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IN THE
Supreme Court of the United States

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

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

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

BRIEF FOR THE EDISON ELECTRIC INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Edison Electric Institute ("EEI") is the national association of U.S. shareholder-owned electric utili-

[1] Pursuant to Rule 37.6, counsel for *amici* certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici*, their members, or their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties. Counsel gave notice to all parties at least 10 days before filing.

ties and their affiliates and industry associates worldwide. Its members are located in 49 states and the District of Columbia. They generate approximately three-quarters of all electricity produced by the nation's electric companies and serve about 70 percent of all retail customers in the nation. Organized in 1933, EEI represents its members' interests and advocates equitable policies in legislative and regulatory arenas.

The American Public Power Association ("APPA") represents the nation's more than 2,000 not-for-profit, publicly owned electric utilities, doing business in every state except Hawaii and serving more than 45 million Americans. APPA's members are units of state or local government.

The National Rural Electric Cooperative Association ("NRECA") represents the nation's 930 not-for-profit, customer-owned rural electric cooperatives, which serve 42 million end users in 47 states.

Amici—whose member companies and utilities collectively serve 94 percent of the electric customers in the nation—appear regularly before this Court in cases presenting issues of great importance to the electric industry and the U.S. economy as a whole. *See, e.g., Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003); *New York* v. *FERC*, 535 U.S. 1 (2002); *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327 (2002). This, without question, is such a case. *Amici*'s member companies recognize the growing concerns regarding the effects of climate change and are extensively engaged in efforts to reduce greenhouse gas ("GHG") emissions and to support federal legislation designed to coordinate further reductions. Indeed, the electric-utility industry leads all other sectors in reducing, avoiding,

or sequestering GHG emissions. *See* Department of Energy, Energy Info. Admin., *Voluntary Reporting of Greenhouse Gases 2005* at 9 (Dec. 2006).[2] Because the predicate for this lawsuit is *global* warming, it is vital that GHG regulation be a *comprehensive* regime, undertaken with an eye toward all sources of GHG emissions and the most efficient and practical ways to reduce those emissions. Only a comprehensive approach can allow for sensible choices regarding (i) how to allocate emissions-reduction responsibilities and emissions credits across economic sectors, (ii) how to foster the technology necessary to facilitate reductions, and (iii) how to ensure that reductions do not saddle consumers with astronomical prices and drive industries and jobs either from one region of the country to another, or overseas.

Federal and state legislators and regulators have been working for years to implement these sorts of multifaceted emissions policies. The *ad hoc* adjudicatory approach approved by the Second Circuit would undermine those efforts. It is the antithesis of the comprehensive strategy the nation needs. The Court should grant the writ.

SUMMARY OF ARGUMENT

1. Electric utilities are already subjected to comprehensive regulation by the political branches at both the federal and state level. These legislators and expert agencies consider the various ways to produce electricity and balance their costs—including environmental costs—against their benefits. First among these regulatory authorities is the

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[2] *Available online at* http://www.eia.doe.gov/oiaf/1605/vrrpt/summary/pdf/0608(2005-s).pdf (last checked Aug. 20, 2010).

federal government, which has the authority to regulate GHGs under the Clean Air Act and is exercising that authority. States, too, have targeted GHGs through emissions-reduction initiatives and renewable-energy requirements that necessarily reduce reliance on GHG-emitting fuel sources. And under traditional utility regulation, state public-utility commissions rule on the relative economic, energy, and environmental considerations of fuel choices—including alternative energy sources and technologies—as part of the rate-review process.

2. The essential attributes that allow the political branches to craft effective and comprehensive GHG regulations are attributes that the federal judiciary lacks: subject-matter expertise, political accountability, and—most important—the ability to implement rules that apply to all sources within, and across, industries. After all, a federal district court does not enjoy a roving commission to police GHG emissions. Instead, the federal courts can resolve only those specific "cases" and "controversies" that parties initiate. U.S. Const. art. III, § 2. But nuisance suits of the type the Second Circuit upheld can be brought by just about any plaintiff against just about any emissions source, of which there are millions in the United States alone. The Second Circuit's decision therefore opens the door to extraordinarily fragmented judicial regulation of GHG emissions. This *ad hoc* approach would undercut ongoing efforts by federal and state legislators and regulators to develop GHG-emissions regimes that take into account the costs of emissions reduction and the technological tools available to reach emissions goals.

