No. 09-17490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF KIVALINA; CITY OF KIVALINA
Plaintiffs-Appellants,

v.

EXXONMOBIL CORPORATION, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of California (San Francisco Division) (No. 08-cv-01138-SBA)

AMICI CURIAE BRIEF OF THE AMERICAN CHEMISTRY COUNCIL, PUBLIC NUISANCE FAIRNESS COALITION, AMERICAN COATINGS ASSOCIATION, AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMING THE DISTRICT COURT DECISION

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Certificate of Corporate Disclosure

Counsel for *Amici* **certifies** the following information in compliance with Federal Rule of Appellate Procedure 26 .1 : *Amici* have no parent corporations and no publicly held stock.

Dated: July 6, 2010 **GARDERE WYNNE SEWELL LLP**

By: /s/ Richard O. Faulk

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I. INTERESTS OF THE *AMICI CURIAE*

Amici Curiae American Chemistry Council,[1] Public Nuisance Fairness Coalition ("PNFC"),[2] American Coatings Association,[3] and the Property Casualty Insurers Association of America,[4] are coalitions and trade organizations whose members include organizations and companies doing business in states served by the Ninth Circuit Court of Appeals, including some companies that may be involved in public nuisance litigation governed by this Court's decisions.

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

[2] *Amicus Curiae* Public Nuisance Fairness Coalition ("PNFC") is composed of major corporations, industry organizations, legal reform organizations and legal experts concerned with the growing misuse of public nuisance lawsuits. *See* PNFC's website, http://www.publicnuisancefairness.org.

[3] *Amicus Curiae* American Coatings Association ("ACA") represents both companies and professionals working in the paint and coatings industry. *See* ACA's website, http://www.paint.org.

[4] *Amicus Curiae* Property Casualty Insurers Association of America ("PCIAA") is a national trade association comprised of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. *See* PCIAA's website, http://www.pciaa.net/.

II. SUMMARY OF THE ARGUMENT

Amici submit this brief to highlight and reinforce particular problems raised by the "political question" doctrine in public nuisance cases involving global climate change. The history of public nuisance reflects a clear reluctance to approve its use when the proscribed conduct and other liability criteria are not constrained by geographical boundaries and are not governed by definitive standards. Similar reasoning applies to the "political question" doctrine, which requires dismissal of claims not subject to judicially discoverable and manageable standards. As this action is framed, these principles are inseparably intertwined. Far from being an "ordinary tort suit," this expansive claim sits squarely at the "crossroads" of substantive law and justiciability.

Some controversies, such as the extraordinarily broad and standardless public nuisance claims alleged here, involve issues where courts lack the tools and resources to reach results that are principled, rational, and based upon reasoned distinctions. When such political questions are raised, courts must decide whether they have the resources to fully analyze and devise a proper remedy, and whether they have the technical and scientific expertise necessary to create standards and rules to resolve the controversy justly. Such inquiries go to the very heart of the political question analysis. In public nuisance cases of global dimensions, courts should defer to the political branches of government – branches that, unlike the judiciary, are equipped to amass and evaluate vast amounts of data bearing upon

complex and dynamic issues – to set and adjust, if warranted, the standards and rules by which courts judge the reasonableness of defendants' actions.

Under controlling Supreme Court authority, even when the political branches have not acted, common law courts are not necessarily free to "fill the void." Irrespective of whether the executive or legislative branches have yet spoken, due respect for their constitutional responsibilities – combined with awareness of the judiciary's own limitations – should motivate judicial restraint. Although the ancients concluded that "nature abhors a vacuum,"[5] there are circumstances in the law, as here, where uncharted voids should be eschewed.

III. ARGUMENT

A. Political Question Analyses Require Courts to Consider Whether They Have the Resources and Tools to Render Principled Judgments

In *Baker v. Carr*[6] and its progeny,[7] the United States Supreme Court held a court should not entertain a dispute when it lacks "judicially discoverable and

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

[6] 369 U.S. 186 (1962).

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

manageable standards for resolving it."[8] As Justice Scalia stated in *Vieth v. Jubelirer*,[9] "[o]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions."[10] Thus, the crux of the political question inquiry is not whether the case is unmanageable because it is too large, complicated, or otherwise difficult from a logistical standpoint. Rather, the inquiry is whether the court has the legal tools to grant relief in a way that is "principled, rational, and based upon reasoned distinctions."[11] At this time, the court lacks those tools.[12]

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

[9] *Id.*

[10] *Id.* (emphasis in original).

