
**In The
Supreme Court of the United States**

AMERICAN ELECTRIC POWER CO. INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

**BRIEF OF BUSINESS ROUNDTABLE AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

MARIA GHAZAL
Director, Public Policy
and Counsel
BUSINESS ROUNDTABLE
901 New York Avenue, NW
West Tower, 3rd Floor
Washington, D.C. 20001
(202) 496-3268

ROBERT P. CHARROW*
LAURA METCOFF KLAUS
GREENBERG TRAUIG LLP
2101 L Street, NW
Washington, D.C. 20037
Charrowr@gtlaw.com
(202) 533-2396

DAVID G. MANDELBAUM
GREENBERG TRAUIG LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 988-7800

*Counsel for Amicus
Business Roundtable*

**Counsel of Record*

February 4, 2011

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Piecemeal Adjudication of Worldwide Climate Issues Would Breed Legal Un- certainty Undermining Capital Invest- ment and Impeding Employment.....	3
A. The Common Law of Tort Is Ill-Suited for Regulating Complex Problems in a Predictable and Rational Manner	3
B. The Particular Vagueness of Public Nuisance Leads to Significant Uncer- tainty	6
C. U.S. Tort Law Is Particularly Ineffi- cient and Ineffective at Fashioning an International Scientific and Economic Global Climate Change Policy.....	11
1. The Parties Necessary to Fashion Rational Standards Are Not and Can Never Be Before the Court.....	11
2. Tort Law Does Not Take into Account Economic Considerations Necessary for Rational National or Global Policy-Making	18

TABLE OF CONTENTS – Continued

	Page
D. The Only Thing That Is Certain From This Litigation Is Economic Uncertainty	19
II. Legal Uncertainty Is Amplified When Federal Courts Inappropriately Interfere with Decisionmaking Committed to Federal and State Regulatory Agencies	22
CONCLUSION.....	26

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	22
<i>City of Milwaukee v. Illinois</i> , 451 U.S. 304 (1981).....	17
<i>Connecticut v. Am. Elec. Power Co.</i> , 582 F.3d 309 (2d Cir. 2009).....	11
<i>Director, OWCP v. Greenwich Collieries</i> , 512 U.S. 267 (1994).....	10
<i>Georgia v. Tennessee Copper Co.</i> , 206 U.S. 230 (1907).....	17
<i>Gorman v. Abbott Labs.</i> , 599 A.2d 1364 (R.I. 1991).....	10
<i>Illinois v. Milwaukee</i> , 406 U.S. 91 (1972)	17
<i>In Re Comiskey</i> , No. 06-1286 (Fed. Cir. Jan. 13, 2009)	2
<i>Massachusetts v. Environmental Protection Agency</i> , 549 U.S. 497 (2007)	12, 13
<i>Mulcahy v. Eli Lilly and Co.</i> , 386 N.W.2d 67 (Iowa 1986).....	10
<i>People v. Lim</i> , 18 Cal.2d 872, 118 P.2d 422 (1941).....	8, 9
<i>Safft v. Eli Lilly and Co.</i> , 676 S.W.2d 241 (Mon. 1984)	10
<i>Sindell v. Abbott Labs.</i> , 26 Cal.3d 588, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980)	10

TABLE OF AUTHORITIES – Continued

	Page
<i>Smith v. Eli Lilly and Co.</i> , 560 N.E.2d 324 (Ill. 1990)	10
<i>Summers v. Tice</i> , 33 Cal.2d 80, 199 P.2d 1 (1948)....	9, 10
<i>The Schoolmaster’s Case</i> , 11 Hen. 4, f. 47, pl. 10 (Y.B. Hilary 1410).....	4
<i>The Thorns Case</i> , 6 Ed. 4, f. 7, pl. 18 (Y.B. Mich. 1466).....	4
<i>Thrifty Oil Co. v. Bank of Am. Nat’l Trust & Savings Ass’n</i> , 322 F.3d 1039 (9th Cir. 2002).....	2

STATUTES AND REGULATIONS:

Rules of the Supreme Court of the United States

Rule 37.3(a)	1
Rule 37.6.....	1
Copyright Act 1709, 8 Anne c.19	6
<i>Mandatory Greenhouse Gas Reporting Rule</i> ,	
40 C.F.R. pt. 98, subpt. H.....	14
40 C.F.R. § 98.1(a)	14
74 Fed. Reg. 66,495 (Dec. 15, 2009).....	12
74 Fed. Reg. 66,517 (Dec. 15, 2009).....	12

TREATIES:

United Nations Framework Convention on Climate Change, <i>adopted</i> May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38	24
---	----

