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 OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS ADDRESSED BY *AMICI CURIAE*

Whether a state and private parties may bring a cause of action under the federal common law of nuisance to limit greenhouse gas emissions from certain sources where the Clean Air Act establishes a comprehensive federal program for regulating these emissions.

Whether a nuisance claim seeking to address global climate change, which would require a court to determine whether Defendants' greenhouse gas producing activities were reasonable under the circumstances relative to untold millions of other sources of greenhouse gas emissions throughout the world, is nonjusticiable under the political question doctrine on the grounds that there is a "lack of judicially discoverable and manageable standards for resolving" the dispute, and that the action presents the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

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Amici curiae the Association of Global Automakers (Global Automakers), the Alliance of Automobile Manufacturers (the Alliance) and the National Automobile Dealers Association (NADA) respectfully submit that the decision of the court of appeals should be reversed.[1]

INTEREST OF *AMICI CURIAE*

The question presented in this case is whether the federal common law recognizes a cause of action for public and private nuisance seeking to address greenhouse gas emissions, where the Clean Air Act already establishes a comprehensive federal program for regulating such emissions. *Amici*, which collectively represent almost the entire automobile industry in the United States, have a significant interest in the correct resolution of this question. The automobile industry is subject to a comprehensive set of motor vehicle fuel economy and greenhouse gas emission regulations jointly adopted by the United States Environmental Protection Agency (EPA) and the National Highway Traffic

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

Safety Administration (NHTSA). The industry has also, however, been the target of a climate-related nuisance lawsuit brought by the State of California seeking the recovery of billions of dollars in damages claimed to have been caused by lawful greenhouse gas emissions from motor vehicles. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (*General Motors*). Although that action was correctly dismissed on political question grounds, the action before this Court raises the prospect that, like defendants in the instant case, the automobile industry may again be the target of climate-related nuisance actions asking courts to determine whether the fuel economy and resulting greenhouse gas emissions from their motor vehicles are reasonable under the circumstances.

The Alliance is a trade association of car and light truck manufacturers, whose members include BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar, Land Rover, Mazda North America, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota Motor North America, Inc., Volkswagen Group of America, and Volvo Cars North America, LLC. Global Automakers'[2] members include 15 foreign-based automobile manufacturers, such as American Honda Motor Company, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America, Inc., Mitsubishi Motors North America, Inc., Nissan North America, Inc., Subaru of America, Inc., and Toyota Motor North America, Inc. NADA is a trade association that represents

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2 Global Automakers formerly operated under the name the Association of International Automobile Manufacturers (AIAM).

franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair, and parts sales. These trade associations represent their members' interests in matters impacting the automobile industry, such as motor vehicle safety, emissions, and fuel economy, and they regularly represent their interests in litigation.

Amici seek to participate in this matter because of the detrimental impact the Second Circuit's holding would have on the automobile industry. If climate-related nuisance actions such as the one presented here are allowed to proceed, the automobile industry would be faced with conflicting standards—some established by the expert agencies within the elected branch of government, and others established ad hoc by non-elected judges and juries—concerning the appropriate amount of greenhouse gases that may be emitted from their vehicles. Given that greenhouse gas emissions are already subject to the comprehensive regulatory program established by the Clean Air Act (and, in the case of motor vehicles, a separate regulatory program established by the Energy Policy and Conservation Act) Article III courts have no role to play in determining how and to what degree greenhouse gas emissions should be reduced or which sector of the economy should bear this reduction burden.

SUMMARY OF ARGUMENT

The decision below included three holdings concerning the viability of Plaintiffs' climate-related nuisance actions: first, that the political question doctrine does not bar their claims; second, that the federal common law recognizes a nuisance cause of action seeking to abate otherwise lawful emissions of greenhouse gases; and third, that the Clean Air Act

has not displaced this federal common law cause of action. These three holdings cannot be reconciled among themselves, let alone with this Court's long-standing precedents, and the circuit court's decision should therefore be overturned.