[11] As Justice Scalia observed, "it is the function of the courts to provide relief, not hope." *Vieth*, 541 U.S. at 304. Judge Armstrong agreed, stating "the relevant inquiry is whether the judiciary is *granting relief in a reasoned fashion* versus allowing the claims to proceed such that they "merely provide 'hope' without a substantive legal basis for a ruling." *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874 (N.D. Cal. 2009) (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) (emphasis in original).

[12] The possibility that manageable standards may be discovered in the future as a result of Congressional or Executive action does not change the fact that they do not exist today. *Vieth*, 541 U.S. at 306 (Kennedy, J. concurring).

B. Courts Lack the Resources and Tools to Develop Standards for Resolving Public Nuisance Cases Involving Global Climate Change

1. Only the Political Branches are Adequately Equipped to Resolve this Complex and Dynamic Issue

According to the plaintiffs, courts are fully capable of deciding global climate change claims because they arise in familiar contexts – as pollution cases.[13] "Familiarity," however, does not guarantee justiciability. Indeed, similarly oversimplified arguments – which bypass full consideration of the scope, nature and complexity of a problem in the "hope" that standards will be discovered in the future – have been soundly rejected as nothing more than "an invitation to litigation without much prospect of redress."[14] Although plaintiffs may classify their claim as a "pollution case," it is plainly unprecedented, unique, and outside the scope of prior judicial experience. While the judiciary has guiding "standards" and "rules" to assist it to grant relief in a reasoned fashion in discrete pollution

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[13] Appellant's Opening Brief at 48 (claiming that "this case is well-grounded in a long line of public nuisance [pollution] cases" and citing *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) for the proposition that "[s]o long as the nature of the inquiry is familiar to the courts, the fact that standards needed to resolve a claim have not yet been developed does not make the question a non-justicable political one").

[14] *Vieth*, 541 U.S. at 278-79. Plaintiffs' contention urges the court to follow the erroneous path initially adopted in *Davis v. Bandemer*, 478 U.S. 109 (1986), in which the United States Supreme Court held that political gerrymandering claims were justiciable even though the court could not agree upon a standard to adjudicate them. Although the *Davis* court apparently "hoped" that standards were discoverable, the Supreme Court revisited the issue eighteen years later and decided otherwise. *Vieth*, 541 U.S. at 278-79.

cases involving localized impacts and identifiably responsible incidents and parties, those "standards" and "rules" have no utility in global controversies where, as here, the pool of potentially responsible parties is not only limitless, but also dates back to the dawn of the Industrial Revolution.

Under such circumstances, the Supreme Court's mandate that "standards" and "rules" must govern judicial decisions should inform lower courts' deliberations when advocates invoke judicial creativity. In a "political question" inquiry, respect for the political spheres is critical. In public nuisance cases based upon global climate change, where no standards presently exist to assess or measure responsibility, "political question" arguments require a comparative evaluation of the resources needed to craft appropriate rules. On other "complex and dynamic" issues, the United States Supreme Court has recognized that, "[a]s an institution, … Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon ["complex and dynamic" issues]."[15]

[15] *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 665-666 (1994) (Kennedy, J., plurality) (regulating free broadcast services in a "fair, efficient and equitable" manner) (citing *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331, n.12 (1985) (regulating veterans disability benefits)); *see also City of Los Angeles v. Alameda Books, Inc*, 535 U.S. 425, 440 (2002) (regulating the effect of adult entertainment establishments on surrounding communities and acknowledging legislative bodies are in a better position than the judiciary to gather and evaluate data).