The Second Circuit's approach would also be expensive—far more costly than a comprehensive national regime. Without new technologies enabling emissions reductions, GHG sources would have to take drastic steps to make quick cuts. Those steps could cause electricity prices to rise quickly and substantially. And of course, allowing GHG-regulation-by-nuisance-suit opens the door to large monetary judgments against the electric industry and other industries—costs that ultimately would be paid by electricity customers.

3. The approach endorsed by the Second Circuit is flawed for yet another reason: It likely would embroil the federal district courts in long-term oversight of standing emissions decrees. This sort of decades-long oversight is not the highest and best use of the federal judiciary.

The bottom line is that GHG regulation is too consequential, and too complex, to address on a piecemeal basis. That, no doubt, is why Congress has already stepped in and displaced federal common law in this area. Congress and the U.S. Environmental Protection Agency ("EPA") have taken actions—including significant steps since the decision below issued—that speak directly to the concerns plaintiffs seek to address through litigation. In the face of those actions, it is not the courts' place to fashion *ad hoc* rules through the largely standardless mechanism of public nuisance law. This Court should grant the petition to ensure that the intricate policy questions surrounding GHG continue to be resolved by the political branches in the first instance.

ARGUMENT

I. THE POLITICAL BRANCHES ENGAGE IN COMPREHENSIVE GHG-EMISSIONS REGULATION.

The political branches already do what no single judge can when it comes to regulating GHG emissions: comprehensively balance the costs of those emissions and alternative energy sources against their benefits. Permitting the judicial branch to recalibrate that balance—guided not by statutory language and expert agency determinations but amorphous common-law adjudication—would be both unworkable and improper.

1. Congress crafted the Clean Air Act as a comprehensive regime for regulating air pollutants. The Act broadly defines "air pollutants," *see* 42 U.S.C. § 7602(g), authorizes EPA to list certain pollutants that "endanger public health or welfare," *id.* § 7408, and requires States to regulate emissions of listed pollutants to prevent pollution from exceeding EPA standards. *Id.* §§ 7409-7410. But that is only the beginning of the wide-ranging regulatory regime the Act creates. It also authorizes EPA to list categories of "stationary sources"—*i.e.*, non-mobile emissions sources, such as power plants—that "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," and to establish federal performance standards for new or modified sources that fall within the listed category. *Id.* § 7411(b)(1)(A). It requires states to issue performance standards for existing stationary sources in some circumstances. *Id.* § 7411(d). It requires that any major new or modified "emitting facility" obtain a permit to ensure

prevention of significant deterioration ("PSD") of air quality and to certify that the facility will use "the best available control technology for each pollutant subject to regulation" under the Act. *Id.* § 7475(a)(4). And it requires operators of large stationary sources to apply for "Title V" operating permits that aggregate all of the Act's requirements. *Id.* § 7661.

In *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007), this Court confirmed that carbon dioxide (CO_2), the principal greenhouse gas, is among the many air pollutants that the Clean Air Act authorizes EPA to regulate. Since the *Massachusetts* decision—and particularly since the Second Circuit's decision below—EPA has taken multiple steps to do just that.

In June 2010, EPA adopted final "tailoring" rules providing that large GHG sources subject to the PSD and Title V programs must address GHG emissions in their permits starting next year, and setting a schedule for regulation of smaller sources. *See* EPA, *Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514 (June 3, 2010) ("*Tailoring Rule*"). Power plants are scheduled to be among the very first emissions sources regulated under those rules, beginning in January 2011. *Id.* at 31516. Thus, beginning a mere four months from now, certain new and modified power plants that qualify as "[m]ajor emitting facilit[ies]" will be required to obtain permits certifying that they are "subject to the best available control technology" for GHGs. 42 U.S.C. § 7475(a)(4).

