No. 10-174

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS OPEN SPACE INSTITUTE, INC., OPEN SPACE CONSERVANCY, INC., AND AUDUBON SOCIETY OF NEW HAMPSHIRE

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QUESTIONS PRESENTED

1. Whether plaintiffs have stated claims under the federal common law of public nuisance in an action for injunctive relief to require defendants to reduce their massive, ongoing contributions to the pollution that causes global warming.

2. Whether at least one plaintiff in this case has standing to seek that relief.

3. Whether plaintiffs' common law claims present a political question that the courts may not resolve.

4. Whether plaintiffs' common law claims have been displaced by the Clean Air Act or Environmental Protection Agency regulation, notwithstanding the fact that at this time neither imposes any emissions limits on defendants' existing power plants at issue in this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire state the following:

Respondents Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire certify that they are their own corporate parents and that they are non-stock corporations.

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INTRODUCTION

This case involves the application of old law to new facts. Both English and American courts have recognized for centuries the right of one who suffers special injury from a public nuisance to bring a private action seeking injunctive relief. This Court has itself heard public nuisance actions and fashioned relief under federal common law in cases involving interstate air and water pollution. And this Court and others have continuously applied these well-established principles to changing technology and changing threats to a common environment.

Petitioners cannot and do not deny that global warming poses extraordinary risks to the public. Indeed, this Court acknowledged in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that "[t]he harms associated with climate change are serious and well recognized," *id.* at 521, and the scientific evidence supporting that conclusion has only grown more compelling since 2007. Nor can petitioners overcome the clear holding of *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), recognized in subsequent cases as well, that, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 103.

Instead, petitioners contend that, because there are so many other contributors to global warming, because the harms are so widespread, and because the task of completely solving the problem is so large, respondents' claims are nonjusticiable and not cognizable under federal common law. These arguments are unsupported by precedent; they consist of repackaged objections that this Court and others have consistently rejected.

First, it has been settled since at least the nineteenth century that, where multiple polluters contribute to a nuisance, each may be enjoined regardless of whether the conduct of any one would have caused the nuisance alone and regardless of others' contributions. Petitioners ("the Utilities") and respondent Tennessee Valley Authority ("TVA") are the five largest U.S. emitters of carbon dioxide, the primary greenhouse gas, and were responsible in 2004 for 650 million tons of carbon dioxide – 10 percent of *all* U.S. anthropogenic emissions. Despite having reasonable ways to reduce their emissions and ample knowledge of their effects on the environment, these five entities have emitted such staggering amounts of carbon dioxide as to set them apart from the vast majority of other emitters.

Second, it is equally settled that the limited set of persons who suffer special injury from a public nuisance has the right to bring a private action seeking injunctive relief. The respondent land trusts fit within that set because they own properties of unusual ecological value and because the trusts' mission is to conserve those properties permanently for public benefit and use. The land trusts' "well-pleaded factual allegations" about the special injuries they will suffer from global warming are both entitled to an "assum[ption of] . . . veracity," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), and well-grounded in widely accepted science.

Finally, this Court and many others have repeatedly applied nuisance principles to changing environmental threats and have taken into account scientific advances in understanding those threats. Courts have, for example, assessed complex scientific evidence in cases involving typhoid contamination of

the Mississippi River and oxygen levels in New York Bay; and they have issued orders limiting pollution in a variety of contexts that do not differ qualitatively from the situation here, where many sources of pollution contribute to newly emerging environmental harms. A Court that a century ago was able to provide injunctive relief against destructive sulfur dioxide emissions causing acid rain, *see Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 477-78 (1915) ("*Tennessee Copper II*"), *decree modified*, 240 U.S. 650 (1916), should not now accept the notion that relief against destructive carbon dioxide emissions from some of the world's largest polluters exceeds judicial competence.

Petitioners' argument that federal common law should not apply in this context is beset by a fundamental paradox. Petitioners concede that interstate air pollution and global warming are matters of preeminently federal concern. Yet, in the absence of a public nuisance claim under *federal* common law, the same injured parties would have *state* common law claims under multiple and potentially conflicting sources of law. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (explaining that "state common law [is] preempted" only where federal common law applies). That result would defeat the goal of having uniform federal common law to govern interstate issues on which federal regulators have not yet spoken.

No federal statute or regulation currently limits the carbon dioxide emissions of the Utilities and TVA. The U.S. Environmental Protection Agency ("EPA") has begun a rulemaking that may (or may not) lead to enforceable limits on carbon dioxide emissions by the Utilities and TVA. Without any

limits in place, claims that new regulations have displaced the old remedy are premature. Meanwhile, federal common law governs this vital issue.

STATEMENT

1. Respondents Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire (together, "Land Trusts") are private nonprofit corporations organized to conserve land permanently for environmental and aesthetic purposes, public access and enjoyment, and scientific research. JA118, 139-40, 141 (¶¶ 5, 67, 74).[1] To carry out these purposes, the Land Trusts have acquired properties of unique ecological value. JA140, 142 (¶¶ 68, 75).

The Land Trusts' properties provide rare habitat for various animals and plants, including ecologically sensitive areas of coastline, riverfront land, wetlands, and hardwood forest. JA140-41, 142-43 (¶¶ 69-73, 76-79). For example, a property at Bellamy River in Dover, New Hampshire, includes an estuary that provides wintering ground for bald eagles, as well as habitat for migratory birds and numerous fish species. JA142 (¶ 76). Another property, the Sam's Point Preserve in Ulster County, New York, includes the only extensive community of dwarf pine trees on bedrock known to exist. JA140-41 (¶ 71). The Land Trusts have made their properties available to the public in perpetuity for hiking, recreation, and education, and to researchers for scientific purposes. JA139-40, 141 (¶¶ 67, 74).

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[1] "JA__ (¶ __)" refers to paragraphs in the Land Trusts' operative complaint, reproduced in the Joint Appendix. "App. __" refers to the appendix to the certiorari petition.

2. The Land Trusts' complaint contains "well-pleaded factual allegations" about the extraordinarily damaging and potentially catastrophic effects of global warming – on the world generally and on their property specifically – that are entitled to an "assum[ption of] . . . veracity." *Iqbal*, 129 S. Ct. at 1950. Because of their particular location and ecological value, the Land Trusts' properties are especially vulnerable to the ongoing and anticipated effects of global warming. As sea levels rise, some coastal and riverfront areas are threatened with permanent flooding, and others with periodic flooding from higher storm surges. JA143-44 (¶¶ 80-83). Marshes that are not flooded entirely will be destroyed as habitat for wildlife as freshwater is replaced by saltwater. JA144 (¶ 84). The hardwood forests (primarily beech, birch, and maple) on the Land Trusts' properties will die out as temperatures rise. *Id.* (¶ 85). Ground-level smog will intensify, causing further damage to the plants and animals on those properties. JA144-45 (¶¶ 87-88).

Those allegations are supported by compelling scientific evidence. Since the complaint was filed in 2004 – indeed, since this Court's decision in *Massachusetts v. EPA* – that evidence has only grown stronger. In November 2007, the Intergovernmental Panel on Climate Change ("IPCC") reported that evidence of an overall warming trend now "is unequivocal." *2007 Synthesis Report*[2] 30. Eleven of the 12 years from 1995 to 2006 were among the 12 warmest recorded since 1850. *Id.* Depending largely on the future carbon emissions levels projected under vari-

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[2] IPCC, *Climate Change 2007: Synthesis Report* (2008) ("*2007 Synthesis Report*"), *available at* http://www.ipcc.ch/publications_and_data/ar4/syr/en/contents.html.

ous economic and technological scenarios, the IPCC's estimates for average global temperature changes over the twenty-first century range from 1.8 to 4.0 degrees Celsius. *Id.* at 45 & tbl. 3.1. For comparison, an ice age is a drop in global average temperature of about 4.0 to 7.0 degrees Celsius. *2007 Physical Science Report*[3] 114.

"Most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase" in human-caused greenhouse gas[4] emissions. *2007 Synthesis Report* 39.[5] Carbon dioxide is the most important greenhouse gas. *Id.* at 39, fig. 2.4. Emissions of carbon dioxide continue to affect the climate for hundreds or thousands of years. *2007 Physical Science Report* 25.

The IPCC's findings confirm that global warming is already having profound consequences, which are projected to continue and to worsen over time. Discussing North America, the IPCC has found:

> Sea level is rising along much of the coast, and the rate of change is likely to increase in the future, exacerbating the impacts of progressive inundation, storm surge flooding, and shoreline erosion. Storm impacts are likely to be more severe, especially along the Gulf and Atlantic

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[3] IPCC, *Climate Change 2007: The Physical Science Basis* (2007) ("*2007 Physical Science Report*"), *available at* http://www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html.

[4] Greenhouse gases heat the planet by "increas[ing] the atmospheric absorption of outgoing radiation," thus "alter[ing] the global energy budget of the earth." *Id.* at 21.

[5] The IPCC uses italicized terms of art to summarize certain probabilistic findings: "*very likely*" means a greater than 90% probability, "*likely*" means greater than 66%, and "*more likely than not*" means greater than 50%. *2007 Synthesis Report* 27.

