

No. 09-17490

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Native Village of Kivalina; City of Kivalina,

Plaintiffs-Appellants,

v.

ExxonMobil Corporation; BP P.L.C.; BP America, Inc.; BP Products North America, Inc.; Chevron Corporation; Chevron U.S.A., Inc.; ConocoPhillips Corporation; The AES Corporation; American Electric Power Company, Inc.; American Electric Power Service Corporation; Duke Energy Corporation; DTE Energy Corporation; Edison International; MidAmerican Energy Holdings Company; Pinnacle West Capital Corporation; The Southern Company; Dynegy Holdings, Inc.; Reliant Energy, Inc.; Xcel Energy Inc.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE SAUNDRA BROWN ARMSTRONG
DISTRICT COURT CASE NO. 08-CV-01138 SBA

BRIEF OF AMICUS CURIAE NATSO, INC.
IN SUPPORT OF DEFENDANTS-APPELLEES
AND IN SUPPORT OF AFFIRMANCE

Tristan L. Duncan
William F. Northrip
Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
Telephone: (816) 474-6550

Richard H. Fallon, Jr.
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
Telephone: (617) 495-3215
COUNSEL FOR NATSO, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 *amici* NATSO, Inc. states that it is a non-profit organization, it has no parent companies, and has not issued any shares of stock.

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IDENTITY AND INTEREST OF THE AMICUS

NATSO, Inc. (“NATSO”) is a national trade association representing the travel plaza and truckstop industry. NATSO’s members run the gamut from small mom and pop stores and family-run businesses to medium and larger sized corporations. NATSO, and its members, are active participants in the ongoing debate before the political branches regarding how to address climate change.

Any judgment that might issue in this case finding the defendants liable for damages allegedly associated with climate change would directly impact NATSO’s members by requiring them to change their business practices or, like the defendants, face the potential for civil liability themselves in future litigation. Additionally, any decision imposing damages on defendant oil companies would necessarily affect the supply of motor fuel, thereby creating negative economic consequences for NATSO’s members. Because of this case’s potentially direct and adverse impact on the businesses and livelihoods of NATSO’s members, the Court should allow NATSO’s voice to be heard.

All parties to this appeal have consented to NATSO’s participation as an amicus.

ARGUMENT

As the District Court correctly held, the political question doctrine bars the exercise of federal jurisdiction over this case. Furthermore, there is no federal common law cause of action for damages relief for emitting greenhouse gases, and the Constitution grants the federal courts no authority to create such a cause of action. These two grounds are closely related. Both reflect the premise that our Constitution vests legislative power in Congress, not the courts.

I. THE POLITICAL QUESTION DOCTRINE BARS THE FEDERAL COURTS FROM CREATING UNPRECEDENTED COMMON LAW LIABILITY FOR THE EMISSION OF GREENHOUSE GASES AND ESTABLISHING *DE FACTO* NATIONAL EMISSIONS STANDARDS FOR GREENHOUSE GASES.

The Supreme Court articulated the criteria for identifying political questions in *Baker v. Carr*, 369 U.S. 186, 216 (1962), which declared that any one of six “formulations” typically characterizes a nonjusticiable political question. Among them, and applicable here, are “a textually demonstrable commitment to a coordinate political department; ... a lack of judicially discoverable and manageable standards ...; [and] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.” *Id.* “[A] political question may arise when any one of the[se] circumstances is present.” *INS v. Chadha*, 462 U.S. 919, 941 (1983); Richard H. Fallon, Jr. *et al.*, *Hart & Wechsler’s The Federal Courts and the Federal System* 235 (6th ed. 2009) (“No single

criterion seems to control, and some appear to ... have a ... prudential or functional feel to them.”).

In all of its aspects, the political question doctrine is “a function of the separation of powers.” *U. S. Dept. of Commerce v. Montana*, 503 U.S. 442, 456 (1992)). *Cf. Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (discussing overarching separation of powers principles generally and explaining that their primary purpose is to prevent “encroachment or aggrandizement [by] one branch at the expense of the other[s]”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“Constitution diffuses power the better to secure liberty....”).

The political question doctrine performs two closely related functions. One involves protecting the political branches from improper judicial intrusion. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) (dismissing a trespass action that presented a political question committed to Congress because a court “must take care not to involve itself in discussions that properly belong to other forums”); *Gilligan v. Morgan*, 413 U.S. 1, 7, 10 (1973) (holding a civil rights action under the Fourteenth Amendment nonjusticiable where the matter at issue, involving the appropriate organization and discipline of the National Guard, was exclusively committed to the political branches). Another function is to prevent the judicial branch from becoming enmeshed in matters that lie beyond the practical

competence of courts to address or manage successfully. *See Gilligan*, 413 U.S. at 10 (applying the political question doctrine where “it is difficult to conceive of an area of governmental activity in which the courts have less competence”); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (finding a dispute nonjusticiable due to the absence of judicially manageable standards).

