectors and industries, and which individual entities within those sectors and industries, should be held responsible for reducing their emissions and by what amounts to achieve that acceptable global level. *Id.* at 183a-185a. These decisions, the district court found, necessarily involve a number of "policy determination[s]" of the type properly reserved for Congress, including "the implications of [emissions reductions] on the United States' ongoing negotiations with other nations concerning global climate change [and] on the United States' energy sufficiency and thus its national security." *Id.* In light of this conclusion, the district court found it unnecessary to address whether plaintiffs had standing or whether federal common law provided a valid basis for their claims. *Id.* at 180a n.6, 187a.

The Second Circuit reversed. *Id.* at 3a. It held that a cause of action for the alleged "nuisance" of climate change could be implied under federal common law, in light of the interstate nature of greenhouse gas emissions and climate change, and that the Clean Air Act did not displace that cause of action because EPA had not (at the time of the Second Circuit's decision) yet exercised authority under the Act to regulate greenhouse gas emissions. *Id.* at 88a. The panel further held that courts could rely on the

"reasonableness" standard of the Restatement (Second) of Torts to adjudicate the claims and that, because the case involved only "six domestic coal-fired electricity plants,"[3] judges would not have to address the broader "policy" issues identified by the district court. *Id.* at 26a, 34a, 119a. Finally, addressing standing, the panel found the allegation that these defendants "contribute" to climate change was adequate to satisfy constitutional requirements. *Id.* at 67a-73a.

The Second Circuit denied timely petitions for rehearing or rehearing en banc. *Id.* at 188a-191a.

SUMMARY OF ARGUMENT

The judgment below, which allows plaintiffs to pursue a federal common law nuisance action against defendants based on their alleged contribution to climate change, transgresses constitutionally and prudentially imposed limits on federal judicial power long recognized and enforced by this Court.

First, plaintiffs lack standing to bring these claims. To establish standing under Article III, a plaintiff must plead facts showing that the alleged harm is both "fairly traceable" to the challenged conduct and "redressable" by the remedy sought. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Neither the specific harms alleged nor climate change generally, however, is traceable to these defendants. According to plaintiffs' own allegations, climate change instead results from greenhouse gas emissions from billions of independent actors over centuries—emissions that have mixed in undiffer-

[3] In fact, the complaints identify dozens of facilities owned or operated by these defendants in more than 20 States. J.A. 105-10, 148-53.

entiated fashion in the atmosphere to gradually increase average global temperatures. See J.A. 79-84, 134-36. Nor would plaintiffs' alleged injuries be redressed by the imposition of emissions caps on these five defendants. Plaintiffs ask that the court impose emissions limits that would achieve defendants' "*share* of the … reductions necessary to significantly slow the rate and magnitude of warming." *Id.* at 102 (emphasis added). As their formulation of the requested relief makes plain, they do not and cannot show that their "remedy" alone would have any effect on climate change, let alone on their risk of injury.

Relying on this Court's decision in *Massachusetts*, the Second Circuit held that the allegation that these defendants "contribute[d]" to climate change through their emissions is sufficient to establish both that defendants' emissions caused the harms asserted and that reducing defendants' share of emissions will redress plaintiffs' injuries. Pet. App. 67a-73a. But, in *Massachusetts*, this Court considered whether the petitioner had standing to pursue a *statutory* cause of action enacted by Congress, not a common law nuisance claim. 549 U.S. at 516. That distinction is "of critical importance" to the standing inquiry. *Id.* This Court found that Congress's decision to create a specific legal right allowed a relaxed causation and redressability analysis for standing to enforce that right. Plaintiffs here do not invoke any statutory right. They seek a tort remedy against private defendants for particular harms, and thus this Court's decision in *Massachusetts* provides no support for the Second Circuit's holding. Plaintiffs must instead satisfy traditional causation and redress-ability requirements. Their allegations are plainly insufficient to do so.

Plaintiffs' claims are also barred by prudential standing restrictions. Those limitations preclude courts from adjudicating "generalized grievances more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004). The chain of causation alleged here would allow suits by and against virtually any enterprise on the planet, based on virtually any injury resulting from climatological or meteorological events. The judiciary is ill-suited to that kind of inquiry unless and until Congress establishes statutory requirements reflecting the policy judgments on which it must be based.

Second, even if plaintiffs had standing, their federal common law nuisance claim for injuries alleged to result from climate change should be dismissed. Federal courts have the power to create federal common law causes of action only when they are authorized to do so by federal statute or required to do so by constitutional need. There is no basis for such an "unusual exercise of lawmaking by federal courts" here. *Milwaukee II*, 451 U.S. at 314. Plaintiffs' claims are not based on any statute, and they do not implicate any constitutional interest or necessity that might warrant such an extraordinary exercise of federal common lawmaking power. *Tex. Indus., Inc.* v. *Radcliff Mats., Inc.*, 451 U.S. 630, 641 (1981).

In fact, numerous considerations militate powerfully against the creation of a federal common law cause of action here. This case is unlike prior nuisance cases, involving delineated regions and discrete numbers of sources, that have come before this Court. *Infra* pp. 35, 38-39. A federal common law claim for contribution to climate change is a cause of action almost any person could pursue in any

court against any governmental or economic actor. *Infra* pp. 18-19. It would require judges to resolve fundamental questions of social and economic policy regarding the response to climate change. And, it would result in a patchwork of conflicting regulation of greenhouse gas emissions, undermining any federal interest in coordinated emissions standards.

Furthermore, even if these claims were theoretically cognizable under federal common law, they would be displaced by the Clean Air Act. When Congress "addresse[s] the problem" previously governed by federal common law, the need for federal common law in that area "disappears." *Milwaukee II,* 451 U.S. at 314-315. Congress here has directly "addressed the problem": The Clean Air Act, like the Clean Water Act, establishes a comprehensive scheme for the regulation of pollutants within its scope. *Massachusetts*, 549 U.S. at 528-29, 532. This Court has held that greenhouse gases are an "air pollutant" under the Act, see *id.*, and States and others may request EPA to consider emissions restrictions similar to those they seek from the court in this case, *id.* at 516, 527. Cf. *Milwaukee II*, 451 U.S. at 325 (describing comprehensive nature of the Clean Water Act, which displaced federal common law water pollution claims). Moreover, plaintiffs' claims are displaced whether or not EPA exercises its full regulatory authority under the Act. Where Congress has legislated on a subject and delegated authority to an agency, federal common law claims are displaced regardless of whether, when, or how the agency then exercises its authority. See *id.* at 324.

