No. 10-174

In the Supreme Court of the United States

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

v.

STATE OF CONNECTICUT, ET AL.

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

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN SUPPORT OF PETITIONERS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

CURTIS E. GANNON
Assistant to the Solicitor General

LISA E. JONES
H. THOMAS BYRON
JUSTIN R. PIDOT
CHARLES R. SCOTT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RALPH E. RODGERS
Acting General Counsel

HARRIET A. COOPER
Assistant General Counsel

MARIA V. GILLEN
Attorney
Tennessee Valley Authority
Knoxville, TN 37902

QUESTIONS PRESENTED

Plaintiffs allege that significant emitters of carbon dioxide in 20 States have created, contributed to, or maintained a common-law public nuisance by contributing to global warming and thus injuring plaintiffs in their capacities as sovereigns or landowners. This brief addresses the following questions:

1. Whether plaintiffs' federal common-law nuisance claims are barred by principles of prudential standing.

2. Whether, assuming plaintiffs have alleged cognizable public-nuisance claims under federal common law, that federal common law has been displaced in this context by the Clean Air Act and associated actions of the United States Environmental Protection Agency.

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OPINIONS BELOW

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

JURISDICTION

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

gust 2, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Clean Air Act (Act or CAA), 42 U.S.C. 7401 *et seq.*, establishes a comprehensive framework for regulation of air pollution and vests EPA (and to some extent the States) with implementing authority. The statute broadly defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g). In the wake of this Court's decision in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), EPA has recently taken several major steps to begin the process of regulating greenhouse-gas emissions under the CAA. Those steps are consistent with the United States' efforts to address climate change in recent international negotiations.[1]

Massachusetts held that Section 202 of the CAA—which authorizes EPA to prescribe standards for emissions of air pollutants from new motor vehicles, 42 U.S.C. 7521(a)(1)—"authorizes EPA to regulate greenhouse gas emissions" if it "forms a 'judgment' that such emissions contribute to climate change." 549 U.S. at 528. Section 108 of the CAA also provides EPA with a mechanism for listing pollutants that "endanger public health or welfare" and meet certain other criteria. 42 U.S.C. 7408. When an air pollutant is listed, the Act

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[1] See, *e.g.*, U.S. Dep't of State, *U.S. Climate Action Report 2010* at 3, http://www.state.gov/documents/organization/140636.pdf (noting that as part of the Copenhagen Accord, the United States proposed to "reduce emissions in the range of 17 percent from 2005 levels by 2020").

requires States to regulate emissions to prevent pollution from exceeding EPA standards. 42 U.S.C. 7409-7410.[2]

In addition, Section 111 of the Act authorizes EPA to list categories of stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7411(b)(1)(A). Once EPA exercises its discretion to list a category of stationary sources, Section 111 directs it to establish federal performance standards for emissions of pollutants specified by EPA from new (or modified) sources in that category. 42 U.S.C. 7411(b)(1)(B). Furthermore, in some circumstances, once EPA has established such new source performance standards (NSPS) for a category of sources, States are required by Section 111(d) to issue performance standards—in accordance with EPA procedures—for *existing* sources in that category.[3] EPA may issue such standards directly if a State does not do so. 42 U.S.C. 7411(d); see also 40 C.F.R. 60.20-60.29 (establishing procedures for adoption of state plans).

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[2] Section 109 of the CAA (42 U.S.C. 7409) directs EPA to establish national ambient air quality standards (NAAQS) for air pollutants for which "air quality criteria" have been issued under Section 108. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 462-463 (2001). Once a NAAQS for a "criteria" pollutant has been established, each State must inform EPA of which areas within the State have attained the standard and which have not; States must then submit implementation plans for attainment and maintenance of the standard. See generally *Environmental Def.* v. *EPA*, 489 F.3d 1320, 1323 (D.C. Cir. 2007).

[3] Section 111(d) standards for existing sources are required only if the NSPS regulates emissions of an air pollutant for which a NAAQS has not been established, or which is not regulated under Section 112 (42 U.S.C. 7412).

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

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

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

2. Petitioners and TVA (collectively, defendants) are six entities that operate fossil-fuel-fired electric power generation facilities in 20 States. Pet. App. 2a. Respondents (other than TVA) are eight States, the City of

New York, and three land trusts (collectively, plaintiffs). *Ibid.*

In July 2004, plaintiffs filed two similar complaints in the United States District Court for the Southern District of New York. Pet. App. 8a, 11a. Both complaints allege that defendants are substantial contributors to carbon-dioxide emissions—amounting to 10% of such emissions caused by human activities in the United States—and thus contribute to global warming. *Id.* at 8a. Plaintiffs claim that defendants are liable for creating, contributing to, or maintaining a public nuisance under federal common law (or, in the alternative, state common law). *Id.* at 8a, 11a, 12a-13a. They seek permanent injunctive relief requiring defendants to abate the nuisance by capping and then reducing their emissions "by a specified percentage each year for at least a decade." *Id.* at 178a.