In finding that Plaintiffs have stated a valid claim under the federal common law of nuisance and that their claim is justiciable despite the political question doctrine, the circuit court's opinion suffers from an incurable internal inconsistency. The court initially determined that the political question doctrine does not bar this action because it concluded that a "decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a national or international emissions policy" concerning greenhouse gas emissions. Pet. App. at 26a. Subsequently, however, the court held that the federal common law is an appropriate tool for private parties to address climate change because of an "overriding federal interest in the need for a uniform rule of decision" in matters concerning global climate change and greenhouse gas emissions. Pet. App. 110a-112a (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*")). Laying these two holdings side-by-side demonstrates that they cannot be reconciled with each other. If it is true, as the circuit court held, that Plaintiffs' complaint properly pleads a claim under the federal common law of nuisance because of the need for a uniform rule of decision concerning industrial greenhouse gas emissions, then adjudicating such a claim would necessarily require a court to determine national policy concerning the appropriate level and allocation of greenhouse gas emissions from the

various sectors of our economy. And once federal courts wade into such an economic, social and political thicket, the political question doctrine is necessarily implicated.

A more discerning examination of the questions presented here shows that the circuit court was only partially correct. Determining whether certain industries should be required to reduce their greenhouse gas emissions and what the appropriate level of these emissions ought to be under the circumstances does require a coordinated approach established at the national level. The court erred, however, in failing to recognize that federal courts are structurally incapable of formulating that coordinated national approach through common law tort suits. To the contrary, because of the inherently "vague and indeterminate" standard that is applied in nuisance actions, *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*"), allowing climate-related nuisance actions to go forward would likely result in courts making ad hoc determinations concerning the reasonableness of greenhouse gas emissions that conflict with each other and that are inconsistent with standards established by the relevant expert agencies.

The political question doctrine requires that questions raising such broad policy concerns that touch on every aspect of the American economy be directed to the political branches. For that reason, the district court presiding over the nuisance action against the automobile industry correctly dismissed that lawsuit, concluding that its adjudication "would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," a task that "is the type of initial policy

determination to be made by the political branches, and not this Court." *General Motors*, 2007 WL 2726871, at *8. Because the political question doctrine renders this case non-justiciable, that should end the inquiry. However, even if it did not, Plaintiffs' claims must still fail because this Court has held that the elected branches have already spoken on the question of greenhouse gas emissions by enacting the comprehensive regulatory program found in the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497 (2007). Since Article III courts may not second-guess the policy judgments made by the elected branches of government, that Congressional action resulted in the displacement of Plaintiffs' claims.

ARGUMENT

I. ADDRESSING GREENHOUSE GAS EMISSIONS REQUIRES A COORDINATED NATIONAL APPROACH THAT IS THE ANTITHESIS OF AD HOC COMMON LAW NUISANCE CLAIMS.

Because of the inextricable link between the engines that run our nation's economy and the emission of greenhouse gases "[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change." Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003). Regulating these activities requires a coordinated national approach that fully accounts for all of the costs and benefits of standards limiting greenhouse gas emissions.

1. The emission of carbon dioxide is the natural byproduct of energy production, as it is released to the atmosphere whenever a carbon-containing fuel—such as oil, natural gas, or coal—is burned. These fossil fuels are the primary energy source for every

sector of the nation's economy; they fuel our motor vehicles, aircraft engines and diesel locomotives; they provide the energy source for approximately 70% of all electricity generated in the United States; and they are a significant source of heat for our homes and industrial facilities. The release of carbon dioxide is therefore inherent in life and business in the United States, and every state in the nation has innumerable sources of emissions.

The environmental impacts of the emission of greenhouse gases such as carbon dioxide likewise cut across state, and indeed national, lines. Once it is released, carbon dioxide disperses evenly throughout the atmosphere and mixes indistinguishably with carbon dioxide from other sources throughout the world. Moreover, carbon dioxide retains its chemical form for long time periods because it is inert and extremely stable. It does not readily reduce to another chemical state or react with other constituents in the atmosphere. Carbon dioxide will therefore remain in the atmosphere until it is removed through a natural process such as plant respiration or oceanic absorption. *See* EPA, Natural Sources and Sinks of Carbon Dioxide http://www.epa.gov/climatechange/emissions/co2_natural.html (last visited Feb. 1, 2011). Because of these unique properties of carbon dioxide, any environmental impacts felt in a particular state can be attributed to sources throughout the world, and not merely those within its own borders.

Consequently, addressing any impact that greenhouse gas emissions may have on the worldwide climate presents unusual challenges that do not arise in traditional environmental contexts where local actions can have a direct impact on local conditions. For example, traditional pollutants like

hydrocarbons and oxides of nitrogen react in the atmosphere in the presence of sunlight to form ozone, which is the major component of localized smog. State action reducing such emissions from sources within their own borders has tangible and measurable impacts on this local air pollution. It may therefore be sound policy to allow states and localities to direct how these pollutants should be controlled because both the costs and the benefits of such regulations are internalized by these jurisdictions, and the responsible policymakers can assess whether the benefits of regulation are worth the costs to its citizens.