Unlike courts, the political branches can consider all pertinent issues in their entirety, rather than being limited to issues raised only by litigants. As a result, political policy choices can strike fairer and more effective balances between competing interests because they can be based on broader perspectives and ample information.[16] Moreover, in contrast to courts, which lose jurisdiction upon rendition of final judgment, political branches have continuing authority to revisit statutes and rules to modify or tailor their provisions.[17]

Political branches are also better equipped to deal with broad issues because they, unlike trial and appellate courts, represent a quorum of the people. While the process of enacting a statute is "perhaps not always perfect, [it] includes deliberation and an opportunity for compromise and amendment and usually committee studies and hearings."[18] Before any law is enacted, it must garner the support of a majority of the people through their elected representatives. Once

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[16] *See Helvering v. Davis*, 301 U.S. 619, 642-44 (1937) (Cardozo, J.) (When Congress is confronted with a problem that "is plainly national in area and dimensions," it does not just "improvise a judgment." Instead, it holds hearings to gather "a great mass of evidence" considering the problem from many perspectives and ultimately "supporting the policy which finds expression in the act"). *See also* Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 12 CONN. L. REV. 1247, 1271 (2000).

[17] *See Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001) (Breyer, J. concurring); *Bandoni v. State*, 715 A.2d 580, 585 (R.I. 1998) (noting that "[i]n the event the Legislature should choose to [modify the statute], there is no question that it has the capacity to do so at any time…. But it is not the function of this Court to act as a super legislative body and rewrite or amend statutes already enacted by the General Assembly").

[18] *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995).

enacted, the legislation is subject to executive veto and must judicially pass any constitutional or interpretational challenges. These "checks and balances" ensure the efficacy of our democracy. When courts bypass these political safeguards to implement their own common law solutions, the judiciary – the least political branch of government – declares policy unilaterally and the "will of the people" is expressed not through their elected representatives, but through a plebiscite of jurors.[19] Juries play an enormously important role in our system of government, but they are not a substitute for decision-making by democratically-elected representatives.

In global public nuisance context, these considerations call for judicial deference – not "common law" policy making. They expose "the limits within which courts, lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems of health care for injured persons, of income replacement, of safe housing and products and medical practices, of insurance, of employment, and of economic efficiency. . . ."[20]

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

[20] *See id*. at 853.

Given the universal scope of this controversy,[21] the depth of the inquiries needed to develop fair standards for its resolution, the comparative resources available to the judiciary and the political branches, and the extreme difficulty, if not impossibility, of fair adjudication – the primacy of political solutions is apparent. Indeed, as Professor Tribe recently wrote, "[w]hatever one's position in the . . . debate over the extent or . . . reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding or at least strongly incentivizing, all involved parties, are the only ones constitutionally entitled to fight that battle."[22]

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

As the District Court noted, climate change cases are not ordinary tort suits that can be litigated under an existing legal framework.[23] Instead, they frame wholly new claims by which plaintiffs seek to hold a comparatively tiny group of

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[21] The majority of the greenhouse gas emissions alleged to be creating this purported public nuisance occur outside the United States. *See* Kevin A. Baumert *et al*., *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy, World Resources Institute* (2005) at 12 (listing greenhouse gas emissions by country) available at http://pdf.wri.org/navigating_numbers.pdf.

[22] *See* Laurence H. Tribe, *et al*., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine,* Wash. Legal Found. Critical Issues Series (Jan. 2010) at 23.

[23] *Kivalina*, 663 F. Supp. 2d at 875 (stating that while well-settled principles of tort and public nuisance law "may provide sufficient guidance in some novel cases, this is not one of them"); *see generally,* Richard O. Faulk and John S. Gray, *Premature Burial? The Resuscitation of Public Nuisance Litigation*, 24 TOXICS L. REPT. 1231 (Oct. 22, 2009).

defendants monetarily liable for a global phenomenon caused universally by nature's creatures and natural forces. It is not enough that courts have experience resolving public nuisance liability and environmental damage cases.[24] The judiciary has *no* experience dealing with public nuisance litigation created by a *global* phenomenon resulting from the release of greenhouse gases by millions, if not billions, of sources (including natural events) worldwide – very few of which are subject to the jurisdiction of American courts or under the control of these defendants.[25] The judiciary's past experience provides no guidance for determining what standards and rules should be applied to fairly and justly resolve this controversy in a principled, rational and reasoned manner.

Public nuisance cases, even those involving interstate issues, have always been contained within well-defined geographic borders. They are localized and linked to impairment of property, or to injuries resulting from such effects.[26] Significantly, all of the precedents upon which the Plaintiffs and the Second

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[24] *See* Laurence H. Tribe, *et al.*, *supra* note 22, at 13-14 ("The political question doctrine is about more than wordplay. . . . [T]he Second Circuit – essentially confusing a label with an argument – concluded that it was an 'ordinary tort suit' and therefore justiciable").

