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 CONNECTICUT, NEW YORK, CALIFORNIA, IOWA, RHODE ISLAND, VERMONT, AND THE CITY OF NEW YORK

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether plaintiff States have standing to sue defendants for the common-law tort of public nuisance when the complaint alleges that defendants' power plants are causing or threatening harm to the States' property and natural resources and to the health and welfare of their citizens, and that reducing defendants' carbon-dioxide emissions will reduce the risk and magnitude of these injuries.

2. Whether plaintiffs' federal common-law nuisance claims can be resolved on the basis of judicially manageable standards, without implicating constitutional separation-of-powers concerns that would require dismissal of the claims as nonjusticiable political questions.

3. Whether plaintiffs have federal common-law nuisance claims that are not displaced by the federal Clean Air Act, 42 U.S.C. § 7401 et seq., when the Act does not place any limits on, or otherwise address, defendants' carbon-dioxide emissions.

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INTRODUCTION

Since the fourteenth century, Anglo-American common law has allowed the sovereign to sue to abate a nuisance that unreasonably interferes with "a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979); *see* William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 998 (1966) (tracing the doctrine back to the reign of Edward III). States have frequently relied on this doctrine to address emerging threats to their citizens' health and safety. For example, this Court has long adjudicated common-law public-nuisance claims brought by States seeking to enjoin air or water pollution that crosses state boundaries, sometimes based on new scientific knowledge about the harm caused by a particular kind of pollution. *See, e.g.*, *New Jersey v. City of N.Y.*, 283 U.S. 473 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906) ("*Missouri II*"); *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*").

In recent years, States have turned their attention to the urgent threat of the phenomenon known as "global warming" or "climate change." There is a broad scientific consensus that emissions of carbon dioxide and other greenhouse gases from human activities, principally the burning of fossil fuels, are causing a substantial alteration of the global climate, resulting in adverse impacts to property and health. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 504-05, 507 (2007).

Before this Court's ruling in *Massachusetts*, the Environmental Protection Agency took the position that

the federal Clean Air Act did not give it authority to regulate greenhouse-gas emissions to address climate-change-related threats. *See id.* at 511-14. Concerned States therefore invoked the common law of public nuisance to abate the health and environmental threats from rising temperatures and seas, just as they had invoked the law of public nuisance in the past for other emerging threats to the public health and welfare. This case concerns a complaint filed in 2004 by States and other concerned parties against five large power companies over the carbon-dioxide emissions from their fossil-fuel-burning power plants, emissions that plaintiffs allege are substantially contributing to the public nuisance of global warming.

These public-nuisance claims are justiciable because they fall within the well-settled confines of a common-law tort that courts have long adjudicated. Plaintiffs' claims differ from earlier public-nuisance claims in that climate change may involve different scientific evidence from earlier threats. But this case is at the motion-to-dismiss stage, and questions of proof are not before the Court. If plaintiffs are ultimately unable to establish that defendants contributed to the public nuisance of global warming, their claims will fail on the merits. If on the other hand plaintiffs substantiate their allegations, they will be entitled to an order abating defendants' contribution to the nuisance. The judiciary is competent to hear and decide those matters on their merits, without invading the exclusive province of the political branches of government.

After certiorari was granted in this case, the Environmental Protection Agency agreed to complete

by 2012 a rulemaking on whether to impose carbon-dioxide emission limitations on sources like defendants' power plants. If EPA imposes these limitations, which it has not committed to doing, all parties agree that the federal common-law nuisance claims at issue here will be displaced. That possibility is a good reason for this Court to dismiss the writ as improvidently granted. And if EPA continues to move forward with regulatory action on schedule, the district court would have a sound basis for staying proceedings on remand while the rulemaking is actively proceeding. But the potential for emission limitations in the future does not displace the federal common law in the present. Until EPA addresses the nuisance, plaintiffs are entitled to pursue relief under the federal common law of public nuisance, just as they have in the past for other threats to the public health or welfare.

STATEMENT

1. In 2004, plaintiffs Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, and the City of New York[1] sued defendants, the five largest emitters of carbon dioxide in the United States, in the United States District Court for the Southern District of New York. Three private land trusts—the Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire—filed a parallel suit against the same defendants, and the two suits were heard together.

1. New Jersey and Wisconsin are no longer participating in the case.

Plaintiffs brought their claims under the common law of public nuisance. They alleged that carbon-dioxide emissions from defendants' power plants contribute to global warming, causing a wide range of current and threatened injuries to plaintiffs and their citizens. Among other things, plaintiffs alleged that the emissions and resulting global warming would:

- increase smog and heat-related mortality in Los Angeles and New York City, J.A. 88-89;
- continue to shrink California's mountain snowpack, which forms the State's largest source of drinking water and has already been diminished by global warming, J.A. 92-93;
- raise sea levels, thereby inundating low-lying property such as much of New York City's infrastructure, J.A. 89-92;
- reduce crop and livestock yields in Iowa, J.A. 96-97;
- lower water levels in the Great Lakes, harming commercial shipping and hydropower production in New York, J.A. 93-96; and
- make it impossible for several species of hardwood trees to survive in Vermont, Connecticut, New York, and Rhode Island, J.A. 97-98;

Plaintiffs alleged that defendants were contributing to and exacerbating these harms by emitting 650 million tons of carbon dioxide each year—10 percent of the entire country's annual emissions. J.A. 57, 84. And

plaintiffs alleged that defendants have feasible, cost-effective alternatives for generating electricity with lower emissions. J.A. 58, 104.

Plaintiffs alleged that the harms caused by global warming will lead to higher surface temperatures and greater threats of injuries, and lower levels of emissions will reduce the rise in temperature and thus decrease the threat of those injuries. J.A. 58, 102. Plaintiffs also alleged that defendants' "emission of millions of tons of carbon dioxide each year contribute to [a] risk of an abrupt change in climate due to global warming." J.A. 101. Therefore, reducing the emissions from defendants' facilities would decrease the threats of the injuries that plaintiffs and their citizens face. J.A. 102.

Plaintiffs sought relief under the federal common law of public nuisance or, in the alternative if federal claims were not available, under the state common law of public nuisance. The States sued both in their capacity as *parens patriae*—to protect the health and welfare of their citizens—and as property owners. *See* J.A. 59-61. The other plaintiffs sued solely as property owners. *See id.* at 120. Plaintiffs sought injunctive relief to reduce defendants' carbon-dioxide emissions, but they did not seek damages.

The district court dismissed the case on the ground that the relief sought by plaintiffs raised nonjusticiable political questions that the district court believed would require complex policy determinations that should be made by the legislative and executive branches. Pet. App. 180a-181a, 183a-187a.

2. The Court of Appeals for the Second Circuit reversed, holding that plaintiffs' public-nuisance claims do not involve political questions because the claims can be decided based on well-settled principles of tort and public-nuisance law and would not require the district court to make policy determinations of a kind clearly reserved for non-judicial discretion. *Id.* at 17a-41a.

The court of appeals in addition rejected several alternative grounds for dismissal that had been raised before but not addressed by the district court. The court of appeals held that plaintiffs' allegations were sufficient at the pleading stage to establish standing, and also sufficient to state a public-nuisance claim under federal common law. *Id.* at 41a-76a, 88a-94a. The court emphasized that it was making only a threshold determination as to standing, based on the pleadings, and that a greater evidentiary showing would be required as discovery progressed and at the summary-judgment stage. *Id.* at 42a-44a.

The court of appeals also held that the federal Clean Air Act does not displace plaintiffs' existing remedies under federal common law because it does not itself regulate greenhouse-gas emissions from stationary sources like defendants' power plants. *Id.* at 131a-144a. The court noted that it was not deciding how, if at all, future Environmental Protection Agency regulatory actions would affect its displacement analysis. *Id.* at 144a, 159a-160, 169a-170a.

The court of appeals denied petitions for panel or *en banc* rehearing. *Id.* at 188a-190a.

3. Except in limited ways that are not relevant here, the Clean Air Act does not prohibit or control the emission of air pollutants unless and until EPA has issued standards controlling the emissions or has required States to do so. *See, e.g.*, 42 U.S.C. § 7411. EPA has not yet issued any such standards or requirements applicable to defendants' existing power plants.

When this case was filed in 2004, EPA had taken the position that it lacked authority to regulate carbon dioxide and other greenhouse gases under the Act, and consequently the agency had taken no steps to regulate those emissions. *See Massachusetts*, 549 U.S. at 511-14. While this case was pending before the court of appeals, this Court held that EPA has the power to regulate greenhouse-gas emissions under the Clean Air Act, if the agency finds that they endanger public health or welfare. *See id.* at 528-30. EPA has since made such a finding for the purposes of greenhouse-gas emissions from motor vehicles and issued regulations limiting those emissions. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009); 75 Fed. Reg. 25,324 (May 7, 2010).