This is not the case for carbon dioxide and other greenhouse gases. Local emissions of these substances do not have impacts that are themselves localized. Consequently, state and local jurisdictions cannot by themselves redress the localized environmental impacts of greenhouse gas emissions by regulating sources within their own borders. Rather, to the extent that a state such as Connecticut or California wishes to address the impact greenhouse gas emissions may have on their climates, they must seek a reduction of these emissions throughout the entire world.[3]

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[3] For example, when the State of California adopted its own set of motor vehicle greenhouse gas emissions standards in 2004, *see* Cal. Code Regs. tit. 13, § 1961.1, (which were subsequently adopted by other petitioners states), the State recognized that:

> It is true that the contribution to a reduction in global warming from the actions of California alone will be small. This is true of any individual contribution. The point here is that human-induced climate change is a

2. For this reason, addressing greenhouse gas emissions requires coordinated national (indeed, international) action. Because the sources of greenhouse gas emissions are ubiquitous and because their impacts are present throughout the country, the national government is best equipped to balance all of the costs and benefits of regulating these emissions within the United States.

This is especially true in the automobile industry. Today's cars and trucks are fueled primarily by carbon-containing fuels like gasoline or diesel. Reducing carbon dioxide emissions from these vehicles is solely a matter of improving fuel economy because carbon dioxide emissions are a direct function of the amount of the carbon-containing fuel consumed by a vehicle. In fact, "fuel economy has become virtually synonymous with CO2 emission rates," because fuel economy is actually calculated by measuring a vehicle's carbon dioxide emissions and then converting those emissions into miles-per-gallon fuel economy using a simple formula. *See* Average Fuel Economy Standards for Light Trucks, 71 Fed. Reg. 17,566, 17,660-61 (Apr. 6, 2006); 40 C.F.R. § 86.144-90; *id.* § 600.113-93(e). Improving fuel economy implicates a number of competing policy concerns such as maintaining consumer choice for vehicles, protecting the economic health of the U.S.

[Footnote continued from previous page]

> truly global problem—one that will eventually require actions by all countries.

See Cal. Envtl. Prot. Agency, Air Res. Bd., *Regulations to Control Greenhouse Gas Emissions from Motor Vehicles, Final Statement of Reasons* 229, 231–34 (2005), *available at* http://www.arb.ca.gov/regact/grnhsgas/fsor.pdf.

automobile industry, and ensuring vehicle safety. *See* Average Fuel Economy Standards for Light Trucks, 71 Fed. Reg. at 17,668. These are issues of wide national concern where Congress, in the Energy Policy & Conservation Act of 1975 ("EPCA"), has instructed NHTSA, the elected branch's expert agency, to determine the "maximum feasible average fuel economy level" for a given model year. 49 U.S.C. § 32902.

Furthermore, because automobile manufacturers operate in a single, integrated economy, a uniform federal standard concerning fuel economy and greenhouse gas emissions is more efficient than multiple, potentially inconsistent, standards. "Where a given product is bought and sold in national markets, and will travel throughout interstate commerce, it is less costly to design and produce the product to conform with a single national standard that applies nationwide." Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130, 148 (2005). This is especially true for carbon dioxide control because unlike other commonly regulated automotive emissions, there is no "bolt on" aftertreatment device that can capture or chemically alter carbon dioxide emissions. Rather, improving motor vehicle fuel economy (and therefore reducing greenhouse gas emissions) goes to the foundation of vehicle design and manufacture. Higher fuel economy vehicles often incorporate advanced technology such as hybrid-electric engines, continuously variable transmissions, specialty lightweight yet high-strength materials, and/or engine down-sizing and turbocharging. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324,

25,373-75 (May 7, 2010) (the "Vehicle Rule"). Integrating these technologies across product lines entails a significant investment of capital, time, resources and engineering planning. *Id.* at 25,445.

Allowing multiple jurisdictions to establish different standards for greenhouse gas emissions—whether through state regulation or through various Article III courts' selective application of nuisance law—would lead to perverse outcomes. "Consumer states," such as California and New York that have brought climate-related nuisance actions (*see, e.g., General Motors*, 2007 WL 2726871) would ask courts to determine the reasonableness of the fuel economy level of the industry's products, and either impose limits on these emissions or require compensation for past climate-related damages. These costs would then be imposed on businesses in "producer states," such as Michigan and Tennessee.