[25] "Plaintiffs' global warming claim is based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere*." *Kivalina*, 663 F. Supp. 2d at 875 (emphasis in original).

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

Circuit decision in *Connecticut v. AEP* relied are within that tradition.[27] As the District Court astutely observed, each case concerned a localized controversy traceable to specific actions by identifiable defendants,[28] such as the discharge of sewage or chemicals into waterways,[29] emission of noxious fumes from copper foundries that destroyed forests, orchards, and crops;[30] dumping garbage that washed ashore and fouled beaches;[31] irrigation projects that contributed to flooding;[32] construction bridges that interfered with navigation;[33] and pollution of lakes by vessels transporting oil.[34] Although Plaintiffs' claim that "the existence of judicially discoverable or manageable standards is exemplified by the long, prior

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[27] *Kivalina*, 663 F. Supp. 2d at 875; *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 326-29 (2d Cir. 2009).

[28] *See Kivalina*, 663 F. Supp. 2d at 875 ("The common thread running through each of those cases is that they involved a discrete number of 'polluters' that were identified as causing a specific injury to a specific area").

[29] *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("Milwaukee I"); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *New York v. New Jersey*, 256 U.S. 296 (1921); *Missouri v. Illinois*, 200 U.S. 496 (1906) ("Missouri II"); *Missouri v. Illinois*, 180 U.S. 208 (1901) ("Missouri I").

[30] *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915); *Georgia v. Tenn. Copper Co.*, 240 U.S. 650 (1916).

[31] *New Jersey v. City of New York*, 283 U.S. 473 (1931).

[32] *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

[33] *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851).

[34] *United States v. Bushey & Sons*, 363 F. Supp. 110, 120-21 (D.Vt.1973), *aff'd without opinion*, 487 F.2d 1393 (2d Cir.1973).

history of air and water pollution cases,"[35] the District Court properly recognized that each of those cases involved acts that occurred within a circumscribed "zone of discharge," affected defined geographic locations, and encompassed situations where the full range of defendants was either known or could be identified.[36] Unlike here, the alleged nuisance in each case was entirely man-made, created over a relatively short period of time, and the relief being sought was injunctive abatement, not monetary damages.[37]

Global climate change, by contrast, is boundless and, according to scientists, caused by a universal and unlimited range of actors and events that allegedly began more than 150 years ago at the start of the Industrial Revolution.[38] Nothing in the law of public nuisance allows plaintiffs to single out these few defendants and hold them monetarily liable for creating a condition that spans the globe and jointly took the entire industrialized world – in combination with natural forces – more than

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[35] *See Kivalina,* 663 F. Supp. 2d at 875.

[36] *Kivalina,* 663 F. Supp. 2d at 875 and 881 (stressing that conduct creating the public nuisance must occur within a specified "zone of discharge" to satisfy standing requirements).

[37] *See supra* notes 29 to 35; *see also generally,* Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 949-50, 955-57 (2007).

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

150 years to create.[39] Currently, it is impossible to distinguish one exhalant's contribution from vehicular or industrial emissions today, much less since the start of the Industrial Revolution.[40] There are also no processes to calculate and account for the impact of biological emissions by the trillions of organisms which inhabit the planet. Nor can the role of titanic natural forces, such as volcanism, be calculated reliably. Moreover, no method exists to account for the myriad of confounding forces that impact the relative degree of liability attributable to these or any potential defendants – such as third-parties that have effected changes to forests and seas which absorb emissions.[41]

Plaintiffs' own allegations confirm the extraordinary scope of this controversy. According to Plaintiffs, once emitted from anywhere in the world, greenhouse gases rapidly mix in the atmosphere and increase in concentration worldwide because they can last centuries in the atmosphere.[42] "In [Plaintiffs'] global warming scenario, emitted greenhouse gases combine with other gases in

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[39] *See generally* John S. Gray and Richard O. Faulk, "*Negligence in the Air?" Should "Alternative Liability" Theories Apply in Lead Paint Litigation?*, 25:1 PACE ENV'T L. REV. (Winter 2008) (discussing the problems associated with apportioning liability in public nuisance cases when the plaintiffs cannot or do not sue all possible defendants, and cannot prove or trace causation as to any particular defendant, and the alleged harm was created over a long period of time).