As a consequence of the motor-vehicle emission standards, EPA was obligated to impose greenhouse-gas limitations on major sources that are newly built or substantially modified starting in 2011. 42 U.S.C. § 7475. The agency did so by issuing a regulation phasing in those limitations over the next several years. *See* 75 Fed. Reg. 31,514 (June 3, 2010). The private defendants have filed a series of cases aimed at blocking these regulations. *See Utility Air Regulatory Group v. EPA*, Nos. 10-1042, 10-1122, 10-1161 (D.C. Cir).

EPA has not limited carbon-dioxide emissions from existing sources, like defendants' power plants, nor has EPA taken any action that obligates it to do so in the future. As TVA's brief explains, after certiorari was granted here EPA entered into a settlement of separate litigation that may lead to regulation of these plants in the future. TVA Br. 50-51. Under this settlement, which became final on March 2, 2011, EPA will propose "new source performance standards" for greenhouse-gas emissions from new and modified power plants along with guidelines to be used by States in establishing emission limitations for existing plants, 42 U.S.C. § 7411(b), (d), and promulgate a final rule with respect to this proposal by 2012. *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010). As TVA has explained, TVA Br. 51 n.25, EPA retains the discretion under the settlement not to issue those performance standards.

SUMMARY OF ARGUMENT

I. The allegations are sufficient to establish that one or more of the plaintiffs has Article III standing at this preliminary stage of the lawsuit. The complaint details the particularized injuries that global warming is causing the States and their citizens, including harm to the States' natural resources and the public health. It alleges that defendants' emissions of carbon dioxide are contributing meaningfully to global warming, and hence to these injuries. And it alleges that an order requiring defendants to lower their emissions would reduce the actual and threatened injuries that plaintiffs and their citizens face.

The facts alleged here are of the same nature and type as those that established the States' standing to seek

abatement of greenhouse-gas emissions in *Massachusetts*. If anything, the case for standing here is stronger than it was in *Massachusetts*. Because *Massachusetts* involved a petition for review, the petitioners had to come forward with evidence establishing the specific facts supporting standing, whereas this case involves a motion to dismiss for which general allegations of harm suffice. And in *Massachusetts* the States sought redress for their injuries only indirectly, through a suit against the regulatory agency, whereas here the States are suing the alleged tortfeasors directly. Indeed, for common-law claims, standing rarely if ever requires separate analysis, because the elements of the claim, including injury and causation, themselves satisfy the requirements of standing.

Nor do plaintiffs lack "prudential standing" on the ground that their claims are generalized grievances—an argument that TVA raises for the first time in this Court. The generalized-grievance doctrine is part of Article III's injury-in-fact requirement, not a separate prudential test for non-constitutional standing. And the injuries alleged here are not generalized as this Court has used that term, because they are concrete and particularized rather than abstract. Although a public-nuisance suit brought under the States' *parens patriae* authority by definition involves a widespread harm that affects the public at large, the federal courts have frequently and properly entertained such suits without dismissing them as generalized grievances.

II. A claim raises a political question only when its resolution would require the judiciary to interfere with matters committed to the political branches. Plaintiffs' claims here are justiciable because common-

law suits are the essence of the business of the judiciary. Moreover, plaintiffs' claims share none of the features of nonjusticiable political questions, such as the absence of judicially manageable standards or the need for the court to make initial nonjudicial policy determinations. Public-nuisance suits are governed by well-established principles that the courts are fully capable of applying in the specific factual context of climate change. While these principles may turn on general standards such as reasonableness, they are no less appropriate for judicial application than many other legal rules that rely on similar standards. Nor will the court need to decide broad policy issues to adjudicate plaintiffs' claims here. The court will need to determine not how to resolve the worldwide problem of global warming, but rather the feasibility of abating defendants' contribution to the nuisance, here by reducing the carbon-dioxide emissions from their power plants.

III. Plaintiffs' public-nuisance claim arises under federal common law. When the States joined the Union, they gave up their sovereign right to use force to abate public nuisances that arose beyond their borders. In return, they received relief for those nuisances under federal common law. Thus, this Court has long applied federal common law to resolve suits by a State complaining about interstate pollution unless a federal statute or regulation addresses the problem.

Here, the Clean Air Act does not itself impose any limits on carbon-dioxide emissions from stationary sources such as defendants' power plants. And while EPA recently began regulating carbon-dioxide emissions from motor vehicles and certain new or modified stationary

sources, thus far it has not issued any regulations that limit carbon-dioxide emissions from existing stationary sources like defendants' plants. Although EPA may issue such regulations in 2012, the possibility of future regulations does not displace plaintiffs' claims in the present.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO SUE.

A. Plaintiffs' allegations of injury and causation suffice to establish Article III standing at this stage.

To satisfy Article III's case-or-controversy requirement, a plaintiff must have suffered or face (1) an injury that is (2) traceable to the defendant's conduct and (3) redressable by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing need not be pleaded with greater specificity than any other elements of the plaintiff's case. Thus, on a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct" are enough because the court will "presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561 (quotation and alteration marks omitted). To defeat a motion to dismiss for failure to state a claim, a plaintiff need plead only "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). TVA, but not the other defendants, agrees that at least some of the plaintiff States have standing under that test. TVA Br. 30.

Because the presence of just one party with standing satisfies Article III's case-or-controversy requirement for all parties, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006), this brief focuses solely on the States' standing.

1. *It is uncontested that the States have adequately alleged concrete injuries.*

No party disputes that allegations in the States' complaint satisfy the first element of standing set forth in *Lujan*, a concrete injury that is actual or imminent. 504 U.S. at 560. But because this Court has an independent obligation to examine standing, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), plaintiffs briefly address the injury-in-fact requirement here.

The States' complaint alleges two kinds of actual or threatened injuries from global warming: injuries to the States' own sovereign and proprietary interests, and injuries to the health and welfare of the States' citizens. Either kind of injury alone would suffice to establish the States' standing.

First, the complaint alleges with particularity current or threatened injuries to the sovereign and proprietary interests of each State. For example, the complaint alleges that global warming has already caused earlier melting of the Sierra Nevada snowpack, which reduces the amount of fresh drinking water available to California during the dry summer season. J.A. 92-93. The complaint also alleges that global warming will cause beach erosion and flooding at particular parks in California, Connecticut, New York, and Rhode Island. J.A. 89-92.

These injuries are indistinguishable from those the Court held cognizable in *Massachusetts*. The Court explained that the "harms associated with climate change are serious and well recognized." 549 U.S. at 521. And it specifically noted the harm to water supplies from melting snowpack, erosion of coastal lands, and flooding as the "significant harms" that established the States' standing there. *Id.* at 521.

Second, a State suing as *parens patriae* may rely on an injury to its quasi-sovereign interests such as the health and welfare of a substantial segment of its population. *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). As the court of appeals correctly noted, Pet. App. 54a-55a, the States' complaint alleges those kinds of interests as well. It alleges, for example, that even one degree of global warming will double the number of heat-related deaths in New York City, to 700 per year. J.A. 88. It also alleges that global warming will increase smog levels, which in turn cause more respiratory illnesses like asthma. J.A. 89. The complaint further alleges threatened injuries to the States' natural resources that would result in aesthetic and economic harms. J.A. 97-98 (describing, for example, threats to hardwood forests in the Adirondack Mountains and New England from global warming). The scale of these alleged injuries suffices to establish *parens patriae* standing at the pleading stage. *See Snapp*, 458 U.S. at 609 (alleged discrimination involving 787 jobs affected a substantial segment of the population of Puerto Rico).

2. ***The States have sufficiently alleged that their injuries are fairly traceable to defendants' emissions.***

a. The Court held in *Massachusetts* that traceability may be satisfied by showing that the emissions targeted in the lawsuit make a "meaningful contribution" to the alleged injuries. 549 U.S. at 524. There, States sought to compel EPA to regulate emissions from new motor vehicles of greenhouse gases, including carbon dioxide. United States motor vehicles collectively were responsible for about six percent of worldwide carbon-dioxide emissions. *Id.* at 524. And the States were seeking EPA regulations applicable only to new motor vehicles, which constitute "only a fraction" of that figure. *Id.* at 544 (Roberts, C.J., dissenting). The Court nonetheless found traceability, reasoning that "by any standard," these emissions "make a meaningful contribution to greenhouse gas concentrations and hence . . . to global warming." *Id.* at 525.

The emissions alleged in this case are commensurate with those found to establish traceability in *Massachusetts*. *See* TVA Br. 29-30 (acknowledging the sufficiency of the States' allegations regarding traceability). The percentage of global emissions at issue in that case (well under six percent) is comparable to the percentage attributed by the complaint to defendants here: about 2.5 percent of all carbon-dioxide emissions worldwide. J.A. 57, 85.

