NO. 10-174

IN THE
Supreme Court of the United States

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

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

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

BRIEF OF ENVIRONMENTAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

AMANDA C. LEITER
Counsel of Record
Associate Professor of Law
The Catholic University of America
Columbus School of Law
3600 John McCormack Rd. NE
Washington, DC 20064
leiter@law.edu
Tel: (202) 319-6755
Fax: (202) 319-4459

Mar. 18, 2011

(List Of Amici Curiae Continues On Inside Cover)

HOPE BABCOCK
Professor of Law
Georgetown University Law Center
600 New Jersey Ave., NW
Washington, DC 20001
202-662-9000

ERIC BIBER
Acting Professor of Law
UC Berkeley School of Law
215 Boalt Hall
Berkeley, CA 94720
510-642-1741

J. PETER BYRNE
Professor of Law
Georgetown University Law Center
600 New Jersey Ave., NW
Washington, DC 20001
202-662-9000

HEATHER ELLIOTT
Assoc. Professor of Law
The University of Alabama School of Law
Box 870382
101 Paul W. Bryant Dr. E
Tuscaloosa, AL 35487
205-348-9965

ERIC T. FREYFOGLE
Max L. Rowe Professor of Law
University of Illinois College of Law
504 E Pennsylvania Ave.
Champaign, IL 61820
217-333-8713

ROBERT GLICKSMAN
J. B. and Maurice C. Shapiro Professor of Environmental Law
The George Washington University Law School
2000 H St., NW
Washington, DC 20052
202-994-4641

AMY J. WILDERMUTH
Professor of Law
University of Utah S.J. Quinney College of Law
332 S. 1400 E.
Salt Lake City, UT 84112
801-585-9694

QUESTION PRESENTED

Can unexercised federal regulatory authority over a pollution source displace federal common law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REGULATIONS and
REGULATORY MATERIALS Page

OTHER MATERIALS Page

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Amici law professors, listed below, teach and write in the areas of torts and environmental law and take a professional interest in the development of this Court's preemption jurisprudence. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.[1]

Hope Babcock is a Professor of Law at Georgetown University Law Center. She teaches environmental and natural resources law and writes in the areas of environmental and natural resources law, administrative law, common law property doctrines, and federalism.

Eric Biber is an Assistant Professor at UC Berkeley School of Law. He is a specialist in conservation biology, land-use planning, and public lands law. His principal research interests include environmental and natural resources law, administrative law, and property.

J. Peter Byrne is a Professor of Law at Georgetown University Law Center, where he also directs the school's Environmental Law and Policy Program and its State-Federal Climate Resource Center. He teaches and writes in the areas of Property, Land Use, Historic Preservation, and Constitutional Law.

---

[1] The parties have consented to the filing of this brief in letters on file with the Clerk's office. Amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than Amici made a monetary contribution to the preparation or submission of the brief.

Heather Elliott is an Associate Professor at the University of Alabama School of Law, where she teaches civil procedure, land use law and planning, and water law. Her scholarship focuses on the role of courts and agencies in a democratic society.

Eric T. Freyfogle is the Max L. Rowe Professor of Law at the University of Illinois College of Law. He has long taught and written in the areas of natural resources, property, and environmental law and policy.

Robert Glicksman is the J. B. and Maurice C. Shapiro Professor of Environmental Law at George Washington University Law School and an internationally recognized expert on natural resources, environmental, and administrative law issues.

Amanda Cohen Leiter is an Associate Professor of Law at the Catholic University of America's Columbus School of Law. Her teaching and research interests include torts, administrative law and process, and environmental law and policy.

Amy J. Wildermuth is a Professor of Law at the University of Utah's S.J. Quinney College of Law. She teaches and writes in the areas of civil procedure, administrative law, natural resources and environmental law, property, and Supreme Court practice.

SUMMARY OF ARGUMENT

This Court has long recognized the vital role that federal law plays in interstate pollution disputes, providing uniform standards under which to evaluate the widely divergent interests of source states and affected states. Until Congress addresses an interstate pollution problem, federal common law supplies the required standards. Later, after Congress and the relevant federal agency have acted, the governing statutes and regulations provide those standards, and there is no longer need to resort to federal common law.

