BEFORE THE IOWA SUPREME COURT

No. 13-0723

LAURIE FREEMAN, JOSEPH PRESTON, SHARON MOCKMOORE, BECCY BOYSEL, GARY D. BOYSEL, LINDA L. GOREHAM, GARY R. GOREHAM, KELCEY BRACKETT & BOBBIE LYNN WEATHERMAN,
Plaintiffs-Appellants,

vs.

GRAIN PROCESSING CORPORATION,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF MUSCATINE COUNTY
HON. MARK J. SMITH

BRIEF OF AMICI CURIAE

NATIONAL ASSOCIATION OF MANUFACTURERS, COUNCIL OF INDUSTRIAL BOILER OWNERS, NATIONAL SHOOTING SPORTS FOUNDATION, INC., NATIONAL MINING ASSOCIATION, NUCLEAR ENERGY INSTITUTE, INC., AND TEXTILE RENTAL SERVICES ASSOCIATION OF AMERICA

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IDENTITIES AND INTERESTS OF AMICI CURIAE

Amici are a highly diverse group of organizations that represent a broad spectrum of American industrial activities. The National Association of Manufacturers (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, and has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Council of Industrial Boiler Owners ("CIBO") is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates with members representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of industrial, commercial and institutional (ICI) boiler and fuel combination currently in operation. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost-effective energy and environmental regulations for ICI boilers.

The National Shooting Sports Foundation, Inc. ("NSSF") is the trade association for America's firearms industry. NSFF's mission is to promote, protect and preserve hunting and the shooting sports. NSSF's members include businesses such as firearms manufacturers and owners and operators of shooting ranges.

The National Mining Association ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

The Nuclear Energy Institute, Inc. ("NEI") is the organization responsible for establishing and advocating a unified policy on matters affecting the commercial nuclear energy industry. NEI represents the commercial nuclear energy industry in litigation and on the regulatory aspects of generic operational and technical matters. NEI's members

include every entity licensed by the U.S. Nuclear Regulatory Commission ("NRC") to operate commercial nuclear power plants or to store commercial used nuclear fuel, as well as nuclear plant designers, architect-engineer firms, nuclear fuel fabricators, and other organizations involved in the nuclear energy industry. The more than 100 operating commercial nuclear power plants in the United States form an integral part of the Nation's energy production infrastructure, and constitute America's largest source of clean-air, carbon-free electricity, producing no greenhouse gases or air pollutants. NEI seeks to promote the continuing availability of nuclear energy in the United States and safe operation of existing nuclear facilities, as well as development of new ones, by ensuring that NRC licensees can rely on the comprehensive federal regulatory scheme as administered by NRC.

The Textile Rental Services Association of America ("TRSA") represents a $16-billion industry employing nearly 200,000 people at more than 1,500 facilities nationwide. These independent and national companies provide laundered, reusable textiles and other products and services that help businesses project a clean and attractive public image. The industry reaches every major business and industrial region and municipality in the country. Most Americans benefit at least once a week from the cleanliness

and safety provided by the industry-through its laundering and delivery of reusable linens, uniforms, towels, floor mats and other products for the healthcare, hospitality and industrial/manufacturing sectors. TRSA member companies' services minimize environmental impacts on air, water and solid waste disposal while reducing costs for millions of customers.

Amici are very concerned about the issues raised in this case because Plaintiffs seek to impose liability under vague common law torts as a method to control otherwise lawful activities, such as emissions already extensively regulated by federal and state regulatory agencies. As manufacturers and suppliers of industrial and consumer products, minerals, energy resources, power and services, many members of *Amici* operate under rules, regulations and permits issued under the auspices of the Clean Air Act and/or other comprehensive federal and state regulatory programs. If Plaintiffs' arguments are accepted, *Amici* and/or their customers will face uncertain, unpredictable, unforeseeable and potentially unbearable liabilities which arise on a "case by case" basis, rather than specific regulatory requirements which permit rational and reliable business planning. Such liabilities may adversely influence investment, operations, and industrial growth not only in Iowa, but also nationally.