Underscoring the flexibility of the political branches to consider all forms of evidence bearing on every facet of the issues they seek to address, EPA explained that the new rules are the product of

"extensive study, debate and hundreds of thousands of public comments." EPA, *EPA Sets Thresholds for Greenhouse Gas Permitting Requirements/Small Businesses & Farms Will Be Shielded* (May 13, 2010) (statement of EPA Administrator Lisa P. Jackson).[3] EPA also explained why it decided to take an incremental approach: " 'Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop;' * * * instead they may permissibly implement such regulatory programs over time, 'refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.' " *Tailoring Rule*, 75 Fed. Reg. at 31544 (quoting *Massachusetts*, 549 U.S. at 524). And it stated that its goal was to "minimize[ ] economic burdens" by allowing permitting agencies to take "energy, environmental, and economic considerations into account" when determining the best available control technology for large sources to lower their emissions. *Id.* at 31590.

The new large-source rules are just one of several GHG-regulating initiatives EPA has launched since this Court's decision in *Massachusetts*. The Solicitor General's brief in support of petitioners catalogues these initiatives in detail. *See* U.S. Br. 25-27. Among other things, the agency has "commit[ted] to undertake another rulemaking, to begin in 2011 and conclude no later than July 1, 2012," that will consider "additional step[s] for phasing in GHG permitting" and that may eventually result in permitting requirements for emissions sources as small as 50,000 tons per year. EPA, *Final Rule: Prevention of*

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[3] *Available online at* http://yosemite.epa.gov/opa/admpress.nsf/0/EA1BF25579E541B1852577220055C20C (last checked Aug. 21, 2010).

Significant Deterioration & Title V Greenhouse Gas Tailoring Rule, Fact Sheet at 2-3 (May 13, 2010).[4] The agency likewise has stated that it is considering whether to subject stationary sources to "new source performance standards" for CO_2—in other words, whether to set standards for the amounts of CO_2 a new source can produce. *See* U.S. Br. 29-30; 42 U.S.C. § 7411.

The important point is that Congress has already delegated authority to EPA to regulate GHG emissions. And while that alone justifies dismissing this federal common-law action, *see infra* at 23, that is not all that has occurred. On the contrary, EPA has recognized its authority and has already promulgated rules that regulate GHG emissions. And the agency has extended its reach beyond stationary sources: In April 2010, EPA and the Department of Transportation "set the first-ever national greenhouse gas emissions standards * * * [for] all new passenger cars and light trucks sold in the United States." EPA, *DOT, EPA Set Aggressive National Standards for Fuel Economy & First Ever Greenhouse Gas Emission Levels for Passenger Cars & Light Trucks* (Apr. 1, 2010).[5]

2. Under the Clean Air Act, states have their own role to play in the burgeoning regulation of GHG emissions. Indeed, one of the key components to the Act's regulatory scheme is Congress's deliberate choice to let state regulators "take the lead in carry-

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[4] *Available online at* http://www.epa.gov/nsr/documents/20100413fs.pdf (last checked Aug. 20, 2010).

[5] *Available online at* http://yosemite.epa.gov/opa/admpress.nsf/8b770facf5edf6f185257359003fb69e/562b44f2588b871a852576f800544e01!OpenDocument (last checked Aug. 20, 2010).

ing out the Clean Air Act" and "enforc[ing] Clean Air Act regulations." EPA, *Understanding the Clean Air Act* (2008).[6] After all, the state political branches are uniquely well suited to crafting "solutions for pollution problems that require special understanding of local industries, geography, housing, and travel patterns, as well as other factors." *Id.*

Thirty-three states participate in regional initiatives—including the Midwest Greenhouse Gas Reduction Accord, the Western Climate Initiative, and the Regional Greenhouse Gas Initiative ("RGGI")—that have as their goal limiting emissions through long-term reduction targets. *See* Pew Center on Global Climate Change, *Regional Initiatives* (updated July 2010) ("*Pew Regional Map*").[7] Twenty-three states have adopted GHG-emissions targets calling for dramatic reductions over time. *See* Pew Center on Global Climate Change, *Greenhouse Gas Emissions Targets* (updated June 2010).[8] Colorado's law, for example, sets the statewide GHG-emissions goal at 20 percent below 2005 levels by 2020 and 80 percent below 2005 levels by 2050. *Id.* And at least five states have adopted current emissions-control standards for electric power plants that cap emissions, require plants to cut emissions, or both. *See*

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[6] *Available online at* http://www.epa.gov/air/peg/understand.html (last checked Aug. 20, 2010).

[7] *Available online at* http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm (last checked Aug. 20, 2010).

[8] *Available online at* http://www.pewclimate.org/what_s_being_done/in_the_states/emissionstargets_map.cfm (last checked Aug. 20, 2010).