> coasts. Salt marshes, other coastal habitats and dependent species are threatened now and increasingly in future decades by sea-level rise, fixed structures blocking landward migration, and changes in vegetation.[6]

3. The Utilities are a group of four holding companies whose subsidiaries own and operate electric power plants. JA121-25 (¶¶ 14-28). In 2004, when this case was filed, the Utilities were four of the five largest emitters of carbon dioxide in the United States; respondent TVA is the fifth. JA118 (¶ 3). The five together emitted approximately 650 million tons of carbon dioxide in 2004 alone. *Id.* That was approximately 25 percent of the carbon emitted by the electric power sector in the United States; approximately 10 percent of *all* carbon emitted by the United States; and approximately 2.5 percent of human-caused carbon emissions worldwide. JA118, 136, 137 (¶¶ 3, 53, 55); App. 8a, 72a.

Those 2004 emissions were only a small fraction of the Utilities' and TVA's past contribution to the problem of global warming. JA137 (¶ 56). Those emissions were also only a small fraction of their projected future contribution if their emissions continue to grow unchecked. From 1994 to 2001, electric power companies in the United States increased their carbon dioxide emissions by 24 percent. JA136 (¶ 54).

The Utilities and TVA, if they chose, could generate the same amount of electricity they do now but emit substantially less carbon dioxide. JA119, 146

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[6] IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability* 55 (2007) (citations omitted), *available at* http://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html.

(¶¶ 9, 98). Economically viable options are available that would permit them to do so without significantly increasing the cost of electricity to their customers. *Id.* These options, set forth in the Land Trusts' complaint, include "using alternative fuels; improving generation efficiency; increasing generation from zero- or low-carbon energy sources such as wind, solar, and gasified coal with emissions capture; co-firing wood or other biomass in coal plants; employing demand-side management techniques; [and] altering the dispatch order of their plants." JA119 (¶ 9).[7]

4. On July 21, 2004, the Land Trusts brought this case against the Utilities and TVA in the Southern District of New York, alleging that, by emitting hundreds of millions of tons of carbon dioxide annually, the Utilities and TVA were contributing to the public nuisance of global warming. The Land Trusts alleged public nuisance claims under federal law and, in the alternative, under the laws of the 20 states in which the Utilities and TVA operate. JA145-53 (¶¶ 91-103, 105-126).

The Land Trusts further alleged that this public nuisance threatens them with special injury: the properties they have purchased and sought to protect in perpetuity for public use will be damaged by global warming, preventing them from maintaining and using those properties as intended. *E.g.*, JA145-46 (¶ 93). On the same day, a group of eight states and

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[7] A power company's "dispatch order" is the "order in which [generating stations are] . . . brought on- and off-line in response to changing load requirements." 3 Barney L. Capehart, *Encyclopedia of Energy Engineering and Technology* 1499 (2007). By meeting demand using power plants that generate less carbon dioxide per kilowatt-hour, a power company can reduce carbon emissions without new investments.

the City of New York (collectively, for convenience, "States") brought a similar action.

The district court dismissed both complaints on the ground that respondents' federal common law claims presented a political question. Relying on *Baker v. Carr*, 369 U.S. 186 (1962), the court concluded that reaching the merits of respondents' claims would require "an initial policy determination of a kind clearly for nonjudicial discretion," App. 181a-182a (internal quotation marks omitted).

On September 21, 2009, the Second Circuit reversed. The court of appeals first held that the district court had erred in determining that this case presented a political question. Examining the considerations set forth by this Court in *Baker*, the court concluded that none supported the district court's ruling. App. 23a-41a. As for the problem of an "initial policy determination" that had troubled the district court, the court of appeals concluded that the States and Land Trusts "need not await an 'initial policy determination' in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century." App. 38a.

Because the Utilities had presented several alternative grounds for affirmance, the court of appeals went on to dispose of them. Relying in significant part on *Massachusetts v. EPA*, the court held that the States and Land Trusts had Article III standing, having shown injury-in-fact, traceability, and redressability; and that the States had *parens patriae* standing. App. 41a-76a. It held that the States and Land Trusts had successfully stated a public nuisance claim under federal common law, rejecting the Utilities' contentions that such claims were limited to

instances of "constitutional necessity" or to nuisances of a "simple type." App. 77a-123a. It held that the Land Trusts could bring public nuisance claims as private parties because they had properly alleged the common law requisite of a special injury from the nuisance. App. 114a-118a.

Finally, the court of appeals considered and rejected the Utilities' claim that the Clean Air Act had displaced the States' and Land Trusts' cause of action under federal common law. At the time, EPA had not yet "regulate[d] [carbon dioxide] emissions from stationary sources" or even found that such emissions endangered the public health and welfare – a prerequisite to any regulation. App. 139a-140a. Reasoning that EPA's merely "proposed finding[s] ha[d] no effect in law," App. 140a, the court declined to hold that they displaced the common law remedy. It "express[ed] no opinion" on the effect that "actual regulation of greenhouse gas emissions under the [Clean Air Act] by EPA" would have on federal common law claims. App. 144a. It then rejected the Utilities' further claim that the federal common law remedy was displaced by other statutes that Congress had passed authorizing "research, reports, technology development, and monitoring" related to global warming. App. 154a.

SUMMARY OF ARGUMENT

I. The private action to enjoin a public nuisance is well established in the precedent of this Court and of other courts as well. The Utilities have raised threshold jurisdictional issues that the Court must decide before reaching the merits. Nevertheless, because such issues must be determined in light of the specific claims that a party presents, the Land Trusts first set forth the history and nature of their cause of action to provide the background necessary for those threshold determinations.

A. Courts of equity have heard public nuisance cases since at least the sixteenth century, and this Court has recognized nuisance principles as fundamental to the common law understanding of property. Public nuisance cases are discussed in Blackstone and other authorities, and were heard by early American courts. This Court itself heard public nuisance cases as early as 1838 and recognized their availability not only to the sovereign, but also to private parties who had suffered a special injury that distinguished them from the rest of the public.

State courts began to hear public nuisance cases arising from industrial water and air pollution by the mid-nineteenth century. This Court heard its first major water-pollution nuisance case in *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*"), and its first major air-pollution case in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) ("*Tennessee Copper I*") (Holmes, J.). With these cases, and others that followed them, the Court considered pressing problems of public health and safety that affected large numbers of people; involved expansive geographic areas affected by numerous pollution sources; and addressed then-novel scientific issues, such as acid

rain (as it is now called) and typhoid contamination in the Mississippi River.

B. In *Milwaukee I*, the Court held that public nuisance claims involving interstate pollution of water or air arise under federal common law. That holding is controlling precedent to which the Court should adhere. *Milwaukee I* is fully consistent with the principles that this Court has applied to recognize limited enclaves of federal common law: interstate pollution involves strong, uniquely federal interests, and also inevitably involves conflicting interests among the several states even where the parties to a particular case are private entities.

C. The Land Trusts have stated a claim for public nuisance. The emissions of carbon dioxide at issue in this case threaten massive harm to the public. Allowing the Land Trusts' suit to continue, moreover, would not open the door to suits by a limitless number of plaintiffs. The historical special injury rule was developed to prevent just such problems, and the Land Trusts meet the rigorous demands of that rule because the ecologically valuable property they have acquired for long-term conservation and public use is particularly vulnerable to global warming.

Nor would this case open the door to suits against a limitless number of defendants: the Utilities and TVA are the largest emitters of carbon dioxide in the United States. Few if any other potential defendants can match their enormous and avoidable contributions to global warming. Moreover, an equitable remedy for those contributions is not beyond judicial competence.

II. The Court need not consider either the Article III standing or the prudential standing of the Land Trusts. Because at least one State has standing, this

case may proceed. Nevertheless, the Land Trusts will address standing because the Court granted certiorari on that question.

A. The Land Trusts have Article III standing. The historical pedigree of the private cause of action for public nuisance brings it well within the judicial power of the United States as traditionally understood. Further, the Land Trusts are threatened by injury-in-fact to their property interests; that injury is traceable to the actions of the Utilities and TVA because their enormous volumes of emissions have contributed to the problem of global warming; and the Land Trusts' injury is redressable because an order requiring the Utilities and TVA to reduce their emissions would reduce or slow the injuries that otherwise threaten the Land Trusts. *Massachusetts v. EPA* further supports the Land Trusts' Article III standing. In fact, there is a *stronger* case for causation here than there was in that case because the relief the Land Trusts seek would decrease the Utilities' and TVA's emissions directly, without intervening administrative action.

The Utilities' argument that respondents cannot show causation is contrary to the accepted common law rule under which defendants may be held liable for contributions that add up to an injurious whole. Indeed, this Court recognized and applied that rule as a matter of federal common law in a pollution case as recently as 2009, in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009). Because the Utilities directly contribute to the alleged injury, cases in which the Court has declined to find standing because of independent actions by third parties that break a causal chain do not apply here. Further, the Utilities' argument that

harms caused by global warming are not redressable fails because, as the Court recognized in *Massachusetts v. EPA*, the "reduc[tion] to some extent" of a "real" (though "remote") "risk of catastrophic harm" counts as meaningful relief. 549 U.S. at 526.

