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.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY AS RESPONDENT SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have caused, contributed to, or maintained a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon-dioxide emissions at judicially determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon-dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon-dioxide emissions at "reasonable" levels based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-170a) is reported at 582 F.3d 309. The opinion of the district court (Pet. App. 171a-187a) is reported at 406 F. Supp. 2d 265.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2009. Petitions for rehearing were denied on March 5, 2010, and March 10, 2010 (Pet. App. 188a-191a). On May 26, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 6, 2010. On June 28, 2010, Justice Ginsburg further extended the time to August 2, 2010, and the petition was filed on that date. The

petition for a writ of certiorari was granted on December 6, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case concerns the methods by which the United States will regulate carbon-dioxide emissions. The control of such emissions is of singular importance due to the pernicious effects of global climate change, and the United States Government is committed to combating climate change. In this case, the plaintiffs seek to maintain federal common-law actions against five electric utilities that have allegedly caused, contributed to, or maintained a public nuisance by contributing to global warming, and they seek injunctive relief to reduce defendants' carbon-dioxide emissions to judicially determined levels. When this case began (in July 2004) as well as when it was argued in the court of appeals (in June 2006), the Environmental Protection Agency (EPA) took the view that the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, did not authorize it to issue mandatory regulations to address global climate change, and that, even if it did have the authority to set greenhouse-gas-emissions standards, it was, at least at that time, unwise to do so. See *Massachusetts* v. *EPA*, 549 U.S. 497, 511 (2007).

In the wake of this Court's decision in *Massachusetts* v. *EPA*, EPA's position has dramatically changed. EPA has taken substantial steps to regulate greenhouse-gas emissions under the CAA, consistent with other high-priority efforts by the Executive Branch to develop appropriate policies to combat climate change,[1] and with

[1] See, *e.g.*, Exec. Order 13,514, 3 C.F.R. 248 (2009 Comp.) (making "reduction of greenhouse gas emissions a priority for Federal agencies"); White House Council on Envt'l Quality, *Progress Report of the*

the United States' efforts to address climate change in recent international negotiations.[2] Plaintiffs' suits seeking restrictions on greenhouse-gas emissions through an injunction imposed by a district court should be dismissed, both because they are nonjusticiable and because any federal common-law nuisance action plaintiffs may once have had has been displaced by EPA's actions.

1. a. The CAA establishes a comprehensive framework for regulating air pollution and vests EPA, and to some extent the States and Indian Tribes, with implementing authority. It defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g). Section 202(a)(1) of the CAA provides that the EPA Administrator "shall by regulation prescribe * * * 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). In *Massachusetts* v. *EPA*, the Court held that Section 202 permits EPA to "regulate greenhouse-

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Interagency Climate Change Adaptation Task Force: Recommended Actions in Support of a National Climate Change Adaptation Strategy 16 (Oct. 2010) (explaining that efforts "to reduce the impacts of climate change" include both mitigation of its causes and adaptation to its effects), http://www.whitehouse.gov/sites/default/files/microsites/ceq/Interagency-Climate-Change-Adaptation-Progress-Report.pdf.

[2] See, *e.g.*, U.S. Dep't of State, *U.S. Climate Action Report 2010*, at 3, http://unfccc.int/resource/docs/natc/usa_nc5.pdf (noting that as part of the 2009 Copenhagen Accord, the United States proposed to "reduce emissions in the range of 17 percent from 2005 levels by 2020").

gas emissions from new motor vehicles in the event that it forms a 'judgment'" that they "'cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" 549 U.S. at 528 (quoting 42 U.S.C. 7521(a)(1)).

Section 111 of the CAA authorizes EPA to list 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). Once EPA exercises its discretion to list a category of stationary sources, Section 111 directs it to establish performance standards for the emission of pollutants specified by EPA from new (or modified) sources in that category. 42 U.S.C. 7411(b)(1)(B). Furthermore, in some circumstances, once EPA has established such new source performance standards (NSPS) for a particular category of sources, States are required by Section 111(d) to issue performance standards—in accordance with EPA guidelines—for *existing* sources in that category.[3] 42 U.S.C. 7411(d). EPA may issue such standards if a State does not do so. *Ibid.*; see also 40 C.F.R. 60.20-60.29 (establishing procedures for the adoption of state plans).

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[3] Section 111(d) standards for existing sources are required if the NSPS regulate emissions of an air pollutant that is not regulated under Section 112 (42 U.S.C. 7412) and not subject to national ambient air quality standards (NAAQS) by virtue of being a pollutant listed under Section 108 (42 U.S.C. 7408). (Only six pollutants—carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide—have been listed under Section 108. See 40 C.F.R. Pt. 50.) Under Section 111(d), States may apply standards less stringent than those identified in EPA's guidelines if they demonstrate that the application of the guidelines to a facility or class of facilities imposes unreasonable costs, is physically impossible, or presents some other factor that makes less-stringent requirements more reasonable. 40 C.F.R. 60.24(f).

Section 165 of the CAA requires that any new "major emitting facility" (or one to which a major modification is made) must obtain a pre-construction permit to ensure the prevention of significant deterioration (PSD) of air quality. 42 U.S.C. 7475; see generally 75 Fed. Reg. 31,520-31,521 (2010) (discussing PSD provisions pertinent to greenhouse-gas emissions). Such PSD requirements apply to any "pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4). The definition of "major emitting facility" includes stationary sources that exceed specified amounts of emissions of any pollutant. 42 U.S.C. 7479(1). A permit application must show that the facility will employ "the best available control technology for each pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4).

Finally, Title V of the CAA (42 U.S.C. 7661-7661f) requires operators of major stationary sources to apply for operating permits. Title V generally does not add substantive emissions-control requirements, but a Title V permit must contain all otherwise-applicable requirements imposed by the CAA, and a major stationary source must follow EPA-prescribed procedures in applying for an operating permit. 42 U.S.C. 7661a; see generally 75 Fed. Reg. at 31,521 (discussing Title V permitting provisions pertinent to greenhouse-gas emissions).

b. The Tennessee Valley Authority (TVA) is an Executive Branch agency with responsibility for the multipurpose development of the Tennessee Valley region. 16 U.S.C. 831. Members of its board of directors are appointed by the President with the advice and consent of the Senate. 16 U.S.C. 831a(a)(1). TVA is expressly authorized by federal statute to "produce, distribute, and sell electric power," 16 U.S.C. 831d(*l*), and all of its power programs are self-financed, 16 U.S.C. 831n–4. It

provides electricity to citizens in seven States, 55% of which is generated by fossil-fuel-fired power plants in Tennessee, Alabama, Kentucky, and Mississippi. TVA "[m]ay sue and be sued in its corporate name." 16 U.S.C. 831c(b).

2. Petitioners and TVA (collectively, defendants) are six entities that operate fossil-fuel-fired electric power generation facilities in 20 States. Pet. App. 2a. Respondents are eight States, the City of New York, and three land trusts (collectively, plaintiffs). *Ibid.*

In July 2004, plaintiffs filed two similar complaints in the United States District Court for the Southern District of New York. J.A. 56-116 (States' Compl.); J.A. 117-154 (land trusts' Compl.). Both complaints allege that defendants are substantial contributors to carbon-dioxide emissions—amounting to 10% of such emissions caused by human activities in the United States—and thereby contribute to global warming. J.A. 57, 118. Plaintiffs claim that defendants are liable for creating, contributing to, or maintaining a public nuisance under federal common law (or, in the alternative, state law). J.A. 103-110, 145-153. They seek permanent injunctive relief requiring defendants to abate the alleged nuisance by capping and then reducing their emissions "by a specified percentage each year for at least a decade." J.A. 110, 153.

Defendants moved to dismiss the complaints for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Pet. App. 178a-179a. In September 2005, the district court granted defendants' motions. *Id.* at 171a-187a. It held that both cases "present non-justiciable political questions" because their resolution would "require[] identification and balancing of eco-

nomic, environmental, foreign policy, and national security interests." *Id.* at 187a.

3. On September 21, 2009, a two-judge panel of the Second Circuit reversed. Pet. App. 1a-170a.

a. The court of appeals discussed the six indicia of a political question articulated in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), and held that plaintiffs' lawsuits do not present a nonjusticiable political question. Pet. App. 23a-41a. With respect to the first *Baker* factor, it held that defendants had forfeited any argument that limiting carbon-dioxide emissions is textually committed to the political Branches under the Commerce Clause, and further held that the case would not interfere with the President's foreign-policy prerogatives because a single court decision in a common-law nuisance action could not "establish a *national* or *international* emissions policy." *Id.* at 24a-25a, 26a. With respect to the second factor—whether there is a "lack of judicially discoverable and manageable standards for resolving" an issue, 369 U.S. at 217—the court reasoned that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century" and that there would be judicially manageable standards here because "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance," Pet. App. 28a, 34a. With respect to the third factor—whether it is impossible to decide an issue "without an initial policy determination of a kind clearly for nonjudicial discretion," 369 U.S. at 217—the court found that there would be no need for any such "policy determination" because this case "appears to be an ordinary tort suit." Pet. App. 38a-39a (internal quotation marks omitted). Finally, the court held that the last three *Baker* factors—which involve the potential for disagreement between the judicial and

political Branches—would not apply because the United States had "no unified policy on greenhouse gas emissions." *Id.* at 40a.

b. The court of appeals then considered three other issues that had not been decided by the district court but that defendants had raised as alternative grounds for affirmance: (1) whether plaintiffs have Article III standing; (2) whether their complaints state a claim under federal common law; and (3) whether the CAA has displaced any such federal common-law claim.