This case implicates both functions of the political question doctrine. Although couching their claims as a garden-variety public nuisance dispute, plaintiffs ask the court to make at least three unprecedented policy determinations of breath-taking scope and to impose them as a matter of judicial fiat without judicially manageable standards. Plaintiffs specifically ask the federal courts to (1) legislate a cause of action for emitting greenhouse gases, (2) establish liability standards that would effectively determine, on a retroactive basis, which emissions of greenhouse gases were permissible and which were not, and (3) apportion liability for harms allegedly attributable to greenhouse gases among innumerable emitters worldwide.

For a court to create a cause of action for emission of greenhouse gases, and to make the policy judgments necessary to establish emissions standards and applicable liability rules, would intrude on, by usurping, the legislative powers of Congress. *See* U.S. Const., Art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States.”); *see generally O’Melveny & Myers*

v. Federal Deposit Insurance Corp., 512 U.S. 79, 89 (1994) (“What sort of tort liability to impose ... involves a host of considerations that must be weighed and appraised” and is “more appropriately for those who write the laws, rather than for those who interpret them.”) (internal quotations and citations omitted); *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 647 (1981) (“The choice we are urged to make is a matter of high policy ... which in our democratic system is the business of elected representatives.”) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). In addition, judicial efforts to address problems associated with global warming would complicate, and could potentially undermine, efforts by the President to negotiate a coordinated international response to a problem that can ultimately be solved only through international cooperation. See Laurence H. Tribe, Joshua D. Branson, & Tristan L. Duncan, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine*, Washington Legal Foundation, Critical Legal Issues Working Paper Series, No. 168 (Jan. 2010).

The second function of the political question doctrine (limiting courts to matters of judicial competence) applies equally. For a court to create a novel tort of global warming, define liability standards identifying permissible and impermissible emissions, and apportion liability among a hand-selected number of the billions of emitters over time and across the globe would require scientific,

economic, and policy judgments that lie far beyond the judicial competence and for which no judicially manageable standards exist. *See id.* at 3; *see also Texas Indus.*, 451 U.S. at 647, quoting *Diamond*, 447 U.S. at 317 (noting that making sound policy judgments requires “the kind of investigation, examination, and study that legislative bodies can provide and courts cannot”).

Plaintiffs’ Complaint not only runs afoul of the central functions of the political question doctrine. It also specifically comes within three of the tests for political questions laid out in *Baker v. Carr*.

A. Resolution of the Issues Framed by Plaintiffs’ Complaint Would be Impossible Without Initial Policy Determinations of a Kind Clearly for Nonjudicial Discretion.

To uphold plaintiffs’ claims, a federal court would need to take at least three large, interrelated steps, all of which require the type of “initial policy determination,” *Baker*, 369 U.S. at 216, that our Constitution reserves to the political branches. First, in adjudicating the Plaintiffs’ Complaint on the merits, a court would need to decide whether there should be a cause of action for greenhouse gas emissions—even though the question of whether the availability of private suits for damages would abet or retard efforts to solve the problem of global warming is very much open to debate. *See Tribe et al., supra*, at 20 (“even climate experts who concur about the need to combat global warming” disagree about which responses would be helpful and which hurtful). The Supreme Court

has affirmed repeatedly that the decision to create a cause of action is a legislative task that requires policy judgments. *See, e.g., Texas Indus.*, 451 U.S. at 646-47 (refusing to craft a federal common law rule establishing a right to contribution in antitrust); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (“[T]his Court has recently and repeatedly said that the decision to create a private right of action is one better left to legislative judgment.”).

In arguing that an initial policy judgment is not necessary, plaintiffs maintain that any requisite policy judgment “has already been provided” by the political branches because “[t]he official U.S. policy is that [greenhouse gas] emissions should be reduced.” Plaintiff’s Brief at 58. The fallacy in this argument is patent. Even if it is U.S. policy that greenhouse gas emissions should be reduced, it is a separate policy question whether the creation of a damages action for contribution to global warming is a desirable mechanism for achieving reductions. *See Tribe et al., supra*, at 19-20. Congress has not made this crucial policy judgment.

