

No. 10-174

IN THE
Supreme Court of the United States

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

v.

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

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

**BRIEF FOR THE EDISON ELECTRIC
INSTITUTE, AMERICAN PUBLIC POWER
ASSOCIATION, AND NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF
PETITIONERS**

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STATEMENT OF INTEREST¹

Edison Electric Institute (“EEI”) is the national association of U.S. shareholder-owned electric utilities and their affiliates and industry associates

¹ Pursuant to Rule 37.6, counsel for *amici* certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici*, their members, or their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties.

worldwide. Its members generate approximately three-quarters of all electricity produced by the nation's electric companies and serve about 70 percent of all retail customers in the nation. Organized in 1933, EEI represents its members' interests and advocates equitable policies in legislative and regulatory arenas.

The American Public Power Association ("APPA") represents the nation's more than 2,000 not-for-profit, publicly owned electric utilities, doing business in every state except Hawaii and serving more than 45 million Americans. APPA's members are units of state or local government.

The National Rural Electric Cooperative Association represents the nation's 930 not-for-profit, customer-owned rural electric cooperatives, which serve 42 million end users in 47 states.

Amici—whose member companies and utilities collectively serve 94 percent of the electric customers in the nation—appear regularly before this Court in cases presenting issues of great importance to the electric industry and the U.S. economy. *See, e.g., Entergy La., Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003); *New York v. FERC*, 535 U.S. 1 (2002). This is such a case. *Amici's* member companies recognize the growing concerns regarding the effects of climate change; indeed, the electric-utility industry leads all other sectors in reducing, avoiding, or sequestering greenhouse gas ("GHG") emissions. *See* Department of Energy, Energy Info. Admin., *Voluntary Reporting of Greenhouse Gases 2005* at 9 (Dec. 2006).² *Amici* and their members support well-

² Available online at [http://www.eia.doe.gov/oiaf/1605/vrrpt/summary/pdf/0608\(2005-s\).pdf](http://www.eia.doe.gov/oiaf/1605/vrrpt/summary/pdf/0608(2005-s).pdf) (last checked Jan. 31, 2011).

designed federal legislation and regulation intended to coordinate further reductions consistent with the ability to provide affordable, reliable electric service to customers. But because the problem at hand is *global* climate change, it is vital that GHG regulation be a *comprehensive* regime, undertaken with an eye toward all sources of GHG emissions and the most efficient, technologically feasible, and practical ways to reduce those emissions. Only a comprehensive approach can allow for sensible choices regarding (i) how to allocate emissions-reduction responsibilities across economic sectors, (ii) how to foster the technology necessary to facilitate reductions, and (iii) how to ensure that reductions do not saddle consumers with high energy prices and drive industries and jobs out of state or overseas.

Federal and state legislators and regulators have been working for years to implement these sorts of multifaceted emissions policies. The *ad hoc* adjudicatory approach approved by the Second Circuit would undermine those efforts. It is the antithesis of the comprehensive strategy the nation needs.

SUMMARY OF ARGUMENT

1. Plaintiffs essentially seek to have the federal courts regulate GHG emissions through case-by-case adjudication. Such a regulatory approach is as unnecessary as it is unwise. Electric utilities are already subjected to comprehensive regulation by the political branches. These legislators and expert agencies comprehensively consider the various ways to produce electricity and balance their costs—including environmental costs—against their benefits. And the essential attributes that allow them to craft effective and comprehensive GHG regulations—

subject-matter expertise, political accountability, and, most important, the ability to implement rules that apply across the board—are attributes the federal judiciary lacks. The Second Circuit’s decision opens the door to extraordinarily fragmented, and costly, judicial regulation of GHG emissions. This Court should reject that approach.

2. Global climate change is an aggregative, global phenomenon: Every emission of carbon dioxide (“CO₂”), methane, and the four other major GHGs—which emanate not only from power plants, but also from motor vehicles, ruminant livestock, fireplaces, people, and billions of natural and anthropogenic sources—contribute proportionally.³ And the solutions are complex; as already outlined, competent GHG emissions regulation necessarily involves a host of tradeoffs and requires detailed knowledge of how industry works. For both of those reasons, the claims plaintiffs advance are “‘generalized grievances more appropriately addressed in the representative branches.’” *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Plaintiffs lack prudential standing—as well as Article III standing—to maintain their suit.

³ Each year, more than 6.1 million domestic industrial, commercial, and other sources emit GHGs in excess of the Clean Air Act’s general emission-tonnage applicability thresholds under the “new source review” program (100 or 250 tons per year, depending on the source category). And that does not even count all the sources that fall outside the Act, including international emissions sources. See EPA, *Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514, 31540 (Table V-I) (June 3, 2010).

3. The bottom line is that GHG regulation is too consequential, and too complex, to address on a piecemeal basis. That is why Congress has already stepped in and displaced any federal common law that might exist in this area. Congress and the Environmental Protection Agency (“EPA”) have taken actions—including significant steps since the decision below issued—that speak directly to the concerns plaintiffs seek to address through litigation. In the face of those actions, it is not the courts’ place to fashion *ad hoc* rules through the largely standard-less mechanism of public nuisance law. The decision below should be reversed.