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

3. On September 21, 2009, a two-judge panel of the Second Circuit reversed. Pet. App. 1a-170a.[4]

The court of appeals discussed the six indicia of a political question articulated in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), and held that plaintiffs' lawsuits do not

[4] Justice Sotomayor was a member of the panel that heard oral argument, but joined this Court before the court of appeals issued its decision. Pet. App. 2a n.*.

present a nonjusticiable political question. Pet. App. 23a-41a. With respect to the first *Baker* factor, it held that defendants had forfeited any argument that limiting carbon-dioxide emissions was textually committed to the political Branches under the Commerce Clause, and that the case would not interfere with the President's foreign-policy prerogatives because a single court decision in a common-law-nuisance action could not "establish a *national* or *international* emissions policy." *Id.* at 24a-25a, 26a. With respect to the second factor—whether there is a "lack of judicially discoverable and manageable standards for resolving" an issue, 369 U.S. at 217—the court of appeals concluded that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century," Pet. App. 28a, and that there would be judicially manageable standards here because "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance," *id.* at 34a. With respect to the third factor—whether it is impossible to decide an issue "without an initial policy determination of a kind clearly for nonjudicial discretion," 369 U.S. at 217—the court found that there would be no need for any such "initial policy determination" because this case "appears to be an ordinary tort suit." Pet. App. 38a-39a (internal quotation marks omitted). Finally, the court held that the last three *Baker* factors—which involve the potential for disagreement between the judicial and political Branches—do not apply because the United States has "no unified policy on greenhouse gas emissions." *Id.* at 40a.

The court of appeals proceeded to consider three other issues that defendants had raised as alternative grounds for affirmance: (1) whether plaintiffs have Article III standing; (2) whether their complaints state a

claim under federal common law; and (3) whether the CAA has displaced any such federal common-law claim.

With respect to standing, the court of appeals held that the State plaintiffs have *parens patriae* Article III standing based on their interest in safeguarding public health and natural resources. Pet. App. 44a-55a. The court also concluded that the States and the land trusts have met the Article III standard articulated in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), because (1) they would allegedly suffer injury in fact as a result of the effects of climate change on their property and proprietary interests, Pet. App. 60a-67a; (2) their allegations that defendants' emissions contribute to climate change satisfy the causation requirement, at least at the motion-to-dismiss stage, *id.* at 67a-73a; and (3) a court could provide effective relief, because reducing defendants' emissions would "*slow or reduce*" climate change, *id.* at 75a; see also *id.* at 76a (agreeing with the proposition that "[e]ven if emissions increase elsewhere, the magnitude of [p]laintiffs' injuries will be less if [d]efendants' emissions are reduced than they would be without a remedy").

Next, the court of appeals held that plaintiffs have stated a claim under federal common law. Pet. App. 77a-123a. Applying Section 821B of the Restatement (Second) of Torts (1977), it found that plaintiffs stated a claim by alleging that defendants contribute to an "unreasonable interference with public rights," Pet. App. 82a-84a, 121a, including "the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world," *id.* at 83a-84a.

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

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

4. As discussed below (see pp. 25-30, *infra*), in the 11 months since the court of appeals issued its decision, EPA has taken several actions pursuant to its authority under the CAA to address emissions of greenhouse

gases (including carbon dioxide). EPA has finalized the proposed rule that the court of appeals discussed and has also adopted standards governing emissions of greenhouse gases from certain motor vehicles. It has taken actions to render carbon dioxide a "pollutant subject to regulation under [the CAA]," 42 U.S.C. 7475(a)(4), effective January 2, 2011. EPA is also, pursuant to a voluntary remand from the D.C. Circuit, evaluating whether and how to add greenhouse gases to the new source performance standards that apply to power plants.

ARGUMENT

Key features of this case counsel against plenary review by this Court at this time. In particular, the case is in an interlocutory posture, which is itself often a sufficient reason to deny certiorari. See, *e.g.*, *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). Moreover, the courts of appeals are not, at present, in conflict on the questions presented.

Nevertheless, limited intervention by the Court is appropriate at this juncture. The court of appeals' decision resolves multiple issues—most of which the district court did not have occasion to address because it dismissed the case on political question grounds—that will be "fundamental to the further conduct of [this] case." *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947). There is also a significant likelihood that the decision will guide or control much additional litigation. Because the predicate for plaintiffs' lawsuits is *global* warming—which is caused by emissions from all around the world and can have detrimental effects almost anywhere in the world—the principal geographic limitation for such suits within

the United States is likely to be the ability to exercise personal jurisdiction over the defendants any particular plaintiff might choose to sue. Thus, so long as the court of appeals' decision provides an extensive roadmap for resolving several threshold questions in favor of plaintiffs in such cases, courts in the Second Circuit will likely host a disproportionate share of such suits, perhaps forestalling percolation of similar issues in other circuits. Accordingly, action by this Court would meaningfully affect an emerging category of litigation over greenhouse-gas emissions that implicates myriad plaintiffs and defendants.[5]

As explained below, this Court should grant certiorari, vacate the judgments of the court of appeals, and remand to enable the court of appeals to consider two questions in the first instance: (1) whether, independent

