No. 10-174

In the Supreme Court of the United States

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

v.

STATE OF CONNECTICUT, ET AL.

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

REPLY BRIEF FOR THE TENNESSEE VALLEY AUTHORITY AS RESPONDENT SUPPORTING PETITIONERS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 10-174

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

v.

STATE OF CONNECTICUT, ET AL.

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

REPLY BRIEF FOR
THE TENNESSEE VALLEY AUTHORITY
AS RESPONDENT SUPPORTING PETITIONERS

The briefs for the State respondents and the Land Trust respondents (collectively, plaintiffs) only reinforce the unprecedented breadth of their claims. Plaintiffs reiterate the sweeping nature of the effects of climate change. See Br. for Connecticut et al. (States Br.) 4; Br. for Open Space Inst. et al. (Land Trust Br.) 5-7. But they give no reason why complex questions about how the Nation should mitigate contributions to global climate change are fit for judicial resolution through judge-made federal common law. Plaintiffs seek to have federal courts declare—at least with respect to power plants operated by respondent Tennessee Valley Authority (TVA) and petitioners (collectively, defendants)—what levels of carbon-dioxide emissions are sufficiently elevated to create liability for, and require an injunction against, contributing to "an unreasonable

interference with a right common to the general public," which is the definition of a "public nuisance" under Restatement (Second) of Torts § 821B(1) (1977). See States Br. 26, 32; Land Trusts Br. 29. Plaintiffs' attachment of a "common law" label to their extraordinary demands does not bring their cases within the federal courts' accustomed and appropriate role. The relief they seek is instead within the province of Congress and of the Executive Branch, which is actively addressing global warming's causes and effects. See TVA Br. 2-3 & nn.1-2, 45-51; Pet. Br. 5-10.

In light of the separation-of-powers concerns raised by plaintiffs' novel suits, TVA submits that the most appropriate way to recognize that judicial relief should be withheld is to conclude that plaintiffs lack prudential standing—because their widely shared grievance is "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))—or to recognize that any common-law claim that plaintiffs might otherwise have had has been displaced by regulatory actions of the Environmental Protection Agency (EPA) under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*

I. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE

Plaintiffs assert that they must be able to bring their claims in federal court, and that those claims could not present separation-of-powers concerns, because they purportedly arise under federal common law and are thus inherently judicial. See States Br. 21-23, 27; Land Trusts Br. 36, 42, 45. Although the Land Trusts concede that this Court must decide jurisdictional questions first, they nevertheless devote the first 19 pages of their

argument (Br. 16-35) to the proposition that they have stated valid public-nuisance claims. Even assuming that is true, it does not itself establish that plaintiffs have satisfied Article III and prudential-standing requirements or that they are not asking the courts to decide nonjusticiable political questions.

A. The Assertion Of Novel Common-Law Claims Does Not Establish Justiciability

1. The common-law label is not the panacea that plaintiffs suggest. Justiciability doctrines, including the "judicially self-imposed limits on the exercise of federal jurisdiction" embodied in prudential standing, *Newdow*, 542 U.S. at 11 (quoting *Allen*, 468 U.S. at 751), apply with as much force to suits brought under the common law as to those brought pursuant to other sources of law. If anything, those important limits on judicial power should apply with *more* force to common-law suits, because it is *Congress* that possesses the power to abrogate prudential-standing limitations, *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997), or to "loosen the strictures" of certain aspects of the Article III analysis, *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009); see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 578 (1992).[1]

In suggesting that a merits inquiry would suffice to determine the justiciability of their claims, plaintiffs rely (States Br. 15; Land Trusts Br. 16) on this Court's

[1] This Court, too, may relax prudential-standing limitations in certain contexts, but those contexts involve the vindication of constitutional, not common-law, rights. See, *e.g.*, *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984) (First Amendment); *Barrows* v. *Jackson*, 346 U.S. 249 (1953) (Equal Protection). See also *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) ("In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff.").

