

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AMERICAN ELECTRIC POWER :

4 COMPANY, INC., ET AL., :

5 Petitioners : No. 10-174

6 v. :

7 CONNECTICUT, ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, April 19, 2011

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:13 a.m.

15 APPEARANCES:

16 PETER D. KEISLER, ESQ., Washington, D.C.; on behalf of
17 Petitioners.

18 NEAL KUMAR KATYAL, ESQ., Acting Solicitor General,
19 Department of Justice, Washington, D.C.; on
20 behalf of Respondent Tennessee Valley Authority, in
21 support of Petitioners.

22 BARBARA D. UNDERWOOD, ESQ., Solicitor General, New York,
23 New York; on behalf of Respondents.

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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 today in Case 10-174, American Electric Power Company v.
5 Connecticut, et al.

6 Mr. Keisler.

7 ORAL ARGUMENT OF PETER D. KEISLER

8 ON BEHALF OF THE PETITIONERS

9 MR. KEISLER: Mr. Chief Justice and may it
10 please the Court:

11 This is a case in which the courts are being
12 asked to perform a legislative and regulatory function
13 in a matter in which the necessary balancing of
14 contending policy interests is among the most complex,
15 multifaceted, and consequential of any policy issue now
16 before the country.

17 The States ask that the courts assess
18 liability and design a new common law remedy for
19 contributing to climate change, and to do so by applying
20 a general standard of reasonableness to determine for
21 each defendant, in this case and in future cases, what,
22 if any, its share of global reductions in greenhouse gas
23 emissions ought to be. That would require the courts
24 not to interpret and enforce the policy choices placed
25 into law by the other branches, but to make those policy

1 choices themselves. And all of our arguments here --
2 that plaintiffs lack standing, that the Federal common
3 law shouldn't be expanded to include this new cause of
4 action, and that the case presents nonjusticiable
5 political questions -- while all of them represent
6 distinct points, All of them flow from the same basic
7 separation of powers principles that establish, we
8 believe, that the case ought to be dismissed.

9 CHIEF JUSTICE ROBERTS: I think that's --

10 MR. KEISLER: Now, all of these issues --

11 CHIEF JUSTICE ROBERTS: That's exactly one
12 thing that's concerned me. They do all flow from the
13 same basic argument, and I'm concerned why you think we
14 should focus on prudential standing, basically, which
15 cuts off our jurisdiction at our own whim, as opposed to
16 dealing with this on the merits.

17 MR. KEISLER: Well --

18 CHIEF JUSTICE ROBERTS: In either case, your
19 argument is that this is too generalized for the Court
20 to -- to address.

21 MR. KEISLER: Mr. Chief Justice, our
22 principal argument has not been prudential standing.
23 The government has focused on the prudential standing
24 argument. We join that and we'd be happy to see the
25 case resolved on that basis, but our principal argument

1 on standing has been Article III standing. And we
2 actually believe that the Court could resolve this case
3 and address the issues in any order, with one possible
4 exception, which is that we do read the Court's decision
5 in Steel Co. as holding that the Court has to address
6 Article III standing before reaching the question
7 whether there's a valid cause of action.

8 JUSTICE SCALIA: Mr. Keisler, what -- what
9 good does it do you to have this Court say that there is
10 no Article III standing? The suit will just be brought
11 in State court --

12 MR. KEISLER: Well --

13 JUSTICE SCALIA: -- under State common
14 law and -- and the States' rules of standing are not
15 ours.

16 MR. KEISLER: Well, many States, Your Honor,
17 have similar doctrines of standing, similar doctrines of
18 political questions.

19 JUSTICE SCALIA: They only need one.

20 MR. KEISLER: Well, in any event, Your
21 Honor, we believe we would have a very strong motion to
22 dismiss in State court on a variety of grounds,
23 including --

24 JUSTICE SCALIA: We're not sure about that,
25 are we? So we -- we -- we -- may be just spinning our

1 wheels here.

2 MR. KEISLER: Well, I don't --

3 JUSTICE SCALIA: Indeed, you know, tapping
4 the case to State judges instead of Federal judges, I
5 would frankly rather have Federal judges do it,
6 probably.

7 MR. KEISLER: Well, as I said, Your Honor, I
8 think we would be able to defeat a State common law
9 claim on grounds of State law, for lack of proximate
10 cause, on standing and political question grounds that
11 many States have that parallel these; but in any case,
12 whichever ground the Court resolves this case on, we
13 think it's clear that the cause of action can proceed.