This case, however, falls in the gap between those time periods. The federal Clean Air Act delegates to the Environmental Protection Agency authority to regulate greenhouse gas emissions from Petitioners' and TVA's existing sources, but the agency has not yet acted on that authority, nor has it finally decided to postpone or forgo action. Consequently, no provision of federal statutory or regulatory law governs those emissions.

In this time period, federal statutory and regulatory law cannot help to resolve this dispute between sovereign state plaintiffs and the out-of-state companies whose conduct the states seek to abate. Under those circumstances, both first principles and this Court's jurisprudence dictate that the responsibility to fill the gap and supply the necessary uniform standards falls squarely on the federal courts. Connecticut and other sovereign state victims of interstate pollution deserve no less.

ARGUMENT

I. FEDERAL LAW IMPOSES NO LIMITS ON GREENHOUSE GAS EMISSIONS FROM PETITIONERS' AND TVA'S EXISTING FACILITIES.

The central issue in any displacement analysis is the coverage of existing federal statutory and regulatory law. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985) ("[T]he relevant inquiry [in a displacement case] is whether the statute '[s]peaks *directly* to [the] question' otherwise answered by federal common law." (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) ("*Milwaukee II*") (alterations and emphasis in *Oneida*))). Petitioners and TVA fill tens of pages in their opening briefs detailing the many things Congress, the President, and the Environmental Protection Agency (EPA) have done or could do to address greenhouse gas emissions in the United States. Pet. Br. at 5-10, 41-45; TVA Br. at 2-5, 46-52. Only one such fact is relevant to this case, however, and it fits in a single sentence: No federal statute or regulation now limits greenhouse gas emissions from Petitioners' and TVA's existing facilities.

To be sure, the Clean Air Act (CAA) grants EPA the authority to control greenhouse gas emissions, *see generally Massachusetts v. EPA*, 549 U.S. 497 (2007), and the agency has begun to act on that authority with respect to other types of emissions sources, *see* TVA Br. at 46-52 (detailing EPA's regulatory posture with respect to greenhouse gas emissions); Land Trust Br. at 47-50 (same). Thus far, however, EPA

has not limited greenhouse gas emissions from Petitioners' and TVA's existing facilities.

As Petitioners and TVA note, EPA has taken one action on greenhouse gases that relates indirectly to large stationary sources. In May 2010, pursuant to the *Massachusetts* decision, the agency commenced regulating greenhouse gas emissions from new motor vehicles. 75 Fed. Reg. 25,324. Under the arcane structure of the CAA, that regulation automatically triggered two separate CAA programs, though neither limits greenhouse gas emissions from Petitioners' and TVA's existing large and stationary facilities. *See generally* Land Trust Br. at 48 (describing the triggering mechanism).

First, the motor vehicle regulation triggered CAA § 165, 42 U.S.C. § 7475, which requires that large new and modified stationary sources of greenhouse gases must obtain a preconstruction permit that incorporates an emission limitation reflecting the best technology currently available to control greenhouse gas emissions. *See generally* TVA Br. at 47-50 & n.23 (explaining the so-called "PSD" program); Land Trust Br. at 48 (same). This requirement, however, applies only if and when Petitioners or TVA build a wholly new facility or undertake a major capital improvement project that significantly increases greenhouse gas emissions from an existing plant. *See* CAA § 165, 42 U.S.C. § 7475(a) (imposing PSD requirements on "major emitting facilit[ies] on which construction is commenced after August 7, 1977"); CAA § 169, 42 U.S.C. § 7479(2)(C) (defining "construction" to include "modification"). As a result, Petitioners and TVA may continue to operate their existing plants indefinitely without becoming subject to this preconstruction

permitting requirement. *See generally* Deepa Varadarajan, Note, *Billboards and Big Utilities: Borrowing Land Use Concepts to Regulate 'Nonconforming' Sources Under the Clean Air Act*, 112 Yale L. J. 2553, 2563 (2003) (discussing the PSD program's "dismal" record of controlling emissions from electric utility plants).

The second automatic consequence of EPA's motor vehicle regulations is that major stationary sources like Petitioners' and TVA's facilities now must incorporate any existing greenhouse gas emissions limits into the "operating permits" those sources have obtained under CAA Title V. CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f. Contrary to their name, however, Title V permits are not true permits-to-emit, but are instead mere compilations of a source's existing legal obligations. In other words, somewhat like the explanatory tax booklets that the Internal Revenue Service (IRS) mails to taxpayers each year, a Title V operating permit simply aggregates preexisting regulatory obligations; the permit itself imposes no new emissions limits. In the absence of a substantive tax code, the IRS booklets would impose no obligation to send a check on April 15; in the absence of substantive greenhouse gas standards, Petitioners' and TVA's Title V permits likewise impose no obligation to limit greenhouse gas emissions.