Third, plaintiffs' claims present non-justiciable political questions. To determine the "share" of global greenhouse gas emissions reductions for which these defendants should be responsible, as plaintiffs

request, J.A. 102, a court would be required to predict potential environmental benefits that might result from imposing caps globally; to compare the social and economic value of the services these defendants provide, as well as services provided by all the other pertinent industry sectors alleged to contribute to global climate change (including manufacturing, transportation, agriculture, petroleum, chemical, and many others); and then to determine the "reasonable" overall level of emissions and "reasonable" emissions-reduction burden to place on defendants' sector and each individual defendant. See Pet. App. 32a-35a (citing "reasonableness" standard of Restatement (Second) of Torts). These decisions involve predictive judgments about every sector of the national and international economies and policy tradeoffs that turn on how the public values different potential economic, social, and environmental risks and benefits. They are precisely the kinds of judgments that are reserved for the political branches. See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

The Second Circuit called this an "ordinary tort suit," Pet. App. 34a, but plainly it is not. It seeks to transfer to the judiciary standardless authority for some of the most important and sensitive economic, energy, and social policy issues presently before the country. The decision below should be reversed.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLIMATE CHANGE NUISANCE CLAIMS.

The doctrine of standing embraces "core" constitutional requirements, arising directly from Article III, as well as "prudential" considerations, "closely related to Art[icle] III concerns but

essentially matters of judicial self-governance." *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975); see also *Allen*, 468 U.S. at 750-52. Neither set of requirements is satisfied here.

A. These Claims Cannot Satisfy Core Constitutional Standing Requirements.

To satisfy the "irreducible constitutional minimum of standing," a plaintiff must plead facts showing an "injury in fact" that is "fairly traceable to the challenged action of the defendant" and "likely … redressable by a favorable decision." *Lujan*, 504 U.S. at 560-61 (alterations omitted). Plaintiffs in this case cannot meet that standard. The injuries alleged are not traceable, much less "fairly traceable," to these defendants, and would not be redressed by imposing emissions caps on them.

The Second Circuit's contrary theory of standing, under which any of the billions of entities that "contribute" greenhouse gases into the atmosphere could be named as defendants in this and similar lawsuits, does not satisfy constitutional causation and redressability requirements and would effectively eliminate those requirements for climate change tort claims. The decisions on which the Second Circuit relied for that theory, most notably *Massachusetts* v. *EPA*, involved suits brought pursuant to congressionally conferred rights of action that can "give rise to a case or controversy where none existed before," 549 U.S. at 516, and do not apply to these non-statutory claims.

1. Plaintiffs' Alleged Injuries Are Not Fairly Traceable To Defendants' Emissions.

The attenuated link that plaintiffs posit between these defendants' emissions and their alleged injuries

suffers from at least two related and fundamental deficiencies. *First,* the complaint fails to allege a plausible "causal connection" between the injuries and the challenged conduct. *Lujan*, 504 U.S. at 560-61; see *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 560 (2007). *Second*, the alleged causal chain impermissibly depends upon "the independent action[s] of … third part[ies] not before the court." *Bennett* v. *Spear*, 520 U.S. 154, 167-69 (1997).

a. The alleged chain of causation fails, first, to draw the necessary connection between the "injury to the complaining party" and "the putatively illegal action." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771-73 (2000); *Warth*, 422 U.S. at 499. The complaints assert that these defendants have contributed to climate change *generally* through their emissions, and that climate change contributes *generally* to increased risks of injuries. See J.A. 79-86, 134-39. But the pleadings never allege the requisite direct connection between these defendants' emissions and the individual risks to which plaintiffs are allegedly exposed.

To the contrary, plaintiffs' own allegations conclusively demonstrate that no such link could reasonably be drawn. The complaints trace climate change to greenhouse gas emissions from billions of sources worldwide over the last several centuries, *id.* at 82, 135, and identify as effects of climate change nearly *every* climatological and meteorological occurrence on the planet, including (among others) "sea-level rise," "the frequency of [damaging] storm[s]," and "an increased likelihood of drought," as well as "the decline of animal and plant populations." *Id.* at 84-102, 137-45. Under this theory, a storm in New York City in 2011 could be traced back to greenhouse gas emissions from a factory in China

that same year, or just as easily to emissions from a California farm in 1961. And those same emissions might later be re-traced forward to a flood in San Francisco in 2111, or to a loss of habitat in the Florida wetlands in 2061. See *id.* at 89, 143 ("Accelerated sea level rise caused by global warming will continue for hundreds of years."). Indeed, emissions from any single facility in the United States might be deemed the "cause" of any adverse climatological or meteorological event anywhere in the world over the next year, or anytime in the next hundred years.

In other words, taking the alleged chain of causation to its logical conclusion, any entity on the planet could sue any other for a risk or injury that could be tied to any natural force, so long as it is alleged to have been affected by global climate change. Responsibility for much of what would traditionally have been called "acts of God" could now be imposed on any entity in the world.

This is not a valid theory of standing. It is not enough for a plaintiff to allege that the defendant's conduct may generally contribute to a risk to "society" or to some group of parties of which the plaintiff is a part. *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 111-14 (1979); see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). Instead, a complaint must show an actual causal connection between the particular risk or injury to the plaintiff and the particular conduct of the defendant. *Allen*, 468 U.S. at 752, 755-56, 764-66; see *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615-16 (1989) (opinion of Kennedy, J.). Indeed, a central purpose of standing doctrine is to limit the number of potential plaintiffs and defendants for any given claim to those with a distinct interest in the subject matter at issue. See

Allen, 468 U.S. at 752, 755-56. The theory advanced by plaintiffs accomplishes the opposite: it allows suits by each against all, for any injury resulting from virtually any climate-related natural event.[4]

In nonetheless declining to dismiss the case for lack of standing, the court of appeals placed heavy emphasis on the fact that the case was "at the pleading stage." Pet. App. 42a-44a. With respect to causation, however, the pleadings in this case make only conclusory allegations that emissions from each of these defendants contribute to injuries from climate change. As this Court recently affirmed, such "conclusory" statements are insufficient. *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1950-51 (2009); *Twombly*, 550 U.S. at 560; see also, *e.g.*, *Warth*, 422 U.S. at 507. The pleadings must, instead, move the claims "across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1950-51. The allegations here fail to do so. They assert a link between greenhouse gas emissions and climate change generally, but they never allege facts that plausibly could explain how any particular defendant's emissions, as opposed to other emissions from countless other actors now and in the past, result in climate change. To go one step further, and suggest that emissions from one of these defendants are the "cause" of a particular risk attributed to

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[4] This case thus bears little resemblance to the tort "contribution" cases cited by the Second Circuit. Pet. App. 69a-70a. Those cases involved a limited, ascertainable set of contributing forces that combined at a point in time to produce a discrete effect. *See* Restatement (Second) of Torts §§ 432, 840E, 875. In such cases, the restricted group of relevant actors and direct link between contributing forces and discrete effect gave rise to a plausible inference that all might be "substantial factors" in causing the injury. *See id.*; *see also* Charles E. Carpenter, *Concurrent Causation*, 83 U. Pa. L. Rev. 941, 941-45 (1935).

climate change—for example, the risk of a heat-related death in Los Angeles in 2100, J.A. 87-88—is even more untenable.

b. The alleged chain of causation also fails because it depends "on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.), *quoted in Lujan*, 504 U.S. at 562. Climate change, according to the complaints, "already has begun" and is attributable to greenhouse gas emissions from billions of independent sources around the world over the course of centuries. J.A. 57, 79-84, 134-36. Plaintiffs further acknowledge that the injunctions they seek would merely "achieve [these defendants'] *share* of the … reductions necessary to significantly slow the rate and magnitude of warming." *Id.* at 102 (emphasis added).