B. The Land Trusts also have prudential standing. They meet the requirements of the special injury rule, which in public nuisance cases serves the same function as prudential standing by narrowing the class of permissible plaintiffs. The Land Trusts have more than "generalized grievances" because they seek to protect their interests in particular properties that they acquired for purposes not shared by the public as a whole. Further, TVA's arguments invoking the generalized-grievance line of cases seek to stretch those cases beyond their bounds: each of those cases involved mere concerned citizens seeking to overturn government action, while this is a traditional common law action to protect property rights.

C. This case does not fall within the political question doctrine. There is no argument here that questions are textually committed to another branch. Rather, these claims are well within the historical scope of the judicial power. There is no initial policy decision that must be made, because the Land Trusts are merely invoking venerable common law rights. Nor is the case judicially unmanageable: the courts are competent to answer even difficult questions about what conduct may be enjoined to protect private landowners from special and irreparable injury.

III. The federal common law of public nuisance applicable to disputes over the pollution of interstate, ambient air has not been displaced by action under the Clean Air Act. Actual, not just possible, regula-

tion of the facilities and emissions at issue is necessary for displacement.

A. The Clean Air Act does not currently place any limits on the carbon dioxide emissions from the Utilities' and TVA's existing power plants. After *Massachusetts v. EPA*, EPA has acted to limit emissions from some sources of carbon dioxide – motor vehicles, and certain newly constructed or modified stationary sources – but those sources are not at issue in this case. The existing power plants that *are* at issue are not subject to any federal limit on their carbon dioxide emissions. EPA has begun a process that may lead to regulation of the carbon dioxide emissions of existing large power plants, but that regulation has not yet occurred and may never occur.

B. The Utilities' contention that the Clean Air Act displaces federal common law regulation without any need for agency action overreads *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), which analyzed in detail the actual regulatory limits placed on discharges of sewage by the Clean Water Act before concluding that Congress and EPA had spoken directly to the regulation of those discharges and that no role remained for federal common law. The Court's careful approach cannot be squared with the Utilities' categorical argument that the mere existence of the Clean Air Act is enough. That Act of its own force places no limits on the Utilities' carbon dioxide emissions.

C. TVA's narrower argument that the particular regulatory activities that EPA has so far undertaken displace federal common law also misses the mark. The regulatory activity that TVA cites falls short of placing actual limits of any kind on the emissions of Utilities' or TVA's existing sources.

ARGUMENT

I. RESPONDENTS HAVE STATED A CLAIM UNDER THE FEDERAL COMMON LAW OF PUBLIC NUISANCE

The Land Trusts have stated a federal common law claim for public nuisance. The private action to enjoin a public nuisance has a long history; the circumstances in which a claim lies for interstate air and water pollution are firmly established by this Court's precedent, and those circumstances are present here. In beginning with this issue, the Land Trusts acknowledge that the question whether they have stated a claim goes to the merits of the action and that this Court must determine whether the present action is a case or controversy within the "judicial Power of the United States," U.S. Const. art. III, § 1, before it can reach the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998).[8]

Standing, however, is determined in light of "the specific common-law, statutory or constitutional claims that a party presents." *International Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Similarly, as the Utilities agree (at 46), the argument that a case presents a political question requires a "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217. Here, the Utilities'

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[8] The Court may, however, turn to the merits of the case before addressing the prudential standing argument raised by TVA. *Cf. Steel Co.*, 523 U.S. at 96-97 (merits issues may be decided before statutory standing). Indeed, the Court need not address prudential standing at all because the issue was neither pressed before nor passed upon by the lower courts. *See infra* p. 42.

arguments against justiciability rest primarily on the limits of the traditional judicial role and the alleged lack of judicially manageable standards for resolving a case. The history and contours of the Land Trusts' common law cause of action rebut those arguments.

A. The Private Action for Public Nuisance Is Long Established by Precedent

1. A sovereign's action to enjoin a common or public nuisance traces to "at least as early as the sixteenth century [in] the English courts" and has been a "commonplace of jurisdiction in American judicial history." *United Steelworkers v. United States*, 361 U.S. 39, 60, 61 (1959) (Frankfurter & Harlan, JJ., concurring).[9] This Court has identified a "public nuisance action [as] a classic example of the kind of suit that relied on the injunctive relief provided by courts in equity." *Tull v. United States*, 481 U.S. 412, 423 (1987). It has further described the law of nuisance, including a state's "power to abate nuisances that affect the public generally," as one of the "background principles" that "define[s] the range of interests that qualify for protection as 'property'" in federal constitutional law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992).

The definition of a public nuisance was traditionally broad. Blackstone, for example, identifies a "common nuisance" as "either the doing of a thing to the annoyance of all the king's subjects, or the

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[9] *See also*, *e.g.*, 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 921 (2d ed. 1839) ("In regard to public nuisances, the jurisdiction of Courts of Equity seems to be of a very ancient date; and has been distinctly traced back to the reign of Queen Elizabeth."); Robert Henley Eden, *A Treatise on the Law of Injunctions* 224-25 (1821) (discussing *Bond's Case*, Moore 238 (1587)).

neglecting to do a thing which the common good requires." William Blackstone, 4 *Commentaries* *167. Case-by-case development gave the law of nuisance more specific content. Among other things, Blackstone describes as nuisances obstructions of "highways, bridges, and public rivers" and "offensive trades and manufactures" that cause injury to the public generally. *Id.* He also includes examples of environmental nuisances, such as placing "a smelting house for lead so near the land of another, that the vapor and smoke kills his corn and grass and damages his cattle"; failing to "scour a ditch . . . whereby [another's] land is overflowed"; and "corrupt[ing] or poison[ing] a water-course." 3 *Commentaries* *217-18.[10]

Most actions for public nuisance were brought by the sovereign – indeed, originally, public nuisance was a common law misdemeanor. As early as 1536, however, the English courts recognized that "a tort action could be maintained by a person who could show that he had suffered particular harm, over and above that caused to the public at large." Restatement (Second) Torts § 821C cmt. a (1979) (citing an anonymously reported case from 1536); *see* William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1004-07 (1966) (describing the history of this requirement). This need for a greater harm than that caused to the public is commonly referred to as the "special injury" rule.

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[10] The smelting-house, flooding, and water-poisoning examples appear in Blackstone's discussion of nuisances to private individuals. He makes clear that such private nuisances become public ones when the offensive conduct is "detrimental to the public" as a whole. 4 *Commentaries* *167.

Both the action for public nuisance and the special injury rule that limited the class of plaintiffs who could bring such actions were adopted by early American cases. By 1838, this Court pronounced it "settled[] that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney general," and recognized that a private party could invoke that jurisdiction if (but only if) he "aver[red] and prove[d] some special injury." *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98, 99 (1838) (citing *Corning v. Lowerre*, 6 Johns. Ch. 439 (N.Y. Ch. 1822) (Kent, Ch.)); *see also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1852) ("[A] public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual.").

2. This Court's earliest public nuisance cases, including *Alexandria Canal* and *Wheeling & Belmont*, involved obstruction of interstate waterways. During the second half of the nineteenth century, numerous American courts applied the law of public nuisance to cases in which private actors contributed to air and water pollution.

In *Woodyear v. Schaefer*, 57 Md. 1 (1881), the Maryland Court of Appeals held a slaughterhouse liable for public nuisance when it discharged blood into a public river, contributing to an "atmosphere filled with [a] stench [that] [wa]s not only disagreeable and uncomfortable to health, but . . . caus[ing] and tend[ing] to create disease." *Id.* at 5. Similarly, in *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884), the California Supreme Court held a mining company liable for public nuisance because it had been "dump[ing] . . . debris into [a] river, to the endangerment of habitation and cultivation of large

tracts of country, upon which are cities, towns, and villages, and to the impairment of . . . navigation." *Id.* at 146.[11]

In *Missouri I*, this Court recognized and itself applied for the first time "'the general rule which gives to a person injured by the pollution of air or water, to the use of which, in its natural condition, he is entitled, an action against the party . . . who causes that pollution.'" 180 U.S. at 247 (quoting *Chapman v. City of Rochester*, 110 N.Y. 273, 277 (1888)). *Missouri I* involved the discharge of sewage from Chicago into the Mississippi River, which the State of Missouri believed would "poison the water supply of the inhabitants of Missouri, and injuriously affect th[e] portion of the bed or soil of the Mississippi river . . . within [Missouri's] territory." *Id.* at 243. The Court overruled Illinois' demurrer, holding that Missouri had stated a claim for public nuisance. *See id.* at 248-49. After hearing evidence, including descriptions of what it called "the most ingenious experiments, . . . [and] subtle speculations, of modern science," the Court concluded that Missouri had failed to prove its allegations and ruled for Illinois on the merits. *Missouri v. Illinois*, 200 U.S. 496, 518, 526 (1906) ("*Missouri II*") (Holmes, J.).

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[11] *See also, e.g.*, *Lockwood Co. v. Lawrence*, 77 Me. 297, 311 (1885) ("Nuisances and injuries affecting waters, including the obstruction, diversion or pollution of streams, afford frequent ground for equitable interference, on the principle of restraining irreparable mischief."); *Village of Pine City v. Munch*, 42 Minn. 342, 343 (1890) (holding the owners of a dam liable for public nuisance when they drained a pond so as to cause decomposing vegetable matter to "fill[] the air with malaria and miasma, which causes wide-spread sickness and death among the inhabitants of [a nearby] village").