Petitioners and TVA also identify a potential *future* EPA action with respect to greenhouse gases from large stationary facilities like Petitioners' and TVA's, but again, that still-unrealized action imposes no present limits on Petitioners' and TVA's greenhouse gas emissions. The agency has indicated that more than a year from now, in May 2012, it *may*

issue a final rule under Section 111 of the CAA. *See http://www.epa.gov/airquality/pdfs/boilerghgsettlement.pdf* at ¶3 (proposing, in settlement of *New York v. EPA*, D.C. Circuit No. 06-1322, to complete by May 2012 a rulemaking process under CAA § 111, 42 U.S.C. § 7411, to develop standards of performance for greenhouse gas emissions from electricity generating units). If issued, that rule *might* limit greenhouse gas emissions from new and modified power plants, and it *might* also require—by a date in the still more distant future—that States impose similar limits on existing power plants. *See id.*; Pet. Br. at 9; TVA Br. at 50-51 & n.25 (explaining the implications of a Section 111 rule for states).

Again, however, no current Section 111 regulation imposes greenhouse gas emissions limits on Petitioners, TVA, or anyone else, and TVA's brief emphasizes that EPA has reserved the right not to impose any such limits at the end of the rulemaking. TVA Br. at 51 n.25 ("A commitment to complete a [Section 111] rulemaking will not mean that EPA has prejudged the question of what, if any, [greenhouse gas emissions standard] will be appropriate; *EPA could ultimately exercise its judgment to find the imposition of such standards inappropriate*." (emphasis added)). Moreover, some members of the current Congress disapprove of the proposed settlement; they have made legislative proposals that, if enacted, would bar EPA from using funds to complete a Section 111 rulemaking or, more broadly, from regulating greenhouse gases. *See, e.g.*, Full-Year Continuing Appropriations for Fiscal Year 2011, H.R. 1, 112th Cong., div. B, tit. VII, § 1746, at 276-77 (2011) (barring use of funds); Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (introduced Mar. 3, 2011) (barring regulation of greenhouse gases).

In conclusion, although the CAA grants EPA the authority to regulate greenhouse gas emissions from Petitioners' and TVA's existing facilities, *Massachusetts v. EPA*, 549 U.S. at 528-29; Pet. Br. at 8-9, the agency has not yet done so. Further, EPA has not finally decided *not* to act on its Section 111 regulatory authority with respect to greenhouse gases; the agency is merely considering what action to take. TVA Br. at 51 n.25 (preserving EPA's discretion). In sum, therefore, EPA has neither regulated nor rejected regulating greenhouse gas emissions from Petitioners' and TVA's existing facilities.

II. UNEXERCISED FEDERAL REGULATORY AUTHORITY DOES NOT AND SHOULD NOT DISPLACE FEDERAL COMMON LAW.

The fact that there are neither federal statutory nor federal regulatory limits on greenhouse gas emissions from Petitioners' and TVA's existing facilities casts in a different light the displacement standard articulated in TVA's opening brief. As TVA explains:

> Federal common law is displaced when an administrative agency takes regulatory action, under the authority of a comprehensive statutory program, to address the issue raised in a putative common-law action. Such displacement can occur when a plaintiff seeks relief that would address the same issue, but in a manner different in character or extent from what the regulatory program provides.

TVA Br. at 44 (citations omitted).

Having accurately characterized the standard, TVA fails in its application of law to fact. This is not a case in which "a plaintiff seeks relief that would address the same issue, but in a manner different in character or extent from what the regulatory program provides." *Id.* Rather, Respondents seek to abate tortious conduct that is not yet addressed by the relevant regulatory program—namely, the uncontrolled emission of large quantities of greenhouse gases from Petitioners' and TVA's existing stationary sources.

