

No. 10-174

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

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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 OF *AMICI CURIAE* NORTH COAST RIVERS  
ALLIANCE, DESERT PROTECTION SOCIETY,  
CALIFORNIA SPORTFISHING PROTECTION  
ALLIANCE, AND KLAMATH FOREST ALLIANCE  
IN SUPPORT OF RESPONDENTS**

—◆—  
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**INTERESTS OF THE *AMICI CURIAE*<sup>1</sup>**

*Amici* are environmental organizations with significant experience in studying, managing and protecting natural and cultivated resources in the states of California and Oregon, including mountains, deserts, forests, rivers, lakes, estuaries and their ecosystems. They are the North Coast Rivers Alliance, Desert Protection Society, California Sportfishing Protection Alliance, and Klamath Forest Alliance. *Amici* are not affiliated with any party to this action, and write solely to offer an environmental perspective on the significant issues of public welfare at stake in this dispute.

*Amicus* North Coast Rivers Alliance (“NCRA”) is an unincorporated association of conservation leaders from throughout the north coast of California engaged in the submission of comments and expert testimony on land and water resource management issues. NCRA seeks compliance by local, state and federal agencies and private industry with state and federal environmental laws. NCRA’s members use California’s north coast rivers for fishing, boating, swimming and scientific study, and are concerned about the adverse effects of greenhouse gas emissions

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<sup>1</sup> All petitioners and respondents have consented to the filing of *amicus* briefs, in support of either party or of neither party. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

on river flows and the well being of fish and wildlife dependent on them in northern California.

*Amicus* Desert Protection Society (“DPS”) is a non-profit California corporation formed in 1993 for the purpose of protecting and preserving the scenic, scientific, historic and recreational resources of the California desert. DPS’ members use the California desert for scientific study, recreation, aesthetic enjoyment and agriculture, and are concerned about the adverse effects of greenhouse gases on climate change in the California desert, including the increasing summer temperatures over the past three decades, and their adverse effects on desert wildlife such as the endangered Peninsular Bighorn Sheep and the Desert Tortoise. DPS has engaged in public education to promote awareness of the unique and fragile resources of the California desert, and has participated in state and federal litigation to protect and restore California’s unique desert resources.

*Amicus* California Sportfishing Protection Alliance (“CSPA”) is a non-profit public benefit corporation organized under the laws of California to preserve California’s public-trust fishery resources and enforce the state and federal laws that protect them. CSPA’s members use northern California rivers for sport and commercial fishing, aesthetic enjoyment, nature study, boating and swimming, and are concerned about the adverse effects of greenhouse gas emissions on the shrinking Sierra Nevada snowpack and declining summer and fall flows of its rivers and those of the California Coast Range.

*Amicus* Klamath Forest Alliance (“KFA”) is a non-profit public benefit corporation organized under the laws of California to promote sustainable forest ecosystems and economies in northern California and southwest Oregon through public education, advocacy and litigation. KFA’s members use the mountains, forests, lakes and rivers of the region for nature study, fishing, boating, hiking, photography, and aesthetic enjoyment. They are concerned about the adverse effects of greenhouse gas emissions on climate change in the Cascade ranges of northern California and southwest Oregon, including rising summer temperatures and declining river flows, and the resulting adverse impacts on fish and wildlife.



### **SUMMARY OF ARGUMENT**

Global warming poses significant, widespread and well documented threats to public health and welfare. Global warming is causing sea levels to rise, glaciers and mountain snowpacks to shrink, summer and fall river flows to decline, wildfires to increase, hurricanes to intensify, and summer heat waves and droughts to become more severe and prolonged. These changes have widespread adverse impacts to agricultural productivity, recreational and commercial fishing, forestry, and human health and safety, particularly among the elderly and infirm.

Although global warming’s adverse impacts are widespread, they cause specific harm to respondents,

thus conferring standing to bring this lawsuit. Respondents have suffered particular, concrete, actual, imminent and redressable harms due to the petitioners' failure to limit greenhouse gas emissions that lead to global warming. These harms are well within the public nuisance cause of action traditionally ascribed to federal common law.

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## ARGUMENT

### I. GLOBAL WARMING THREATENS SIGNIFICANT HARM TO PUBLIC HEALTH AND WELFARE

Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.<sup>2</sup>

As a result of global warming and associated weather pattern changes, regions of the United States have suffered a wide spectrum of devastating effects, including unprecedentedly destructive hurricanes, brutal winters, extensive flooding, extreme heat waves, and widespread and prolonged drought.

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<sup>2</sup> Intergovernmental Panel on Climate Change ("IPCC"), CLIMATE CHANGE 2007 SYNTHESIS REPORT: CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 30 (Intergovernmental Panel on Climate Change 2008), located at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf).

Global sea levels have already risen, and future increases in sea levels threaten the very existence of many coastal communities. Glaciers and mountain snowpacks continue to shrink, causing summer and fall river flows to decline in quantity and quality. The acreage of total arable land and irrigated farmland continues to diminish. Summer temperatures are rising, crops are failing, the Sierra Nevada snowpack is dwindling, winter flooding is increasing and summer river flows are declining. The elderly and the infirm are dying in aberrant heat waves and unusually harsh winters.

Despite these dire consequences and the uncontroverted evidence that anthropogenic greenhouse gas (“GHG”) emissions are directly contributing to climate change (*id.* at 36-38), petitioners here ask that they be allowed to continue to degrade the planet’s atmosphere for pecuniary gain without consequence or compensation to those affected by their actions. This request should be denied.

