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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF

Plaintiffs argue that their suits involve only the routine application of "old law to new facts." Br. of OSI et al. ("OSI Br.") 1. That is wrong. Plaintiffs' claims are unprecedented—and plainly non-justiciable. If accepted, the legal theories underlying these claims will have extraordinary ramifications for courts and society alike.

Those ramifications are starkly illustrated by plaintiffs' efforts to satisfy Article III's traceability and redressability requirements. Plaintiffs deny that a finding that they have standing here would permit them to sue virtually anyone, arguing instead that, in this case, they sued only five "substantial" contributors of greenhouse gas emissions. Br. of Connecticut et al. ("State Br.") 15-16. Yet plaintiffs' claimed injuries result from the risks of climate change, and they allege that the "primary factor in determining the rate and magnitude" of that change is not these five defendants' emissions but the overall concentration of greenhouse gases throughout the atmosphere from past, present, and future sources. J.A. 102.

Plaintiffs' theory of traceability therefore relies on the assertion that "each person who ... contributes to a public nuisance may be held liable even if others are also contributing," and even if that person contributes "to only a slight extent." State Br. 15. And their theory of redressability rests on the claim that reducing a fraction of even one defendant's emissions will "contribute to a reduction in the risk and threat of injury," because "the lower the [overall] level of emissions, the lesser the injuries." *Id.* at 17. Plaintiffs thus predicate their right to bring this suit on the logic that every emission increases the risk of

injury, and every reduction lowers that risk. If those premises were a sufficient predicate for standing, they would enable plaintiffs and any others satisfying plaintiffs' expansive "special injury" standard to use the federal courts to target any sector of the economy that they believe should reduce its emissions.

Plaintiffs' theory would also require the courts to make broad policy judgments, without statutory standards or regulatory guidance, in determining the nature and scope of the injunctions (if any) that should be entered against whichever of the countless potential defendants a plaintiff might choose to name. Plaintiffs argue that courts can simply apply nuisance law's "reasonableness" standard to decide for each defendant what level of emissions is acceptable. OSI Br. 29; State Br. 33-34. But they nowhere explain how courts would do this, and for good reason: it is a judicially unmanageable task.

To adjudicate these claims, a court would need to determine (i) the overall reductions necessary to reach a safe level of atmospheric greenhouse gases (*i.e.*, the level at which the plaintiffs would not face undue risk of harm); and (ii) the defendants' "share of the carbon dioxide emission reductions necessary to" reach that level. J.A. 102. To determine a defendant's "share" of necessary reductions, however, a court would need to decide what everyone else's "share" should be. And to do this, a court would need to determine the social utility of the defendants' emissions-causing conduct and the societal costs of reducing those emissions, and then weigh those benefits and costs against the social benefits and costs of reducing emissions from numerous other activities. Only by conducting such comparative assessments would a court have any basis for deciding, for example, that these defendants must

reduce emissions by three percent, while major airlines should reduce theirs by only one percent.

These policy judgments should be made by the political branches, not the courts. This is so *not* because they involve "difficult scientific questions." State Br. 34. It is because the task of weighing the relative societal burdens of, for example, more expensive electricity in certain parts of the country against the relative societal burdens of greater costs in agriculture, transportation, manufacturing, and many other economic sectors calls for policy judgments so sweeping in their implications that they can legitimately be made only by the politically accountable branches.

Plaintiffs respond that balancing is unnecessary because the social utility of a defendant's conduct is irrelevant under public nuisance law. *Id.* at 32-33. But the relief they seek—a three percent annual reduction in defendants' emissions for ten years, J.A. 102—belies this claim. If social utility were truly irrelevant, then plaintiffs' "every reduction matters" theory would seemingly support a total shutdown of defendants' electric generating plants. Plaintiffs understandably avoid seeking this unthinkable relief. Their unwillingness to embrace the consequences of their theory confirms that a complex weighing of the respective costs and benefits of innumerable emissions-causing activities is essential to resolution of their claims. And this standardless, *ad hoc* balancing would be repeated and revised by different district courts in suit after suit, as these and other plaintiffs sue other emitters as asserted contributors to climate change to obtain their respective "shares" of necessary reductions as well.