14 JUSTICE KENNEDY: Well, if -- if you had a
15 State court suit with a State plaintiff, wouldn't the
16 State be able to adduce Federal common law as a ground
17 for recovery? And then we would get to the merits and
18 see if there is a Federal common law cause of action.

19 MR. KEISLER: It's -- it's possible, Your
20 Honor, although we think they would be more likely to
21 proceed under State common law. But either way, we
22 don't think the elements of a State or Federal common
23 law cause of action under nuisance could be met here,
24 and we're very confident we could defeat that claim in
25 State court as well.

1 JUSTICE KENNEDY: Well, we all -- we all
2 know that you sometimes have to peek at the merits to
3 see if there's standing. There's a little cheating that
4 goes on. But -- but in this case it does seem to me
5 that you're lacking any clear precedent. When I think
6 of standing, I think of *Frothingham v. Mellon*. That
7 isn't this case.

8 MR. KEISLER: But the Court has said in
9 *Warth v. Seldin* that the plaintiff has to demonstrate
10 that it will benefit in some tangible way from the
11 Court's intervention. And that's --

12 JUSTICE GINSBURG: If you have -- if you
13 have the precedent of *Massachusetts v. EPA* and if any
14 one plaintiff has standing, I guess that's enough. So
15 if you look at standing alone, it seems to me the States
16 would have standing on the same basis that *Massachusetts*
17 had standing.

18 MR. KEISLER: Justice Ginsburg, we believe
19 that *Massachusetts* was very carefully qualified to focus
20 on the particular regulatory context of that opinion.
21 The Court said that it was addressing standing to
22 challenge the denial of a petition for rulemaking, when
23 the agency would be proceeding incrementally to address
24 a broader problem, and a statute specifically gave the
25 petitioners the right to seek that kind of incremental

1 protection. The Court was very specific about that.
2 The statutory right was of critical importance, it said,
3 to the standing inquiry.

4 JUSTICE KAGAN: Mr. Keisler, the Court did
5 say that, but it's cut off from the Court's actual
6 analysis in the case. When the Court goes through
7 injury and causation and redressability, the Court never
8 refers to the statutory cause of action.

9 MR. KEISLER: But it does, Justice Kagan,
10 specifically refer to the regulatory context in which
11 the case is taking place. The Court said that if the
12 EPA's arguments there about traceability and
13 redressability were adopted, it would doom most
14 challenges to agency action because agencies proceed
15 incrementally.

16 Here we have no statute, we have no agency
17 proceeding incrementally, and we believe there is no
18 basis for the plaintiffs to seek that kind of
19 incremental relief when they've acknowledged that will
20 have no material effect on their injury; and they
21 acknowledged that in the State's complaint when they
22 specifically said that the relief they seek here would
23 only constitute these defendants' share of the larger
24 overall emissions reductions that would be necessary in
25 order to have any material effect on climate change or

1 the injuries that they assert. That is an
2 acknowledgment that the relief they seek here would not
3 provide them any redress except in connection with other
4 reductions that would be obtained elsewhere, and that we
5 think means that this is a classic case in which the
6 injuries are not the product of the defendants' conduct
7 but of the collective independent actions of numerous
8 third parties not before the Court.

9 JUSTICE KAGAN: But the Court clearly
10 understood that in Massachusetts v. EPA and said that it
11 was enough, and I would think under traditional standing
12 principles the standing there was actually harder to
13 find because one had to go through the EPA first. One
14 had to say the EPA should regulate, and then the EPA
15 would regulate, and then the question was would that
16 reduce emissions levels? Here the EPA is out of the
17 picture. The action is much more direct.

18 MR. KEISLER: But there, Your Honor, they
19 were suing a defendant, the EPA, that had regulatory
20 authority over the entire country. Here they're suing
21 five separate defendants, each of whom has to be
22 evaluated individually, and there is not a single one of
23 them against whom the relief sought would have any
24 tangible effect on the injuries that the plaintiffs
25 claim here. But we also think that Massachusetts is

1 relevant in a completely different respect, which is the
2 Court was very specific in Massachusetts about what its
3 role was and what it wasn't. The Court said: We lack
4 the expertise or the authority to second-guess the
5 policy choices of the EPA, but its role there was to
6 compel the agency to adhere to the statute as the Court
7 interpreted it.