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[5] As petitioners discuss (Pet. 8-10), even before the decision below, other cases were brought presenting similar common-law claims of public nuisance against a wide swath of defendants based on alleged contributions to global warming. See *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (suit by Eskimo village against 24 oil, energy, and utility companies, alleging that their emissions have, by contributing to global warming, caused Arctic sea ice to diminish), appeal pending, No. 09-17490 (9th Cir.); *Comer* v. *Murphy Oil USA*, 585 F.3d 855, 861 (5th Cir. 2009) (class-action suit by Mississippi coastal residents and landowners against oil and electric-power companies, alleging that their emissions "contribut[ed] to global warming" and "added to the ferocity of Hurricane Katrina"), opinion vacated pending reh'g en banc, 598 F.3d 208, appeal dismissed, 607 F.3d 1049 (5th Cir. 2010); *California* v. *General Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007) (suit by State of California against automobile manufacturers alleging that the vehicles they produce emit carbon dioxide, which causes global warming, which reduces snow pack and increases sea levels, resulting in reduced water supplies, increased risk of flooding, increased coastal erosion, and increased risk and intensity of wildfires).

of Article III standing requirements, plaintiffs' suits should be barred as a matter of prudential standing; and (2) whether, in light of multiple actions that EPA has taken since the court of appeals issued its decision, any otherwise cognizable federal common-law claims here have been displaced.

A. Even If Article III Jurisdiction Exists, Plaintiffs' Suits Should Be Barred As Generalized Grievances More Appropriately Addressed In The Representative Branches

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

As a legal matter, petitioners' concerns are best expressed as defects in demonstrating prudential standing. Principles of prudential standing have been developed largely as a matter of judicial self-restraint and exist independently of Article III. One such principle requires federal courts to refrain from adjudicating "generalized grievances more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)).

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

Plaintiffs' common-law claims here are precisely the kind of "generalized grievance[]" that is "more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12. This would be a different case if there were, for example, a "constitutional or statutory provision" that "properly can be understood as granting persons in the plaintiff[s'] position a right to judicial relief." *Warth*, 422 U.S. at 500. Indeed, Congress has vested a federal agency, EPA, with the power to regulate emissions from power plants and carbon dioxide as an emission and has expressly provided for focused judicial review of EPA's actions. See *Massachusetts* v.

EPA, 549 U.S. 497, 516 (2007) (discussing 42 U.S.C. 7607(b)(1)). It has also provided for citizen enforcement of emissions standards that EPA establishes. 42 U.S.C. 7604. None of that is at issue here. Rather, plaintiffs proceed without relying on any statutory right or statutory cause of action, and have sued a handful of defendants from among a broad array of entities that emit greenhouse gases. Moreover, the types of harms they seek to redress could potentially be suffered by virtually any landowner, and to an extent, by virtually every citizen, in the United States (and, indeed, in most of the world). Prudential standing principles counsel in favor of leaving resolution of such claims to the representative Branches.

Plaintiffs' common-law nuisance claims are quintessentially fit for political or regulatory—not judicial—resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both plaintiffs and defendants. On the plaintiffs' side, the eight States, one city, and three land trusts in these suits are but a tiny subset of those who could allege they are injured by carbon-dioxide emissions that have contributed or will contribute to global climate change. The court of appeals focused largely on plaintiffs' asserted injuries as landowners. See Pet. App. 59a-67a. But plaintiffs' allegations are not unusual in that respect. Global climate change will potentially affect the property interests of most landowners. The court of appeals explained that global warming's effects come from the land, the sea, and the air, and will threaten the beaches, the fields, the hills—and almost

everywhere in between.[6] The court of appeals' analysis of the claims of the land-trust plaintiffs (Pet. App. 62a-63a) further confirms that nearly all landowners will suffer injuries of the types they allege here. Moreover, global warming's effects will not be limited to landowners; they will also be felt by governments, individuals, corporations, and interest groups throughout the Nation and around the world.

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

The multiplicity of potential plaintiffs and defendants is rendered especially troubling by the very nature of common-law public-nuisance claims seeking to slow

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[6] See Pet. App. 61a-62a (cataloging alleged damage to "States with ocean coastlines" as well as States "bordering the Great Lakes"; noting that "a rise in sea level would * * * accelerate beach erosion," "[w]armer temperatures would threaten agriculture" in other States, and disruption of ecosystems would "affect[] State-owned hardwood forests and fish habitats"); see also *Massachusetts*, 549 U.S. at 521-522 & nn.18-19 (discussing New Orleans and Hurricane Katrina in the context of Massachusetts' claims of injury); note 5, *supra* (noting injuries alleged in other nuisance suits about global warming).

global warming. The problem is not simply that many plaintiffs could bring such claims and that many defendants could be sued. Rather, it is that essentially any potential plaintiff could claim to have been injured by any (or all) of the potential defendants. The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere—making it impossible to consider the sort of focused and more geographically limited effects characteristic of traditional nuisance suits targeted at particular nearby sources of water or air pollution. It is cases of the latter sort on which the court of appeals relied as examples of "the federal courts' masterful handling of complex public nuisance issues." Pet. App. 29a.[7]