TABLE OF AUTHORITIES – Continued

	Page
MISCELLANEOUS:	
RESTATEMENT (SECOND) OF TORTS (1979)	7, 18
Sir William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND (Oxford: Clarendon Press 1765-1769)	5
Herbert L.A. Hart, THE CONCEPT OF LAW (Ox- ford: Oxford Univ. Press 1961)	5
W. Page Keeton <i>et al.</i> , PROSSER & KEETON ON TORTS (5th ed. 1984)	4, 7
David Lieberman, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH CENTURY BRITAIN (New York: Cambridge Univ. Press 1989)	5, 6
BABYLONIAN TALMUD, SEDER NEZIKIN, BABA M'TZIA (Salis Daiches & H. Freedman Trans- lators and Editors 1959)	4, 7
John W. Wade, Victor E. Schwartz <i>et al.</i> , PROSSER, WADE AND SCHWARTZ'S TORTS (9th ed. 1994)	9
Morris Arnold, <i>Accident, Mistake, and the Rules of Liability in the 14th Century Law of Torts</i> , 128 U. PENN. L. REV. 361 (1979)	4
Benjamin Bernanke, <i>Irreversibility, Uncertainty and Cyclical Investment</i> , 98 QUARTERLY J. OF ECONOMICS 85 (1983)	20
Nicholas Bloom, <i>The Impact of Uncertainty Shocks</i> , 77 ECONOMETRICA 623 (2009)	20

TABLE OF AUTHORITIES – Continued

	Page
Robert Lensink, Hong Bo & Elmer Sterken, <i>Does uncertainty affect economic growth? An empirical analysis</i> , 135 REVIEW OF WORLD ECONOMICS 379 (1999).....	2
Victor E. Schwartz and Phil Goldberg, <i>The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort</i> , 45 WASHBURN L.J. 541 (2006).....	7
David M. Trubek, <i>Max Weber on Law and the Rise of Capitalism</i> , 1972 WIS. L. REV. 720 (1972).....	20
Marilyn Brown, Frank Southworth & Andrea Surzynski, <i>Shrinking the Carbon Footprint of America</i> (Brookings, May 2008)	15
Helmut Wagner, <i>Macroeconomic Analysis of the Cost of Judicial Barriers in the Single Market, Part III</i> in: COST OF JUDICIAL BARRIERS FOR CONSUMERS IN THE SINGLE MARKET, A REPORT FOR THE EUROPEAN COMMISSION (H. von Freyhold, V. Gessner, E.L. Vial and H. Wagner, eds. (Brussels 2005).....	19
Stephen Schwartzman, Lecture at Hong Kong University (Oct. 18, 2010), as reported at http://www.efinancialnews.com/story/2010-10-19/schwarzman-regulators-hamper-growth	2

INTEREST OF AMICUS CURIAE¹

Business Roundtable is an association of chief executive officers of leading U.S. companies with nearly \$6 trillion in annual revenues and more than 13 million employees. Member companies comprise nearly a third of the total value of the U.S. stock markets and more than 60 percent of all corporate income taxes paid to the federal government. As the senior leaders of many of the country's largest and most responsible corporate citizens, Business Roundtable members have a strong interest in ensuring that national and global policies affecting global climate change are developed in a rational and coherent manner through existing regulatory mechanisms. Business Roundtable members are deeply concerned whenever a court, federal or state, takes it upon itself to shape global economic and scientific policy. Judicial intervention through an ancient common law tort into matters of national policy is particularly ill-advised here, where the litigation would necessarily undermine the Executive Branch's ability to negotiate multilateral treaties, and where the tort itself is so amorphous that predictable standards are absent. This form of litigation will generate significant legal

¹ Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.3(a), amicus certifies that counsel of record for both parties have consented to its filing in letters on file with the Clerk's office submitted herewith.

uncertainty – nationally and globally – of the very type that will adversely affect capital markets, unnecessarily increase transactional costs, and will generally place a drag on capital investment and employment.



SUMMARY OF ARGUMENT

It has been said that legal uncertainty is the enemy of economic growth. *See, e.g., In Re Comiskey*, No. 06-1286, slip op. at 11 (Fed. Cir. Jan. 13, 2009) (“Uncertainty is the enemy of commercial investment.”); *Thrifty Oil Co. v. Bank of Am. Nat’l Trust & Savings Ass’n*, 322 F.3d 1039, 1050-51 (9th Cir. 2002); Stephen Schwartzman, Lecture at Hong Kong University (Oct. 18, 2010), as reported at <http://www.efinancialnews.com/story/2010-10-19/schwarzman-regulators-hamper-growth>. Capitalism works best when businesses can balance risk against uncertainty. Excessive uncertainty, however, hinders the ability even to calculate with any degree of accuracy the odds of potential outcomes. *See* Robert Lensink, Hong Bo & Elmer Sterken, *Does uncertainty affect economic growth? An empirical analysis*, 135 *REVIEW OF WORLD ECONOMICS* 379 (1999) (showing empirically that uncertainty hinders economic growth).