#### **A. Decreased Availability of Fresh Water**

Most Western states, including California and Oregon, depend on mountain glaciers and seasonal mountain snowpack to assure a year-round fresh water supply for domestic and agricultural uses.<sup>3</sup> In fact, snowmelt provides approximately 70 percent of

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<sup>3</sup> Bruce E. Johansen, GLOBAL WARMING IN THE 21ST CENTURY 195-196, 224-227 (PRAEGER PUBLISHERS, 2006).

water flow in the western United States. California, in particular, is extremely dependent on snowpack storage of water. According to Jeffery Mount, professor of ecogeomorphology at the University of California, Davis, “[California] clings to the Sierra Nevada. The health of the Sierra Nevada, the hydrology of the Sierra Nevada, is everything to California.” *Id.*

California’s water supply is now at substantial risk. Each year, the mountain snow in the Sierra Nevada accumulates later and melts earlier, concurrent with a steady rise in average annual temperature.<sup>4</sup> This shortened season results in less overall snowpack accumulation, and less freshwater storage for human consumers. The mountain elevation level at which freezing occurs rises with temperature, meaning that much of the precipitation that once fell as snow will now fall as rain, leading to more frequent and severe flooding and a critical decrease in snowpack storage.<sup>5</sup>

Since springtime snowmelt is the primary source of water for the state, changes in the volume and timing of that freshwater infusion have significant

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<sup>4</sup> *Id.*; I.T. Stewart, et al., “Changes Toward Earlier Streamflow Timing Across Western North America,” *Journal of Climate* 18:1136-1155 (April 15, 2005).

<sup>5</sup> Johansen, *supra*, at 225-226; D.F. Boesch et al., *The Potential Consequences of Climate Variability and Change on Coastal Areas and Marine Resources: Report of the Coastal Areas and Marine Resources Sector Team*. Silver Spring, USGCRP:163 (2000).

impacts on state water management programs. *Id.* Rising temperatures prevent storage of precipitation as snow, increase flooding, erosion and landslides,<sup>6</sup> and exacerbate fluctuations in river flows, harming agricultural, municipal, and recreational consumers of that water. Furthermore, higher summer temperatures and lower forest moisture create dry conditions conducive to bark beetle infestations of forests and the ignition and spread of wildfires.<sup>7</sup>

Regional rainfall has dropped by 20 percent in many parts of California since 1900.<sup>8</sup> Some models predict even greater declines in precipitation as average temperatures increase.<sup>9</sup> In combination with decreased snowpack and more variable runoff flows, this drop in rainfall will worsen the existing water crisis in California. As water budgets in the West grow ever tighter, global warming will only aggravate the intensity and frequency of future disputes and sacrifices due to limited supplies.<sup>10</sup>

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<sup>6</sup> United Nations Environmental Programme (UNEP), *Glacial Lake Outburst Flood Monitoring and Early Warning System* (2000), available at <http://www.rrcap.unep.org/issues/glof>.

<sup>7</sup> Johansen, *supra*, at 222-223.

<sup>8</sup> T.R. Karl et al., "Indices of Climate Change for the United States," *Bulletin of the American Meteorological Society*, 77:279-291 (1996).

<sup>9</sup> J.M. Lenihan et al., "Climate Change Effects on Vegetation Distribution, Carbon, and Fire in California," *Ecological Applications* 13(6):1667-1681 (2003).

<sup>10</sup> Johansen, *supra*, at 226-227.

## B. Extreme Temperatures

The EPA estimates that a warming of three degrees Fahrenheit would almost double the annual heat-related deaths in Los Angeles, from 70 (in 1997) to 125.<sup>11</sup> The National Academy of Sciences projects that by the end of the 21st century, rising temperatures would cause a seven-fold increase in heat-related deaths in Los Angeles based on a 15-degree rise in summertime high temperatures, or a climate similar to that of Death Valley at present.<sup>12</sup> Even a small rise in global temperature can increase substantially the number of extremely hot days, increasing the likelihood of “killer” heat waves.<sup>13</sup> Such heat waves exacerbate preexisting cardiovascular and respiratory disorders, disproportionately affecting the elderly, very young, poor, and ill.<sup>14</sup> High temperatures

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<sup>11</sup> J. Patz et al., *Climate Change and Health in California: A Pier Research Roadmap*, prepared for California Energy Commission (CEC-500-2005-093) (May 2005) (available at [http://www.energy.ca.gov/pier/final\\_project\\_reports/CEC-500-2005-093.html](http://www.energy.ca.gov/pier/final_project_reports/CEC-500-2005-093.html))

<sup>12</sup> Johansen, *supra*, at 226-227.

<sup>13</sup> IPCC, *supra*, at 46, 51-52; Johansen, *supra*, at 190-191; T.R. Karl and R.W. Knight, “The 1995 Chicago heat wave: How likely is a recurrence?” *Bulletin of the American Meteorological Society* 78:1107-1119 (1997).

<sup>14</sup> IPCC, *supra*, at 46, 51-52; A.J. McMichael, *Human population health*. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE THIRD ASSESSMENT REPORT: CLIMATE CHANGE 2001 (Cambridge University Press, Cambridge, UK).

in urban areas also increase ground-level ozone, a pollutant that causes lung damage.<sup>15</sup>

In 2006 California experienced one of the most deadly heat waves on record, resulting in well over one hundred deaths and temperatures over 120 degrees in many towns across the state.<sup>16</sup> Many of the deaths were due to the fact that, unlike prior heat waves, the 2006 heat wave saw extremely high nighttime temperatures as well as daytime highs, so those affected were unable to recover at night.<sup>17</sup> And this, according to the IPCC, is only a sign of things to come: “[North American] [c]ities that currently experience heat waves are expected to be further challenged by an increased number, intensity and duration of heat waves during the course of the century.”<sup>18</sup>

### C. Extreme Weather Events

The World Meteorological Organization has documented a link between global warming and increasing extreme weather events, as have independent researchers, who write that “the increasing . . . number of category 4 and 5 hurricanes . . . is directly

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<sup>15</sup> *Id.*; see also, Johansen, *supra*, at 614-616.

<sup>16</sup> J. Steinhauer, “In California, Heat is Blamed for 100 Deaths,” *NEW YORK TIMES*, July 28, 2006.

<sup>17</sup> H. Becerra, “High Nighttime Temperatures Set Records Too,” *LOS ANGELES TIMES*, July 25, 2006.