The second policy decision that a federal court would need to make in order to create a cause of action for greenhouse gas emissions would be to determine what level of emissions, by which firms and individuals, should be held actionable and which should not—thereby effectively establishing de facto regulatory standards applicable worldwide. *See Cipollone v. Liggett Group, Inc.*, 505 U.S.

504, 521 (1992), quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (“[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.”). Courts have no competence to perform the standard-setting function required to develop a federal cause of action for contribution to global warming. See *Tribe et al., supra*, at 18-19. The requisite policy judgments are ones that, within our democratic system of government, should be made by policy-makers, not the federal courts. See *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (courts have “neither the expertise nor the authority to evaluate [climate change] policy judgments”).

The District Court rightly held that the political question doctrine applies for this reason. If the case were to be adjudicated under common law public nuisance standards, the District Court found, the applicable test would be that laid out in Section 821B of the *Restatement (Second) of Torts* (1979), which defines a public nuisance as an “unreasonable interference with a right common to the public.” See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874 (N.D. Cal. 2009). Under this standard, which requires a weighing of “the gravity of the harm against the utility of the conduct,” *Restatement* § 821B, cmt. e, a federal judge or jury would need to make a multitude of policy-based judgments for which no judicially manageable standards are available. Among the questions needing answers are these:

- Balancing: How should contribution to economic productivity be weighed or traded against contribution to global warming?
- Responsibility and Fair Notice: Is it reasonable for a business or an individual to conclude that, absent politically negotiated international climate agreements, unilateral reductions of greenhouse gas emissions in the United States would have been ineffective in reducing any alleged harm and, accordingly, that unilateral, economically costly emission-reducing measures are not mandated by a sensible balance of costs and benefits?
- Making Matters Worse: Would de facto, judicially established limits on carbon emissions enforced through the common law result in a transfer of manufacturing activities from the United States to other, less regulated jurisdictions thereby increasing the overall level of global carbon emissions? If so, does this consideration matter to the determination of whether carbon-emitting actions in the United States are reasonable or unreasonable?
- Value Judgments: Are some carbon emitting activities more reasonable than others? How does a court in the context of a global nuisance suit consider and weigh in principled fashion the countless perspectives to determine what is reasonable?

Confronted with the fact that federal courts could not determine which emissions are “unreasonable” without making fundamental policy judgments of a non-judicial nature, plaintiffs argue, in essence, that the District Court erred by relying on the wrong section of the *Restatement*. See Plaintiffs’ Brief at 15, 17, 23-27, 29-30, 51-54. According to plaintiffs, federal courts should apply a strict liability rule to their Complaint. See Plaintiffs’ Brief at 26, 52.

Plaintiffs’ argument fails at multiple levels. First, as defendants and other *amici* have cogently argued, strict liability is not applicable here. There is no need to repeat these decisive arguments. The District Court was correct. If a federal court were to create a cause of action for greenhouse gas emissions, it could not differentiate impermissible from permissible levels of emissions without making reasonableness determinations that would require non-judicial policy judgments.

Second, the *Restatement (Second) of Torts* is not part of the law of the United States. The American Law Institute is not Congress. Even if the *Restatement* recommended a strict liability standard for greenhouse gas emissions, under which every emitter of greenhouse gases would be liable to anyone who was severely harmed by global warming, a federal court could not adopt that standard without making a fundamental policy judgment that should be made by the political branches.

Third, plaintiffs either overlook or fail to understand the inherent restrictions that the common law of nuisance, as reflected in the *Restatement*, has always incorporated. *See Introduction to RESTATEMENT (SECOND) OF TORTS*, vol. 4, at viii (1979) (“[T]he law of torts [is] a dynamic set of norms, inviting adaption as social conditions and prevailing values change, [but only] *within the limits of the judicial function.*”) (emphasis added). The judgments of national and international policy that plaintiffs ask federal courts to make in this case lie far beyond the scope of properly judicial common-law decision-making. The *Restatement* implicitly recognizes as much when it provides that the courts should root their judgments of “unreasonableness” in nuisance cases in “community standards,” *id.* § 828 cmt. b (emphasis added), because, apart from community standards, “there is often no uniformly acceptable scale or standard of social values to which courts can refer.” *Id.* In this case, for which it is clear that no “community standards” exist, a court could not proceed without making uncabined policy judgments that even the *Restatement* recognizes courts should eschew as “outside the limits of the judicial function.” *See generally* Jesse Dukminer et al., *PROPERTY* 665 (6th ed. 2006) (“[N]uisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems.”).