ARGUMENT

I. “JUDICIAL REGULATION” OF GHG EMISSIONS IS BOTH UNNECESSARY AND UNWISE.

Adjudicating the plaintiffs’ common-law tort claims—and those of similarly situated plaintiffs nationwide—is both unnecessary and unwise. It is unnecessary because the political branches are already regulating—extensively—the very same GHG emissions at issue in this common-law suit. And it is unwise because only the political branches have the tools needed to successfully regulate so diffuse a collection of activities leading to those emissions. Those political branches—Congress and EPA, buttressed at times by states working in conjunction with the federal government—have crafted laws and regulations that address emissions reductions. Specifically, Congress has enacted provisions in the Clean Air Act that authorize EPA to regulate GHGs where certain statutory prerequisites are met, and EPA has followed suit by adopting regulations

that impose emission-reduction obligations. And they have done so in a way that reflects an effort to tailor emissions requirements to the availability of technologies necessary to meet them, and to implement incentives designed to speed those technologies to market. To inject ad hoc “judicial regulation” of GHG emissions into this regulatory regime would sow confusion and burden industry with inordinately expensive regulatory uncertainty.

A. The Political Branches Are Engaged In Comprehensive GHG Emissions Regulation.

1. The principal federal actors in the GHG regulation field are Congress and EPA. Congress crafted the Clean Air Act as a comprehensive regime for regulating air pollutants. The Act broadly defines “air pollutants,” *see* 42 U.S.C. § 7602(g), authorizes EPA to list pollutants that “endanger public health or welfare” where certain statutory prerequisites are satisfied, *id.* § 7408(a)(1), and requires states to regulate emissions of listed pollutants to prevent pollution from exceeding EPA standards. *Id.* §§ 7409-7410. But that is only the beginning of the wide-ranging regulatory regime the Act creates. It also authorizes EPA to list categories of “stationary sources”—*i.e.*, non-mobile emissions sources, such as power plants—that “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare,” and to establish federal performance standards for new or modified sources that fall within the listed category. *Id.* § 7411(b)(1)(A), (B). It requires states to issue performance standards for existing stationary sources in some circumstances, subject to EPA-

promulgated guidelines. *Id.* § 7411(d). It requires that any major new or modified “emitting facility” obtain a permit to ensure prevention of significant deterioration (“PSD”) of air quality and to certify that the facility will use “the best available control technology for each pollutant subject to regulation” under the Act. *Id.* § 7475(a)(4). And it requires operators of large stationary sources to apply for “Title V” operating permits that aggregate all of the Act’s requirements. *Id.* § 7661.

In *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), this Court confirmed that CO₂, the principal GHG, is among the many air pollutants that the Clean Air Act authorizes EPA to regulate. Since *Massachusetts*, and particularly since the Second Circuit decision now on review, EPA has taken multiple steps to regulate GHG emissions. Indeed, in the months since the Court granted certiorari in this case, EPA has rolled out increasingly aggressive GHG regulatory plans—plans that render backdoor regulation of GHG emissions through federal common-law nuisance suits even more unnecessary and inappropriate than it was before.

In April 2010, EPA and the Department of Transportation “set the first-ever national greenhouse gas emissions standards * * * [for] all new passenger cars and light trucks sold in the United States.” EPA, DOT, *EPA Set Aggressive National Standards for Fuel Economy & First Ever Greenhouse Gas Emission Levels for Passenger Cars & Light Trucks* (Apr. 1, 2010).⁴ In June 2010, EPA turned its atten-

⁴ Available online at <http://yosemite.epa.gov/opa/admpress.nsf/8b770facf5edf6f185257359003fb69e/562b44f2588b871a852576f800544e01!OpenDocument> (last checked Jan. 31, 2011).

tion to stationary sources like those at issue here: It adopted final “tailoring” rules providing that large GHG sources subject to the PSD and Title V programs must address GHG emissions in their permits, and setting a schedule for regulation of smaller sources. See EPA Final Rule: *Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514 (June 3, 2010) (“*Tailoring Rule*”). Those rules, which took effect last month, apply to power plants. *Id.* at 31516. Thus, certain new and modified power plants that qualify as “[m]ajor emitting facilit[ies]” are now required to obtain permits certifying that they are “subject to the best available control technology” for GHGs. 42 U.S.C. § 7475(a)(4). And the agency has committed to undertake another rulemaking this year that will consider “additional step[s] for phasing in GHG permitting” and that may eventually result in similar permitting requirements for emissions sources as small as 50,000 tons per year. EPA, *Final Rule: Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule, Fact Sheet* at 2-3 (May 13, 2010).⁵

Nor did EPA stop there. In December 2010—after the Court granted certiorari in this case—EPA expanded its GHG emissions oversight, announcing that before the end of this year it plans to propose GHG new source performance standards (“NSPS”) applicable to new and modified fossil-fuel-fired electric power plants and petroleum refineries. See M. Wald, *EPA Says It Will Press on with Greenhouse*

⁵ Available online at <http://www.epa.gov/nsr/documents/20100413fs.pdf> (last checked Jan. 31, 2011).