In *Tennesee Copper I*, the Court considered a claim by Georgia "that the air over its territory should not be polluted on a great scale by sulphurous acid gas," produced by two private copper companies based in Tennessee. 206 U.S. at 238. The pollution threatened "damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case within the requirements of Missouri [I]." *Id.* at 238-39. Based on the evidence and the severity of the harm, the Court concluded that it had "no alternative to issuing an injunction." *Id.* at 239. After appointing a special master, the Court issued orders placing specific quantitative limits on one of the copper companies' emissions (the other had settled) to ensure "adequate relief." *Tennessee Copper II*, 237 U.S. at 477-78.

The Court has dealt with the merits of actions for public nuisance involving interstate environmental harm several times since *Tennessee Copper*. *See*, *e.g.*, *New York v. New Jersey*, 256 U.S. 296 (1921) (denying relief for New Jersey's discharge of sewage into New York Harbor); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (enjoining New York City's discharge of sewage into the ocean). State and federal courts have continued to decide many cases applying the common law principles of public nuisance to a variety of environmental harms. Those principles – and this Court's reasoning in *Missouri II* and *Tennessee Copper I* – also have significantly affected the field of international environmental law. *See Trail Smelter Case* (U.S. v. Can.), 3 Rep. Int'l Arb. Awards 1905, 1963-66 (U.N. Arb. Trib. 1941).

B. A Public Nuisance Claim for Ambient, Interstate Air or Water Pollution Arises Under Federal Common Law

1. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (Brandeis, J.), a diversity case, this Court held that "[t]here is no federal *general* common law." *Id.* at 78 (emphasis added). But in a case decided the same day and written by the same author, the Court recognized that *specialized* federal common law applies to interstate disputes. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."). The Court has adhered to this principle that federal common law persists in certain "enclaves" that pose "intrinsically federal" problems, where permitting the law of a particular state to govern would "undermine the federal interest." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964) (giving examples).[12]

In *Milwaukee I*, this Court, relying on *Hinderlider*, held that common law claims dealing with "ambient or interstate" air or water pollution fall within one of those remaining enclaves of federal common law. 406 U.S. at 105 & n.7. "When we deal with air and

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[12] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("[P]ost-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way."); Henry J. Friendly, *In Praise of* Erie – *And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 407 (1964) ("*Erie* caused the principle of a specialized federal common law . . . to develop within a quarter century into a powerful unifying force.").

water in their ambient or interstate aspects," the Court explained, "there is a federal common law." *Id.* at 103. The Court also interpreted *Tennessee Copper I*, "[t]he leading air case," as a proper, pre-*Erie* application of this specialized federal common law. *Id.* at 104. We know of no case that has suggested that *Milwaukee I*'s holding is not good law.

The Utilities nevertheless call *Milwaukee I*'s declaration that interstate pollution is an enclave of federal common law "plainly *dicta*" and urge this Court to "disavow" it. Pet. Br. 36-38 & n.11. They argue that, because *Milwaukee I* involved "conflicting rights of States," its holding should be limited to cases in which both parties are state entities. *Id.* at 36. They argue in the alternative that *Milwaukee I* should be read as authorizing federal common law only in the interstices of the Clean Water Act. *See id.* at 36-37.

The Utilities disregard this Court's actual words: "The question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of [former 28 U.S.C.] § 1331(a). We hold that it does." 406 U.S. at 99. This express holding was necessary to the Court's result; the Court declined original jurisdiction because Illinois had the right to bring its suit in federal district court under federal question jurisdiction. *Id.* at 98, 108. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [this Court is] bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996).

2. *Milwaukee I* was correct when decided and should not be cast aside. After *Erie*, the vast majority of nuisance law, like the vast majority of American common law, is state law. Federal common law

nevertheless still plays an important role in a few areas, such as where the "interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981) (citing *Milwaukee I*). "[T]he control of interstate pollution," as one of those areas, "is primarily a matter of federal law." *Ouellette*, 479 U.S. at 492.[13]

There is a compelling federal interest in protecting the integrity of interstate water and air – an interest fully represented by no one state alone. The Utilities conceded this point below:

> Indeed, the Supreme Court has recognized that "air and water in their ambient or *interstate* aspects" are the concern of federal, not state, law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*") (emphasis added). This is so not merely because it is inappropriate to allow any one State's law to govern a dispute between two States. States Br. at 49. It is also because the very interstate nature of the affected air or water creates "an overriding federal interest in the need for a uniform rule of decision or . . . touches basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6.[14]

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[13] *See also Arkansas v. Oklahoma*, 503 U.S. 91, 98-101, 110 (1992) ("[W]e have long recognized that interstate water pollution is controlled by *federal* law."); *Milwaukee II*, 451 U.S. at 319 n.14 (federal common law applies where "problems requiring federal answers are not addressed by federal statutory law").

[14] Brief for Defendants-Appellees Cinergy Corporation and Xcel Energy, Inc. at 25, No. 05-5119-cv (2d Cir. filed Feb. 20, 2006) (omission in original). All the Utilities either joined the quoted brief or adopted its arguments. *See* Brief for Defendants-Appellees American Electric Power Company, Inc., American

In addition to that core federal interest, the use of federal common law also protects the states' interests – both dignitary and practical. As this Court has explained, the states retain "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden v. Maine*, 527 U.S. 706, 714 (1999). For this reason, "the federal courts play an indispensable role in maintaining the structural integrity of the constitutional design" because a "federal forum assures the peaceful resolution of disputes between the States." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275-76 (1997) (plurality opinion). The Court's recognition in *Tennessee Copper I* that the common law rule it was applying was grounded in the "still remaining quasi-sovereign interests" of the states, 206 U.S. at 237, is accordingly a strong reason for that rule to be federal.

Federal common law does and should also govern claims brought by private litigants such as the Land Trusts here. Where the conflicting interests of different states justify the application of federal common law, it is unimportant whether the relevant states are nominal parties to the case. *See Milwaukee I*, 406 U.S. at 105 n.6 ("[I]t is not only the character of the parties that requires us to apply federal law."); *Empire HealthChoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 707, 709 (2006) (Breyer, J., dissenting) (discussing cases in which federal common law governs suits between "private parties"). *Hinderlider*, for example, was a suit brought by a Colorado corpo-

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Electric Power Service Corporation, and Southern Company at 4, No. 05-5119-cv (2d Cir. filed Feb. 20, 2006); Brief of Defendant-Appellee Tennessee Valley Authority at 3 n.1, No. 05-5119-cv (2d Cir. filed Feb. 20, 2006).

ration against a Colorado state officer in the Colorado state courts; but because the suit involved the allocation of water between Colorado and New Mexico under an interstate compact, the Court applied federal common law. *See* 304 U.S. at 95, 110; *Sabbatino*, 376 U.S. at 427 ("[N]o State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties.").

Further, in the absence of a public nuisance claim under *federal* common law, the same private parties would have *state* common law claims, which is why the Land Trusts pleaded such claims in the alternative. JA147-53 (¶¶ 105-126). *See Milwaukee II*, 451 U.S. at 313 n.7 ("If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."); *Ouellette*, 479 U.S. at 499 (holding that, after the Clean Water Act has displaced the federal common law of nuisance, the common law of the state of the source of the pollution still applies).[15] In a case such as this one, with a mixture of state and private parties, it would be anomalous if the district court had to consider whether the operation of the same power plants constituted a nuisance under multiple, potentially conflicting sources of law. Such a result would defeat the purpose of having uniform federal common law govern interstate issues.

3. The Utilities rely heavily on cases concerning this Court's modern, restrictive approach to the creation of new private rights of action in cases involving federal constitutional and statutory rights. *See* Pet.

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[15] The Clean Water Act's savings clause that *Ouellette* held to preserve state common law remedies is virtually identical to the Clean Air Act's saving clause. *See Ouellette*, 479 U.S. at 497; *compare* 33 U.S.C. § 1370 *with* 42 U.S.C. § 7416.

Br. 32-33, 36 (citing, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). Those cases, however, dealt with an entirely different problem: the need to "interpret [a] statute Congress has passed to determine whether it displays an intent to create . . . a private remedy." *Sandoval*, 532 U.S. at 286. Here, it has been "settled" for centuries that a cause of action exists for public nuisance for a private party who "avers and proves some special injury." *Alexandria Canal*, 37 U.S. (12 Pet.) at 98, 99. And it has been settled for decades that interstate disputes generally and, under *Milwaukee I*, common law public nuisance cases involving interstate pollution in particular arise under federal law.

As we have explained, even if the Court were to depart from that settled precedent, *state* common law claims for public nuisance based on interstate pollution would continue to be litigated in both state and federal courts. *See supra* p. 26. The effect of *Milwaukee I* is thus not to create new litigation where none would have existed, but to enable the resolution of inevitable disputes under uniform law in a federal forum that treats the states as equals.