SUMMARY OF THE ARGUMENT

Amici curiae fully support and agree with the positions and arguments of Defendant Grain Processing Corporation ("GPC") regarding preemption of Plaintiffs' state tort claims. In doing so, *Amici* adopt by reference all arguments and authorities advanced by GPC. This Court should not accept the Plaintiffs' invitation to expand the scope of judicial discretion based upon vague notions of "public interest" and unspecified "factors." (Am. Pet. at E; Pl. Br. at 53 n.35). The Clean Air Act was passed to address these concerns, and specific federal and state regulations were then promulgated to balance the environmental protection and economic growth – including the need for jobs. The field of environmental protection is entirely occupied by these pervasive programs – and amorphous common law torts that threaten to upset this delicate balance are necessarily preempted.

In addition to the foregoing, however, *Amici* submit this brief to emphasize particular problems in the Plaintiffs' arguments raised by the "political question" doctrine. *Amici* focus on the second test stated in *Baker v. Carr*, 369 U.S. 186 (1962), namely, whether courts lack "judicially discoverable and manageable standards" for resolving nuisance cases involving regulated pollutants. *Id.* at 278. Such cases raise quintessential

"political questions" because they would require courts to make policy judgments instead of abiding by the requirement that judicial action be governed "by *standard*, by *rule*." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (emphasis in original); *cf. Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007) (noting the court had "neither the expertise nor the authority" to make policy judgments). This is especially true when those decisions have already been entrusted to other branches of government. *See Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions").

The history of nuisance litigation reflects a clear reluctance to approve its use when the proscribed conduct and other liability criteria 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 conjoined. Far from being an ordinary tort suit, this action sits squarely at the "crossroads" of substantive law and justiciability.

When litigants raise questions regarding the "reasonableness" of emissions in regulated environments, courts must decide whether they have the investigative resources and technical and scientific expertise necessary to create the standards and rules needed to resolve the controversy justly. Such inquiries go to the very heart of the political question analysis – especially when Congress has entrusted the executive branch with the responsibility to make the same decision.

In nuisance cases dealing with regulated emissions, courts should defer to the executive and legislative branches of government – which are authorized to set and adjust standards and rules to guide the regulated community's actions. Otherwise, the judiciary, which lacks the broad investigative and rulemaking authority of administrative agencies, risks uninformed and erroneous decisions based solely upon information collected in the adversary process. The "political question" doctrine wisely prevents such results by requiring courts to defer to the regulating agency's judgments regarding the "reasonableness" of emission levels, instead of relying upon "case by case" evaluations.

ARGUMENT

A. Courts Should Not Entertain Controversies Regarding "Political Questions" That Are Not Subject to Judicially Discoverable and Manageable Standards.

In prior "political question" controversies, this Court has declared its allegiance to the principles stated by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny. *See, e.g., King v. State*, 818 N.W.2d 1, 17 (Iowa 2012).

In *Baker,* the Supreme Court held that courts should not entertain a dispute when they lack "judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 278 (describing the second, and one of the most critical, of several tests to determine the existence of a political question). As Justice Scalia stated in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), "[o]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard,* by *rule*." 541 U.S. at 278 (emphasis in original). "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." *Id.*

The requirement of guiding "standards" is especially important when common law causes of action are alleged. The United States Supreme Court has refused to extend federal common law liabilities when doing so presents

serious difficulties in devising workable judicial standards. *See Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (declining to extend liability when the standard "would be endlessly knotty to work out"). This is particularly true where, as here, plaintiffs have "alternative remedies" in the regulatory arena to vindicate their rights – and where there are "special factors" that counsel hesitation before authorizing causes of action. 551 U.S. at 575 (citing *Carlson v. Green*, 446 U.S. 14, 18-19 (1980)). As *Amici* will develop below, at least two "special factors" here render this controversy non-justiciable.