Accordingly, business leaders tend to support rational rules that reduce uncertainty; they tend to oppose regulation that not only constrains innovation and trade, but also increases uncertainty. This latter

type of regulation melds the worst of both worlds – stifling creativity while promoting unpredictability – and is exemplified by the attempt to regulate global climate change judicially using the ancient tort of public nuisance. Judicial regulation of complex systems where the science is not well understood is ill-advised both scientifically and economically. That sort of judicial regulation would inject precisely the type of uncertainty that hinders economic growth.



ARGUMENT

I. Piecemeal Adjudication of Worldwide Climate Issues Would Breed Legal Uncertainty, Undermining Capital Investment and Impeding Employment

A. The Common Law of Tort Is Ill-Suited for Regulating Complex Problems in a Predictable and Rational Manner

This case highlights the limitations of the common law of public nuisance as a rational means of regulating global climate change.² The law of nuisance, with its feet firmly rooted in the 17th and 18th Centuries and which has “meant all things to all people,” will likely prove as effective at abating global

² The Second Circuit championed the federal common law of public nuisance. Business Roundtable doubts that there is such a federal common law of public nuisance. This issue is thoughtfully and thoroughly discussed in petitioners’ merits briefs.

warming as blood-letting was at curing George Washington. W. Page Keeton *et al.*, PROSSER & KEETON ON TORTS 616 (5th ed. 1984). Common law principles, especially those of public nuisance, are ill-suited for resolving complex societal problems in a scientifically and economically rational manner.

Tort law³ was conceived and evolved in simpler times to address simpler problems. As such, common law principles, as developed in England, tended to be verbally concise and therefore, necessarily broad in scope and variable in application. Prior to the 18th century, the trade-off between simplicity and predictability favored the former at the expense of the latter. The helter-skelter way in which the common law evolved, case-by-case, minimized the speed and coherence with which refined principles emerged. Nonetheless, the common law alone – especially in tort – was well suited for largely agrarian societies where the purpose of the law was modest: to resolve concrete disagreements, usually between neighbors, that were

³ It was not until the 19th century that “torts” was recognized as a separate body of law. However, the notion of a civil wrong outside of contract traces its origin to the Babylonian Talmud and was recognized in England as early as the 14th century. See BABYLONIAN TALMUD, SEDER NEZIKIN, BABA M’TZIA, folio 118b at 672 *et seq.* (Ch. IX) (Salis Daiches & H. Freedman Translators and Editors 1959); Morris Arnold, *Accident, Mistake, and the Rules of Liability in the 14th Century Law of Torts*, 128 U. PENN. L. REV. 361 (1979); *The Schoolmaster’s Case*, 11 Hen. 4, f. 47, pl. 10 (Y.B. Hilary 1410) (unfair competition); *The Thorns Case*, 6 Ed. 4, f. 7, pl. 18 (Y.B. Mich. 1466) (trespass).

relatively straightforward and where cause and effect were not difficult to pinpoint.

The inherent limitations of the common law were recognized by early English jurists, parliamentarians, and philosophers, including William Blackstone and Jeremy Bentham, two men who rarely saw eye-to-eye. See Sir William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND, Book III, ch. 22 (Oxford: Clarendon Press 1765-1769).⁴ Bentham, for example, viewed the “Common Law as a course of punishing without command.” David Lieberman, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH CENTURY BRITAIN 238 *et seq.* (New York: Cambridge Univ. Press 1989) (“Lieberman”). The “Dark chaos of the Common law,” as Bentham noted, was imprecise and unknowable and fit only for beasts:

To be governed by Statute Law belongs only to men. It is by Common Law that even beasts are governed. A mode of government that is fit only for Beasts, and for them fully, because of them incapable of a better.

Id.

The common law, even in 18th century Britain, was ill-suited for regulating complex systems in a predictable manner. As industrialization began to take hold, the Crown’s reliance on the common law began

⁴ See also Herbert L.A. Hart, THE CONCEPT OF LAW 119-130 (Oxford: Oxford Univ. Press 1961).

to wane. When confronted with a systemic legal issue with broad technological or economic implications, the Crown turned to the Parliament for a statutory solution and not to the King's Bench for a common law decree. Thus, starting at the early 18th Century and coinciding with the industrial revolution, the output of public statutes began to increase dramatically. *See* Lieberman at 13. For example, even though the English courts recognized and enforced an author's property right in his writings, provided the author had been granted the right to have works published, the uncertainties associated with allowing copyright law to develop *ad hoc*, as had been the case, was rejected in favor of a more coherent legislative approach leading to Statute of Anne, also known as the Copyright Act 1709, 8 Anne c.19. The Crown was concerned that a book-by-book, case-by-case approach would lead to regional variations that would undermine both the trade in books and the establishment of more commercial printing facilities.