Pew Center on Global Climate Change, *Emissions Caps for Electricity* (updated June 2010).[9]

Nor have these regulatory efforts stopped at emissions mandates, caps, or trading regimes. At least 30 states impose renewable energy requirements—*i.e.*, requirements that by a certain date, a specified percentage of the state's electricity be produced using wind, hydroelectric, solar, and other power sources that do not generate greenhouse gases. *See* Federal Energy Regulatory Comm'n, *Renewable Portfolio Standards (RPS) & Goals* (updated Aug. 2010).[10] These requirements will reduce GHG emissions as electrical generation from renewable sources grows. Twenty-one states have adopted performance incentives to promote efficient electric-power end use. *See* Institute for Elec. Efficiency, *State Electric Efficiency Regulatory Frameworks* at 1 (July 2010).[11] And more than a dozen states have passed laws ensuring that utilities are not punished with lower cost recovery when their customers end up using less energy as a result of efficiency gains. *See id.* at 2-3. Moreover, under traditional utility regulation (which applies to utilities serving two-thirds of the electric customers in the nation), state regulatory commissions approve utility rates. As part of that process, they rule directly on the relative economic, energy, and environmental considerations involved in different fuel

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[9] *Available online at* http://www.pewclimate.org/what_s_being_done/in_the_states/cap_and_offset_map.cfm (last checked Aug. 20, 2010).

[10] *Available online at* http://www.ferc.gov/market-oversight/othr-mkts/renew/othr-rnw-rps.pdf (last checked Aug. 20, 2010).

[11] *Available online at* http://www.edisonfoundation.net/IEE/issueBriefs/IEE_StateRegulatoryFrame_0710.pdf (last checked Aug. 20, 2010).

choices, including alternative energies and technologies. *See, e.g.*, Final Order, *In re Application of Appalachian Power Co.* at 19-21, No. PUE-2009-00030 (Va. S.C.C. July 15, 2010) (evaluating cost-effectiveness of utility's carbon-capture project).

* * *

The policy-oriented decisions described above are of the sort that expert agencies and commissions are well qualified to make. *See Tailoring Rule*, 75 Fed. Reg. at 31548. After all, these decisions must be implemented in a way that reduces GHG emissions while "minimiz[ing] economic burdens" for industry and consumers. *Id.* at 31590. They must be tied to emerging technologies, apply innovative programs like market-based tools and offsets, and take into account the effects regulation will have on existing energy sources. *See infra* at 13-20. These are unmistakably regulatory endeavors committed to the political branches. As we explain below, that is precisely why judicial involvement in GHG regulation is both unworkable and unnecessary.

II. INJECTING "JUDICIAL REGULATION" INTO THIS MIX WOULD SUBSTANTIALLY UNDERMINE THE REGULATORY SCHEME.

The key attributes that allow the political branches to effectively regulate GHG emissions—subject-matter expertise, political accountability, institutional consistency, and coordinated comprehensive planning—are absent in the federal judiciary. A single federal district court judge, called upon to resolve a nuisance lawsuit instituted at the whim of a plaintiff against a subset of defendants, is simply

unable to formulate the type of comprehensive GHG-emissions policy that is necessary to redress the global, aggregative phenomenon at issue here. This Court should grant the petition to clarify that the federal judiciary's role in regulating GHG emissions is no different than the one it plays in all other matters covered by the Clean Air Act: to exercise judicial review over regulatory decisions made under laws enacted by the political branches, not to formulate those decisions in the first instance.

A. Judges Adjudicating Individual Nuisance Lawsuits Cannot Make Comprehensive Policy.

As an initial matter, GHG-regulation-by-nuisance-suit would be neither comprehensive nor rational. Different judges could impose completely different emissions constraints or caps, and different time frames for compliance, even within the same industry. Some industries could face stringent mandates to cut their GHG emissions "by a specified percentage each year for at least a decade," Pet. App. 178, and others not. Indeed, portions of the *same* industry could face caps and others not, depending on whom a given plaintiff chooses to sue and where. And of course, subsets of an industry could face additional draconian punishments—including monetary damages and even plant-shutdown requirements—constrained only by individual judges' conceptions of what level of GHG emissions is "unreasonable."

