



1 of 3 DOCUMENTS



Caution

As of: Oct 10, 2012

**AMERICAN ELECTRIC POWER COMPANY, INC., et al., Petitioners v.
CONNECTICUT et al.**

No. 10-174

SUPREME COURT OF THE UNITED STATES

*131 S. Ct. 2527; 180 L. Ed. 2d 435; 2011 U.S. LEXIS 4565; 79 U.S.L.W. 4547; 72 ERC
(BNA) 1609; 41 ELR 20210; 22 Fla. L. Weekly Fed. S 1184*

April 19, 2011, Argued

June 20, 2011, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [***1]

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

Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 2009 U.S. App. LEXIS 20873 (2d Cir. N.Y., 2009)

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondents, several States, a city, and land trusts, filed federal common law public nuisance claims against petitioner power companies, asking the court to set carbon-dioxide emissions. The U.S. Court of Appeals for the Second Circuit reversed a dismissal, holding respondents had

standing, the nuisance claims were adequately stated, and the Clean Air Act, *42 U.S.C.S. § 7401 et seq.*, did not "displace" federal common law. Certiorari was granted.

OVERVIEW: The Clean Air Act and the Environmental Protection Agency (EPA) actions it authorized displaced any federal common law right to seek the relief sought. The Act spoke directly to such emissions. *42 U.S.C.S. § 7411* directed the EPA to list categories of air pollution and establish emission standards. In fact, the EPA was doing so for greenhouse gas emissions from fossil-fuel fired power plants. The Act itself thus provided a means to seek limits on the emissions--the same relief respondents sought by invoking federal common law. The critical point was that Congress delegated to the EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation was what displaced federal common law. The judgments respondents would commit to federal judges, in suits in any federal district, could not be reconciled with the decisionmaking scheme Congress enacted. It was error to find that federal judges could set limits on greenhouse

gas emissions in face of a law empowering the EPA to set the same limits, subject to judicial review only to ensure against arbitrary, capricious, or unlawful action under 42 U.S.C.S. § 7607(d)(9).

OUTCOME: The Second Circuit's exercise of jurisdiction was affirmed by an equally divided Supreme Court. The judgment of the Second Circuit that claims under the federal common law of nuisance were stated and that the Clean Air Act did not "displace" federal common law was reversed and the case was remanded. 6-0 Decision; 1 concurrence. Justice Sotomayor took no part in the consideration or decision of the case.

LexisNexis(R) Headnotes

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

[HN1] The Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. Naturally present in the atmosphere and also emitted by human activities, greenhouse gases are so named because they trap heat that would otherwise escape from the Earth's atmosphere, and thus form the greenhouse effect that helps keep the Earth warm enough for life. Greenhouse gases qualify as "air pollutants" within the meaning of the governing Clean Air Act provision, 42 U.S.C.S. § 7602(g); they are therefore within the regulatory ken of the Environmental Protection Agency (EPA).

Civil Procedure > Federal & State Interrelationships > Federal Common Law > Interstitial Law

Environmental Law > Federal & State Interrelationships > General Overview

[HN2] Environmental protection is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law. When courts deal with air and water in their ambient or interstate aspects, there is a federal common law.

Civil Procedure > Federal & State Interrelationships > Federal Common Law > Interstitial Law

[HN3] Recognition that a subject is meet for federal law governance does not necessarily mean that federal courts

should create the controlling law. Absent a demonstrated need for a federal rule of decision, the United States Supreme Court has taken the prudent course of adopting the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation. And where borrowing the law of a particular State would be inappropriate, the Supreme Court remains mindful that it does not have creative power akin to that vested in Congress.

Real Property Law > Torts > Nuisance > General Overview

[HN4] Public nuisance law, like common law generally, adapts to changing scientific and factual circumstances.

Civil Procedure > Federal & State Interrelationships > Federal Common Law > Interstitial Law

Civil Procedure > Federal & State Interrelationships > Federal Common Law > Preemption

[HN5] When Congress addresses a question previously governed by a decision rested on federal common law, the need for an unusual exercise of law-making by federal courts disappears. Legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law. Due regard for the presuppositions of the embracing federal system does not enter the calculus, for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest. The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue.

Environmental Law > Air Quality > Emission Standards > Stationary Sources > General Overview

Environmental Law > Air Quality > Emission Standards > Stationary Sources > New Sources

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

[HN6] Section 111 of the Clean Air Act directs the Environmental Protection Agency (EPA) Administrator to list categories of stationary sources that in her judgment cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. 42 U.S.C.S. § 7411(b)(1)(A). Once the EPA lists a category, the agency must establish standards of performance for emission of

pollutants from new or modified sources within that category. § 7411(b)(1)(B). And, § 7411(d) then requires regulation of existing sources within the same category. For existing sources, the EPA issues emissions guidelines, 40 C. F. R. § 60.22,.23 (2009); in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, § 7411(d)(1).

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Environmental Law > Air Quality > Enforcement > Citizen Suits

Environmental Law > Air Quality > Enforcement > Criminal Prosecutions

Environmental Law > Air Quality > Enforcement > Government Civil Actions

[HN7] The Clean Air Act provides multiple avenues for enforcement. The Environmental Protection Agency (EPA) may delegate implementation and enforcement authority to the States, 42 U.S.C.S. § 7411(c)(1), (d)(1), but the agency retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court. 42 U.S.C.S. §§ 7411(c)(2), (d)(2), 7413, 7414. In specified circumstances, the Act imposes criminal penalties on any person who knowingly violates emissions standards issued under § 7411. 42 U.S.C.S. § 7413(c). And the Act provides for private enforcement. If States (or the EPA) fail to enforce emissions limits against regulated sources, the Act permits "any person" to bring a civil enforcement action in federal court. 42 U.S.C.S. § 7604(a).