B. The Particular Vagueness of Public Nuisance Leads to Significant Uncertainty

The characteristics of the common law – broad principles, case-by-case development, and absence of a coherent legislative mandate – that limit its ability to grapple predictably with complicated problems are especially evident in the tort of public nuisance. Notwithstanding the superb efforts of the American Law Institute (“ALI”) to bring a modicum of structure

and stability to the law of public nuisance, the tort remains, much as it has throughout its twenty-century history, a “vague[], uncertain[], and confus[ing]” term that can encompass anything that is distasteful. PROSSER AND KEETON at 617.⁵ The ALI defines a “public nuisance” as “an unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). It would be difficult to conjure up a more amorphous tort. In this setting, even the most basic terms are denuded of meaning. To determine whether the alleged interference is “unreasonable,” the “common right” and the “general public” must be defined. Neither is self-evident in this setting. First, a “right” presupposes either a duty or some reasonable expectation. Determining whether a duty exists is an unbounded exercise in judicial discretion. Second, no one can have a reasonable expectation about world climate variation; it has varied dramatically during the past millennium swinging from mini-ice ages to a more temperate climate before industrialization. Third, the “right” has to be a “common right.” When

⁵ The earliest known discussion of the law of public nuisance appears in the BABYLONIAN TALMUD, SEDER NEZIKIN, BABA M'TZIA, *supra* n.2, Portions of the Talmud discussing public nuisance were compiled about 2000 years ago; the term “public nuisance” first appeared in a portion of the Talmud compiled about 1600 years ago. For an outstanding history of public nuisance, see Victor E. Schwartz and Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006) (tracing the tort’s development to shortly after the Norman Conquest).

dealing with global climate, who is included in the word “common?” Do we include those living in Asia? There is no guidance. Nor is there a rational method for determining who should be included within the term “general public.” The eleven-word, one sentence definition is little more than a dense package of linguistic uncertainty.

Seventy years ago, California’s supreme court recognized this inherent uncertainty and declined to permit the tort to be used as a method of shaping public policy. See *People v. Lim*, 18 Cal.2d 872, 118 P.2d 472 (1941). In *Lim*, the court, enjoined the operation of a gambling house under a public nuisance-like statute, but declined to do so under the common law of public nuisance. The court observed that

the tendency to utilize the equity injunction as a means of enforcing public policy is a relatively recent development in the law. . . . Courts have held that public and social interests, as well as the rights of property, are entitled to the protection of equity. . . . This development has resulted in a continuous expansion of the field of public nuisances in which equitable relief is available at the request of the state. . . . The courts of this state, however, have refused to sanction the granting of injunctions on behalf of the state merely by a judicial extension of the definition of “public nuisance.” . . . [C]ompelling reasons of policy require that the responsibility for establishing those standards of public morality, the violations of which are to

constitute public nuisances within equity's jurisdiction, should be left with the legislature. . . . 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.

People v. Lim, 18 Cal.2d at 878, 879-80 (citations omitted) (emphasis supplied).

The limitations of the common law approach become apparent when issues take on even the slightest patina of complexity. *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948), a case studied by virtually every law student in first year torts class, aptly illustrates these limitations. See John W. Wade, Victor E. Schwartz *et al.*, PROSSER, WADE AND SCHWARTZ'S TORTS 276 (9th ed. 1994). In *Summers*, a member of a hunting party was struck in the eye by a single pellet after two other members of the party simultaneously fired in the plaintiff's direction. Inasmuch as each defendant was equally likely to have fired the pellet that struck the plaintiff, the plaintiff would have been unable to prove by a preponderance of the evidence that either of two was responsible had the normal burdens of proof and producing evidence pertained. To accommodate a three-party, two-possible-cause suit, the court altered the normal burdens by introducing a fudge factor: shifting the burden of producing evidence onto the defendants. The court justified this approach as preferable to allowing the

defendants, both whom acted unreasonably, to escape liability. Since *Summers*, courts have debated whether to embrace methods to artificially allocate loss among a finite set of arguably culpable actors where causation cannot be determined. There is still no consensus among the states. See, e.g., *Sindell v. Abbott Labs.*, 26 Cal.3d 588, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980) (adopting a market share approach); but see, *Safft v. Eli Lilly and Co.*, 676 S.W.2d 241, 247 (Mon. 1984); *Mulcahy v. Eli Lilly and Co.*, 386 N.W.2d 67 (Iowa 1986); *Smith v. Eli Lilly and Co.*, 560 N.E.2d 324 (Ill. 1990); and *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991) (all opting to retain traditional requirement that plaintiff prove identity of tortfeasor). In the federal courts, applying federal law, it appears unlikely that there would be any modification in the burdens to accommodate these somewhat more complicated cases. See, e.g., *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 277-78 (1994) (holding that, unless a statute indicates to the contrary, normal burdens of persuasion and production pertain in litigation under the Administrative Procedure Act).