Finally, just as a court could not develop a liability standard without making a policy judgment, neither could a court apportion liability in a case such as this

without making a fairness judgment of staggering importance. The relationship between carbon emissions and climate change “does not operate like the kind of simple, short-term, more linear relationship between cause and effect that most people . . . assume is at work when they contemplate pollution.” Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 Cornell L. Rev. 1153, 1164 (2009).

To the obvious and urgent policy question of how liability should be apportioned among actual and potential defendants, plaintiffs answer only that “[d]efendants will have their day in court where they may try to establish a basis for apportioning liability.” Plaintiffs’ Brief at 60. Under the political question doctrine, this is no answer. The Supreme Court has repeatedly held that the question whether to create a right of contribution among those who have violated federal law is a policy judgment for Congress, not the courts. *See Texas Indus.*, 451 U.S. at 647. The political question doctrine applies precisely because the question of *how* liability for harms caused by greenhouse gas emissions ought to be apportioned could not be answered “without an initial policy determination of a kind clearly for nonjudicial discretion.” *Baker*, 369 U.S. at 216.

B. No Judicially Manageable Standards Exist to Resolve the Issues Presented by Plaintiffs’ Claims for Relief.

This case presents a political question for the additional reason that there are no “judicially discoverable and manageable standards for resolving” the policy

questions that plaintiffs present for adjudication. *See Vieth*, 541 U.S. at 278 (“[J]udicial action must be governed by *standard*, by *rule*.”). As the Supreme Court has recognized, the “nuisance concepts” under which plaintiffs ask the court to create liability for greenhouse gas emissions are “vague and indeterminate” even as applied to relatively traditional cases. *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (“*Milwaukee II*”). In this extraordinary case, which involves some of the most profound and complex policy questions now confronting Congress, the President, and the international community, “vague and indeterminate” nuisance concepts fall far short of furnishing judicially manageable standards.

Vieth, in which the Supreme Court held that familiar equal protection formulae provided no judicially manageable standards for resolving challenges to partisan gerrymanders of electoral districts, offers a precise analogy. Justice Scalia’s plurality opinion recognized that the Equal Protection Clause provides judicially manageable standards in nearly all equal protection disputes. Nevertheless, the language of the Equal Protection Clause and familiar formulae for applying it failed to give sufficient guidance to a court in answering the complex, contentious, and policy-based question of when a political gerrymander goes “too far.” *See Vieth*, 541 U.S. at 296-97 (“The central problem is determining when political gerrymandering has gone too far.”). Justice Kennedy’s concurrence also concluded that the case should be dismissed due to the lack of judicially

manageable standards for applying the Fourteenth Amendment to political gerrymandering claims. *See id.* at 312-13 (Kennedy, J., concurring).

As it was in *Vieth*, so it is in this case. Common law concepts of nuisance may suffice as judicially manageable standards in the general run of tort cases. In this case, however, plaintiffs ask this Court to apply familiar-sounding tort concepts in a context so vastly different that – like the equal protection guarantee in *Vieth* – they cease to function as judicially manageable standards. *See* Tribe *et al.*, *supra*, at 10-11; *see also Vieth*, 541 U.S. at 290 (distinguishing the “easily administrable standard” provided by the Equal Protection Clause in one-person, one-vote cases from the more problematic standards proposed for partisan gerrymandering cases).

Cases in which the Supreme Court has felt obliged to craft federal common law to resolve interstate pollution disputes brought by a state against polluters in other states do not, as plaintiffs suggest, indicate otherwise. As the District Court rightly recognized, the judgments necessary to resolve traditional nuisance cases in which a state is the plaintiff -- and the number of potential defendants is limited and the chain of causation is direct -- differ in kind from those required to resolve this case. *See generally* Dukminer *et al.*, PROPERTY, at 665.

Even in relatively simple nuisance cases brought by states, the Supreme Court has expressed unease about the quasi-legislative aspect of its role. *See, e.g.*,

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 501 (1971) (“History reveals that the course of this Court’s prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth.”); *New York v. New Jersey*, 256 U.S. 296, 313 (1921) (“The grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted.”). In light of that unease, plaintiffs’ reliance on *ordinary* pollution cases to establish the existence of judicially manageable standards for this extraordinary and unprecedented case is manifestly misplaced. *See generally Baker*, 369 U.S. at 217 (the political question doctrine requires a fact-intensive “discriminating inquiry into the precise facts and posture of the particular case”).