8 In this case, the States are asking the
9 courts to play exactly the role that this Court
10 disclaimed in Massachusetts v. EPA, which is to make
11 those policy choices in the first instance, and they say
12 that the courts can do this because the courts have done
13 this in prior nuisance cases, but this case is nothing
14 like any of the prior nuisance cases this Court has
15 held. It's nothing like an instance in which one State
16 is complaining that another State has dumped sewage into
17 a body of water that's crossed the border. The case --

18 CHIEF JUSTICE ROBERTS: So how many States
19 does it take? I think, you know, if it's three States
20 who have made that allegation, I don't know exactly how
21 you draw the line between a case like Tennessee Copper
22 and this case.

23 MR. KEISLER: It's not a question of the
24 quantity of plaintiffs, Mr. Chief Justice, it's the
25 nature of the task that the Court would have to perform,

1 and this task is different because of the global nature
2 of the phenomenon.

3 JUSTICE KENNEDY: I'm more receptive to this
4 kind of argument if I know we're going to the merits as
5 opposed to standing --

6 MR. KEISLER: It -- it --

7 JUSTICE KENNEDY: -- and I recognize that we
8 slip in and out of the two categories, and don't want to
9 make it difficult on you. But I take it that these
10 arguments also go to whether there's a cause of action
11 on the merits.

12 MR. KEISLER: Exactly, Your Honor, and
13 whether the Court should expand the Federal common law
14 to recognize this. The global nature of this phenomenon
15 makes it different because every sector of the economy
16 worldwide produces greenhouse gases, and there is no
17 geographic nexus, as there was in Tennessee Copper and
18 every one of the other nuisance cases, between the
19 source of the emission and the victim that claims the
20 harm. And that changes what the Court has to do. It
21 means that any court or policymaker thinking about how
22 to alleviate the kinds of injuries that are pled here
23 has to first think what is the appropriate overall level
24 of greenhouse gas emissions in the atmosphere and then
25 make a comparative judgment about how the reductions

1 that would be necessary to achieve that level should be
2 allocated among all the different sectors based on the
3 social good that that sector produces and what
4 reductions would mean to that social good.

5 JUSTICE GINSBURG: I thought your -- your
6 first argument when you addressed this issue was there
7 is a decisionmaker and that decisionmaker is EPA. So
8 you wouldn't get to even how arduous a task this would
9 be if it was within the court's bailiwick. I thought
10 your position was that the function, this regulatory
11 function, has been assigned to the EPA and not to the
12 courts.

13 MR. KEISLER: We are making both arguments,
14 Justice Ginsburg. We don't think there would be an
15 appropriate Federal common law cause of action even if
16 the Clean Air Act hadn't been enacted. But certainly
17 the argument is even stronger and easier because of the
18 existence of the Clean Air Act and in particular because
19 this Court in Massachusetts v. EPA interpreted the Clean
20 Air Act so that the term "pollutant" specifically
21 includes greenhouse gases, and that means that Congress
22 has assigned to EPA the task of making precisely the
23 determinations that plaintiffs ask the courts to make
24 here: Do greenhouse gases endanger the public, and if
25 so, what regulatory consequence --

1 JUSTICE SCALIA: Well, the EPA is given
2 authority to regulate other pollutants, including those
3 that do not go up into the atmosphere, but that does not
4 prevent California, for example, from enacting stricter
5 standards for its -- for automobiles in its State.

6 MR. KEISLER: Oh, and --

7 JUSTICE SCALIA: So why should we say the
8 EPA preempts the Federal common law?

9 MR. KEISLER: Because this issue, and I
10 would prefer to refer to it as displacement rather than
11 preemption, is very different from the question of
12 preemption of State law. The Clean Air Act has a
13 savings clause that preserves State authority across a
14 variety of areas, but the Court in second Milwaukee v.
15 Illinois cases specifically distinguished between
16 displacement of State law and displacement of Federal
17 common law. It said the -- the presumption is against
18 preemption of State law because of various concepts of
19 State sovereignty, but because of Federal concepts of
20 separation of powers, the presumption is in favor of
21 lawmaking by Congress and not lawmaking by courts, and
22 that means that the standard is very different. It
23 means that if Congress has addressed the problem, then
24 Federal common law is displaced.