statement that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *International Primate Prot. League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). It is of course true that the cognizability of an injury depends in part on the nature of the claim. But that does not eliminate the need to show a concrete, individualized, traceable, and redressable injury, even in a common-law case. Nor does *Primate Protection League* suggest otherwise. It declined to decide whether the plaintiffs had Article III standing, *id.* at 78 n.4, but still recognized that Article III's requirements could be more stringent than those necessary to state a claim. See *id.* at 75, 88-89 (explaining that remand to state court of claims for "tort damages" and relief "according to equity" would not be futile because "plaintiff's lack of Article III standing would not necessarily defeat its standing in state court").[2]

Thus, courts have recognized that a common-law claim must be dismissed for want of jurisdiction—not failure to state a claim—when a plaintiff lacks standing. See, *e.g.*, *Alvarado* v. *KOB-TV, LLC*, 493 F.3d 1210, 1214 n.1 (10th Cir. 2007) (plaintiffs not identified in media report lacked standing to bring defamation and false-imprisonment claims); *Freeman* v. *First Union Nat'l*,

---

[2] Plaintiffs (States Br. 16; Land Trusts Br. 40) quote *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), for the proposition that the "hurdle" for establishing standing should be raised no "higher than the necessary showing for success on the merits." *Id.* at 181. But they ignore the Court's actual point, which was that "the standing inquiry" in that case *did* require a showing of "injury to the plaintiff," but, in the context of the particular claim at issue there, no additional showing of "injury to the environment." *Ibid.*

329 F.3d 1231, 1235 (11th Cir. 2003) (receiver lacked standing to bring negligence claim); *City of Phila.* v. *Beretta U.S.A. Corp.*, 277 F.3d 415, 419 n.3 (3d Cir. 2002) (civic organizations lacked standing to bring claims against gun manufacturers for public nuisance, negligence, and negligent entrustment). Cf. *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting) (landowner would have standing to "complain[] that a neighbor's upstream dam constitutes a nuisance" if "harm to his downstream property" is "bound to occur").

While it may be true that standing in most common-law suits is "self-evident," States Br. 22 (citation omitted), this is far from an ordinary tort suit. The quintessential tort involves one party whose conduct directly injures another. See *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (en banc) ("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."). Here, by contrast, defendants' challenged activities allegedly injure plaintiffs only by combining with the activities of billions of people, corporations, and governments. In such circumstances, merely referring to "common law" cannot dictate that federal courts can exercise jurisdiction. Moreover, the cases, cited above, on which plaintiffs rely in arguing that a merits inquiry can satisfy standing requirements involved Article III, not prudential standing; the Judiciary can quite properly adopt additional, non-Article III standing limitations as a matter of self-restraint, whether or not they match some preconceived or abstract notion of who may properly bring a suit to enjoin a public nuisance under federal common law, which itself would have to be fashioned by the courts.

2. Even if a plaintiff could establish standing by showing a right under the relevant substantive law to whatever form of relief it seeks, plaintiffs here would still need to show that federal common law provides such a right. The Land Trusts contend that "this case involves just the kind of long history" that should be "'well nigh conclusive'" of their right. Br. 36 (citation omitted). The States similarly assert that the "causes of action * * * at issue here" have been "previously recognized" by this Court because they are "public-nuisance claims by States regarding transboundary pollution." Br. 41.

But using the phrase "transboundary pollution" to describe plaintiffs' allegations is a calculated and dramatic understatement. The allegedly tortious chain of injury here does not merely cross a boundary between two States (as in, for example, *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907)). Instead, it transcends each and every boundary on the Earth. Plaintiffs allege that when carbon dioxide is emitted, from anywhere in the world, into the atmosphere, it "persist[s there] for several centuries," mixing with earlier and later emissions and causing the entire planet to warm by amounts that are "unprecedented in thousands of years of human civilization" and "will have harmful consequences worldwide," ranging from the melting of glaciers and sea ice to the fatal bleaching of coral reefs; from "more and greater floods" to "an increased likelihood of drought"; from reducing agricultural production to increasing urban death rates. J.A. 81, 83, 84, 88, 96-97 (States' complaint); see also J.A. 137-139 (Land Trusts' complaint).