In any event, the States' allegations of meaningful contribution are sufficient at this stage; precise scientific calculations can and should await factual development during discovery. *Cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009) (the factual allegations of a complaint meet

the "facial plausibility" standard when they "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

b. Although the standard for traceability is less stringent than the standard for establishing causation as a matter of substantive tort law, *see, e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc) (Wilkinson, C.J.) (citing cases), principles of tort law confirm that defendants' alleged contributions to global warming satisfy the traceability requirement. *Cf. Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund,* 500 U.S. 72, 77 (1991) ("[s]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents").

It is well established that each person who causes or contributes to a public nuisance may be held liable even if others are also contributing to the nuisance. Pet. App. 69a-70a (citing *Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001)); *see also Woodyear v. Schaefer*, 57 Md. 1, 5 (1881) (rejecting defendant's argument that it could not be enjoined from polluting a stream because it was just one of many polluters, reasoning that "[o]ne drop of poison in a person's cup may have no injurious effect[] [b]ut when a dozen, or twenty, or fifty, each put in a drop, fatal results may follow"). As the *Restatement* explains, "[i]t may, for example, be unreasonable to pollute a stream to only a slight extent, harmless in itself, when the defendant knows that pollution by others is approaching or has reached the point where it causes or threatens serious interference with the rights of those who use the water." Restatement (Second) of Torts § 840E cmt. b; *accord Boim v. Holy Land Found. for Relief & Dev.*, 549

F.3d 685, 696-97 (7th Cir. 2008) (en banc) (Posner, J.); W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 52, at 354 (5th ed. 1984); *cf. Edmonds v. Compagnie Gen. Transatlantique*, 443 U.S. 256, 260 n.8 (1979) ("A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury.").

Here, the States allege that defendants are "substantial contributors" to the public nuisance of global warming, based on the volume of carbon-dioxide emissions from their power plants. J.A. 57; *see id.* 85-86, 104. These allegations are consistent with the common-law principle set forth above that one who contributes to a nuisance may be held liable. *Cf. Massachusetts*, 549 U.S. at 524-25 (evidence of "meaningful contribution" to global warming satisfies causation prong of standing test). Because the alleged injuries are traceable to defendants as a matter of tort law, they are also traceable as a matter of standing law. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (courts should not "raise the standing hurdle higher than the necessary showing for success on the merits").

3. *The States have sufficiently alleged that a ruling awarding them injunctive relief would redress the States' injuries.*

A lawsuit need not completely redress all of a plaintiff's injuries at once; it is enough for standing if a favorable ruling would reduce the degree or likelihood of the injuries. As this Court recognized in *Massachusetts*, the requested remedy need not "*reverse*" global warming; the pertinent question is whether the plaintiffs have

alleged that the requested remedy would "*slow* or *reduce* it." 549 U.S. at 525 (emphasis in original).

Here, the States' complaint alleges that requiring defendants to reduce emissions at their power plants will "contribute to a reduction in the risk and threat of injury to the plaintiffs and their citizens and residents from global warming." J.A. 102. That is because the "primary factor in determining the rate and magnitude of future warming," and thus the risk and degree of global-warming-related harm, is "the level of greenhouse gas concentrations in the atmosphere." *Id.* This, in turn, is "driven by the rate of emissions of greenhouse gases and, in particular, of carbon dioxide." *Id.* Thus, the greater the overall level of emissions, the greater the resulting injuries, and the lower the level of emissions, the lesser the injuries. *Id.* And because plaintiffs seek direct limitations on defendants' emissions, J.A. 110, a favorable decision would lower overall global emissions and reduce the risk and degree of the alleged global-warming-related emissions.

As TVA acknowledges, TVA Br. 30, these allegations are sufficient to establish redressability under *Massachusetts*. Similar to the defendants here, EPA had argued in *Massachusetts* that redressability was lacking because a favorable decision compelling EPA regulation of greenhouse gas emissions from new motor vehicles "would therefore result in, at most, a tiny percentage reduction in worldwide greenhouse gas emissions." Brief for Federal Respondent at 13 (S. Ct. No. 05-1120). The Court disagreed, reasoning that the "risk of catastrophic harm, though remote, is nevertheless real" and "[t]hat risk would be reduced to some extent if petitioners received the relief they seek." 549 U.S. at 526. Similarly, the States allege

that global warming will result in a number of serious harms, including heat-related deaths and respiratory illnesses, and that an order compelling defendants to decrease their emissions would reduce the risk of injury and severity of their injuries. J.A. 58, 83-84, 102.

Although *Massachusetts* relied in part on the fact that the States in that case had invoked a statutory remedy, 549 U.S. at 516-18, its discussion of Article III standing was not limited to statutory rights, and the Court expressly held that Massachusetts had satisfied "the most demanding standards of the adversarial process." 549 U.S. at 521. The Court relied in significant part on *Georgia*, a common-law nuisance case, for the proposition that "States are not normal litigants for purposes of invoking federal jurisdiction." *Id.* at 518. In *Georgia*, the Court ordered injunctive relief to abate a public nuisance even though the evidence might not have supported granting similar relief to a private plaintiff. *Id.* Affording special solicitude to the States in pursuing a remedy as *parens patriae* is therefore consistent with *Massachusetts* and *Georgia*.

4. ***The States' standing here is even more firmly established than in* Massachusetts.**

As explained above, the States' standing here follows directly from *Massachusetts*, which held in almost identical circumstances that the States had standing to seek abatement of greenhouse-gas emissions. But the standing of the States in this case is even more firmly grounded than in *Massachusetts* in three respects.

a. *Massachusetts* addressed a petition for review of agency action, *see* 549 U.S. at 514, and thus was decided

under summary-judgment standards rather than (as here) motion-to-dismiss standards. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). For example, although the dissenting justices in *Massachusetts* agreed that a State's loss of coastal lands *could* be an injury that confers standing, they concluded that the States in that case had not offered enough evidence that such loss was *actually* occurring or would be likely to occur in the near future. 549 U.S. at 541-42 (Roberts, C.J., dissenting); *see also Lujan*, 504 U.S. at 561 (at the summary judgment stage, the plaintiff cannot rely on "mere allegations" but rather must proffer evidence establishing the "specific fact" supporting standing) (quotation marks omitted).

This case, however, presents itself on a motion to dismiss, which means that "general factual allegations of injury resulting from the defendant's conduct may suffice" and the courts will presume that the general allegations embrace the specific facts needed to support standing. *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (quotation marks omitted). As the court of appeals noted, at this point in the litigation the States "need not present scientific evidence to prove that they face future injury or increased risk of injury, that Defendants' emissions cause their injuries, or that the remedy they seek will redress those injuries." Pet. App. 43a; *see also Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920 (7th Cir. 2002) (Easterbrook, J.) ("Skepticism about a plaintiff's ability to prove its claims is not a reason to dismiss a pleading, however. It is at most a reason to hold a hearing and require the plaintiff to pony up the proof.").[2]

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2. For this reason, *amici* Southeast Legal Foundation, *et al.*, err in asking the Court to dismiss based on *amici*'s erroneous scientific analysis before plaintiffs have presented any evidence

b. Standing "is ordinarily substantially more difficult to establish" when—as in *Massachusetts*, but unlike here—the plaintiff's alleged harm flows not from the defendant's conduct directly but rather from third parties that could be regulated by the defendant. *Lujan*, 504 U.S. at 562 (quotation marks omitted). As TVA recognizes, the chain of causation is shorter here than the one at issue in *Massachusetts*, because the States "seek judicial relief directly from the entities responsible for the allegedly unlawful emissions." TVA Br. 31. To establish their public-nuisance claims, the States will have to show that defendants' emissions are causing an injury-in-fact to the public health or welfare. If the States prove injury and causation, they necessarily will have established their standing. *See Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) (traceability and redressability are "two facets of a single causation requirement") (quotation marks omitted).

It is irrelevant to redressability that "the vast bulk of greenhouse gas emissions are from sources that are not parties to this case and would not be reached by a decree in this case." Pet. Br. 24. Unlike in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989), where the effectiveness of the remedy sought depended on "the unfettered choices made by independent actors not before the courts," redressability here does not depend on the conduct of third parties. *Cf. Massachusetts*, 549 U.S. at 526 ("A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.").[3] Moreover, it is long established

of causation. *See* Brief of Southeastern Legal Foundation, *et al.*, as *Amici Curiae* in Support of Petitioners 20-37.