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

Environmental Law > Litigation & Administrative Proceedings > Judicial Review

[HN8] If the Environmental Protection Agency (EPA) does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and the EPA's response will be reviewable in federal court. 42 U.S.C.S. § 7607(b)(1).

Civil Procedure > Federal & State Interrelationships > Federal Common Law > Interstitial Law

[HN9] The relevant question for purposes of

displacement of federal common law is whether the field has been occupied, not whether it has been occupied in a particular manner. Of necessity, Congress selects different regulatory regimes to address different problems.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

[HN10] Federal courts can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted.

Environmental Law > Air Quality > Emission Standards > Stationary Sources > General Overview

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

[HN11] The Clean Air Act directs the Environmental Protection Agency (EPA) to establish emissions standards for categories of stationary sources that, in the EPA Administrator's judgment, cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. 42 U.S.C.S. § 7411(b)(1)(A). The use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits. The EPA may not decline to regulate emissions if refusal to act would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 42 U.S.C.S. § 7607(d)(9)(A).

Environmental Law > Air Quality > Emission Standards > Stationary Sources > General Overview

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

[HN12] The Clean Air Act entrusts the complex balancing of an environmental benefit that is potentially achievable, the Nation's energy needs, and the possibility of economic disruption, to the Environmental Protection Agency (EPA) in the first instance, in combination with state regulators. Each standard of performance the EPA sets must take into account the cost of achieving emissions reduction and any nonair quality health and environmental impact and energy requirements. 42 U.S.C.S. § 7411(a)(1), (b)(1)(B), (d)(1). The EPA may distinguish among classes, types, and sizes of stationary sources in apportioning responsibility for emissions reductions. § 7411(b)(2), (d). And the agency may waive compliance with emission limits to permit a facility to

test drive an innovative technological system that has not yet been adequately demonstrated. § 7411(j)(1)(A). The Act envisions extensive cooperation between federal and state authorities, § 7401(a), (b), generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain, § 7411(c)(1), (d)(1)-(2).

DECISION:

[**435] Clean Air Act (42 U.S.C.S. § 7401 et seq.) and Environmental Protection Agency action authorized by Act held to displace federal common law public nuisance claims against carbon-dioxide emitters allegedly contributing to global warming.

SUMMARY:

Procedural posture: Respondents, several States, a city, and land trusts, filed federal common law public nuisance claims against petitioner power companies, asking the court to set carbon-dioxide emissions. The U.S. Court of Appeals for the Second Circuit reversed a dismissal, holding respondents had standing, the nuisance claims were adequately stated, and the Clean Air Act, 42 U.S.C.S. § 7401 et seq., did not "displace" federal common law. Certiorari was granted.

Overview: The Clean Air Act and the Environmental Protection Agency (EPA) actions it authorized displaced any federal common law right to seek the relief sought. The Act spoke directly to such emissions. 42 U.S.C.S. § 7411 directed the EPA to list categories of air pollution and establish emission standards. In fact, the EPA was doing so for greenhouse gas emissions from fossil-fuel fired power plants. The Act itself thus provided a means to seek limits on the emissions--the same relief respondents sought by invoking federal common law. The critical point was that Congress delegated to the EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation was what displaced federal common law. The judgments respondents would commit to federal judges, in suits in any federal district, could not be reconciled with the decisionmaking scheme Congress enacted. It was error to find that federal judges could set limits on greenhouse gas emissions in face of a law empowering the EPA to set the same limits, subject to judicial review only to ensure against arbitrary, capricious, or unlawful action under 42 U.S.C.S. § 7607(d)(9).

Outcome: The Second Circuit's exercise of jurisdiction was affirmed by an equally divided Supreme Court. The judgment of the Second Circuit that claims under the federal common law of nuisance were stated and that the Clean Air Act did not "displace" federal common law was reversed and the case was remanded. 6-0 Decision; 1 concurrence. Justice Sotomayor took no part in the consideration or decision of the case.

LAWYERS' EDITION HEADNOTES: [**436]

[**LEdHN1]

ENVIRONMENTAL LAW §24

CLEAN AIR ACT -- REGULATION --
GREENHOUSE GASES

Headnote:[1]

The Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. Naturally present in the atmosphere and also emitted by human activities, greenhouse gases are so named because they trap heat that would otherwise escape from the Earth's atmosphere, and thus form the greenhouse effect that helps keep the Earth warm enough for life. Greenhouse gases qualify as "air pollutants" within the meaning of the governing Clean Air Act provision, 42 U.S.C.S. § 7602(g); they are therefore within the regulatory ken of the Environmental Protection Agency (EPA). (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN2]

ENVIRONMENTAL LAW §22
ENVIRONMENTAL LAW §27

AIR AND WATER -- COMMON LAW

Headnote:[2]

Environmental protection is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law. When courts deal with air and water in their ambient or interstate aspects, there is a federal common law. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN3]

COURTS §792

FEDERAL CONCERN -- ADOPTION OF STATE
LAW

Headnote:[3]

Recognition that a subject is meet for federal law governance does not necessarily mean that federal courts should create the controlling law. Absent a demonstrated need for a federal rule of decision, the United States Supreme Court has taken the prudent course of adopting the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation. And where borrowing the law of a particular State would be inappropriate, the Supreme Court remains mindful that it does not have creative power akin to that vested in Congress. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN4]