<sup>18</sup> IPCC, *supra*, at 51-52.

linked to” increasing temperatures.<sup>19</sup> Hurricane modeling has produced similar results. Simulated hurricanes modeled under warmer, high-GHG conditions are more intense, and a greater number of them evolve into powerful Category 5 storms.<sup>20</sup> Many people have already died as a result of increased hurricane activity in the Gulf region, and it is expected that deadly hurricane activity will only increase on average. Although the West Coast does not suffer hurricanes, climate change-induced increases in precipitation have caused flooding and landslides, particularly in California.<sup>21</sup>

#### **D. Disease**

Global warming will exacerbate many public health problems. According to the IPCC:

The health status of millions of people is projected to be affected through, for example, increases in malnutrition; increased deaths, diseases and injury due to extreme weather

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<sup>19</sup> C. Hoyos et al., “Deconvolution of the Factors Contributing to the Increase in Global Hurricane Intensity,” *Science* (16 March 2006) 11235601 (DOI: 10.1126).

<sup>20</sup> T.R. Knutson, “Impact of CO<sub>2</sub>-Induced Warming on Simulated Hurricane Intensity and Precipitation: Sensitivity to the Choice of Climate Model and Convective Parameterization,” *Journal of Climate* 17(18):3477-3495 (Sep. 15, 2004).

<sup>21</sup> D.F. Boesch et al., *The Potential Consequences of Climate Variability and Change on Coastal Areas and Marine Resources: Report of the Coastal Areas and Marine Resources Sector Team*. Silver Spring, USGCRP:163 (2000).

events; increased burden of diarrhoeal diseases; increased frequency of cardio-respiratory diseases due to higher concentrations of ground-level ozone in urban areas related to climate change; and the altered spatial distribution of some infectious diseases.<sup>22</sup>

As mentioned, climate change will increase the spread of infectious diseases. For example, in 1970, Dengue fever, a prolonged, flu-like infection that can cause internal bleeding, fever, and death, had nearly disappeared from the Americas.<sup>23</sup> Because of rising temperatures, the range of the mosquito that carries Dengue fever has increased dramatically. *Id.* Consequently, Dengue fever is now common in much of South and Central America, and has spread as far north as areas of Texas “for the first time since records have been kept.” *Id.* at 602. Similarly, geographic ranges for many diseases such as malaria, West Nile virus, western equine encephalitis, St. Louis encephalitis, Lyme disease, hantavirus, and *Vibrio parahaemolyticus* gastroenteritis will all expand as temperatures continue to rise, increasing the number of cases of severe illness and death directly attributable to global warming.<sup>24</sup>

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<sup>22</sup> IPCC, *supra*, at 48.

<sup>23</sup> Johansen, *supra*, at 601-02.

<sup>24</sup> *Id.*; P.R. Epstein, “Climate Change and Human Health,” *New England Journal of Medicine* 353(14):1433-1436 (October 6, 2005); P.R. Epstein, “West Nile Virus and the Climate,” *Journal of Urban Health* 78(2):367-371 (June 2001).

## E. Recreational and Commercial Fishing

Oceans absorb most of the excess carbon dioxide produced by humans, either as dissolved gas, or in the calcium carbonate skeletons of marine animals. It is estimated that the oceans have absorbed around half of all carbon dioxide generated by human activities since 1800.<sup>25</sup> In seawater, dissolved carbon dioxide becomes a weak carbonic acid, lowering the water's pH. *Id.* As the carbon dioxide content of the atmosphere has increased, the acidification of the oceans has harmed many forms of marine life, including several species of commercial fish.<sup>26</sup> Other warming-induced changes have serious ramifications for fisheries and ocean life. For instance, temperature anomalies in the North Atlantic have already degraded the entire ocean food chain, starting from the bottom: “[f]ree-floating microscopic plants called phytoplankton, the base of the oceanic food web, have been declining rapidly in areas where they once nourished rich fisheries, most notably in the temperate areas of the world’s oceans in the Northern and Southern hemispheres.”<sup>27</sup> Additionally, migration

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<sup>25</sup> C.L. Sabine et al., “The Oceanic Sink for Anthropogenic CO<sub>2</sub>,” *Science* (July 16, 2004) 305 (5682):367-371.

<sup>26</sup> *Id.*; IPCC, *supra*, at 48, 52.

<sup>27</sup> Johansen, *supra*, at 463; see also D.H. Cushing, *POPULATION PRODUCTION AND REGULATION IN THE SEA: A FISHERIES PERSPECTIVE* (Cambridge Univ. Press, Cambridge, 1995); J.M. Fromentin & B. Planque, “*Calanus* and environment in the eastern North Atlantic.” 2. Influence of the North Atlantic Oscillation on *C.*

(Continued on following page)

patterns and spatial distributions of large fish, such as bluefin tuna, have been altered through climate-induced changes in prey abundance and temperature changes.<sup>28</sup> Overall, global fish production is expected to fall substantially as a result of rising ocean temperatures and acidity.<sup>29</sup> Changes like this have already affected fisheries in the northeast Pacific ecosystem.<sup>30</sup> In addition, global warming impacts on river water temperatures and flows and wetland habitats are severely degrading the health of fish populations including trout and salmon, harming commercial and sport fishing industries.<sup>31</sup> An analysis of global warming impacts on trout habitat predicts that up to 42 percent of existing fish habitat in the

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*finmarchius* and *C. helgolandicus*. *Marine Ecology Prog. Service* 134:111-118 (1996).

<sup>28</sup> *Id.*; J.J. Polovina, "Decadal variation in the trans-Pacific migration of northern bluefin tuna (*Thunnus thynnus*) coherent with climate-induced change in prey abundance." *Fish Oceanography* 5:114-119 (1996).

<sup>29</sup> G.R. Walther et al., "Ecological Responses to Recent Climate Change," *Nature* 416:389-395 (March 28, 2002).

<sup>30</sup> J. A. McGowan, D. R. Cayan & L. M. Dorman, "Climate-ocean variability and ecosystem response in the Northeast Pacific," *Science* 281:210-217 (1998).

<sup>31</sup> D. Caissie, "The Thermal Regime of Rivers: A Review," *Freshwater Biology*, 51(8):1389-1406 (August 2006); D.W. Welch, Y. Ishida, and K. Nagasawa, "Thermal Limits and Ocean Migrations of Sockeye Salmon (*Oncorhynchus nerka*): Long-term Consequences of Global Warming," *Canadian Journal of Fisheries and Aquatic Science* 55: 937-948 (1998).