3. The complaint's allegations do not support the suggestion that defendants' competitors will increase their own emissions

that States may take incremental steps to protect their citizens by suing just some of the contributors to a public nuisance—for example, a single factory that is fouling the air in a city with many emitters, *Richards v. City of Seattle*, 114 P. 896 (Wash. 1911), a single mining company among many whose discharges are degrading a river, *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884), or a single slaughterhouse that is polluting the air into which there are many other emitters, *Dennis v. State*, 91 Ind. 291 (1883). Even if injuries suffered in 2011 could be traced to emissions from "a factory in China that same year, or just as easily to emissions from a California farm in 1961," Pet. Br. 18-19, the existence of other contributors to climate change is not dispositive either as a matter of substantive tort law or as a matter of standing.

c. Because this case—unlike *Massachusetts*—involves only common-law claims, the concerns regarding the separation of powers that ultimately drive the standing doctrine, *see Allen*, 468 U.S. at 752, are not present here. The line of cases culminating in *Lujan* dealt solely with lawsuits brought to enforce statutory or constitutional provisions by taxpayers or others functioning as private attorneys general—lawsuits where injury-in-fact, traceability, and redressability are not subsumed within

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in response to defendants' reductions. *See* Brief *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioners 19. The complaint alleges that "[d]efendants have available to them practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers." J.A. 58. Because defendants can achieve reductions without significantly raising customers' electricity costs, those customers are not likely to switch to defendants' competitors even if the competitors are not subject to an abatement order.

the elements of the claim. In those cases, a threshold inquiry regarding standing serves a gatekeeping function to ensure that the plaintiffs "have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). The gatekeeping function is necessary because once the threshold question of standing is resolved, the parties and the court then proceed to address the proper application of the public law in question, an inquiry that often will not focus on the standing-conferring injury on the plaintiff.

By contrast, the merits inquiry in a lawsuit brought under the common law turns on that injury, and thus "standing to sue is self-evident." Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* 69 (5th ed. 2007); *see also* Erwin Chemerinsky, *Federal Jurisdiction* § 2.3, at 68 (4th ed. 2003) ("Injury to rights recognized at common law—property, contracts, and torts—are sufficient for standing purposes."). In most common-law litigation, "there is scant need for courts to pause over the standing inquiry. One can readily recognize that the victim of an automobile accident or a party to a breached contract bears the kind of claim that he may press in court." *Gaston Copper Recycling Corp.*, 204 F.3d at 154; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("[J]urisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.") (quotation and alteration marks omitted).

The doctrine of standing "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Adjudicating common-law torts, including public-nuisance cases, is the essence of the business of the

judiciary. *See* TVA Br. 40 (the States' common-law claims "ask the judiciary to act in its own domain"). As a result, the gatekeeping function provided by a separate analysis of standing is unnecessary here.

B. In light of the States' showing of concrete injury, there are no prudential limitations that require dismissal of the case.

1. *The generalized-grievance doctrine is part of Article III, not prudential, standing.*

Although TVA agrees that the States have satisfied the requirements for Article III standing, it nonetheless argues that they do not have prudential standing because their public-nuisance claims amount to "generalized grievances" that are more appropriately addressed through the political process. TVA Br. 14-24. This argument—which was neither raised in nor decided by the lower courts—is inconsistent with this Court's standing jurisprudence. Prudential standing addresses issues such as whether the plaintiff's claims fall within the zone of interests protected by the statutory provision invoked in the suit, which is not at issue here. *See Bennett*, 520 U.S. at 162. But the generalized-grievance requirement is part of the Article III—not prudential—standing inquiry, because it addresses whether the plaintiff has suffered an injury-in-fact. *See, e.g.*, *Lance v. Coffman*, 549 U.S. 437, 439 (2007); *FEC v. Akins*, 524 U.S. 11, 23-24 (1998); *Lujan*, 504 U.S. at 573-74. Although the Court "has occasionally in dicta described the prohibition on generalized grievances as merely a prudential bar," the doctrine "squarely rest[s] on Article III considerations, as the analysis in *Lujan* . . . confirms." *Hein v. Freedom From Religion Found., Inc.*,

551 U.S. 587, 634 n.5 (2007) (Scalia, J., concurring in the judgment). Because the States have satisfied Article III's injury-in-fact requirement, TVA's prudential standing argument adds nothing.

TVA all but admits as much, asserting that "the prudential-standing analysis articulated" in its brief "is distinct from, and would not alter, [the] Court's settled approach . . . in litigation to establish Article III injury." TVA Br. 21 n.7. In other words TVA is asking the Court to create a *new* rule of prudential standing that would allow for threshold dismissal of claims under an ill-defined balancing test without any connection to traditional standing requirements.

But the generalized-grievance doctrine is not a catch-all for cases involving complex issues that could arguably be more efficiently or effectively addressed by regulation. *See* TVA Br. 18. Federal courts have a "virtually unflagging obligation" to exercise their jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Moreover, all of the concerns TVA raises about this case can be addressed through conventional legal analysis. For example, TVA's argument about EPA's role under the Clean Air Act is indistinguishable from petitioners' arguments about whether the Act has displaced the States' common-law causes of action. *Compare* TVA Br. 15, 18, *with* Pet. Br. 40-46. And TVA's arguments about the purported difficulties in fashioning a remedy here are identical to petitioners' political-question arguments. *Compare* TVA Br. 15-21 *with* Pet. Br. 38-40, 46-51. The Court therefore should decline TVA's invitation to muddle settled principles of justiciability with a new prudential-standing test.

2. *The States' claims are not generalized grievances.*

While global warming may cause widespread harm, that does not make the States' public-nuisance claims generalized grievances as this Court has used that term. Generalized grievances are "abstract and indefinite." *Akins*, 524 U.S. at 23. The quintessential generalized grievance is a case in which a group of plaintiffs sues only out of "common concern for obedience to law." *Id.* These kinds of disputes seek "what would, in effect, amount to an advisory opinion" and thus are more appropriate for the political process. *Id.* at 24.

But this case presents something quite different. Grievances are not generalized if the alleged harm is concrete rather than abstract, even if it is also widespread. In *Akins*, for example, the Court examined whether voters had suffered an injury-in-fact from their inability to obtain information about an organization's donations to political candidates. 524 U.S. at 20-21. Although the voters' alleged "informational injury" was "widely shared" by the public at large, the Court nevertheless found that the injury was "sufficiently concrete and specific" to overcome the limitation associated with generalized grievances. *Id.* at 24-25. The Court also identified a "widespread mass tort" as the kind of claim that, while affecting "large numbers of individuals suffering the same common-law injury," would nevertheless "count as an injury in fact." *Id.* (quotation and alteration marks omitted); *see also Lujan*, 504 U.S. at 572 (also identifying a mass tort as the kind of claim that impacts a large number of people but nevertheless would meet the concrete-injury requirement).

The States' public-nuisance claims here allege concrete injuries—to their interests both as landowners and as *parens patriae*—arising out of a mass tort, which *Akins* and *Lujan* held are sufficient for standing. And the complaint goes beyond the requirements of *Akins*, because it also alleges impacts of global warming that are *particularized* to each of the States, based on the diverse nature of the public resources at issue and each State's unique geography. *Cf. Akins*, 524 U.S. 35 (Scalia, J., dissenting) (arguing that injuries must be particularized to avoid being generalized grievances). The States' claims therefore are not abstract or indefinite, or seeking an advisory opinion. They are not generalized grievances as this Court has used that term.

To the extent that the States make claims alleging harm to the general public, they do so in their unique capacities as *parens patriae* and as sovereigns seeking to abate a public nuisance, which by definition involves a harm to the general public. *See* Restatement (Second) of Torts § 821B (defining "public nuisance," *inter alia*, as "an unreasonable interference with a right common to the general public"). As this Court recognized in *Snapp*, there is a long line of cases in which "States successfully sought to represent the interests of their citizens in enjoining public nuisance." 458 U.S. at 603. And as explained above, the States have met the requirements identified by *Snapp* for asserting their *parens patriae* claims. This demonstrates that their interest is concrete, not abstract, and therefore sufficient to confer standing. *See Md. People's Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985) (Scalia, J.) ("It is unquestionable that a state, in its *parens patriae* capacity, does qualify as personally suffering some actual or threatened injury") (quotation and alteration marks omitted).

II. THE POLITICAL-QUESTION DOCTRINE DOES NOT BAR ADJUDICATION OF PLAINTIFFS' COMMON-LAW CLAIMS.

The political-question doctrine is a limited exception to the obligation of the federal courts to exercise jurisdiction, invoked sparingly by the Court to prevent inappropriate interference by the judiciary in the business of the political branches. *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). The separation-of-powers concerns that gave rise to the doctrine have vitality only in a small number of constitutional and foreign affairs cases and are not present in common-law tort cases like this one, which are at the core of what the judicial branch does. Nor, in any event, do plaintiffs' particular claims have any of the features of a true political question, such as a lack of judicially manageable standards.