With respect to standing, the court of appeals held that the State plaintiffs have *parens patriae* standing based on their interest in safeguarding public health and natural resources within their borders. Pet. App. 44a-55a. The court also concluded that the States and the land trusts have met the Article III standard articulated in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), because (1) they alleged injury in fact as a result of the effects of climate change on their property and proprietary interests, Pet. App. 58a-67a; (2) their allegations that defendants' emissions contribute to climate change satisfy the causation requirement, at least at the motion-to-dismiss stage, *id.* at 67a-73a; and (3) a court could provide effective relief, because reducing defendants' emissions would "*slow* or *reduce*" climate change, *id.* at 75a (quoting *Massachusetts* v. *EPA*, 549 U.S. at 525); see also *id.* at 76a (agreeing that "[e]ven if emissions increase elsewhere, the magnitude of [p]laintiffs' injuries will be less if [d]efendants' emissions are reduced than they would be without a remedy").

Next, the court of appeals held that plaintiffs have stated a claim under federal common law. Pet. App. 77a-123a. Applying Section 821B of the Restatement (Second) of Torts (1977), the court concluded that plaintiffs

stated a claim by alleging that defendants contribute to an "unreasonable interference with public rights," Pet. App. 82a-84a, 121a, including "the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world," *id.* at 83a-84a.

Finally, the court of appeals held that the CAA had not displaced a federal common-law public-nuisance cause of action seeking to cap and reduce carbon-dioxide emissions that contribute to climate change. Pet. App. 137a-144a. The court's discussion of displacement drew a line between the actual "regulation" of greenhouse-gas emissions and mere "study" or "monitor[ing]" of such emissions. *Id.* at 135a & n.46, 156a. It discussed EPA's 2009 proposed finding in the context of Section 202 of the CAA that greenhouse gases endanger public health and welfare, but said that "[u]ntil EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact speak directly to the particular issue raised" by plaintiffs. *Id.* at 142a (internal quotation marks and alterations omitted). The court observed that "EPA has yet to make any determination that [greenhouse-gas] emissions are subject to regulation under the Act, much less endeavor *actually* to regulate the emissions." *Id.* at 144a. In the absence of "the requisite findings" from EPA, the court concluded that the CAA "does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources." *Ibid.* As a result, the court held that plaintiffs' federal common-law claim had not yet been displaced. *Ibid.*

Petitioners and TVA filed petitions for panel or en banc rehearing. The court of appeals denied those petitions on March 5 and 10, 2010. Pet. App. 188a-191a.

4. As discussed in greater detail below (see pp. 46-51, *infra*) in the 15 months since the court of appeals issued its decision, EPA has taken several substantial actions pursuant to its CAA authority to address greenhouse-gas emissions. EPA finalized the proposed rule that the court of appeals discussed—the "endangerment finding" (*i.e.*, that greenhouse-gas emissions are reasonably anticipated to endanger public health and welfare). It also adopted standards governing emissions of greenhouse gases from certain motor vehicles. As a result of those regulations, which took effect on January 2, 2011, carbon dioxide is now a "pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4).[4] On December 23, 2010, EPA announced a proposed settlement agreement, under which it would commit to complete, by May 26, 2012, a rulemaking relating to NSPS for greenhouse gases emitted by fossil-fuel-fired electric-utility steam-generating units (*i.e.*, the category of stationary sources at issue in this case).

Thus, EPA's actions have triggered a regulatory cascade that will result in the application of PSD requirements to new and modified stationary sources that emit greenhouse gases. EPA will be required to assess what, if any, NSPS it should issue for various categories of stationary sources and what guidelines it should issue and thus require States to implement with respect to emissions from existing facilities within those categories

[4] On December 10, 2010, the D.C. Circuit denied motions to stay the new regulations pending that court's consideration of petitions for review. See *Coalition for Responsible Regulation* v. *EPA*, Nos. 09-1322, 10-1073, 10-1092.

of stationary sources. As those actions demonstrate, EPA is actively exercising its statutory discretion to determine when and how greenhouse gases from stationary sources (including defendants' power plants) will become subject to emissions standards under the CAA.

SUMMARY OF ARGUMENT

I. A. Plaintiffs' complaints should be dismissed for lack of prudential standing. Plaintiffs bring claims under the federal common law of public nuisance against six defendants alleged to emit greenhouse gases contributing to climate change. But virtually every person, organization, company, or government across the globe also emits greenhouse gases, and virtually everyone will also sustain climate-change-related injuries. Principles of prudential standing do not permit courts to adjudicate such generalized grievances absent statutory authorization, particularly because EPA, which is better-suited to addressing this global problem, has begun regulating greenhouse gases under the CAA. As a result, plaintiffs' suits must be dismissed.

B. Because plaintiffs cannot establish prudential standing, the Court need not—and thus should not—consider whether their allegations satisfy Article III standing requirements at the pleading stage. In any event, although the issue is not free from doubt, plaintiffs' allegations are sufficient to survive a motion to dismiss. The coastal State plaintiffs' allegations closely mirror those the Court found sufficient to establish Article III standing in *Massachusetts* v. *EPA,* 549 U.S. 497 (2007). Those plaintiffs have Article III standing based on their interest in preventing the loss of sovereign territory for which they are also the landowners.

C. The Court also need not, and should not, decide whether plaintiffs' suits are barred by the political-question doctrine. This case does raise separation-of-powers concerns highlighted by the second and third factors used in *Baker* v. *Carr*, 369 U.S. 186 (1962), to describe the political-question doctrine: "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 217. In the circumstances of this case, however, the principle of prudential standing that bars judicial consideration of generalized grievances, and the recognition that any common-law claims have been displaced by EPA's regulatory actions under the CAA, are more restrained and appropriate grounds on which to rest a decision to dismiss.

II. Any claim for public nuisance that federal common law may otherwise provide to plaintiffs has been displaced by regulatory actions taken by EPA pursuant to the CAA. EPA has issued an endangerment finding and promulgated emissions standards for light-duty motor vehicles, actions which rendered greenhouse gases (including carbon dioxide) subject to regulation under the CAA. EPA has also promulgated a rule to phase in the application of PSD requirements to greenhouse-gas emissions from new and modified stationary sources. EPA has, therefore, spoken directly to the question plaintiffs ask the courts to resolve through federal common law.

ARGUMENT

I. PLAINTIFFS' COMMON-LAW NUISANCE CLAIMS ARE NOT JUSTICIABLE

Petitioners advance two nonmerits grounds for dismissing these suits: that plaintiffs lack standing (Pet. 13-20), and that their suits present nonjusticiable political questions (Pet. 26-31). Those arguments are both rooted in petitioners' legitimate concerns about the unprecedentedly broad nature of plaintiffs' nuisance suits, which would require a federal court, in the course of resolving asserted federal common-law claims against six defendants, to make numerous significant scientific, technical, and policy determinations about whether and how to slow climate change—even though that phenomenon is, by plaintiffs' own account, a result of the actions of innumerable sources of various kinds of emissions from around the world over many decades.

The United States, including TVA, agrees that plaintiffs' common-law nuisance suits present serious concerns regarding the role of an Article III court under the Constitution's separation of powers—especially in light of the representative Branches' ongoing efforts to combat climate change by formulating and implementing domestic policy and participating in international negotiations. Those concerns are, however, best addressed under principles of prudential standing, which constrain federal courts from entertaining generalized grievances that are more appropriately addressed by the representative Branches.

A. Plaintiffs Lack Prudential Standing Because Their Suits Are Generalized Grievances More Appropriately Addressed By The Representative Branches

As this Court has explained, standing doctrine comprises two parts: "Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (citation and internal quotation marks omitted). While prudential standing limitations are "closely related to Art[icle] III concerns," they are not constitutionally compelled and are "essentially matters of judicial self-governance." *Id.* at 12 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)). "Without such limitations * * * the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Ibid.* (quoting *Warth*, 422 U.S. at 500). Careful adherence to such principles of judicial self-restraint is especially important when, as here, a court is asked to entertain a cause of action based on federal common law, which is itself fashioned by the Judiciary.

1. Federal courts must refrain from adjudicating generalized grievances like plaintiffs' common-law claims

One principle of prudential standing requires federal courts to refrain from adjudicating "generalized grievances more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12 (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). Here, plaintiffs' common-law claims are precisely that kind of "general-

ized grievance[]." *Ibid.* This is not a situation in which plaintiffs have invoked a "constitutional or statutory provision" that could "properly * * * be understood as granting persons in the plaintiff[s'] position a right to judicial relief." *Warth*, 422 U.S. at 500. Congress, rather, has vested a federal agency with the power to regulate emissions from power plants and to regulate carbon dioxide as a pollutant, and it has expressly provided for judicial review of EPA's actions in exercising those regulatory powers. See *Massachusetts* v. *EPA*, 549 U.S. at 516 (discussing 42 U.S.C. 7607(b)(1)). Congress has also provided for citizen suits to enforce the emissions standards that EPA establishes or to challenge the agency's failure to perform any nondiscretionary act or duty. See 42 U.S.C. 7604. But those statutory provisions and remedies are not at issue here.