TVA alternatively suggests that displacement can "occur[] when an agency … decides to postpone or even forgo the imposition of regulatory standards, where the decision is made … on the basis of a weighing of relevant considerations under the statutory scheme." *Id.* at 44-45. Notably, TVA cites no caselaw or other authority to support the proposition that an agency's decision *not* to regulate an interstate pollution problem displaces the federal courts' common law authority to grant relief to states harmed by the pollution. Moreover, even if a final regulatory decision not to act could displace federal common law, that is not this case. EPA has not decided "to postpone or even forgo the imposition of regulatory standards." *Id.* at 44. Here, although the CAA grants EPA authority to regulate greenhouse gases from Petitioners' and TVA's existing facilities, the agency has neither decided to impose emissions standards, nor decided against imposing them. The agency, by its own description, is still figuring out what to do. TVA Br. at 51 n.25.

In short, this is a case in which affected states and other entities seek to abate an interstate nuisance that could someday be, *but has not yet been*,

addressed by federal regulatory authorities. Petitioners' and TVA's argument that the Clean Air Act somehow displaces this action therefore amounts to a claim that latent federal regulatory authority over tortious conduct can, without more, displace federal common law remedies for that conduct. That premise cannot withstand careful scrutiny for two key reasons.

A. This Court's Displacement Precedent Requires A Careful Evaluation Of The State Of Existing Statutory And Regulatory Law.

First, this Court has never suggested that the mere fact that Congress has lifted its pen to acknowledge a significant interstate pollution problem displaces the federal courts' authority to address the same problem. On the contrary, in *Illinois v. City of Milwaukee* ("*Milwaukee I*"), this Court recognized a role for "federal common law to abate a public nuisance in interstate or navigable waters" despite the existence of "numerous [federal] laws touching on interstate waters." 406 U.S. 91, 101, 104 (1972). As of 1972, when that case was decided, those relevant laws included "the Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U.S.C. § 1152, [which] tighten[ed] control over discharges into navigable waters so as not to lower applicable water quality standards." *Milwaukee I*, 406 U.S. at 101. Among other things, the Federal Water Pollution Control Act (FWPCA) created a Federal Water Quality Administration (FWQA, now EPA), and charged the FWQA Administrator with "prepar[ing] or develop[ing] comprehensive programs for eliminating or reducing the pollution of interstate

waters and tributaries thereof." 33 U.S.C. §§ 1152, 1153(a) (1970). True, Congress ultimately deemed the pre-1972 version of the FWPCA, at issue in *Milwaukee I*, "inadequate in every vital aspect," S. Rep. No. 92-414, p.7 (1971), but the inadequacy concerned the FWQA's seeming inability to implement the law in a meaningful way, not the agency's lack of regulatory authority.

In other words, the federal common law recognized by the *Milwaukee I* Court filled a regulatory void, not a statutory one. Federal statutes that addressed water pollution "exist[ed]" at the time, and they granted ample authority to the relevant regulatory agency (FWQA), but that agency had not yet "appli[ed]" the statutes to Milwaukee's alleged pollution of Lake Michigan. *Milwaukee II*, 451 U.S. at 401. It was this regulatory void that necessitated Illinois' appeal to the federal courts.

No such regulatory void existed when the case returned to this Court almost nine years later, in *Milwaukee II*. 451 U.S. 304 (1981). By that time, Congress had enacted the Federal Water Pollution Control Act Amendments of 1972 (1972 Amendments). Pub.L. 92-500, 86 Stat. 816. The 1972 Amendments made it "illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." *Milwaukee II*, 451 U.S. at 310-11. Under the Amendments, the City of Milwaukee had to obtain so-called "National Pollution Discharge Elimination System" or "NPDES" permits for its sewer systems, giving EPA and its state delegate, the Wisconsin Department of Natural Resources (WDNR), the opportunity and obligation to impose effluent limitations and otherwise oversee "the

completion of planning and additional construction to control sewage overflows." *Id.* at 311.