It makes little sense to encourage a landscape in which Company *A* faces strict court-mandated emissions limits and monetary outlays while Company *B* faces more finely calibrated regulation under the

Clean Air Act, even though both are from the same industry, produce the same emissions, and have the same effect on the nation's total GHG output. *See Legislative Proposals to Reduce Greenhouse Gas Emissions: An Overview: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 110th Cong. (June 19, 2008) (statement of EEI President Thomas R. Kuhn at 12) ("Kuhn Testimony")[12] ("[A] ton of GHGs is a ton of GHGs, no matter where it is reduced, avoided, or stored."). That is just one of many reasons why the GHG problem is best addressed by regulation.

B. Judges Cannot Tie Emissions Mandates To The Tools Needed To Achieve Them.

There is a second, equally important reason why judicial GHG regulation would be detrimental: Judges lack the institutional competence to link emission targets to the new technologies, taxes, and market-based tools that can facilitate GHG reductions.

1. *Technology.* Electric-power companies spend billions of dollars each year on new technologies and operational measures designed to protect the environment, and the result has been steep cuts in air emissions. However, there is currently no feasible technology to reduce fossil-fuel power plants' CO_2 emissions, in contradistinction to the technologies available to control traditional air pollutants. *See* Kuhn Testimony at 4, 33-36. Thus GHG-emissions cuts—especially the sorts of sharp reductions con-

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[12] *Available online at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/Testimony/EAQ/110-eaq-hrg.061908.Kuhn-testimony.pdf (last checked Aug. 20, 2010).

templated to mitigate global warming—cannot be instituted overnight. On the contrary, they will require the adoption of an array of advanced no- or low-carbon technologies, including increased use of wind, solar, incremental hydroelectric and nuclear power, as well as carbon capture and geologic sequestration ("CCS") for coal and natural gas. Those technologies, in turn, take years to develop and deploy commercially. Technologies such as wind and solar are intermittent resources and expensive. Kuhn Testimony at 29-30. Additional nuclear power requires substantial up-front investment and long lead times for construction. *Id.* at 32-33. All of these power sources will be subject to "technical, economic, and regulatory challenges," including "transmission siting, building, and integration constraints." *Id.* at 30-31. And emissions-reducing approaches such as CCS are still in the demonstration stage; they will require billions of dollars, and long-term research and development, before they are deployable at reasonable prices. *See id.* at 32-36.

A recent study by the Electric Power Research Institute ("EPRI") throws the connection between these new technologies and further GHG reductions into stark relief. The study concluded that "the aggressive development and deployment of several advanced technologies"—including water and solar power, advanced light-water nuclear reactors, and CCS—"could reduce U.S. electricity sector CO_2 emissions by roughly 45% by 2030," compared to 2007 figures. EPRI, *The Power to Reduce CO_2 Emissions: The Full Portfolio* at 2-3 (2007) ("*EPRI PRISM*

Study").[13] But, the study warned, this sort of reduction—which is in line with the GHG goals many states have set, *see supra* at 10—will only be possible if industry and regulators work together to put in place an "expanded and multi-decade [research and development] program." *Id.* at 3-14. Without that coordinated public-private effort and investment, aggressive CO_2 cuts would be either impossible or exorbitantly expensive.

In short, "[f]or any carbon policy to reduce GHG emissions effectively * * * compliance timeframes must correspond to the availability of technologies needed to reduce emissions." EEI, *Understanding EEI's Global Climate Change Points of Agreement* at 2 (Feb. 2009) ("*Understanding Points of Agreement*").[14] Legislators and regulators understand that. Working pursuant to federal and state laws, they have taken steps to align reduction goals with the availability of technologies that will facilitate them. For example, California has mandated that one-third of electricity sales come from renewable sources by 2020—and it has done so on the explicit rationale that "substantially increased development of renewable energy" is "needed to meet the greenhouse reduction goal of 1990 levels by 2020 and 80 percent below 1990 levels by 2050." Exec. Order No. S-21-09 (Cal. Sept. 15, 2009).[15]

Legislators and regulators also can (and do) design financial incentives—including direct incentives for

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[13] *Available online at* http://mydocs.epri.com/docs/public/DiscussionPaper2007.pdf (last checked Aug. 20, 2010).

[14] *Available online at* http://www.eei.org/ourissues/TheEnvironment/Climate/Documents/PointsofAgree-EEIcommunFINAL.pdf (last checked Aug. 20, 2010).