Instead of relying on any CAA standards or cause of action, plaintiffs have elected to sue a handful of defendants from among an almost limitless array of entities that emit greenhouse gases. Moreover, the types of injuries that plaintiffs seek to redress, even if concrete, could potentially be suffered by virtually any landowner, and to an extent, by virtually every person, in the United States (and, indeed, in most of the world). Even if plaintiffs were found to have Article III standing to raise such claims—an issue the Court need not reach—principles of prudential standing counsel strongly in favor of leaving the resolution of such widely shared claims to the representative Branches.

a. Plaintiffs' common-law nuisance claims are quintessentially fit for political or regulatory—not judicial—resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both potential plaintiffs and potential defen-

dants. On the plaintiffs' side, the eight States, one city, and three land trusts in these suits are a tiny subset of those who could allege they are injured by greenhouse-gas emissions that have contributed or will contribute to global climate change. The court of appeals focused largely on plaintiffs' asserted injuries as landowners. See Pet. App. 59a-67a. But plaintiffs' allegations are not unusual in that respect. Global climate change will potentially affect the property interests of most landowners. The court of appeals explained that the effects of climate change come from the land, the sea, and the air, and they will threaten the beaches, the fields, the hills—and almost everywhere in between.[5] Indeed, the court of appeals' analysis of the claims of the land-trust plaintiffs (*id.* at 62a-63a) confirms that nearly all landowners will suffer injuries of the types they allege. And the effects of climate change will not be limited to landowners; they will also be felt by individuals, corporations, and governmental entities throughout the Nation and around the world.

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[5] See Pet. App. 10a, 61a-62a (cataloging alleged "reduction of California's mountain snowpack" and damage to "States with ocean coastlines" and those "bordering the Great Lakes"; noting that "a rise in sea level would * * * accelerate beach erosion," "[w]armer temperatures would threaten agriculture" in other States, and disruption of ecosystems would "affect[] State-owned hardwood forests and fish habitats"). See also *Native Village of Kivalina* v. *Exxon Mobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (nuisance claims based on allegation that climate change requires relocation of Eskimo village), appeal pending, No. 09-17490 (9th Cir.); *Comer* v. *Murphy Oil USA*, 585 F.3d 855, 861 (5th Cir. 2009) (nuisance claims based on allegation that climate change contributed to property damage caused by Hurricane Katrina), opinion vacated pending reh'g en banc, 598 F.3d 208, appeal dismissed, 607 F.3d 1049 (5th Cir. 2010), petition for mandamus denied *sub nom. In re Comer*, S. Ct. No. 10-294 (Jan. 10, 2011).

Parallel breadth and complexities also characterize the range of potential defendants in suits presenting such common-law claims, because the categories of those who emit carbon dioxide and other greenhouse gases (and thus contribute to climate change as plaintiffs allege) are equally capacious. Plaintiffs' complaints name a few entities that operate power plants in 20 States. But the electric-utility industry comprises many more companies in the United States and abroad, to say nothing of many other sectors of the economy that are also responsible for significant shares of greenhouse-gas emissions. See 75 Fed. Reg. at 31,519 (listing "important sources" of such emissions, including motor vehicles, "industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management").

b. The multiplicity of potential plaintiffs and defendants is rendered especially troubling by the very nature of common-law public-nuisance claims seeking to slow climate change. The problem is not simply that many plaintiffs could bring such claims and that many defendants could be sued. It is also that essentially any potential plaintiff could claim to have been injured by any (or all) of the potential defendants. The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere—making it impossible to consider the sort of focused and more geographically proximate effects that were characteristic of traditional nuisance suits targeted at particular nearby sources of water or air pollution.[6]

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[6] It is cases of the latter sort on which the court of appeals relied as examples of "the federal courts' masterful handling of complex public nuisance issues." Pet. App. 29a. This Court last recognized a federal common-law cause of action in the pollution context in *Illinois* v. *City*

In the context of climate change, a regulatory solution will be far better suited to addressing the scope of the problem and to fashioning an appropriately tailored set of remedies than a potentially open-ended series of common-law suits in far-flung district courts. Even a single common-law proceeding would be a less efficient, effective, manageable, and accountable means for considering in the first instance (rather than on judicial review of an expert agency's determination) how much the Nation's greenhouse-gas emissions should be reduced to address global climate change, how much of the burden of reducing the Nation's contributions should be borne by the electric-utility industry, which segments of that industry should make which changes, and at what rate such reductions should occur. A court—when no statute or regulation is in place to provide guidance—is simply not well-suited to balance the various interests of, and the burdens reasonably and fairly to be borne by, the many entities, groups, and sectors of the economy that, although not parties to the litigation, are affected by a phenomenon that spans the globe.

c. Establishing appropriate levels for the reduction of carbon-dioxide emissions from power plants "by a specified percentage each year for at least a decade" (as

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of Milwaukee, 406 U.S. 91 (1972) (*Milwaukee I*), which concerned discharges into a particular body of water (Lake Michigan), though it subsequently held that a water-pollution suit recognized in *Milwaukee I* had been displaced by later statutory amendments, see *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*). The other nuisance cases discussed by the court of appeals long predated the CAA and—unlike this case—also involved only localized rather than global effects. See, *e.g.*, *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907). Accordingly, the prudential-standing argument advanced here would not alter the standing analysis for traditional nuisance cases involving such localized grievances.

plaintiffs request, J.A. 110, 153) would inevitably entail multifarious policy judgments, which should be made by decisionmakers who are politically accountable, have expertise, and are able to pursue a coherent national or international strategy—either at a single stroke or incrementally. Cf. *Massachusetts* v. *EPA*, 549 U.S. at 524 ("[Agencies] whittle away at [massive problems] over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."). For such reasons, courts often accord the highest levels of deference to Executive Branch agencies' application of their regulatory and scientific expertise and policy judgment to address such complex problems. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); *NRDC* v. *EPA*, 571 F.3d 1245, 1251-1253 (D.C. Cir. 2009); *New Eng. Legal Found.* v. *Costle*, 666 F.2d 30, 33 (2d Cir. 1981).

EPA has recognized the complexity and resulting uncertainty that exists about many of the localized effects of climate change. See 74 Fed. Reg. 66,497 (2009) ("[I]n light of existing knowledge * * * not all risks and potential impacts can be quantified or characterized with uniform metrics. There is variety not only in the nature and potential magnitude of risks and impacts, but also in our ability to characterize, quantify and project such impacts into the future."). Although plaintiffs ask the courts to cap and reduce defendants' emissions, the myriad questions associated with developing a judgment about reasonable levels of greenhouse-gas emissions from defendants and the broader industry of which they are a part are more properly answered by EPA. EPA is, after all, the regulatory agency charged by Congress with the responsibility for setting standards for air-pollutant emissions and with significant expertise in the

scientific disciplines that must be brought to bear in establishing appropriate limitations on emissions.

In the CAA, Congress has created a regime under which EPA and state regulators determine the best means of regulating air pollutants. Since this Court held in *Massachusetts* v. *EPA* in 2007 that carbon dioxide falls within that regulatory authority, EPA has taken several significant steps toward addressing the very question presented here. See pp. 46-51, *infra*. That regulatory approach is preferable to what would result if multiple district courts—acting separately and without the benefit of even the most basic statutory or regulatory guidance—were to use common-law nuisance cases as opportunities to sit as arbiters of scientific and technology-related disputes and *de facto* regulators of power plants and other sources of pollution, not just within their districts but nationwide. Cf. *North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291, 296 (4th Cir. 2010) (observing, in a suit involving a state common-law claim, that "encourag[ing] courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air" would result in "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike").

The confluence in this case of several factors—including countless potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made—demonstrates that plaintiffs' concerns about climate change should be resolved by the representative Branches, not federal courts. Questions about how to regulate and reduce carbon-dioxide emissions are thus

the kind of generalized grievances that are "more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12.[7] And EPA is actively addressing how and when to regulate carbon-dioxide emissions —decisions that the CAA in turn makes subject to judicial review. Plaintiffs thus lack prudential standing to assert their claims directly in federal court by seeking to invoke judge-made federal common law.