West could be lost by 2090.<sup>32</sup> A 50 percent loss in wetland area and productivity will lead to a 15 to 20 percent loss in estuarine-dependent fish harvests by the end of this century. *Id.*

## F. Agriculture

Farming across the United States will be adversely affected by changes in rainfall distribution patterns, higher temperatures, and drought. Contrary to premature predictions by some that increased atmospheric carbon dioxide will increase agricultural production,<sup>33</sup> the negative impacts of higher temperatures and a destabilized water supply will outweigh any positive fertilization effect. The cereal grasses (wheat, rice, and corn) producing most of the nation's calories benefit *least* from increases in carbon dioxide.<sup>34</sup> The slight increases in crop yields due to greater concentrations of carbon dioxide in the air are more than offset by higher temperatures

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<sup>32</sup> K. O'Neal, EFFECTS OF GLOBAL WARMING ON TROUT AND SALMON IN U.S. STREAMS (Defenders of Wildlife, 2002).

<sup>33</sup> R.M. Adams et al., "A Reassessment of the Economic Effects of Global Climate Change on U.S. Agriculture," *Climatic Change* 30(2):147-167 (1995).

<sup>34</sup> E.A. Ainsworth and S.P. Long, "What Have We Learned from Fifteen Years of Free-Air CO<sub>2</sub> Enrichment (FACE)? A Meta-Analytic Review of the Responses of Photosynthesis, Canopy Properties and Plant Production to Rising CO<sub>2</sub>," *New Phytologist* 165:351-72 (2005).

and decreases in soil moisture.<sup>35</sup> For example, rice yield declines by ten percent for each 1-degree rise in growing-season minimum temperatures.<sup>36</sup> Where increased carbon dioxide accelerates crop growth, it simultaneously *diminishes* the nutritional quality of that crop.<sup>37</sup> Levels of protein decreased by an average of 14 percent across the cereal grains studied when they were exposed to increased levels of carbon dioxide.<sup>38</sup> Concentrations of iron and zinc also dropped under the same conditions.<sup>39</sup> Alterations in rainfall distribution patterns, as well as more rapid spring snowmelt, are causing increased erosion of

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<sup>35</sup> H. Fountain, "Observatory: Threat to Rice Crops," *NEW YORK TIMES*, December 12, 2000, F-5; *see, also*, Intergovernmental Panel on Climate Change, *CLIMATE CHANGE 2001: IMPACTS, ADAPTATION AND VULNERABILITY*, section 5.3 (Cambridge University Press, Cambridge 2001).

<sup>36</sup> S. Peng et al., "Rice Yields Decline with Higher Night Temperature From Global Warming," *Proceedings of the National Academy of Sciences* 101(27):9971-9975 (July 6, 2004).

<sup>37</sup> L.M. Jablonski, X. Wang, and P.S. Curtis, "Plant Reproduction under Elevated CO<sub>2</sub> Conditions: A Meta-Analysis of Reports on 79 Crop and Wild Species," *New Phytologist* 156 (2002) 9-26.

<sup>38</sup> "More Carbon Dioxide Could Reduce Crop Value," *Environment News Service*, October 3, 2002.

<sup>39</sup> S.P. Seneweera and J.P. Conroy, "Growth, Grain Yield and Quality of Rice (*Oryza sativa* L.) in Response to Elevated CO<sub>2</sub> and Phosphorus Nutrition," *Soil Science and Plant Nutrition* 43:1131-1136 (1997).

farmland, and rising sea levels are causing coastal erosion.<sup>40</sup>

### G. The Costs of Climate Change Impacts

According to the IPCC: “Multiple industries, such as timber, fisheries, travel, tourism, and agriculture are threatened by disturbances caused by climate change. Impacts on these sectors will influence financial markets, insurance companies and large multinational investors.”<sup>41</sup> For example, a prominent study authored by British economist Nicholas Stern predicts that it would require a commitment of 1 percent worldwide gross domestic product (“GDP”) to stabilize the carbon emissions and thereby avoid the worst effects of climate change.<sup>42</sup> Stern predicted that failure to cut emissions in the very near future would result in a 20 percent decrease in global GDP in the second half of this century. *Id.* In 2008 Stern doubled his estimate for the cost of carbon stabilization to 2

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<sup>40</sup> K. Zhang, B.C. Douglas and S.P. Leatherman, “Global Warming and Coastal Erosion,” *Climatic Change* 64(1-2):41-58 (May 2004).

<sup>41</sup> IPCC, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE: ECOSYSTEMS, THEIR PROPERTIES, GOODS, AND SERVICES 246 (Cambridge University Press, Cambridge, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., 2007).

<sup>42</sup> N. Stern, *Stern Review on The Economics of Climate Change* (HM Treasury, 2006).

percent of the world's GDP in light of the unexpected rapidity of the changes to the global environment.<sup>43</sup> Using a different metric, another recent report, focused on the United States only, states,

if present trends continue, the total cost of global warming will be as high as 3.6 percent of gross domestic product (GDP). Four global warming impacts alone – hurricane damage, real estate losses, energy costs, and water costs – will come with a price tag of 1.8 percent of U.S. GDP, or almost \$1.9 trillion annually (in [2008] dollars) by 2100.<sup>44</sup>

Despite the difficulty in projecting accurate future costs, it is apparent that failure to act now will multiply the costs in the future – including the costs of adapting to new climate challenges, replacing ecosystem services, and attempting to reverse – if possible – the degradation of the planet's atmosphere.

## II. THE JUDICIARY IS WELL EQUIPPED TO TACKLE CLIMATE CHANGE LITIGATION

Contrary to the claims of certain *amici*, affirming the Second Circuit's decision will not (1) cause "hundreds" of similar lawsuits to be filed that will

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<sup>43</sup> J. Jowit and P. Wintour, *Cost of tackling global climate change has doubled, warns Stern*, *The Guardian*, June 26, 2008.