B. Lack of "Judicially Discoverable" Standards.

Plaintiffs seek the Iowa judiciary's assistance to abate a nuisance allegedly caused by air emissions from Appellee's facilities – even though the emissions are permitted under the authority of federal and state regulatory agencies. For courts to intervene, however, they must have the means to obtain the full range of facts necessary to make principled and rational decisions about whether the levels of emissions released from the facilities are "reasonable." Otherwise, they cannot devise the standards and rules necessary to decide the controversy.

In both the "political question" inquiry and the law of nuisance, respect for the executive and legislative spheres is critical. In nuisance

cases, "political question" arguments necessarily require a comparative evaluation of the resources needed to craft appropriate rules. When such an evaluation is conducted here, the balance requires judicial deference to the political branches of government.

Congress enacted the Clean Air Act, 42 U.S.C. §§ 7401—7671q ("CAA") to generally address air pollution in the United States. Nathan Richardson, *et al.*, *The Return of an Old and Battle-Tested Friend, The Clean Air Act*, 166 RESOURCES 25, 29 (Fall 2010). Through the CAA, Congress established a comprehensive framework for regulating air pollution.

The compounds involved in this case are considered "air pollutants" under the broad language of 42 U.S.C. § 7602(g) of the CAA. The federal government has a lengthy and comprehensive record of regulating air pollutants. Given the EPA's comprehensive federal regulatory scheme, the United States Supreme Court has held that interstate nuisance suits stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987) (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The *Ouellette* court also admonished against the

"tolerat[ion]" of "common-law suits that have the potential to undermine this regulatory structure," *id.* at 497, and singled out nuisance standards in particular as "vague" and "indeterminate," *id.* at 496 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)) (internal quotation marks omitted); *see also North Carolina, ex rel. Cooper v. Tenn. Valley Auth. ("TVA")*, 615 F.3d 291, 3016 (4th Cir. 2010).

The contrast between the Clean Air Act scheme to regulate air pollution and nuisance – an "ill-defined omnibus tort of last resort" where "one searches in vain ... for anything resembling a principle" – could not be more stark. *TVA*, 615 F.3d at 302 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)). Attempting to simultaneously resolve air pollution issues using common law claims will condone the use of multiple standards throughout the nation. In various states, facilities already subject to an EPA-sanctioned state permit could be declared "nuisances" when a judge in Iowa sets one standard, a judge in a nearby state sets another, and a judge in another state sets a third. Such a scenario ultimately leads one to question "[w]hich standard is the hapless source to follow?" *Id.* (citing *Ouellette*, 479 U.S. at 496 n. 17).

Using the tort of nuisance to punish otherwise-permitted emissions would encourage the use of vague standards to scuttle the nation's carefully

created system for accommodating the need for energy production and the need for clean air. The result would be a "balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *TVA*, 615 F.3d at 296. The problems associated with this scenario illustrate the necessity for resources and tools beyond the reach of the adversary system.

"As 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]." *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 665-66 (1994); *see also City of Los Angeles v. Alameda Books, Inc*, 535 U.S. 425, 440 (2002) (acknowledging legislative bodies are "in a better position than the judiciary to gather and evaluate data"). Unlike courts, the executive and legislative branches can consider all pertinent issues in their entirety either through hearings or because of required comment periods. *See, e.g.*, 42 U.S.C. §§ 7409(a)(1)(B), (b)(1) & (2), 7426(a)(1).

As a result, executive and legislative policy choices can strike fairer and more effective balances between competing interests because they can be based on broader perspectives and ample information rather than being limited to issues raised only by litigants. *See Helvering v. Davis*, 301 U.S.

619, 642-44 (1937) (noting that Congress does not improvise a judgment when confronted with a national problem, but 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).