The intrinsically *global* nature of global warming—in both its causes and effects—distinguishes plaintiffs' allegations from all previously recognized public-nuisance

suits involving air and water pollution. See TVA Br. 18 n.6, 43 n.20. Consistent with the tort's origins in the obstruction of particular "highways, bridges, and public rivers," 4 William Blackstone, *Commentaries on the Laws of England* 167 (1769) (quoted at Land Trusts Br. 18), earlier cases involved only localized, rather than global, effects, and featured a clear geographic nexus between the plaintiff and defendant. The cases plaintiffs cite (States Br. 38-39; Land Trusts Br. 19-21) each involved a specific geographic area (usually a portion of a single body of water).[3] In their attempt to illustrate the scope of earlier cases, the States highlight (Br. 42-43) the decision in *Missouri* v. *Illinois*, 200 U.S. 496 (1906). But that case involved allegations that disease-causing bacteria traveled from a discrete place (Chicago) to another discrete place (St. Louis) by means of a discrete pathway (from an artificial drainage canal to the Des Plaines River to the Illinois River to the Mississippi River) over a period of days, not centuries. *Id.* at 518. While global warming may affect specific places in discrete ways, its ubiquitousness sets it apart from the nuisance alleged in *Missouri*.

---

[3] See, *e.g.*, *New Jersey* v. *City of N.Y.*, 283 U.S. 473, 476-477 (1931) (suit to enjoin New York City from dumping garbage into Atlantic Ocean at points "about 10, 12½ and 22 miles * * * from the New Jersey shore"); *Mayor of Georgetown* v. *Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91 (1838) (suit to enjoin aqueduct across Potomac River); *Village of Pine City* v. *Munch*, 44 N.W. 197 (Minn. 1890) (suit to enjoin seasonal draining of pond); *People* v. *Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884) (enjoining company from dumping mine tailings into river that flowed into Sacramento River, impairing navigability of both); *Woodyear* v. *Schaefer*, 57 Md. 1, 2 (1881) (enjoining slaughterhouse from discharging blood and offal into "small stream" one mile upstream from plaintiff's flour mill).

Accordingly, the States are assuredly correct in conceding (Br. 43) that "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." While the Court has previously recognized that nuisance law adapts to emerging problems and understandings, see *Missouri*, 200 U.S. at 522, it is clear that the Court cannot simply proceed on the assumption that plaintiffs' "claims are justiciable because they fall within the well-settled confines of a common-law tort that courts have long adjudicated." States Br. 2. To the contrary, the genesis, scale, and duration of global warming not only make the political Branches the appropriate source for the government's response, but also counsel great caution before finding plaintiffs' claims justiciable under the rubric of judge-made federal common law.

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

While at least some of the State plaintiffs can satisfy Article III standing requirements (TVA Br. 25-33; note 5, *infra*), these suits still should be dismissed for want of prudential standing, because they present "generalized grievances more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751); see TVA Br. 14-21. It is, in fact, difficult to imagine a more generalized grievance than global warming. Several factors converge in this case to demonstrate that plaintiffs' concerns about climate change should be handled by the political Branches, not the Judiciary, including the countless potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of under-

lying policy judgments that would need to be made to compel defendants to "achieve" what a court might regard as "their share of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of warming," J.A. 102. And it is especially appropriate for the Judiciary to exercise self-restraint in the context of a purported federal common-law action when EPA is actively addressing how and when to regulate carbon-dioxide emissions pursuant to the CAA, and its expert decisions in that regard will themselves be subject to judicial review pursuant to special statutory procedures. See 42 U.S.C. 7607(b)(1) (Supp. III 2009).