NUISANCES §1

CHANGING CIRCUMSTANCES

Headnote:[4]

Public nuisance law, like common law generally, adapts to changing scientific and factual circumstances. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN5]

STATUTES §191

DISPLACEMENT OF FEDERAL COMMON LAW
-- CONGRESSIONAL PURPOSE

Headnote:[5]

When Congress addresses a question previously governed by a decision rested on federal common law, the need for an unusual exercise of law-making by federal courts disappears. Legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for pre-emption of state law. Due regard for the presuppositions of the embracing federal system does not enter the calculus, for it is primarily the office of

Congress, not the federal courts, to prescribe national policy in areas of special federal interest. The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks [**437] directly to the question at issue. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN6]

ENVIRONMENTAL LAW §24

CLEAN AIR ACT -- POLLUTION SOURCES --
REGULATION

Headnote:[6]

Section 111 of the Clean Air Act directs the Environmental Protection Agency (EPA) Administrator to list categories of stationary sources that in her judgment cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. *42 U.S.C.S. § 7411(b)(1)(A)*. Once the EPA lists a category, the agency must establish standards of performance for emission of pollutants from new or modified sources within that category. *§ 7411(b)(1)(B)*. And, *§ 7411(d)* then requires regulation of existing sources within the same category. For existing sources, the EPA issues emissions guidelines, *40 C.F.R. § 60.22, .23 (2009)*; in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, *§ 7411(d)(1)*. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN7]

ENVIRONMENTAL LAW §24
ENVIRONMENTAL LAW §25CLEAN AIR ACT -- IMPLEMENTATION --
ENFORCEMENT -- DELEGATION OF AUTHORITY

Headnote:[7]

The Clean Air Act provides multiple avenues for enforcement. The Environmental Protection Agency (EPA) may delegate implementation and enforcement authority to the States, *42 U.S.C.S. § 7411(c)(1), (d)(1)*, but the agency retains the power to inspect and monitor regulated sources, to impose administrative penalties for

noncompliance, and to commence civil actions against polluters in federal court. *42 U.S.C.S. §§7411(c)(2), (d)(2), 7413, 7414*. In specified circumstances, the Act imposes criminal penalties on any person who knowingly violates emissions standards issued under § 7411. *42 U.S.C.S. § 7413(c)*. And the Act provides for private enforcement. If States (or the EPA) fail to enforce emissions limits against regulated sources, the Act permits "any person" to bring a civil enforcement action in federal court. *42 U.S.C.S. § 7604(a)*. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN8]

ENVIRONMENTAL LAW §24
ENVIRONMENTAL LAW §26

CLEAN AIR ACT -- EMISSIONS LIMITS --
REVIEW

Headnote:[8]

If the Environmental Protection Agency (EPA) does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and the EPA's response will be reviewable in federal court. *42 U.S.C.S. § 7607(b)(1)*. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN9]

STATUTES §191

DISPLACEMENT OF FEDERAL COMMON LAW

Headnote:[9]

The relevant question for purposes of displacement of federal common law is whether the field has been occupied, not whether it has been occupied in a particular manner. Of necessity, Congress selects different regulatory regimes to address different problems. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.) [**438]

[**LEdHN10]

ADMINISTRATIVE LAW §246

JUDICIAL REVIEW -- COMPLIANCE WITH

STATUTE

Headnote:[10]

Federal courts can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN11]

ENVIRONMENTAL LAW §24

CLEAN AIR ACT -- EMISSIONS --
ADMINISTRATOR'S JUDGMENT

Headnote:[11]

The Clean Air Act directs the Environmental Protection Agency (EPA) to establish emissions standards for categories of stationary sources that, in the EPA Administrator's judgment, cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. *42 U.S.C.S. § 7411(b)(1)(A)*. The use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits. The EPA may not decline to regulate emissions if refusal to act would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *42 U.S.C.S. § 7607(d)(9)(A)*. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

[**LEdHN12]

ENVIRONMENTAL LAW §24

CLEAN AIR ACT -- ENVIRONMENTAL
PROTECTION AGENCY -- STATE REGULATORS

Headnote:[12]

The Clean Air Act entrusts the complex balancing of an environmental benefit that is potentially achievable, the Nation's energy needs, and the possibility of economic disruption, to the Environmental Protection Agency (EPA) in the first instance, in combination with state regulators. Each standard of performance the EPA sets must take into account the cost of achieving emissions reduction and any nonair quality health and

environmental impact and energy requirements. 42 U.S.C.S. § 7411(a)(1), (b)(1)(B), (d)(1). The EPA may distinguish among classes, types, and sizes of stationary sources in apportioning responsibility for emissions reductions. § 7411(b)(2), (d). And the agency may waive compliance with emission limits to permit a facility to test drive an innovative technological system that has not yet been adequately demonstrated. § 7411(j)(1)(A). The Act envisions extensive cooperation between federal and state authorities, 42 U.S.C.S. § 7401(a), (b), generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain, § 7411(c)(1), (d)(1)-(2). (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Kagan, JJ.)

SYLLABUS

[**439] [*2529] In *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248, this Court held that the Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases, and that the Environmental Protection Agency (EPA) had misread that Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. In response, EPA commenced a rulemaking under § 111 of the Act, 42 U.S.C. § 7411, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants. Pursuant to a settlement finalized in March 2011, EPA has committed to issuing a final rule by May 2012.

The lawsuits considered here began well before EPA initiated efforts to regulate greenhouse gases. Two groups of plaintiffs, respondents here, filed separate complaints in a Federal District Court against the same five major electric power companies, petitioners here. One group of plaintiffs included eight States and New York City; the second joined three nonprofit land trusts. According to the complaint, the defendants are the largest emitters [***2] of carbon dioxide in the Nation. By contributing to global warming, the plaintiffs asserted, the defendants' emissions substantially and unreasonably interfered with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. All plaintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually.