25 JUSTICE SCALIA: What's your best case?

1 MR. KEISLER: Milwaukee v Illinois II. That
2 was the case in which the Court held that the Clean
3 Water Act displaced a Federal common law nuisance claim
4 by Illinois against Milwaukee and specifically said
5 because Congress had addressed the problem, Federal
6 common law had no role to play. Here Congress has
7 established a process and it's a process in which the
8 States and the private parties here can participate.
9 They can file petitions for rulemaking, they can appeal
10 EPA decisions that they oppose, and it would be
11 completely inconsistent with that process if they could
12 also take a complete end run around it and go to court
13 and ask courts to make the decisions that Congress has
14 assigned to EPA.

15 JUSTICE SCALIA: This is a merits argument,
16 right?

17 MR. KEISLER: Yes, it is a merits argument,
18 because it says that any Federal common law action would
19 be displaced by the Clean Air Act.

20 Now, the --

21 JUSTICE KAGAN: Is the consequence of that
22 argument, Mr. Keisler, that there in fact is no Federal
23 common law of interstate pollution claims?

24 MR. KEISLER: I don't think there is very
25 much left of any Federal common law of interstate

1 pollution claims, just because the field has been so
2 heavily occupied by statutes. You know, all the
3 nuisance cases that the court of appeals relied on, Your
4 Honor, they were in a completely different time. They
5 were at a time when the Court's view of its common law
6 authority was extremely broad and its view of Congress's
7 constitutional power under the Commerce Clause was very
8 narrow.

9 JUSTICE SCALIA: Of course, you're going to
10 have to struggle with the preemption question sooner or
11 later. You're confident you can establish not only
12 displacement of Federal common law, but also preemption
13 of State common law, right?

14 MR. KEISLER: It will ultimately depend on
15 the state of the law at the time that such a
16 hypothetical case is filed, but we would welcome the
17 opportunity, Your Honor.

18 JUSTICE KENNEDY: Is part of the inquiry,
19 part of the dynamic, how imminent the Federal regulation
20 is?

21 MR. KEISLER: I don't think so, Justice
22 Kennedy. I think the question is always what Congress
23 has done, not what the stage of the EPA rulemaking
24 process is. Congress, not EPA, can create or modify or
25 destroy causes of action, and that's why the Court said

1 in that Milwaukee 2 case that when Congress has
2 addressed the problem that's the end of the inquiry.
3 And there is no question that Congress has addressed not
4 just the general problem, but the specific problem here.
5 It has the statute which assigns EPA the authority to
6 regulate pollutants in certain ways and pollutants have
7 been defined under Massachusetts v. EPA to include the
8 precise greenhouse gasses that are at issue here.

9 There couldn't be a more specific example of
10 Congress having addressed the problem and assigned a
11 different approach to dealing with it than letting the
12 courts work it out under Federal common law.

13 The States' and the private plaintiffs'
14 argument is that the Federal common law will only be
15 displaced when EPA adopts the precise regulation that
16 provides the precise form of relief that they're asking
17 for. There's no case that says that and that's not the
18 law.

19 JUSTICE GINSBURG: EPA couldn't give --
20 could EPA give that relief? We're dealing with existing
21 stationary sources. We're not dealing with new or
22 modified sources.

23 MR. KEISLER: We believe that the EPA can
24 consider, as it's undertaking to do, regulating existing
25 nonmodified sources under section 111 of the Clean Air

1 Act, and that's the process that's engaged in now. It's
2 announced that it will propose standards in the summer
3 and complete a rulemaking by May. Obviously, at the
4 close of that process there could be APA challenges on a
5 variety of grounds, but we do believe that they have the
6 authority to consider standards under section 111.

7 And if the Court has no questions, with the
8 Court's permission I would like to reserve the balance
9 of my time.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Keisler.

12 General Katyal.

13 ORAL ARGUMENT OF NEAL KUMAR KATYAL,
14 ON BEHALF OF RESPONDENT TENNESSEE VALLEY
15 AUTHORITY, IN SUPPORT OF PETITIONERS

16 GENERAL KATYAL: Thank you, Mr. Chief
17 Justice, and may it please the Court:

18 In the 222 years that this Court has been
19 sitting, it has never heard a case with so many
20 potential perpetrators and so many potential victims,
21 and that quantitative difference with the past is
22 eclipsed only by the qualitative differences presented
23 today. Accordingly, the Court should apply the
24 prudential standing doctrine and hold these lawsuits not
25 fit for judicial resolution. The very name of the

1 alleged nuisance, "global warming," itself tells you
2 much of what you need to know. There are billions of
3 emitters of greenhouse gasses on the planet and billions
4 of potential victims as well.