1. Plaintiffs contend (States Br. 23-26; Land Trusts Br. 42) that, because they have alleged concrete injuries for purposes of Article III, they also satisfy the requirements of prudential standing. But that misapprehends the nature of prudential-standing doctrine, which is a "rule of self-restraint" for the courts. *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 154 (1970) (quoting *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953)). Prudential-standing doctrine provides "[a]dditional" limitations that "exist even though the Article III requirements are met." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804 (1985). It prevents courts from being "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." *Newdow*, 542 U.S. at 12 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)); see also *id.* at 18 & n.8 (dismissing for lack of prudential standing even though some of plaintiff's allegations might "suffice to establish Article III standing").

2. In an attempt to portray their grievance as one that is not generalized, plaintiffs characterize their public-nuisance action as limited. Discounting the possibility that their theory would allow for a "'multiplicity of actions,'" the Land Trusts stress that they "have properly alleged a special injury" that sets them apart from other potential plaintiffs. Br. 30-31 (quoting Restatement (Second) of Torts § 821C, cmt. a); see also States Br. 44 (citing same limitation on public-nuisance suits brought "by private parties"). The special-injury limitation may have some bite when the alleged nuisance already has the geographic nexus and localized effects that have traditionally characterized public-nuisance actions, because it further limits an already-local pool of victims. See, *e.g.*, *In re Exxon Valdez*, 104 F.3d 1196, 1198 (9th Cir. 1997). But it is toothless in the context of an alleged nuisance in which the Earth's atmosphere transmits the effects of every emission anywhere to virtually anywhere and everywhere in the world, exponentially expanding the class of potential victims.

The Land Trusts' contention that they own "types of property * * * that are particularly vulnerable to global warming" (Br. 31) does little to distinguish them from countless others in global warming's far-reaching wake.[4] Nor does their suggestion (*ibid.*) that they differ from other landowners because they bought their property with a "special purpose" of "conserving" it for various uses. Nearly all landowners can plausibly assert

---

[4] EPA has found "that human-induced climate change has the potential to be far-reaching and multi-dimensional." 74 Fed. Reg. 66,497 (2009). Climate change raises "risks associated with changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens." *Ibid.*

that they do not want their land to undergo the many detrimental changes that global warming may wreak.[5]

3. Plaintiffs' attempt to show that their theory would not yield "a limitless number of *defendants*" (Land Trusts' Br. 32) is similarly unconvincing. EPA has explained that, in addition to power-production facil-

[5] The States' theories of standing (Br. 12-13) are also capacious, including not just their interests as landowners but also the interests of citizens whose "health and welfare" would be affected by global climate change. TVA explained in its opening brief (at 25-33) that, although the question is not free from doubt, at least the coastal States appear to have satisfied the requirements of Article III standing at the pleading stage in light of this Court's decision in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). But that conclusion does not support the States' contention (Br. 12-13) that they have *parens patriae* standing by virtue of "quasi-sovereign interests" in the "health and welfare" of their citizens. The injury discussed in *Massachusetts* v. *EPA* was not of a *parens patriae* nature, because it was expressly limited to the "particularized injury" that Massachusetts alleged "in its capacity as a landowner" that stood to lose its "sovereign territory." 549 U.S. at 519, 522, 523 n.21; see also *id.* at 522 n.19 (itemizing state-owned lands, facilities, and infrastructure). And with respect to defendant TVA in particular, its opening brief pointed out (Br. 27 n.11) 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)). The States do not respond to that point.