A. The political-question doctrine is limited to foreign affairs and constitutional issues, which are not present here.

1. The political-question doctrine applies only to cases implicating separation-of-powers concerns, and not to common-law tort claims like those at issue here. The Court's extensive review of the history and evolution of the political-question doctrine in *Baker v. Carr*, 369 U.S. 186, 208-235 (1962), confirms the limited scope of the doctrine. The Court in *Baker* first clarified that the "nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* at 210. Because this is ultimately an "exercise in constitutional interpretation," *id.* at 211, a court must look primarily to the Constitution to determine whether a matter has been

committed, either explicitly or implicitly, to the political branches to the exclusion of the judiciary.

Baker involved a challenge under the Equal Protection Clause to a State's apportionment of its legislators among counties. To determine whether the case was justiciable, *Baker* reviewed the cases in which the Court had previously considered the political-question doctrine and identified several factors that had given rise to separation-of-powers concerns, including "a textually demonstrable constitutional commitment of the issue to a coordinate political department," "a lack of judicially discoverable and manageable standards for resolving it," and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 217.

Most of the political-question cases discussed in *Baker* concerned the area of foreign affairs, which the Constitution unambiguously commits to the political branches. *Id.* at 211-14 & n.31. The cases concerning domestic controversies each involved a constitutional issue, and the political-question discussion in those cases generally centered on the textual-commitment test. The Court did not invoke the "lack of judicially discoverable and manageable standards" to describe a factually complex question, as defendants seek to do here. Instead, the Court referred to a lack of judicially discoverable or manageable standards in the course of explaining that the matter implicated a particular constitutional provision that lacked such standards, or that the matter was textually committed to a political branch that had not enunciated any standards. For example, in *Coleman v. Miller*, 307

U.S. 433 (1939), the Court dismissed a claim that a State's ratification of a constitutional amendment failed to satisfy Article V's requirements, because the questions involved were committed to Congress and neither Article V nor any statute provided criteria for a judicial determination. Similarly, in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the Court dismissed a trespass claim that depended on determining which of two competing state governments in Rhode Island was legitimate, because the Guarantee Clause commits that question to Congress and does not provide "a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government," *Baker*, 369 U.S. at 223. Unlike these cases, the Court in *Baker* determined that the Equal Protection Clause claim before it did not raise any question to be decided by a political branch and that "[j]udicial standards under the Equal Protection Clause are well developed and familiar." *Id.*

The few cases dismissed by this Court on political-question grounds since *Baker* also involved constitutional challenges to the actions of another branch of government. *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality opinion) (legislative gerrymandering of congressional districts); *Nixon v. United States*, 506 U.S. 224, 228-36 (1993) (Senate procedure for impeaching a federal judge); *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973) (National Guard's standards for weaponry, training, and other matters). When this Court found a lack of judicially discoverable or manageable standards in these cases, it did so only as a basis for determining that the constitutional claim was within the province of another branch. *Vieth*, 541 U.S. at 305 (plurality opinion); *Nixon*, 506 U.S. at 228-31.

2. This Court has never held that the political-question doctrine bars adjudication of a tort case absent a question of constitutional law or foreign affairs—neither of which is present here.[4] Nor should the doctrine be extended to such a case. Outside of these contexts, common-law claims do not implicate separation-of-powers issues. Instead, they require the judiciary "to act in the manner traditional for English and American courts." *Vieth*, 541 U.S. at 278 (plurality opinion); *see also* TVA Br. 40 (plaintiffs "ask the judiciary to act in its own domain by applying judicially fashioned federal common law in a new context").

Nor does the judiciary's exercise of power in common-law cases present any danger of an irreconcilable conflict between the branches, because the political branches remain free to modify or displace common-law principles. EPA may limit carbon-dioxide emission from existing power plants, and thereby displace plaintiffs' federal common-law claims. Congress similarly may pass legislation modifying or displacing federal common law in this area. As a result, this case presents no risk that the judiciary will develop a "parallel" regulatory system that would "frustrate and complicate" EPA's regulatory undertakings, TVA Br. 38, or that common-law decisions

4. Defendants have abandoned their argument that plaintiffs' claims interfere with the President's authority over foreign affairs. *See* Pet. App. 24a. Their *amici* Law Professors cite a handful of lower-court cases that applied the political-question doctrine to bar adjudication of common-law claims, but those cases all turned on an issue of foreign policy or military affairs that the courts found to be exclusively committed to the political branches. *See* Brief for Law Professors as *Amici Curiae* in Support of Petitioners 22-23.

will "conflict[] with current and future legislation and regulation addressing greenhouse gas emissions," Pet. Br. 51. That makes this case quite different from one raising true political questions, which are matters of constitutional interpretation about the political branches' respective powers and therefore may not be susceptible to correction by those branches. *Cf. Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 409-10 (1932) (Brandeis, J., dissenting) (political branches are not free to correct judicial error with respect to constitutional rulings). And to the extent that the regulatory and judicial processes are proceeding in parallel, the district court has the discretion to manage the case in a way to avoid any conflict, such as by staying proceedings to allow the rulemaking to play out.[5]

B. The *Baker v. Carr* factors do not bar adjudication of plaintiffs' claims.

1. Defendants argue that plaintiffs' federal common-law claims present a political question because public-nuisance law inherently suffers from two of the factors identified in *Baker*, 369 U.S. at 217: a lack of judicially

5. There is also no danger that adjudication of the States' federal common-law claims would undermine the cooperative federalism scheme embodied in the Clean Air Act, as claimed by the *amici* States supporting petitioners. *See* Brief of States of Indiana, et al. as *Amici Curiae* in Support of Petitioners 12-23. As explained below (p. 53), the States' role under the Clean Air Act is to implement and enforce federal standards, the promulgation of which will displace federal common law. In any event, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Baker*, 369 U.S. at 210.

discoverable and manageable standards, and initial policy determinations of a kind clearly for nonjudicial discretion. Pet. Br. 46-47. But public-nuisance law is a settled part of the common law created by the judiciary itself, so the standards that govern it were necessarily judicially discovered and any policy determinations that it requires are necessarily of a kind for judicial discretion.

There are long-established standards for deciding plaintiffs' public-nuisance claims. *See, e.g.*, *Missouri II*, 200 U.S. at 520; *Missouri I*, 180 U.S. at 248*; Georgia v. Tenn. Copper Co.*, 237 U.S. 474, 474-78 (1915); *Georgia*, 206 U.S. at 236-39. As this Court recognized more recently in a different context, nuisance law "ordinarily entails" "analysis of, among other things, the degree of harm to public lands and resources" from the challenged activity, the "social value" of the activity, and "the relative ease with which the alleged harm can be avoided." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030-31 (1992). These standards are judicially manageable; indeed, courts are required to apply them as a matter of constitutional law in some takings litigation. *See id.* As the court of appeals recognized, Pet. App. 82a-83a, these standards have been distilled in the *Restatement*, which provides that a public nuisance is "an unreasonable interference with a right common to the general public," taking into account several factors, including whether the conduct (1) interferes with public health; (2) "is proscribed by a statute, ordinance or administrative regulation"; or (3) "is of a continuing nature or has produced a permanent or long-lasting effect." Restatement (Second) of Torts § 821B(1), (2)(a)-(c).

Contrary to defendants' assertion, Pet. Br. 47, in this public-nuisance case (unlike in a private-nuisance case)

it is doubtful that the district court will need to weigh the gravity of the harm caused by defendants' emissions against the utility of the conduct to determine liability. *See* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359, 368-69 (1990); *see also Georgia*, 206 U.S. at 237-39 (finding, without any inquiry into fault, that Georgia adequately pleaded a public-nuisance claim and was entitled to an injunction); *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) ("The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant."), *rev'd on other grounds*, 451 U.S. 304 (1981).

But even if a court were required to determine the reasonableness of defendants' conduct, that would not turn this case into a political question. The Court has never found a political question merely because a case involves a broad standard that courts must tailor to the particular behavior at issue. *See Munoz-Flores*, 495 U.S. at 396 ("Surely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges.").[6] In fact, applying broadly

6. As counsel for the private defendants has acknowledged in advocating for a repudiation of the political-question doctrine entirely, when courts perform their "traditional judicial function,"

stated principles to the specific facts and circumstances of a case is the very nature of common-law adjudication. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 290 (2d Cir. 2007) (Hall, J., concurring) ("Common law decisionmaking proceeds through the incremental, analogical application of broadly-stated principles, and it is therefore not amenable to the formulation of finely detailed rules in the manner of a regulatory code.").