Regulating greenhouse gas emissions is therefore a task best suited to the national government. Deciding the appropriate level of regulation entails a complex analysis of multiple, often competing, considerations. As the Intergovernmental Panel on Climate Change has stated:

> Natural, technical, and social sciences can provide essential information and evidence needed for decisions on what constitutes 'dangerous anthropogenic interference with the climate system.' At the same time, such decisions are value judgments determined through socio-political processes, taking into account considerations such as development, equity, and sustainability, as well as uncertainties and risk.

Intergovernmental Panel on Climate Change, *Climate Change 2001: Synthesis Report; Summary*

for Policymakers 2 (2001), *available at* http://www.ipcc.ch/pdf/climate-changes-2001 /synthesis-spm/synthesis-spm-en.pdf. Standards for greenhouse gas emissions must be set at the level where the benefits of additional stringency are outweighed by the additional costs to society. Only the national government can properly consider and balance all of the relevant considerations—such as the anticipated environmental benefits, the costs borne by consumers, and the regulatory burdens imposed on industry—and set appropriate standards accordingly.

3. The series of ad hoc judicially-fabricated federal common law tort judgments inherent in the Second Circuit panel's decision is fundamentally inconsistent with the uniform national approach required to address greenhouse gas emissions. And applying federal common law will not provide any greater certainty or uniformity because of the inherently vague and forum-specific standards found in nuisance law. The Restatement defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979). Whether a particular interference is unreasonable under the circumstances turns on weighing "the gravity of the harm against the utility of the conduct." *Id.* § 821B cmt. e. "[I]n determining whether the gravity of the interference with the public right outweighs the utility of the actor's conduct, it is necessary to consider the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the character of the locality and the impracticability of preventing or avoiding the invasion." *Id.* § 828 cmt. a.

There is no objectively-discernable answer to these questions that could be applied consistently in all federal courts throughout the country. For instance, "the social value that the law attaches to" the burning of fossil fuels to generate electricity or power motor vehicles may be different in Connecticut than it is in Ohio. Similarly, because greenhouse gases mix evenly in the atmosphere and the location of a source therefore has no impact on the concentration of greenhouse gases at any particular location "the suitability" of the greenhouse gas emitting conduct "to the character of the locality" may be different in Vermont than it is in Michigan. There is nothing inherent in the federal common law of nuisance requiring that a federal court in one jurisdiction answer these questions the same way a court in a different jurisdiction would. Consequently, subjecting industry to "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 v. TVA*, 615 F.3d 301 (4th Cir. 2010) (*citing International Paper Co. v. Ouellette*, 479 U.S. 481, 496-97 (1987) (allowing "a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states.")).

II. *MASSACHUSETTS V. EPA* INSTRUCTS THAT THE CLEAN AIR ACT AUTHORIZES AND PROVIDES FOR A COMPREHENSIVE FEDERAL PROGRAM TO CONTROL GREENHOUSE GAS EMISSIONS THAT DISPLACES FEDERAL COMMON LAW.

Congress is the political branch that is empowered by the Constitution to direct national policy through the enactment of statutes, and where Congress speaks to an issue in that manner, federal

common law is displaced. In light of this Court's holding in *Massachusetts v. EPA*, there can no longer be any doubt as to whether Congress has displaced Plaintiffs' common law cause of action through the Clean Air Act. It has. Yet despite this federal authority, the circuit court concluded that there is no displacement here because at the time of its decision "EPA [did not] regulate carbon dioxide under the CAA—at least not in the sense that EPA require[d] control of such emissions at [that] time." Pet. App. 135a. While that premise of the court's decision is no longer true, even if it were, the circuit court committed a fundamental error of law in concluding that displacement depends on the activities of a federal agency, instead of properly focusing on whether Congress intended a federal statute to occupy the field.

1. The circuit court erred by applying an unduly rigorous displacement standard that focused on whether EPA has provided the precise remedy sought by Plaintiffs. That standard cannot be reconciled with this Court's precedents holding that the displacement turns on the scope of the statute enacted by Congress. Once Congress has "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency," there is simply no role left for the courts for "the formulation of appropriate federal standards . . . through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence . . . ." *Milwaukee II*, 451 U.S. at 317. "[W]hen 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 314.