Of course, even if Article III standing for global-warming public-nuisance suits were exclusively limited to States (or other entities with claims to represent their citizens' interests), that would still leave at least 50 entities (representing the diverse interests of hundreds of millions of individuals) able to ask different federal courts at different times to respond, without Congressional guidance, to a global phenomenon and effect far-reaching social changes at the expense of hand-picked sets of defendants, who might be selected on the basis of parochial (or changeable) interests. Cf. States Br. 3 n.1 (noting New Jersey and Wisconsin have withdrawn from this case). Prudential-standing doctrine properly addresses those concerns.

ities, other important domestic sources of greenhouse gases include "industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management." 75 Fed. Reg. 31,519 (2010). Plaintiffs assert that "the district courts know how to apply" the "'venerable maxim *de minimis non curat lex*,'" and they contend that defendants' contribution "to global warming is *not* trifling." Land Trusts Br. 33-34; see also States Br. 8, 14.[6] Of course, although defendants are among the largest national emitters of carbon dioxide, when measured against the alleged nuisance (which is not limited to the United States), their contributions to the nuisance are much smaller, and are joined by contributions from many other sectors of the economy. That is why a comprehensive, national solution, administered by an Executive agency, is needed.

In any event, the submission that plaintiffs' public-nuisance claim would somehow be available against only the largest emitters of greenhouse gases is fatally compromised when plaintiffs stress that, under the Restatement, *every single contributor* to global warming may be held liable for the nuisance and have its conduct enjoined, even if it has contributed "to only a slight extent"

[6] The Land Trusts say (Br. 7-8) that defendants have failed to use "[e]conomically viable options" to reduce emissions, but TVA's public Integrated Resource Plan addresses such options. See TVA, *Integrated Resource Plan: TVA's Environmental & Energy Future* (Mar. 2011), http://www.tva.gov/environment/reports/irp/pdf/Final_IRP_complete.pdf. Plaintiffs do not otherwise contend that defendants operate their plants in an unusual way. Using defendants' size as a selection criterion evinces no principle that would prevent public-nuisance suits from swelling into unmanageable tangles of claims and counterclaims involving every significant commercial, industrial, and governmental operation across the country or around the world.

and its own contribution would be "harmless in itself." Land Trusts Br. 40 (quoting Restatement (Second) of Torts § 840E cmt. b); see also States Br. 15 ("[i]t is well established that each person who * * * contributes to a public nuisance may be held liable").

4. Plaintiffs contend (States Br. 23-24; Land Trusts Br. 43-44) that, outside the taxpayer- and citizen-standing contexts, this Court has not dismissed cases on the ground that they are generalized grievances.[7] They also point (States Br. 25) to this Court's "hypothetical example" of a "widespread mass tort" as something that might create "the same common-law injury" in "large numbers of individuals." *FEC* v. *Akins*, 524 U.S. 11, 24 (1998). Although the Court has "not exhaustively defined the * * * dimensions" of prudential standing, the doctrine is grounded on the principle of self-restraint that "it might be appropriate for the federal courts to decline to hear a case" that is better resolved by other institutions. *Newdow*, 542 U.S. at 12-13. While the other institutions at issue here are not the same ones as in *Newdow*, this case perfectly fits the description of a dispute that is "more appropriately addressed in the representative branches." *Id.* at 12.

The numbers of persons who contribute to and are affected by global warming are virtually limitless, and the effects of any one party's conduct on another are far from direct. Plaintiffs' theory thus contemplates that almost unimaginably broad categories of both potential plaintiffs and potential defendants would be able to litigate about widespread effects felt by individuals, corpo-

[7] As explained in TVA's opening brief (at 21 n.7), the reason plaintiffs lack prudential standing here is different from the absence of Article III standing where a plaintiff asserts only an undifferentiated, generalized grievance about the conduct of government.

rations, and governmental entities throughout the Nation and around the world, without even any need to establish that any individual defendant directly affected any individual plaintiff. In that sense, plaintiffs' theory is fundamentally at odds with the purpose of the "zone of interest" strand of prudential-standing doctrine, because it flouts the premise that a discernible "zone of interest" demarcates which "particular plaintiff should be heard to complain of a particular * * * decision." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987).[8] Plaintiffs' theory could also subject any defendant to repeated rounds of potentially inconsistent litigation in various district courts, because one plaintiff would not be bound by a judgment secured by another plaintiff. See TVA Br. 37-38. Although plaintiffs accuse TVA of "asking the Court to invent a new doctrine" (Land Trusts Br. 44; see also States Br. 24)—a curious attack given the entire nature of their suits—they have failed to identify any earlier case that this Court has permitted to proceed on such a foundation.