Defendants also express concern that complex questions of causation make this case unmanageable for a court, Pet. Br. 49-50, but again the Court has never found a political question simply because a claim involves a complex chain of causation or difficult scientific questions. Indeed, complex causation issues occur repeatedly in, for example, toxic tort litigation, where courts must weigh scientific evidence regarding chemical pathways and the etiology of disease. The science relevant to carbon dioxide's impact on climate is, for the most part, governed by basic, long-established principles of chemistry and physics. *See, e.g.*, National Research Council, *Advancing the Science of Climate Change* (2010); Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* (2007).[7]

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they "are often called upon to apply generalized and ambiguous abstract principles to specific factual situations, even when the application of those principles is unclear." Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. Rev. 1031, 1060 (1984).

7. The National Research Council's report is available at http://www.americasclimatechoices.org/panelscience.shtml, and the Intergovernmental Panel's report is available at http://www.ipcc.ch/publications_and_data/ar4/syr/en/contents.html.

2. Well-established principles also exist to guide federal courts in fashioning equitable relief in common-law public-nuisance cases. Courts have a long tradition of equity practice with "a background of several hundred years of history" to call upon. *Hecht v. Bowles*, 321 U.S. 321, 329 (1944). Federal courts regularly adjudicate cases involving complex issues and potential remedies that may have broad societal significance. *See, e.g., Georgia*, 206 U.S. at 236-39; *Colorado v. New Mexico*, 459 U.S. 176, 183, 189-90 (1982) (applying principle of "equitable apportionment," which requires consideration of numerous complex scientific and factual issues, to fashion remedy in interstate water allocation dispute); *see also Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1083 (2d Cir. 1982) ("we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be addressed"). And the *Restatement* provides standards for determining whether injunctive relief is appropriate based on "a comparative appraisal of all of the factors in the case," including "the nature of the interest to be protected," "the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied," and "the practicability of framing and enforcing the order or judgment." Restatement (Second) of Torts § 936(1)(a), (e), (g).

In crafting a remedy for this case, the district court would focus on facts specific to the parties in the litigation, not broad policy issues such as determining the reasonable level of global emissions or emissions from sources that are not a party to this lawsuit. Pet. Br. 47-48. In particular, the court would assess the feasibility of reducing emissions from petitioners' plants and, based upon expert testimony, set a timetable for those reductions. *See Georgia*, 206

U.S. at 239 (contemplating a delay in issuing injunction to allow defendants a reasonable time to install emissions controls). Nor would fashioning injunctive relief require a court to make the "policy judgments" that the Court in *Massachusetts*, 549 U.S. at 533-34, stated that it did not have the "expertise" or "authority" to evaluate. *See* Pet. Br. 51. Those issues "have nothing to do with whether greenhouse gas emissions contribute to climate change" or to the injuries alleged here. *Massachusetts*, 549 U.S. at 533.

3. This case should also not be dismissed on the ground that it presents "unique and difficult challenges for the federal courts" that would be better handled comprehensively by the political branches or on a global basis. TVA Br. 37-38; *see also* Pet. Br. 50. That a comprehensive political solution to climate change might be preferable does not mean that courts lack the authority and capability to decide the discrete issues of liability presented here in the absence of such a solution. The same is true in many other areas of tort law, such as products liability, yet the courts adjudicate common-law claims unless and until a statute or regulation displaces the common law with a different regulatory regime. The political-question doctrine is not a broad, catch-all doctrine that courts can use to jettison cases that involve issues that courts think would be better handled by the other branches. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them.").

At bottom, defendants' political-question argument rests heavily on the politicized character of the climate-change debate. But this misunderstands the nature of the political-question doctrine. The Court in *Baker* took care to underscore that the political-question doctrine is "one of 'political questions,' not one of 'political cases.'" 369 U.S. at 217; *see also Japan Whaling Ass'n*, 478 U.S. at 230 ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones"); *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) ("The objection that the subject-matter of the suit is political is little more than a play upon words."). Courts have a constitutional obligation to exercise their jurisdiction under Article III even where, as here, the issue involved is one that may have political sensitivities.

III. THE FEDERAL COMMON LAW ENCOMPASSES PLAINTIFFS' PUBLIC-NUISANCE CLAIMS AND HAS NOT BEEN DISPLACED BY THE CLEAN AIR ACT OR REGULATORY ACTIONS TAKEN BY EPA.

A. Plaintiffs' claims arise under federal common law.

1. *There is a federal common law of public nuisance.*

"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." *Georgia*, 206 U.S. at 237. In exchange for giving

up the ability to abate transboundary nuisances by force, the States received the right to seek relief for those nuisances under federal law. In the absence of action by either Congress or a federal administrative agency that addresses the nuisance, the States are entitled to invoke the judicially developed body of federal common law. *Id.*; *see also Arkansas v. Oklahoma*, 503 U.S. 91, 98 (1992); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 n.13 (1981); *Milwaukee I*, 406 U.S. at 107; *Missouri II*, 200 U.S. at 520; *Missouri I*, 180 U.S. at 241.

a. The earliest public-nuisance cases involving interstate pollution were *Missouri I*, *Missouri II*, and *Georgia*. In *Missouri*, an original action in the Court, Missouri claimed that Illinois had caused a public nuisance by discharging sewage into the Mississippi River, causing typhoid deaths downstream in Missouri. The Court held that Missouri's claim—which could amount to a *casus belli* if it were between sovereign nations—stated a claim for equitable relief in federal court. *Missouri II*, 200 U.S. at 520. Although the Court ultimately concluded that Missouri had not established the element of causation, it did so only after full evidentiary development, including conflicting expert testimony regarding the impact of typhoid bacillus found in Illinois's discharges on the incidence of typhoid in Missouri. *Id.* at 523-26.

Similarly, in *Georgia*, 206 U.S. at 236, the Court entertained Georgia's suit to enjoin copper companies located in Tennessee from "discharging noxious gas" into Georgia, where the gases damaged forests, orchards, and crops. After full evidentiary development, the Court entered the injunction, relying upon common-law tort principles. *Id.* at 237, 239; *see also New Jersey*, 283 U.S.

at 483 (enjoining New York City from dumping garbage into the Atlantic Ocean, polluting New Jersey's waters and beaches); *New York*, 256 U.S. at 312-13 (entertaining, although ultimately rejecting, New Jersey's challenge to New York's discharge of treated sewage).

b. Although these cases were decided before *Erie* explained that "[t]here is no federal *general* common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), this Court has since confirmed that interstate public-nuisance claims remain one of the few areas of federal *specialized* common law. The Court did so in *Milwaukee I*, where Illinois asked the Court to determine whether Milwaukee and other local authorities had created a public nuisance by discharging sewage into Lake Michigan. Because the dispute was between a State and the political subdivisions of another State, it fell within the Court's non-exclusive original jurisdiction, 28 U.S.C. § 1251(b), and the Court remanded the suit to a district court after determining that it raised a federal question: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." 406 U.S. at 103.

In reaching that conclusion, the Court relied extensively on *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971), *see* 406 U.S. at 99-100, 103, where Texas claimed that the use of pesticide by ranchers in New Mexico had impaired Texas water supplies. The court of appeals determined that Texas had raised a federal question because a State that joins the union gains a federal common-law right to "protection by a federal court against improper pollution or impairment by outside sources." 441 F.2d at 236; *accord Arkansas*, 503 U.S. at 98-101,

110. Based on that reasoning and the Court's prior public-nuisance decisions—*Missouri II*, *Georgia*, *New York*, and *New Jersey*—*Milwaukee I* ruled that there is a "federal common law of nuisance." 406 U.S. at 107.

Contrary to defendants' contention, Pet. Br. 36-37, that ruling was not *dictum*. As the Court made plain, it was declining to exercise its original jurisdiction to hear the case only because Illinois had raised a claim arising under federal law that could be heard by a federal district court.[8] 406 U.S. at 97-98 & n.1.

c. Nothing has transpired since *Milwaukee I* that would undermine the continuing vitality of the federal common law of public nuisance. Defendants conflate the question whether to imply a cause of action to enforce a statute or regulation with the question whether the federal common law of nuisance exists, arguing that just as this Court has shown increasing reluctance to imply statutory causes of action it also should be reluctant to recognize federal common-law claims. Pet. Br. 33. But these are two different enterprises.

When Congress creates an obligation by statute, the question is whether that statute also enacts a private cause

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8. One of defendants' *amici* argues that this holding conflicts with the earlier ruling in *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959). Brief of Nicholas Johnson as *Amicus Curiae* in Support of Petitioners 5. But *Romero* held only that *maritime* claims did not fall within the general federal-question statute, 28 U.S.C. § 1331. That determination was rooted in the separate treatment of maritime cases under Article III and the Judiciary Act of 1789, *Romero*, 358 U.S. at 359-65, and has no application to the federal common law of public nuisance.

of action. This question is one of congressional intent. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). But when the obligation is created by something other than legislation, such as the Constitution or the common law, there is no issue of congressional intent. For example, this Court enforces the dormant Commerce Clause to protect interstate commerce in areas where Congress has not acted. *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460 (2005).