Displacement, therefore, does not depend on whether or how the expert agency has exercised the authority granted by Congress, as the circuit court erroneously held, but rather on the regulatory framework established by the statute. "The comprehensiveness of the legislative grant is not diminished, nor is the congressional intent to occupy the field rendered unclear, merely by reason of the regulatory agency's discretionary decision to exercise less than the total spectrum of regulatory power with which it was invested." *Mattoon v. City of Pittsfield*, 980 F.2d 1, 5 (1st Cir. 1992); *see also Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 477-78 (7th Cir. 1982) (federal common law is displaced if Congress has "considered the problem . . . and enacted some solution" even if "it has not done so by means of remedies against the polluters themselves").

2. The Clean Air Act displaces this common law nuisance claim because it is a "comprehensive . . . scheme to control air pollution in the United States.")*Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles*, 869 F.2d 1196, 1201 (9th Cir. 1988; *see also Weiler v. Chatham Forest Prod., Inc.*, 392 F.3d 532, 534 (2d Cir. 2004) ("[t]he Clean Air Act created a complex and comprehensive legislative scheme to protect and improve the nation's air quality"). Indeed, the Act has been described as "one of the most comprehensive pieces of legislation in our nation's history." *Motor Vehicle Mfrs. Ass'n of the United States, Inc., v. N.Y. Dept. of Env. Conservation*, 17 F.3d 521, 524 (2d Cir. 1994). And the question concerning whether that statute applies to greenhouse gases was answered in the affirmative by this Court in *Massachusetts v. EPA*.

The Clean Air Act regulates all "pollutants" that EPA determines cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. Title I of the Act pertains to stationary sources of emissions, which broadly include "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. §§ 7411(a)(3); 7602(z). For instance, Title I requires EPA to establish "new source performance standards" for "categories of stationary sources" that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Similarly, the prevention of significant deterioration program (PSD) subjects any new or modified "major emitting facility" to permitting requirements with respect to any "pollutant subject to regulation under [the Act]." 42 U.S.C. §§ 7475, 7479.

Title II of the Clean Air Act applies to mobile sources of emissions. Section 202(a) requires the EPA Administrator to establish standards "applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Similar provisions of Title II require EPA to set emission standards for nonroad engines and vehicles, to the extent that those sources "cause[], or contribute[] to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §§ 7547(a)(1), 7571(a)(2)(A).

3. In *Massachusetts v. EPA*, this Court held that carbon dioxide is a "pollutant" subject to the comprehensive regulatory program found in Title II

of the Clean Air Act, that EPA must exercise its discretion to consider whether such emissions from motor vehicles endanger public health or welfare consistent with the statute, and that EPA must establish standards under Section 202(a), 42 U.S.C. § 7521(a)(1), controlling carbon dioxide emissions from new motor vehicles if the Agency makes an endangerment finding.[4] *See* 549 U.S. at 528-33. That determination by itself leads inexorably to the conclusion that a federal nuisance claim directed at the same emissions has been displaced by Congress's enactment of the Clean Air Act.[5] Whatever action EPA was to eventually take concerning greenhouse gases—whether finding endangerment and consequently enacting standards, or finding lack of endangerment and enacting no standards—flows from the discretionary authority under the statute.

The circuit court's holding would erroneously require a specific form of agency action before finding displacement. That is the position taken also by Plaintiffs, which enlisted Article III courts to force

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4 The question of whether greenhouse gas emissions are also subject to regulation under other titles of the Clean Air Act was not before the Court.

5 As discussed above, EPCA establishes a separate comprehensive national program for regulating motor vehicle fuel economy. And because "[f]uel consumption and CO2 emissions from a vehicle are two 'indissociable' parameters" such that "fuel economy is directly related to emissions of greenhouse gases such as CO2," Average Fuel Economy Standards for Light Trucks, 71 Fed. Reg. at 17,659, EPCA also effectively establishes a national program governing motor vehicle carbon dioxide emissions. Consequently, EPCA provides an independent basis for displacement with respect to motor vehicle greenhouse gas emissions.

greenhouse gas emission reductions because they believed that EPA was shirking its obligation to regulate under the Clean Air Act. This is demonstrated by the history of *Massachusetts v. EPA*, and California's then concurrent nuisance lawsuit against the automobile industry.