Gas Regulation, N.Y. Times, Dec. 23, 2010, at A16.⁶ NSPS are “national emission standards that are progressively tightened over time to achieve a steady rate of air quality improvement without unreasonable economic disruption.” EPA, *Air Quality Management—New Source Performance Standards* (Jan. 2010) (“NSPS Summary”).⁷ Under the NSPS program, EPA sets emissions standards of pollutants—here GHGs—for new and modified facilities in certain industry sectors, and the regulated facilities must install cost-effective, state-of-the-art emission controls to meet those standards. *See id.*; *see also* 42 U.S.C. § 7411(a)-(c). In the case of air pollutants that are not regulated under certain other provisions of the Clean Air Act, such as GHGs, the Act then “requires the States to determine appropriate control limits for *existing* sources for which there is an NSPS.” EPA, *The On-line State Implementation Plan Processing Manual—What’s Not in a SIP* (emphasis added); *see* 42 U.S.C. § 7411(d).⁸ EPA’s latest initiative thus moves well beyond permitting. It is designed to produce hard emissions standards for the very power plants plaintiffs want the federal courts to regulate.

2. Underscoring the political branches’ flexibility to consider all forms of evidence bearing on the issues they seek to address, EPA has explained that its new

⁶ Available online at http://www.nytimes.com/2010/12/24/science/earth/24epa.html?_r=1&scp=5&sq=greenhouse&st=cse (last checked Jan. 31, 2011).

⁷ Available online at <http://www.epa.gov/apti/course422/apc4c.html> (last checked Jan. 31, 2011).

⁸ Available online at <http://icode.pes.com/sipman/mContent.cfm?chap=1&filePos=8> (last checked Jan. 31, 2011).

rules are the product of “extensive study, debate and hundreds of thousands of public comments.” EPA, *EPA Sets Thresholds for Greenhouse Gas Permitting Requirements/Small Businesses & Farms Will Be Shielded* (May 13, 2010) (statement of EPA Administrator Lisa P. Jackson).⁹ EPA also explained why it decided to take an incremental approach in the Tailoring Rule: “‘Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop;’ * * * instead they may permissibly implement such regulatory programs over time, ‘refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.’” *Tailoring Rule*, 75 Fed. Reg. at 31544 (quoting *Massachusetts*, 549 U.S. at 524). And it stated that its goal was to “minimize[] economic burdens” by recognizing that the Clean Air Act requires permitting agencies to take “energy, environmental, and economic considerations into account” when determining the best available control technology for large sources to limit their emissions. *Id.* at 31590.

These sorts of considerations are built into the NSPS program too. Performance standards “are based on the best demonstrated technology (BDT),” which “refers to the best system of continuous emissions reduction that has been demonstrated to work in a given industry, considering economic costs and other factors, such as energy use.” *NSPS Summary, supra*; see 42 U.S.C. § 7411(a)(1). Put another way, the NSPS system creates emissions standards, but it does not do so in a vacuum. Instead, it tailors re-

⁹ Available online at <http://yosemite.epa.gov/opa/admpress.nsf/0/EA1BF25579E541B1852577220055C20C> (last checked Jan. 31, 2011).

quired emissions cuts to ensure that they can be achieved with existing technology—and that the expense of compliance does not drive the regulated industry to ruin. *See Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 904 (7th Cir. 1990) (summarizing NSPS program’s components).

3. Under the Clean Air Act, states have their own role to play in regulating GHG emissions. Indeed, one of the key components in the Act’s regulatory scheme is Congress’s deliberate choice to let state regulators “take the lead in carrying out the Clean Air Act” and “enforc[ing] Clean Air Act regulations.” EPA, *Understanding the Clean Air Act* (2008).¹⁰

States will have primary responsibility through their “state implementation plans,” or SIPs, for the GHG permitting contemplated by the Tailoring Rule. *See* EPA, *EPA Proposes Rules on Clean Air Act Permitting for Greenhouse Gas Emissions* (Aug. 12, 2010) (“*EPA SIP Statement*”). States also may—and do—choose to take the lead in enforcing NSPS using their own locally developed procedures and enforcement mechanisms. *See* 42 U.S.C. § 7411(c). “States have ‘wide discretion’ in formulating their plans,” *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 470 (2004) (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976)), though they must include certain EPA-specified measures.

Congress through the Clean Air Act chose to give states these leading roles because the state political branches are uniquely well suited to crafting “solutions for pollution problems that require special

¹⁰ Available online at <http://www.epa.gov/air/peg/understand.html> (last checked Jan. 31, 2011).

understanding of local industries, geography, housing, and travel patterns, as well as other factors.” *Understanding the Clean Air Act, supra*. And EPA has specifically recognized that states are “best-suited to issue permits to sources of GHG emissions,” in part because states “have long-standing experience working together with industrial facilities” located in their jurisdictions. *EPA SIP Statement, supra*.