Moreover, EPA has already begun taking actions to address carbon-dioxide emissions under the CAA, and a common-law proceeding would be a less efficient, effective, and manageable means for considering in the first instance (rather than on judicial review of an agency determination) how much of the burden of reducing the Nation's contributions to global climate change should be borne by the electric-utility industry, or for determining which segments of that industry should make which changes to accommodate the Nation's need to reduce carbon-dioxide emissions, or at what rate such re-

[7] This Court last recognized a federal common-law cause of action in the pollution context in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), though it subsequently held that water-pollution suits recognized in *Milwaukee I* had been displaced by later statutory amendments, see *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313, 315 n.8 (1981). The other nuisance cases discussed by the court of appeals long predated enactment of the Clean Air Act and—unlike this case—still involved only localized rather than global effects. Accordingly, the prudential standing argument advanced here would not alter the standing analysis for cases involving such localized grievances.

ductions should occur. Courts—when no statute is in place to provide guidance—are simply not well-suited to balance the various interests of, and the burdens to be borne by, the many entities, groups, and sectors of the economy that, although not parties to the litigation, would be affected by a grievance that spans the globe.

Establishing appropriate levels for the reduction of carbon-dioxide emissions from power plants "by a specified percentage each year for at least a decade" (as plaintiffs request, Pet. App. 178a) would inevitably entail multifarious policy judgments, which should be made by decision makers who are politically accountable, have expertise, and are able to pursue a coherent national or international strategy—either at a single stroke or incrementally, cf. *Massachusetts*, 549 U.S. at 524. For such reasons, courts often accord the highest levels of deference to Executive Branch agencies' application of their regulatory and scientific expertise to address such complex problems. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); *NRDC* v. *EPA*, 571 F.3d 1245, 1251-1253 (D.C. Cir. 2009); *New Eng. Legal Found.* v. *Costle*, 666 F.2d 30, 33 (2d Cir. 1981).

In the CAA, Congress has created a regime under which EPA and state regulators determine the best means of regulating air pollutants. Since this Court held in 2007 that carbon dioxide falls within that regulatory authority, see *Massachusetts*, 549 U.S. at 528-535, EPA has taken several significant steps toward addressing the very question presented here. See pp. 25-30, *infra*. That regulatory approach is preferable to what would result if multiple district courts—acting without the benefit of even the most basic statutory guidance—could use common-law nuisance claims to sit as arbiters of scientific and technology-related disputes and *de facto*

regulators of power plants and other sources of pollution both within their districts and nationwide. Cf. *North Carolina* v. *TVA*, No. 09-1623, 2010 WL 2891572, at *1 (4th Cir. July 26, 2010) (suit involving a state common-law claim; "encourag[ing] courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air" would result in "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike").

The confluence in this case of several factors—including the myriad potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made—demonstrates that plaintiffs' global-warming nuisance claims should be resolved by the representative Branches, not federal courts. And here, the issue at hand is actually being addressed by the representative Branches, rendering resort to common-law remedies unnecessary and duplicative.

2. The prudential standing analysis articulated here would not alter this Court's settled approach to challenges that raise generalized grievances "about the conduct of government." *Lance* v. *Coffman*, 549 U.S. 437, 442 (2007) (per curiam). This Court has addressed the justiciability of claims of government misconduct brought by taxpayers or citizens as part of the inquiry into whether a plaintiff has alleged a sufficiently particularized and concrete stake in litigation to establish Article III injury. See *ibid.*[8] Here, plaintiffs are not as

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[8] See also *Hein* v. *Freedom from Religion Found.*, 551 U.S. 587, 633-634 & n.5 (2007) (Scalia, J., concurring in the judgment) (concluding

serting the general interest of a taxpayer or citizen in having the government follow the law. Instead, they assert that their property interests—or those of their citizens, in the case of the States' *parens patriae* status[9]—have been damaged by the actions of private and governmental parties.

Thus, the issue here is not whether plaintiffs' alleged injuries are abstract or concrete. Even assuming that plaintiffs have sufficiently alleged individualized injuries for Article III purposes, questions about how to regulate and reduce carbon-dioxide emissions are, for the reasons discussed above, "more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12.[10] Indeed, EPA has begun to address how and when to regulate carbon-dioxide emissions—decisions that the

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that a taxpayer's "'generally available grievance about government'" fails to "satisfy Article III's requirement that the injury in fact be concrete and particularized," notwithstanding prior "dicta describ[ing] the prohibition on generalized grievances as merely a prudential bar") (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 (1992)); *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 345-346 (2006) (describing federal-taxpayer-standing doctrine as based on Article III); *FEC* v. *Akins*, 524 U.S. 11, 23 (1998) (analyzing Article III injury and considering whether harm is "of an abstract and indefinite nature") (internal quotation marks omitted).

[9] Although TVA is a defendant, the court of appeals' analysis of the States' *parens patriae* interests did not address the rule that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)). Unlike in *Massachusetts* (see 549 U.S. at 520 n.17), the States here do not and cannot claim that their suits simply assert their quasi-sovereign rights under an Act of Congress that has dispensed with prudential standing limitations.

[10] Even widely shared environmental harms may establish injury for Article III purposes. See, *e.g.*, *Massachusetts*, 549 U.S. at 522.

CAA in turn makes subject to judicial review. Plaintiffs thus lack prudential standing to assert their claims under federal common law.