4. The Utilities further argue (at 39) that this Court's precedent has recognized federal common law claims only for "nuisances 'of simple type.'" That is not so. In *Missouri II*, Justice Holmes explained that there was "no pretense" that Missouri had advanced "a nuisance of the simple kind that was known to the older common law" – and then went on to discuss in exacting detail the "subtle" and "ingenious" evidence of "modern science," including a "striking experiment with typhoid germs suspended in the Illinois river in permeable sacs." 200 U.S. at 518, 522-26. The Court ultimately found that Missouri had not proven its

case, but the way in which it made that finding shows that it was not afraid to hear complex scientific evidence in a common law nuisance case.[16]

5. Finally, the Utilities claim (at 35-36) that *Tennessee Copper* rested on a "perceived constitutional necessity wholly lacking here" because it was decided "at a time when Congress was thought to lack the power" to regulate interstate pollution. They concede (at 36-37), as they must, that this theory cannot explain *Milwaukee I*, which is why they must urge this Court to disavow that case. They overlook, however, that it also cannot explain *Missouri II*, where the Court reached the merits of a public nuisance claim without deciding "whether Congress could act or not" to regulate the conduct at issue. 200 U.S. at 519. If the Court had thought that Congress's lack of power were a prerequisite to it hearing a nuisance claim, it would have decided that question first.

Indeed, the *Missouri II* Court explained that the possibility that Congress might lack power to act was a reason to be particularly cautious in hearing Missouri's claim, because it could mean that the Court's decision would "establish[] . . . a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States, sanctioned by" Congress. *Id.* at 520. Here, where Congress undoubtedly can act to regulate the carbon

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[16] Similarly, *New York v. New Jersey* includes a lengthy discussion of expert testimony concerning the levels of "dissolved oxygen" in the "water adjacent to New York City," which this Court described as "the best index or measure of the degree to which [water] is polluted by organic substances" under "the present state of learning." 256 U.S. at 311-12.

dioxide emissions at issue, that concern has no weight. The Utilities have their history backwards.

C. The Land Trusts State a Private Claim for Public Nuisance

1. The requirements of a cause of action for public nuisance arising from air or water pollution are straightforward: one who emits into the common air (as in *Tennessee Copper I*) or discharges into the common water (as in *Missouri I* or *New Jersey v. City of New York*) pollutants that endanger the public health or safety or that threaten property damage on a "great scale," *Tennessee Copper I*, 206 U.S. at 238, acts at risk of liability. These cases, and the many others that came before and after them, establish that massively harmful pollution is "an unreasonable interference with a right common to the general public" because it amounts to a "significant interference with the public health [and] the public safety." Restatement (Second) of Torts § 821B(1), 2(a); *see id.* § 826 cmt. e (discussing the "crystallization of legal opinion" that certain conduct is unreasonable as a "result of a series of judicial decisions"). Indeed, in *Washington v. General Motors Corp.*, 406 U.S. 109 (1972), decided the same day as *Milwaukee I*, the Court declared that "[a]ir pollution is . . . one of the most notorious types of public nuisance in modern experience." *Id.* at 114.[17]

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[17] The Utilities' attack on the common law of nuisance relies heavily on *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010), *pet. for cert. pending*, No. 10-997 (filed Feb. 2, 2011), in which the Fourth Circuit held the nuisance laws of the source states at issue there did not extend beyond the emissions limits for sulfur dioxide and other traditional pollutants regulated under the federal Clean Air Act. *See id.* at 306-10, *cited in* Pet. Br. 5, 24, 39, 42. The Court will have its own opportunity

Modern public nuisance law also includes the traditional special injury rule: a suit to enjoin a public nuisance may be brought only by a public official, or by a private party who has "suffered harm of a kind different from that suffered by other members of the public." Restatement (Second) of Torts § 821C(1)-(2). This rule serves "to relieve the defendant of the multiplicity of actions that might follow if everyone were free to sue for the common wrong." *Id.* cmt. a.[18]

2. The Utilities cannot and do not deny that global warming poses extraordinary risks to the public. This Court acknowledged in *Massachusetts v. EPA* that "[t]he harms associated with climate change are serious and well recognized," 549 U.S. at 521, and the scientific evidence supporting that conclusion has only grown more compelling since 2007. *See supra* pp. 5-7. Instead, the Utilities contend (at

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to decide on the correctness of that case. Regardless, it is irrelevant here, where there are no federal statutory limits on the Utilities' and TVA's pollution. Moreover, it is a telling indication of how broadly the Utilities' argument sweeps that it would eliminate the nuisance cause of action even with respect to traditional pollutants of the kind involved in the *Tennessee Copper* cases, and even when they have contributed to premature deaths and widespread illness. *See* Pet. for Cert. at 26-27, No. 10-997.

[18] Where it is unclear whether particular conduct constitutes a public nuisance, the Second Restatement counsels also taking into account whether that conduct "is of a continuing nature or has produced a permanent or long-lasting effect" and whether the defendant "knows or has reason to know" of its conduct's "effect upon the public right." Restatement (Second) of Torts § 821B(2)(c) & cmt. e. As shown in the text, this case involves conduct that is firmly established as unlawful. Regardless, the Utilities and TVA did know of the long-lasting harm caused by their continuing conduct, *see* JA127, 133-34, 137 (¶¶ 33, 43, 56), and this further buttresses respondents' claims against them.

39) that, because there are so many contributors to the problem of global warming and because so many throughout the world will ultimately be harmed by it, the traditional common law rule would "result[] in an essentially limitless set of potential plaintiffs and defendants." These concerns are exaggerated.

The concern that a private cause of action for public nuisance would result in a limitless number of *plaintiffs* is as old as the action itself. *See* Prosser, 52 Va. L. Rev. at 1007 (describing the concern, stated "many times" in the cases, that "[d]efendants are not to be harassed, and the time of the courts taken up, with complaints about public matters from a multitude who claim to have suffered"); Blackstone, 3 *Commentaries* *219 ("[I]t would be extremely hard, if every subject in the kingdom were allowed to harrass the offender with separate actions."). The courts have addressed this concern through the "special injury" requirement, *see* Prosser, 52 Va. L. Rev. at 1007, which this Court recognized as part of a private action for public nuisance at least as early as *Alexandria Canal*.

The Land Trusts have properly alleged a special injury. They own types of property – coastal areas, riverfront property, marshes, estuaries, and other types of unique wildlife habitat – that are particularly vulnerable to global warming. JA143-44 (¶¶ 80-87). Their reason for acquiring that property, moreover, is the special purpose of permanently conserving that property for environmental and aesthetic purposes, public access and enjoyment, and scientific research, JA118, 139-40, 141 (¶¶ 5, 67, 74), all of which global warming will prevent them from pursuing – for example, by inundating their land under rising seas. As long-lived organizations whose pri-

vate property rights are permanently and inextricably bound up with public purposes, the Land Trusts are uniquely well-situated to claim a special injury from global warming.

3. The Utilities' argument that a private cause of action for public nuisance would result in a limitless number of *defendants* is a variation on the argument that a defendant should escape liability for contributing to a public nuisance because many others have done the same and because it is impossible to pick out any particular defendant's contribution. This position, too, has been long rejected:

> It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. . . . Each standing alone, might amount to little or nothing. But it is when all are united together, and contribute to a common result, that they become important as factors, in producing the mischief complained of. . . . One drop of poison in a person's cup, may have no injurious effect. But when a dozen, or twenty, or fifty, each put in a drop, fatal results may follow.

Woodyear, 57 Md. at 9-10. Other nuisance cases (both public and private) take a similar position, as does the Second Restatement.[19]

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[19] *See*, *e.g.*, *Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001) ("[N]uisance liability at common law has been based on actions which 'contribute' to the creation of a nuisance."); *Gold Run Ditch & Mining*, 66 Cal. at 144, 148 (following *Woodyear* in a case where defendant's waste was intermingled with a "vast amount" of waste from other polluters on a river and with "still other material which is the product of natural erosion") (collecting cases) (internal quotation marks omitted); Restatement (Second) of Torts § 840E & cmt. b (discussing liability for an "aggregate nuisance resulting from the contributions of all").

That common law rule has been recognized and reaffirmed by recent cases involving multiple polluters. Courts often resolve claims that a defendant has *contributed* to a pollution-based injury even though the defendant's conduct would not alone have *caused* that injury. The best example is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). CERCLA actions commonly involve very large numbers of potentially responsible parties, yet Congress left it to the judiciary to apply "'traditional and evolving principles of common law'" for responsibility in tort "'when two or more persons acting independently cause a distinct or single harm.'" *Burlington Northern*, 129 S. Ct. at 1881 (quoting *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983), and Restatement (Second) of Torts §§ 433A, 881)) (alteration omitted).

Nor must the established principle of common liability for a collectively created nuisance be pushed to the absurd length that the Utilities suggest, so that "any entity on the planet could sue any other." Pet. Br. 19. "[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles," *Wisconsin Dep't of Revenue v. William Wrigley, Jr.*, 505 U.S. 214, 231 (1992), and the district courts know how to apply it. The most recent Restatement of Torts adopts this maxim as a matter of proximate cause doctrine. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 36 (2010) ("[w]hen an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm," there is no liability).

In this case, the contribution of the Utilities and TVA to global warming is *not* trifling. When the complaint was filed, they were responsible for one-tenth of all carbon dioxide emissions of the United States and more than one-fiftieth of all human-caused carbon dioxide emissions. *See supra* p. 7. That is enough to make this case worth bringing and hearing.