The states also engage in other GHG-related initiatives that complement the Clean Air Act’s regulatory scheme. To take only a few examples: Thirty-three states participate in regional initiatives—including the Midwest Greenhouse Gas Reduction Accord, the Western Climate Initiative, and the Regional Greenhouse Gas Initiative (“RGGI”)—that have as their goal limiting emissions through long-term reduction targets. See Pew Center on Global Climate Change, *Regional Initiatives* (updated Dec. 2010) (“*Pew Regional Map*”).¹¹ At least 30 states impose renewable energy requirements—*i.e.*, requirements that by a certain date, a specified percentage of the state’s electricity be produced using wind, hydroelectric, solar, or other power sources that do not generate greenhouse gases. See Federal Energy Regulatory Comm’n, *Renewable Portfolio Standards (RPS) & Goals* (updated Aug. 2010).¹² These requirements will reduce GHG emissions as electrical generation from renewable sources grows. Twenty-one states

¹¹ Available online at http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm (last checked Jan. 31, 2011).

¹² Available online at <http://www.ferc.gov/market-oversight/other-mkts/renew/other-rnw-rps.pdf> (last checked Jan. 31, 2011).

have adopted performance incentives to promote efficient electric-power end use. See Institute for Elec. Efficiency, *State Electric Efficiency Regulatory Frameworks* at 1 (July 2010).¹³ And more than a dozen states have passed laws ensuring that utilities are not punished with lower cost recovery when their customers end up using less energy as a result of efficiency gains. See *id.* at 2-3.

Moreover, under traditional utility regulation (which applies to utilities serving two-thirds of the electric customers in the nation), state regulatory commissions approve utility rates. As part of that process, they rule directly on the relative economic, energy, and environmental considerations involved in different fuel and generation choices, including alternative energies and technologies. See, e.g., Final Order, *In re Application of Appalachian Power Co.* at 19-21, No. PUE-2009-00030 (Va. S.C.C. July 15, 2010) (evaluating cost-effectiveness of utility's carbon-capture project).

4. The regulatory framework described above is the product of policy choices derived from deep knowledge of industry: How quickly should particular sectors be expected to reduce emissions? What technologies are available to make those cuts, and when will new technologies come online? What quantum of compliance costs can particular industries absorb without impairing competitiveness and driving jobs overseas? These are the sorts of decisions that legislatures, expert agencies, and commissions are well-qualified to make. See *Tailoring Rule*,

¹³ Available online at http://www.edisonfoundation.net/IEE/issueBriefs/IEE_StateRegulatoryFrame_0710.pdf (last checked Jan. 31, 2011).

75 Fed. Reg. at 31548. And as we explain below, the complexities and policy judgments necessarily required in GHG regulation underscore the fact that judicial involvement is both unworkable and unnecessary.

B. Judicial Regulation By Nuisance Suit Would Substantially Undermine The Existing Regulatory Scheme.

For the reasons just described, the rule adopted by the Second Circuit would have federal courts elbowing their way into a crowded—and complex—legislative and regulatory field. And that is precisely why the federal courts should stay their hand. The key attributes that allow the political branches to effectively regulate GHG emissions—subject-matter expertise, political accountability, institutional consistency, and coordinated, comprehensive planning—are absent in the federal judiciary. A single federal district court judge, called upon to resolve a nuisance lawsuit brought by a single plaintiff against a subset of defendants, is simply unable to formulate the type of comprehensive GHG-emissions policy that would be necessary to meaningfully address the global, aggregative phenomenon at issue here.

1. When legislatures and agencies develop GHG regulations, they do so in light of detailed evidence; their regulations typically have broad application; and they can (and do) consider cost and competitiveness issues. GHG-regulation-by-nuisance-suit, in contrast, would be neither comprehensive nor rational. Different judges could impose completely different emissions constraints or caps, and different time frames for compliance, even within the same industry. Some industries could face stringent

mandates to cut their GHG emissions “by a specified percentage each year for at least a decade,” Pet. App. 178, and others not. Indeed, portions of the same industry—or even the same emissions source—could face caps and others not, or could even face conflicting caps, depending on whom a given plaintiff chooses to sue and where. See *North Carolina ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010) (“An EPA-sanctioned state permit may set one standard, a judge in a nearby state another, and a judge in another state a third. Which standard is the hapless source to follow?”) And of course, subsets of an industry could face additional draconian punishments—including monetary damages and even plant-shutdown requirements—constrained only by individual judges’ conceptions of what level of GHG emissions is “unreasonable.”

It makes little sense to encourage a landscape in which Company *A* faces strict court-mandated CO₂ emissions limits and monetary outlays while Company *B* faces more finely calibrated regulation under the Clean Air Act, even though both are in the same industry, emit the same gases, and contribute to the same undifferentiated global concentration of atmospheric GHGs. That is just one of many reasons why the GHG issue is better addressed by regulation and best addressed by legislation.