[40] *Kivalina*, 663 F. Supp. 2d at 869.

[41] *See generally*, Richard O. Faulk and John S. Gray, *A Lawyer's Look at the Science of Global Climate Change, supra* note 35, at 12-14 (providing discussion and references regarding absorption roles of forests and oceans).

[42] *Kivalina*, 663 F. Supp. 2d at 869.

the atmosphere which *in turn* results in the planet retaining heat, which *in turn* causes the ice caps to melt and the oceans to rise, which *in turn* causes the Arctic sea ice to melt, which *in turn* allegedly renders Kivalina vulnerable to erosion and deterioration resulting from winter storms."[43] Given this extraordinary causal chain and the fact that that two-thirds of all greenhouse gases were emitted before 1980,[44] it is difficult to see how yesteryear's pollution cases will lead to "judicially discoverable and manageable standards" that will guide the court in cases such as the instant one to a decision that is "principled, rational, and based upon reasoned distinctions."[45]

Both "political question" considerations and the substantive law of public nuisance wisely preclude courts from resolving controversies when fair standards cannot be devised to resolve amorphous claims.[46] For example, the law of public

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[43] *Id*. at 876 (emphasis in original).

[44] *Id.* at 869.

[45] *Vieth*, 541 U.S. at 278; *Kivalina*, 663 F. Supp. 2d at 876 (noting that neither the plaintiffs nor *AEP* offer any guidance "that would enable the court to reach a resolution of this case in any 'reasoned' manner"). *See also, Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (A pleading that merely offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do").

[46] Although not developed in this brief, similar principles govern the issue of standing, which defendants also claim is lacking. To establish standing, plaintiffs must show a "concrete and particularized" injury that is "fairly traceable" to the action of a particular defendant. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

nuisance requires more than an "injury in fact" to justify recovery. To be a nuisance, a defendant's interference with the public right must be "substantial." It cannot be a "mere annoyance," a "petty annoyance," a "trifle," or a "disturbance of everyday life."[47] The defendant's interference must also be objectionable to the ordinary reasonable person, and one that materially interferes with the ordinary physical comfort of human existence according to plain, sober, and simple notions.[48] Under these authorities, the alleged causal link must be more than conjectural or hypothetical, and merely speculative connections between the defendant's conduct and the alleged injury are insufficient. In a global context, where countless untraceable and unquantifiable natural, biological, and anthropogenic emissions allegedly acted cumulatively over centuries to produce harm, determining whether any particular emissions constitute a "substantial interference" is objectively impossible.

Simply stated, the immeasurable scope of the controversy matters. Using public nuisance to redress global climate change far exceeds the tort's common law boundaries – and while venturing beyond those fences may be intellectually

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[47] *See generally,* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 557-58 (1941); *see also* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L. Q. 755, 772 (2001).

[48] William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1002-03 (1966); *see also* Antolini, *supra* note 63, at 772 n.57 (citing FRANCIS HILLIARD, THE LAW OF TORTS FOR PRIVATE WRONGS 631 (2d ed. 1861)).

adventurous, there are no standards or rules that guarantee that such explorations will result in justice.[49] Here, Plaintiffs' complaint plainly demonstrates the impossibility of determining whether or to what degree Plaintiffs' injuries were caused by any particular person or event. To avoid this barrier, Plaintiffs propose a new liability scheme – one which arbitrarily selects a few defendants, dispenses with objective standards entirely, and then entrusts the issue of "substantial interference" entirely to the fact-finder's subjective speculations. Such a standardless exercise is not jurisprudential. Instead, it requires assessments that are uniquely suited to the political branches of government. The proceeding requested by Plaintiffs may be "called a trial, but it is not."[50]

3. Using Public Nuisance as an Aggregative Tort Creates "Standardless" Liability That Implicates the Political Question Doctrine

Despite the Plaintiffs' claim and the Second Circuit's reasoning that their ruling was consistent with the Restatement (Second) of Torts,[51] they failed to heed

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

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

[51] *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 328.