4. The Utilities further contend that the federal common law of public nuisance should not extend to their conduct because "[d]ifferent jurists would . . . impose different forms of relief against different sources of greenhouse gas emissions." Pet. Br. 40 (citing App. 35a). That concern goes to the available remedy, not to liability; but any extended debate about remedy here would be premature, because the States and Land Trusts have not yet had an opportunity to make the record that would support it. Once that record is made, the burden will be on the States and Land Trusts to show the appropriateness of a particular remedy.

As the Court observed in *Missouri I*, however, "such observations are not relevant" on motion to dismiss. 180 U.S. at 248-49. Further, this is not a case in which the complaint shows on its face that no meaningful relief can be granted. On the contrary, the complaint alleges that the Utilities and TVA have "available . . . practical and economically viable options for reducing their carbon dioxide emissions without significantly increasing the cost of electricity to their customers." JA119 (¶ 9) (giving examples). If found liable, they should at a minimum be required to employ such measures.

The Utilities assert (at 15-16, 47-48) that respondents' public nuisance claims will require the district

court to set a reasonable level for *all* global emissions and then parcel out the needed reductions among nations and industrial sectors. That assertion is incorrect. The appropriate remedy will turn on the reasonable remedial measures that these particular defendants should be required to take, in light of evidence about their technological and economic capabilities and their past knowing contributions to an enormous public problem.

In *Tennessee Copper II*, this Court issued an injunction that it found would provide "adequate relief" without "ascertain[ing] with certainty" the full relief "necessary to render the territory of Georgia immune from injury." 237 U.S. at 477-78. A Court that in 1915 was able to provide relief against destructive sulfur dioxide emissions should not accept a century later the notion that providing meaningful relief against destructive carbon dioxide emissions is beyond judicial competence.

II. RESPONDENTS' CLAIMS ARE JUSTICIABLE

The Utilities and TVA argue that the claims brought by the States and the Land Trusts are not justiciable. The Utilities contend that all respondents lack standing under Article III, § 2 of the Constitution and also that this case presents a political question. Pet. Br. 16-29, 46-51. TVA concedes that at least some States have Article III standing, TVA Br. 25-33, but contends that all respondents lack prudential standing because they are seeking relief for "generalized grievances," TVA Br. 13-24; *see also* Pet. Br. 30-31. These arguments lack merit.

If the Court concludes that the States have standing, it need not address the standing of the Land Trusts. One respondent with standing to seek

injunctive relief is enough. *See*, *e.g.*, *Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984); TVA Br. 32-33. Nevertheless, the Land Trusts will address their own standing because it is among the questions on which the Court granted certiorari.

A. Respondents Have Article III Standing

1. The judicial power of the United States extends only to resolving "Cases" and "Controversies." U.S. Const. art. III, § 2. These terms take their meaning from a historical understanding of the kind of "cases and controversies [that have] traditionally [been] amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102; *see Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (explaining that the "[j]udicial power . . . come[s] into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'"). Because of these historical roots to the doctrines that have grown up around Article III, this Court has treated "history [as] well nigh conclusive" of the inquiry into standing when a particular type of action was indeed the traditional concern of the English courts. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777 (2000).

As we have shown in Part I.A, this case involves just the kind of long history that the Court found "well nigh conclusive" in *Vermont Agency*. Lawyers of the founding generation would have been thoroughly familiar with the concept of a public nuisance, which was established by many English cases and discussed in authoritative references. They would have been (as Chancellor Kent was in *Corning*) equally familiar and comfortable with the concept

that a private individual could seek relief for a public nuisance after showing a special injury. The Utilities face a daunting task in attempting to show that the application of this old law to new facts transgresses constitutional limits on the judicial role.

2. The Land Trusts' constitutional standing is confirmed by this Court's modern refinement of the test, which identifies three "requisite elements": (1) a "personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and (3) "likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (internal quotation marks omitted).

First, the Land Trusts have alleged "an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent.'" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citations and footnote omitted). The injury that the Land Trusts have alleged is damage to their property, a paradigm example of a concrete and particularized interest. *See*, *e.g.*, *Hodel v. Irving*, 481 U.S. 704, 711 (1987) (holding that loss of a fractional property interest was injury-in-fact). Heightened levels of carbon dioxide already in the atmosphere will cause that property "actual and imminent" injury, *Massachusetts v. EPA*, 549 U.S. at 521 (internal quotation marks omitted): temperatures are increasing, ecosystems are changing, and sea levels are rising. Those injuries will only increase over time, perhaps catastrophically so. The Land Trusts' injury-in-fact is further supported by their special interest in preserving their properties permanently for conservation purposes and for public use. *See supra* pp. 31-32.

Second, the Land Trusts have alleged facts to show that their injury is fairly traceable to the unlawful conduct of the Utilities and TVA. Those entities "and their predecessors in interest have emitted large amounts of carbon dioxide from the combustion of fossil fuels for at least many decades," which "will remain in the atmosphere for many [more] decades, or even centuries." JA137 (¶ 56). The Land Trusts have further alleged that the Utilities and TVA have been increasing their emissions faster than the rest of the U.S. economy and will continue to do so in the future. JA136-37 (¶ 54). "Judged by any standard," the Utilities and TVA "make a meaningful contribution to greenhouse gas concentrations and hence," based on the facts alleged, "to global warming." *Massachusetts v. EPA*, 549 U.S. at 525.

Third, the same facts that establish causation further show that the Land Trusts' injuries would be redressed by judicial relief. Where, as here, "[t]he relief requested . . . [is] simply the cessation of the allegedly illegal conduct," the "'redressability' analysis is identical to the 'fairly traceable' analysis." *Allen v. Wright*, 468 U.S. 737, 759 n.24 (1984); *see* Pet. Br. 22 (citing *Allen*). The "enormity of the potential consequences associated with manmade climate change" weigh heavily in favor of a finding that even a small reduction in the "risk of catastrophic harm" satisfies the bare minimum constitutional requirement for standing. *Massachusetts v. EPA*, 549 U.S. at 525, 526. And there is "a substantial likelihood that the judicial relief requested will . . . reduce that risk." *Id.* at 521 (internal quotation marks omitted).

As TVA acknowledges (at 28-30), the Court's constitutional holding in *Massachusetts v. EPA*, where nearly identical allegations were held to satisfy

"the most demanding standards of the adversarial process," 549 U.S. at 521, provides ample support for traceability and redressability in this case. Indeed, the relationship between injury and remedy is tighter in this case than in that one: the Land Trusts seek substantive judicial relief that would *directly* restrain the largest emitters of carbon dioxide in the United States, rather than procedural relief to create "some possibility . . . [of] prompt[ing] . . . [EPA] to reconsider [its] decision" not to take regulatory action to reduce emissions. *Id.* at 518.

Accordingly, it makes no difference (as the Utilities contend, at 24-29) that there is no statutory remedy here, as there was in *Massachusetts v. EPA*. The special "'chain[] of causation'" that "'Congress ha[d] . . . articulate[d]'" in that case, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)), was the chain between the "procedural right" to challenge agency action and the ultimate action that the agency might take, *id.* at 520. Here, the States and Land Trusts do not need to take those extra causal steps, so they do not need "special solicitude" to establish standing. *Id.*[20]

3. The Utilities argue (at 18) that the Land Trusts have failed to "allege [a] . . . direct connection between these defendants' emissions and the individual risks to which plaintiffs are allegedly exposed" and that without such an allegation the harm to the Land Trusts is not traceable to the Utilities' conduct.

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[20] For the same reason, it also does not matter that the Land Trusts lack the "quasi-sovereign" interest that Massachusetts had in protecting its state-owned lands. *Massachusetts v. EPA*, 549 U.S. at 520. To be sure, the States *do* have that same quasi-sovereign interest here.

What the Utilities appear to mean is that, if they were the only emitters of carbon dioxide in the world, their emissions would not alone cause significant global warming, *see id.* at 19-20; they say this fact creates a constitutional barrier to relief.

There is not and should not be any such rule, constitutional or otherwise. As we have explained, the common law of public nuisance recognizes that the courts may adjudicate claims for a defendant's *contribution* to a cognizable injury, and federal courts frequently apply that law in pollution cases. *See supra* pp. 32-34 & n.19.

The Utilities acknowledge this rule, but attempt to distinguish it on the ground that the common law requires "a plausible inference that all [contributors] might be 'substantial factors' in causing the injury." Pet. Br. 20 n.4 (citing Restatement (Second) of Torts §§ 432, 840E, 875). But liability for contribution to a nuisance lies even when any single actor's contribution would be "harmless in itself" and even when the nuisance has already "reached the point where it causes . . . serious interference with the rights of those who use the water" before that contribution is made. Restatement (Second) of Torts § 840E cmt. b; *see id.* (giving the example of one who "pollute[s] a stream to only a slight extent") What the Utilities seek is thus to "raise the standing hurdle higher than the necessary showing for success on the merits in an action," which this Court has declined to do. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Cases in which alleged harm was caused by "the unfettered choices made by independent actors not before the courts," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion), *quoted in* Pet. Br.