A system that cannot readily address cases with a finite and identifiable set of points (*i.e.*, parties) with known etiologies cannot hope to address a case such as this where the points are uncountable and unknowable, where there is no scientific consensus about complex mechanisms of general and specific causation, and where every plaintiff is also a potential defendant and vice-versa: Among the States,

California and New York are two of the largest emitters of greenhouse gases, with California motor vehicles alone accounting for about four percent nationally of all emissions from all sources. See http://www.epa.gov/climatechange/emissions/state_energyco2inv.html

The Second Circuit brushed aside these widely recognized inadequacies of the nuisance tort, concluding that “Defendants’ argument is undermined by the fact that federal courts have successfully adjudicated complex common law public nuisance cases for over a century.” *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 326 (2d Cir. 2009). The court’s conclusion ignored the obvious and begged the question. It is obvious that a case-by-case common law approach to regulating global climate necessarily engenders significant uncertainties – legal, scientific, economic and policy. Given that these uncertainties exist, the question then becomes how great is each type of uncertainty and what costs are associated with each. These questions were never addressed by the court.

C. U.S. Tort Law Is Particularly Inefficient and Ineffective at Fashioning an International Scientific and Economic Global Climate Change Policy

1. The Parties Necessary to Fashion Rational Standards Are Not and Can Never Be Before the Court

Tort law is particularly ill-suited when it comes to crafting a solution to plaintiffs’ complaint of greenhouse

gas emissions from certain fossil-fuel-fired electric power plants. In order to adjudicate liability or to craft a remedy, the district court would have to consider most activities in the world economy. No district court could have all the parties responsible for those activities before it, nor could the court ever receive enough evidence to make the necessary findings. This is just not a case that a court can get right.

According to the complaint, emissions of carbon dioxide into the atmosphere cause global warming which will injure plaintiffs. App. 56-57, ¶ 1 & App. 86-102, ¶¶ 103-46. The *location* of the emissions does not matter. *See, e.g.*, App. 56-57, ¶¶ 1, 2 & App. 102, ¶ 147. Any ton of carbon dioxide emitted anywhere on the planet will mix in the atmosphere and will cause climate change everywhere to the same extent as any other ton of carbon dioxide. *See, e.g., Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 523-25 (2007). All carbon dioxide emissions everywhere on the planet are fungible from plaintiffs' perspective. The Environmental Protection Agency's Endangerment Finding in response to *Massachusetts v. EPA* describes this global feature at length, finding that "it would not be meaningful to define the air pollution as the greenhouse concentrations over the United States as somehow being distinct from the greenhouse gas concentrations over other regions of the world." 74 Fed. Reg. 66,495, 66,517 (Dec. 15, 2009).

Moreover, plaintiffs complain specifically of carbon dioxide emissions from electricity generation. In order for electricity service to be reliable, the amount

of electric power generated at any given instant must equal the amount demanded. *Cf.* App. 68-70, ¶¶ 41-43. Plaintiffs acknowledge that “demand-side management” would reduce emissions; a power company’s emissions of carbon dioxide will decline if the amount of electricity demanded goes down. That is why activities like lighting and heating that require electric power are said to have a “carbon footprint,” even though a light bulb or a heater does not itself emit carbon dioxide; the power plant that supplies electricity to power them emits the carbon dioxide. Persons other than the electric power generator are typically responsible for that electricity demand.

For these reasons, every activity in the world that causes greenhouse gas emissions not only contributes to the alleged nuisance of which plaintiffs complain, but also would form a critical part of any remedy, assuming any remedy were required. *Cf. Massachusetts v. EPA*, 549 U.S. at 525. Even though plaintiffs allege that defendants emit as much as ten percent of the carbon dioxide emissions from human activities in the United States – and therefore percents or tenths of percents of the total emissions in the world – and even if that amount were material to the total, one cannot determine whether controlling those emissions is or is not equitable or sensible without understanding all other emissions and determining that emissions from defendants’ particular generation fleets are the appropriate activities to curtail or to change.