2. Likewise, judges lack the institutional competence to link emissions targets to the new technologies that can facilitate GHG reductions at an acceptable cost.

a. Electric-power companies spend billions of dollars each year on new technologies and operational measures designed to protect the environment, and

the result has been steep cuts in air emissions. However, there is currently no feasible technology to reduce fossil-fuel power plants' CO₂ emissions, in contradistinction to the technologies available to control traditional air pollutants. *See Legislative Proposals to Reduce Greenhouse Gas Emissions: An Overview: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce, 110th Cong. (June 19, 2008) (statement of EEI President Thomas R. Kuhn at 4, 33-36) ("Kuhn Testimony").*

Thus rational GHG-emissions cuts—especially the sorts of sharp reductions that some contemplate in an effort to mitigate global climate change—cannot be instituted overnight. They will require the adoption of an array of advanced no- or low-carbon technologies, including increased use of wind, solar, incremental hydroelectric, and nuclear power. They will also depend on the development of cost-effective, commercially available carbon capture and geologic sequestration (“CCS”) in the case of power plants that burn coal or natural gas. These technologies take years to develop and deploy commercially. Technologies such as wind and solar are relatively expensive and present grid integration issues due to their intermittency. *See Kuhn Testimony at 29-30.* Additional nuclear power requires substantial upfront investment and long lead times for construction. *See id.* at 32-33. All of these power sources will be subject to “transmission siting, building, and integration constraints.” *Id.* at 30-31. And emissions-reducing approaches such as CCS are still in the demonstration stage; they will require billions of dollars, and long-term research, development, and

demonstration, before they are deployable at reasonable prices. *See id.* at 32-36.

A study by the Electric Power Research Institute (“EPRI”) throws the connection between these new technologies and further GHG reductions into stark relief. The study concluded that “the aggressive development and deployment of several advanced technologies”—including water and solar power, advanced light-water nuclear reactors, and CCS—“could reduce U.S. electricity sector CO₂ emissions by roughly 45% by 2030,” compared to 2007 figures. EPRI, *The Power to Reduce CO₂ Emissions: The Full Portfolio* at 2-3 (2007) (“*EPRI PRISM Study*”).¹⁴ But, the study warned, this sort of reduction will be possible only if industry and regulators work together to put in place an “expanded and multi-decade [research and development] program.” *Id.* at 3-14. Without that coordinated public-private effort and investment, aggressive CO₂ cuts would be either impossible or exorbitantly expensive.

b. In short, “[f]or any carbon policy to reduce GHG emissions effectively * * * compliance timeframes must correspond to the availability of technologies needed to reduce emissions.” EEI, *Understanding EEI’s Global Climate Change Points of Agreement* at 2 (Feb. 2009).¹⁵ Legislators and regulators possess the tools necessary to align reduction goals with technological reality in this way. For example, EPA’s forthcoming NSPS regulations will be required to

¹⁴ Available online at <http://www.scribd.com/doc/6819599/US-Power-to-reduce-2007-CO2-emission> (last checked Jan. 31, 2011).

¹⁵ Available online at <http://www.eei.org/ourissues/TheEnvironment/Climate/Documents/PointsofAgree-EEIcommunFINAL.pdf> (last checked Jan. 31, 2011).

calibrate GHG performance standards to “the best demonstrated [emissions-control] technology” for the particular industry segment in order to avoid “unreasonable economic disruption.” *NSPS Summary, supra*. Legislators and regulators also can (and do) design financial incentives to help new technology reach the market. And they can (and do) decide whether particular investments in no- or low-GHG-emitting energy technology are worthwhile given their costs to customers. *See, e.g., Order, In re Application of Ky. Power Co. for Approval of Renewable Energy Purchase Agreement*, No. 2009-00545, 2010 WL 2640998 (Ky. P.S.C. June 28, 2010) (denying utility permission to use wind power on the ground that it would not produce the lowest cost for consumers); Ohio Rev. Code Ann. § 4928(B)-(C) (setting renewable-energy benchmarks for electrical utilities but creating limited “escape clauses” to avoid creating excessive expenses for consumers).

The judiciary, of course, lacks the institutional competence to take any of these crucial steps. If a single judge were to impose emissions mandates through an individual nuisance suit, those mandates would be formulated in a vacuum. They would be untethered from industry realities familiar to the regulators who grapple with these issues every day.

c. Dramatically reducing the nation’s GHG emissions will be expensive no matter what the approach. But the cost may well be much higher if judges issue emissions-reduction mandates that are divorced from technological progress.

That is so in part because facilities in the electric-power industry (among others) could be forced to try to meet short-term emissions targets by switching from coal to natural gas, which is not a cost-effective long-term approach. As the then-chairman of the

Federal Energy Regulatory Commission (“FERC”) warned two years ago, “poorly-designed” GHG rules that “exclude the role of coal and nuclear power * * * would undermine” regulators’ ability to “ensure adequate electricity supplies at a reasonable price.” See Carbon Control News, *FERC Faces Climate Challenge* (Oct. 28, 2008) (statement of Joseph T. Kelliher) (available upon request).