Nor does the presence of some States as plaintiffs mitigate those fundamental justiciability concerns, for the States do not sue as sovereigns enforcing their *own* laws to abate a public nuisance within their *own* borders. Rather, they rely on effects of global warming that are widely experienced among people of the Nation (and

---

[8] The Court has recognized that the "zone of interest" analysis is not governed by "a single inquiry," and that, outside the context of "the generous review provisions of the [Administrative Procedure Act]," a plaintiff must show more to establish that it is within the zone of interest of the relevant "constitutional or statutory provision." *Clarke*, 479 U.S. at 400 n.16. Yet, in plaintiffs' view, virtually everybody in the world would be within the zone of interest for a *common-law* action to abate global warming.

world) at large, and they seek to have *federal* courts fashion *federal* law to impose limits on emitters in numerous other States. This aspect of the case thus reinforces the conclusion that the widely dispersed problems plaintiffs identify are properly addressed by Congress and the Executive—the Branches of the national government that are politically accountable to the people in all of the States. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones[.]"); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 325 (1981) (*Milwaukee II*) ("water pollution control" is such a complex subject that it is better left to "administrative agencies possessing the necessary expertise," and is "particularly unsuited to the approach inevitable under a regime of federal common law").[9] Dismissing plaintiffs' suits on prudential-standing grounds would simply acknowledge that federal courts should not provide the Nation's first-line response to a world-wide problem caused by world-wide activities.

C. This Case Raises Separation-Of-Powers Concerns Addressed By The Political-Question Doctrine, But Other Grounds Provide A More Appropriate Basis For Dismissal

TVA acknowledged in its opening brief that the Court could rely on the political-question doctrine to direct dismissal of this case, but it also explained that a

---

[9] See also *Milwaukee II*, 451 U.S. at 325 (quoting district judge's admission that his "grasp of some of the testimony was less complete than [he] would like it to be" and that "the arcane subject matter * * * was sometimes over the heads of all of us to one height or another").

decision on prudential-standing or displacement grounds would be a more appropriate means of withholding judicial relief. TVA Br. 39-40.

Plaintiffs' attempt to limit the political-question doctrine to cases involving constitutional claims or foreign affairs (States Br. 27-31; Land Trusts Br. 44) is inconsistent with *Baker* v. *Carr*, 369 U.S. 186 (1962), which recognized that a nonjusticiable political question may arise "in various settings," and that the doctrine renders a question nonjusticiable out of concern for preserving the proper "relationship between the judiciary and the coordinate branches of the federal government." *Id.* at 210. Here, the factual assessments, predictive determinations, and weighing of a complex mix of factors going to costs, benefits, economics, fairness, and international implications that are relevant to addressing global warming would call for judgments of the sort that under the Constitution are appropriately made by Congress and the Executive, not the courts. Such judgments would pervade any finding of liability and fashioning of an appropriate remedy by the courts. Both inquiries would be fraught with numerous difficulties that cannot be decided by plaintiffs' invocation of the "unreasonable interference" standard from public-nuisance law.

The States seek to force defendants to "achieve *their share* of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of warming," J.A. 102 (emphasis added), asserting that any remedy-phase considerations would not need to "focus on * * * broad policy issues such as determining the reasonable level of global emissions or emissions from sources that are not a party to this lawsuit." States Br. 35. The Land Trusts similarly assert that an "appropriate remedy" would be limited to "the reasonable reme-

dial measures that these particular defendants should be required to take," purportedly making it unnecessary for a court "to set a reasonable level for *all* global emissions." Land Trusts Br. 35. But what can properly be regarded as these particular defendants' "share" of emissions reductions for public-nuisance purposes cannot be divorced from the various considerations identified above, or from "broad policy issues" concerning "the reasonable level of global emissions" or emissions from other sources that contribute to the problem. Again, dismissal on prudential-standing grounds would appropriately take account of those concerns.