2. It is appropriate to resolve this case on prudential-standing grounds before considering other threshold grounds

Prudential standing is an issue that may be resolved at the outset of a case. See *Tenet* v. *Doe*, 544 U.S. 1, 7

[7] Despite a similarity in terminology, the prudential-standing analysis articulated here is distinct from, and would not alter, this Court's settled approach to challenges that raise "undifferentiated, generalized grievance[s] about the conduct of government." *Lance* v. *Coffman*, 549 U.S. 437, 442 (2007) (per curiam). This Court has addressed the justiciability of challenges to government action brought by taxpayers or citizens as part of the inquiry into whether a plaintiff has alleged a sufficiently particularized and concrete stake in litigation to establish Article III injury. See *ibid.*; see also *Hein* v. *Freedom from Religion Found.*, 551 U.S. 587, 633-634 & n.5 (2007) (Scalia, J., concurring in the judgment) (concluding that a taxpayer's "'generally available grievance about government'" fails to "satisfy Article III's requirement that the injury in fact be concrete and particularized," notwithstanding prior "dicta describ[ing] the prohibition on generalized grievances as merely a prudential bar") (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 (1992)); *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 345-346 (2006) (describing federal-taxpayer-standing doctrine as based on Article III); *FEC* v. *Akins*, 524 U.S. 11, 23 (1998) (analyzing Article III injury and considering whether harm is "of an abstract and indefinite nature"). Here, plaintiffs are not asserting the "generalized" interest of a taxpayer or citizen in having the government follow the law. Instead, they assert that their property interests have been damaged largely by the actions of private parties.

n.4 (2005) ("[T]he prudential standing doctrine[] represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction."). Indeed, it is well established that prudential standing may be resolved before Article III standing. See, *e.g.*, *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) (assuming without deciding the existence of Article III standing in order to address prudential standing); *Newdow*, 542 U.S. at 18 & n.8 (finding that plaintiff "lack[ed] prudential standing to bring this suit in federal court," without addressing Article III standing).[8]

In this case, compelling reasons counsel in favor of addressing prudential standing before other threshold questions, such as Article III standing and the political-question doctrine. It provides an appropriately narrower ground for decision, because a prudential-standing decision would be based on the particular context and circumstances of the claims here, which are asserted under federal common law that is itself fashioned by the courts. Prudential standing also provides a more deferential and restrained basis for dismissing suits like plaintiffs' because that basis for dismissal could be revisited by Congress, to the extent consistent with Article III. As this Court has explained, principles of prudential standing can, "unlike their constitutional counterparts, * * * be modified or abrogated by Congress." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997); see also *FEC* v. *Akins*, 524 U.S. 11, 20 (1998) (holding that the existence of a statute embodying Congress's intention to authorize the "kind of suit" at issue meant that the plaintiffs

[8] The concurring Justices in *Newdow* disagreed with the conclusion that the plaintiff lacked prudential standing but did not criticize the Court's decision to address prudential standing first. See 542 U.S. at 18-25 (Rehnquist, C.J., concurring in the judgment).

"satisf[ied] 'prudential' standing requirements"); *United Food & Commercial Workers* v. *Brown Group, Inc.*, 517 U.S. 544, 558 (1996) ("prudential limitations are rules of 'judicial self-governance' that 'Congress may remove . . . by statute'") (quoting *Warth*, 422 U.S. at 509).

The restraint and flexibility inherent in prudential-standing doctrine also respond to petitioners' proper insistence that the representative Branches' active role in addressing climate change must be respected. See Pet. 27, 31, 34; see also *Newdow*, 542 U.S. at 12 (prudential-standing restrictions prevent courts from deciding questions "of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights") (quoting *Warth*, 422 U.S. at 500).

The appropriateness of dismissing this case on prudential-standing grounds follows as well from this Court's recognition in *Massachusetts* v. *EPA* that Congress's statutory "authorization" of the "type of challenge to EPA action" present there—but absent in the common-law action here—was "of critical importance to the standing inquiry." 549 U.S. at 516 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). Had this case fallen within the bounds of a citizen-suit provision like 42 U.S.C. 7604, the existence of that statutory cause of action would mean that Congress had itself eliminated *prudential*-standing limitations (see *Bennett*, 520 U.S. at 162) and had itself diminished to that extent an important concern animating the prudential-standing doctrine: that the representative Branches are otherwise better suited than the federal courts to resolve such matters. When Congress has en-

acted a statute authorizing suit, the prudential-standing inquiry is different because Congress presumably has "at the very least identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

"The rules of standing, whether as aspects of the Art[icle] III case-or-controversy requirement *or as reflections of prudential considerations* * * *, are threshold determinants of the propriety of judicial intervention" that must be established by "the complainant" who seeks "the exercise of the court's remedial powers." *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (quoting *Warth*, 422 U.S. at 517-518) (emphasis added). Thus, before considering the merits of plaintiffs' suits, this Court must assure itself that, quite aside from the requirements of Article III, "judicially self-imposed limits on the exercise of federal jurisdiction" would not be transgressed, *Allen*, 468 U.S. at 751.[9] Plaintiffs' suits would transgress those limits.

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[9] As noted in TVA's brief at the certiorari stage (at 21), the parties did not expressly address the question of prudential standing in the lower courts. Neither did the court of appeals, even though the Second Circuit has held that prudential-standing limitations cannot be waived by the parties. See *Thompson* v. *County of Franklin*, 15 F.3d 245, 248 (1994) (the court's "independent obligation to examine subject matter jurisdiction * * * extends 'to the prudential rules of standing' ") (citation and footnote omitted). In any event, the question is "fairly included" (Sup. Ct. R. 14.1(a)) in the first question presented, which refers to "standing" but is not limited to Article III standing, see Pet. i. And because the question is jurisdictional, this Court could address it even if it had never been raised by the parties. See, *e.g.*, *Newdow*, 542 U.S. at 12-18 (dismissing for lack of prudential standing even though that issue was not raised in the lower courts or in the parties' briefs in this Court).

B. Under *Massachusetts* v. *EPA*, At Least Some Of The State Plaintiffs Have Article III Standing In Their Capacity As Sovereign Landowners

If the Court concludes, as urged above, that plaintiffs lack prudential standing, then the Court need not—and therefore should not—reach the issue of their standing under Article III of the Constitution. See *Pearson* v. *Callahan*, 129 S. Ct. 808, 821 (2009) (following "the older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable") (internal quotation marks and ellipsis omitted); *PDK Labs. Inc.* v. *United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("[I]f it is not necessary to decide more, it is necessary not to decide more."). If, however, the Court reaches the Article III question, we believe that, although the question is not free from doubt, the allegations advanced by the coastal States in their capacity as sovereign landowners are sufficient to survive a motion to dismiss under this Court's recent decision in *Massachusetts* v. *EPA*. Some of the coastal States' allegations of potential injuries here are materially similar to those that were found sufficient in *Massachusetts* v. *EPA* to satisfy the requirements for Article III standing. While there are differences between that case and this one, the differences cut both ways and on balance do not deprive plaintiffs of Article III standing at the pleading stage.

1. Like its prudential counterpart, Article III standing serves as a means of determining whether "a litigant is entitled to have a federal court resolve his grievance." *Kowalski*, 543 U.S. at 128. In order to establish Article III standing "[t]o seek injunctive relief," a plaintiff must make three showings: (1) "that he is under threat of

suffering 'injury in fact' that is concrete and particularized [and] actual and imminent, not conjectural or hypothetical"; (2) that the threat is "fairly traceable to the challenged action of the defendant"; and (3) that it is "likely that a favorable judicial decision will prevent or redress the injury." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009).

In *Massachusetts* v. *EPA*, the Court held that the Commonwealth of Massachusetts had established Article III standing to petition for judicial review of EPA's decision under the CAA not to regulate greenhouse gases emitted by motor vehicles. See 549 U.S. at 516-526. The Court concluded that "[t]he harms associated with climate change are serious and well recognized," that there is "a causal connection between man-made greenhouse gas emissions and global warming," and that "[a] reduction in domestic emissions would slow the pace of global emissions increases" and thus "reduce[] to some extent" the "risk of catastrophic harm" from "the rise in sea levels associated with global warming." *Id.* at 521, 523, 526.

The Court's standing analysis in *Massachusetts* v. *EPA* was carefully limited in two ways. The Court considered only a single kind of plaintiff (a sovereign State) and relied on only a single kind of injury (the loss of state-owned land). With respect to the first limitation, the Court explained that it was "of considerable relevance that the party seeking review here is a sovereign State and not * * * a private individual," and it acknowledged that Massachusetts' "quasi-sovereign interests" entitled it to "special solicitude in [the Court's]

standing analysis." 549 U.S. at 518, 520.[10] The second limitation on the Court's analysis revealed that the "quasi-sovereign interests" it invoked were not of a traditional *parens patriae* nature (*i.e.*, brought on behalf of citizens who had their own injuries).[11] Those interests were instead associated with land over which Massachusetts was *both* the sovereign *and* the owner. When the Court addressed the nature of Massachusetts' concrete injury in fact, it did not rely on anything other than the injury Massachusetts would suffer "in its capacity as a landowner" as "rising seas" swallowed "coastal land" that was not only owned by the Commonwealth but also its "sovereign territory." *Id.* at 522-523 & n.21; see also *id.* at 519 (noting that Massachusetts had a "well-founded desire to preserve its sovereign territory") (citing *Alden* v. *Maine*, 527 U.S. 706, 715 (1999)); *id.* at 523 n.21 (stating that "[o]ur cases require nothing more" than the allegation that rising seas "will lead to the loss of Massachusetts' sovereign territory"); *id.* at 539 (Roberts, C.J., dissenting) (explaining that the majority's decision "applies our Article III standing test to the as-

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[10] The Court did not separately consider the standing of the non-State petitioners in that case, which included local governments and private organizations. See 549 U.S. at 505.