<sup>44</sup> F. Ackerman, E. A. Stanton, *THE COST OF CLIMATE CHANGE; WHAT WE WILL PAY IF GLOBAL WARMING CONTINUES UNCHECKED* iv (Natural Resources Defense Council, 2008)

overwhelm the courts, (2) “destabilize our economy,” or (3) “undermine our political process.” U.S. Chamber of Commerce *Amicus Curiae* Brief, p. 5. First, as admitted by petitioners, there are very few similar cases currently pending in the nation’s courts. Pet. Br. 2, n. 1. Petitioners in fact could cite only one. *Id.* Further, this case only concerns injunctive relief to limit future emissions. Future cases may target other large polluters seeking similar relief, but as courts rule on these cases the range of defendants will shrink quickly. Consequently, motivation to file lawsuits seeking injunctive relief against an ever-smaller array of polluters with fewer and fewer emissions will diminish. As to the claims that injunctions setting future limits on GHG emission will destabilize our economy, one need only refer to the extraordinary profits of large energy producing corporations to recognize the fallacy of such a statement. Under even the most basic of common law principles, no actor is permitted to profit from the destruction of other entities’ property and the health and safety of citizens.

As to the claim that the Second Circuit’s holding threatens to undermine the political process of the United States, nothing could be further from the truth. Courts have a long-standing history of tackling difficult and large-scale problems when other branches of the government were unable to act, *e.g.*:

- *Brown v. Board of Education*, 347 U.S. 483 (1954) – This Court ordered the desegregation of the nation’s entire public school system.

- Asbestos Litigation – According to one database, asbestos litigation has involved at least 200,000 lawsuits, 700,000 plaintiffs, and several thousands defendants,<sup>45</sup> and the rate at which people are diagnosed with asbestos-related diseases will likely increase through the next decade.
- *Arizona vs. California* – The Courts, through the use of a special master, determined the states’ and tribes’ rights to the waters of Colorado River.
- Oil Spill Litigation – Courts resolved the extensive litigation pertaining to the Exxon Valdez oil spill and the current multifaceted litigation resulting from the more recent Gulf Oil Spill.

These cases, among many others, demonstrate that the courts are fully capable of addressing large-scale environmental problems. The fact that a problem is significant and affects many different interests should not weigh against its resolution by the courts; rather, such circumstances counsel for the judiciary’s action to resolve such a problem.

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<sup>45</sup> Navigant Consulting, Asbestos Litigation Database, located at: [http://navigant.designreactor.com/downloads/AsbestosLitigationDatabase\\_Global\\_IC.pdf](http://navigant.designreactor.com/downloads/AsbestosLitigationDatabase_Global_IC.pdf).

**III. THE WIDESPREAD DAMAGE ALREADY CAUSED BY GLOBAL WARMING, AS WELL AS THE POTENTIALLY HORRENDOUS IMPACTS FUTURE GENERATIONS WILL EXPERIENCE, MUST BE ACCOUNTED FOR UNDER THE LAW**

As shown above, the physical threats posed by global warming and the ability of the judiciary to address those threats are well documented and establish the strong scientific, practical, and philosophical foundation for judicial action. The legal foundation for such action, however, is equally clear, as demonstrated by the excellent analysis of the Second Circuit Court of Appeals. Accordingly, Western Conservation Organizations restrict their legal argument to several specific issues most pertinent to this Court's review.

The generalized effects of global warming have specific adverse impacts on petitioners, conferring standing to bring this action. Petitioners have suffered particular, concrete, actual, imminent, and redressable harms due to petitioners' GHG emissions that lead to global warming. Western Conservation Organizations agree with the Tennessee Valley Authority ("TVA") that respondents have satisfied the requirements of Article III standing and that the Political Question Doctrine is not an appropriate lense through which to examine respondents' claims. As TVA observed, "plaintiffs' allegations are sufficient to survive a motion to dismiss" on Article III grounds, and this "Court also need not, and should not, decide

whether plaintiffs' suits are barred by the political question doctrine." Brief for the Tennessee Valley Authority as Respondent Supporting Petitioners ("TVA Brief") at 11, 12.

The requirements of Article III standing are satisfied first because general allegations are usually sufficient at the pleadings stage, lowering the burden such that plaintiffs need only show a credible risk to their interests. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Second, as this Court explained in *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) ("*Massachusetts v. EPA*"), States enjoy relaxed standing criteria that avoid normal standards for redressability and immediacy. Furthermore, as recognized in *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982), there is no reason why rights accorded to the states for more than a century to bring common law nuisance claims should be denied here.

The specific elements of Article III standing are (1) a sufficiently concrete, particular, and immediate injury in fact; (2) causation such that the conduct complained of is fairly traceable to the conduct complained of; and (3) the likelihood of the injury being redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Each element exists here. First, both current and future injuries have been exhaustively demonstrated by the thoroughly documented climate change related harms described above. Second, because the harm alleged can be the result of many contributing factors so long

as petitioners can reasonably be found to have added to that harm, causation is satisfied. See *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (holding that every possible cause of an injury need not be sued to establish standing); *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n. 7 (4th Cir. 1992) (distinguishing tort requirements for causation from those of Article III standing); *Cox v. City of Dallas*, 256 F.3d 281, 292 n. 19 (5th Cir. 2001) (common law nuisance encompasses actions which contribute to the creation of the nuisance). Third and finally, this Court's determination in *Massachusetts v. EPA*, 549 U.S. at 525, that lowering motor vehicle emissions would slow or reduce harms suffered as a result of global warming buttresses the Second Circuit's determination that reducing GHG emissions from powerplants would satisfy the redressability requirements of Article III standing. *Connecticut v. American Electric Power Company, Inc.*, 582 F.3d 309, 347-349 (2d Cir. 2009) ("American Electric"); *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 310 (D.C. Cir. 2001); cf. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (equal protection does not impose an all or nothing requirement).