Finally, notwithstanding plaintiffs' implicit recognition that any ultimate remedy in this case would be equitable and discretionary, they do not respond to TVA's contention that the Court could determine that equitable grounds warrant dismissal of plaintiffs' claims at the outset, in light of the separation-of-powers concerns present here. TVA Br. 41-42 & n.19.

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

As TVA explained in its opening brief (at 46-51), since this Court held that the CAA authorizes EPA to regulate greenhouse gases as air pollutants, see *Massachusetts* v. *EPA*, 549 U.S. 497, 528-535 (2007), EPA has taken several significant actions to address greenhouse-gas emissions. Carbon dioxide is now a "pollutant subject to regulation under [the CAA]," 42 U.S.C. 7475(a)(4), and is therefore addressed by the CAA's provisions for the prevention of significant deterioration (PSD) of air quality, 42 U.S.C. 7475. See TVA Br. 47. EPA has issued a regulation to phase-in the application of those

PSD provisions to major new and modified sources (including power plants). See *id.* at 49-50. Moreover, under a settlement that was finalized on March 2, 2011, EPA has committed to deciding by May 26, 2012, whether and to what extent certain existing stationary sources (including power plants like defendants') will be subject to greenhouse-gas-emissions limitations under 42 U.S.C. 7411, even if they have not undergone any modifications. See TVA Br. 50-51. As a result of EPA's regulatory actions, any federal common-law cause of action that plaintiffs might otherwise have had against those who contribute to a global-warming public nuisance by emitting carbon dioxide has been displaced.

a. Plaintiffs contend (States Br. 51; Land Trusts Br. 47) that displacement has not occurred because EPA's regulatory regime does not currently impose carbon-dioxide-emissions limits on each of defendants' existing power plants. In the States' view, "regulatory actions 'occupy the field' under *Milwaukee II* only when they address the challenged nuisance." Br. 51 (citation omitted). But EPA *is* addressing the nuisance that plaintiffs allege—global warming (J.A. 57, 119)—in multiple ways, even if it happens not to be addressing all potential contributions to that nuisance or not to be addressing particular sources in the way plaintiffs prefer. Plaintiffs themselves characterize the nuisance as the result of many actors (not just the six defendants here), so the problem of which they complain is being addressed. There is no support for plaintiffs' proposed definition of the relevant "field" as excluding every portion not already covered by specific regulatory standards, and such a definition would be inconsistent with this Court's decisions.

Middlesex County Sewerage Authority v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), demonstrates that EPA's exercise of authority over greenhouse-gas emissions and the steps it has already taken toward regulating the specific emissions at issue here suffice to displace any federal common-law claims. *Sea Clammers* held that a statute displaced federal public-nuisance claims even though it permitted the dumping of certain materials to persist unrestricted for a period of time. *Id.* at 22 n.32. In so doing, the Court held that federal common law could not be used to substitute a different regulatory scheme for the one Congress had deemed appropriate.[10]

The same is true here. EPA has determined that the appropriate way to address climate change is to regulate under the CAA "one step at a time." 75 Fed. Reg. at 31,544-34,545. Apparently impatient with that deliberative approach, plaintiffs ask the federal courts to use federal common law to impose additional limits on the particular sources plaintiffs have singled out. Such an exercise of judicial authority would effectively deny EPA the opportunity to "refine[] [its] preferred approach as circumstances change and [it] develop[s] a more nuanced understanding of how best to proceed," *Massachusetts* v. *EPA*, 549 U.S. at 524. See also Con-