[15] *Available online at* http://gov.ca.gov/press-release/13273/ (last checked Aug. 20, 2010).

renewable development—to help new technology reach the market. *See supra* at 10-11. Finally, they can (and do) decide whether particular investments in renewable-energy technology are worthwhile given their costs to customers. *See, e.g.*, Order, *In re Application of Ky. Power Co. for Approval of Renewable Energy Purchase Agreement*, No. 2009-00545, 2010 WL 2640998 (Ky. P.S.C. June 28, 2010) (denying utility permission to add wind power to its portfolio on the grounds that it would not produce the lowest cost for consumers).

The judiciary, of course, lacks the institutional competence to take any of these crucial steps. If a single judge were to impose emissions mandates through an individual nuisance suit, those mandates would be formulated in the vacuum of a single lawsuit. They would be untethered from industry realities familiar to the legislators and regulators who grapple with these issues every day.

2. *Taxes or market-based tools.* Nor do judges have at their disposal the taxes or market-based regulatory tools that might incentivize or support emissions cuts in a cost-effective manner. Legislators and regulators across the nation (and world), for example, have considered emissions taxes and various approaches to emissions caps and offset mechanisms as a way to reduce emissions efficiently. *See, e.g.*, Congressional Budget Office, *Policy Options for Reducing CO_2 Emissions* (Feb. 2008); Pew Center on Global Climate Change, *North American Cap & Trade Initiatives* (2010).[16] Offsets authorize industry to make cuts in the most efficient way and at the

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[16] *Available online at* http://www.pewclimate.org/what_s_being_done/in_the_states/NA-capandtrade (last checked Aug. 20, 2010).

most appropriate location, domestically and internationally. *See generally* Congressional Research Serv., *The Role of Offsets in a Greenhouse Gas Emissions Cap-and-Trade Program: Potential Benefits & Concerns* (Apr. 2008).[17] A judge cannot begin to consider—much less design or impose—such systems.

C. Judicial Regulation Risks Economic Harm By Causing The Costs Of Cutting GHG Emissions To Rise Quickly And Substantially.

Dramatically reducing the nation's GHG emissions will be expensive no matter what the approach. But the cost may well be much higher if judges issue emissions-reduction mandates that are divorced from technological progress.

That is so in part because the electric-power industry (among others) could be forced to try to meet short-term emissions targets by switching to natural gas, which is not a cost-effective long-term approach. As the then-chairman of the Federal Energy Regulatory Commission ("FERC") warned two years ago, "poorly-designed" GHG rules that "exclude the role of coal and nuclear power * * * would undermine" regulators' ability to "ensure adequate electricity supplies at a reasonable price." *See* Carbon Control News, *FERC Faces Climate Challenge* (Oct. 28, 2008) (statement of Joseph T. Kelliher) (available upon request).

A recent EPRI study compared the cost of reaching aggressive long-term GHG-reduction targets under

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[17] *Available online at* http://www.nationalaglawcenter.org/assets/crs/RL34436.pdf (last checked Aug. 20, 2010).

two scenarios: one in which the United States comprehensively encourages new technologies as part of its regulatory scheme, and another in which the nation is less effective in bringing these technologies to market. The study concluded that under the second scenario, "natural gas [would] become[ ] the dominant generation fuel by 2030, and CO_2 reduction policies [would] only be met through large reductions in electricity demand, placing severe constraints on economic growth." EPRI, *Modeling the Technology Mix* at 18 (2007).[18] The study also concluded that real electricity prices would rise nearly *six times* more by 2050 under the second scenario—260 percent, versus 45 percent. *Id.* That is because natural gas—the only fuel besides nuclear, hydropower, and coal to provide the around-the-clock generation needed to serve the electric grid—produces about half as much CO_2 as coal for an equivalent amount of energy. This is too high an emissions rate to satisfy long-term GHG reduction goals. Thus the expenses involved in a "dash to gas"—including extensive capital investment in new natural-gas pipeline transportation and generating facilities—would be wasteful. The new facilities would have to be replaced or retrofitted long before the end of their useful lives by investing in even lower-emitting technologies (if commercially available) to achieve long-term reduction goals. *See generally EPRI PRISM Study.*