An EPRI study compared the cost of reaching aggressive long-term GHG-reduction targets under two scenarios: one in which the United States comprehensively encourages new technologies as part of its regulatory scheme, and another in which the nation is less effective in bringing these technologies to market. The study concluded that under the second scenario, “natural gas [would] become[] the dominant generation fuel by 2030, and CO₂ reduction policies [would] only be met through large reductions in electricity demand, placing severe constraints on economic growth.” EPRI, *Modeling the Technology Mix* at 18 (2007).¹⁶ It concluded that real electricity prices would rise nearly *six times* more by 2050 under the second scenario—260 percent, versus 45 percent. *Id.* at 19. That is because natural gas—the only fuel besides nuclear, hydropower, and coal that can provide the around-the-clock generation needed to serve the baseload needs of the nation’s electric grid—is commonly assumed to produce about half as much CO₂ as coal does for an equivalent amount of energy.¹⁷ This is too high an emissions rate to sat-

¹⁶ Available online at http://mydocs.epri.com/docs/Corporate Documents/EPRI_Journal/2007-Fall/1016127_ModelingtheTech Mix.pdf (last checked Jan. 31, 2011).

¹⁷ In fact, the CO₂ differential may be even smaller than that. A recent report indicates that when methane leakage is taken

isfy ambitious long-term GHG reduction goals. Thus the expenses involved in a “dash to gas”—including extensive capital investment in new natural-gas pipeline transportation and generating facilities—would be wasteful. The new facilities would have to be replaced or retrofitted long before the end of their useful lives by investments in even lower-emitting technologies (if commercially available) to achieve long-term reduction goals.

Judicial regulation, which by definition cannot tie emissions mandates to technological incentives, is tailor-made to produce the “astronomical[ly]” more expensive second scenario. Kuhn Testimony at 5. And the trickle-down effect of those costs could be severe: “[C]onsumers would be compelled to curtail their use of electricity dramatically, with resulting consequences to the economy and the standard of living.” *Id.*¹⁸

into account, natural gas may produce as much as three-quarters the CO₂ that coal does. See A. Lustgarten, *Climate Benefits of Natural Gas May Be Overstated*, ProPublica (Jan. 25, 2011), available online at <http://www.propublica.org/article/natural-gas-and-coal-pollution-gap-in-doubt> (last checked Feb. 3, 2011). If that figure is confirmed, the wastefulness of a “dash to gas,” and the likelihood of sharp price increases for electricity under such a scenario, would be all the more apparent.

¹⁸ Judicial regulation could also produce added expense by opening the door to large monetary judgments against the electric industry (among others). Such judgments would be inequitable, for reasons already discussed. See *supra* at 15. But they would also raise costs further still, and would deplete the resources that businesses could otherwise invest in research, development, demonstration, and deployment of next-generation fuel technologies. These costs would ultimately be paid by electricity customers, affecting the entire economy.

3. Finally, even putting aside its practical flaws, GHG-regulation-by-nuisance-lawsuit is inappropriate from an institutional perspective for two reasons. First, it would place courts in the position of second-guessing the federal government and the states on how they balance the energy, environmental, economic, and technological considerations involved in producing electricity. Second, it would embroil the federal judiciary in decades-long oversight for which the courts are institutionally ill-suited.

a. Nuisance-suit regulation of GHG emissions necessarily requires judges to revisit, and potentially overrule, the considered policy decisions of the political branches. This lawsuit is a perfect example. The petitioning electric utilities face multiple layers of regulation—under the Clean Air Act; regional accords such as the RGGI, to which several of the plaintiffs here are parties; state climate laws; and state renewable portfolio standards. Through these laws and rules, the political branches are making judgments about which emissions cuts are required, when they are required, and—most importantly—what level of emissions is reasonable. But nuisance actions focus on just that question of reasonableness. *See* Pet. App. 80a (opinion of court below, defining public nuisance as “an *unreasonable* interference with a right common to the general public”) (emphasis added); Restatement (Second) of Torts § 821B(1) (1979). The nuisance approach thus effectively requires judges to second-guess regulatory determinations that the political branches have already made. Judges should not be making such determinations in the first instance; instead, they should continue to review determinations crafted by expert agencies under the Administrative Procedure Act’s

deferential standard of review. *See* 5 U.S.C. § 706(2). As this Court has emphasized, the federal courts' occasional prerogative to create common law does not mean "courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) ("*Milwaukee II*").

b. The Second Circuit's decision portends an unmanageable role for the federal courts. GHG reductions take time—the timeline for significant cuts is measured in decades—and any judicial mandates likely would have to be revisited over the years, much like a consent decree, as technologies advance, demand for electricity changes, new power plants are built, and the underlying regulatory scheme shifts. *See Angela R. by Hesselbein v. Clinton*, 999 F.2d 320, 326 (8th Cir. 1993) ("Although a consent decree may save federal judicial resources in the short term, its entry is often only the beginning of extended judicial involvement."). Moreover, the Second Circuit's decision, if left intact, no doubt will lead to more lawsuits against industries, and other entities with perceived deep pockets, that emit GHGs. The result: Multiple federal district courts could find themselves engaging in near-permanent, ongoing oversight of standing decrees—at least to the extent those courts see fit to impose liability.