5 JUSTICE KENNEDY: Well, again, that just
6 goes to the merits. You make that argument to the
7 district court that your injunction is meaningless,
8 equity does not require an idle act. End of case.

9 GENERAL KATYAL: Well, Justice Kennedy, I
10 think it goes to both. That is, this Court in outlining
11 what the prudential standing doctrine is all about in,
12 for example, Newdow has said the following at page 11:
13 "Without prudential standing limitations, the Court
14 would be called upon to decide abstract questions of why
15 public significance, even though other governmental
16 institutions may be more competent to address the
17 questions and even though judicial intervention may be
18 unnecessary to protect individual rights.

19 JUSTICE SCALIA: I'll add a third thing that
20 it goes to and that's Article III standing. It's clear
21 in our cases, if as you say the relief requested here
22 will not remedy the complaint of these people, you don't
23 have to go to prudential standing. That it seems to me
24 would deny Article III standing.

25 GENERAL KATYAL: Well, Justice Scalia, I

1 think that this case is best like Newdow, in which the
2 Court went to prudential standing first before Article
3 III. And the reason for that is because this court in
4 Massachusetts v. EPA, in analyzing the redressability
5 prong of what you're asking said that the reductions
6 that were sought there, if granted, would, quote, "slow
7 or reduce the problem."

8 JUSTICE KENNEDY: Well, I'll think about it,
9 but Newdow was a case where we thought that this
10 particular litigant was not directly injured. Here the
11 State said it's directly injured. That's the
12 distinction.

13 JUSTICE GINSBURG: More than that, Newdow
14 was a case of a father trying to assert a right on
15 behalf of a child, and the child herself did not want
16 that right nor did her mother. So it seems to me it's
17 worlds apart, and when you describe prudential standing
18 as involving generalized grievance, I thought that the
19 generalized grievance was Article III. I thought that's
20 what Mrs. Frothingham's case was about; it was a
21 grievance that she shared with everybody in the
22 populations, so she didn't have standing.

23 GENERAL KATYAL: Justice Ginsburg, we're not
24 here saying that this case follows inexorably,
25 inexorably from the facts of Newdow or, frankly, from

1 any case that this Court has decided. There is no case
2 in the 222 years that announces the precise rule we're
3 seeking here, and the reason is because you have never
4 heard a case like this before involving the quantity and
5 quality of the claims sought here, the --

6 JUSTICE KAGAN: But it seems, General
7 Katyal, that there also is no case where we've ever used
8 this language of generalized grievance as a prudential
9 matter rather than as an Article III matter. So am I
10 wrong about that?

11 GENERAL KATYAL: Well, I think that this
12 Court has in *Newdow* and in *Warth v. Seldin* used the
13 language of generalized grievances to reflect prudential
14 considerations.

15 JUSTICE KAGAN: But *Newdow* -- *Newdow* quoted
16 the language of generalized grievance that came from
17 *Warth*, but it didn't specifically pin anything on that
18 language.

19 GENERAL KATYAL: I quite agree with you,
20 Justice Kagan. This is not like a case in which the
21 government is announcing some rule of standing that
22 requires the Court to, for example, call into question
23 previous precedents of this Court that reached the
24 merits or something like that. It's that this Court has
25 never had a case involving this scale and scope, and we

1 think that the prudential standing doctrine, at least in
2 a circumstance like this, which is a Federal common law
3 cause of action in which the Court is already being
4 asked to fashion the rules and, as Justice Scalia says,
5 an equitable action in which the Court has I think
6 special abilities to fashion relief if appropriate and
7 not -- I think prudential standing reflects best the
8 kind of tapestry of different factors.

9 JUSTICE KAGAN: Well, General Katyal, how
10 about the Aiken case, because in the Aiken case I think
11 the government came in and made the same argument, that
12 even though the injury was concrete, it was too
13 generalized and therefore there should be no standing,
14 the Court specifically rejected that argument both as to
15 Article III and as to prudential standing.