TVA's arguments concerning the inappropriateness of applying the Political Question Doctrine to the particular circumstance of this case likewise bear emphasis. TVA Brief 39. As per the factors established by *Baker v. Carr*, 369 U.S. 186, 217 (1962): (1) separation of powers is not implicated because the

political branches have remained silent on global warming and there is no textual commitment of the regulation of nuisance in general or of GHGs in particular in the Constitution to either the Executive or Legislative branches (see *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991); *Maine People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 286 (1st Cir. 2006) (both cases stating that nuisance is the provenance of the judiciary); (2) this case is governed by recognizable common law nuisance standards;<sup>46</sup> (3) ordinary tort suits like this one are inherently susceptible to judicial discretion (*McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007); and (4)-(6) this case demonstrates no lack of respect or embarrassment for the political branches or for the nation as a whole, nor does it contravene a need for unquestioning adherence to already made political decisions, in large part because there is no established U.S. policy on GHGs. Consequently, and contrary to the majority of briefs filed so far, the discussion of legal issues raised by the present case ought to begin with Prudential Standing.

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<sup>46</sup> This factor bears such a striking resemblance to prudential issues covered in depth below that petitioners (Pet. 47-49), as well as many of the *amici* writing in support of petitioners, have become confused. As pointed out by the Second Circuit, the standards undoubtedly exist and can be applied. *American Electric*, 582 F.3d at 328-330. Whether or not they should be applied is beyond the scope of the Political Question Doctrine and belongs rather in a discussion of Prudential Standing.

## A. Prudential Standing

This case represents the functioning of the American system of government at its finest, where the three coequal and coordinate branches operate through a system of checks and balances to ensure that the weakness of each particular branch is counter-balanced by the strength of one of its coordinate branches. Here, we see the inherent weakness of a political system besieged by special interests and frozen by the magnitude of the challenge to the American system of government posed by global warming. The legislative and executive branches have been emasculated by disproportionately powerful special interests and the self-interested scientific demagoguery of some of the most powerful economic interests ever known. There is no more appropriate time and place for a judiciary to stand for equity and justice than here and now, counter-balancing the failures of the other branches rather than deferring to those failures.

Prudential Standing involves limits self-imposed by the federal judiciary. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). Under *Allen v. Wright*, 468 U.S. 737, 751 (1984), Prudential Standing is defined as

several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a

plaintiff's complaint fall within the zone of interests protected by the law invoked.

Petitioners and TVA place particular emphasis on a description of Prudential Standing as a doctrine which requires courts to absent themselves from disputes that involve an "abstract question of wide public significance." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); TVA Brief 14; Pet. 19-20. Prudential Standing is a more appropriate doctrine under which to analyze the primary legal questions raised by petitioners and TVA because the undefined character of the doctrine lends itself to complex discussions of judicial philosophy and theories of government. According to this Court, "we have not exhaustively defined the prudential dimensions of the standing doctrine." *Elk Grove Unified Sch. Dist.*, 542 U.S. at 12.

Nevertheless, the arguments advanced by petitioners and TVA make the same basic mistake of earlier arguments made before the Second Circuit which conflate the ability of the court to handle climate litigation with the will of the court to do so. It is beyond a doubt that this Court *can* act, as demonstrated by the Second Circuit's thorough treatment of the foundational legal issues of federal nuisance jurisprudence. The question therefore becomes one of the will to act, and especially the will to act in fairness and equity when the other great institutions of American government find themselves cowed by exactly the arguments raised by petitioners and TVA to cow this Court.

## 1. Petitioners Have Prudential Standing

Petitioners place the foundation for Prudential Standing principles in *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-475 (1982) (“*Valley Forge*”). This foundation, as explained by this Court in *Valley Forge*, consists of a “set of prudential principles” that require: (1) the plaintiff to “assert his own legal rights and interests” rather than those of third parties (citing *Warth v. Seldin*, 422 U.S. at 499); (2) courts to refrain from ruling on “abstract questions of wide public significance” which amount to ‘generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches” (quoting *Warth v. Seldin*, 422 U.S. at 499-500); and (3) the particular complaint at issue to “fall within ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question’” (quoting *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). It is undisputed by petitioners and TVA that respondents are asserting their own legal rights and that respondents’ claims fall within the zone of interests typically protected by the common law of nuisance. Therefore petitioners and TVA must focus on the second *Valley Forge* principle and the claim that respondents’ claims constitute a generalized grievance.

Despite TVA’s attempt to break this second *Valley Forge* principle down into constituent parts (TVA Brief 14-15), the principle itself remains essentially a holistic description of an uncompelled judicial

philosophy of self-governance rather than a sharply delineated methodology by which to evaluate standing. Essentially, TVA would have this Court declare that, due to the scope of the problem, this Court is helpless. In fact, the present case presents a well-defined example of judicial power which can be applied without setting public policy. As this Court explained in *Warth v. Seldin*, 422 U.S. at 500, “the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.” Arguing that because there is no statutory or constitutional provision this Court should deny respondents’ standing is tantamount to denying standing to all common law claims. Because this is clearly an absurd result, it must be assumed that there is an additional term in the description from *Warth v. Seldin*, namely “whether the constitutional or statutory provision [or common law claim] on which the claim rests properly can be understood as granting persons” standing. *Id.* Once spelled out in these terms, the argument becomes simply whether or not a federal common law nuisance cause of action exists for respondents, a question Western Conservation Organizations believe the Second Circuit conclusively answered in the affirmative.<sup>47</sup> Thus, the right to

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<sup>47</sup> Western Conservation Organizations believe that the question of a cause of action has been established by the Second Circuit’s exhaustive description, including the tracing of nuisance claims through both case law (beginning with *Mugler v.*

(Continued on following page)

judicial relief itself argues strongly against a denial of Prudential Standing in the present case.