Importantly, the NPDES permitting program differs markedly from the CAA Title V program that is now applicable to Petitioners' and TVA's greenhouse gas emissions. The NPDES program "clearly authorize[s], and in many cases … require[s]" state environmental agencies "to establish substantive [emissions] limits based on specific technology and the condition of the receiving water." Mary Ellen Ternes and Ross A. Macfarlane, *Negotiating Title V Operating Permits: A View from the Provinces*, 13-FALL Nat. Resources & Env't 417, 417 (1998). By contrast, in the Title V program, "Congress clearly made the policy judgment that permits should only implement and enforce existing applicable requirements, not create new ones." *Id.*

As the *Milwaukee II* Court noted, the City of Milwaukee dutifully obtained the NPDES permits required by the 1972 Amendments: by 1981, when that case was decided, Milwaukee and other petitioners in the case were "operat[ing] their sewer systems and discharg[ing] effluent under [NPDES] permits," *Milwaukee II*, 451 U.S. at 311—permits that imposed substantive effluent limitations and other operating requirements. As a result, in the Court's view, there was no longer cause to resort to federal common law. Congress had not "left the formulation of appropriate federal standards to the courts through application of … nuisance concepts, but rather ha[d] occupied the field through the establishment of a comprehensive regulatory program supervised by an expert agency." *Id.* at 317; *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 n.7 (2008) (characterizing *Milwaukee II* as a case in

which "plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the [Clean Water Act (CWA)]").

The *Milwaukee II* Court reached this displacement conclusion, however, only after carefully evaluating the statutory *and regulatory* law applicable to Milwaukee's sewage overflows. Indeed, the Court repeatedly emphasized the pervasive administrative regulation of Milwaukee's effluent. The majority noted, for example, that under the 1972 Amendments *every* "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"; that "the problem of effluent limitations has been thoroughly addressed *through the administrative scheme* established by Congress"; and later that "there is no basis for a federal court to impose more stringent limitations than those *imposed under the regulatory regime*." *Milwaukee II*, 451 U.S. at 318, 319, 320 (emphasis added). In each instance, the Court focused not on the coverage of the 1972 Amendments alone, but instead on the coverage of the overall legal regime established by the Amendments and implemented by EPA.

Two sentences in the middle of the *Milwaukee II* majority opinion make this point pellucid: "It is quite clear from the foregoing [discussion] that the state agency duly authorized by the EPA to issue discharge permits under the Act has addressed the problem of overflows from petitioners' sewer system. … There is no 'interstice here to be filled by federal common law: overflows are covered by the Act *and have been addressed by the regulatory regime established by the*

Act." *Id.* at 323 (emphasis added). In other words, the Court found dispositive the fact that Milwaukee's emissions were well regulated, not just by the 1972 Amendments, but by those Amendments as implemented by "the agency charged by Congress with administering this comprehensive scheme." *Id.* at 320.

A dispute between the majority and dissent in *Milwaukee II* further underlines the importance of thoroughly evaluating the regulations applicable to the alleged nuisance. At one point, the dissent accuses the majority of "assum[ing] that as soon as Congress addresses a question previously governed by federal common law," the common law remedy is "automatic[ally] displace[d]." *Id.* at 333-34 (Blackmun, J., dissenting) (internal quotation marks omitted). Not true, says the majority, the analysis is not automatic but nuanced, and it requires a detailed "assessment" of the state of the law. *Milwaukee II*, 451 U.S. at 315 n.8. Displacement does *not* occur as soon as Congress has spoken, but instead when the overall regulatory "scheme established by Congress addresses the problem formerly governed by federal common law." *Id.*; *see also Middlesex County Sewer Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (finding federal common law displaced in the context of ocean dumping, in part because the relevant federal statute, the Marine Protection, Research and Sanctuaries Act (MPRSA), creates a "*regulatory scheme* … no less comprehensive, with respect to ocean dumping, than" the CWA's scheme with respect to point sources (emphasis added)); *id.* at 12 (noting that the MPRSA "requires a permit for any dumping into ocean waters").

True, plaintiffs cannot resort to federal common law merely because the federal statutory and regulatory regime fails to address their problem in the way they would prefer. "Demanding *specific* regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law" is inappropriate, *Milwaukee II*, 451 U.S. at 324 (emphasis added), because federal courts have authority only to "'fill[] gap[s]'" in a federal regulatory scheme, not to "provid[e] a different regulatory scheme," *id.* at 324 n.18. But where the relevant regulatory scheme does nothing to address a sovereign state plaintiff's interstate pollution problem, *Milwaukee I* establishes that the federal law does not leave the affected state without recourse; there is ample room for federal courts to fill the gap.