3. Like petitioners' Article III and political question arguments, prudential standing is a threshold non-merits issue that may be resolved at the outset of a case—and, indeed, may be resolved before Article III standing. See, *e.g.*, *Tenet* v. *Doe*, 544 U.S. 1, 7 n.4 (2005) ("[T]he prudential standing doctrine[] represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction."); *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) (assuming Article III standing in order to address prudential standing); *Newdow*, 542 U.S. at 18 & n.8 (finding plaintiff "lack[ed] prudential standing to bring this suit in federal court," without addressing Article III standing).[11]

In this case, compelling reasons counsel in favor of addressing prudential standing before other threshold questions, such as Article III standing and the political question doctrine. It is a narrower ground for decision, because it can be based on the context of the claims here, which are asserted under federal common law that is itself fashioned by the courts, and which present a unique confluence of a vast category of potential plaintiffs who may sue any among a vast category of potential defendants by alleging that their actions affected the entire Earth.

Prudential standing also provides a more deferential and restrained basis for dismissing suits like plaintiffs' because the basis for dismissal can be revisited by Con-

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

gress. As this Court has explained, principles of prudential standing can, "unlike their constitutional counterparts, * * * be modified or abrogated by Congress." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997); see also *FEC* v. *Akins*, 524 U.S. 11, 20 (1998) (holding that the existence of a statute embodying Congress's intention to authorize the "kind of suit" at issue meant that the plaintiffs "satisf[ied] 'prudential' standing requirements"); *United Food & Commercial Workers* v. *Brown Group, Inc.*, 517 U.S. 544, 558 (1996) ("prudential limitations are rules of 'judicial self-governance' that 'Congress may remove . . . by statute'") (quoting *Warth*, 422 U.S. at 509).

The restraint and flexibility inherent in prudential standing doctrine complement petitioners' appropriate concerns that the representative Branches' active role in addressing global warming be taken into account. See Pet. 27, 31, 34; see also *Newdow*, 542 U.S. at 12 (noting that prudential standing prevents courts from deciding questions "of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights") (quoting *Warth*, 422 U.S. at 500).

Dismissal on prudential standing grounds also follows from this Court's recognition in *Massachusetts* that Congress's statutory "authorization" of the "type of challenge to EPA action" present there—but absent in the common-law action here—was "of critical importance to the standing inquiry." 549 U.S. at 516 (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Had this case fallen within the bounds of a citizen-suit provision like 42 U.S.C. 7604, the existence of that statutory cause of ac-

tion would mean that Congress had eliminated *prudential* standing limitations and itself diminished the concern animating the prudential standing doctrine: that the representative Branches are otherwise better suited than are the federal courts to resolving such matters. When Congress has enacted a statute authorizing suit, the standing inquiry is different because Congress has "at the very least identif[ied] the injury it [sought] to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment).[12]

4. To be sure, defendants (including TVA) did not present a prudential standing argument to the courts below. Nevertheless, "[t]he rules of standing, whether as aspects of the Art[icle] III case-or-controversy requirement *or as reflections of prudential considerations* defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention" that must be established by "the complainant" who seeks "the exercise of the court's remedial powers." *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (emphasis added). Thus, before considering the merits of this suit, courts should be assured that "judicially self-imposed limits on the exercise of federal

[12] Compared to Article III standing, prudential standing is also more susceptible to definitive resolution at the outset of the case. Even if plaintiffs have satisfied Article III standing at the pleading stage, as the court of appeals held, questions of injury, causation, and redressability would need to be revisited as the suit progressed. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990); Pet. App. 43a (expressly relying upon "the lowered bar for standing at the pleading stage"). Plaintiffs would, for instance, need to produce evidence to support their assertion that "[e]ven if emissions increase elsewhere, the magnitude of [p]laintiffs' injury will be less if [d]efendants' emissions are reduced than they would be without a remedy." *Id.* at 76a.

jurisdiction" will not be transgressed. *Allen*, 468 U.S. at 751; see, *e.g.*, *Newdow*, 542 U.S. at 12-18 (dismissing for lack of prudential standing even though that issue was not raised in the lower courts or in the parties' briefs in this Court).

This Court could, of course, decide the question of prudential standing for itself, even though that question was not addressed by the district court or court of appeals. As a general matter, however, the Court does not decide questions that have not been answered by the court of appeals, because it is a court "of final review, 'not of first view.'" *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Here, because there are independent reasons to remand, so that the court of appeals can consider whether any cognizable federal common-law claim has been displaced in light of recent regulatory developments (see pp. 22-32, *infra*), it would be appropriate for the court of appeals (or the district court on further remand) also to address, in the first instance, whether prudential standing principles bar consideration of plaintiffs' federal common-law claims, independent of Article III.[13]

B. Any Federal Common-Law Claims Here Have Been Displaced By EPA Actions Taken After The Court Of Appeals Issued Its Decision

The court of appeals held that plaintiffs' federal common-law actions for public nuisance had not been

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[13] In the Second Circuit, prudential standing cannot be waived by the parties because the court's "independent obligation to examine subject matter jurisdiction * * * extends 'to the prudential rules of standing.'" *Thompson* v. *County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) (citation and footnote omitted).

displaced by the CAA because "EPA does not currently regulate carbon dioxide under the CAA," and does not "regulate such emissions from stationary sources." Pet. App. 135a, 144a. Those predicates for the court of appeals' analysis of the displacement question are no longer true. In the 11 months since the court issued its decision, EPA has taken several affirmative steps to make carbon-dioxide emissions "subject to regulation" under the CAA as of January 2, 2011. Thus, even assuming the court's decision was correct when it was issued, it is now clear, in light of intervening developments, that any federal common-law cause of action against petitioners and TVA for their emissions has been displaced.