Other emissions might be more equitable or sensible to curtail. Burning gasoline in automobiles generates carbon dioxide emissions much in the same way as burning coal in a power plant will. *See, e.g., Mandatory Greenhouse Gas Reporting Rule*, 40 C.F.R. § 98.1(a). Assuming plaintiffs were to establish that carbon dioxide emissions in fact caused them injury, a court in fashioning an injunction such as plaintiffs seek would need to determine whether good policy and good sense require carbon dioxide emission reductions by replacement of gasoline-powered automobiles with electric cars. Electric cars would increase demand for electricity and therefore emissions from defendants' facilities. However, the injunction plaintiffs seek would discourage replacement of conventional automobiles by requiring defendants to take costly steps that increase the cost of electricity relative to the cost of gasoline.

Similarly, manufacturing of concrete causes very substantial emissions of carbon dioxide. *See, e.g., 40 C.F.R. pt. 98, subpt. H* (mandatory greenhouse reporting for cement manufacturing). A court cannot appropriately enjoin defendants to construct different facilities without determining that the additional demand for concrete occasioned by the required construction will not have more of an effect on greenhouse gas emissions than the emissions avoided from defendants' facilities.

The economy and public health depend on reliable delivery of electric power. At any given moment, electricity demand contains a mix of critical uses, like

hospital equipment, and arguably less critical ones, like hair dryers or on-line poker machines. Defendants have no ability to direct what they generate to specific users at any given moment. A court fashioning injunctive relief like that demanded here, however, could enjoin only defendants – the power companies – and not their customers.

Moreover, many broad public policy decisions would affect both carbon dioxide emissions and emissions from defendants' facilities, and not necessarily in the same direction. The carbon dioxide emissions associated with living or doing business in different parts of the United States vary markedly. By way of example only, one study published in 2008, estimated the *per capita* carbon footprint in the 100 largest metropolitan areas in the United States from transportation and residential energy use in 2005, and showed a range of more than a factor of two. In this example, the estimated *per capita* carbon footprint in the Washington, D.C. area (3.12 metric tons/person/year) was more than double the footprint of people living in the New York City area (1.5 metric tons/person/year) or Los Angeles (1.41 metric tons/person/year). Marilyn Brown, Frank Southworth & Andrea Surzynski, *Shrinking the Carbon Footprint of America* (Brookings, May 2008).⁶ The location of new development

⁶ We cite this only by way of example. The estimates exclude non-residential energy use. They are, by now, somewhat dated. The study report does not provide information on variation *within* metropolitan areas nor does it analyze anything other than these 100 large metropolitan areas. The observation we make is just the obvious: location matters.

and the nature of land use have material implications for the rate of carbon dioxide emission. A trial court considering the injunction requested by plaintiffs would have to determine whether equitable and sensible policy to achieve total domestic carbon dioxide emission reductions (assuming for the sake of argument that those emissions reductions were equitable and sensible at all) might require incentives for people and businesses to move *into* an area served by one of the defendants – resulting in increased carbon dioxide emissions by that defendant. That is, if the service area of one of the defendants had housing and transportation infrastructure that made living there particularly greenhouse-gas-friendly, a global policy might want to encourage growth in that area, increasing the demand for that defendant's electricity and therefore its carbon dioxide emissions.

Almost every activity in every economy in the world – from manufacturing to power production to home cooking fires – has an effect on the total emissions of carbon dioxide on the planet. A court's determination to enjoin or not to enjoin these defendants implicitly depends upon a judgment about the relative value of all of these other activities. The persons responsible for all those other activities can never be joined in a tort case; they are everyone in the world. The persons responsible even in the United States cannot be joined.

Even if those parties were not considered indispensable, the facts concerning every activity in the

worldwide economy would have to be considered by the district court were this Court not to reverse. A trial court in a tort case is uniquely ill-suited to make judgments about the total sweep of human activity in the United States, let alone the world.

The court of appeals below analogized this case to other public nuisance cases considered by the federal courts. This claim, however, differs markedly from copper smelter emissions, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), or sewage discharges, *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (“*Milwaukee I*”); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (“*Milwaukee II*”). In each of these cases, a single pollution source affected the plaintiff state. If the defendant carried on its activity somewhere else, it would not have caused the alleged public nuisance to the plaintiff. Here, there is no question of location. There is no issue of local concentration of pollutants. Any ton of carbon dioxide anywhere in the world allegedly harms plaintiffs equally. Indeed, if Petitioners closed the facilities at issue and they (or another company) opened new identical facilities in a different state, or nation, the result to plaintiffs would allegedly be the same. This itself reveals the inherent non-justifiability of the claims. A trial court in a common law tort case cannot possibly choose among those emissions, and their causes, in fashioning an injunction. The list of necessary parties – or at least necessary facts – would be unmanageably large.