Dean Prosser's stern warning in his comments to § 821B: "[I]f a defendant's conduct . . . does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, *the court is acting without an established and recognized standard*."[52] Dean Prosser's concerns were recently reinforced by one of the reporters for the Third Restatement, Professor James A. Henderson, who warned about the "lawlessness" of expansive tort liability.[53] According to Professor Henderson, these new tort theories are not lawless simply because they are non-traditional or court-made, or because the financial stakes are high. Instead, "the lawlessness of these aggregative torts inheres in the extent to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring recovery."[54] Such paths lead inevitably to limitless and universal liability. If the Court allows this controversy to proceed, it will be "empower[ing] judges and juries to exercise regulatory power at the macro-

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[52] RESTATEMENT (SECOND) OF TORTS § 821B cmt. e. (1979) (emphasis added). Because of its vagueness and mutability outside of defined boundaries, public nuisance has even been characterized as a "chameleon word." J.R. Spencer, *Public Nuisance: A Critical Examination*, 48(1) CAMBRIDGE L. J. 55, 56 (1989). Interestingly, despite their professed reliance on the Restatement, Plaintiffs do not reference Dean Prosser's concerns.

[53] *See* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005). Despite Professor Henderson's status and writings, Plaintiffs do not reference his concerns or distinguish his reasoning from the present "aggregative" controversy.

[54] *Id*. at 338.

economic level that even the most aggressive administrative agencies could never hope to possess. In exercising these extraordinary regulatory powers via tort litigation, courts (including juries) exceed the legitimate limits of both their authority and their competence."[55]

Dean Prosser's wise advice, as well as Professor Henderson's concerns about "lawlessness," are substantiated by the history of public nuisance – a history where courts have refused to expand liability because of concerns over "standardless" liability. In the early 20th century, litigants argued that public nuisance should be expanded to address activities that were not criminal and which did not implicate property rights or enjoyment.[56] Proponents of this expansion argued that the "end justified the means" by highlighting the tort's remarkable effectiveness and claiming "that [otherwise] there is no adequate remedy provided at law."[57]

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[55] *Id*. Although the Second Circuit stressed that tort cases rarely involve political questions, *Kivalina*, 663 F. Supp. 2d at 875 (citing *Connecticut*, 582 F.3d at 326-29), aggregative torts, such as public nuisance, raise unique "lawlessness" concerns that transcend routine tort cases and cross the political question threshold. *See* Henderson, *supra* note 53, at 338.

[56] *People v. Lim*, 118 P.2d 472, 475 (Cal. 1941) (noting that courts justified "public nuisance" abatement because "public and social interests, as well as the rights of property, are entitled to the protection of equity").

[57] *See* Edwin S. Mack, *Revival of Criminal Equity* 16 HARV. L. REV. 389, 400-03 (1903). These same arguments are again resurfacing as governmental authorities employ public nuisance litigation to address complex problems such as urban violence and public health issues. *See* Faulk & Gray, *supra* note 37, at 974-75.

Legal commentators and authorities, however, objected when public authorities sought to use public nuisance to address broad societal problems such as over-reaching monopolies, restraint of trade activities, prevention of criminal acts, and labor controversies such as strikes.[58] They warned that this "solution" was planting the seeds of abuse that would ultimately weaken the judicial system.[59] Finally, when public nuisance was used as a precursor to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to address environmental contamination in the Love Canal controversy, a decade of nuisance litigation failed to produce a solution.[60] Thereafter, arguments urging expansion were increasingly rejected, most notably in California, where the state's Supreme Court ultimately deferred to the legislature's "statutory supremacy" to define and set standards for determining liability.[61] Significantly, the court did so because judicial creativity would otherwise result in "standardless" liability.[62]

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[58] Mack noted that the expanding boundaries of public nuisance law made courts of equity of that time period careless of their traditional jurisdictional limits. Mack, *supra* note 57, at 397.

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

[60] *See* Eckardt C. Beck, *The Love Canal Tragedy*, EPA Journal (Jan. 1979), available at http://www.epa.gov/history/topics/lovecanal/01.htm ("no secure mechanisms [were] in effect for determining such liability"). *See generally*, Charles H. Mollenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 EXPERT EVIDENCE REPORT. 474, 475-76 (Sept. 24, 2007).