The link alleged between climate change and these defendants' emissions is thus wholly insufficient. Climate change has commenced and will continue, according to the complaints, with or without these defendants' emissions. See *id.* at 57, 79-84, 134-36. And it will abate or slow, again according to the complaints, only if sources other than defendants simultaneously reduce their emissions—a possibility that is entirely speculative. *Id.* at 102. These defendants therefore cannot be said to "cause" climate change in any reasonable sense of the term, much less to "cause" the increased risks of injuries that plaintiffs allege will follow from climate change.

Plaintiffs' characterization of defendants as possible "contributors" to climate change, through their greenhouse gas emissions, does not establish causation for purposes of standing. In *Allen* v.

Wright, 468 U.S. 737 (1984), for example, parents of minority schoolchildren lacked standing to challenge IRS policy concerning tax exemptions to racially segregated private schools in part because, even if those exemptions might contribute to continued segregation in public schools, that injury ultimately resulted from the independent enrollment decisions of other parents. *Id.* at 757-59. In *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989), a teachers association lacked standing to challenge a state law that transferred leasing revenue from school trust funds to other parties because the trust funds were also subsidized by the State, and "the State might reduce its supplement … so that the [total] money available for schools would be unchanged." *Id.* at 614 (opinion of Kennedy, J.). And, in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), the Court dismissed for lack of standing a lawsuit in which the plaintiffs claimed to be injured by agencies' funding of projects that posed risks to endangered species when the agencies at issue "generally suppl[ied] only a fraction of the funding for [the] … project[s]" and "nothing … indicate[d] that the projects … will either be suspended, or do less harm to listed species, if that fraction is eliminated." *Id.* at 571 (plurality); see also *Allen*, 468 U.S. at 759 n.24 (noting that, when the "relief requested [is] simply the cessation of … allegedly illegal conduct," the traceability and redressability analyses are "identical").

This Court has found standing based on allegations that a defendant "contributed" to an injury that was caused by the separate decisions of third parties only when the defendant's conduct had a "determinative or coercive effect" in producing those third-party decisions and therefore the ultimate injury. *Bennett*, 520 U.S. at 169. In such circumstances, the third-

party decisions are not "independent," because they are themselves traceable to the defendant's actions. See, *e.g., id*. That principle is not applicable here. The chain of events leading to climate change, according to the complaints, depends upon the emissions of greenhouse gases by innumerable independent actors both past and present, J.A. 79-84, 134-36, and those sources neither were nor are directed, or even influenced, by these defendants in any way. An injury that is alleged to be caused by the collective operations of the global economy over generations is not "caused" by, and cannot be "traced" to, the handful of individual defendants named here.

2. The Alleged Harms Will Not Be Redressed By The Relief Sought.

For similar reasons, plaintiffs also do not, and cannot, plausibly allege that the relief they seek will redress their alleged harms. As noted, the complaints assert only that the injunctions requested would "achieve [these defendants'] *share* of the … reductions necessary to significantly slow the rate and magnitude of warming." J.A. 102 (emphasis added). Put differently, plaintiffs' theory concedes that broader reductions are "necessary" to slow or reverse climate change and to prevent future harm to the interests they have identified; and the relief they seek here represents some unknown increment of those broader reductions.

Such allegations are plainly insufficient to support standing. Although Congress and federal agencies, such as EPA, may attack environmental, social, or economic problems through a series of "incremental step[s]," *Massachusetts*, 549 U.S. at 524, a court is not a legislator or a regulator. A federal court may not enter relief against a particular tort defendant unless the relief sought from that defendant will

redress the plaintiff's injury. *Lujan*, 504 U.S. at 562; see also *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.). The complaints in this case do not and cannot allege that the relief requested—only these defendants' "share" of global emissions reductions—would prevent or mitigate plaintiffs' claimed harms.

Equally to the point, the vast bulk of greenhouse gas emissions are from sources that are not parties to this case and would not be reached by a decree in this case; indeed, to an increasing degree, most of these sources are outside the United States and may not be reached even by follow-on cases. Thus, there is no basis to believe that reductions ordered here from particular sources would lead to *any* overall reduction, or prevent or even slow the ongoing global warming effect that plaintiffs allege. To the contrary, it is just as likely that other sources would *increase* their emissions if these defendants limit theirs, thereby negating the purported benefit achieved by these defendants' "share" of emissions reductions in this country. See, *e.g.*, *North Carolina*, 615 F.3d at 302. Even if independent sources might not increase their emissions—so that a decree in this case might result in some overall reduction in worldwide greenhouse gases—that possibility and its scope are "too uncertain to satisfy the redressability prong of federal standing requirements." *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.).

3. The Standing Analysis In Statutory Rights Cases, Including *Massachusetts* v. *EPA*, Does Not Apply.

The Second Circuit nevertheless concluded that a plaintiff claiming injury from climate change has standing to sue any defendant that "contributes" to climate change through greenhouse gas emissions. In support of this theory, it relied largely on this

Court's decision in *Massachusetts* v. *EPA*, as well as lower court decisions in Clean Water Act cases such as *PIRG* v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990). Pet. App. 69a-75a. Those cases, however, addressed *statutory* causes of action, where the litigant brought suit to redress a *statutory* violation. 549 U.S. at 516-17. Their holdings have no application in a non-statutory, common law case such as this.

In *Massachusetts* and other cases, this Court has characterized the statutory basis of a cause of action—or, conversely, the lack thereof—as "of critical importance to the standing inquiry." *Id.* at 516. This is so because "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." *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)); see, *e.g.*, *Warth*, 422 U.S. at 500; *Sierra Club* v. *Morton*, 405 U.S. 727, 732-35 (1972). When a statute confers upon a class of persons an interest in enforcement of its provisions, and an individual within that class suffers a concrete harm "of a kind" the statute was "designed to protect [against]," that individual may under some circumstances have standing to bring suit against the party that caused the statutory violation as a means of vindicating the statutorily protected interest, even if the litigant cannot "meet[ ] all the normal standards for redressability and immediacy" that would apply in the absence of a statutory cause of action. *Massachusetts*, 549 U.S. at 517-18; *FEC* v. *Akins*, 524 U.S. 11, 20 (1998); *Lujan*, 504 U.S. at 572-73 & nn.7-8, 578; see *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000); *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S.

669, 686-89 (1973); *Morton*, 405 U.S. at 736-38; *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153-55 (1970).[5]

This explains why in *Massachusetts* the Court concluded that the State had standing to press its claim against EPA. That claim did not seek common law injunctive relief against the alleged nuisance of climate change; it was brought pursuant to an express statutory cause of action under the Clean Air Act, granting the State the right "to challenge agency action unlawfully withheld." 549 U.S. at 516-17 (citing 42 U.S.C. § 7607(b)(1)). Through the claim, the State sought to compel EPA to exercise its statutory authority under the Act to consider, in response to a rulemaking petition, whether greenhouse gas emissions from motor vehicles endanger the public and should be regulated. *Id.* at 514-16. This Court found that the State had standing to bring the claim, even though there was only a "possibility" that EPA would ultimately exercise its discretion to regulate those emissions, because the relief requested would, at a minimum, redress the statutory violation and vindicate the statutorily protected interest in ensuring that EPA makes properly grounded judgments about "air pollutants" that may endanger the public. *Id.* at 518, 524-26.