Judicial regulation, which by definition cannot tie emissions mandates to technological incentives, is tailor-made to produce the vastly more expensive

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[18] *Available online at* http://mydocs.epri.com/docs/CorporateDocuments/EPRI_Journal/2007-Fall/1016127_ModelingtheTechMix.pdf (last checked Aug. 20, 2010).

second scenario. As EEI recently told Congress: "If targets and timetables are not aligned with the nearer-term capabilities of expanded energy-efficiency and enhanced renewables, and the longer-term, widespread deployment of new nuclear plants and advanced coal and CCS technologies, the costs of compliance would become astronomical." Kuhn Testimony at 5. And the trickle-down effect of those costs could be severe: "[C]onsumers would be compelled to curtail their use of electricity dramatically, with resulting consequences to the economy and the standard of living." *Id.*

Judicial regulation would also produce added expense for another reason: It could open the door to large monetary judgments against the electric industry (among others). Such judgments would be inequitable, for the reasons already discussed. *See supra* at 13-14. But they would also raise costs further still, and would deplete the resources that businesses could otherwise invest in research, development, and deployment of next-generation fuel technologies. These costs would ultimately be paid by electricity customers, affecting the entire economy.

D. Judicial Regulation Is Inappropriate From An Institutional Perspective.

Finally, even putting aside its practical flaws, GHG-regulation-by-nuisance-lawsuit is inappropriate from an institutional perspective: It would place courts in the position of second-guessing the federal government and the states on how they balance the benefits versus the costs of using different fuels and technologies to produce electricity.

This lawsuit is a perfect example. The petitioner electric utilities face multiple layers of regulation—

under the Clean Air Act; regional accords such as the RGGI, to which numerous plaintiffs are parties; state climate laws; and state renewable portfolio standards. Through these laws and rules, the political branches have already made judgments about which emissions cuts are required, when they are required, and—most importantly—*what level of emissions is currently reasonable*. *Compare* Pet. App. 80a (opinion of court below, defining public nuisance as "an *unreasonable* interference with a right common to the general public") (emphasis added); Restatement (Second) of Torts § 821B(1) (1979). The nuisance approach thus requires judges to effectively revisit and second-guess regulatory determinations that the political branches have already made. But judges cannot meaningfully evaluate the adequacy of those determinations in the first instance (as opposed to reviewing those determinations under a deferential standard of review through administrative proceedings). As this Court has emphasized, the federal courts' occasional prerogative to create common law does not mean "courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981) ("*Milwaukee II*").

III. THE SECOND CIRCUIT'S APPROACH WOULD FORCE THE COURTS INTO A QUASI-PERMANENT OVERSIGHT ROLE.

The Second Circuit's decision portends a colossal and unmanageable role for the federal courts. GHG reductions take time—the timeline for significant

cuts is measured in decades—and any judicial mandates likely would have to be revisited over the years, much like a consent decree, as technologies advance, demand for electricity changes, new power plants are built, and the underlying regulatory scheme shifts. *See Angela R. by Hesselbein* v. *Clinton*, 999 F.2d 320, 326 (8th Cir. 1993) ("Although a consent decree may save federal judicial resources in the short term, its entry is often only the beginning of extended judicial involvement."). Moreover, the Second Circuit's decision, if left intact, no doubt will lead to more lawsuits against industries that emit GHGs. The result: Multiple federal district courts could find themselves embroiled in near-permanent, ongoing oversight of standing decrees—at least to the extent those courts see fit to impose liability.

This Court has expressed skepticism about legal theories that would embroil the federal courts in oversight minutiae, stating that they "often squander[ ] judicial resources with little offsetting benefit to anyone." *Sandin* v. *Conner*, 515 U.S. 472, 482 (1995). There is no reason to drain the judiciary's resources in this way, particularly given that legislators and regulators are already addressing the problem in the very states that are plaintiffs in this litigation—*see Pew Regional Map* (highlighting GHG initiatives in Connecticut, New York, New Jersey, Rhode Island, Vermont, Wisconsin, Iowa, and California)—as well as in the many other states in which petitioners operate. Plaintiffs' attempt to deputize the federal courts as adjunct environmental regulators is as ill-considered as it is unnecessary.