Although regulatory agencies are charged with broadly foreseeing, researching, considering, and accommodating *economic* consequences in their regulations – including the potential impact on jobs – courts are not in a position to undertake similar tasks. *See Am. Elec. Power Co.*, 131 S. Ct. at 2540 (noting that Judges may not commission studies, issue rules under notice-and-comment, or invite input but are instead "confined by a record"). Indeed, one of the primary purposes of the CAA's permitting program is to balance environmental concerns with "economic growth." *See* 42 U.S.C. § 7470. More importantly, courts, which lose jurisdiction upon rendition of final judgment, cannot modify their decrees to ameliorate "unintended consequences" or changing conditions. Executive and legislative branches, on the other hand, have continuing authority to revisit statutes and rules to modify or tailor their provisions. *See Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001).

Those branches are also better equipped to deal with broad issues because, unlike trial and appellate courts, they 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." *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995). Before any law is enacted, it must garner the support of a majority of the people through their elected representatives. Once 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.

Plaintiffs seek to bypass these political safeguards through common law solutions, which would allow the judiciary – the least political branch of government – to declare public policy without the involvement of the public's elected representatives. Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994) (explaining that 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").

Courts and juries play an enormously important role in our system of government, but they are not a substitute for decision-making by democratically-elected executives and legislators. As the Fourth Circuit recently observed: "we doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider. 'Courts are expert at statutory construction, while agencies are expert at statutory implementation.'" *TVA*, 615 F.3d at 305 (quoting *Negusie v. Holder*, 555 U.S. 511, 129 S.Ct. 1159, 1171 (2009). Unlike *ad hoc* lawsuits, regulations and permits provide an opportunity for predictable standards that are scientifically grounded. *Id.* at 305-06. In this highly technical area, it is crucial that courts respect the strengths of the rulemaking processes on which Congress placed its imprimatur.

Air emissions from the facilities at issue in this case are already permitted and extensively regulated by both federal and state governments. The statutes and regulations applicable to their emissions represent decades of thought, work and compromises by legislative bodies and agencies and a vast array of special interests seeking to influence the choices being made. "To say this regulatory and permitting regime is comprehensive would be an

understatement. To say it embodies carefully wrought compromises states the obvious." *TVA*, 615 F.3d at 298.

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 . . ." Linde, 28 VAL. U. L. REV. at 853. For example,

- Litigation involves comparatively fewer stakeholders than legislation and regulation. DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977);
- Judges are limited by the facts of the controversy presented by the parties before them, and are, as a result, ill-equipped to make general policy decisions which require global analysis. *Id.* at 33-35. ("Related issues, not raised by the instant dispute, must generally await later litigation.") *Id.* at 35.
- Litigation is a piecemeal process – judicial remedies are imposed on a "case by case" basis and are not flexible across time or in the form they take. *Id.* at 33-35 ("[T]he courts have only the option of issuing coercive orders: injunctions. . . Legislators and administrators, on the other hand, have a wider range of tools in their kit. They may resort to the same kinds of sanctions judges invoke or they may use taxation, incentives and subsidies . . . interventions in the marketplace, the establishment of new organizations . . ."). *Id.* at 34-35.

In nuisance 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. Sometimes, as here, "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." *Vieth*, 541 U.S. at 277. Unless this inquiry is answered correctly, the judiciary, the parties, and the public interest will be sacrificed to the shifting sands of standardless liability.

C. Lack of "Manageable" Standards.

Nuisance is extraordinarily subjective and notoriously difficult to define and apply. When compared to the specificity achieved by the legislative and administrative processes that apply to regulated industries, the tort's vague precepts are not sufficiently definite and manageable to enable juries and judges to grant relief that is "principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278. As a result, nuisance claims that challenge the "reasonableness" of regulated emissions present "political questions" that must be resolved by the executive and legislative branches, which have the resources and authority to create manageable standards and rules.