2. Tort Law Does Not Take into Account Economic Considerations Necessary for Rational National or Global Policy-Making

Conventionally, a court will not find a public nuisance unless the defendant's activity unreasonably interferes with a public right. RESTATEMENT (SECOND) OF TORTS, § 821B(1). Reasonableness connotes some evaluation of the defendant's activity and the public right with which it interferes, assuming the "public" can be identified. Certainly a court will not enjoin a public nuisance unless it find that the activity to be enjoined has a lower value than the interest upon which the enjoined activity encroaches. A trial court cannot possibly make that determination here.

A trial court cannot determine that defendants' carbon dioxide emissions should be enjoined rather than the emissions from a concrete plant in China. The court of appeals below hypothesized a "fair share" of carbon dioxide emission reductions that ought to be allocated to the United States as a whole, and a fair share of those reductions that could be allocated to defendants. However, a district court has no way of making the determination of the United States' fair share of reductions as against the European Union or India. The court has no way to decide which domestic emissions are less valuable than foreign ones and at what level. Moreover, a district court has no way of deciding which activities in the domestic economy have what shares of that hypothetical United States total reduction.

The decision to enjoin certain emitting activities and to permit others – to define the “aliquot” to be assigned to these defendants – would have economy-wide ramifications. Electricity would be more or less costly or more or less reliable. Some steps would be taken and others not. Trial judges in individual tort cases cannot possibly have before them the parties or the evidence necessary to make those decisions.

Moreover, the relative values of activities change over time. One form of electric power generation may make sense today, but not tomorrow. Even if plaintiffs were able to demonstrate that they experienced injury from greenhouse gas emissions, and even if they could somehow demonstrate that defendants should be enjoined in some way, within short order that injunction might well require modification to reflect changes in the economy. That sort of real-time adjustment could not possibly occur through tort litigation.

D. The Only Thing That Is Certain From This Litigation Is Economic Uncertainty

Legal philosophers and economists have long recognized that legal uncertainty has an adverse impact on the economy at all levels. It increases investment risks and transaction costs, discourages consumers from purchasing and stifles investment by entrepreneurs. *See, e.g.,* Helmut Wagner, *Macroeconomic Analysis of the Cost of Judicial Barriers in the Single Market, Part III* in: COST OF JUDICIAL

BARRIERS FOR CONSUMERS IN THE SINGLE MARKET, A REPORT FOR THE EUROPEAN COMMISSION, edited by H. von Freyhold, V. Gessner, E.L. Vial and H. Wagner (Brussels 2005); David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720 (1972).

On the investment side, uncertainty is empirically correlated with stock-market volatility and hence the risk of investment. See, e.g., Benjamin Bernanke, *Irreversibility, Uncertainty and Cyclical Investment*, 98 QUARTERLY J. OF ECONOMICS 85 (1983). As uncertainty increases, risk increases as does the volatility of the markets. This is consistent with theoretical predictions and empirical findings that the absence of information (*i.e.*, lack of predictability) hinders rational investment: those willing to invest are discouraged from doing so. Correspondingly, as the uncertainty abates, investment rebounds. See Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 ECONOMETRICA 623 (2009). Late last year, Congress interjected significant short-term uncertainty into the economy when it was unable to reach accord on whether the Bush tax cuts would continue or be permitted to sunset. Businesses had no way of knowing what their tax burdens would be the following years and therefore, lacked the information necessary to make strategic plans. This in turn fueled market volatility that not only undermined investment, but also growth and the willingness of businesses to expand their workforces. In short, added legal uncertainty in the midst of significant economic recession

should not be embraced. Yet, that is precisely what the Second Circuit has done.

Business Roundtable is particularly concerned that suits of this nature, which subject all businesses to potential lawsuits and ask courts to fashion national and international policy, may increase uncertainty in precisely those areas of the economy that the executive branch has targeted to receive incentives. Specifically, the government has implemented legislation that provides significant economic incentives for companies that develop, manufacture and distribute electric cars and corresponding tax credits for those who purchase those cars (*e.g.*, Chevrolet Volt). As noted, electric cars increase the demand for electric generation while the current lawsuit is aimed at forcing generators to decrease their output. If the electric output is decreased, then infrastructure necessary to support an electric fleet (*e.g.*, adequate number of charging stations) may not develop as planned and the absence of that infrastructure may discourage consumers from purchasing these new, greenhouse gas friendly automobiles. Suits, such as this, which engender uncertainty, may well obviate the benefits of government programs by increasing the risks to both consumers and manufacturers.

Business Roundtable is also concerned that legal uncertainty, unlike other forms of uncertainty (*e.g.*, catastrophic event uncertainty), translates immediately into higher operating costs (*e.g.*, higher insurance premiums, added attorneys fees), further amplifying its adverse impact on the economy. These

transaction costs do little to improve productivity or increase employment. Indeed, they have precisely the opposite effect.