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[5] *See also Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) ("Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."); *cf. Warth*, 422 U.S. at 501 ("[P]ersons to whom Congress has granted a right of action …may invoke the general public interest in support of their claim."). The process by which Congress "define[s] injuries and articulate[s] chains of causation" might also be described as "elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously in-adequate in law." *Lujan*, 504 U.S. at 578.

The Court emphasized that the claims in *Massachusetts* were directed at a regulatory decision under a federal statute. *Id.* at 524-26. Congress and federal agencies need not address "massive problems in one fell regulatory swoop," the Court explained, but may instead "whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed." *Id.* For that reason, the fact that the regulations sought by the State in *Massachusetts* might not "reverse" climate change or mitigate its effects did not preclude standing. *Id.* Because Congress had authorized EPA to address the alleged risks of climate change through "incremental" regulation, *id.*, and had created a cause of action to ensure that EPA properly exercised its authority in considering whether to undertake such regulation, the State had standing to vindicate its statutorily conferred interest in seeking the incremental protection from those risks that regulation might afford. *Id.*

The claims in this case stand on an entirely different footing, because they were brought not to vindicate a statutory interest but to impose individualized injunctions under common law. A court is not a regulator and lacks the discretion of a legislature to craft "tentative" remedies designed to "whittle away" at a larger problem. *Id.* In contrast, in a case seeking individual relief under the common law, a federal court may enter judgment against a particular defendant only where the plaintiff's injury is "traceable" to that defendant and where relief against the defendant would "redress" that injury. In the absence of a statutory right and cause of action, there is no basis to "loosen the strictures of the … standing inquiry" to allow litigants to sue based on

nothing more than a possible "contribution" to a risk of injury. *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009); *Lujan*, 504 U.S. at 562; see also *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.).

The circuit court decisions in *Powell Duffryn* and other Clean Water Act cases on which the court of appeals erroneously relied, Pet. App. 69a-72a, are consistent with that understanding. Those cases interpret the Clean Water Act to create and confer a substantive statutorily protected interest in the enforcement of discharge permits issued under that Act. See, *e.g.*, *Powell Duffryn*, 913 F.2d at 72. They then hold that a person has standing to sue for a violation of the statute (*i.e.*, a "discharge[of] some pollutant in concentrations greater than allowed by [a] permit") if he or she can relate that violation to an actual concrete harm—for example, by showing that the pollutant was discharged "into a waterway in which the plaintiff[ ] ha[s] an interest" and is of a type that likely "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id.*; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc); *Sierra Club* v. *Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996).

Thus, because the Clean Water Act authorized EPA to address the harms of water pollution through discharge limits, and created a private right of action to enforce these limits, the plaintiffs had standing to vindicate their statutorily conferred right to enjoy waterways unmarred by the very types of aesthetic or other injuries that the federal permits were intended to prevent. See, *e.g.*, *Powell Duffryn*, 913 F.2d at 73 (plaintiffs had standing based on aesthetically offensive oily and greasy sheen where permit limited amounts of oil and grease that could be discharged).

By contrast, applying the *Powell Duffryn* analysis in the absence of an alleged discharge in excess of statutorily-authorized federal limits, as the Second Circuit suggested, Pet. App. 71a, ignores the fundamental (indeed, the sole) basis for standing in that and similar cases: that Congress had defined the discharge as a statutory violation and granted individuals a cause of action to remedy it. Compare Pet. App. 70a-71a (concluding that standing requirement in *Powell Duffryn* that there be a discharge in excess of statutory limits is not "meaningful" in this case "because there is no statute") with *Kivalina*, 663 F. Supp. 2d at 879-80 & n.7 (describing Second Circuit's reasoning as "circular").

This Court has never applied such an analysis outside of the statutory rights context or suggested, as the Second Circuit did, Pet. App. 70a-73a, that the statutory basis for a claim is immaterial to standing. To the contrary, the Court consistently has considered this fact "of critical importance" to the standing inquiry. *Massachusetts*, 549 U.S. at 516.[6] Whether or not Congress would have the power to authorize a suit such as this, it has not done so, and because plaintiffs cannot otherwise satisfy Article III traceability and redressability requirements, their claims should be dismissed.

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[6] *See also Summers*, 129 S. Ct. at 1151 (Kennedy, J., concurring) ("This case would present different considerations if Congress had sought to provide redress for a concrete injury 'giv[ing] rise to a case or controversy where none existed before.'"); *Warth*, 422 U.S. at 513-14 (rejecting standing and noting that the case's "critical distinction" from *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), where standing was upheld in factually analogous circumstances, was that the claims in *Trafficante* arose under a federal statute).

B. Prudential Standing Principles Also Bar These Claims.

In addition to "core" constitutional requirements, the federal judiciary observes "prudential" limitations on its authority. *Valley Forge Christian Coll.* v. *Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982). Most relevant here is "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12.

The claims in this case constitute precisely this type of "generalized grievance." They challenge conduct—the emission of greenhouse gases—that is common to (and necessary for) virtually every enterprise on the planet. *Supra* pp. 3-4. And they assert impacts from climate change that will allegedly be felt by virtually every person around the world. *Supra* pp. 18-19. It is hard to conceive of a grievance more "generalized" than this.

The nature of these claims, as well as the policy judgments necessary to their consideration, see *infra* pp. 47-51, further confirm that they are "more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12. Indeed, judicial forbearance is "especially important" here: These claims are asserted under federal common law, unsupported by any statute and lacking "manageable standards" for their adjudication, and Congress and EPA are engaged in ongoing legislative and regulatory responses to issues of greenhouse gas emissions and climate change. U.S. Cert. Br. 13; see also *supra* pp. 5-10. For these reasons, and those further explained by the United States in its brief in

support of certiorari, the claims are barred by principles of prudential standing.[7]

II. A CLIMATE CHANGE NUISANCE CAUSE OF ACTION CANNOT BE MAINTAINED AS A MATTER OF FEDERAL COMMON LAW.

Even if plaintiffs had standing, their federal common law cause of action should be dismissed. This Court's decisions make clear that federal courts do not have authority to create a federal common law nuisance cause of action to address climate change. Moreover, even if such a claim otherwise would exist, it has been displaced by, at a minimum, Congress's enactment of the Clean Air Act. That Act establishes a "comprehensive" regulatory process, *Chevron*, 467 U.S. at 848, through which EPA can determine whether and how greenhouse gas emissions should be regulated based on proceedings in which interested persons, including plaintiffs here, may seek emissions restrictions. Cf. *Milwaukee II*, 451 U.S. at 314

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[7] The Second Circuit suggested that, if the States satisfied the requirements for *parens patriae* standing, the prudential limitation on the adjudication of generalized grievances would not apply. Pet. App. 53a-54a. But the doctrine of *parens patriae* simply allows a State to sue on behalf of its citizens despite the independent prudential prohibition on "a litigant's raising another person's legal rights." *See Elk Grove*, 542 U.S. at 12; *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 611-12 (1982) (Brennan, J., concurring); R. Fallon, D. Meltzer, & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 289-93 (5th ed. 2003); *see also Massachusetts*, 549 U.S. at 520 (noting "special solicitude" owed to State's assertion of a quasi-sovereign interest for purposes of *parens patriae*). That doctrine does not eliminate other jurisdictional barriers, prudential or otherwise. *E.g.*, *Massachusetts*, 549 U.S. at 520-26 (addressing "core" constitutional standing after finding that States satisfied *parens patriae*).