1. As the court of appeals recognized, federal common law is "subject to the paramount authority of Congress," which means that a "previously available federal common-law action" will be "displaced" whenever a "scheme established by Congress addresses the problem." Pet. App. 123a-124a (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313, 315 n.8 (1981) (*Milwaukee II*)); see also, *e.g.*, *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). Accordingly, federal common law is displaced when an administrative agency takes regulatory action, under the authority of a comprehensive statutory program, to address the particular issue raised in a putative common-law cause of action.

Displacement of common law occurs even when a plaintiff seeks relief that would address the same issue in a manner that is different in character or extent from what the regulatory program provides. See *Milwaukee II*, 451 U.S. at 324 ("the question is whether the field has been occupied, not whether it has been occupied in a particular manner"); see also *Mobil Oil Corp.*, 436 U.S.

at 623-625 (holding that any federal common-law damages remedy for loss of society had been displaced by the Death on the High Seas Act, which provided damages for pecuniary loss but not for loss of society).

Petitioners contend that Congress's enactment of the CAA, which is a comprehensive regulatory program to address air pollution, was sufficient to displace plaintiffs' common-law claims, without regard to any regulatory actions that EPA has taken pursuant to the CAA. See Pet. 21-22. While there can be little doubt that the CAA established a "comprehensive" regulatory program,[14] it is unnecessary to determine in this case whether the statute alone displaced plaintiffs' claims here, because, even if it did not, the regulatory actions that EPA has taken pursuant to the CAA have had that effect by speaking directly to the question of limiting carbon-dioxide emissions.

2. The court of appeals held that—as of September 21, 2009—plaintiffs' federal common-law claims had not been displaced because it concluded that "EPA does not currently regulate carbon dioxide under the CAA" and does not "regulate such emissions from stationary sources." Pet. App. 135a, 144a. In light of subsequent developments, neither of those propositions remains true. In the wake of this Court's decision in *Massachusetts*, EPA has already taken five significant actions addressing carbon-dioxide emissions. Four of those actions occurred entirely after the decision of the court of appeals, and the fifth was commenced prior to the court of appeals' decision and has progressed since then.

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[14] See, *e.g.*, *Chevron U.S.A. Inc.*, 467 U.S. at 848 ; *Michigan* v. *United States EPA*, 581 F.3d 524, 526 (7th Cir. 2009); *American Farm Bureau Fed'n* v. *EPA*, 559 F.3d 512, 516 (D.C. Cir. 2009); *Latino Issues Forum* v. *United States EPA*, 558 F.3d 936, 938 (9th Cir. 2009).

a. First, on October 30, 2009, nearly six weeks after the court of appeals' decision, EPA issued a final rule that requires certain sources that annually emit more than 25,000 tons of greenhouse gases (and, in some instances, less) to report those emissions to EPA. 74 Fed. Reg. 56,264 (2009). EPA stated that the rule "does not require control of greenhouse gases," *id.* at 56,260, but that the data would inform decisions about whether to regulate greenhouse gas emissions under, *inter alia*, Section 111 or 202 of the CAA, *id*. at 56,265.

b. Second, on December 15, 2009, EPA published a final finding under Section 202 of the CAA that greenhouse gases in the atmosphere may reasonably be anticipated to endanger public health and welfare. 74 Fed. Reg. at 66,497. That "endangerment finding" also included a determination that carbon-dioxide and other greenhouse-gas emissions from new motor vehicles contribute to total greenhouse-gas air pollution; specifically, it determined that the portion of the transportation sector regulated by Section 202 is responsible for just over 23% of greenhouse-gas emissions in the United States, making it the "second largest emitter within the United States behind the electricity generating sector." *Id*. at 66,499.[15]

c. Third, on May 7, 2010, EPA (acting with the Department of Transportation's National Highway Traffic Safety Administration) published a joint final rule that will dramatically reduce greenhouse-gas emissions from light-duty vehicles. 75 Fed. Reg. 25,324. EPA's new emissions standards were required by Section 202 of the CAA as a result of EPA's December 2009 endangerment

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[15] On July 29, 2010, EPA denied petitions for reconsideration of its December 2009 endangerment finding. See 75 Fed. Reg. at 49,556.