21, do not help the Utilities. Those cases sought relief against government defendants who had not themselves injured the plaintiffs; instead, their conduct had allegedly affected the conduct of third parties who had caused injury. *See id.* Because those plaintiffs could not show that the relief they sought would *actually* affect the third party's actions, they could not establish standing.[21] No such intervening causes are present here, where the Utilities themselves are adding to the atmosphere hundreds of millions of tons of carbon dioxide yearly, contributing to the general injury to the public and the special injuries to the Land Trusts.

The Utilities also argue (at 23-24) that, because the States and Land Trusts seek to compel them only to do their "share" to slow or reduce global warming, the alleged harm is not judicially redressable. This argument exactly parallels one that was rejected in *Massachusetts v. EPA*. *See* 549 U.S. at 526 ("The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek."). And that holding is consistent with precedent that permits a suit for injunctive relief against a contribu-

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[21] *See Lujan*, 504 U.S. at 570-71 (plurality opinion) (rejecting a suit by environmental groups that would have decreased U.S. funding for projects that injured endangered species, but not necessarily stopped the projects); *ASARCO*, 490 U.S. at 614-15 (plurality opinion) (rejecting a suit by state teachers against the Arizona Land Department to invalidate mineral leases because doing so would not necessarily have caused Arizona to spend more money on education); *Allen*, 468 U.S. at 757-59 (rejecting a suit by parents of schoolchildren to invalidate tax exemptions for racially discriminatory schools because the schools would not necessarily have changed their policies in response).

tor to a nuisance even when all the other contributors are not joined.

B. Respondents Have Prudential Standing

This Court need not and should not address TVA's contention that the States and Land Trusts lack prudential standing. That contention was "neither pressed nor passed upon below." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion). Nevertheless, the Land Trusts will address the issue because TVA makes the argument at length and because this Court has occasionally considered prudential standing for the first time after granting certiorari. *See*, *e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-18 (2004).

1. As TVA observes (at 14), the principle that the federal courts will decline as a prudential matter to hear claims that would require "adjudication of generalized grievances more appropriately addressed in the representative branches," *Allen*, 468 U.S. at 751, is "closely related to Art[icle] III concerns," *Newdow,* 542 U.S. at 12 (internal quotation marks omitted). The historical answer to the Utilities' constitutional standing objection, *see supra* pp. 36-37, thus has equal force in response to TVA's prudential argument. Further, the special injury rule evolved specifically to address concerns about a "multiplicity of potential litigants," TVA Br. 17, much like the concerns underpinning prudential standing. The Land Trusts' ability to meet that requirement, *see supra* pp. 31-32, answers whatever concerns may remain.

2. In any event, the injury the Land Trusts seek to prevent is not "generalized": rather, their concern is that the particular property they own will be damaged by global warming and that this will interfere with their particular mission to preserve this proper-

ty for future generations. That injury is not common to all citizens or even to all landowners. Even among those private landowners who own land that they have specially committed to preserve, the character and degree of the injury varies. It is not "undifferentiated and common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (internal quotation marks omitted).

The dissent in *FEC v. Akins*, 524 U.S. 11 (1998), which took a more demanding view of standing than did the majority, made this point very clear. *See id.* at 35 (Scalia, J., dissenting) ("One tort victim suffers a burnt leg, another a burnt arm – or even if both suffer burnt arms they are *different* arms. . . . With the generalized grievance, on the other hand, the injury or deprivation is not only widely shared but it is *undifferentiated*."). Just so here: global warming may cause landowners other than the Land Trusts to suffer the loss of *different* property, but the Land Trusts will be the only ones to suffer damage to the particular land they are charged with preserving.

3. TVA's contention that the respondents in this case lack prudential standing is unsupported by precedent and seeks a dramatic extension of that doctrine. TVA cites no case in which this Court has applied the rule against generalized grievances to bar any common law claim. Instead, that rule limits the plaintiffs who can assert constitutional and statutory challenges to government action, by prohibiting "undifferentiated, generalized grievance[s] about the conduct of government," where "[t]he only injury plaintiffs allege is that the law . . . has not been followed." *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam).

TVA asserts in a footnote (at 21 n.7) that the rule it seeks is distinct from the rule applied in *Lance*, conceding that "plaintiffs are not asserting the 'generalized' interest of a taxpayer or citizen in having the government follow the law." But, if TVA is not relying on *Lance* and its predecessors, then it appears to be asking the Court to invent a new doctrine without justification. Conduct-of-government cases are the only generalized-grievance cases there are. Prudential standing has never been, and should not be, an open-ended inquiry into whether a judge thinks that a particular claim of private right has such broad-reaching consequences that the plaintiff should go to Congress and not to court.

C. Respondents' Claims Raise No Political Question

In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), involving international and interstate pollution of Lake Erie with mercury, the Court specifically distinguished interstate pollution cases from "political questions" and held that under *Tennessee Copper I* and other interstate pollution cases, the judiciary is "empowered to resolve this dispute in the first instance." *Id.* at 496 (internal quotation marks omitted). Undeterred, the Utilities contend (at 46-51) that this case falls within the political question doctrine. That doctrine applies primarily when the text of the Constitution commits the resolution of an issue to one of the representative branches of government, rather than to the courts. *See Nixon v. United States*, 506 U.S. 224, 228 (1993) ("[T]he courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed.").

The Utilities press no claim of such a textual commitment before this Court. On the contrary, a common law public nuisance claim fits comfortably within the traditional definition of a "Case" or "Controversy." *See supra* p. 36. Accordingly, "the textual commitment factor actually weighs in favor of resolution by the judiciary." *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008).

Both in theory and as applied, the political question doctrine "is purposely very narrow in scope." *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1236 (D.C. Cir. 2009), *pet. for cert. pending*, No. 10-699 (filed Nov. 24, 2010). A case does not present a political question merely because it has "great importance to the political branches" or "has motivated partisan . . . debate." *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992). Nor is it sufficient that a case exhibit "interplay . . . [with] the conduct of this Nation's foreign relations" or "have significant political overtones." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). So long as the case involves a "characteristic role[]" of the judiciary such as "interpret[ing] statutes," *id.*, it remains justiciable. Deciding common law claims is certainly consistent with the traditional judicial role.

The Utilities contend that this case requires an "'initial policy determination'" that has not yet been made. Pet. Br. 47 (quoting *Baker*, 369 U.S. at 217). That is hard to square with their claim two pages earlier that Congress has already made all the relevant "basic policy choices," *id.* at 45, but even taken on its own terms the claim is incorrect. The policy decision relevant to a common law claim for public nuisance was made long ago, when the courts first recognized such claims.

The Utilities further contend that this case exhibits a lack of "'judicially discoverable and manageable standards.'" *Id.* at 47 (quoting *Baker*, 369 U.S. at 217). But the standards for determining liability for public nuisance are a matter of established precedent, *see supra* pp. 29-31, and have repeatedly been applied to sources of pollution that threaten health and property, *see supra* pp. 19-21. As for the remedy, the "considerations that equity always takes into account," *Tennessee Copper I*, 206 U.S. at 238 (Holmes, J.), are nothing if not judicially manageable. *See supra* pp. 34-35 (discussing possible remedies in this case).

III. RESPONDENTS' FEDERAL COMMON LAW CLAIMS HAVE NOT BEEN DISPLACED

Both the Utilities and TVA contend that the States' and Land Trusts' federal common law claims have been displaced, but they do so based on strikingly different theories. The Utilities argue that any federal common law claims for air pollution have been categorically displaced by the mere existence of the Clean Air Act, whatever EPA may or may not do. Pet. Br. 40-46. TVA argues that the Court need not reach that broader question but should instead determine that EPA's particular regulatory actions regarding carbon dioxide have displaced respondents' claims, TVA Br. 42-53, though those actions have not yet limited emissions by the Utilities or by TVA.

The Utilities' broad argument is wrong and misreads *Milwaukee II*, the case on which the Utilities principally rely. TVA's narrower claim is premature.

A. Neither the Clean Air Act nor EPA Regulations Presently Limit Petitioners' Emissions

The Clean Air Act contains mechanisms under which EPA can potentially regulate emissions of carbon dioxide by an existing stationary source such as a power plant. None of these mechanisms has yet been used to regulate the Utilities' or TVA's existing stationary sources.