The District Court dismissed both suits as presenting

nonjusticiable political questions, but the Second Circuit reversed. On the threshold questions, the Circuit held that the suits [**440] were not barred by the political question doctrine and that the plaintiffs had adequately alleged Article III standing. On the merits, the court held that the plaintiffs had stated a claim under the "federal common law of nuisance," relying on this Court's decisions holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry, see, e.g., [*2530] *Illinois v. Milwaukee*, 406 U.S. 91, 93, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (*Milwaukee I*). The court further determined that the Clean Air Act did not "displace" federal common law.

Held:

1. The Second Circuit's exercise of jurisdiction [***3] is affirmed by an equally divided Court. P. ----, 180 L. Ed. 2d, at 445.

2. The Clean Air Act and the EPA action the Act authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Pp. ---- - ----, 180 L. Ed. 2d, at 445-451.

(a) Since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188, recognized that there "is no federal general common law," a new federal common law has emerged for subjects of national concern. When dealing "with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I*, 406 U.S., at 103, 92 S. Ct. 1385, 31 L. Ed. 2d 712. Decisions of this Court predating *Erie*, but compatible with the emerging distinction between general common law and the new federal common law, have approved federal common-law suits brought by one State to abate pollution emanating from another State. See, e.g., *Missouri v. Illinois*, 180 U.S. 208, 241-243, 21 S. Ct. 331, 45 L. Ed. 497. The plaintiffs contend that their right to maintain this suit follows from such cases. But recognition that a subject is meet for federal law governance does not necessarily mean that federal courts should create the controlling law. The Court need not address the question whether, absent the Clean Air Act and the EPA actions it authorizes, [***4] the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions. Pp. ---- - ----, 180 L. Ed. 2d, at

445-447.

(b) "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee v. Illinois*, 451 U.S. 304, 314, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (*Milwaukee II*). Legislative displacement of federal common law does not require the "same sort of evidence of a clear and manifest [congressional] purpose" demanded for preemption of state law. *Id.*, at 317, 101 S. Ct. 1784, 68 L. Ed. 2d 114. Rather, the test is simply whether the statute "speak[s] directly to [the] question" at issue. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 56 L. Ed. 2d 581. Here, *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Clean Air Act. 549 U.S., at 528-529, 127 S. Ct. 1438, 167 L. Ed. 2d 248. And it is equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants. The Act directs EPA to establish emissions standards for categories of stationary [***5] sources that, "in [**441] [the Administrator's] judgment," "caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). Once EPA lists a category, it must establish performance standards for emission of pollutants from new or modified sources within that category, § 7411(b)(1)(B), and, most relevant here, must regulate existing sources within the same category, § 7411(d). The Act also provides multiple avenues for enforcement. If EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. See § 7607(b)(1). The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants--the same relief the plaintiffs [*2531] seek by invoking federal common law. There is no room for a parallel track. Pp. ---- - ----, 180 L. Ed. 2d, at 447-448.

(c) The Court rejects the plaintiffs' argument, and the Second Circuit's holding, that federal common law is not displaced until EPA actually exercises its regulatory authority by setting emissions standards for the defendants' [***6] plants. The relevant question for displacement purposes is "whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S., at 324, 101 S. Ct. 1784,

68 L. Ed. 2d 114. The Clean Air Act is no less an exercise of the Legislature's "considered judgment" concerning air pollution regulation because it permits emissions until EPA acts. The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation displaces federal common law. If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse is to seek Court of Appeals review, and, ultimately, to petition for certiorari.

The Act's prescribed order of decisionmaking--first by the expert agency, and then by federal judges--is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in a particular greenhouse gas-producing sector requires informed assessment of competing interests. The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators. The expert [***7] agency is surely better equipped to do the job than federal judges, who lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. The plaintiffs' proposal to have federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable" and what level of reduction is necessary cannot be reconciled with Congress' scheme. Pp. ---- - ----, 180 L. Ed. 2d, at 448-450.

(d) The plaintiffs also sought relief under state nuisance law. The Second Circuit did not reach those claims because it held that federal common law governed. In light of the holding here that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act. Because none of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law, the matter is left for consideration on [**442] remand. Pp. ---- - ----, 180 L. Ed. 2d, at 450-451.

582 F.3d 309, reversed and remanded.

COUNSEL: Peter D. Keisler argued the cause for petitioners.

Neal Kumar Katyal argued the cause for respondent Tennessee Valley Authority, supporting petitioners.

Barbara D. Underwood argued the cause for respondents Connecticut, et al.

JUDGES: Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Breyer, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in part and concurring in the judgment, [***8] in which Thomas, J., joined. Sotomayor, J., took no part in the consideration or decision of the case.

OPINION BY: GINSBURG

OPINION

[*2532] Justice **Ginsburg** delivered the opinion of the Court.

We address in this opinion the question whether the plaintiffs (several States, the city of New York, and three private land trusts) can maintain federal common law public nuisance claims against carbon-dioxide emitters (four private power companies and the federal Tennessee Valley Authority). As relief, the plaintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually. The Clean Air Act and the Environmental Protection Agency action the Act authorizes, we hold, displace the claims the plaintiffs seek to pursue.