[61] *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal.) *cert. denied*, 521 U.S. 1120 (1997) (stating that "[t]his lawmaking supremacy serves as a brake on

There is plainly an overlap between this jurisprudential principle and the "political question" doctrine. Although these concepts are inextricably linked, their conjunction has been inexplicably overlooked. Just as courts have traditionally resisted invitations to expand public nuisance liability in the absence of clear boundaries and guiding principles, courts also must resist deciding political question controversies where they cannot devise definitive standards and rules for their adjudication. Each principle informs courts when advocates invite creative excursions, and in both contexts, respect for the legislative and executive spheres, and the constitutional limits on judicial power, is critical. History's experience with public nuisance as a tort traditionally circumscribed by geographic limits and caused by identifiable actors, coupled with the pronounced concerns of wise legal scholars and courts regarding the dangers of entertaining controversies without guiding adjudicative principles, demonstrates the present impossibility of rendering judgments in climate change cases that are "principled, rational, and based upon reasoned distinctions."

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any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance'").

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

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

Contrary to the Plaintiffs' claim, legislative and regulatory silence are not dispositive of whether courts are competent to decide climate change controversies. Indeed, there has been "a longstanding resistance, as a matter of law, to the idea that legislative inaction or silence, filtered through a judicial stethoscope, can be made to sound out changes in the law's lyrics – altering the prevailing patterns of rights, powers, or privileges that collectively constitute the message of our laws."[63] Moreover, the Supreme Court has condemned reliance on congressional silence as "a poor beacon to follow."[64] More pointed – and remarkably similar to the concerns of Dean Prosser and Professor Henderson – is Justice Frankfurter's warning that "*we walk on quicksand* when we try to find in the absence of . . . legislation a controlling legal principle."[65]

The absence of action by the political branches does not empower common law adventures. This is especially true in public nuisance cases based upon global

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

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

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

climate change, where there are no "controlling legal principles" to frame the controversy, fully investigate the issues, adjudicate liability or allocate responsibility. In such cases, courts must decide whether they have the resources to investigate and devise a proper remedy, and whether they are capable of creating definitive standards and rules to resolve the controversies fairly. This question goes to the very heart of the political question doctrine.[66] Unless this inquiry is answered correctly, the judiciary, the parties, and the public interest will be sacrificed to the shifting sands of "standardless" liability.

IV. CONCLUSION

If, as Justice Holmes counsels, the development of the common law should be "molar and molecular,"[67] the transmutation of "public nuisance" concepts to address global climate change requires more rumination and digestion than the judiciary alone can prudently provide. Advocates who tout public nuisance litigation as a universal panacea should pay careful attention to the "rumination" analogy. Despite the tort's ravenous reputation as a potential "monster" capable of

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[66] The Supreme Court clearly recognizes that such scenarios exist. *See Vieth*, *supra* note 7, at 277 ("Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches *or involves no judicially enforceable rights*") (emphasis added).

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

devouring time-honored legal precedents in a single gulp,[68] that appetite is constrained by the common law's tendencies to move in a "molar and molecular" fashion – to chew thoroughly – and then to swallow, if at all, only small bits at a time.

Faced with a planetary controversy, it is appropriate for this Court to consider whether the judiciary has the resources and tools to investigate, evaluate, and fairly resolve this action. *Amici* urge the Court to consider the unique role of the judiciary in our tripartite system of government, and to decide that the standards and rules necessary to resolve this controversy can only be developed justly and reliably outside the judiciary's limited realm. Particularly while Congress and the Executive Branch are in the midst of addressing climate change issues, it is inappropriate for courts to entertain standardless aggregative controversies. Under such circumstances, the limits of judicial competency suggest that forbearance, rather than adventure, is the most principled response. Accordingly, the District Court's dismissal should be affirmed.

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[68] *See In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (holding that, if public nuisance law expanded beyond its traditional boundaries, it "would become a monster that would devour in one gulp the entire law of tort"); *see also Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (originating the quote above).

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2010, I electronically filed the foregoing *Amici Curiae Brief of the American Chemistry Council, Public Nuisance Fairness Coalition, American Coatings Association, and Property Casualty Insurers Association of America in Support of Defendants-Appellees and Affirming the District Court Decision,* with the Clerk of the Court for the United States Court of Appeals by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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Signature of Attorney or Unrepresented Litigant

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Date: July 6, 2010