The petitioners in *Massachusetts v. EPA* included many of the same state plaintiffs that filed this nuisance action.[6] The original petition requested EPA to promulgate greenhouse gas emissions limits for motor vehicles—the very remedy Plaintiffs seek here from the federal judiciary with regard to stationary sources—based on the argument that the Clean Air provided that authority. As a backstop to that petition, the State of California separately sued the six largest automobile manufacturers in federal court claiming that the emissions of greenhouse gases from their vehicles constituted a nuisance under the federal common law. This lawsuit was avowedly intended to fill what was perceived by California to be a void caused by federal inaction in controlling greenhouse gas emissions. As explained in the press release from the California Attorney General's office, the action was brought because "the Bush Administration's inaction on global warming has forced California and other states to take action on their own." *See* Office of the Attorney General, News Release: Attorney General Lockyer Files Lawsuit Against "Big Six" Automakers for Global Warming Damages in California (September 20, 2006), http://ag.ca.gov/newsalerts/print_release.php?id=1338. Accordingly, California argued that its

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6 Plaintiffs, the states of Connecticut, New York, California, New Jersey, Rhode Island, and Vermont were also petitioners in *Massachusetts v. EPA*.

federal common law nuisance claims were not displaced by the Clean Air Act in part because EPA had concluded "'that the Clean Air Act does not authorize U.S. EPA to regulate for global climate change purposes, and accordingly that carbon dioxide and other GHGs cannot be considered 'air pollutants' subject to the Clean Air Act's regulatory provisions for any contribution they may make to global climate change.'" *See* Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 11-12 in *California v. General Motors*, No. 3:06-cv-05755 (Feb. 1, 2001) (quoting Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003)). California argued that "U.S. EPA's interpretation precludes a finding of displacement." *Id.* at 12.

Massachusetts v. EPA resolved the question of whether carbon dioxide is subject to regulation under the Clean Air Act in favor of the petitioners. Reading the Clean Air Act's definition of "air pollutant" broadly, the Court found that carbon dioxide and the other greenhouse gases fall within the purview of the Act's regulatory provisions. *Id.* at 528-29. Consequently, the Court held, the Clean Air Act requires EPA to determine whether emissions of carbon dioxide from motor vehicles cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare, and, if so, prescribe motor vehicle emissions standards under Section 202(a) of the Act. *Massachusetts,* 549 U.S. at 533.

EPA has since acted on that mandate. On December 15, 2009, EPA published its "Endangerment Finding," wherein it determined that atmospheric concentrations of greenhouse gases may be "reasonably be anticipated both to endanger public

health and to endanger public welfare," and that emissions of greenhouse gases from motor vehicles "contribute to the air pollution" for which the endangerment finding was made. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496, 66,497, 66,537-45 (Dec. 15, 2009). Because the Clean Air Act requires EPA to prescribe emissions standards for motor vehicles once it makes an endangerment finding, EPA promulgated regulations for cars and light trucks for model years 2012 through 2016. *See* Vehicle Rule, 75 Fed. Reg. 25,324. Those rules went into effect on January 2, 2011.

During the period of time that *Massachusetts v. EPA* was pending and EPA was subsequently fulfilling its mandate, the State of California pursued its separate nuisance action against the automobile industry. In 2007, the district court dismissed the State's complaint on the ground that the issue presented a nonjusticiable political question, finding that "[t]he adjudication of Plaintiff's claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," a task which entails "the type of initial policy determination to be made by the political branches, and not this Court." *General Motors*, 2007 WL 2726871, at *8. California initially appealed this ruling to the Ninth Circuit, and while the appeal was pending, EPA finalized the motor vehicle rulemaking described above. Having achieved the remedy it sought from the political branch, the State of California dismissed its appeal of the nuisance action. In doing so, the State "acknowledge[d] that the federal common law may be

displaced by federal statute where a comprehensive regulatory or statutory scheme speaks directly to the particular issue and provides an adequate remedy,"[7] and cited EPA's action in regulating greenhouse gas emissions as a basis for staying and ultimately dismissing its appeal. *See* State of California, Request for Continuance of Oral Argument at 3, *California v. General Motors*, No. 07-16908 (9th Cir. Jan. 21, 2009).

4. That federal rulemaking established a single national program governing both motor vehicle greenhouse gas emissions and fuel economy. "[B]ecause the relationship between improving fuel economy and reducing CO2 tailpipe emissions is a very direct and close one," EPA's greenhouse gas standards were adopted jointly with fuel economy regulations promulgated by the National Highway Traffic Safety Administration (NHTSA). Vehicle Rule, 75 Fed. Reg. at 25,327.[8] The joint rulemaking also paved the way for California to amend its separate greenhouse gas emissions regulations (that were also adopted by twelve other states) to allow manufacturers to use compliance with the federal program to achieve compliance with its program. *See*

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7 As discussed above, however, that remedy need not be the precise remedy sought by a tort plaintiff in order for the plaintiff's common law claim to be displaced.