I

In *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), this Court held that [HN1] [**LEdHR1] [1] the Clean Air Act, 42 U.S.C. § 7401 et seq., authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. "[N]aturally present in the atmosphere and . . . also emitted by human activities," greenhouse gases are so named because they "trap . . . heat that would otherwise escape from the [Earth's] atmosphere, and thus form the greenhouse effect that helps keep [***9] the Earth warm enough for life." 74 Fed. Reg. 66499 (2009).¹ *Massachusetts* held that the Environmental Protection Agency (EPA) had misread the Clean Air Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. 549 U.S., at 510-511, 127 S. Ct. 1438, 167 L. Ed. 2d 248. Greenhouse gases, [*2533] we determined, qualify as "air pollutant[s]" within the meaning of the governing Clean Air Act provision, *id.*, at 528-529, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (quoting § 7602(g)); they are therefore within EPA's regulatory ken.

Because EPA had authority to set greenhouse gas emission standards and had offered no "reasoned explanation" for failing to do so, we concluded that the agency had not acted "in accordance with law" when it denied the requested rulemaking. *Id.*, at 534-535, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (quoting § 7607(d)(9)(A)).

1 In addition to carbon dioxide, the primary greenhouse gases emitted by human activities include methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. 74 Fed. Reg. 66499.

Responding to our decision in *Massachusetts*, EPA undertook greenhouse gas regulation. In December 2009, the agency concluded that greenhouse gas emissions from motor vehicles "cause, or contribute to, air pollution which [***10] may reasonably be anticipated to endanger public health [**443] or welfare," the Act's regulatory trigger. § 7521(a)(1); 74 Fed. Reg. 66496. The agency observed that "atmospheric greenhouse gas concentrations are now at elevated and essentially unprecedented levels," almost entirely "due to anthropogenic emissions," *id.*, at 66517; mean global temperatures, the agency continued, demonstrate an "unambiguous warming trend over the last 100 years," and particularly "over the past 30 years," *ibid.* Acknowledging that not all scientists agreed on the causes and consequences of the rise in global temperatures, *id.*, at 66506, 66518, 66523-66524, EPA concluded that "compelling" evidence supported the "attribution of observed climate change to anthropogenic" emissions of greenhouse gases, *id.*, at 66518. Consequent dangers of greenhouse gas emissions, EPA determined, included increases in heat-related deaths; coastal inundation and erosion caused by melting icecaps and rising sea levels; more frequent and intense hurricanes, floods, and other "extreme weather events" that cause death and destroy infrastructure; drought due to reductions in mountain snowpack and shifting precipitation patterns; destruction [***11] of ecosystems supporting animals and plants; and potentially "significant disruptions" of food production. *Id.*, at 66524-66535.²

2 For views opposing EPA's, see, e.g., Dawidoff, *The Civil Heretic*, N. Y. Times Magazine 32 (March 29, 2009). The Court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide

emissions and climate change.

EPA and the Department of Transportation subsequently issued a joint final rule regulating emissions from light-duty vehicles, see *75 Fed. Reg. 25324 (2010)*, and initiated a joint rulemaking covering medium- and heavy-duty vehicles, see *id.*, at 74152. EPA also began phasing in requirements that new or modified "[m]ajor [greenhouse gas] emitting facilities" use the "best available control technology." § 7475(a)(4); *75 Fed. Reg. 31520-31521*. Finally, EPA commenced a rulemaking under § 111 of the Act, *42 U.S.C. § 7411*, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants. Pursuant to a settlement finalized in March 2011, EPA has committed to issuing a proposed rule by July 2011, and a final rule by May 2012. See *75 Fed. Reg. 82392*; Reply Brief for Tennessee Valley Authority [***12] 18.

II

The lawsuits we consider here began well before EPA initiated the efforts to regulate greenhouse gases just described. In July 2004, two groups of plaintiffs filed separate complaints in the Southern District of New York against the same five major electric power companies. The first group of plaintiffs included eight State³ [*2534] and New York City, the second joined three nonprofit land trust⁴; both groups are respondents here. The defendants, now petitioners, are [*444] four private companies⁵ and the Tennessee Valley Authority, a federally owned corporation that operates fossil-fuel fired power plants in several States. According to the complaints, the defendants "are the five largest emitters of carbon dioxide in the United States." App. 57, 118. Their collective annual emissions of 650 million tons constitute 25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, *ibid.*, and 2.5 percent of all anthropogenic emissions worldwide, App. to Pet. for Cert. 72a.

3 California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, although New Jersey and Wisconsin are no longer participating. Brief [***13] for Respondents Connecticut et al. 3, n. 1.

4 Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire.

5 American Electric Power Company, Inc. (and

a wholly owned subsidiary), Southern Company, Xcel Energy Inc., and Cinergy Corporation.

By contributing to global warming, the plaintiffs asserted, the defendants' carbon-dioxide emissions created a "substantial and unreasonable interference with public rights," in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. App. 103-105, 145-147. The States and New York City alleged that public lands, infrastructure, and health were at risk from climate change. App. 88-93. The trusts urged that climate change would destroy habitats for animals and rare species of trees and plants on land the trusts owned and conserved. App. 139-145. All plaintiffs sought injunctive relief requiring each defendant "to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." App. 110, 153.

The District Court dismissed both suits as presenting non-justiciable political questions, citing *Baker v. Carr*, *369 U.S. 186*, *82 S. Ct. 691*, *7 L. Ed. 2d 663 (1962)*, but [***14] the Second Circuit reversed, *582 F.3d 309 (2009)*. On the threshold questions, the Court of Appeals held that the suits were not barred by the political question doctrine, *id.*, at 332, and that the plaintiffs had adequately alleged Article III standing, *id.*, at 349.