The necessity of this balancing of societal burdens and interests across virtually all economic activities

makes this case fundamentally different from those in which courts have applied other broad standards (*e.g.*, "reasonableness" under the Fourth Amendment), or weighed important equitable claims (*e.g.*, apportioning rights in a single river). State Br. 33, 35. There is no meaningful judicial analog for the enterprise plaintiffs seek to launch. It is, instead, a legislative and regulatory function, properly reserved under our constitutional system for the legislative and executive branches.

For these reasons, plaintiffs' claims fail on every level. Neither the importance of greenhouse gas emissions, nor their interstate and international character and consequences, offer any justification for implying a completely unmanageable federal common law nuisance remedy to address this unique concern. And these same considerations establish that litigation of such a claim is also barred by the separation-of-powers principles reflected in this Court's doctrines of standing, displacement, and political question.

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

The unprecedented nature of plaintiffs' asserted cause of action is reflected in the theory of standing necessary to support it. Under that theory, any single "contribution" of greenhouse gas emissions could be a traceable cause of climate change; as a result, plaintiffs alleging risks associated with climate change could sue to enjoin any source of those emissions, claiming that any reduction in emissions would mitigate those risks to some degree, however small. Petrs. Br. 19-21. Never before has this Court approved such an expansive approach to standing, which would allow suits by each against all and

effectively eliminate the requirements of traceability and redressability for climate change cases. *Id.*[1]

1. These problems cannot be ignored merely because plaintiffs allege that these defendants are "substantial" sources of greenhouse gas emissions, and "the five largest U.S. emitters of carbon dioxide." OSI Br. 2, 32-34; State Br. 15-16. Plaintiffs selected five defendants, but their theory of standing fails to restrict the pool of potential defendants. It would allow suit against *any* contributor of greenhouse gas emissions, no matter how "slight" its contribution. OSI Br. 32-34, 40; State Br. 15-16.

Plaintiffs argue that tort law would not impose liability for a "*de minimis*" contribution. OSI Br. 33. But there is no apparent standard by which a court could define who is or is not a "*de minimis*" or "substantial" contributor of greenhouse gas emissions. Plaintiffs' theory of redressability, moreover, plainly sweeps into the latter category innumerable actors in every major economic sector.

The five defendants in this case are characterized as "substantial" contributors because, collectively, they are allegedly responsible for approximately 2.5% of annual anthropogenic carbon dioxide emissions worldwide. OSI Br. 7; State Br. 14. But these defendants are separate entities, so their emissions cannot be aggregated for purposes of assessing standing. *E.g.*, *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J., joined by Rehnquist, C.J., Stevens & Scalia, JJ.) ("standing to

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[1] Contrary to plaintiffs' argument, OSI Br. 35-36, plaintiffs in a tort suit must each independently establish standing. *See, e.g.*, *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 111 (1979). That is particularly true where, as here, plaintiffs brought their claims in separate, unconsolidated lawsuits.

sue is not a kind of gaming device that can be surmounted merely by aggregating the allegations"). Individually, each defendant was allegedly responsible in 2004 for less than one percent of annual worldwide anthropogenic carbon dioxide emissions, which have been accumulating in the atmosphere for centuries.[2] J.A. 57, 61-67, 84-85. And plaintiffs claim that each defendant should be required to reduce its emissions by a limited yearly percentage—about three percent—as its "share" of the overall emissions reduction needed to address climate change. *Id.* at 102. For judicial relief to have any appreciable impact on those alleged risks, therefore, countless other relatively minute "shares" of annual reductions must be obtained through litigation against innumerable other sources of anthropogenic greenhouse gas emissions—including those in the "electricity, industrial, commercial, residential, transportation and agriculture sectors." 73 Fed. Reg. 44354, 44402 (July 30, 2008).[3] Thus, plaintiffs' theory of redressability offers no meaningful limit on the number of entities that can be sued as "substantial" contributors to global greenhouse gas emissions.