Given the nature of the issues presented, plaintiffs’ assertion that “[d]amages cases rarely present political questions because the resolution of liability and damages is well within judicial competency,” Plaintiffs’ Brief at 47, is misleading in its first clause and false in its second. The Supreme Court case that functions as the fountainhead of the political question doctrine, *Luther v. Borden*, was a suit for damages predicated on a claim of common law trespass. The central question was whether the alleged trespasser was lawfully authorized to come onto the plaintiff’s

property. The answer to that question, in turn, depended on which of two rival claimants was the legitimate government of Rhode Island. In holding that responsibility to resolve that question was vested in the political branches by the Guarantee Clause, U.S. Const., Art. IV, § 4, the Court also emphasized the crucial, functional point that there was no “rule” to guide a judicial decision concerning whether a state constitution dating from the colonial era had been legitimately displaced by a disputed vote. *Luther*, 48 U.S. at 41. Nor, the Court continued, would a federal tribunal have had the practical capacity to make all of the relevant factual determinations such as whether the requisite number of Rhode Island voters had duly approved a proposed new state constitution. *See id.* at 41-42.

As with the rationale of *Vieth*, the logic of *Luther* applies here. It is indisputable that no established “rule” resolves the policy questions that a court developing a cause of action for greenhouse gas emissions would need to answer. It is equally plain that a federal court lacks the practical capacity to appraise the imponderables involved in fixing liability standards for and apportioning costs among potential defendants. Under *Luther*, this case thus presents a nonjusticiable political question.

C. The Central Questions Presented by Plaintiffs' Complaint are Textually Committed to the Political Branches, Congress and the President.

As the Supreme Court explained in *Nixon v United States*, 506 U.S. 224 (1993), the *Baker* criteria are not isolated but instead interact with, and support, one another. *See id.* at 228-29 (recognizing that “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”). Here, the need for initial policy determinations and the absence of judicially manageable standards help establish that the first *Baker* formulation, involving “a textually demonstrable commitment of the issue to a coordinate political department,” *Baker*, 369 U.S. at 216, also applies.

The Constitution is, of course, linguistically silent as to which branch of government is empowered to address climate change. There is no “Climate Change Clause” or “Carbon Emissions” Clause. “But global climate change raises such manifestly insuperable obstacles to principled judicial management that its very identification as a judicially redressable source of injury cries out for the response that plaintiffs have taken their ‘petition for redress of grievances’ to the wrong institution.” *Tribe et al., supra*, at 9.

Textual commitments may be implied from the Constitution’s structure and immanent logic. *See Nixon*, 506 U.S. 228-29. “Behind the words of the

constitutional provisions are postulates which limit and control.” *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). In this case, the controlling postulate marks functions that only Congress or the President could discharge competently as committed, respectively, to Congress and the President. *See, e.g., Alperin v. Vatican Bank*, 410 F.3d 532, 549 (9th Cir. 2005) (“Here we are not faced with analyzing a specific clause of the Constitution but rather proceed from the understanding that the management of foreign affairs predominantly falls within the sphere of the political branches.”).

Responding to the challenges posed by global warming will require policy choices that are inherently legislative and thus inherently committed to Congress. The “Constitution is neither silent nor equivocal about who shall make the laws,” *Youngstown*, 343 U.S. at 587.¹ Article I vests lawmaking power exclusively in Congress, not the federal courts. *See generally Sosa*, 542 U.S. at 727. Sound reasons support the constitutional allocation of power to Congress to address problems, such as climate change, that inherently require national and international systemic solutions that are beyond the judicial competence to craft. Through the legislative process, Congress can gather information and obtain input from a wide

¹ While *Youngstown*, which involved a presidential order to the Secretary of Commerce to take possession of the nation’s steel mills, is not a political question doctrine case, it is relevant to the separation-of-powers issues here. As much as the presidential order in *Youngstown*, the judicial action that the plaintiffs request in this case would usurp law-making powers that the Constitution vests exclusively in Congress.

variety of sources that are not available to the courts. *See, e.g., Diamond*, 447 U.S. at 317. Having done so, Congress, and Congress alone, has the arsenal of tools to devise and implement programmatic responses to multi-dimensional problems. *See Tribe et al., supra*, at 22-23 (maintaining not only that courts are ill-equipped to address the problem of climate change, but also that “an ad hoc mishmash of common law regimes [would] frustrate legislators’ attempts to design coherent and systemic ... solutions”).

The nature of the implied commitment here is also illustrated by the overarching separation of powers principles enunciated in *Youngstown*. There, the court considered the constitutionality of an Executive Order compelling steel companies to *continue operations* supplying steel for the war effort. *See* 343 US at 581 (1952). Although no provision of the Constitution specifically referred to the production of steel, the court concluded that the Executive Order possessed the attributes of law-making, which is a congressional power, and did not involve the properly executive task of law enforcement. *Youngstown*, 343 U.S. at 587-88.