(holding that the Clean Water Act displaces federal common law water pollution claims).

A. There Is No Federal Common Law Nuisance Cause Of Action To Address Alleged Effects of Climate Change.

"There is no federal general common law." *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938).[8] That is because the Constitution vests general lawmaking power in Congress, not the judiciary. Accordingly, since *Erie*, this Court has recognized that courts have only a highly "restricted" authority to create federal common law. *Tex. Indus.*, 451 U.S. at 640.

This limited authority has been exercised most often to create federal common law rules of decision to resolve claims that litigants are otherwise authorized to bring under state law. See *infra* pp. 34-35. This case, however, involves the far rarer use of federal common law to create a cause of action. Because it is such an extraordinary exercise of power for federal courts to themselves authorize the invocation of their authority to hear cases, this Court

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[8] For much of the Nation's first 150 years, it was "clear" that "there is no"—and "can be no"—"federal common law of the United States." *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 658-59 (1834); *see* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1274-75 (1985). During this period, the "common law" applied by federal courts was not "federal," but was characterized as a "general" corpus of legal principles—a "transcendental body of law outside of any particular State"—which any court, state or federal, could draw from and develop. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 725-27 (2004). *Erie* rejected this view, holding that common law exists only as authorized by a sovereign entity. 304 U.S. at 78-79. At that point, it became necessary to address whether and when *federal* common law might be available. *Sosa*, 542 U.S. at 725-27; *see* Jay, *supra*, at 1322.

has, for over 30 years, repeatedly held that federal courts should no longer create or expand causes of action. For example, although implying causes of action from statutes was a classic exercise of federal common lawmaking power, see, *e.g.*, Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421 (1964), the Court more recently has repudiated the practice, *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001). It likewise has refused to expand causes of action previously implied from statutes, *e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), or "to extend *Bivens* liability to any new context or new category of defendants," *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67-68 (2001). The Court also declined to create a federal common law cause of action for violations of international legal norms—even though the Alien Tort Statute authorized such judicial lawmaking. *Sosa*, 542 U.S. at 727-28. "[A] decision to create a private right of action," the Court explained, "is one better left to legislative judgment in the great majority of cases." *Id.*

The federal "nuisance" cause of action asserted in this case does not arise under any federal statute. Nor do any of the relevant—and very limited—concerns that have justified creation of federal common law causes of action in the past support such an "unusual exercise of lawmaking by federal courts" here. *Milwaukee II*, 451 U.S. at 314. Moreover, even if there were a basis for such an exercise, the exceptional complexity and scope of the issues raised by this lawsuit demonstrate that creation of a "climate change" cause of action falls outside the courts' "limited" and "restricted" federal common lawmaking powers.

1. This Court has upheld the creation of federal common law in only three "enclaves": (i) "[controversies] concerned with the rights and obligations of the United States," (ii) "admiralty cases," and (iii) "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Tex. Indus.*, 451 U.S. at 641; see also *Sosa*, 542 U.S. at 725-30; *Atherton* v. *FDIC*, 519 U.S. 213, 225-226 (1997). The "uniquely federal interests" that have justified such exercises of judicial lawmaking are "few" and "restricted." *Tex. Indus.*, 451 U.S. at 641. Although these interests have distinct "constitutional underpinnings," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423, 426-27 & n.25 (1964), all ultimately rested on some perceived notion of constitutional necessity justifying the creation of federal common law.

Most typically, courts have fashioned federal common law rules of decisions in situations where they have deemed it unacceptable under our constitutional scheme for certain substantive rights to be determined under state law. Cases involving the rights and obligations of the United States are paradigmatic examples of such federal common lawmaking. See, *e.g.*, *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943); see also *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 505-06 (1988) (recognizing "government contractor" defense as "closely related" to rights and obligations of the United States). Other examples have included recognition of an affirmative defense derived from an interstate compact governing the allocation of interstate waters, see *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938), and much of admiralty law, see *N.W. Airlines, Inc.* v. *Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95-96 (1981).

Much more rarely, courts have concluded that the structure of our Constitution and the status of the States in our federal system justify creation of a federal common law cause of action. For example, because the Constitution guarantees States a forum to adjudicate their disputes (having denied States the right to address them by treaty or force), the Court recognized a cause of action for the resolution of state boundary disputes. See *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 723-31 (1838); cf. *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State."); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1322-23 (1996). The Court similarly recognized a cause of action to resolve "the conflicting rights of States," *Tex. Indus.*, 451 U.S. at 641, when one State sued another State to abate a discrete transboundary nuisance, see, *e.g.*, *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923). And, at a time when Congress was thought to lack the power to provide any remedy for such harms[9] (and before *Erie* had rejected the idea of a "general common law" enforceable by federal courts), the Court in one case relied on this same reasoning to resolve a discrete nuisance claim brought by the State of Georgia against a company in Tennessee, after Georgia had made "a vain application to the State of Tennessee for relief." *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 236 (1907).

The Second Circuit assumed that the present case qualifies as an "interstate … dispute[ ]," warranting the creation of federal common law, simply because it

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[9] *See, e.g.*, *United States* v. *E.C. Knight Co.*, 156 U.S. 1 (1895).

can be characterized as an "interstate pollution dispute." Pet. App. 99a-100a. But this Court has never created a federal common law cause of action merely because a plaintiff alleges wrongs with transboundary effects. Instead, recognition of the federal common law cause of action rested on a perceived constitutional necessity wholly lacking here. See *Atherton*, 519 U.S. at 224 ("To find a justification for federal common law in this argument … is to substitute analogy or formal symmetry for the controlling legal requirement, namely, the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest."); see also *California* v. *Sierra Club*, 451 U.S. 287, 296 n.7 (1981) (prior cases adjudicating "nuisance" claims did not somehow "federalize" those claims or "establish a general federal law of nuisance").