Although Plaintiffs insist that their expansive application of nuisance is consistent with the Restatement (Second) of Torts, they fail to heed a

dispositive warning – a warning that is central to determining whether this case presents a "political question." In his comments to § 821B of the Restatement, Dean Prosser, the official reporter, warned that "[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.*" RESTATEMENT (SECOND) OF TORTS § 821B cmt. e. (1979) (emphasis added).

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, including nuisance litigation. *See* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005). According to Professor Henderson, these amorphous 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 damages." *Id.* at 338.

Such paths lead inevitably to controversies where liability is controlled by the discretion of individual courts, rather than by rules of law. If cases like the present controversy are allowed to proceed, judges and juries will be empowered "to exercise regulatory power at the macro-economic level of such a magnitude that even the most ambitious administrative agencies could never hope to possess." *Id.* In exercising these extraordinary regulatory powers via tort litigation, courts and juries "exceed the legitimate limits of both their authority and their competence." *Id.* Aggregative torts, such as nuisance, raise unique "lawlessness" concerns that transcend routine tort cases and cross the political question threshold.

Confusion regarding the liability standards for nuisance is as ancient as the tort itself. Since its precepts have proven difficult to explain and apply, nuisance historically has "meant all things to all people." W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS 616 (5TH ed. 1984). Nuisance has even been characterized as a "chameleon word" because of its vagueness, mutability, and lack of defined boundaries. J. R. Spencer, Public Nuisance: *A Critical Examination*, 48(1) CAMBRIDGE L. J. 55, 56 (1989)

When Horace Wood published the first American treatise on nuisance in 1875, he described nuisance as a "wilderness of law." Horace Wood, *The*

Law of Nuisances iii (3d ed. 1893). By 1949, the tort's boundaries were so "blurred" that nuisance had become a "mongrel" tort that was "intractable to definition." F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949). Later, William Prosser, reporter for the Restatement (Second) of Torts, described nuisance law as an "impenetrable jungle," and as a "legal garbage can" full of "vagueness, uncertainty and confusion." William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942). Additional time and experience have not clarified the situation. *See, e.g.,* Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 Harv. L. Rev. 984, 984 (1952) (a "mystery"); John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L.Q. 241, 241 (1972) (a "quagmire"). Given this subjectivity, it is not surprising that more recent decisions still confess "bewilderment" regarding the tort's boundaries. *See, e.g., Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 520 (Mich. Ct. App. 1992) ("Suffice it to say that, despite attempts by appellate courts to rein in this creature, it, like the Hydra, has shown a remarkable resistance to such efforts").

Because of these vagaries, the history of nuisance demonstrates judicial concerns about expanding the tort's application. In the early twentieth

century, litigants argued that nuisance should be expanded to address activities that were not criminal and which did not implicate property rights or enjoyment. *People v. Lim*, 118 P.2d 472, 475 (Cal. 1941) (noting that some courts justified "nuisance" abatement because "public and social interests, as well as the rights of property, are entitled to the protection of equity"). Legal commentators and authorities objected, however, when public authorities sought to use nuisance to address broad societal problems. Edwin S. Mack, 16 HARV. L. REV. 389, 397-99 (1903) (noting that the expanding boundaries of nuisance law made courts of equity of that time period careless of their traditional jurisdictional limits). They warned that this "solution" was planting the seeds of abuse that would ultimately weaken the judicial system. *Id.* at 400-03.

Finally, when 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, over a decade of litigation utterly failed to produce a solution. *See* Eckardt C. Beck, *The Love Canal Tragedy,* EPA Journal (Jan. 1979) ("no secure mechanisms [were] in effect for determining such liability"); 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).