Turning to the merits, the Second Circuit held that all plaintiffs had stated a claim under the "federal common law of nuisance." *Id.*, at 358, 371. For this determination, the court relied dominantly on a series of this Court's decisions holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry. *Id.*, at 350-351; see, e.g., *Illinois v. Milwaukee*, *406 U.S. 91*, *93*, *92 S. Ct. 1385*, *31 L. Ed. 2d 712 (1972) (Milwaukee I)* (recognizing right of Illinois to sue in federal district court to abate discharge of sewage into Lake Michigan).

The Court of Appeals further determined that the Clean Air Act did not "displace" federal common law. In *Milwaukee v. Illinois*, *451 U.S. 304*, *316-319*, *101 S. Ct. 1784*, *68 L. Ed. 2d 114 (1981) (Milwaukee II)*, this Court held that Congress had displaced the federal common law right of action recognized in *Milwaukee I* by adopting amendments to the Clean Water Act, *33 U.S.C. § 1251 et seq.* That legislation [***15] installed an all-encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively with interstate water pollution. The legislation itself

prohibited the discharge [*2535] of pollutants into the waters of the United States without a permit from a proper permitting authority. *Milwaukee II*, 451 U.S., at 310-311, 101 S. Ct. 1784, 68 L. Ed. 2d 114 [**445] (citing § 1311). At the time of the Second Circuit's decision, by contrast, EPA had not yet promulgated any rule regulating greenhouse gases, a fact the court thought dispositive. 582 F.3d, at 379-381. "Until EPA completes the rulemaking process," the court reasoned, "we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact 'spea[k] directly' to the 'particular issue' raised here by Plaintiffs." *Id.*, at 380.

We granted certiorari. 562 U.S. ___, 131 S. Ct. 813, 178 L. Ed. 2d 530 (2010).

III

The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions, 549 U.S., at 520-526, 127 S. Ct. 1438, 167 L. Ed. 248; and, further, that no other [***16] threshold obstacle bars review.⁶ Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, 549 U.S., at 535, 127 S. Ct. 1438, 167 L. Ed. 248, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits. See *Nye v. United States*, 313 U.S. 33, 44, 61 S. Ct. 810, 85 L. Ed. 1172 (1941).

6 In addition to renewing the political question argument made below, the petitioners now assert an additional threshold obstacle: They seek dismissal because of a "prudential" bar to the adjudication of generalized grievances, purportedly distinct from Article III's bar. See Brief for Tennessee Valley Authority 14-24; Brief for Petitioners 30-31.

IV

A

"There is no federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed.

1188 (1938), famously recognized. In the wake of *Erie*, however, a keener understanding developed. See generally Friendly, In Praise of *Erie*--And of the New Federal Common Law, 39 N. Y. U. L. Rev. 383 (1964). *Erie* "le[ft] to the states what ought be left to them," *id.*, at 405, and thus required "federal courts [to] follow state decisions on matters of substantive [***17] law appropriately cognizable by the states," *id.*, at 422. *Erie* also sparked "the emergence of a federal decisional law in areas of national concern." *Id.*, at 405. The "new" federal common law addresses "subjects within national legislative power where Congress has so directed" or where the basic scheme of the Constitution so demands. *Id.*, at 408, n. 119, 421-422. [HN2] [**LEdHR2] [2] Environmental protection is undoubtedly an area "within national legislative power," one in which federal courts may fill in "statutory interstices," and, if necessary, even "fashion federal law." *Id.*, at 421-422. As the Court stated in *Milwaukee I*: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." 406 U.S., at 103, 92 S. Ct. 1385, 31 L. Ed. 2d 712.

Decisions of this Court predating *Erie*, but compatible with the distinction emerging from that decision between "general common law" and "specialized federal common law," Friendly, *supra*, at 405, have approved federal common law suits brought by one State to abate pollution emanating from another State. See, e.g., [*2536] *Missouri v. Illinois*, 180 U.S. 208, 241-243, [**446] 21 S. Ct. 331, 45 L. Ed. 497 (1901) (permitting suit by Missouri to enjoin Chicago from discharging untreated sewage into interstate [***18] waters); *New Jersey v. City of New York*, 283 U.S. 473, 477, 481-483, 51 S. Ct. 519, 75 L. Ed. 1176 (1931) (ordering New York City to stop dumping garbage off New Jersey coast); *Georgia v. Tennessee Copper Co.*, 240 U.S. 650, 36 S. Ct. 465, 60 L. Ed. 846 (1916) (ordering private copper companies to curtail sulfur-dioxide discharges in Tennessee that caused harm in Georgia). See also *Milwaukee I*, 406 U.S., at 107, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (post-*Erie* decision upholding suit by Illinois to abate sewage discharges into Lake Michigan). The plaintiffs contend that their right to maintain this suit follows inexorably from that line of decisions.

[HN3] [**LEdHR3] [3] Recognition that a subject is meet for federal law governance, however, does not necessarily mean that federal courts should create the controlling law. Absent a demonstrated need for a federal

131 S. Ct. 2527, *2536; 180 L. Ed. 2d 435, **LEdHR3;
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rule of decision, the Court has taken "the prudent course" of "adopt[ing] the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979); see *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 32-34, 77 S. Ct. 119, 1 L. Ed. 2d 93 (1956). And where, as here, borrowing the law of a particular State would be inappropriate, the Court remains mindful that [***19] it does not have creative power akin to that vested in Congress. See *Missouri v. Illinois*, 200 U.S. 496, 519, 26 S. Ct. 268, 50 L. Ed. 572 (1906) ("fact that this court must decide does not mean, of course, that it takes the place of a legislature"); cf. *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 308, 314, 67 S. Ct. 1604, 91 L. Ed. 2067 (1947) (holding that federal law determines whether Government could secure indemnity from a company whose truck injured a United States soldier, but declining to impose such an indemnity absent action by Congress, "the primary and most often the exclusive arbiter of federal fiscal affairs").