---

[10] The States try to distinguish *Sea Clammers* on the ground that, in their view, the statute provided relief "in increments," while "EPA has as yet provided *no* relief at all for emissions at issue here." Br. 51-52. But the plaintiffs in *Sea Clammers* were also afforded no relief under the statute—and they were *never* going to receive the relief they sought (compensation for historic harm that ocean dumping had caused to their fishing grounds). 453 U.S. at 4-5. Under plaintiffs' view, that denial of relief should have been a regulatory void to be filled by federal common law, but the Court rejected that conclusion. *Id.* at 22 n.32.

sumer Energy Alliance Amicus Br. 30-31 (describing risk that public-nuisance suits will force defendants to lock-in inferior technologies to comply with short-term reduction requirements). By overriding Congress's determination that EPA, and not the federal courts, should prescribe federal law's regulation of greenhouse-gas emissions, plaintiffs' suits would also contravene this Court's judgment that courts should not create "federal common law" to "provid[e] a different regulatory scheme" than the one prescribed by the CAA. *Milwaukee II*, 451 U.S. at 324 n.18.

Defendants' existing power plants are subject to regulation for greenhouse-gas emissions with respect to certain modifications.[11] That EPA still retains discre-

---

[11] Plaintiffs acknowledge (States Br. 52; Land Trusts Br. 48) that defendants' already-existing facilities will be subject to current greenhouse-gas-emissions standards if they are deemed to have been modified. See also TVA Br. 49 n.23; Office of Air & Radiation, EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases* 6-9 (Mar. 2011), http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf (explaining that modifications will trigger greenhouse-gas permitting standards under the phase-in steps that begin in January and July 2011). That is not merely a theoretical possibility. In previous cases, EPA has argued that defendants' existing facilities had become subject to new emissions limits as a result of certain physical or operational changes. See, *e.g.*, *TVA* v. *EPA*, 278 F.3d 1184, 1187-1188 (11th Cir. 2002) ("Centrally at issue * * * is EPA's determination that certain maintenance and repair projects conducted by TVA at many of its coal-fired power plants in the past twenty years constituted 'modifications' that required TVA * * * to bring the plants into compliance with the more stringent emissions limitations that apply to new facilities."), withdrawn in part, *TVA* v. *Whitman*, 336 F.3d 1236 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004); *United States* v. *Duke Energy Corp.*, No. 1:00cv1262, 2010 WL 3023517, at *1 (M.D.N.C. 2010) (EPA alleged "Duke Energy made modifications to coal-fired electrical generating plants * * * without obtaining permits in violation of the [PSD] provisions of the CAA.").

tion about precisely how and whether to limit carbon-dioxide emissions from existing power plants that are *not* modified does not forestall displacement. EPA is now active in that portion of the field as well (TVA Br. 50-51), and it has, in any event, established more generally that greenhouse gases are pollutants subject to regulation under the CAA. With the agency exercising its statutory authority to determine whether, when, and to what extent to limit greenhouse-gas emissions from different categories of sources, there is no remaining role for federal common-law regulation. See TVA Br. 44-45. Indeed, EPA's discretion (such as over what standards will issue by May 2012) simply reflects the basic point: These are complex technical, scientific, economic, and policy decisions that should be made by an expert body with authorization from the political Branches.

b. The States suggest (Br. 49-50) that the Court should refrain from deciding whether EPA's regulatory actions have displaced plaintiffs' nuisance claims, because they say that question was not decided by the court of appeals and is not included in the question presented. But the court of appeals recognized that EPA's regulatory efforts were relevant to the displacement analysis. See Pet. App. 144a (holding that, because EPA had not yet completed its then-pending rulemaking, the CAA "does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources"). TVA fully explained the intervening regulatory developments in the discussion of displacement in its certiorari-stage brief (at 23-32), and those regulatory actions are plainly relevant to determining whether "the Clean Air Act * * * assigns federal responsibility for regulating

[carbon-dioxide] emissions to the Environmental Protection Agency." Pet. i.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

APRIL 2011