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. *See People v. Lim*, 118 P.2d 472, 475 (Cal. 1941). Significantly, the court did so because judicial creativity would otherwise result in "standardless" liability. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal.) *cert. denied,* 521 U.S. 1120 (1997). Thereafter, other states also refused to expand nuisance liability beyond its traditional boundaries. *See, e.g., State v. Lead Industries Ass'n,* 951 A.2d 428 (R.I. 2008) (rejecting use of nuisance in lead paint litigation); *In re Lead Paint Litigation,* 924 A.2d 484, 494 (N.J. 2007) (same).[1]

There is plainly an overlap between these jurisprudential concerns and the "political question" doctrine. Just as courts have traditionally

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[1] For more detailed jurisprudential history regarding nuisance, *see generally,* Richard O. Faulk and John S. Gray, *Public Nuisance at the Crossroads: Policing the Intersection Between Statutory Primacy and Common Law,* 15 Chapman L. Rev. 485 (2012); Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance,* 18 Mo. Envtl. L.& Policy Rev. 1 (2011); Richard O. Faulk and John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation,* 2007 Mich. St. L. Rev. 941 (2007).

resisted invitations to expand nuisance liability in the absence of clear boundaries and guiding principles, courts must also resist deciding political question controversies where they cannot devise definitive standards and rules for their adjudication.

In today's legal landscape, where conduct and business activities are thoroughly regulated by statutes and administrative rules, there are comparatively few areas where a common law court is free to act without legislative or regulatory influence. As a result, in modern America the common law does not operate in a vacuum, but rather exists within a dynamic and interactive democracy that informs, guides, and, at times, constrains its creativity.

Today's plethora of local, state and federal pollution laws has largely eliminated the need for pollution-based nuisance litigation, except in those instances where the political branches have defined specific situations, activities and behaviors as nuisances. *See, e.g., People v. Lim*, 118 P.2d at 476 ("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"); *Acuna*, 929 P.2d at 606 (stating that "[t]his lawmaking supremacy serves as a brake on 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' ").

Plaintiffs now demand that these objective constraints be abandoned. In their place, they propose that courts create *ad hoc* common law standards to regulate perceived evils by regulating air pollution independently of standards and rules developed pursuant to the Clean Air Act. In doing so, they frame wholly new claims that are unbounded by rational constraints. As the Fourth Circuit recently observed in *North Carolina v. TVA*, 615 F.3d 291, 302 (4th Cir. 2010):

> [W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application. If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bullfights, we will be hard pressed to derive any manageable criteria.

Both "political question" considerations and the substantive law of nuisance preclude courts from resolving controversies when fair standards cannot be devised to resolve amorphous claims. Courts should not dispense with objective standards developed by regulatory agencies by relegating liability to subjective speculations. Such standardless exercises are not jurisprudential. Instead, they transform courts into regulatory agencies, require them to devise *ad hoc* standards for each case, and then mandate

enforcement using the threat of contempt to motivate compliance. Such a proceeding may be "called a trial, but it is not." *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").

CONCLUSION

If, as Justice Holmes counseled, the development of the common law should be "molar and molecular,"[2] the transmutation of "nuisance" concepts to address controversies arising within an extensively regulated environment requires more rumination and digestion than the judiciary alone can prudently provide. Advocates who tout 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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[2] *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,[3] 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 controversy based on a defendant's behavior in an extensively regulated environment, it is appropriate for this Court to consider whether the judiciary has the resources and tools to investigate, evaluate, and fairly resolve these claims. *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 such controversies can only be developed justly and reliably outside the judiciary's limited realm.

Given Congress' prior passage of the CAA and its amendments, and the widespread and specific implementation of the CAA's requirements by the executive branch, it is inappropriate for courts to entertain standardless aggregative controversies. Under such circumstances, the limits of judicial

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[3] *See In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (holding that, if 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).

competency suggest that forbearance, rather than adventure, is the most principled response.

For the foregoing reasons, the judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF FILING

I, Sarah E. Crane, hereby certify that eighteen (18) copies of the attached Brief of Amici Curiae were filed with the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, IA 50319, on the 10th day of October, 2013.

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I hereby certify that on the 10th day of October, 2013, I served the foregoing Brief of Amici Curiae by mailing a copy thereof to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 5,470 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Times New Roman 14 pt.

Dated: October 10, 2013

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