This Court has expressed skepticism about legal theories that would embroil the federal courts in oversight minutiae, stating that they "often squander[] judicial resources with little offsetting benefit to anyone." *Sandin v. Conner*, 515 U.S. 472, 482

(1995). There is no reason to drain the judiciary’s resources in this way, particularly given that legislators and regulators are already addressing GHG emissions nationally, in the states that are plaintiffs in this litigation, and in the states where defendants operate. *See Pew Regional Map* (highlighting GHG initiatives in Connecticut, New York, New Jersey, Rhode Island, Vermont, Wisconsin, Iowa, California, Colorado, Indiana, Michigan, Minnesota, New Mexico, Ohio, and South Dakota).

* * *

For all of these reasons, plaintiffs’ attempt to deputize the federal courts as adjunct environmental regulators is as ill-considered as it is unnecessary. As Judge Wilkinson recently observed in a closely related context: “It ill behooves the judiciary to set aside a congressionally sanctioned scheme” that “reflects the extensive application of scientific expertise[.] * * * To replace [EPA] air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country.” *North Carolina*, 615 F.3d at 301. Just so. The decision below should be reversed.

II. PLAINTIFFS LACK STANDING.

The considerations set forth above point to the threshold ground on which reversal is appropriate: As petitioners explain in their brief, plaintiffs lack both Article III and prudential standing to maintain suit. The following discussion addresses in greater detail why prudential standing is absent here.

1. The prudential standing doctrine “embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction.’” *Newdow*, 542 U.S. at 11 (quoting *Allen*, 468 U.S. at 751). The doctrine has three components. First, a litigant may not “rais[e] another person’s legal rights.” *Id.* at 12 (quoting *Allen*, 468 U.S. at 751). Second, litigants may not “‘adjudicat[e] * * * generalized grievances more appropriately addressed in the representative branches.’” *Id.* (quoting *Allen*, 468 U.S. at 751). Third, the plaintiff’s claim must “‘fall within the zone of interests protected by the law invoked.’” *Id.* (quoting *Allen*, 468 U.S. at 751). These limitations help maintain the balance between the branches because without them “the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

2. Plaintiffs’ complaint fails the prudential-standing test because it articulates “generalized grievances more appropriately addressed in the representative branches.” *Newdow*, 542 U.S. at 12. A generalized grievance is one “shared in substantially equal measure by all or a large class of citizens.” *Warth*, 422 U.S. at 499. That is an apt description of plaintiffs’ claims. After all, GHGs are emitted everywhere, by practically every person and business; they emanate not just from power plants and other industrial facilities but also from cars, trucks, homes, and small businesses. *See supra* n. 3. And their effect is aggregative and undifferentiated. “[A] ton of GHGs is a ton of GHGs,” Kuhn Testimony

at 12, and it accordingly “makes no difference where the [GHG] emissions occur, because emissions anywhere contribute equally to global harm[.]” B. Karkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 *Geo. L.J.* 257, 281 (2001). Plaintiffs thus could just as easily sue any collection of businesses that comes to mind—or they could sue private citizens who drive gas-guzzlers, or burn leaves, or overuse their fireplaces. See FireGrates R Us, *Fire Grate Frequently Asked Questions* (recommending use of “un-split wood” for home fireplaces because “[t]ypical split-log fires are the cause of much [GHG] pollution”).¹⁹ Likewise, practically anyone—or at least any large landowner—could substitute for the current plaintiffs and advance similar claims. The alleged harm at issue thus plainly is “shared in substantially equal measure by all or a large class of citizens.” *Warth*, 422 U.S. at 499.

Moreover, the GHG-emissions issue is the quintessential “question[] of wide public significance” that “other governmental institutions [are] more competent to address[.]” *Id.* at 500. That conclusion flows ineluctably from all the considerations set forth in Part I, *supra*. GHG emissions are caused by practically everyone. And measures to reduce emission levels (i) must be calibrated to available technology; (ii) must be undertaken with an eye on costs, environmental effects, and energy supplies; and (iii) require policy judgments regarding the relative burdens that different industries should bear. See

¹⁹ Available online at http://www.radiantfiregrates.com/fire_faq.html (last checked Jan. 31, 2011).

supra at 14-21. Indeed, these considerations explain why Congress has given EPA—and EPA is exercising—authority to address regulation of GHG emissions in a way that takes these factors into account. There can be little serious question that the issues raised by this lawsuit are “more appropriately addressed in the representative branches.” *Newdow*, 542 U.S. at 12. Plaintiffs lack prudential standing for this reason too.