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[2] Carbon dioxide is, moreover, only one of several greenhouse gases, and other types—for example, methane—have a substantially greater climatological impact on a per-volume basis. *E.g.*, Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: The Physical Science Basis* 210-14 (2007).

[3] Critically, more than 80% of annual global anthropogenic greenhouse gas emissions come from overseas sources such as those in China and India, 74 Fed. Reg. 66496, 66538 (Dec. 15, 2009), which presumably could not be compelled by federal courts to contribute their own "shares" of reductions.

Similar problems afflict plaintiffs' proposal to restrict these claims to States and private entities alleging "special injury." OSI Br. 18-19; State Br. 44. Plaintiffs never offer a precise definition of that standard, but the land trusts allegedly satisfy it because they purchased their properties for the purpose of conservation, and that interest is at risk from climate change. OSI Br. 31-32. Any purchaser of property, however, could assert an interest in its preservation—as well as some risk to that interest from the climatological and meteorological occurrences plaintiffs attribute to climate change. State Br. 4. In short, neither "special injury" nor the other constructs proposed by plaintiffs offer a principled basis on which to limit meaningfully the potential parties to climate change litigation, or suffice to meet Article III's traceability and redressability requirements.

2. Unable to satisfy constitutional standing requirements, plaintiffs argue in the alternative that those requirements should not apply because their claims are assertedly patterned after a traditional private common law tort action. OSI Br. 36-37; State Br. 21-23; see Br. of Tort Law Scholars 10-12. That is not the law. This Court has never suggested that standing requirements are inapplicable merely because a claim has historical antecedents or addresses private as opposed to governmental conduct. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103-04 n.5 (1998) ("[T]he standing inquiry ... does not depend on the defendant's status as a governmental entity. There is no conceivable reason why it should."). To the contrary, even when claims have historical pedigrees, this Court still requires plaintiffs to show injury-in-fact, traceability, and redressability. *E.g.*, *Vt. Agency of Natural Res.* v.

United States ex rel. Stevens, 529 U.S. 765, 771-73 (2000). These elements represent the "irreducible constitutional minimum of standing," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and they cannot be ignored because a claim is framed as a tort.

In any event, the climate change claims asserted in this case are nothing like the tort and nuisance cases courts have adjudicated in the past. Those cases, including the "contribution" cases plaintiffs cite, involved a finite (though sometimes large) number of parties whose actions in a particular geographic area produced a discrete effect in or near that area: for example, an automobile strikes a pedestrian, State Br. 22; several factories emit a pollutant that "foul[s] the air in a city," *id.* at 21; or fifty people each put "[o]ne drop of poison in a person's cup," OSI Br. 32. In these circumstances, where there is a clear nexus between individual contributors and ultimate effect, it is reasonable to characterize each of the actors as a "substantial factor" in producing the harm. Restatement (Second) of Torts §§ 432, 840E, 875; see TVA Br. 15.

The sweeping liability claims here bear no resemblance to those limited tort actions. The contributors of greenhouse gas emissions are innumerable and ever-expanding; the alleged effects of climate change are diffuse and worldwide; and there is no geographic or temporal nexus between individual emissions and particular alleged effects of climate change. Petrs. Br. 18-21. Without any such nexus, each and all of the billions of "contributors" of greenhouse gas emissions over centuries and across the globe cannot be characterized as "substantial factors" in producing each and all of the occurrences

plaintiffs attribute to climate change. *Id.*; see Br. of Chevron 16-21.