In this case, plaintiffs ask the courts to legislate, rather than the executive, but judicial legislation would be every bit as much an affront to the separation of powers. An award of damages would embody a legislative judgment about what carbon emissions policy ought to be, derived from a cost-benefit analysis of costs to plaintiffs versus utility of continued energy production at current levels. As

such, like the policy question in *Youngstown*, it is inherently legislative. In the context of the unique, global, inherently systemic nature of climate change, balancing of competing considerations of costs and utility is not possible in any traditional common-law calculus. Indeed, such substantive, non-interstitial, lawmaking in the guise of the common law unconstitutionally aggrandizes judicial power beyond the Judiciary's law-application function and unconstitutionally violates separation-of-power principles.

Other elements of responsibility for resolving global problems such as climate change are vested in the President, who is the nation's chief voice and representative in the domain of foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). In particular, it is only the President who can negotiate treaties. U.S. Const., Art. II, § 2, cl. 2. By "textually ... commit[ting]" this power to the President, Article II precludes any judicial authority to establish de facto regulatory standards for greenhouse gas emissions that might disrupt a treaty-based or other internationally negotiated response to the global problem of climate change. *Cf. American Ins. Assn. v. Garamendi*, 539 U.S. 396, 424 (2003) (invalidating a state law because it interfered with presidential prerogatives by

giving “the President ... less to offer and less economic and diplomatic leverage” in negotiations with foreign governments) (internal citation and quotation omitted).

II. PLAINTIFFS’ ASSERTED CAUSE OF ACTION UNDER THE FEDERAL COMMON LAW FAILS TO STATE A CLAIM.

In arguing that the federal courts should create an unprecedented cause of action for greenhouse gas emissions, plaintiffs badly misunderstand the limits that the Constitution imposes on lawmaking by the federal courts. The same constitutional provisions that vest responsibility for addressing national and global problems in Congress and the President bar the federal courts from usurping that responsibility in the guise of federal common lawmaking. Although federal common law exists in a few enclaves in which it is “necessary to protect uniquely federal interests,” *Texas Indus.*, 451 U.S. at 640, there is no federal common law cause of action for the emission of greenhouse gases, and the federal courts have no authority to legislate such a cause of action.

A. Plaintiffs Have No Claim to Relief Under Federal Common Law.

“[T]he Supreme Court has recognized the need and authority of courts to fashion federal common law [only] in a few and restricted instances.” *Int’l Audubon Soc’y v. Dep’t of Water*, 869 F.2d 1196, 1201 (9th Cir. 1989), quoting *Texas Indus.*, 451 U.S. at 640. As defendants and other *amici* have persuasively argued, none of those instances has any pertinence here.

Although the Supreme Court has upheld federal common law causes of action in a relatively small number of cases involving interstate pollution, it has done so only in cases satisfying each of three criteria, none of which is met in this case. First, all of the Supreme Court cases upholding common law claims to relief from interstate pollution have “involve[d] a state suing [pollution] sources outside of its own territory.” *Audubon*, 869 F.2d at 1205 (emphasis added). Plaintiffs here are not a state. Second, as the Court asserted in *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923), and repeated in *Illinois v. Milwaukee*, 406 U.S. 91, 106 n.8 (1972) (“*Milwaukee I*”), “[i]t is the creation of a public nuisance of simple type for which the State may properly seek an injunction.” (emphasis added). Plaintiffs’ protestations to the contrary notwithstanding, their alleged public nuisance is most assuredly not “a public nuisance of simple type.” Third, the interstate pollution cases in which the Supreme Court has applied federal common law have all involved claims to injunctive relief. See *Middlesex County Sewage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 10, 21-22 (1981) (recognizing that an asserted federal common law claim for damages caused by interstate pollution went “considerably beyond” a prior decision “which involved purely prospective relief sought by a state plaintiff” and finding the claim preempted). Here, the plaintiffs seek damages.

In asserting their wholly unprecedented claim, plaintiffs place unsupportable weight on a dictum in *Milwaukee I*, 406 U.S. at 103, that “[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.” *See* Plaintiffs’ Brief at 18. But this was only a dictum, uttered in a suit brought by a state, not by private parties. *Milwaukee I* presented no occasion for the Supreme Court to hold that there is a “*general* federal common law” of interstate pollution, a point that this court has recognized. *Audubon*, 869 F.2d at 1201. Cases decided subsequent to *Milwaukee I* demonstrate that there is no general federal common law of interstate pollution and that the federal courts may not create one.