To be sure, the opinion in *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), declares broadly that "[w]hen we deal with air and water in their ambient or interstate aspects[ ] there is a federal common law," *id.* at 103. But this statement is plainly *dicta*. First, the case involved "conflicting rights of States," as one State (*i.e.*, Illinois) complained of pollution to its waters caused by the "instrumentalit[y]" of another State (*i.e.*, the City of Milwaukee and its sewerage authority, acting under authority of and in conformance with Wisconsin law). *Id.* at 94-97. Second, and more fundamentally, *Milwaukee I* is properly understood as basing its holding not on the type of constitutional necessity that had theretofore justified the extraordinary use of judicial lawmaking power to create a federal common law cause of action, but on then-existing "federal environmental protection statutes," *id.* at 101-04 & n.5, which the Court

interpreted to contain remedial gaps that (under the then-prevailing view of implied causes of action) allowed for and authorized development of federal common law. See *id.* (citing *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448 (1957), interpreting Labor Management Relations Act as granting lawmaking authority to the federal courts); see also *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987) (explaining that *Milwaukee I* found that the terms of the Clean Water Act were "not sufficiently comprehensive"); *Milwaukee II*, 451 U.S. at 324 n.18 (same). Indeed, according to the Court in *Milwaukee I*, the federal statute then governing water pollution appeared to invite the creation of federal common law, as it "ma[de] clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters"; authorized the Attorney General to bring an equitable "abatement" action in federal court; and expressly provided that "[s]tate and interstate action[s] to abate pollution of interstate or navigable waters shall be encouraged and shall not … be displaced by Federal enforcement action." 406 U.S. at 102-04 (quoting 33 U.S.C. §§ 1151, 1160 (1970)).[10]

Milwaukee I, therefore, cannot properly be understood as having jettisoned the notions of constitutional necessity that justified recognition of a federal common law cause of action for States to sue to abate discrete interstate nuisances. Nor, for the same reason, should it be read to have authorized courts to create federal common law to deal

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[10] The Court later held in *Milwaukee II* that the Clean Water Act displaced federal common law water pollution claims, 451 U.S. at 325, and it has since rejected the more expansive view of implied causes of action reflected in cases like *Milwaukee I*, *see Alexander*, 532 U.S. at 287.

pervasively and comprehensively with all matters relating to "air and water in their ambient or interstate aspects."[11]

2. No notion of constitutional necessity justifies recognition of the extraordinary federal common law "nuisance" cause of action that plaintiffs purport to assert in this case. This case raises no claims of conflicting States' rights. And, even if it did, no theory of constitutional necessity compels federal courts to provide a remedy, as it is now understood that Congress is fully empowered to do so under the Commerce Clause. Thus, even if Congress had wholly failed to address the issue—which is not the case, see *infra* Part II.B—courts would lack authority to recognize the right that plaintiffs assert. In addition, two overarching factors militate conclusively against "exercising [the] innovative authority over substantive law" necessary to recognize the cause of action sought here. *Sosa*, 542 U.S. at 726; see *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68-69 (1966) (noting factors).

First, the nature and complexities of these issues, and the possible ramifications of recognizing a cause of action, strongly counsel against any exercise of judicial lawmaking in this particular context. The nuisance cases this Court adjudicated in the past all

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[11] To the extent *Milwaukee I* could be so read, this Court should disavow such a reading as fundamentally at odds with the now-prevailing understanding of the federal courts' limited and restricted authority to create federal common law causes of action. *Supra* pp. 32-33. Indeed, as explained below, such an understanding of *Milwaukee I* would arrogate to federal courts responsibility for addressing issues that are wholly unfit for resolution by courts using federal common law and that, under our constitutional scheme, are properly resolved by the political branches.

involved a localized problem that affected a discrete area and was traceable to a discrete source—*i.e.*, nuisances "of simple type." See, *e.g., Tenn. Copper*, 206 U.S. at 237; *Missouri*, 180 U.S. 208. The claims here—alleging that defendants' greenhouse gas emissions combine with emissions from countless other activities around the globe that have been accumulating for centuries to create a worldwide problem—bear no resemblance to those cases or any other previous tort claim.

To hold that anyone affected by climate change may maintain a claim against any source of greenhouse gas emissions under the federal common law of "nuisance" would expand the traditional conception of that cause of action beyond all recognizable bounds. Indeed, it would be unprecedented and transformative, resulting in an essentially limitless set of potential plaintiffs and defendants, see *supra* pp. 18-19, and a judiciary asked to design, enforce, and (over time) modify a set of piecemeal regulatory decrees of great intricacy and enormous consequence for the Nation's energy supply and economic security (and for the international climate change negotiations in which the United States is presently engaged, see *supra* pp. 9-10). The effects would be massive and unpredictable. *North Carolina*, 615 F.3d at 306 ("There is no way to predict the effect on … utilities generally of supplanting operating permits with mandates derived from public nuisance law, but one suspects the costs and dislocations would be heavy indeed."). Addressing these issues is a task for "those who write the laws, [not] those who interpret them." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994); *Tex. Indus.*, 451 U.S. at 640.

Second, recognition of this cause of action would not serve, and could undermine, any federal interest in

coordination of air emission regulation. No standards would direct judges and juries in assessing a "reasonable" level of emissions in any individual case, other than the "vague and indeterminate" mandate of the Restatement, *Milwaukee II*, 451 U.S. at 317, to "weigh[ ] the gravity of the harm against the utility of the conduct," Restatement (Second) of Torts § 821B cmt. e. Different jurists would invariably "balanc[e] the equities" (Pet. App. 35a) differently, come to different conclusions, and impose different forms of relief against different sources of greenhouse gas emissions. The result would be a "balkanization of clean air regulations and a confused patchwork of standards." *North Carolina*, 615 F.3d at 296.

The judgment of the Second Circuit would thus not only "revert … to the understanding of private causes of action that held sway 40 years ago," *Alexander*, 532 U.S. at 287, creating a "new substantive legal liability without legislative aid and as at the common law," *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983), based on the court's notion of what rights and remedies would best serve the public interest. It would do so in a context far *more* complex, policy-laden, and consequential than any at issue in the prior cases on which the court of appeals relied for support.

B. Any Federal Common Law Climate Change Nuisance Cause Of Action Has Been Displaced.

Even if there would otherwise have been a federal common law cause of action to address the "nuisance" of climate change, any such cause of action has been displaced by Congress. Federal common law is relied upon as a "necessary expedient" in the "absence of an applicable act of Congress." *Milwaukee II*, 451 U.S. at 314-15. For that reason, when Congress "addresse[s] the problem" previously governed by

federal common law, "the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* Congress has addressed the issue of greenhouse gas emissions: this Court held in *Massachusetts* that the Clean Air Act defines those emissions as an "air pollutant," 549 U.S. at 528-29, 532, and required EPA to consider regulation of those emissions consistent with its statutory duties, *id.* Just as the Clean Water Act displaced the federal common law water pollution claims asserted in *Milwaukee II*, the Clean Air Act displaces the common law air emission claims asserted here. See *Milwaukee II*, 451 U.S. at 325 ("the invocation of federal common law … in the face of congressional legislation … is peculiarly inappropriate in areas as complex as water pollution control," the problems of which are "particularly unsuited to the [*ad hoc* adjudicative] approach inevitable under a regime of federal common law").