16 GENERAL KATYAL: Right, and I think Aiken
17 says that the prudential standing cases thus far have
18 been about has concrete injury been shown to a
19 particular person. And we're not disputing that for
20 purposes of Article III concrete injury has been shown
21 to at least one plaintiff, but we think that --

22 JUSTICE GINSBURG: To that extent you
23 disagree with Mr. Keisler because he says there is no
24 Article III?

25 GENERAL KATYAL: That is absolutely correct,

1 we do disagree to that extent. We think that prudential
2 standing best reflects the Court's general intuition in
3 this area that when a problem is of this magnitude and
4 literally involving the world, where everyone is a
5 potential perpetrator, everyone is a potential victim,
6 and where their own theory at page 15 of their brief and
7 32 and 40 states: "If someone contributes one drop to
8 the nuisance, they can be sued.

9 CHIEF JUSTICE ROBERTS: Counsel, you don't
10 usually -- your phrase is exactly what bothers me. We
11 don't usually base a decision on our general intuition,
12 and the idea of prudential standing that we have
13 jurisdiction of the case but we're not going to decide
14 it is contrary to Chief Justice Marshall's famous line
15 that if we don't have jurisdiction, we can't decide it,
16 but if we do, we have to decide it.

17 GENERAL KATYAL: But I think that the
18 prudential standing doctrine generally and the zone of
19 interest test in particular really do focus on this
20 question, Mr. Chief Justice, about whether or not a case
21 can be cut down to judicially manageable standards.

22 CHIEF JUSTICE ROBERTS: I'll give that you
23 on the zone of interests, but there you're dealing with
24 administrative law and a very narrow proposition. I
25 think it's Justice Kennedy's point, or at least the

1 point of his questions, that these issues meld into the
2 merits and, at least for anyone who is troubled by the
3 idea that we are not going to decide a case even though
4 we have jurisdiction to decide it, maybe that's the
5 better place to address it.

6 GENERAL KATYAL: I'll move to that and take
7 your invitation, Mr. Chief Justice. But before doing
8 so, I would say that if you're going to give me
9 administrative law and zone of interest I think you
10 should then give me Federal common law, which this Court
11 is at its height in terms of fashioning who can come
12 into court and what those rules may be.

13 JUSTICE SCALIA: I don't understand why you
14 assert that the remedy here will not provide the
15 relief -- you acknowledge that, don't you, that the
16 remedy here cannot possibly stop global warming, right?

17 GENERAL KATYAL: We acknowledge that the
18 relief that they are seeking looks like the relief in
19 Massachusetts v. EPA, which is that it would, if the
20 Court --

21 JUSTICE SCALIA: It does? It does? In
22 Massachusetts v. EPA the relief was allowing a Federal
23 agency to regulate the entire society's carbon
24 emissions.

25 GENERAL KATYAL: Justice Scalia, that isn't

1 what the Court said. What the Court said is that it
2 would allow regulation in the transportation sector,
3 which would be approximately 1.7 billion tons, and here
4 they are saying 650 million tons. And so, I agree it's
5 less, but I think that the -- and one can criticize the
6 reasoning in the majority, but if that -- that is the
7 rule of this Court, and I think that as long as a
8 slowing or reduction --

9 JUSTICE SCALIA: Do you think -- do you
10 think that was the holding of Massachusetts v. EPA, that
11 EPA can only regulate the transportation section?

12 GENERAL KATYAL: That is what the Court
13 based its redressability analysis on.

14 JUSTICE SCALIA: Is that the holding of the
15 case and -- and do you think the -- the -- the
16 forthcoming EPA rules can only govern transportation?

17 GENERAL KATYAL: Of course not. I'm just
18 saying that the --

19 JUSTICE SCALIA: Of course not. Of course
20 the case covers --

21 GENERAL KATYAL: But I am talking --

22 JUSTICE SCALIA: -- what the EPA could do.

23 GENERAL KATYAL: Right. And I'm just
24 talking about the redressability part of the analysis,
25 Justice Scalia. For that the Court said that this

1 reduction in the transportation sector was sufficient.

2 If I could take the Mr. -- the Chief
3 Justice's invitation to address displacement at this
4 time. We believe that we meet the State's own test for
5 displacement, which is found at page 46 of their brief,
6 which is: "A Federal common law nuisance claim is
7 displaced when a Federal statute or regulatory action
8 addresses the nuisance." And here you have not just the
9 Clean Air Act, you have the Clean Air Act plus, a
10 cascade of a number of different actions taken after,
11 Justice Scalia, the opinion in Massachusetts v. EPA.