In this case, a careful assessment of the CAA regulatory scheme admits of only one conclusion: the Act and its implementing regulations do not address the problem of greenhouse gas emissions from Petitioners' and TVA's existing sources. The Act grants EPA authority to limit those emissions, but existing regulations do not yet do so. The 1972 Amendments at issue in *Milwaukee II* differ from the CAA in this key respect: under the amended CWA, "*[e]very* point source discharge [of water pollution] is prohibited unless covered by [an administrative] permit," *Milwaukee II*, 451 U.S. at 318 (emphasis in original), whereas the CAA leaves existing point sources of air pollution unregulated unless and until EPA acts, Pet. App. at 143a (contrasting the CWA with the CAA, under which "the states and the EPA are not required to control effluents from every source, but only from those sources which are found

… to threaten national ambient air quality standards" (internal quotations omitted)).

Moreover, even if TVA is correct in its unsupported claim that federal common law could be displaced "when an agency … decides to postpone or even forgo" regulation of the nuisance, TVA Br. at 44, that has not occurred in this case. The regulatory void here results not from an administrative decision to eschew regulation or to leave Petitioners' and TVA's greenhouse gas emissions unregulated, but from EPA's confusion about the scope of its own authority. TVA Br. at 2 ("When this case began [EPA] took the view that the [CAA] did not authorize it to issue mandatory regulations to address global climate change."). Once EPA has taken some final and reviewable action with respect to Petitioners' and TVA's greenhouse gas emissions, the courts can assess whether that action alters the landscape for common law plaintiffs. Until that time, however, the federal courts have ample authority to abate the serious and unaddressed interstate nuisance to which Petitioners' and TVA's emissions contribute.

B. Petitioners' And TVA's Displacement Argument Ignores The Need For Uniform Federal Standards To Govern Interstate Pollution Disputes.

The second reason that *unexercised* federal regulatory authority over a pollution source cannot displace federal common law relates to the central role that federal standards play—and should play—in the resolution of interstate pollution disputes. This Court has repeatedly recognized the need for uniform federal standards to govern interstate pollution. For example, the Court has explained that until Congress

and regulatory agencies act to address an interstate nuisance, affected downwind or downstream states are entitled to the protections of "'[f]ederal common law and not the varying common law of the individual States.'" *Milwaukee I*, 406 U.S. at 107 n.9 (quoting *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971)).

The Court has also emphasized the importance of uniform federal standards during a later time period, when Congress and the relevant agency have addressed the nuisance. At that point, affected states enjoy the protections of the federal statutory regime, *Milwaukee II*, 451 U.S. at 313-15 (focusing the displacement inquiry on the question whether federal statutory and regulatory law—as opposed to state law—"addresses a question previously governed by a decision rested on federal common law"), and they may even have the ability to help shape the contours of that regime, *id.* at 325-26 (itemizing the various actions "a State affected by decisions of a neighboring State's [NPDES] permit-granting agency" can take "to seek redress" under the CWA).

Both before Congress has legislated and after a federal statutory regime is in place and fully implemented, therefore, federal law serves to protect affected states from self-dealing by source states—that is, from the risk that source states will "tilt[] the [regulatory] table in the state sovereign's direction." Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw. U. L. Rev. 551, 568 (2008); *see generally* Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. Pa. L. Rev. 121, 203-04 (1985) (recognizing that source states and affected states often have very different views about how strictly to

regulate a polluting industry); Kenneth M. Murchison, *Interstate Pollution: The Need for Federal Common Law,* 6 Va. J. Nat. Res. Law 1, 29-30 (1986) (same). During both time periods, federal law guarantees an even playing field for affected states—first via common law, and then via federally prescribed emissions standards.

This case, however, falls into a gap. Congress has delegated to EPA regulatory authority over greenhouse gas emissions from stationary sources, but the agency has not yet used that authority to regulate those emissions. As a result, those emissions remain unregulated by federal statutory and regulatory law. Petitioners and TVA suggest that during this period—which can last for decades, as this case illustrates—the protections of federal law fall away. Pet. Br. at 40-46; TVA Br. at 44-53. That outcome would show insufficient regard for Connecticut and other sovereign states' interest in abating the tortious conduct of large out-of-state emitters of greenhouse gases. *Cf. Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court."); *see also Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906) (describing one state's pollution of a river as a "casus belli for a State lower down"). Indeed, that outcome would leave affected states with fewer federal rights and protections *after* the passage of federal pollution statutes than they enjoyed before such statutes were enacted.