8 In *Massachusetts v. EPA*, this Court recognized that EPA's regulation of greenhouse gas emissions might "overlap" with NHTSA's administration of the federal fuel economy program, but because NHTSA and EPA are sister agencies within the same Executive Branch, it concluded that "both [Agencies can] administer their obligations and yet avoid inconsistency." *Massachusetts*, 549 U.S. at 532.

Cal. Code Regs. tit. 13, § 1961.1(a)(1)(A)(ii). As EPA explained in the preamble to the final rule:

> The National Program also represents regulatory convergence by making it possible for the standards of two different Federal agencies and the standards of California and other states to act in a unified fashion in providing these benefits. The National Program will allow automakers to produce and sell a single fleet nationally, mitigating the additional costs that manufacturers would otherwise face in having to comply with multiple sets of Federal and State standards.

Vehicle Rule, 75 Fed. Reg. at 25,326.[9]

The Environmental Protection Agency is also in the process of implementing greenhouse gas rules concerning stationary sources. On April 2, 2010, EPA determined that once the motor vehicle greenhouse gas regulations became effective on January 2, 2011, then greenhouse gases are made subject to the comprehensive Clean Air Act's Prevention of Significant Deterioration and Title V programs. 42 U.S.C. §§ 7470, *et seq.*; *id.* § 7661. *See*

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9 Similarly, Carol M. Browner, Assistant to the President for Energy and Climate Change, stated in a press release announcing the development of this program that "[a] clear and uniform national policy is not only good news for consumers who will save money at the pump, but this policy is also good news for the auto industry which will no longer be subject to a costly patchwork of differing rules and regulations." *See* Office of the Press Secretary, President Obama Announces National Fuel Efficiency Policy (May 19, 2009), available at http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy/.

Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010). Subsequently, EPA adopted a rule to regulate greenhouse gas emissions from stationary sources that emit at least 75,000 tons of carbon dioxide equivalent per year and would otherwise require a preconstruction permit for a non-greenhouse gas pollutant. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (the "Tailoring Rule").

These actions by the expert agencies seek to balance competing policy concerns, such as which sectors of the economy should be required to reduce their greenhouse gas emissions, how quickly these reductions will occur, and at what cost to the economy. For example, EPA has initially limited the applicability of the PSD and Title V programs to very large sources because it determined that applying these provisions to all sizes of stationary sources of greenhouse gas emissions would entail unacceptable costs and burdens on both the smaller sources as well as the permitting authorities. *See* Tailoring Rule, 75 Fed. Reg. at 31,533-41 (June 3, 2010).

Because the Clean Air Act authorizes and provides for a comprehensive program to control air pollution in the nation, and because greenhouse gas emissions are subject to that program, Plaintiffs' federal common law nuisance claim has been displaced. "The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee II*, 451 U.S. at 319 (citation and footnote omitted). "If courts across the

nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern." *North Carolina*, 615 F.3d at 298.

III. THE POLITICAL QUESTION DOCTRINE DICTATES THAT THE COORDINATED NATIONAL APPROACH TO ADDRESS GREENHOUSE GAS EMISSIONS MUST COME FROM THE ELECTED BRANCHES OF GOVERNMENT.

Even if the Clean Air Act did not establish a comprehensive federal program regulating greenhouse gas emissions, the circuit court still erred in finding that Plaintiffs have stated a justiciable cause of action asserting that Defendants' greenhouse gas emissions constitute a public nuisance. In contrast to the relevant expert agencies, federal courts have "neither the expertise nor the authority to evaluate the[] policy judgments" that inform the manner in which greenhouse gases should be controlled. *Massachusetts*, 549 U.S. at 533. Rather, policy choices of this magnitude must be resolved "within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). Here, the political question doctrine renders Plaintiffs' lawsuit nonjusticiable because the remedy sought would require a federal court to decide which among the countless emitters of greenhouse gases should be held responsible for the impacts of those emissions, and what greenhouse gas producing activities are unreasonable under the circumstances. The court below did not articulate any "judicially discoverable

and manageable standards" for drawing these lines and failed to recognize that their placement presents the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

1. First, the line between the parties that must compensate others for their greenhouse gas emissions and the parties that escape financial responsibility is not governed by any judicially discernable standard and entails a policy decision not suited to the courts. Because carbon dioxide emissions are the unavoidable result of burning carbon-based fuel, every participant in the world economy is partially responsible for the concentration of greenhouse gases in the atmosphere. Nuisance actions directed at greenhouse gas emissions are therefore distinguishable from cases involving transborder pollution that this Court has previously recognized. *See Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Georgia v. Tenn. Copper Co.,* 206 U.S. 230, 236 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901). Those cases involved a limited number of actors causing a traceable and identifiable harm to discrete victims. Enjoining the Tennessee Copper facility's emissions of noxious gas, or declaring that the discharge of sewage into Lake Michigan constitutes a public nuisance, did not require any court to engage in quasi-legislative policymaking in drawing the line between liable parties and non-liable parties.