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*Kansas*, 123 U.S. 623 (1887), proceeding through *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901), and *Illinois v. Milwaukee*, 406 U.S. 91 (1972), and finishing with the influence that the Restatement (Second) of Torts has had over federal cases including *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3d Cir. 1980); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and *City of Evansville v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979)). The Second Circuit concludes this analysis by finding that the injuries claimed constitute (1) an unreasonable interference with (2) a right common to the general public. Further, the Appeals Court found that the distinction between a statutory cause of action and a common law cause of action is irrelevant to the current case. In other words, federal courts have not been stripped of their authority to determine where a federal common law cause of action exists. *American Electric*, 582 F.3d at 349-371 (2d Cir. 2009). The Second Circuit's analysis dispatches petitioners' arguments by showing that there had never been "a requirement upon all federal common law of nuisance cases that the challenged pollution must be 'directly traced' or that plaintiffs must sue all sources of the pollution complained of in order to state an actionable claim" (*Id.* at 356); explaining "that a state raising a claim based on quasi-sovereign interests is 'somewhat more certainly entitled to specific relief than a private party might be'" (*id.* at 354-355 (quoting *Tennessee Copper Co.*, 206 U.S. at 237)); and demonstrating that private parties are not precluded from participating (*Id.* at 362). Nowhere in the common law of nuisance is there a "geographic nexus" requirement, as TVA tries to invent. TVA Brief 43 n. 20. As TVA itself explains to the contrary, this Court "did not suggest that the novel nature of the claim, the difficulty of the scientific question, or the physical attenuation between the release of sewage in Chicago and the alleged spread of disease in St. Louis had placed that claim beyond the common law's reach." *Id.*

TVA has lost sight of the limited relief sought by respondents in its attempt to cast the context of the present case as too large to comprehend. TVA Brief 15. Respondents are actually foreclosing a multiplicity of suits and aiding judicial efficiency by seeking an order forcing “Defendants to cap and then reduce their carbon dioxide emissions.” *American Electric*, 582 U.S. at 314. Once such an order is in place there will no longer be any cause to pursue claims, and the already sparse landscape of global warming nuisance claims will dry up altogether. This Court is not being asked to determine the claim of TVA’s bugbear, “unimaginably broad categories of both potential plaintiffs and potential defendants.” TVA Brief 16. Nor is this Court being asked to determine a system of damages for global warming claims. Rather, this Court is simply being asked to allow respondents to exercise their right to seek judicial redress to limit the continuing damage and thus enable respondents to plan for the future costs of adapting to all of the myriad effects of climate change.

## **2. The Courts Have a Unique Responsibility**

In petitioners’ attempt to frighten the Court, they have cast the present case as a judicial takeover of the entire realm of air pollution regulation. This is analogous to an argument that *Georgia v. Tennessee Copper Co.* was also a judicial takeover of the regulation of air pollution, when in reality that case only

involved the limitation of harmful emissions from a discrete set of emitters so as to ameliorate future damages. 206 U.S. 230. Only the courts have the authority to address and apply the federal common law of nuisance and protect the fundamental concept of equity that it embodies. No other branch of government is better equipped to do so than the judiciary. It is fundamental to this analysis that any broad balancing of “the burdens reasonably and fairly to be borne by the many entities, groups, and sectors of the economy” (TVA Brief 18) would necessarily displace the court’s narrow adjudication of individual common law claims. Justice, like Nature herself, abhors a vacuum and must stand when no one else will – else there is no justice. How to address the current and future damages likely to occur as a result of global warming in the absence of a comprehensive federal strategy for addressing GHGs is a question for the courts.

### **B. There Is No Displacement of the Federal Common Law of Nuisance**

In order for the common law of nuisance to be displaced, there must exist a comprehensive regulatory framework that substantially covers the specific damages complained of by the particular plaintiffs in the present case. There is no comprehensive regulatory program in place to govern GHG emissions in the U.S. Consequently, new EPA findings bring the agency no closer to a comprehensive regulatory framework for addressing the GHG emissions complained of by

plaintiffs. This Court in *Massachusetts v. EPA* established only that the Clean Air Act could support a comprehensive regulatory program to address GHG emissions; the whole point of the Court's decision was that EPA had not yet begun that comprehensive program. Merely showing that carbon dioxide falls within the regulatory authority of the EPA is insufficient to prove displacement, as are the claimed but merely preliminary "significant steps toward addressing" GHG emissions cited by petitioners. TVA Brief 20; Pet. 40-46.

This Court has generally defined the area occupied by federal common law in the negative, as "[w]hen Congress has not spoken to a particular issue." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981). This Court's description of federal common law in *City of Milwaukee v. Illinois* is well worth reprising as it is especially relevant in the present case:

[n]othing in this process suggests that 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. See *TVA v. Hill*, 437 U.S. 153, 194 (1978); *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980); *United States v. Gilman*, 347 U.S. 507, 511-513 (1954). We have always recognized that federal common law is "subject to the paramount authority of Congress." *New*

*Jersey v. New York*, 283 U.S. 336, 348 (1931). It is resorted to “[i]n absence of an applicable Act of Congress,” [*Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)] and because the Court is compelled to consider federal questions “which cannot be answered from federal statutes alone,” *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring). See also *Board of Commissioners v. United States*, 308 U.S. 343, 349 (1939); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594 (1973); *Miree v. DeKalb County*, 433 U.S. 25, 35 (1977) (Burger, C. J., concurring in judgment). Federal common law is a “necessary expedient,” *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc), and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.

*Id.* at 313-314 (some citations omitted). In order to find displacement, this Court must find that the scheme established by Congress to regulate GHG emissions would “address the problem formerly governed by federal common law.” *Id.* at 315. Since nuisance law is applicable to GHGs, as the Second Circuit has so convincingly demonstrated, the burden shifts to the Legislative and Executive branches if they wish to positively enter the field by designing legislation or regulations that substantively address

the problem. A statute or regulation must speak *directly* to the issue at hand in order to displace federal common law. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-237 (1985). An implied statement of negative intent along the lines that Congress has chosen not to act (TVA Brief 23) is patently insufficient to show displacement. *Id.*

TVA repeatedly makes the point that it would prefer to have EPA regulate rather than allow the courts to address GHG pollution. TVA Brief 20. However, what TVA would prefer,<sup>48</sup> or what might be considered the very best method for dealing with the problems of global warming, is most certainly not at issue in the present case. The fantasy of a balkanization of GHG regulation (*id.*) is nothing more than a weak appeal to slippery slope reasoning.