[11] The Court has recognized that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)). Here, although TVA is a defendant, the Court, as in *Massachusetts* v. *EPA*, need not consider whether the States' *parens patriae* allegations would suffice to confer standing apart from the allegations of direct injuries to state-owned property, including the erosion of coastal beaches, because finding that the States have standing in their proprietary capacity is sufficient. See 549 U.S. at 522.

serted injury of the Commonwealth's loss of coastal property").

2. In this case, some of the plaintiff States—including Massachusetts' neighbors, Connecticut and Rhode Island—allege injuries that are materially identical to the one the Court found sufficient to support standing in *Massachusetts* v. *EPA*. The States' complaint alleges that they have suffered and will suffer numerous injuries from climate change, including the same array of threatened injuries catalogued in the National Research Council report cited in *Massachusetts* v. *EPA*. See 549 U.S. at 521. In particular, the complaint contains several allegations about injuries associated with sea-level rise, including allegations that it will inundate coastal property, will "cause billions of dollars of damage to property, including state-owned" property, and will lead to increased erosion of beaches. J.A. 89-92. The complaint specifically alleges that "[a]ccelerated sea-level rise due to unrestrained global warming" threatens to erode beaches "owned by" the coastal States. J.A. 91-92 (identifying state-owned parks and beaches in New York, California, Connecticut, and Rhode Island). Connecticut and Rhode Island border Massachusetts, and it is reasonable to assume at the pleading stage that climate change would affect public coastal property to a similar extent in all three States. Accordingly, like Massachusetts in the earlier case, the coastal States here have adequately alleged a concrete injury in their capacities as sovereign owners of land that is threatened with destruction by sea-level rise associated with climate change.

3. *Massachusetts* v. *EPA* is also instructive with respect to the other two prongs of Article III standing analysis: causation and redressability. With respect to

causation, the Court first explained that agencies, like legislatures, frequently approach problems incrementally, and "[t]hat a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law." 549 U.S. at 524. But the Court then further explained that, in any event, "reducing domestic automobile emissions is hardly a tentative step," because "[j]udged by any standard, U. S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming." *Id.* at 524-525.

Unlike *Massachusetts* v. *EPA*, this case does not involve a challenge to a discrete agency action addressing a problem in an incremental way pursuant to a statutory directive or authorization to proceed in such a manner. Rather, it is plaintiffs themselves, through their choice of defendants, who seek to proceed incrementally, and thereby to have the courts do so in the adjudication of an asserted public nuisance under federal common law. The aspect of the Court's rationale in *Massachusetts* v. *EPA* that focuses on the particular authority and ability of agencies to proceed incrementally therefore is not directly applicable here.

The Court's further reasoning about causation in *Massachusetts* v. *EPA*, focusing on the amount of emissions, however, does appear to be applicable to this case. Under that reasoning, plaintiffs have adequately alleged that defendants' emissions constitute a "meaningful contribution * * * to global warming." 549 U.S. at 525. The States' complaint alleges that defendants annually emit approximately 650 million tons of carbon dioxide. J.A. 84. Although that figure is about one-third of the amount that the Court mentioned in *Massachusetts* v.

EPA, 549 U.S. at 524 (referring to emissions from the entire "transportation sector," not just the smaller amount of automobile emissions that were actually at issue in the case), the Court's conclusion that "more than 1.7 billion metric tons" was a meaningful contribution when "[j]udged by any standard" (*id.* at 524-525) indicates that that amount was not at the outer limit of what would satisfy the causation element of Article III standing in a suit brought by a State alleging substantial loss of sovereign lands.

With respect to redressability, the Court in *Massachusetts* v. *EPA* reasoned that "[w]hile it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming," it did not follow that the Court "lack[ed] jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it." 549 U.S. at 525. The Court concluded that the redressability requirement had been satisfied because "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere" in the world with other emitters. *Id.* at 526. In light of that discussion, the court of appeals here was correct in concluding that plaintiffs have adequately alleged—at least under "the lowered bar for standing at the pleading stage"—that "[e]ven if emissions increase elsewhere, the magnitude of [p]laintiffs' injuries will be less if [d]efendants' emissions are reduced than they would be without a remedy." Pet. App. 43a, 76a.[12]

4. Petitioners contend (Pet. 16) that *Massachusetts* v. *EPA* is distinguishable. They stress that the opinion

[12] If the suit were to progress past the pleading stage, questions of injury, causation, and redressability would of course need to be revisited in light of the evidence. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990).

noted that the statute authorizing judicial review of EPA decisions was "of critical importance to the standing inquiry" in that case because "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Here, by contrast, there is no Act of Congress authorizing this cause of action. Plaintiffs have not invoked the CAA's citizen-suit provision. Cf. *Public Interest Research Group* v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71-73 (3d Cir. 1990) (suit for pollutant discharges in excess of amounts allowed by Clean Water Act permit), cert. denied, 498 U.S. 1109 (1991). Nor is there any statute akin, for example, to the Sherman Act (15 U.S.C. 1, 4), authorizing federal courts, at the behest of certain injured parties, to enjoin unreasonable emissions of greenhouse gases.

As the Court has recently explained, Congress's ability to "loosen the strictures of the redressability prong" in the context of a challenge to agency action accounts for the inability to predict with assurance whether the plaintiff would, after securing judicial vindication of his claimed procedural right before the agency, ultimately "be successful in persuading the [agency] to avoid impairment of [the plaintiff's] concrete interests." *Summers*, 129 S. Ct. at 1150; see also *Massachusetts* v. *EPA*, 549 U.S. at 517-518. This case does not involve that kind of uncertainty, because plaintiffs are not challenging an agency's action or failure to act to limit emissions by third parties. Plaintiffs' chains of causation and redressability are *shorter* than the ones in *Massachusetts*, because they seek judicial relief directly from the entities responsible for the allegedly unlawful emissions. For

the same reason, their chains are also shorter than the ones in *Lujan*, because their standing does not "hinge on the response of [a] regulated (or regulable) third party to * * * government action." 504 U.S. at 562.[13]

5. If the Court agrees that, in light of *Massachusetts* v. *EPA*, the coastal States here have adequately alleged Article III standing at the pleading stage be-

[13] Plaintiffs' Article III standing also finds some support in the background proposition that the common law provides for claims against those who contribute to a public nuisance, even when a particular defendant is not the exclusive contributor to the nuisance. See Restatement (Second) of Torts § 840E at 177 (1977) ("[T]he fact that other persons contribute to a nuisance is not a bar to the defendants' liability for his own contribution."); *id*. cmt. b at 177 (public nuisance claim may lie where "each of several persons contributes to a nuisance to a relatively slight extent, so that his contribution taken by itself would not be an unreasonable one and so would not subject him to liability"); *Sprint Communications Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) ("We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.").

In *Milwaukee I*, for example, the Court recognized that Illinois could sue Milwaukee for releasing untreated sewage into Lake Michigan. See 406 U.S. at 103-108. In the suit that followed on that claim, the district court discussed the existence of harmful nutrients released into the lake by non-point sources and by point sources in Illinois and Michigan, and held that it would be "sufficient for plaintiffs to show that defendants' nutrient discharges constitute a significant portion of the total nutrient input to the lake." *Illinois ex rel. Scott* v. *City of Milwaukee*, No. 72 C 1253, 1973 U.S. Dist. LEXIS 15607, at *21-*22 (N.D. Ill. 1973), aff'd in part, rev'd in part, *Illinois* v. *City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979), vacated on other grounds, *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). To be sure, *Milwaukee I* involved discharges into a particular body of water, through which the pollution reached the plaintiffs—not, as here, emissions into the Earth's atmosphere that affect plaintiffs only to the extent they add to all other emissions of greenhouse gases worldwide in a manner that allegedly visits harm on plaintiffs. But that distinction goes more to prudential than to Article III standing.

cause, like Massachusetts, they are the owners of sovereign territory that could be destroyed by rising sea levels associated with global warming, then constitutional standing principles would pose no further barrier to this Court's consideration of whether the common-law nuisance claims asserted by plaintiffs have been displaced by the CAA or regulatory actions taken by EPA. See *Massachusetts* v. *EPA*, 549 U.S. at 518 ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."); *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").[14]

C. This Case Raises Separation-Of-Powers Concerns Addressed By The Political-Question Doctrine, But Plaintiffs' Lack Of Prudential Standing Provides A More Appropriate Basis For A Dismissal On Grounds Of Nonjusticiability

Concluding that judicial resolution of the merits of plaintiffs' common-law nuisance claims would present substantial separation-of-powers concerns, the district court dismissed both complaints on the ground that they "present non-justiciable political questions." Pet. App.

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[14] Of course, if the Court were to conclude that the coastal States lack Article III standing here, then the other plaintiffs would, *a fortiori*, lack standing, whether they are private land trusts that have no "quasi-sovereign interests" (*Massachusetts* v. *EPA*, 549 U.S. at 520), or inland States that allege many potential injuries from climate change but not the actual "loss of * * * sovereign territory" that they own (*id.* at 523 n.21), or a locality (the City of New York) that does not have the same "dignity * * * of sovereignty" that States possess in our federal system (*id.* at 519 (quoting *Alden*, 527 U.S. at 715)). Accordingly, we do not further discuss the other injuries alleged by plaintiffs.