IV. CONGRESS HAS DISPLACED FEDERAL COMMON LAW IN THIS AREA.

The comprehensive regulatory regime discussed above counsels, as a practical matter, against any attempt by the federal courts to impose emissions mandates of their own. But the regime's existence also highlights one of the Second Circuit's legal errors—namely, its conclusion that the federal courts have the authority to impose such mandates using the common law. They do not. Through the Clean Air Act, Congress chose to regulate GHGs and to delegate the details to the EPA. *See supra* at 6-9. EPA is actively exercising that authority. Thus "Congress has not left the formulation of appropriate federal standards to the courts through the application of often vague and indeterminate nuisance concepts." *Milwaukee II*, 451 U.S. at 318.

As petitioners rightly point out, Pet. 21, the authority Congress has claimed to regulate air pollution is sufficient to displace federal common law under *Milwaukee II*. The court below admitted that the Clean Air Act is a "comprehensive legislative scheme" to regulate air quality. Pet. App. 131a-132a; *compare Milwaukee II*, 451 U.S. at 317 (Clean Water Act was a "comprehensive regulatory program" to regulate water quality). And "Congress' intent in enacting" the Clean Air Act "was clearly to establish an all-encompassing program of [air] pollution regulation." *Milwaukee II*, 451 U.S. at 317.

Rather than examine the Clean Air Act, the Second Circuit focused on the fact that EPA's regulatory scheme under the Act remains a work in progress. *See* Pet. App. 135a-141a. But that misunderstands the issue. As petitioners correctly observe, the

displacement inquiry turns primarily "on Congress' decisions," not EPA's. Pet. 23. And this Court has made clear that Congress, through the Clean Air Act, authorized EPA to consider and implement GHG-emissions standards. Indeed, among other things, the Act authorizes EPA to (i) "require[ ] new or modified sources to install state-of-the-art pollution controls," (ii) "pursue judicial and administrative enforcement actions for injunctive relief and civil penalties," and (iii) "establish Federal standards of performance" for new stationary sources of emissions. EPA, *CAA National Enforcement Programs* (May 2010).[19] That EPA has not yet exercised every aspect of this power with respect to GHGs does not change the fact that Congress has given it the authority to do so. EPA is entitled to "implement [its] regulatory programs over time, 'refining [its] preferred approach as circumstances change and as [it] develop[s] a more nuanced understanding of how best to proceed.'" *Tailoring Rule*, 75 Fed. Reg. at 31544 (quoting *Massachusetts*, 549 U.S. at 524). Any judicial attempt to impose emissions mandates would not be "filling a gap"; it would be overwriting the regulatory scheme the political branches have affirmatively chosen. *Milwaukee II*, 451 U.S. at 324 n.18. That is precisely what the doctrine of displacement is designed to prevent.

Moreover, to the extent regulatory action under the Clean Air Act is relevant to the displacement analysis,[20] the gaps the Second Circuit perceived in the

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[19] *Available online at* http://www.epa.gov/oecaerth/civil/caa/caaenfprog.html (last checked Aug. 20, 2010).

[20] *See Illinois* v. *City of Milwaukee*, 406 U.S. 91, 107 (1972) (observing that "new federal laws *and new federal regulations* may in time pre-empt the field of federal common law of

regulatory scheme have vanished. Every major EPA action to regulate GHGs under the Act has occurred *since* the Second Circuit's decision issued in September 2009. *See supra* at 6-9. Those actions will subject various industries, including certain power plants, to PSD and other regulation as soon as January 2011. *See supra* at 7. Thus the Second Circuit's pointed observations that EPA had made only "*proposed*" findings about the effect of GHG emissions, Pet. App. 140a (emphasis in original), that EPA "does not currently regulate carbon dioxide under the CAA," Pet. App. 135a, and that EPA might still "determine * * * that regulation of greenhouse gases is * * * inappropriate under the terms of the Act," *id.* at 140a-141a, are no longer accurate. And the conclusion the court reached on the basis of those observations—that "the CAA does not * * * regulate greenhouse gas emissions," *id.* at 144a—is inaccurate on its face. It is clear that the EPA has the statutory power to regulate GHGs, and it is doing so. Accordingly, there is no room for the federal courts to exercise their "severely limited" power to create common law. *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001).

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nuisance") (emphasis added); *Texas* v. *Pankey*, 441 F.2d 236, 241 (10th Cir. 1971). *See also* U.S. Br. at 24.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

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