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

Promulgation of the final light-duty-vehicle standards means that, as of January 2, 2011, EPA will, for the first time, consider greenhouse gases to be "pollutant[s] subject to regulation under [the CAA]," in the sense meant by 40 C.F.R. 52.21(b)(50)(iv), and therefore subject to Sections 165 and 169(1) of the CAA (42 U.S.C. 7475(a), 7479(1)). See 75 Fed. Reg. at 31,549-31,551. Those provisions—which apply to stationary sources—require any new or modified "major emitting facility" to obtain a so-called "PSD permit," under the provisions of the CAA designed to prevent significant deterioration of air quality. 42 U.S.C. 7470-7479.[16] In order to obtain such a permit, a facility must, among other things, be

[16] The CAA applies PSD requirements to a "major emitting facility," 42 U.S.C. 7475(a), which is defined to include any "source with the potential to emit" at least 250 tons per year of "any air pollutants," as well as certain "stationary sources of air pollutants" (including, as most relevant here, fossil-fuel-fired steam electric plants and boilers), if they emit or have the potential to emit at least 100 tons per year. 42 U.S.C. 7479(1). EPA's regulations implement those requirements by applying them to "major stationary source[s]," 40 C.F.R. 52.21(a)(2), which are defined to include stationary sources that emit at least 100 or 250 tons per year of a "regulated NSR pollutant," 40 C.F.R. 52.21(b)(2)(i), which includes "[a]ny pollutant * * * subject to regulation under the [CAA]." 40 C.F.R. 52.21(b)(50)(iv).

"subject to the best available control technology for each pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4). By the same token, the promulgation of the light-duty-vehicle standards means that EPA, for the first time, will consider greenhouse gases to be subject to the permitting requirements under Title V of the CAA. See 42 U.S.C. 7661a(a), 7661(2)(B), 7602(j); 75 Fed. Reg. 31,551-31,554 (describing EPA's interpretation of the applicability of Title V). As the D.C. Circuit has explained, the Title V permitting process "requires that certain air pollution sources, including every major stationary source of air pollution, each obtain a single, comprehensive operating permit to assure compliance with all emission limitations and other substantive CAA requirements that apply to the source." *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 993 (2005); see also *Virginia* v. *Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (describing Title V permit as "a source-specific bible for [CAA] compliance"), cert. denied, 519 U.S. 1090 (1997).

d. The chain of regulatory consequences following the light-duty-vehicle standards led to EPA's fourth action. On June 3, 2010, EPA issued a final rule that tailors application of the PSD and Title V permitting requirements. 75 Fed. Reg. 31,514. That rule limits the scope and effective date of those requirements by providing an incremental phase-in process, applying in January 2011 to sources already obtaining permits for other pollutants, and later to additional sources. *Id.* at 31,516.[17]

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[17] Pursuant to the first step of the tailoring rule, sources are subject to the PSD requirements on account of their carbon-dioxide emissions as of January 2, 2011, only if (1) they are already subject to such requirements due to emissions of non-greenhouse-gas air pollutants, and

As a result of the foregoing four developments—each of which occurred after the court of appeals' decision—it is no longer true that "EPA has yet to make any determination that such emissions are subject to regulation under the Act, much less endeavor *actually* to regulate the emissions." Pet. App. 144a. In fact, EPA has now taken final action that, as of January 2, 2011, makes carbon dioxide subject to regulation under the Act. Nor does it matter, for purposes of displacement analysis, that EPA has adopted an incremental approach that begins in a few months and expands over several years. In *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court held that the Marine Protection, Research, and Sanctuaries Act of 1972 displaced federal common law immediately and entirely, even though "Congress allowed some continued dumping of sludge" for nine years after the statute was enacted as a result of its "considered judgment that it made sense to allow entities like petitioners to adjust to the coming change." 453 U.S. at 22 n.32; see also *Massachusetts*, 549 U.S. at 533 (recognizing that EPA possesses "significant latitude as to the manner, timing, content, and coordination of its regulations"); *id.* at 524 ("Agencies, like legislatures, do not generally

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(2) they undertake a modification that will increase their carbon-dioxide emissions by at least 75,000 tons per year while also significantly increasing emissions of non-greenhouse-gas pollutants. 75 Fed. Reg. at 31,516. The second step of the rule, beginning on July 1, 2011, "will phase in additional large sources of [greenhouse-gas] emissions." *Ibid.* Similar steps apply in the case of Title V. *Id.* at 31,523-31,524. The third step, beginning in July 2013, may phase in regulation of additional sources. *Ibid.* EPA also stated that no sources or modifications below a certain size (50,000 tons of carbon dioxide per year) would be made subject to PSD or Title V permitting requirements before April 30, 2016. *Ibid.*

resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed.”).

e. Although it is already clear that carbon-dioxide emissions from stationary sources will be subject to regulation under the CAA when the vehicle standards take effect on January 2, 2011, a fifth development is also relevant. Since 2007, EPA has repeatedly noted that it is engaged in the process of determining whether, in light of this Court’s decision in *Massachusetts*, it should subject stationary sources—including the sectors that cover defendants’ power plants—to new source performance standards for carbon-dioxide emissions under Section 111 of the CAA, 42 U.S.C. 7411.