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<sup>48</sup> It is far from clear, actually, that TVA or petitioners in general would prefer that EPA regulated GHG emissions. For the sake of the present case they take that stance, but the subtext to their argument is that they would far prefer that there be no regulation whatsoever. Their arguments boil down to this: the law forbids the courts from redressing respondents' legitimate grievances even where, as here, Congress and the Executive are silent.

**1. EPA Action Under the Clean Air Act, Both Before and After *Massachusetts v. EPA*, Failed to Constitute a Comprehensive Regulatory Program Addressing Damage from GHG Pollution**

The Clean Air Act was not designed specifically to govern GHG emissions, although it is sufficiently broad to allow EPA – should it elect to do so – to address the multifarious impacts of global warming. As this Court found in *Massachusetts v. EPA*, 549 U.S. at 127, the Clean Air Act certainly authorizes the regulation of GHGs because it was so broadly written, but that conclusion is a far cry from concluding that the Clean Air Act actively addresses the problem of GHG emissions. As the Second Circuit explains, “we must look specifically at the regulation of stationary sources” in order to determine whether displacement has occurred in the present case. *American Electric*, 582 F.3d at 376. Indeed, no decision by this Court has held that federal common law is displaced by the Clean Air Act in the area of air pollution. *Id.* at 378.

Under the Clean Air Act, the EPA is charged at present only with *monitoring*, not regulating, CO2 emissions. *Id.* at n. 46 (citing Pub. L. No. 101-549, § 821(a)). Before it can even begin the process of designing regulations, the EPA must first issue an endangerment finding. As the Second Circuit elaborates, “EPA must still complete the remaining steps in the rulemaking process before it could actually regulate greenhouse gas emissions, including setting

NAAQS and delaying any action to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance.” *Id.* at 380 (quotations omitted). Thus, the problem respondents complained of was not specifically and effectively addressed under the Clean Air Act<sup>49</sup> at the time the Second Circuit issued its ruling. *Id.* at 381.

TVA acknowledges this to be true, conceding that the Clean Air Act imposes “few restrictions on the emissions of air pollutants in the absence of regulations promulgated by EPA.” TVA Brief 45. Mere enactment of the Clean Air Act was thus insufficient to displace the federal common law of nuisance. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1, 14-15 (1981). Therefore petitioners’ claim that, “[j]ust as the Clean Water Act displaced the federal common law water pollution claims asserted in *Milwaukee II*, the Clean Air Act displaces the common law air emission claims asserted here” (Pet. 41.) is mistaken because the analogy between the Clean Air Act and the Clean Water Act is faulty – the Clean Air Act imposes few restrictions without specific regulation by EPA, whereas the Clean Water Act by contrast specifically

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<sup>49</sup> Petitioners have notably abandoned all claims that federal common law has been displaced in this area by any federal legislation or administrative action outside of the Clean Air Act.

proscribes discharges of pollutants into the waters of the U.S. TVA Brief 45.

**2. EPA Action Since the Second Circuit's Ruling Does Not Displace the Courts; Final Action by Administrative Agencies or by Congress is Extremely Uncertain**

EPA has clearly not directly addressed the problem raised by respondents. Petitioners and TVA would have this Court rule that EPA's procrastination and tentative proposals directly address the problem, claiming that by "actively exercising its judgment and statutory discretion to determine when and how . . .," the EPA has taken decisive action. TVA Brief 45. But the EPA's regulatory process is a long and convoluted process, and the end result is very much in doubt up to, and in some cases even beyond, the moment regulations are actually on the books. It could take 20 years for EPA to make rules that directly address respondents' grievances, during which time petitioners would have this Court sit idly by while respondents' equitable claims languish unheard.

There is ample proposed legislation currently in Congress limiting the ability of the EPA to regulate. For instance, the proposed Energy Tax Prevention Act of 2011, sponsored by Senators James Inhofe and

John Barrasso, and Representatives Fred Upton<sup>50</sup> and Ed Whitfield, would block EPA regulation of GHGs under the Clean Air Act. S. 228, 112th Cong. (2011). Another bill sponsored by Senator Jay Rockefeller of West Virginia would force EPA to take a two year hiatus from any regulatory effort directed at addressing the damage caused by global warming. S. 231, 112th Cong. (2011). With these efforts in mind, as well as the keen understanding possessed by the Court of the labyrinthine regulatory process of the EPA, it is clear that EPA is a long way from displacing the federal common law nuisance cause of action addressing stationary source GHG emissions. Add to this the potential for litigation to derail EPA's efforts, and the uncertainty surrounding EPA regulations is pervasive.

Endangerment and mobile source emissions findings by the EPA do not mean that major stationary sources are now regulated by the EPA. TVA advances several conclusions based on new miles-per-gallon standards, among them that polluters must now obtain permits (TVA Brief 48), but these conclusions are nothing more than TVA's non-binding interpretation of what the future holds and hardly a sound basis on which to make a displacement finding. TVA stretches displacement jurisprudence and credulity with its claim that "[b]y issuing the endangerment

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<sup>50</sup> Yet these same legislators appearing as *amicus curiae* urge this Court to find that EPA regulation has displaced respondents' common law claims.

finding and light-duty-vehicle rule, and thereby rendering greenhouse gases ‘subject to regulation’ under the existing statutory scheme of the CAA, EPA displaced any federal common-law.” *Id.* at 48-49. TVA’s argument is riddled with speculation: “*if* the settlement is formally adopted;” (*id.* at 51) “[EPA] *may* soon be specifically committed to completing a rule-making;” (*id.*) EPA is “in the *process* of responding to a remand;” (*id.* at 50, quotation omitted). TVA’s argument for federal displacement is far too murky to oust the courts from their historic authority and duty to apply the common law. Displacement of the common law requires more.



## CONCLUSION

Prudential concerns strongly favor respondents’ standing before this Court. There has been no significant action taken by the political branches that would displace federal common law. Accordingly, this Court should affirm the Second Circuit’s ruling and allow respondents’ prosecution of their nuisance causes of action to proceed, lest the grave harm caused by

petitioners' greenhouse gas emissions continue unabated and unredressed.

Respectfully submitted,

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