In the cases on which the plaintiffs heavily rely, States were permitted to sue to challenge activity harmful to their citizens' health and welfare. We have not yet decided whether private citizens (here, the land trusts) or political subdivisions (New York City) of a State may invoke the federal common law of nuisance to abate out-of-state pollution. Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders.

The defendants argue that considerations of scale and complexity distinguish global warming from the more bounded pollution giving rise to past federal [***20] nuisance suits. Greenhouse gases once emitted "become well mixed in the atmosphere," 74 *Fed. Reg.* 66514; emissions in New Jersey may contribute no more to flooding in New York than emissions in China. Cf. Brief for Petitioners 18-19. The plaintiffs, on the other hand, contend that an equitable remedy against the largest emitters of carbon dioxide in the United States is in order and not beyond judicial competence. See Brief for Respondents Open Space Institute et al. 32-35. And we have recognized that [HN4] [**LEdHR4] [4] public nuisance law, like common law generally, adapts to changing scientific and factual circumstances. *Missouri*, 200 U.S., at 522, 26 S. Ct. 268, [**447] 50 L. Ed. 572 (adjudicating claim though it did not concern "nuisance of the simple kind that was known to the older common

law"); see also *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472, 62 S. Ct. 676, 86 L. Ed. 956 (1942) (Jackson, J., concurring) ("federal courts are free to apply the traditional common-law technique [*2537] of decision" when fashioning federal common law).

We need not address the parties' dispute in this regard. For it is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common law claim for curtailment [***21] of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.

B

[HN5] [**LEdHR5] [5] "[W]hen Congress addresses a question previously governed by a decision rested on federal common law," the Court has explained, "the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee II*, 451 U.S., at 314, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (holding that amendments to the Clean Water Act displaced the nuisance claim recognized in *Milwaukee I*). Legislative displacement of federal common law does not require the "same sort of evidence of a clear and manifest [congressional] purpose" demanded for preemption of state law. *Id.*, at 317, 101 S. Ct. 1784, 68 L. Ed. 2d 114. "[D]ue regard for the presuppositions of our embracing federal system . . . as a promoter of democracy," *id.*, at 316, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)), does not enter the calculus, for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest. *TVA v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978). The test for whether congressional legislation excludes the declaration [***22] of federal common law is simply whether the statute "speak[s] directly to [the] question" at issue. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978); see *Milwaukee II*, 451 U.S., at 315, 101 S. Ct. 1784, 68 L. Ed. 2d 114; *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 236-237, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985).

We hold that the *Clean Air Act* and the EPA actions it authorizes displace any federal common law right to

seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. 549 U.S., at 528-529, 127 S. Ct. 1438, 167 L. Ed. 2d 248. And we think it equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants.

[HN6] [**LEdHR6] [6] Section 111 of the Act directs the EPA Administrator to list "categories of stationary sources" that "in [her] judgment . . . caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). Once EPA lists a category, the agency must establish standards of performance for emission of pollutants from new or modified sources within that category. § 7411(b)(1)(B); see also § 7411(a)(2). [**448] And, most [***23] relevant here, § 7411(d) then requires regulation of existing sources within the same category.⁷ For existing sources, EPA issues emissions guidelines, see 40 C. F. R. § 60.22, .23 (2009); in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary [*2538] sources within their jurisdiction, § 7411(d)(1).

7 There is an exception: EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408-7410, or the "hazardous air pollutants" program, § 7412. See § 7411(d)(1).

[HN7] [**LEdHR7] [7] The Act provides multiple avenues for enforcement. See *County of Oneida*, 470 U.S., at 237-239, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (reach of remedial provisions is important to determination whether statute displaces federal common law). EPA may delegate implementation and enforcement authority to the States, § 7411(c)(1), (d)(1), but the agency retains the power to inspect and monitor regulated sources, to impose administrative penalties for non-compliance, and to commence civil actions against polluters in federal court. §§ 7411(c)(2), (d)(2), 7413, 7414. In specified circumstances, the Act imposes [***24] criminal penalties on any person who knowingly violates emissions standards issued under § 7411. See § 7413(c). And the Act provides for private enforcement. If States (or EPA) fail to enforce emissions limits against regulated sources, the Act permits "any person" to bring a

civil enforcement action in federal court. § 7604(a).

[HN8] [**LEdHR8] [8] If EPA does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. See § 7607(b)(1); *Massachusetts*, 549 U.S., at 516-517, 529, 127 S. Ct. 1438, 167 L. Ed. 2d 248. As earlier noted, see *supra*, at ---, 180 L. Ed. 2d, at 443, EPA is currently engaged in a § 7411 rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired power plants. To settle litigation brought under § 7607(b) by a group that included the majority of the plaintiffs in this very case, the agency agreed to complete that rulemaking by May 2012. 75 Fed. Reg. 82392. The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants--the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.

C

The plaintiffs [***25] argue, as the Second Circuit held, that federal common law is not displaced until EPA actually exercises its regulatory authority, *i.e.*, until it sets standards governing emissions from the defendants' plants. We disagree.