187a. The political-question doctrine, however, is only one mechanism for identifying cases that are not fit for judicial resolution; in the circumstances of this case, the principle of prudential standing that bars judicial consideration of generalized grievances is a more restrained and appropriate ground on which to rest such a decision.

1. The political-question doctrine is animated by separation-of-powers principles. See *Baker* v. *Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). But the same concerns undergird other doctrines, including prudential standing, which, as discussed above, is dispositive here. As this Court has observed:

> All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Allen v. *Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1178-1179 (D.C. Cir.) (Bork, J., concurring), cert. denied, 464 U.S. 823 (1983)); see also, *e.g.*, *Poe* v. *Ullman*, 367 U.S. 497, 508-509 (1961) (plurality opinion) ("Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought."). Like the prudential-standing doctrine, the political-

question doctrine is "deriv[ed] in large part from prudential concerns about the respect [courts] owe the political departments." *Nixon* v. *United States*, 506 U.S. 224, 252-253 (1993) (Souter, J., concurring in the judgment) (citing *Goldwater* v. *Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring in the judgment)). Indeed, the Court could conclude that, in certain gray areas that "cluster about Article III" and call for judicial self-restraint, the political-question doctrine has a distinct, self-imposed prudential component akin to prudential standing. But if this Court finds that plaintiffs lack prudential standing, as we argue above, there is no need to determine whether the political-question doctrine also bars a decision on the merits of their claims.[15]

2. In applying the political-question doctrine, there is no simple and precise test for identifying which questions courts should refrain from addressing lest they "inappropriate[ly] interfere[] in the business of the other branches of Government." *United States* v. *Munoz-Florez*, 495 U.S. 385, 394 (1990). But in *Baker* v. *Carr*, *supra*, the Court identified six guiding factors:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding with-

[15] Precedent supports resolving questions of standing before those of political question, see *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974), and the Court should follow that practice here. Cf. *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585, 588 (1999) (in choosing "among threshold grounds for denying audience to a case on the merits," it is appropriate to decide a "straightforward" question before a more "difficult and novel" one).

> out an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. *Baker* emphasized the "necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging." *Ibid.* This Court's subsequent cases have not provided much additional guidance. A plurality of the Court recognized that the six *Baker* factors "are probably listed in descending order of both importance and certainty," *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004), but the two cases since *Baker* in which the Court found a political question relied upon the first factor.[16]

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[16] See *Nixon*, 506 U.S. at 229 (questions about the procedures for trying an impeachment are textually committed to the Senate); *Gilligan* v. *Morgan*, 413 U.S. 1, 7 (1973) (powers over "the training, weaponry, and orders of the [National] Guard" are vested in the Legislative and Executive Branches). In *Vieth*, a four-Justice plurality concluded that "political gerrymandering claims are nonjusticiable" under the second *Baker* factor because there are "no judicially discernible and manageable standards for adjudicating" them. 541 U.S. at 281. Justice Kennedy's opinion concurring in the judgment in *Vieth* concluded only that the Court was "require[d] [to] refrain from intervention in this instance" because the plaintiffs had not proposed a suitable "standard[] for measuring the burden a [partisan] gerrymander imposes on representational rights," and it remained possible that a standard could "emerge in the future," *id.* at 311, 317.

3. As the district court held (Pet. App. 187a) and as petitioners argue (Pet. 28), this case does raise concerns highlighted by the second and third *Baker* factors: "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217. Plaintiffs' theory of liability could provide virtually every person, organization, company, or government with a claim against virtually every other person, organization, company or government, presenting unique and difficult challenges for the federal courts. And resolving such claims would require each court to consider numerous and far-reaching technological, economic, scientific, and policy issues, and to make difficult predictive judgments, in determining whether and to what extent each defendant should be deemed liable under general principles of nuisance law for some share of the injuries associated with global climate change—and therefore be ordered by a court to limit its emissions to some extent.

Those potential difficulties are compounded by the prospect that different district courts entertaining such suits could reach widely divergent results, based, *inter alia*, on different findings of fact that would be subject to appellate review only for clear error, or on different assessments of what is "reasonable," or on different exercises of equitable discretion in fashioning relief. Such suits would lack the benefits of centralized decisionmaking that characterize Executive agency action. Moreover, a judicial decision in one case brought by particular plaintiffs would not assure a final resolution for the defendants involved because other potential plaintiffs would not be bound by the judgment and could instead bring their own suits. Such suits would therefore lack

the certainty and repose that the political Branches can afford through legislative and regulatory action.

The separation-of-powers concerns in this case arise from a confluence of factors, including the unique breadth of plaintiffs' claims; the complex and multifarious policy judgments implicated by the claim that greenhouse-gas emissions from the particular sources selected by plaintiffs unreasonably interfere with public rights; and Congress's enactment, pursuant to its enumerated powers under Article I, Section 8 of the Constitution, of the CAA provisions that authorize EPA to regulate air-pollutant emissions, coupled with EPA's decisions rendering greenhouse-gas emissions subject to regulation under the CAA. Determining appropriate restrictions on greenhouse-gas emissions is a task best suited for resolution by the representative Branches, which possess the requisite scientific and technical expertise and centralized decisionmaking authority, and are politically accountable. Development by the Judiciary of a parallel system of common-law regulation of greenhouse-gas emissions would frustrate and complicate those ongoing regulatory undertakings.

The claims (and defenses) in this case would thus present unique problems for the Judiciary. The difficulty of those claims for judicial resolution—particularly in the absence of a statute adopted by the political Branches assigning such a role to the Judiciary—is more marked in light of the steps that *have* been taken by the political Branches to regulate in this area. The consequence of those steps is that any judicial remedy that might otherwise have existed for a federal common-law nuisance has been displaced by the actions of Congress and EPA. See pp. 42-53, *infra*. Such displacement of federal common law through the actions of the

political Branches is itself a manifestation of the separation of powers. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 315 (1981) (*Milwaukee II*) ("Our 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal"' when Congress has addressed the problem.") (quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978)).

4. Notwithstanding the foregoing, if this case did not involve a challenge to a phenomenon that is so widely caused and has an impact that is so widely experienced (which in this case separately demonstrates that plaintiffs lack prudential standing), and if EPA had not commenced regulating greenhouse gases under the CAA (which demonstrates that any common-law claim has been displaced), the separation-of-powers concerns it presents would markedly diminish.[17] Thus, we believe that, although the Court could properly rely on the political-question doctrine to direct dismissal of this case, a decision on prudential-standing grounds (discussed above) or the displacement analysis (discussed below) would be a more appropriate and tailored means of recognizing why it is appropriate to withhold judicial relief. Those other grounds would also better account for the principal way in which this case differs from

[17] Just as Congress has the power to alter the prudential-standing analysis and the displacement analysis, action by the political Branches can bear on aspects of the political-question doctrine. Congress could, for instance, make the initial policy determinations to allow for adjudication of a common-law nuisance action to address climate change. And EPA could prescribe emissions standards that would—if such standards did not displace federal common law—provide discernible and manageable standards for courts to apply in resolving such cases. Plaintiffs here, however, have relied on the purported *absence* of action by the political Branches as justification for their claims.

most cases presenting a political question: Plaintiffs are not asking the courts to enforce a constitutional or another external standard or norm that is typically in the domain of nonjudicial actors. Compare, *e.g.*, *Vieth*, *supra*. Instead, they ask the judiciary to act in its own domain by applying judicially fashioned federal common law in a new context. While it is of course true, as the court of appeals observed, that "federal common law of nuisance claim[s] * * * have been adjudicated in federal courts for over a century," Pet. App. 38a, this case is of a different order, in the ways discussed above.[18]

The applicability of the political-question doctrine will, to be sure, often be a threshold, non-merits question that should be resolved before a court would otherwise decide a question beyond the proper scope of judicial power. In this case, however, a determination that any common-law cause of action has been displaced (see pp. 42-53, *infra*) would not actually require the Court to do what the political-question doctrine would forbid (*i.e.*, to decide an asserted common-law public-nuisance claim based on alleged contributions to global climate change in the absence of "judicially discoverable and manageable standards" or "an initial policy determination of a kind clearly for nonjudicial discretion"). Such a determination would not involve the impermissible assertion

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[18] Declining to address the political-question doctrine's applicability in the circumstances of this case would be analogous to the approach in Justice Kennedy's concurring opinion in *Vieth*. "[E]rr[ing] on the side of caution" because "another case" might propose a suitable standard for evaluating whether a partisan gerrymander burdens representational rights, Justice Kennedy did not find a political question, but nevertheless concluded that the appellants (who proposed no suitable standard of their own) had failed to state a claim on which relief could be granted. 541 U.S. at 311-313 (opinion concurring in the judgment).

of judicial power, but would instead simply acknowledge that, in light of actions already taken by the political Branches, there is no place for judicial relief under the mantle of federal common law. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

Moreover, there is another aspect of this case that would support dismissal. Plaintiffs seek only injunctive relief, which "is a matter of equitable discretion" that "does not follow from success on the merits as a matter of course." *Winter* v. *NRDC*, 129 S. Ct. 365, 381 (2008). Especially because the political-question doctrine involves prudential concerns, the Court could determine that plaintiffs' complaints, because they are not based on any statutory cause of action but rather invoke federal common law, should be dismissed at the outset on equitable grounds that do not require the Court to resolve whether a political question is presented or to decide any political question. Cf. *O'Shea* v. *Littleton*, 414 U.S. 488, 499 (1974) ("[Article III standing] considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief; and even if we were inclined to consider the complaint as presenting an existing case or controversy, we would firmly disagree with the Court of Appeals that an adequate basis for equitable relief against petitioners had been stated."). Such a disposition, in the unique circumstances of a federal common-law claim, would rest on the

distinct separation-of-powers concerns that the case presents.[19]

II. ANY FEDERAL COMMON-LAW CLAIMS HAVE BEEN DISPLACED BY EPA'S REGULATORY ACTIONS UNDER THE CLEAN AIR ACT

If the Court reaches the question, it should hold that plaintiffs cannot state a claim for public nuisance under federal common law because any such claim has been displaced by the actions that EPA has taken under the CAA to regulate carbon-dioxide emissions.