This is, then, not a case in which the requirements of standing are being "raise[d] ... higher than the necessary showing for success on the merits." OSI Br. 40; State Br. 16. Never before has a court adjudicated claims such as these, or adopted the expansive and novel theory of "contribution" on which they are based. Br. of DRI 10-20; Br. of Nat'l Fed. Ind. Bus. 13-25. There is no reason to believe that plaintiffs' theory of climate change as "the ultimate public nuisance" would or should be accepted even as a matter of tort law. Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 Envtl. L. Rep. 10230 (2009). And, even if it were, there would be no basis for lowering constitutional traceability or redressability requirements to match that relaxed causation standard. Just as constitutional standing requirements cannot be raised to bar adjudication of "matters that were the traditional concern of the courts at Westminster," *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.), so, too, novel tort claims cannot be used to lower those requirements. *Lujan*, 504 U.S. at 560-61.

3. Nor does *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), relax standing requirements for the claims presented here. That case arose in a regulatory context, where Congress often authorizes agencies to address problems incrementally. *Id.* at 516-17, 524-26. In addition, it was brought pursuant to an express statutory right of action, allowing petitioners to seek the "incremental" remedy of specific emissions regulations. *Id.* No statutory right is invoked in this case, so that analysis cannot support the comparable "incremental" relief sought here. Petrs. Br. 24-29.

Plaintiffs respond that Congress's decision to create a statutory right of action is relevant to standing analysis in only one limited respect: it establishes only that uncertainty about whether an agency will provide relief *on the merits* does not break the chain of causation when a party complains about the denial of a *procedural right*. OSI Br. 39. But this Court has also deemed the presence of a statutory right of action crucial to determining whether plaintiffs have standing in cases that raised no issue of agency discretion. *E.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000). And in *Massachusetts* itself, the statutory right of action was "critical," 549 U.S. at 516, not merely because it filled a gap in causation resulting from agency discretion. More fundamentally, this Court found that the statutory cause of action was important to the standing analysis because its exercise vindicated Congress's policy judgment to afford petitioners the right to obtain the "incremental" benefit of piecemeal emissions reductions that agency action could provide, notwithstanding the broad array of independent sources of greenhouse gas emissions that would remain unaffected by the regulations sought. Petrs. Br. 25-30.

By contrast, it is directly relevant in this non-statutory tort case that the overwhelming majority of greenhouse gas emissions come from independent sources that cannot be affected by a judicial decree here. This Court has in several cases rejected claims of standing when the occurrence of the harm depended on the conduct of independent third parties—including, contrary to plaintiffs' suggestion, OSI Br. 40-41, cases in which the defendant was alleged to contribute "directly" to the harm. Petrs.

Br. 21-22 (citing, *inter alia*, *ASARCO*, 490 U.S. 605). That is the situation here: according to the complaints, climate change "has begun" and will continue whether or not these defendants are required to "achieve their share" of the overall global emissions reductions that are "necessary to significantly slow the rate and magnitude of warming." J.A. 79, 102.

Plaintiffs' inability to plead facts establishing redressability underscores the impropriety of extending a common law tort claim to address these issues. Plaintiffs are not suing to obtain meaningful redress for their alleged injuries, or to vindicate a statutory right; they are suing because, in their view, Congress and EPA are not doing enough to address global warming. See OSI Br. 50-54; State Br. 48-54. Plaintiffs thus seek to use federal common law to implement their vision of proper public policy and apply it to a small subset of regulated entities. Article III courts do not exist to allow States and other parties to implement their incremental preferred responses to a national concern. To have standing, plaintiffs must allege facts establishing that judicial relief will redress their injuries—something they do not and cannot do.

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

Standing concerns aside, the federal common law cause of action asserted here should not be recognized. It goes far beyond any "nuisance" cause of action previously adjudicated by this Court, and implicates broad issues of national and international importance that render it fundamentally a matter for legislative, not judicial, resolution.