The Supreme Court’s rejection of federal common lawmaking began with the epochal recognition in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), that law is necessarily made, not found, and that the crafting of common law rules of decision therefore involves law making. *See generally Sosa*, 542 U.S. at 726 (recognizing that “along with, and in part driven by,” modern understandings of the nature of “common law has come an equally significant rethinking of the role of the federal courts in making it”). But the appreciation that *Erie* limited federal judicial authority to create federal common law causes of action has increased over time, as the Court has emphasized ever more insistently that, subject only to rare exceptions, lawmaking is a legislative rather than a judicial function. In cases decided within roughly the past 30 years, the Court has almost always rebuffed

claims that the federal courts should recognize causes of action not authorized by Congress. See Fallon *et al.*, *Hart & Wechsler's The Federal Courts & the Federal System*, *supra*, at 705-07.

The dictum in *Milwaukee I* suggesting that there is a general federal common law of interstate pollution dates to 1972, during “the heady” but now bygone “days in which [the Supreme] Court assumed common-law powers to create causes of action,” before *Erie*’s limitation on judicial lawmaking was fully appreciated. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); see, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (declining to “revert in this case to the understanding of private causes of action that held sway 40 years ago” under “the *ancien regime*”). With respect to interstate pollution disputes, *Milwaukee II*, decided in 1981, initiates the modern age. 451 U.S. 304 (1981). There, the Court held that Congress’s enactment of the Clean Water Act divested the federal courts of federal common lawmaking power in interstate water pollution disputes. See *id.* at 317. Federal common law, it emphasized, was permissible only where it was “necessary,” or a “necessary expedient.” *Id.* at 313-14 (internal quotation omitted).

It is emphatically not constitutionally “necessary” for the federal courts to create the novel cause of action that plaintiffs assert. The power to do so, like the power to establish the de facto regulatory standards that a cause of action for

damages would embody, *see Cipollone*, 505 U.S. at 521, is vested in Congress. Acting within its constitutional powers, Congress has authorized the Environmental Protection Agency (“EPA”) to regulate greenhouse gas emissions. *See Massachusetts v. EPA*, 549 U.S. at 533. The EPA has exercised its regulatory authority and propounded, *inter alia*, a final regulation governing greenhouse gas emissions from light duty vehicles, *see* 75 Fed. Reg. 25,323 (May 7, 2010), and rules addressing greenhouse gas emissions by stationary sources, *see* 75 Fed. Reg. 31,514 (June 3, 2010). Under these circumstances, any claim that federal common lawmaking to address climate change is constitutionally “necessary” is, in essence, a claim that there should be more stringent regulation than Congress has authorized and that it should be enforced by remedies that Congress has not provided. The federal courts have no authority to recognize such a claim. *See Alexander*, 532 U.S. at 287.² The question is one of policy that our Constitution commits to Congress. *See, e.g., Sosa*, 542 U.S. at 727. *See also Chadha*, 462 U.S. at 951 (“The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the

² Cf. *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring)(explaining that the problem with appeals to ‘necessity of the case’ as a basis for asserting power over an issue otherwise committed to Congress, when Congress has failed to act to the degree that the other branch of government (in that case the President) believes is reasonable is that “necessity knows no law”).

separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”).

B. Even if This Dispute Were Necessarily Governed by Federal Common Law, Federal Common Law Would Not Impose Liability on the Defendants for Contributing to Global Warming.

Plaintiffs appear to assume that, if there is a general federal common law of interstate pollution, the governing rule of decision must be one that makes emitters of greenhouse gases liable for any serious injuries allegedly associated with global warming. This assumption is mistaken. Even if the court were to conclude that federal common law applies to this case, it would not follow that the defendants owe particular duties to plaintiffs or that plaintiffs are entitled to recover. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988) (applying a federal common law rule immunizing defendants from liability for faulty design of military equipment). Admiralty law well illustrates this basic principle. The Supreme Court has long held that the constitutional grant of admiralty jurisdiction, U.S. Const., Art. III, § 2, cl. 1, necessitates the development of maritime law by the federal courts in the absence of applicable federal legislation. *See, e.g., Texas Indus.*, 451 U.S. at 641 & n. 14. Obviously, however, the applicable rules of admiralty do not always impose liability on defendants.