As this Court has explained, even in those few areas where a federal common-law action has already been recognized and persists, it is necessarily "'subject to the paramount authority of Congress,'" which means that a "previously available federal common-law action" will be "displaced" whenever a "scheme established by Congress addresses the problem formerly governed by federal common law." *Milwaukee II*, 451 U.S. at 313, 315 n.8 (quoting *New Jersey* v. *New York*, 283 U.S. 336, 348 (1931)); see also, *e.g.*, *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). To assess whether federal common law has been displaced in a given context, "the relevant inquiry is whether the statute '[speaks] *directly* to [the] question' otherwise answered by federal common law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 236-237 (1985) (quoting *Milwaukee II*, 451

[19] See *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 731 (1996) ("[F]ederal courts have the power to dismiss or remand cases based on abstention principles * * * where the relief being sought is equitable or otherwise discretionary."); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.) ("Whether or not this is * * * a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief.").

U.S. at 315) (alterations and emphasis in *Oneida*). Here, regulatory actions that EPA has taken pursuant to its authority under the CAA—largely after the court of appeals' decision in this case—meet that test and have displaced any common-law nuisance claims that plaintiffs might once have had.

This case differs from *Milwaukee II* because there this Court had already recognized the availability of a federal common-law cause of action in *Milwaukee I*, which the Court then found in *Milwaukee II* to have been displaced. Here, the Court has not determined whether a federal common-law cause of action would otherwise be available if justiciability obstacles could be overcome. Whether to recognize in the first instance a federal common-law cause of action to abate emissions that contribute to global warming is a decision that might be informed by the enactment of the CAA, this Court's decision in *Massachusetts* v. *EPA*, and any implementing measures taken by EPA. Because any federal common-law claim that might otherwise have been advanced by plaintiffs has so clearly been displaced, however, the Court need not determine whether federal common law should, absent displacement, provide a cause of action for public nuisance against persons and entities that contribute to climate change.[20]

[20] Whether global climate change should be regarded as a public nuisance cognizable under domestic common law is a novel question, apparently decided for the first time by the court of appeals in this case. In prior public nuisance cases, there was a geographic nexus between those liable and those injured. See, *e.g.*, *Milwaukee I*, 406 U.S. at 93 (defendant's sewage discharges into Lake Michigan, the waters of which were used by Illinois); *Georgia* v. *Tennessee Copper*, 206 U.S. at 238 (noxious gases traveling from defendant's plants "over great tracts of Georgia land"). Cf. *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114, 116 (1972) (calling air pollution a "public nuisance" and noting

1. Federal common law is displaced when an administrative agency takes regulatory action, under the authority of a comprehensive statutory program, to address the issue raised in a putative common-law action. Such displacement can occur when a plaintiff seeks relief that would address the same issue, but in a manner different in character or extent from what the regulatory program provides. See *Milwaukee II*, 451 U.S. at 324 ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner."); see also *Mobil Oil*, 436 U.S. at 623-625 (holding that any federal common-law damages remedy for loss of society had been displaced by the Death on the High Seas Act, which provided damages for pecuniary loss but not for loss of society). And displacement also occurs when an agency, whose comprehensive statutory authority to regulate the subject matter has been triggered, decides to postpone or even forgo the imposition of regulatory standards, where the decision is made

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that "corrective remedies for air pollution * * * necessarily must be considered in the context of localized situations"). The Court has never addressed whether such a nexus is a prerequisite for a public nuisance. In *Missouri* v. *Illinois*, 200 U.S. 496 (1906), the Court recognized that public nuisance law adapts to changing scientific and factual circumstances. In that case, determining whether sewage discharged by Chicago could cause typhoid fever in St. Louis after traveling 357 miles over eight to eighteen days was at the frontier of scientific understanding. See *id.* at 523. The Court acknowledged there was "no pretense" that Missouri had alleged "a nuisance of the simple kind that was known to the older common law," and that the suit "almost necessarily would have failed" if it "had been brought fifty years ago." *Id.* at 522. It held that the then-present evidence did not support Missouri's allegations, *id.* at 526, but it 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.

through the exercise of that authority on the basis of a weighing of relevant considerations under the statutory scheme. Courts may not substitute their judgment, under the guise of common law, for the determinations made by federal agencies as to how, when, and whether regulation is appropriate.

Petitioners contend (Pet. 21) that Congress's enactment of the CAA was itself sufficient to displace plaintiffs' common-law claims, without regard to any regulatory actions that EPA has taken pursuant to the CAA. While there is little doubt that the CAA established a "comprehensive" regulatory program, see, *e.g.*, *Chevron U.S.A.*, 467 U.S. at 848, the CAA differs in important respects from the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, which was found to have displaced federal common-law limits on the discharge of pollutants into the waters of the United States. See *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11, 14-15 (1981); *Milwaukee II*, 451 U.S. at 317-320. The terms of the CWA directly prohibit the discharge of pollutants into the waters of the United States without authorization from a proper permitting authority. See 33 U.S.C. 1311(a). The terms of the CAA, by contrast, impose few restrictions on the emissions of air pollutants in the absence of regulations promulgated by EPA. This case, however, does not involve the mere enactment of the CAA.

Exercising its regulatory authority under the CAA, EPA has directly entered the field plaintiffs would have governed by common-law nuisance suits. Since January 2, 2011, greenhouse gases have been subject to regulation under the CAA, and EPA is actively exercising its judgment and statutory discretion to determine when and how emissions from different categories of sources

of greenhouse gases will be regulated. As a result, the CAA, as implemented by EPA, speaks directly to the question of how carbon-dioxide emissions should be limited and thus displaces any common-law claims pertaining to that question.

2. In the wake of this Court's decision in *Massachusetts* v. *EPA*, the agency has taken several significant actions to address greenhouse-gas emissions.

a. Two of EPA's recent regulatory actions worked in concert to render greenhouse gases "pollutant[s] subject to regulation under [the CAA]" for purposes of the PSD permitting process that applies to new and modified emitting facilities. 42 U.S.C. 7475(a)(4). First, on December 15, 2009, EPA published a final finding under Section 202 of the CAA that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." 74 Fed. Reg. at 66,497. That so-called "endangerment finding" also included a determination that carbon-dioxide and other greenhouse-gas emissions from new motor vehicles contribute to the greenhouse-gas air pollution that endangers public health and welfare. *Id.* at 66,537. In making that determination, EPA found that the portion of the transportation sector regulated by Section 202 is responsible for just over 23% of greenhouse-gas emissions in the United States, making it the "second largest emitter within the United States behind the electricity generating sector." *Id.* at 66,499.

Second, on May 7, 2010, EPA (acting with the Department of Transportation's National Highway Traffic Safety Administration) published a joint final rule requiring reductions in greenhouse-gas emissions from light-duty motor vehicles. 75 Fed. Reg. at 25,324. Under Section 202(a)(1) of the CAA, the promulgation of

those new emissions standards followed from EPA's December 2009 endangerment finding. See 42 U.S.C. 7521(a)(1); 75 Fed. Reg. at 25,327. Those standards took effect on January 2, 2011 (for vehicles of model year 2012), and they will become increasingly stringent until model year 2016. *Id.* at 25,329-25,330. EPA exercised its discretion to phase in those standards over that period to allow manufacturers to "incorporate technology to achieve [greenhouse-gas] reductions" and to "plan for compliance using a multi-year time frame, * * * consistent with normal business practice." *Id.* at 25,332.