1. Plaintiffs' view of federal common law harkens to "the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*." *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963). Plaintiffs argue that, while federal courts are limited in their authority to imply rights of action arising from federal statutes, no similar restrictions apply when the claims are premised on "nonstatutory duties" that are "created by ... the Constitution or the common law." State Br. 40-41. In that context, plaintiffs claim, federal courts are generally free to recognize and adjudicate causes of actions "to enforce the common law." *Id.*; see OSI Br. 26-27.

That is plainly wrong. The creation or expansion of a cause of action at the federal level is an inherently legislative act—whether the claim is based on statutory right, constitutional guarantee, or common law duty. *E.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 388-90 (1983) (refusing to expand *Bivens* action to denials of First Amendment rights). This Court has consistently held in all types of cases that a federal common law claim may be recognized only when justified by a "uniquely federal interest" that would be undermined if the claim were not recognized. *Tex. Indus., Inc.* v. *Radcliff Mats., Inc.*, 451 U.S. 630, 641-42 (1981).[4] Indeed, even when a uniquely federal interest is present in a particular *area* of law such

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[4] *Compare Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 725-27 (2004) (Alien Tort Statute); *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (Civil Rights Act), *with Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 n.3 (2001) (Eighth Amendment); *Bush*, 462 U.S. at 388-90 (First Amendment), *with California* v. *Sierra Club*, 451 U.S. 287, 296 n.7 (1981) (common law nuisance); *Wheeldin*, 373 U.S. at 652 (common law abuse of process); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 314 (1947) (common law indemnity); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888) (common law nuisance); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 658-59 (1834) (common law copyright).

that federal common law *generally* applies, this Court has refused to approve specific proposed causes of action within that area of law when doing so would implicate policy issues more appropriately addressed by Congress. *Bush*, 462 U.S. at 378-380, 388-90. In *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947), for example, the Court found that federal common law governed claims by the United States seeking recovery of costs relating to the negligent injury of a soldier, but nonetheless declined to recognize that specific cause of action because the claim concerned "question[s] of federal fiscal policy" that were "a proper subject for congressional action, not for any creative power of ours." *Id.* at 314.

Similarly, this Court's previous adjudication of common law "nuisance" claims and cases involving interstate air emissions, see *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), does not support recognition of the specific and unprecedented federal common law claims asserted here. Those cases did not "establish a general federal law of nuisance." *California* v. *Sierra Club*, 451 U.S. 287, 296 n.7 (1981). They held only that, in the specific circumstances presented, and in light of then-existing federal statutes and relevant constitutional principles, the federal courts could address a specific claim without "intruding within a field properly within Congress' control." *Standard Oil*, 332 U.S. at 316; see Petrs. Br. 36-37.

Moreover, all of the disputes addressed in prior nuisance cases were of a type susceptible to resolution through a common law cause of action. They addressed allegations that a noxious pollutant emitted by a source in one State was causing harm in another. *Milwaukee I*, 406 U.S. at 93; *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 236 (1907); *Missouri*,

180 U.S. at 211-21. Put differently, one State was outsourcing its pollution to another. Those disputes involved a discrete number of relevant parties and an identifiable causal link between the challenged conduct in the source State and the resulting injury in the complaining State. *E.g.*, *Milwaukee I*, 406 U.S. at 103-07. However novel the scientific proof of causation may have been in *Missouri* v. *Illinois*, 200 U.S. 496 (1906), resolution of that and other essentially regional disputes did not require the Court to make expansive policy judgments with implications for the Nation's economy and foreign policy, using "vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*").

These claims are different in kind. Carbon dioxide is not inherently noxious—to the contrary, it is essential to virtually all industries, and produced as a result of numerous natural processes. And greenhouse gas emissions from a particular source in one State cannot be linked to particular alleged effects of climate change in any other. Petrs. Br. 18-20. As a result, this case does not involve one State outsourcing its pollution to another, or a localized dispute between an injured State and an injury-producing source in another. In marked contrast, the injuries asserted here—the effects of climate change—are alleged both to result from and affect enterprises in all States and around the world.

Contrary to plaintiffs' assertions, OSI Br. 1, therefore, this clearly is *not* a case in which "all that is involved is application of 'a well-settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept.'"