The sewage discharges at issue in *Milwaukee II*, we do not overlook, were subject to effluent limits set by EPA; under the displacing statute, "[e]very point source discharge" of water pollution was "prohibited unless covered by a permit." 451 U.S., at 318-320, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (emphasis deleted). As *Milwaukee II* made clear, however, [HN9] [**LEdHR9] [9] the relevant question for purposes of displacement is "whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.*, at 324, 101 S. Ct. 1784, 68 L. Ed. 2d 114. Of necessity, Congress selects different regulatory regimes to [**449] address different problems. Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely by breathing.

The Clean Air Act is no less an exercise of the legislature's "considered judgment" concerning the regulation of air pollution because it permits emissions until EPA acts. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 22, n. 32, 101

S. Ct. 2615, 69 L. Ed. 2d 435 (1981) [***26] (finding displacement although Congress "allowed some continued dumping of sludge" prior to a certain date). The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law. Indeed, were EPA to decline to regulate [*2539] carbon-dioxide emissions altogether at the conclusion of its ongoing § 7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination.

EPA's judgment, we hasten to add, would not escape judicial review. [HN10] [**LEdHR10] [10] Federal courts, we earlier observed, see *supra*, at ---, 180 L. Ed. 2d, at 448, can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted. As we have noted, see *supra*, at ---, 180 L. Ed. 2d, at 440, [HN11] [**LEdHR11] [11] the Clean Air Act directs EPA to establish emissions standards for categories of stationary sources that, "in [the Administrator's] judgment," "caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). "[T]he use of the word 'judgment,' " we explained in *Massachusetts*, "is [***27] not a roving license to ignore the statutory text." 549 U.S., at 533, 127 S. Ct. 1438, 167 L. Ed. 248. "It is but a direction to exercise discretion within defined statutory limits." *Ibid.* EPA may not decline to regulate carbon-dioxide emissions from power plants if refusal to act would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 7607(d)(9)(A). If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari in this Court.

Indeed, this prescribed order of decisionmaking--the first decider under the Act is the expert administrative agency, the second, federal judges--is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic

[***28] disruption must weigh in the balance.

[HN12] [**LEdHR12] [12] The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators. Each "standard of performance" EPA sets must "tak[e] into account the cost of achieving [emissions] reduction and any nonair quality health and environmental impact and energy requirements." § 7411(a)(1), (b)(1)(B), (d)(1); see also 40 C. F. R. § 60.24(f) (EPA may permit [**450] state plans to deviate from generally applicable emissions standards upon demonstration that costs are "[u]nreasonable"). EPA may "distinguish among classes, types, and sizes" of stationary sources in apportioning responsibility for emissions reductions. § 7411(b)(2), (d); see also 40 C. F. R. § 60.22(b)(5). And the agency may waive compliance with emission limits to permit a facility to test drive an "innovative technological system" that has "not [yet] been adequately demonstrated." § 7411(j)(1)(A). The Act envisions extensive cooperation between federal and state authorities, see § 7401(a), (b), generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain, see § 7411(c)(1), (d)(1)-(2).

It is [***29] altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping [*2540] with issues of this order. See generally *Chevron U.S. A. Inc. v. NRDC*, 467 U.S. 837, 865-866, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.

Notwithstanding these disabilities, the plaintiffs propose that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable," [***30] App. 103, 145, and then

131 S. Ct. 2527, *2540; 180 L. Ed. 2d 435, **450;
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decide what level of reduction is "practical, feasible and economically viable," App. 58, 119. These determinations would be made for the defendants named in the two lawsuits launched by the plaintiffs. Similar suits could be mounted, counsel for the States and New York City estimated, against "thousands or hundreds or tens" of other defendants fitting the description "large contributors" to carbon-dioxide emissions. Tr. of Oral Arg. 57.

The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme Congress enacted. The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action "arbitrary, capricious, . . . or otherwise not in accordance with law." § 7607(d)(9).

V

The plaintiffs also sought relief under state law, in particular, the law of each State where the defendants operate power plants. See App. 105, 147. The Second Circuit did not reach the state law claims because it held that federal common law [***31] governed. 582 F.3d, at 392; see *International Paper Co. v. Ouellette*, 479 U.S. 481, 488, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987) (if [**451] a case "should be resolved by reference to federal common law[,] . . . state common law [is] preempted"). In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act. *Id.*, at 489, 491, 497, 107 S. Ct. 805, 93 L. Ed. 883 (holding that the Clean Water Act does not preclude aggrieved individuals from bringing a "nuisance claim pursuant to the law of the source State"). None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.

* * *

For the reasons stated, we reverse the judgment of

the Second Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice **Sotomayor** took no part in the consideration or decision of this case.

CONCUR BY: ALITO

CONCUR

Justice **Alito**, with whom Justice **Thomas** joins, concurring in part and concurring in the judgment.

I concur in the judgment, and I agree with the Court's displacement analysis on the assumption (which I make for [***32] the sake of argument because no party contends [*2541] otherwise) that the interpretation of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, adopted by the majority in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), is correct.

REFERENCES

42 U.S.C.S. § 7401 *et seq.*

17A *Moore's Federal Practice* §§124.40, 124.41 (Matthew Bender 3d ed.)

Treatise on Environmental Law §§2.02, 2.03, 18.01-18.06 (Matthew Bender)

L Ed Digest, Environmental Law § 24

L Ed Index, Pollution

Validity, construction, and application of Clean Air Act, as amended (CAA) (42 U.S.C.S. § 7401 *et seq.*)--Supreme Court cases. 157 L. Ed. 2d 1285.

Supreme Court's view as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. 39 L. Ed. 2d 942.

The Supreme Court and the post-Erie federal common law. 31 L. Ed. 2d 1006.

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