If a federal court had to identify or craft a federal common law rule of decision for this case, which it does not, a no-liability rule would be the only

proper choice in the absence of affirmative action by Congress. Under our Constitution the purpose of which is to preserve ordered liberty, federal courts are restrained from imposing novel duties enforced by liability rules even, in domains of uniquely federal interest in which federal law necessarily supplies the controlling rules of decision. *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), states the controlling principles. *Standard Oil* was a common law tort action brought by the Government to recover for losses that it incurred as a result of the defendant having injured a member of the armed services. The Supreme Court held by 8-1 that the question of liability to the government was a matter of such inherently federal interest that it was necessarily governed by federal law. *See id.* at 305, quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (“[T]he creation or negation of such liability is not a matter to be determined by state law ... ‘In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.’”). But, having determined that federal common law applied, the Court adopted a no-liability rule, reasoning that the development of a liability regime lay beyond the practical and constitutional competence of the federal courts. *See id.* at 313.

“[T]he issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the

appropriateness of means to be used in executing the policy sought to be established,” the Court held. *Id.* at 314. And the requisite policy judgments, and their “conversion into law,” were “a proper subject for congressional action, not for any creative power of ours.” *Id.* Finally, the Court added, “exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise, in view of the settled contrary practice, which action by Congress would avoid, not only here but in the many other cases we are told may be governed by the decision.” *Id.* at 316.

The separation-of-powers principles that mandated a no-liability rule in *Standard Oil* would apply *a fortiori* to plaintiffs' asserted cause of action here. The ultimate issues involving appropriate responses to the problems posed by global warming “come[] down in final consequence” to ones of policy. *See Tribe et al., supra.* The resolution of such issues is, accordingly, “a proper subject for congressional action, not for any creative action of” the federal courts. *Standard Oil*, 332 U.S. at 314. *See generally O'Melveny & Myers*, 512 U.S. at 89; *Texas Indus.*, 451 U.S. at 647. Finally, the judicial establishment of a retroactively applicable liability regime for contribution to global warming would unquestionably “involve a possible element of surprise, in view of the settled

contrary practice,” *Standard Oil*, 332 U.S. at 316, that could, potentially, raise concerns of fundamental fairness under the Takings and Due Process Clauses that Congress, by prospective legislation, could avoid. *Cf. Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (holding that a statute retroactively imposing large, unanticipated, and disproportionate liability based on conduct in the remote past violates the Constitution).

Texas Industries is to the same effect. In *Texas Industries*, the Court denied liability for contribution in an antitrust case. Liability for antitrust violations, including liability for contribution, is necessarily governed by federal law. Yet in the absence of a federal statute mandating liability for contribution, the Court held that the applicable federal rule was one of no liability because, within the federal separation of powers, only Congress has the authority to create liability regimes in the absence of constitutional necessity. *See* 451 U.S. at 646-47. Thus, even if federal common law supplied the rule of decision in this case, *Standard Oil* and *Texas Industries* mandate that the applicable rule would be one under which plaintiffs could not recover damages.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

/S/ Tristan L. Duncan

Tristan L. Duncan
William F. Northrip
Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
Telephone: (816) 474-6550

Richard H. Fallon, Jr.
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
Telephone: (617) 495-3215
ATTORNEYS FOR NATSO, INC.

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DATED: July 7, 2010

/s/ Tristan L. Duncan
Tristan L. Duncan
ATTORNEY FOR NATSO, INC.

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I hereby certify that on July 7, 2010, I electronically filed the foregoing *Amicus Curiae* Brief of NATSO, Inc. via the Court's Electronic Case Filing System.

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David T. Buente Jr.
Sidley Austin, LLP
1501 K Street, N.W.
Washington, DC 20005

Samuel R. Miller
Sidley Austin, LLP
Suite 5000
555 California St.
San Francisco, CA 94104-1715

Christopher A. Seeger
Stephen A. Weiss
James A. O'Brien, III
Seeger Weiss LLP
One William St.
New York, NY 10004

Terrell W. Oxford
Susman Godfrey, L.L.P.
901 Main Street, Ste. 5100
Dallas TX 75202

Kamran Salour
Greenberg Traurig LLP
2450 Colorado Ave., Ste. 400E
Santa Monica, CA 90404

Paul E. Gutermann
Akin Gump Strauss Haer & Feld
1333 New Hampshire Ave., N.W.
Washington D.C. 20036

Dennis J. Reich
Reich & Binstock
4625 San Felipe, Ste. 1000
Houston, TX 77027

Gary E. Mason
The Mason Law Firm LLP
1225 19th Street, NW, Suite 500
Washington, DC 20036

/S/Tristan L. Duncan

Tristan L. Duncan
William F. Northrip
Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
Telephone: (816) 474-6550

Richard H. Fallon, Jr.
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
Telephone: (617) 495-3215
ATTORNEYS FOR NATSO, INC.