Standard Oil, 332 U.S. at 315. Unlike claims brought by a State against a discrete pollution source or discrete group of sources alleged to harm its residents, plaintiffs' claims would allow any or all States to sue facilities in any or all other States and seek emissions caps reflecting their interests and policy preferences. Federal common law has never been employed to resolve such disputes, and a "nuisance" action originally developed to address "obstructions of highways" and "scour[ing] of ditch[es]," OSI Br. 18, cannot be contorted to encompass such claims. See *Standard Oil*, 332 U.S. at 311-16 (tradition of common law indemnity claims did not support recognition of indemnity claim as a matter of federal common law).[5] The issues raised by this case are of national and global concern, and can legitimately be addressed only by the political branches. See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994) (weighing and appraising policy considerations is a task "for those who write the laws, rather than for those who interpret them").[6]

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[5] These claims also would be unique in allowing private parties to assert an environmental nuisance claim under federal common law for the first time in this Court's history. *See* Pet. App. 102a-112a.

[6] Plaintiffs argue further that this cause of action is necessary to preserve "uniformity" and protect against the "uncertainty" that would arise if federal common law were not applied. OSI Br. 3; State Br. 45. But this Court has said that bare pleas for uniformity are insufficient to warrant creation of federal common law rules of decision, *Atherton* v. *FDIC*, 519 U.S. 213, 219-20 (1997), let alone creation or expansion of a federal common law cause of action. In any event, Congress, not the courts, should decide whether and how any interest in "uniformity" of greenhouse gas emissions regulation should be pursued (and is in a far better position to achieve such uniformity). *See Standard Oil*, 332 U.S. at 311-16.

2. Any federal common law climate change cause of action that might have been recognized has been displaced. Petrs. Br. 41-46. Plaintiffs acknowledge that this Court has held that the Clean Air Act ("CAA") grants EPA regulatory authority to restrict greenhouse gas emissions pursuant to statutory criteria, and they concede that EPA has exercised that authority and further committed to consider regulations concerning the very category of facilities at issue here. OSI Br. 50-54; State Br. 48-54. They nevertheless argue that displacement does not occur unless and until "EPA issues performance standards applicable to existing power plants." OSI Br. 52; State Br. 49; see Br. of Envtl. Law Prof. 8-16.

This is not the standard for displacement. In addressing *preemption* of *state* law, the presumption is against the party seeking preemption. *Milwaukee II*, 451 U.S. at 316-17. In contrast, this case addresses whether Congress has displaced federal common law, and the presumption therefore runs the other way: courts "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* Once Congress "addresse[s] [a] problem," whether through direct legislative regulation or by conferring regulatory authority on a federal officer or agency, related common law claims are displaced. *Id.* at 324; see *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981); *Arizona* v. *California*, 373 U.S. 546, 565-66, 580-81 (1963).

There is no doubt that the CAA "addresse[s] the problem" of greenhouse gas emissions by directing EPA to consider regulations based on the agency's findings regarding the risks of those emissions. Petrs. Br. 41-46; see *Chevron U.S.A., Inc.* v. *Natural*

Res. Def. Council, Inc., 467 U.S. 837, 848 (1984) (describing the CAA as a "comprehensive" approach to air pollution regulation).[7] The fact that Congress chose to address these issues by delegating regulatory authority to an agency, rather than imposing direct statutory emissions restrictions, does not mean there is a "gap" in the legislative scheme to be filled by courts. Petrs. Br. 41-44. Nor is there a "gap" in the statutory system with respect to the particular emissions restrictions plaintiffs seek: federal law not only grants EPA authorization to consider imposing such restrictions pursuant to statutory criteria, but also defines an administrative process by which plaintiffs can seek those restrictions through rulemaking petitions to EPA and judicial review of EPA's responses (the process used in *Massachusetts* v. *EPA*). *Id.*