In an attempt to downplay the influence a court's decision in this action would have, the circuit court claimed that "[t]he possibility that mandatory emissions reductions may be imposed upon these defendants is quite different from mandatory emissions reduction requirements on American industry." Pet. App. 26a n.4 (quotations omitted). To the contrary: as a practical matter, any decision by a

federal court adjudicating a greenhouse gas-related nuisance claim would have a sweeping impact on industry. Because responsibility for greenhouse gas emissions is shared across the entire economy, those defendants unfortunate enough to be singled out by plaintiffs in a lawsuit like this would likely implead other responsible parties. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 n.17 (1978) ("a defendant in a tort suit such as this one would surely try to limit his liability by impleading any joint tortfeasors for indemnity or contribution").[10] Once that happens, the court would be required to consider the entire spectrum of greenhouse gas emitters—ranging from the largest operator of coal-fired power plants down to the individual motorist commuting 50 miles to and from work each day in a gasoline-powered car—and draw a line between those parties who are liable and those who are not. The circuit court did not articulate any standard that is "principled, rational, and based upon reasoned distinctions" for determining where that seemingly arbitrary line should be drawn. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). As every district court to have considered the matter has concluded, "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009); *see also General Motors*, 2007 WL 2726871, at *15 ("[t]he Court is left without guidance . . . in determining who should bear the costs associated with the global

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[10] Even where a nuisance action seeks injunctive relief, a defendant may implead other joint-tortfeasors and seek an order requiring them to bear a share of the emission reductions required to abate the nuisance. Restatement (Second) of Torts § 840E.

climate change that admittedly result from multiple sources around the globe.").

2. This action presents a nonjusticiable political question also because it would require a court to make a policy determination concerning which greenhouse gas-emitting activities pose an "unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979). Aside from invoking the inherently "vague and indeterminate nuisance concepts," *Milwaukee II*, 451 U.S. at 317, the circuit court did not articulate any standard for making that determination. As one district court succinctly stated:

> Applying the above-discussed [nuisance] principles here, the factfinder will have to weigh, inter alia, the energy producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level. . . . The factfinder would then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of [climate-related damages].

Kivalina, 663 F. Supp. 2d at 874-75.

Moreover, drawing the line between those greenhouse gas-emitting activities that result in an "unreasonable interference with a right common to the general public" and those that do not, requires the type of quasi-legislative balancing that properly belongs with the elected branches of government. For example, resolution of a greenhouse gas nuisance claim necessarily "entails a determination of what would have been an acceptable limit on the level of

greenhouse gases emitted by Defendants." *Kivalina*, 663 F. Supp. 2d at 876. Plaintiffs, after all, do not claim that that Defendants should not be emitting any greenhouse gases at all in generating the electricity that powers our economy. Rather, they claim that at some as yet undefined level, those emissions become unreasonable and therefore constitute a nuisance. However, as discussed above, deciding the optimum level of carbon dioxide emissions from a particular activity entails a policy decision concerning the proper balance between economic growth and development on the one hand, and environmental stewardship on the other. As the Central District of California correctly found in dismissing California's lawsuit against the automobile industry,

> [t]he adjudication of Plaintiff's claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court.

General Motors, 2007 WL 2726871, at *8.

This is precisely the type of broad policymaking that belongs in the elected branches of government. As discussed above, directing the nation's energy policy and regulating the resulting greenhouse gas emissions—whether from motor vehicles or stationary sources—entails a number of social and economic trade-offs which Congress has directed the relevant expert agencies to weigh. *See, e.g.,* Vehicle Rule, 75 Fed. Reg. at 25,404, 25,555 (describing the statutory factors weighed by EPA and NHTSA). A climate-related tort action would invariably chart a

different and conflicting course. An action against the automobile industry, for instance, would ask an Article III court to determine what constitutes a "reasonable" level of motor vehicle greenhouse gas emissions even though EPA and NHTSA have already addressed this question in their recent joint rulemaking. These policy questions rest exclusively with the elected branches in our system of government.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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