This Court's decision in *Massachusetts v. EPA* established that carbon dioxide is an "air pollutant" within the meaning of § 302(g) of the Act, 42 U.S.C. § 7602(g). That case concerned EPA's obligations to address carbon dioxide and other greenhouse gas emissions from new motor vehicles under § 202 of the Act, 42 U.S.C. § 7521. The Court remanded for EPA to consider the scientific evidence and decide whether emissions of these pollutants from new vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7521(a)(1). EPA made a two-part determination in December 2009 (1) that greenhouse gas emissions accumulated in the atmosphere endanger both public health and welfare, and (2) that emissions of those pollutants from new motor vehicles contribute to the accumulation of dangerous air pollution in the atmosphere.[22] EPA then promulgated greenhouse gas emission standards for light-duty motor vehicles.[23]

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[22] EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

[23] EPA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

These motor vehicle emission standards triggered two other provisions of the Act, neither of which limits carbon dioxide emissions from existing power plants. Under § 165 of the Act, 42 U.S.C. § 7475, the construction of *new* and *modified* "major emitting facilities" is prohibited without a permit containing an emission limitation reflecting the best available control technology "for each pollutant subject to regulation under this chapter." *Id.* § 7475(a)(4). Beginning on January 2, 2011 (when the motor vehicle standards took effect), carbon dioxide became "subject to regulation" for purposes of that program. None of the existing facilities at issue here will be affected by § 165, however, unless the Utilities or TVA make "major modification[s]" to them.[24]

EPA's vehicle greenhouse gas emission standards also affect the requirement that major stationary sources obtain "operating permits" under Title V of the Act. 42 U.S.C. § 7661a. The agency imposes no substantive requirements when issuing a Title V operating permit: such a permit merely compiles pre-existing requirements established under other parts of the Act, serving as an aid to their enforcement. The existing power plants operated by the Utilities and TVA already have Title V operating permits compiling pre-existing emissions limitations for long-regulated pollutants such as sulfur dioxide, nitrogen oxides, and particulate matter. Until they are subjected to actual limitations on their carbon

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[24] A "major modification" for these purposes is "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase . . . of a regulated NSR pollutant . . . ; and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 51.166(b)(2).

dioxide emissions by some other provision of the Act, their Title V permits will not need to be changed and will not limit carbon dioxide emissions.

EPA's principal pathway for regulating carbon dioxide emissions from existing power plants under the Clean Air Act is by imposing performance standards under § 111 of the Act, 42 U.S.C. § 7411. Under § 111, EPA defines a list of categories of stationary sources that in the Administrator's judgment "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" and sets emission levels for specific pollutants from new or modified sources based on a determination of what is achievable using the "best system of emission reduction" available. *Id.* § 7411(a)(1), (b)(1)(A). Under § 111(d)(1), EPA also (in coordination with the states, and with exceptions not applicable here) sets similar performance standards for *existing* sources in the listed categories, weighing factors including sources' "remaining useful lives." *Id.* § 7411(d)(1).

Power plants have been a listed category since 1971, but EPA has set § 111 performance standards to date only for a few pollutants such as sulfur dioxide, nitrogen oxides, and particulate matter. EPA has not yet established § 111 standards that limit emissions of carbon dioxide. It has, however, recently agreed in a settlement of other litigation to initiate a rulemaking in which it will *consider* whether to do so. *See* TVA Br. 10, 50-51. The settlement commits EPA to complete a rulemaking process covering existing power plants by May 2012. If EPA acts, states would then be obligated to establish and implement emission standards for their existing

power plants – or, if the states do not act, EPA will step in. *See* 42 U.S.C. § 7411(d)(2)(B).

Under the settlement, however, EPA is not obliged to promulgate carbon dioxide emission limitations either for new and modified power plants or for existing plants. EPA has retained the option of not ultimately issuing any such standards.

Further, the settlement expressly depends on the availability of appropriated funds, recognizing that Congress could deny EPA funding to regulate carbon dioxide. Language that would have done so was included in a recent appropriations bill that passed the House of Representatives on February 19, 2011, *see* H.R. 1, 112th Cong., div. B, tit. VII, § 1746, at 276-77 (2011), but was not adopted by the Senate. Though that funding rider was not enacted, it illustrates the real possibility that EPA's current efforts, though undertaken in good faith, may come to nothing. It would be inappropriate, for the purposes of displacement, simply to assume that emissions standards will be forthcoming.

B. The Clean Air Act Does Not of Its Own Force Displace Respondents' Claims

1. Congress displaces federal common law when it "'speak[s] directly to a question'" that common law would otherwise govern. *Milwaukee II*, 451 U.S. at 315 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). But common law remains in place when "problems requiring federal answers are not addressed by federal statutory law." *Id.* at 319 n.14.

In *Milwaukee II*, this Court held that, because the sewage discharges that gave rise to the cause of action in *Milwaukee I* had been "thoroughly addressed through the administrative scheme established by

Congress," that cause of action was displaced. *Id.* at 320. The Clean Water Act, the Court found, had already put in place a specific permitting mechanism for controlling the problem that Illinois had alleged to be a public nuisance. That mechanism had already led to judicial relief including an order that any overflows be abated – relief practically identical to what would have been available in a public nuisance action. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 239 (1985) (observing that *Milwaukee II* relied on the "specific remedial provisions contained in" the Clean Water Act).

Under these circumstances, it is unsurprising that the Court concluded that Illinois' attempt to renew its nuisance claim rested fundamentally on a belief that "the permits issued to petitioners under the Act do not control overflows or treated discharges in a *sufficiently stringent* manner," *Milwaukee II*, 451 U.S. at 324 n.18 (emphasis added), and declined to allow Illinois to proceed. As the Court put it in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), the problem in *Milwaukee II* was that "plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those" of the Clean Water Act. *Id.* at 489 n.7.

2. This Court's decision in *Massachusetts v. EPA* held that the Clean Air Act authorizes EPA to regulate carbon dioxide. That decision by itself, however, imposed no limits on carbon dioxide emissions even from mobile sources such as automobiles, let alone from existing stationary sources such as power plants. Rather, it remained for EPA to make endangerment and contribution findings and establish emission standards under § 202(a) of the Clean Air Act before any constraint was imposed even on

automobile manufacturers. Until EPA issues performance standards applicable to existing power plants, carbon dioxide emissions from the Utilities' and TVA's existing plants will remain unregulated. *See supra* pp. 46-50.

The Utilities contend (at 45) that EPA's mere "authority . . . to make regulatory decisions" displaces federal common law remedies. That goes far beyond *Milwaukee II*. Indeed, in that case this Court emphasized that under the Clean Water Act "*[e]very* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." 451 U.S. at 318 (footnote omitted). The Clean Air Act contains no similar prohibitions. It allows existing-source emissions to continue without limitation until they are restricted by affirmative agency action; in this case, by performance standards that the agency may issue (but has not yet issued) under § 111.

C. Regulatory Action by EPA Has Not Yet Displaced Respondents' Claims

TVA suggests that, whether or not the Clean Air Act itself displaces federal common law claims, EPA's recent actions have increased the level of agency involvement enough for displacement. That would be premature. Displacement will occur only when federal standards govern the emission of carbon dioxide from existing power plants. Only then will Congress and EPA have "'spoke[n] directly to [the] question,'" *Milwaukee II*, 451 U.S. at 315, and provided a "uniform standard" for "dealing . . . with the environmental rights of a State against improper impairment by sources outside its domain" that removes the

need for federal common law, *Milwaukee I*, 406 U.S. at 107 n.9 (internal quotation marks omitted).[25]

First, TVA states that, as a collateral consequence of the action EPA has taken on motor vehicles, any "new or modified 'major emitting facility'" must now obtain a permit under § 165 that includes the best available control technology for carbon dioxide. TVA Br. 47-48 & n.21 (quoting 42 U.S.C. § 7475(a)). As of this writing, however, the Land Trusts know of no existing facility operated by the Utilities or TVA that has been modified since January 2, 2011. Any constraints stemming from § 165 will affect only those power plants that are modified in the future and will never affect the vast majority of existing power plants that merely continue current operations.

Second, TVA states, that as another collateral consequence of EPA's motor-vehicle action, the power plants at issue are now "subject to the permitting requirements under Title V of the" Clean Air Act. TVA Br. 48. TVA overstates its case. As we have explained, unlike discharge permits under the Clean Water Act, Title V permits are compilations of pre-existing requirements; they do not limit carbon dioxide emissions. *See supra* p. 48.

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[25] *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), is not to the contrary. TVA contends that the statute in *Sea Clammers* displaced federal common law even though it allowed "'continued dumping of sludge' for nine years after" its enactment. TVA Br. 52 (quoting *Sea Clammers*, 453 U.S. at 22 n.32). But dumping during those nine years required a permit, *see* 453 U.S. at 12, which under *Milwaukee II* was enough to displace. After that time, EPA was directed to end sludge dumping *completely*. *See id.* at 9 n.14. Accordingly, *Sea Clammers* does not establish that federal common law may be displaced by a regulatory regime that does not yet regulate.

Third, TVA also states that EPA intends to complete a rulemaking by May 26, 2012, that may lead to limits on existing facilities' emissions of carbon dioxide under § 111 of the Act. TVA Br. 51 & n.25. As TVA itself concedes, one possible outcome of that process is that EPA will *not* impose any limits, or even decide whether limits would be appropriate. Among other things, Congress may decline to fund EPA's rulemaking without changing the underlying substantive law. *See supra* pp. 49-50. Congress also might remove EPA's authority to regulate carbon dioxide entirely.[26] What, if anything, such legislative actions would do to federal common law causes of action for air pollution would depend on what Congress said and how.

Adopting a turn of phrase suggested by the Solicitor General, this Court once wrote that the repeal of a statute cannot "leave behind a pre-emptive grin without a statutory cat." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988). This case involves a claim that the pre-emptive grin *precedes* an *anticipated* regulatory cat. Displacement of federal common law is appropriate when, and only when, some substantive rule of regulatory law arrives to displace it. "[U]ntil that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water" – and no less air – "pollution." *Milwaukee I*, 406 U.S. at 107.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[26] *See*, *e.g.*, Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (introduced Mar. 3, 2011).

Respectfully submitted,

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