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[7] The CAA's "comprehensive" regulatory scheme is wholly unlike the system established by the pre-1972 Federal Water Pollution Control Act ("FWPCA") addressed in *Milwaukee I*, notwithstanding plaintiffs' efforts to link the statutes. State Br. 49. The FWPCA did not grant EPA *any* direct authority to regulate pollutant discharges. Petrs. Br. 42-43. Instead, it allowed the agency to request that the Attorney General bring an equitable abatement action where, as in common law nuisance actions, relief depended on the district judge's discretionary balancing of "the public interest and equities of the case." 33 U.S.C. § 1160(c)(5) (1970). Indeed, the FWPCA's savings clause expressly provided that "interstate action[s] ... shall not ... be displaced." *Id.* § 1160(b); *see Milwaukee I*, 406 U.S. at 102-04. The CAA, by contrast, vests in EPA direct authority to set and enforce emissions limitations, Petrs. Br. 41-43, and this Court has held that the language of its savings clause, 42 U.S.C. § 7416, does *not* preserve federal common law claims against displacement, *Milwaukee II*, 451 U.S. at 328-29 & n.21 (discussing "virtually identical" provisions in Clean Water Act).

Plaintiffs effectively ask this Court to hold that the CAA does not displace federal common law because the statute does not "obligate[ ]" EPA to regulate emissions in the way they prefer. OSI Br. 49. This argument reflects plaintiffs' *policy* judgment that the approach selected by Congress is inadequate or unsatisfactory and should be supplemented (if not supplanted) by the common law regulatory regime they propose. Br. of Rep. Upton 3-11. Accepting plaintiffs' argument would affirmatively undermine the regulatory scheme enacted by Congress, allowing plaintiffs to bypass the administrative process Congress established and instead seek a different and competing regime of emissions restrictions crafted by federal judges. Petrs. Br. 40-46; see Br. of EEI 14-23; Br. of Cato 29-34; Br. of U.S. Chamber of Commerce 28-30; cf. *Astra USA, Inc.* v. *Santa Clara County, Cal.*, No. 09-1273, 2011 WL 1119021, at *6-7 (U.S. Mar. 29, 2011) (refusing to recognize common law cause of action when Congress provided administrative system to address relevant issues). Creating and policing such a regime is not a proper function of the federal judiciary or federal common law.

III. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.

In addition to being precluded by principles of standing and restrictions on the role of federal common law, plaintiffs' claims are non-justiciable because they call on courts to address and resolve inescapably political questions. Petrs. Br. 46-51. To determine a "reasonable" emissions level for these defendants, a court would be required to determine the "reasonable" global level of greenhouse gas emissions, weighing the global risks of climate change and the global costs and benefits of emissions-

producing activities and associated reduction measures, and then make a comparative judgment to determine which industries, sectors, and particular defendants should be required to reduce their emissions and by how much. *Id.* These determinations implicate a broad array of national and international socioeconomic policy issues, with wide-ranging ramifications for the Nation's economy and security extending far beyond the parties in this case. *E.g.*, Br. of Am. Farm Bureau 10-22; Br. of U.S. Chamber of Commerce 24-30; Br. of Nat'l Black Chamber of Commerce 4-6; Br. of Bus. Roundtable 3-25.[8]

Nowhere do plaintiffs explain how a court could manage a "reasonableness" inquiry in this context. Instead, they propose an alternative standard under which a court could grant relief on these claims "without any inquiry into fault" based solely on the severity of the risks posed by climate change. State Br. 32-33. But, as the authorities they cite acknowledge, that standard would likewise require courts to engage in a "reasonableness" analysis, to decide whether it is socially and economically appropriate to hold the defendant liable for alleged harm regardless of fault, *e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 88, at 629-30 (5th ed. 1984), and thus implicates the same *ad hoc* judicial balancing of policy goals that the political