Unlike a statute, which may contain its own remedial measures that obviate the need for a private right of action, these nonstatutory duties would have no force if there were no implied cause of action to enforce them. Thus, in one of the narrow areas in which federal common law exists, this Court properly recognizes a cause of action to enforce the common law. Because the entire enterprise is judicially created, recognition of a cause of action does not run afoul of the rule for statutes set forth in *Alexander*.

Moreover, defendants are mistaken to suggest that this case involves recognition of a new cause of action. As noted above, this Court has long heard federal public-nuisance claims by States regarding transboundary pollution. Even if this Court were no longer recognizing new common-law causes of action, that would not affect the viability of previously recognized causes of action like those at issue here. *See, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (enforcing an implied cause of action recognized before *Alexander*).

2. *The federal common law of public nuisance encompasses the claims here.*

a. Defendants offer two limiting principles to distinguish this Court's prior public-nuisance cases from this case, but they are mistaken.

First, defendants argue that the federal common law is limited to disputes between two States. Pet. Br. 36. But this Court has repeatedly addressed public nuisance disputes between States and non-state actors. *Georgia* involved Georgia's public-nuisance claims against private copper companies in Tennessee. 206 U.S. at 236. And *Milwaukee I* was a suit by Illinois against non-state actors (Milwaukee and other local authorities). 406 U.S. at 97-98. Indeed, the fact that the defendants in that case were not themselves States was essential to the holding that the case did not fall within this Court's exclusive original jurisdiction. *Id.* at 98. Moreover, the reason for recognizing federal common law in this field—that States gave up their power to abate interstate nuisances forcibly when they entered the Union, *see Georgia*, 206 U.S. at 237—exists equally whether the nuisance is created by another State or its citizens.

Second, defendants also argue that the federal common law of public nuisance is limited to "a localized problem that affected a discrete area and was traceable to a discrete source—*i.e.*, nuisances of simple type." Pet. Br. 39 (citations and quotation marks omitted). But in the *Missouri* cases, Missouri alleged a public nuisance that was neither localized nor clearly traceable to a discrete source, claiming that Illinois's sewage injured the residents of St. Louis, over 300 miles downstream.

In its day, that claim was as scientifically complex as the claims made by the States here, and the Court observed that "we cannot but be struck by the consideration that if this suit had been brought fifty years ago it almost necessarily would have failed." *Missouri II*, 200 U.S. at 522. Indeed, the Court emphasized that Missouri's claim did *not* involve "a nuisance of the simple kind that was known to the older common law." *Id.* Yet the Court did not, as defendants request here, reject Missouri's public-nuisance claim on that ground. Instead, it allowed full factual development of Missouri's claims and only then resolved them on the merits, finding that the evidence did not establish causation. *Id.* at 525.

As in *Missouri II*, the causation element of plaintiffs' claims here is a matter of proof that can and should be decided under public-nuisance law. Just as Missouri had to prove that discharges from Illinois contributed to typhoid deaths in St. Louis, plaintiffs will ultimately have to prove that defendants' emissions contribute to the global warming that threatens to injure plaintiffs. The claims will rise or fall on whether plaintiffs can provide that proof, but the claims should not be dismissed at the start merely because the public nuisance alleged here is of a scope and complexity not yet addressed by federal courts due to the newness of the global-warming problem.

b. Recognizing that plaintiffs have stated claims under federal common law will neither open the floodgates to federal public-nuisance litigation nor increase the likelihood of inconsistent judicial remedies. Plaintiffs are not asking the Court "[t]o hold that anyone affected by climate change may maintain a claim against any source of greenhouse gas emissions under the federal common

law of nuisance." Pet. Br. 39 (quotation marks omitted). The federal common law of public nuisance arose to resolve interstate public-nuisance claims made by *States*, and this Court need not decide whether the non-state plaintiffs would be able to assert federal common-law claims if they were suing without the participation of States.

Public-nuisance and standing principles also limit who can sue and be sued for injuries resulting from climate change. For example, public-nuisance claims may be brought only by a sovereign, or by private parties whose specialized injury is different from that suffered by the general public. Restatement (Second) of Torts § 821C. Recognizing the States' right to sue under federal common law thus will not, as claimed by defendants, result in an "essentially limitless set" of potential parties. Pet. Br. 39; *see also id.* at 50; TVA Br. 37.

Climate-change litigation under federal common law has reflected these limits. Only two other federal common-law suits have been brought, only one of which remains pending. *See Native Vill. of Kivalina v. ExxonMobile Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal voluntarily dismissed*, No. 07-16908 (Dkt. No. 54, June 24, 2009).

Defendants also misunderstand the consequences of *not* applying federal common law here. They assert that recognizing federal common law creates a risk that federal courts would "come to different conclusions, and impose different forms of relief against different sources of greenhouse gas emissions." Pet. Br. 40; *see also* TVA

Br. 37. But the alternative is state common law, which creates a much greater risk of inconsistency. So long as plaintiffs have a claim under federal common law, they may not sue under state common law. *Milwaukee II*, 451 U.S. at 313 n.7; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). But because the Clean Air Act preserves their right to sue under state common law, they may bring state common-law claims if they have no federal common-law claim. *See Ouellette*, 479 U.S. at 497-99 (interpreting the savings clause in the Clean Water Act, 33 U.S.C. §1365(e), which is virtually identical to the savings clause in the Clean Air Act, 42 U.S.C. § 7604(a)(1)). Thus the risk of inconsistent rulings from the courts of the several States will be greater if plaintiffs do not have a claim under federal common law. *See Milwaukee I*, 406 U.S. at 107 n.9 (federal common law is preferable to the "varying common law of the individual States").[9]

Furthermore, defendants overstate the dangers of inconsistent rulings here. In any area of the law, particularly one involving equitable discretion, it is always possible that courts will come to different conclusions on facially similar facts. But courts *should* reach different results when the differences in the factual records in

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9. Petitioners cite *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 296 (4th Cir. 2010), *pet. for cert. filed*, No. 10-997, to support their argument that federal common law creates a risk of inconsistent rulings, *see* Pet. Br. 40, but that case rested on *state* common-law, *see* 593 F. Supp. 2d 812, 829 (W.D.N.C. 2009). The court of appeals held there that the Clean Air Act preempts state common law claims, but that holding is incorrect, *see* Brief of the States of Maryland et al. as *Amici Curiae* in Support of Petitioner, No. 10-977 (filed Mar. 7, 2011), and in any event the issue is not presented here.

separate cases warrant it. Even emission limitations imposed under the Clean Air take into account a range of factors "on a case-by-case basis," including "production processes and available methods, systems, and technologies" and "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). Ordinary procedural tools, such as transfer and consolidation of related cases and appellate review, will remain available to defendants that face potentially conflicting obligations. And in the unlikely event that inconsistent judicial rulings become a problem, the political branches will remain free to step in. *Cf. Blakely v. Washington*, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting) ("Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. Case-by-case judicial determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards.").

B. Neither the Clean Air Act nor the limited regulatory actions taken by EPA displaces plaintiffs' federal common-law claims.

A federal common-law public-nuisance claim is displaced when a federal statute or regulatory action addresses the nuisance. The relief that the Clean Air Act authorizes for emissions of air pollutants by stationary sources is the imposition of emission limitations. *See* 42 U.S.C. § 7411(d). Because no limitations have yet been imposed on existing power plants' carbon-dioxide emissions by either the Clean Air Act itself or EPA's limited regulatory actions, plaintiffs' federal common-law claims have not been displaced.

Milwaukee I held that the Federal Water Pollution Control Act (now called the Clean Water Act) in its original incarnation did not displace Illinois's federal common-law claims because it did not establish controls on the sewage discharges challenged by Illinois. *See* 406 U.S. at 103. This Court explained that controls would arise only if the United States brought an abatement action. *Id.*

But Congress amended the Clean Water Act in 1972 to provide that "[*e*]*very* point source discharge is prohibited unless covered by a permit" setting emissions limits. *Milwaukee II*, 451 U.S. at 318. Illinois's federal common-law claims were displaced by the amended Act and the permits issued to Milwaukee under the Act, which (1) imposed effluent limitations on Milwaukee's sewage treatment plants, and (2) established a program for abating overflows from Milwaukee's sewers.

Because effluent limitations were established for the sewage plants, "there [was] no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime by reference to federal common law." *Id*. at 320. And while the overflow abatement program would take several years to complete, it was also sufficient to displace Illinois's claims because it "addressed the problem of overflows." *Id.* at 323.

It did not matter that EPA controlled overflows on a case-by-case basis rather than by uniform regulation:

> Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of

> federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner.