II. Legal Uncertainty Is Amplified When Federal Courts Inappropriately Interfere with Decisionmaking Committed to Federal and State Regulatory Agencies

In *Baker v. Carr*, 369 U.S. 186 (1962), this Court described six attributes of political questions that federal courts cannot or should not decide. The Court included in that enumeration questions with “a lack of judicially discoverable and manageable standards for resolving it” and questions with “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion[.]” 369 U.S. at 210 (factors two and three).

For the reasons explained above, even if plaintiffs could establish that they have suffered or will suffer injury as the result of carbon dioxide emissions, the remedy for that injury cannot be decided by a federal court. That remedy presents a political question under the second and third *Baker* factors. Every ton of carbon dioxide emitted anywhere in the world is fungible. Plaintiffs do not claim to suffer more injury from nearby emissions of carbon dioxide than from emissions in Asia or Europe. Every activity in the domestic and world economies affects carbon dioxide emissions. Moreover, defendants supply electricity. The amount supplied at any time must equal

the amount demanded, or the electricity supply “grid” will cease to be reliable.

Plaintiffs seek to have the district court enjoin defendants to reduce their carbon dioxide immediately and over time. Plaintiffs hypothesize a “fair share” for each defendant of the emissions reduction required globally to mitigate climate change. However, the district court has no discoverable or manageable standards to determine what that “fair share” might be.

No judicial principles establish the “fair share” of defendants’ electric power plants as against electric power plants in China or automobiles in India or forest destruction in Brazil or land use decisions in Europe. The court of appeals below suggested that some “aliquot” of reduction might be assigned to defendants much in the way multiple polluters of a single stream might have to reduce their pollution proportionately. But there is no reason why *pro rata* reduction in carbon dioxide emissions is either fair or good policy. Some activities that emit carbon dioxide are more important to the economy or to national defense or to human well-being than others. Moreover, no judicial standard determines the “fair share” of the United States in any required global reduction. No standard would allow a court to decide that the United States should reduce its emissions at a higher or lower rate than France or Japan or Myanmar. Plaintiffs are not suing to enforce international treaties or domestic implementation of those

treaties.⁷ They have brought a tort claim. Tort law simply does not address the questions that this case presents.

Moreover, a district court cannot decide whether or how to reduce emissions of carbon dioxide from the domestic economy without nonjudicial policy decisions. Other departments of government must decide whether the United States ought to have any obligation to reduce greenhouse gas emissions from its economy. Other departments are charged with determining whether foreign economies ought to bear larger or smaller burdens than does ours.

In addition, other departments must decide *how* the domestic economy should reduce emissions, if at all, and on what schedule. The decision to cap emissions from one sector or another cannot be made by a court in any principled fashion. A court cannot tell whether manufacturing ought to be encouraged over agriculture, or reliable electricity service is more valuable than inexpensive gasoline. A court cannot decide whether emission limits ought to be technology-based and fixed (for example, that all electricity generation fleets should average no more than so many tons of carbon dioxide/megawatt-hour) or tradable.

⁷ Notably, the United States has ratified the United Nations Framework Convention on Climate Change. However, it has not ratified any protocol under that Convention that establishes a specific emission ceiling or reduction. *See* United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38.

These policy decisions are value judgments about which there is no right or wrong answer, and are for the Executive Branch and Congress. Courts are ill-equipped to make such foreign and/or economic policy.

The court of appeals below was far too facile with its reasoning. It analogized this case to a water pollution or localized air pollution case. If one or a few sources of pollution cause a high concentration of pollution that adversely affects a plaintiff, a court can decide whether one or more of those sources should change operations or relocate. There is no moving away here, according to the complaint. Plaintiffs claim that every activity in the world economy affects them. A court simply cannot choose among those activities. That is a political decision for other branches of government.



CONCLUSION

For all of these reasons, as well as those set forth in the briefs for the petitioners, amicus respectfully urges the Court to reverse the decision below.

Respectfully submitted,

MARIA GHAZAL
Director, Public Policy
and Counsel
BUSINESS ROUNDTABLE
901 New York Avenue, NW
West Tower, 3rd Floor
Washington, D.C. 20001
(202) 496-3268

ROBERT P. CHARROW*
LAURA METCOFF KLAUS
GREENBERG TRAUIG LLP
2101 L Street, NW
Washington, D.C. 20037
Charrowr@gtlaw.com
(202) 533-2396

DAVID G. MANDELBAUM
GREENBERG TRAUIG LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 988-7800

*Counsel for Amicus
Business Roundtable*

**Counsel of Record*