In 2006, an EPA final rule revised new source performance standards for certain emissions by fossil-fuel-fired electric-utility steam-generating units of a certain size.[18] At the time, EPA stated that it lacked “authority to set NSPS to regulate CO_2 or other greenhouse gases that contribute to global climate change.” 71 Fed. Reg. 9869 (2006). Several States and environmental organizations challenged that conclusion in a petition for review filed in the D.C. Circuit. See *New York* v. *EPA*, No. 06-1322 (D.C. Cir.). After this Court’s decision in *Massachusetts*, expressly holding that Section 202 of the CAA authorizes EPA to regulate greenhouse-gas emissions, the agency sought a voluntary remand. It told the D.C.

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[18] That source category includes defendants’ power plants, which would be subject to any revised NSPS if they were reconstructed or modified, 40 C.F.R. 60.14-60.15, and would be covered by any emissions guidelines for existing sources required by CAA Section 111(d) as a result of the NSPS revision.

Circuit that, as the agency with the authority to establish emission limits for specific pollutants that may reasonably be anticipated to endanger public health or welfare (see 42 U.S.C. 7411), it should "be given the opportunity in the first instance to examine and decide the effect of *Massachusetts* in the [S]ection 111 context * * * and then to make appropriate policy decisions consistent with that analysis." EPA's Combined Mot. To Govern Further Proceedings & Resp. To Envtl. & State Pet'rs' Mot. To Govern Further Proceedings, 8-9, 10, *New York*, *supra* (filed June 18, 2007). The D.C. Circuit granted EPA's request for a remand without vacatur on September 24, 2007.[19]

Since then, EPA has stated that it is "in the process of responding to a remand from the D.C. Circuit requiring it to consider whether to add standards for [greenhouse gases] to the NSPS for utility boilers." 73 Fed. Reg. 44,487 (2008); see *ibid.* ("EPA has begun a review of the existing NSPS source categories to determine whether it would be appropriate to regulate [greenhouse-gas] emissions from sources in each category" under CAA Section 111); cf. EPA, *National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants* 134-135 (Aug. 9, 2010), http://www.epa.gov/ttn/oarpg/t1/fr_notices/portland_cement_fr_080910.pdf (final rule revising NSPS for Portland-cement-manufacturing facilities, noting they are "the third highest U.S. source of CO_2 emissions" and that EPA "is working towards a proposal for [greenhouse-gas] standards" for them).

[19] The remand occurred between the oral argument and the decision in this case, but the parties did not bring that event—or EPA's associated commitment—to the Second Circuit's attention.

3. As the foregoing account demonstrates, after the Second Circuit issued its opinion, EPA took clear steps to regulate carbon-dioxide emissions, specifically including such emissions from stationary sources, under the authority granted to it by the comprehensive regulatory program established by Congress in the CAA. And EPA is also in the process of considering whether to take additional regulatory action. Thus, it is now clear that the CAA, as implemented by EPA, "speak[s] directly" (*Milwaukee II*, 451 U.S. at 315 (quoting *Mobil Oil*, 436 U.S. at 625)) to the particular issue presented by plaintiffs' nuisance claims about global warming: regulation of carbon-dioxide emissions, and in particular emissions from stationary sources (like defendants' power plants).

Although EPA has not done precisely what plaintiffs demand here (*i.e.*, cap defendants' carbon-dioxide emissions and require them to be reduced annually for at least a decade, Pet. App. 178a), that is not the relevant test. As this Court has stated: "Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S. at 324; see also *id.* at 323 ("Although a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act, such disagreement alone is no basis for the creation of federal common law."); *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982) (refusing "to find that Congress has not 'addressed the question' because it has not enacted a remedy against polluters," because that "would be no different from holding that the solution Congress chose

is not adequate," and "*Milwaukee II* * * * precludes the courts from scrutinizing the sufficiency of the congressional solution").

4. The displacement analysis in the decision below was predicated on the now-obsolete conclusion that EPA had not taken action under its CAA authority to regulate carbon-dioxide emissions from stationary sources. Stripped of that premise, the result reached by the court of appeals is no longer warranted (if indeed it was at the time of the decision).

Because a different answer to the displacement question would require the Second Circuit to affirm the dismissal of plaintiffs' complaints, and because there is a "reasonable probability" that the court "would reject" its former premise in light of "intervening developments," it would be "appropriate" for this Court to vacate the judgments below and remand for further proceedings to consider whether plaintiffs' common-law claims have been displaced by EPA's regulatory actions. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). Such a remand would also allow the court of appeals to consider in the first instance whether plaintiffs satisfy prudential standing requirements. See p. 22 & n.13, *supra*.[20]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgments of the court of appeals should be vacated, and the case should be remanded for further proceedings to consider, *inter alia*, whether the non-

[20] TVA appeared through its own counsel in the district court and court of appeals, and its briefs and oral arguments did not reflect consultation with other Executive Branch agencies, including EPA and the Department of Justice.

federal respondents satisfy prudential standing requirements and the effect on the court's analysis of recent actions taken by the Environmental Protection Agency with respect to greenhouse-gas emissions.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

CURTIS E. GANNON
Assistant to the Solicitor General

LISA E. JONES
H. THOMAS BYRON
JUSTIN R. PIDOT
CHARLES R. SCOTT
Attorneys

RALPH E. RODGERS
Acting General Counsel

HARRIET A. COOPER
Assistant General Counsel

MARIA V. GILLEN
Attorney
Tennessee Valley Authority

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