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[8] The political and normative judgments inherent in recognition and adjudication of these claims, as well as the potentially massive socioeconomic consequences, are highlighted by amicus briefs supporting respondents. *E.g.*, Br. of AllEarth 4-20 (citing "market failures" and promotion of "clean energy" technologies); Br. of N. Coast Rivers 4-17 (citing cross-industry economic effects); Br. of Unitarian Universalist Ministry 10-24 (citing "ethical implications" of these issues).

question doctrine forbids. Petrs. Br. 46-51. Moreover, to hold that no balancing is required to resolve these claims, and that any "contributor" of greenhouse gas emissions—that is, virtually any enterprise anywhere in the world—could be judicially compelled to halt its emissions without any consideration of social utility or costs, would carry extraordinary consequences for the Nation's economy and security and would necessarily reflect a *policy* choice concerning the proper manner of assigning responsibility for and addressing the risks of climate change. That even plaintiffs do not here urge such draconian measures, which is what their theory logically supports, confirms the political questions inherent in their claims.

Nor are these claims justiciable merely because they are framed as a common law tort. OSI Br. 44-46; State Br. 32-33. One of the earliest political question cases, *Luther* v. *Borden,* 48 U.S. (7 How.) 1 (1849), was an action for common law trespass. *Id.* at 34. To adjudicate the merits of the claims there, however, a court would have been required to determine which of two competing governments of Rhode Island was lawful—a political question beyond a court's authority to resolve, notwithstanding the fact that it arose in a common law tort action. *Id.* at 35-39. Indeed, virtually *every* case presenting a non-justiciable political question comes to the court clothed in some recognized cause of action; if that were all that were required to compel a court to address an otherwise non-justiciable political question, the doctrine would be meaningless.

While political questions have arisen most often in cases addressing "foreign affairs and constitutional issues," State Br. 27, 30, those cases were deemed non-justiciable not because the doctrine is limited to

those two subject matters, but because particular questions implicated by those cases were committed exclusively to other branches or because there were no judicially manageable standards by which they could be resolved without engaging in *ad hoc* policy determinations. *E.g.*, *Vieth* v. *Jubelirer*, 541 U.S. 267, 277 (2004) (plurality); see *Baker* v. *Carr*, 369 U.S. 186, 210-17 (1962). This Court emphasized in *Baker* that the political question doctrine applies "even in private litigation which directly implicates no feature of separation of powers," and that it cannot be addressed by mere "semantic cataloguing" of prior cases in which a political question has been found. 369 U.S. at 214, 216; see Br. of U.S. Chamber of Commerce 17-18; Br. of Petrs. Law Prof. 22-23.

Moreover, this case *does* implicate constitutional issues and foreign affairs concerns: *inter alia*, whether the judiciary is constitutionally empowered to recognize and adjudicate a cause of action for global climate change in the absence of legislative or regulatory guidance when the relevant issues are subject to ongoing international negotiations. Br. of ACC 26-34; Br. of Global Automakers 24-29. These matters are undoubtedly "within the province of [the political] branch[es]." State Br. 29; see Br. of Rep. Upton 9-13.

The problem thus is not the "importance" of the questions presented, the "political overtones" of these cases, or the "complex[ity]" of the issues. OSI Br. 45-46; State Br. 34. The problem is that these claims inherently involve highly sensitive policy tradeoffs and judgments with far-reaching national and global effects. Petrs. Br. 46-51; see Br. of Indiana 12-24; cf. *Massachusetts*, 549 U.S. at 533 (courts have "neither the expertise nor the authority to evaluate these policy judgments"). The standards this Court and

others have previously applied in assessing the "reasonableness" of particular conduct, including in constitutional claims and prior nuisance cases, *e.g.*, State Br. 32-33, offer no basis for adjudicating these fundamentally different claims or for balancing the myriad national and international socioeconomic issues they implicate.[9]

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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[9] Many of the issues that make this case non-justiciable under the political question (and Article III standing) doctrines also support dismissal on prudential standing grounds, as the Solicitor General argues. TVA Br. 11-22.

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