1. The Clean Air Act, like the Clean Water Act, is a "comprehensive" regulatory scheme to address environmental pollution. *Chevron*, 467 U.S. at 848; see also 42 U.S.C. § 7401. It vests in EPA responsibility to consider regulating any "air pollutant," defined broadly to encompass "any physical, chemical, [or] biological … substance … [which] enters the ambient air," 42 U.S.C. § 7602(g); authorizes EPA to require, when it makes certain findings, that mobile and stationary sources meet technology- and air quality-based emission standards, *id.* §§ 7409, 7411, 7502, 7521; requires major sources to secure operating permits as well as pre-construction permits that establish emissions limitations, *id.* §§ 7475(a), 7661b(a), 7661c(a); and grants EPA rights to enforce those limitations through administrative and judicial proceedings, *id.* §§ 7413, 7477. The Act is "sweeping" and "capacious."

Massachusetts, 549 U.S. at 528-29, 532; see *North Carolina*, 615 F.3d at 298 ("To say this regulatory and permitting regime is comprehensive would be an understatement.").

Throughout the debates and reports of Congress, its sponsors repeatedly characterized the Act as "comprehensive," and commented on its expansive reach. *E.g.*, 136 Cong. Rec. S592 (daily ed. Jan. 31, 1990); *id.* at H2511 (daily ed. May 21, 1990); *id.* at H12845 (daily ed. Oct. 26, 1990). Like the Clean Water Act, the legislation was "self-consciously comprehensive." *Milwaukee II*, 451 U.S. at 319. Nothing in the Act or legislative history suggests that Congress intended to leave "room for courts to attempt to improve on that program with federal common law." *Id.*; see also *North Carolina*, 615 F.3d at 304 ("Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with … judicially managed nuisance decrees"); *Nat'l Audubon Soc'y* v. *Dep't of Water*, 869 F.2d 1196, 1202 (9th Cir. 1988) (same).

The Second Circuit analogized the Clean Air Act to the pre-1972 Federal Water Pollution Control Act (FWPCA), Pet. App. 142a-44a, which *Milwaukee I* found did not displace common law water pollution claims, 406 U.S. at 98-100. But the FWPCA at that time did not provide any authority for direct enforcement of discharge limitations for individual pollutants. Instead, it provided that, if EPA believed that a particular discharge constituted a danger to the public, it could—after seeking voluntary resolution, petitioning the State to act, and holding a public hearing—ask the Attorney General to bring an equitable "abatement" action in federal court. *Id.* at 102-03 (citing 33 U.S.C. §§ 1151, 1160 (1970)); see

United States v. *Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974) (addressing claims under FWPCA). In contrast, the Clean Air Act vests EPA with broad authority not only to promulgate national standards for pollutants, but also to enforce those standards directly, through administrative or judicial proceedings, and to mandate that stationary sources in identified categories secure pre-construction and operating permits. *Massachusetts*, 549 U.S. at 528-29; see 42 U.S.C. §§ 7413, 7475, 7477, 7604, 7607, 7661b, 7661c. This statute bears no resemblance to the FWPCA addressed in *Milwaukee I*. Instead, it more closely mirrors the post-1972 Clean Water Act in *Milwaukee II*, on which the permit requirements of the Clean Air Act were modeled. *Clean Air Act: A Summary of the Act and Its Major Requirements*, CRS Report RL30853, at 15 (May 2005).

Most fundamentally, greenhouse gases collectively have been held to be an "air pollutant" within the meaning of the Clean Air Act, see *Massachusetts*, 549 U.S. at 528-29, 532 (citing 42 U.S.C. § 7602(g)), and EPA has interpreted the Act to provide it with authority to consider restrictions on greenhouse gas emissions from mobile and stationary sources, including those of these defendants. See 75 Fed. Reg. 31514. Accordingly, through the Clean Air Act, Congress has established a legislative scheme that "speaks directly" to the alleged problem identified in the complaint, rendering resort to federal common law not only unnecessary but improper. See *Milwaukee II*, 451 U.S. at 314-15, 325.

2. The Clean Air Act's displacement of federal common law claims is further underscored by other aspects of the federal regulatory scheme. In particular, federal law specifically defines methods by which States and other persons may seek, through

rulemaking petitions, regulations addressing greenhouse gas emissions. See *Massachusetts*, 549 U.S. at 527; cf. *Milwaukee II*, 451 U.S. at 326-28. In other words, Congress has already provided a statutory means by which these plaintiffs could pursue essentially the same relief they now seek through common law.

Federal law allows interested persons, including plaintiffs here, to petition EPA to consider rulemaking with respect to any category of air pollution sources they contend poses a risk to the public. See *Massachusetts*, 549 U.S. at 516-17. The denial of such a petition is subject to judicial review in the courts of appeals, with the option of further review in this Court—the basis for the State's claim in *Massachusetts*. *Id.* (citing 42 U.S.C. § 7607(b)). And, once regulations are adopted, whenever a State issues an operating permit to a major stationary pollution source in its jurisdiction, that State must notify contiguous and other nearby States that might be affected, and those States may petition EPA to revise or reject the permit terms. 42 U.S.C. § 7661d(a)(2), (b)(2). Again, the denial of such a petition is subject to review in a federal court of appeals. *Id.* § 7607(b).

Congress's decision to provide these express avenues for States and others to seek emissions limitations means that federal courts may not allow plaintiffs to bypass those paths and seek similar relief in diverse district courts under federal common law standards fashioned by judges. See *Alexander*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). As was true in *Milwaukee II*, any common law cause of action that might have been recognized has been displaced.

3. The Second Circuit believed that the Clean Air Act did not have displacing effect—despite its comprehensive character, specific coverage of greenhouse gases as "pollutants," and applicable remedial schemes—because EPA had not exercised its authority under the Act to regulate greenhouse gas emissions by these individual defendants. Pet. App. 140a-44a. In particular, the court of appeals focused on the fact that EPA had not yet issued regulations finding that such emissions "endanger" the public or controlling emissions from stationary sources. *Id.* These two predicates are no longer true, as the United States pointed out in arguing that current regulations compel displacement. U.S. Cert. Br. 22-24. But, even leaving aside these regulatory developments, the absence of regulations would not alter the displacing effect of the Act.

It is Congress that can create or eliminate causes of action. Agencies have no lawmaking power but that which Congress invests in them. *Alexander*, 532 U.S. at 290-91. Rulemaking by an agency, for that reason, can neither independently support the development of federal common law, nor expand or diminish the displacing effect of a federal statute. See *id.* Thus, once Congress legislates on the subject and delegates authority to an agency to make regulatory decisions implementing Congress's basic policy choices, federal common law claims are displaced regardless of whether or how the agency exercises its delegated authority. As this Court explained in *Milwaukee II*, "[d]emanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question[: t]he question is whether the field has been occupied, not whether it has been occupied in a particular manner." 451 U.S.

at 324; see also *Middlesex Cnty. Sewer Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 622-23 (1978).

Likewise here, the Clean Air Act delegates regulatory authority over carbon dioxide emissions to EPA, and thus displaces federal common law claims addressing those emissions without regard to how the agency has exercised or may exercise its authority. If, for example, EPA had found (contrary to its actual finding) that greenhouse gases *do not* endanger the public health and welfare, there would be no basis for a federal court then to make a competing assessment under a federal common law of torts. To hold, as the court of appeals did, that there are still "interstices" for courts to "fill[ ]," Pet. App. 37a, is "no different from holding that the solution Congress chose is not adequate. This [a court] cannot do." *Illinois* v. *Outboard Marine Corp.,* 680 F.2d 473, 478 (7th Cir. 1982).

III. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.

By virtue of their subject matter, certain cases are not cognizable in the courts because they present "political questions." *Vieth* v. *Jubelirer*, 541 U.S. 267, 277 (2004) (plurality). A political question is present if, upon a "discriminating inquiry into the precise facts and posture of the particular [claims]," *Baker*, 369 U.S. at 217, adjudication of the claims would require the courts to make "an initial policy determination of a kind clearly for nonjudicial discretion," to decide a case in the absence of "judicially discoverable and manageable standards," or otherwise to resolve a question that has been or should be decided by the other branches. *Id.*; see *INS* v. *Chadha*, 462 U.S. 919, 941 (1983) (a political

question exists "when *any one* of the … circumstances [outlined in *Baker*] is present") (emphasis added). While the claims in this case implicate all of these concerns, see, *e.g.*, *supra* pp. 5-9, 40-46, it is particularly clear that their adjudication would require an impermissible "initial policy determination" made in the absence of "judicially discoverable and manageable standards."

"One of the most obvious limitations imposed by [Article III] is that judicial action must be governed by *standard*, by *rule*." *Vieth*, 541 U.S. at 278 (plurality) (emphasis in original). Those rules must be "principled, rational, and based upon reasoned distinctions," and not the result of "ad hoc" policy judgments. *Id.* By contrast, claims that would "cast [judges] forth upon a sea of imponderables," *id.* at 290, or "involve large elements of prophecy," *Chi. & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), are not justiciable.

Adjudication of the claims in this case would place a judge in that intractable situation. Central to any common law "nuisance" claim is the allegation that the defendant's actions constitute "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1); see *id.* §§ 821B cmt. e, 822. To determine whether an interference is "unreasonable," a judge must "weigh[ ] … the gravity of the harm against the utility of the conduct." *Id.* § 821B cmt. e.

No "principled" or "reasoned" standards would govern this inquiry in the context of the claims alleged in this case. To determine a "reasonable" emissions level for a single defendant, a judge would first have to determine the "reasonable" level of global emissions in light of the global risks of climate change, and the global costs and benefits of

emissions-producing activities and associated reduction measures. The posited risks of climate change and the costs and benefits of emissions reductions, however, are not quantifiable or predictable even under the report described in the complaints as "a standard scientific reference on global warming." J.A. 80; see Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2001: Synthesis Report*, at 2-5 (2001) (noting "uncertainties" in addressing these issues). And, even if a judge could somehow determine a "reasonable" aggregate emissions level for sources worldwide, in order then to determine a "reasonable" level for an individual source the judge could not simply divide the global level by the number of historical worldwide sources of greenhouse gas emissions (assuming that number could somehow be obtained), but would necessarily have to tailor emissions levels on a nation-by-nation, sector-by-sector (if not entity-by-entity) basis, weighing the gravity of harm to plaintiffs against the utility of each sector's and each defendant's conduct. Moreover, because total worldwide emissions are in flux and the relative quantities of emissions are ever-changing among nations, sectors, and individual sources, these allocations would need to be revisited by courts in perpetuity.

A judge in this circumstance would "search[ ] in vain ... for anything resembling a principle in the common law of nuisance." *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). Thus, to resolve these claims, any decisionmaker would need to make *ad hoc* policy judgments, for which there is no "right" or "wrong" answer. For example, a judge that accepts the argument that climate change produced the risks

allegedly facing these plaintiffs could, under that theory, "trace" the phenomenon to automotive companies' decisions to offer fuel-intensive sport-utility vehicles, but find that the electric utilities and oil and coal companies had responsibly limited their emissions over time and therefore were "reasonable." Or, the judge might determine that individual car ownership is integral to the national economy and that other industries "caused" climate change and should have reduced their emissions. Or, the judge might trace climate change to the emissions of the U.S. Department of Defense or other government entities and hold that utilities, oil companies, and car companies and drivers acted reasonably. Whether our Nation should have had more public transportation and fewer cars, more electricity from nuclear power or solar power, or less electricity and slower economic growth are not decisions that any judge should make. These are issues of "high policy" that only a legislature has the capacity and authority to address. *Tex. Indus.*, 451 U.S. at 647.

This case is thus hardly an "ordinary tort suit," as the Second Circuit described it. Pet. App. 34a. Prior common law pollution claims involved a discrete number of emitters, a clear chain of causation, and a specific injury resulting from the discharged substance itself in a localized area, even when the emissions crossed state lines. See *supra* pp. 35, 38-39. In contrast, the emissions here are not inherently harmful, but instead are produced by virtually all enterprises on the planet. According to the pleadings, defendants' emissions combined in the Earth's atmosphere with undifferentiated emissions from billions of sources around the planet over centuries to trap heat, altering the global environment and, in turn, influencing by undefined

increments the impact of naturally occurring processes that already affect the planet. Indeed, because under plaintiffs' theory liability for climate change could be traced to any emitter of greenhouse gases over the past centuries, all emitters (to the extent they are still in existence) would presumably be subject to joinder as defendants. See Fed. R. Civ. P. 13(h), 20(a)(2). Far from an "ordinary" nuisance suit, a climate change tort case such as this could become the largest and most complex in the history of jurisprudence. This fact simply underscores that, to resolve these claims, a judge would be making decisions committed to the political branches.

"The requirements of Art[icle] III are not satisfied merely because a party … has couched [its] request for … relief … in terms that have a familiar ring to those trained in the legal process." *Valley Forge*, 454 U.S. at 471. Whatever the label applied to these claims, only a legislature has the capacity and authority to assess and weigh the cost of one societal harm (the possible risks of climate change and its effects) against the innumerable other societal harms (including increased costs and lost productivity) that would flow from restrictions on emissions of carbon dioxide and other greenhouse gases. See Laurence H. Tribe et al., Wash. Legal Found., Critical Legal Issues Series No. 169, *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-15 (Jan. 2010); see also IPCC, *supra*, at 2 (describing these decisions as "value judgments [that must be] determined through socio-political processes, taking into account considerations such as development, equity, and sustainability, as well as uncertainties and risk"). *Massachusetts* explained that, although the Court could adjudicate the agency's compliance with the

Clean Air Act—"a question eminently suitable to resolution in federal court," 549 U.S. at 516—it had "neither the expertise nor the authority to evaluate the[ ] policy judgments" identified by EPA as counseling against greenhouse gas regulation. *Id.* at 533-34. These are the very judgments courts would have to make if the claims in this case were adjudicated.

The lack of judicially manageable standards, the need for initial policy decisions to be made by judges, and the actual and potential conflicts with current and future legislation and regulation addressing greenhouse gas emissions and climate change all demonstrate that this case presents "political questions" that are reserved for the representative branches.

CONCLUSION

The decision of the court of appeals should be reversed, and the case should be remanded with instructions that it be dismissed.

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STATUTORY ADDENDUM