International Paper Company v. Ouellette, 479 U.S. 481 (1987), is not to the contrary. To fully comprehend the important distinction between this case and *Ouellette*, one must understand both the contours of the *Ouellette* decision and the workings of the CAA's and CWA's "virtually identical" savings clauses, *Milwaukee II*, 451 U.S. at 328 (comparing CWA § 505(e), 33 U.S.C. 1365(e), with CAA § 304(e), 42 U.S.C. 7604(e)).

Ouellette concerned a Vermont landowner's attempt to wield Vermont nuisance law against a paper company located in New York. The defendant in the case had "discharge[d] a variety of effluents into [Lake Champlain]," allegedly making the waters of the lake "foul, unhealthy, smelly, and … unfit for recreational use." *Ouellette*, 479 U.S. at 484. This Court began its analysis by recognizing the earlier decision in *Milwaukee II*, under which "federal legislation now occupied the field of [water pollution regulation], pre-empting all *federal* common law." *Id.* at 489 (emphasis in original). The Court then recognized that the CWA's "saving clause negates the inference that Congress 'left no room' for state causes of action." *Id.* at 492. Finally, the Court determined that the only state common law so preserved is that of the *source* state. *Id.* at 497. Overall, therefore, the Court concluded that the CWA prevented Ouellette and his fellow tort plaintiffs from pursuing their claims under federal or Vermont common law, but that "nothing in the Act bar[red]" them from "bringing a nuisance claim pursuant to the law of" New York. *Id.*

In reaching that conclusion, the *Ouellette* majority focused in part on an aspect of the CWA that the CAA shares: both statutory regimes allow source

states to "require discharge limitations *more stringent than* those required by the Federal Government." *Ouellette*, 479 U.S. at 490 (emphasis added); 40 C.F.R. § 123.1(i) (relevant CWA implementing regulation); 42 U.S.C. § 7416 (relevant section of the CAA). In other words, both the CWA and the CAA impose a regulatory floor. Source states may "impose standards … stricter" than federal law provides, but they may never ratchet control *down* from what the federal regime requires. *Ouellette*, 479 U.S. at 499.

This federal floor figured prominently in *Ouellette*'s reasoning. After the Court observed that its decision did not "leave respondents without a remedy" because they could pursue their claims under New York common law, it hastened to add that New York's emissions standards might prove even stricter than relevant federal standards. *Id.* at 497 ("By its terms the CWA allows States such as New York to impose higher standards on their own point sources, and … this authority may include the right to impose higher common-law as well as higher statutory restrictions."). In other words, the Court suggested that consigning victims of interstate pollution to the common law of the source state is fair because source state emissions standards cannot be weaker than—and may be stricter than—applicable federal standards.

In this case, however, there is no federal floor because, as noted above, no provision of federal statutory or regulatory law limits Petitioners' and TVA's greenhouse gas emissions. As a result, there is absolutely nothing to prevent Petitioners' and TVA's home states from "tilt[ing] the [regulatory] table in [their] direction[s]." Epstein, *Federal Preemption*, 102

Nw. U. L. Rev. at 568. Unlike in *Ouellette*, therefore, a displacement holding here would leave the victims of unregulated interstate greenhouse gas pollution—including Connecticut and the other sovereign state victims—entirely at the mercy of source states. This Court has never shown so little regard for states' "reasonable demands on the ground of their still remaining quasi-sovereign interests." *Georgia v. Tennessee Copper Co*., 206 U.S. at 237.

CONCLUSION

This is neither a case in which "a plaintiff seeks relief that would address the same issue, but in a manner different in character or extent from what the regulatory program provides," nor a case in which "an agency [has] decide[d] to postpone or even forgo the imposition of regulatory standards." TVA Br. at 44. Rather, this case involves a federal pollution statute that EPA has not yet implemented in a way that addresses the serious interstate pollution problem of which Respondents complain. In this context, a finding that federal common law is displaced would leave Respondents with no remedy beyond that provided under the varying common law of Petitioners' and TVA's home states, and with no guarantee that those states' common law meets a minimum, uniform, and federally-approved standard of stringency. Sovereign state and other victims of interstate pollution merit greater protections than such a rule can possibly provide.

Respectfully submitted,

AMANDA C. LEITER
Counsel of Record
Associate Professor of Law
The Catholic University of America
Columbus School of Law
3600 John McCormack Rd. NE
Washington, DC 20064
Tel: (202) 319-6755
Fax: (202) 319-4459

March 18, 2011