Because the final light-duty-vehicle standards have taken effect (as of January 2, 2011), EPA now considers greenhouse gases to be "pollutant[s] subject to regulation under [the CAA]," in the sense meant by 42 U.S.C. 7475(a)(4), and therefore subject to Sections 165(a) and 169(1) of the CAA (42 U.S.C. 7475(a) and 7479(1)). See 75 Fed. Reg. at 31,606-31,607 (to be codified at 40 C.F.R. 52.21(b)(49)-(50), effective January 2, 2011) (specifying when greenhouse gases are "subject to regulation"); 75 Fed. Reg. at 17,019, 31,549-31,551 (explaining EPA's construction of the phrase "pollutant subject to regulation"). Those provisions—which apply to stationary sources—require any new or modified "major emitting facility" to obtain a so-called "PSD permit" under the provisions of the CAA designed to prevent significant deterioration of air quality. 42 U.S.C. 7470-7479.[21] In

[21] The CAA applies PSD requirements to a "major emitting facility," 42 U.S.C. 7475(a), which is defined to include any "source with the potential to emit" at least 250 tons per year of "any air pollutant," as well as certain "stationary sources of air pollutants" (including, as most relevant here, fossil-fuel-fired steam electric plants and boilers), if they emit or have the potential to emit at least 100 tons per year. 42 U.S.C. 7479(1). EPA's regulations implement those requirements by applying

order to obtain such a permit, a facility must, among other things, be "subject to the best available control technology for each pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4).

The promulgation of the light-duty-vehicle standards also means that EPA considers greenhouse gases to be subject to the permitting requirements under Title V of the CAA. See 42 U.S.C. 7661a(a), 7661(2)(B), 7602(j); 75 Fed. Reg. at 31,551-31,554 (describing EPA's interpretation of Title V's applicability). As the D.C. Circuit has explained, the Title V permitting process "requires that certain air pollution sources, including every major stationary source of air pollution, each obtain a single, comprehensive operating permit to assure compliance with all emission limitations and other substantive CAA requirements that apply to the source." *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 993 (2005); see also *Virginia* v. *Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (describing Title V permit as "a source-specific bible for [CAA] compliance"), cert. denied, 519 U.S. 1090 (1997). Defendants' power plants are "major stationary source[s] of air pollution" and thus subject to Title V permitting requirements.

By issuing the endangerment 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-

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them to "major stationary source[s]," 40 C.F.R. 52.21(a)(2), which are defined to include stationary sources that emit at least 100 or 250 tons per year of a "regulated NSR pollutant," 40 C.F.R. 52.21(b)(2)(i), which includes "[a]ny pollutant * * * subject to regulation under the [CAA]." 40 C.F.R. 52.21(b)(50)(iv).

law requirements imposing alternative or additional emissions standards for greenhouse gases.[22]

b. Additional EPA regulatory actions reinforce the conclusion that plaintiffs' common-law claims have been displaced. Recognizing that the light-duty-vehicle rule was going to cause greenhouse gases to be regulated pollutants subject to PSD and Title V permitting requirements, EPA issued a so-called "tailoring rule" on June 3, 2010. See 75 Fed. Reg. at 31,514. That tailoring rule phases in the applicability of PSD requirements to greenhouse gases emitted by stationary sources, discussed above (see pp. 5, 47-48, *supra*), applying those requirements in January 2011 to sources already obtaining permits for other pollutants, and later to additional sources. 75 Fed. Reg. at 31,516.[23] In the tailoring rule,

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[22] As noted above (see note 4, *supra*), on December 10, 2010, the D.C. Circuit denied several motions to stay EPA's endangerment finding, its motor-vehicle-emissions standards for greenhouse gases, its tailoring rule, and its decision addressing the date on which greenhouse-gas emissions became "subject to regulation" under the CAA. The parties in those pending challenges submitted briefing-format proposals to the D.C. Circuit on January 10, 2011.

[23] Pursuant to the first phase of the tailoring rule, sources became subject to the PSD requirements on account of their carbon-dioxide emissions as of January 2, 2011, only if (1) they were already subject to such requirements due to emissions of non-greenhouse-gas air pollutants, and (2) they undertook a modification that would increase their carbon-dioxide emissions by at least 75,000 tons per year while also significantly increasing emissions of non-greenhouse-gas pollutants. 75 Fed. Reg. at 31,516. The second phase of the tailoring rule, beginning on July 1, 2011, "will phase in additional large sources of [greenhouse-gas] emissions." *Ibid.* Similar phases apply in the case of Title V. *Id.* at 31,523-31,524. In the third phase, beginning in July 2013, EPA may regulate additional sources. *Ibid.* The tailoring rule specifies that EPA will engage in further rulemaking to address any remaining PSD requirements, but indicates that no sources or modifications below a

EPA clarified that, in its considered judgment, regulation of greenhouse-gas emissions from stationary sources should proceed in an orderly and phased fashion based on a variety of considerations. Cf. *Massachusetts* v. *EPA*, 549 U.S. at 524. Plaintiffs' attempt to secure court-ordered emissions reductions from emitters of their choosing on their own schedule would be plainly inconsistent with EPA's systematic, phased approach.

In another significant step indicating EPA's active engagement in the process of determining how and when greenhouse-gas emissions will be regulated, EPA announced on December 23, 2010 that it had entered into a proposed settlement agreement in an earlier case about whether the new source performance standards (NSPS) for utility boilers (*i.e.*, power plants like defendants') should include standards for greenhouse-gas emissions.[24] That proposed settlement (which was subject to a 30-day public-comment period that expired on January 31, 2011, see 75 Fed. Reg. at 82,392) would commit EPA to complete a NSPS rulemaking under Section 111 of the CAA (42 U.S.C. 7411). If the settlement is adopted by EPA, the purpose of the ensuing rulemaking would be to consider standards applicable to new and modified facilities; it would simultaneously consider standards under which States would be required (under

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certain size would be made subject to PSD or Title V permitting requirements before April 30, 2016. *Ibid.*

[24] The case—which was brought by, *inter alia*, several of the plaintiffs here—is on voluntary remand from the D.C. Circuit. See *New York* v. *EPA*, No. 06-1322 (Sept. 24, 2007). As discussed in TVA's certiorari-stage brief in this case (at 29-30 & n.19), EPA had previously announced it was "in the process of responding to a remand from the D.C. Circuit requiring it to consider whether to add standards for [greenhouse gases] to the NSPS for utility boilers." 73 Fed. Reg. 44,487 (2008).

42 U.S.C. 7411(d)) to impose regulatory limitations on emissions from *existing* facilities. See p. 4, *supra*. Under the settlement, EPA would issue a proposed rule by July 26, 2011 and promulgate final regulations by May 26, 2012.[25] Thus, if the settlement is formally adopted, EPA will have established a precise time line for deciding whether and to what extent emissions standards under the CAA will apply to the very carbon-dioxide emissions at issue in this case.

3. As the foregoing discussion demonstrates, EPA now regulates greenhouse-gas emissions under the currently existing statutory scheme of the CAA, and it may soon be specifically committed to completing a rulemaking to address greenhouse-gas-emissions standards applicable to defendants' already-existing power plants, even if they are not modified. Thus, it is abundantly clear that the CAA, as it is now being implemented by EPA, "speak[s] directly" (*Milwaukee II*, 451 U.S. at 315 (quoting *Mobil Oil*, 436 U.S. at 625)) to the particular issue presented by plaintiffs' federal common-law nuisance claims about climate change: regulation of greenhouse-gas emissions, and in particular emissions from stationary sources (like defendants' power plants).

The conclusion that EPA's actions have displaced any common-law emissions standards is unaffected by EPA's decision to adopt an incremental approach that will not necessarily lead to standards specifically governing greenhouse-gas emissions from defendants' already-existing power plants (unless they are modified and thus

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[25] The text of the settlement agreement is available at http://www.epa.gov/airquality/pdfs/boilerghgsettlement.pdf. A commitment to complete a rulemaking will not mean that EPA has prejudged the question of what, if any, NSPS will be appropriate; EPA could ultimately exercise its judgment to find the imposition of such standards inappropriate.

require a PSD permit under the new regulations), at least until some time after May 26, 2012. In *Middlesex County Sewerage Authority*, the Court held that the Marine Protection, Research, and Sanctuaries Act of 1972 displaced federal common law immediately and entirely, even though "Congress allowed some continued dumping of sludge" for nine years after the statute was enacted based on its "considered judgment that it made sense to allow entities like petitioners to adjust to the coming change." 453 U.S. at 22 n.32; see also *Massachusetts* v. *EPA*, 549 U.S. at 533 (recognizing that EPA possesses "significant latitude as to the manner, timing, content, and coordination of its regulations"); *id.* at 524 ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.").

Although EPA has not yet done precisely what plaintiffs demand here (*i.e.*, cap defendants' carbon-dioxide emissions and require them to be reduced annually for at least a decade, J.A. 110, 153), that is not the relevant test. As this Court has stated: "Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S. at 324; see also *id.* at 323 ("Although a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act, such disagreement alone is no basis for the creation of federal common law.");

Illinois v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982) (refusing "to find that Congress has not 'addressed the question' because it has not enacted a remedy against polluters," because that "would be no different from holding that the solution Congress chose is not adequate," and "*Milwaukee II* * * * precludes the courts from scrutinizing the sufficiency of the congressional solution").

Because EPA's regulatory activities speak directly to the issue of greenhouse-gas emissions, any common-law claims seeking to reduce such emissions have been displaced.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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