Id. at 324. Although defendants make much out of that observation, Pet. Br. 45-46, the Court did not state, as defendants would have it, that displacement occurs whenever a statute merely legislates in the same field as the alleged nuisance. The Court's point was simply that, even if Illinois would have preferred that EPA issue a *regulation* addressing overflows, the abatement program established by Milwaukee's permits was sufficient to solve the problem and thus displaced Illinois's federal common-law claim. The crucial predicate—which, as explained below, is absent here—was that positive federal law addressed the problem by imposing a program for abating the overflows and afforded Illinois relief for the nuisance.

Unlike in *Milwaukee II*, the carbon-dioxide emissions from defendants' existing sources are neither prohibited by the Clean Air Act nor subject to regulatory emission limitations or an abatement program. Nor are those emissions otherwise addressed by either the Clean Air Act or EPA's regulatory actions. As a result, plaintiffs' federal common-law claims have not been displaced.

1. *The Clean Air Act does not itself address the public nuisance alleged by plaintiffs.*

Defendants argue that the Clean Air Act, standing alone, has displaced plaintiffs' claims but do not confront the essential difference between the Clean Water Act and the Clean Air Act: The former prohibits any discharge

of water pollutants unless authorized by a permit, while the latter does not prohibit or control the emission of air pollutants unless and until EPA has taken affirmative steps to regulate the emissions. *See* TVA Br. 45. Defendants try to equate the two statutes by quoting various descriptions of the Clean Air Act as "comprehensive," "sweeping," and "capacious," Pet. Br. 41 (citations omitted), but displacement must turn on what a statute actually does, and the Clean Air Act does not regulate carbon-dioxide emissions from defendants' plants.

It is not enough that the Clean Air Act gives EPA the authority to regulate carbon-dioxide emissions from existing power plants and allows plaintiffs to petition EPA to act. Pet. Br. 43-44. Unlike the panoply of actual remedies that the Court analyzed in *Milwaukee II*, the existence of EPA authority has had no effect on defendants' emissions. Indeed, if a grant of authority to a federal agency were sufficient to displace a federal common-law claim, the *pre*-1972 Federal Water Pollution Control Act would have displaced Illinois's claim, because that version of the statute authorized the United States to bring an abatement action. *Milwaukee I*, 406 U.S. at 103. Only EPA actions actually addressing the emissions would satisfy the federal interest that gave rise to the federal common law of public nuisance.

2. *EPA's regulatory actions have not addressed the public nuisance alleged here.*

a. TVA's argument that EPA's regulatory actions displace federal common law also fails. There are several prudential reasons for the Court not to reach that issue. The issue was not decided below, is not argued by petitioners,

and is not fairly included in the questions presented, Sup. Ct. R. 14(1)(a), which ask only whether the Clean Air Act itself displaces the States' claims by "speak[ing] directly to the subject matter and assign[ing] federal responsibility for regulating such emissions to" EPA, Pet. Br. i. *See Skinner v. Switzer*, — U.S. —, slip op. at 14 (Mar. 7, 2011) ("Mindful that we are a court of review, not of first view, we confine this opinion to the matter on which we granted certiorari . . . .") (quotation marks, alteration marks, and citation omitted). And even if the regulations upon which TVA relies controlled emissions from defendants' plants—which they do not—the regulations are currently being challenged by numerous parties, including the private defendants. *See Utility Air Regulatory Group v. EPA*, Nos. 10-1042, 10-1122, 10-1161 (D.C. Cir). It would be premature for this Court to decide the effect on plaintiffs' claims of those regulations before their validity has been finally adjudicated by the lower courts.

Moreover, EPA recently entered into a settlement agreement that calls for it to complete a rulemaking by May 2012 on whether to issue new source performance standards for greenhouse-gas emissions from new and modified power plants, as well as guidelines for state limits on greenhouse-gas emissions from existing plants. Notice of Proposed Settlement Agreement, 75 Fed. Reg. 82,392 (Dec. 30, 2010); *see also* Pet. Br. 9; TVA Br. 50-51. Should those emissions become subject to actual limitations, plaintiffs' federal common-law claims here would be displaced under *Milwaukee II*.

In these circumstances, the more prudent disposition of the petition would be to dismiss the writ of certiorari as improvidently granted. The case would then return to the district court, which would have a sound basis

to stay further proceedings pending the outcome of EPA's rulemaking. If for some reason EPA does not follow through by 2012 with regulations actually limiting emissions from defendants' plants, the district court and the court of appeals would have an opportunity to consider whether some basis for displacement then existed despite the absence of actual regulation, and the unsuccessful party could seek this Court's review.

b. If the Court nonetheless now reaches the question of whether EPA's recent regulatory actions have displaced plaintiffs' federal claims, the Court should hold that they do not. TVA argues that the claims have been displaced because EPA has "directly entered the field plaintiffs would have governed by common-law nuisance suits." TVA Br. 45. But regulatory actions "occupy the field" under *Milwaukee II*, 451 U.S. at 317-18, only when they address the challenged public nuisance, and EPA's regulatory actions do not address greenhouse-gas emissions from existing power plants. TVA claims that plaintiffs are complaining that "EPA has not yet done precisely what plaintiffs demand here," TVA Br. 52, but plaintiffs are not objecting to the *kind* of relief that EPA has provided. Instead, they seek relief under federal common law because EPA has as yet provided *no* relief at all for emissions at issue here.

Nor are plaintiffs' claims displaced because EPA is taking an "incremental approach" to addressing greenhouse-gas emissions. *See* TVA Br. 44. TVA relies on *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11-12, 22 & n.32 (1981), *see* TVA Br. 52, but the incremental approach adopted by the statute at issue in that case was part of a comprehensive scheme initially imposing immediate limitations on dumping

sewage sludge in the ocean and later prohibited dumping altogether. Thus, relief was provided in increments there, unlike here where EPA has provided no relief from defendants' emissions.

The series of EPA actions discussed by TVA culminated in the imposition of greenhouse-gas limitations on new and modified major stationary sources, but neither imposed limitations on existing sources nor obligated EPA to regulate those emissions in the future. *See* TVA Br. 46-50. The first action in that series was EPA's issuance—as a result of this Court's decision in *Massachusetts*—of a finding under the section of the Act that pertains to mobile sources, 42 U.S.C. § 7521(a)(1), that greenhouse gases "may reasonably be anticipated to endanger public health or public welfare." As a result of the endangerment finding, EPA issued greenhouse-gas emission standards for light-duty motor vehicles. *See* 75 Fed. Reg. 25,324.

Those standards made greenhouse gases a pollutant "subject to regulation" for the purposes of two of the Act's stationary-source programs—the "prevention of significant deterioration" ("PSD") program and the Title V permitting program—neither of which requires greenhouse-gas limitations for existing power plants. 42 U.S.C. §§ 7475(a)(4), 7479(1), 7602(j), 7661(2)(B), 7661a(a); 75 Fed. Reg. at 31,606-07, 31,551-54. The PSD program covers only *new* "major" stationary sources and *modifications* to major stationary sources. 42 U.S.C. §§ 7475(a), 7479(2)(C). The Title V operating permit program requires major stationary sources, including defendants' plants, to obtain one permit setting forth all the emission limitations already imposed under other provisions of the Act, in order to facilitate enforcement of

those limitations, but does not itself impose any emission limitations, as TVA acknowledged at the certiorari stage, *see* Brief of the Tennessee Valley Authority in Support of Petitioners 4. Since there are no carbon-dioxide emission limitations imposed on existing power plants, defendants' Title V permits do not include such limitations.

To implement its new obligations under the PSD and Title V programs, EPA issued the "tailoring rule," which phases in the greenhouse-gas requirements under the PSD program and Title V. 75 Fed. Reg. 31,514. TVA cites the tailoring rule as evidence of EPA's judgment that "regulation of greenhouse-gas emissions from stationary sources should proceed in an orderly and phased fashion based on a variety of considerations," TVA Br. at 50, but the tailoring rule reflects only EPA's judgment that for administrative reasons, it should take an incremental approach to meeting its obligations under the PSD and Title V programs. 75 Fed. Reg. at 31,516. As explained above, these programs do not impose limitations on greenhouse-gas emissions from existing sources.

c. Greenhouse-gas limitations on existing stationary sources would be triggered if EPA issued new source performance standards for greenhouse-gas emissions from power plants under 42 U.S.C. § 7411(b). Those standards themselves would apply to new and modified plants, but they also would obligate EPA to issue regulations requiring States to impose emission standards on existing power plants. *Id.* § 7411(d)(1); *see also* TVA Br. 50-51. EPA has announced that it intends to complete a rulemaking by May 2012 on the issue of new source performance standards for power plants, but, as TVA emphasizes, TVA Br. 51 n.25, there is no guarantee that

this rulemaking will actually impose limits on defendants' emissions or otherwise address them. In any event, until the rulemaking is complete, federal law will offer no relief for defendants' emissions nor address them in any way other than through federal common law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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