III. CONGRESS HAS DISPLACED ANY FEDERAL COMMON LAW IN THIS AREA.

The comprehensive legal and regulatory regime discussed above thus counsels against judicial intervention and highlights the plaintiffs’ standing deficiency. But it also underscores an additional legal error in the Second Circuit’s opinion—namely, its conclusion that the federal courts have the authority to impose GHG mandates using the common law. They do not. Through the Clean Air Act, Congress chose to regulate GHGs and to delegate the details to EPA. *See supra* at 6-11. EPA is actively exercising that authority. Thus “Congress has not left the formulation of appropriate federal standards to the courts through the application of often vague and indeterminate nuisance concepts.” *Milwaukee II*, 451 U.S. at 317. Instead, it has “spoke[n] directly to [the] question” of GHG regulation and has already “addressed the problem” plaintiffs now attempt to bring before the federal courts. *Id.* at 315.

As petitioners rightly point out, Br. 41-42, the authority Congress has exercised to regulate air pollution is sufficient to displace any federal common law under *Milwaukee II*. The court below admitted that the Clean Air Act is a “comprehensive legislative

scheme” to regulate air quality. Pet. App. 131a-132a; *cf. Milwaukee II*, 451 U.S. at 317 (Clean Water Act was a “comprehensive regulatory program” to regulate water quality). And “Congress’ intent in enacting” the Clean Air Act “was clearly to establish an all-encompassing program of [air] pollution regulation.” *Milwaukee II*, 451 U.S. at 317.

Rather than examine the Act, the Second Circuit focused on the fact that EPA’s regulatory scheme remains a work in progress. See Pet. App. 135a-141a. But that misunderstands the issue. As petitioners correctly observe, Br. 45, the displacement inquiry turns primarily on Congress’s decisions, not EPA’s. And this Court has made clear that Congress, through the Clean Air Act, authorized EPA to consider and implement GHG-emissions standards subject to criteria in the statute. Indeed, among other things, the Act authorizes EPA to (i) “require[] new or modified sources to install state-of-the-art pollution controls,” (ii) “pursue judicial and administrative enforcement actions for injunctive relief and civil penalties,” and (iii) “establish Federal standards of performance” for new stationary sources of emissions. EPA, *CAA National Enforcement Programs* (May 2010).²⁰ Congress thus has given EPA substantial authority to regulate within the context of a comprehensive legislative scheme and has left it to the agency to oversee matters of implementation and enforcement. Any judicial attempt to impose emissions mandates would not be “filling a gap”; it would be overwriting the regulatory scheme the political branches have affirmatively chosen. *Milwaukee II*,

²⁰ Available online at <http://www.epa.gov/oecaerth/civil/caa/caaenfprog.html> (last checked Jan. 31, 2011).

451 U.S. at 324 n.18. That is precisely what the doctrine of displacement is designed to prevent.

Moreover, to the extent regulatory action under the Clean Air Act may be relevant to the displacement analysis,²¹ the gaps the Second Circuit perceived in the regulatory scheme have vanished. EPA has taken final action under the Act to regulate GHG emissions from both mobile and stationary sources *since* the Second Circuit's decision issued in September 2009. *See supra* at 8-11. For instance, with respect to mobile sources, EPA's actions have created GHG emissions standards for new motor vehicles. With respect to stationary sources, EPA has subjected facilities in various industries, including the electric generating industry, to "new source review" preconstruction permitting requirements and associated Title V operating-permit requirements for these GHGs. *See supra* at 7-8. And EPA has announced plans to roll out, in the form of proposed NSPS, the sorts of emissions standards petitioners here seek through one-off judicial decisions. Thus the Second Circuit's pointed observations that EPA had made only "*proposed*" findings about the effect of GHG emissions, Pet. App. 140a (emphasis in original), that EPA "does not currently regulate carbon dioxide under the CAA," Pet. App. 135a, and that EPA might still "determine * * * that regulation of greenhouse gases is * * * inappropriate under the terms of the Act," *id.* at 140a-141a, are now wrong and outdated. And the conclusion the court reached on the basis of

²¹ *See Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) (observing that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance") (emphasis added); *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971). *See also* Br. for TVA at 44-45.

those observations—that “the CAA does not * * * regulate greenhouse gas emissions,” *id.* at 144a—is inaccurate on its face. It is clear that EPA has the statutory power to regulate GHGs, and it is doing so.²² There is no room for the federal courts to exercise their “severely limited” power to create common law. *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001).

²² Some members of Congress have announced legislative proposals to block or delay aspects of EPA’s GHG regulations. Other members, who favor the EPA’s regulatory approach, oppose those proposals. See E. Schor & S. Abruzzese, *Senate Dems Gear Up to Battle House GOP on EPA’s Climate Regs*, NYTimes.com, Jan. 7, 2011, available online at <http://www.nytimes.com/gwire/2011/01/07/07greenwire-senate-dems-gear-up-to-battle-house-gop-on-epa-22835.html> (last checked Jan. 31, 2011). Even if Congress were to take action affecting EPA regulations, however, that would not change the outcome of the displacement analysis: Congress in any event has “spoke[n] directly to [the] question” of GHG regulation, thereby precluding application of federal common law. *Milwaukee II*, 451 U.S. at 315.

CONCLUSION

For the foregoing reasons, and those in the petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

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