12 JUSTICE ALITO: At what point in this -- in
13 what point in this cascade did the displacement occur?

14 GENERAL KATYAL: We think that the Court
15 doesn't really need to get into it. And for the -- the
16 reason is this: Displacement actions are extremely
17 rare, Federal common law actions are rare, so we don't
18 think you should announce some sort of general standard
19 for when displacement occurs. It's a more case-by-case
20 situation.

21 Here you have undoubted evidence that it
22 occurred -- that it has occurred because of a number of
23 different things.

24 JUSTICE ALITO: We don't know what EPA may
25 do down the road, we don't know what Congress may do

1 down the road. So don't we have to have some idea about
2 when this takes place in order so that this precedent
3 may --

4 GENERAL KATYAL: Certainly --

5 JUSTICE ALITO: -- be applied to the future
6 course of conduct?

7 GENERAL KATYAL: Certainly, Justice Alito, I
8 think it's appropriate for the Court to look at what
9 has -- what is happening right now. And here's what's
10 happening. First, in December 2009 the EPA issued an
11 endangerment finding, finding these greenhouse gases
12 significant pollutants.

13 JUSTICE KAGAN: But, General Katyal, suppose
14 that the EPA had decided not to issue the endangerment
15 finding. Would your argument still apply?

16 GENERAL KATYAL: I think that that would
17 present a difficult case, because it would be the one
18 like the Petitioners make, which is the Clean Air Act
19 alone. And I think that what the States themselves
20 acknowledge and what the language of Milwaukee II --
21 excuse me -- Milwaukee I says in it is that -- and this
22 is at page 107 of the opinion: "It may happen that new
23 Federal laws and new Federal regulations may in time
24 preempt the Federal common law of nuisance. We think
25 that both together presents the best and easiest case

1 for displacement," and you have that here. You have not
2 just the endangerment finding; you have the EPA
3 regulating all passenger cars, all light motor vehicles
4 right now.

5 JUSTICE KAGAN: But if I insisted you answer
6 the hypothetical I gave you, what would the answer be?
7 No endangerment finding. Is there displacement?

8 GENERAL KATYAL: I think that it's a -- it's
9 a difficult case to make for -- for displacement, but I
10 think it could be made, for the reasons Mr. Keisler
11 suggests. But I --

12 CHIEF JUSTICE ROBERTS: Why is it -- I don't
13 want to make -- try to make a case for you, but why is
14 it that much more difficult? It's just -- I mean, it's
15 sort of like the negative commerce clause, right? The
16 fact that EPA has the authority to regulate in a
17 particular area means that the ball has passed from the
18 courts to the agency, to the executive branch, and
19 they've made an implicit decision not to regulate a
20 particular question.

21 GENERAL KATYAL: Absolutely. I think that
22 there's a good argument to be made. I imagine the
23 argument on the other side that you'll hear in a moment
24 is that the Clean Air Act doesn't look precisely like
25 the Clean Water Act in terms of forcing the agency to

1 decide various things.

2 CHIEF JUSTICE ROBERTS: I guess that would
3 be a preemption question rather than -- rather than a
4 displacement question.

5 GENERAL KATYAL: I think that very well may
6 be. And with respect to that, Mr. Chief Justice, you
7 had asked before about State common law causes of action
8 and whether they would be -- they would kind -- the
9 existence of those would somehow mean that the Court
10 should either find jurisdiction or reach the merits in a
11 way. And we think that the same arguments that prohibit
12 the Court from -- from -- from recognizing a Federal
13 common law cause of action for displacement very well
14 may be preemption questions as well that could be
15 addressed down the road with respect to State common law
16 actions.

17 And we don't think the Court should be
18 troubled by the existence of a potential State common
19 law cause of action. It's just like Milwaukee II, in
20 which the dissenters made precisely this argument. They
21 said: If you don't recognize it, then the States will
22 regulate it and it will balkanize and the like. And
23 what the majority said is: That's a question for down
24 the road; the question for now is has displacement
25 occurred?

1 JUSTICE ALITO: I understand that that's not
2 the issue here, but does the government have a position
3 on that if -- if New York law provides exactly the same
4 public nuisance claim that is now asserted under Federal
5 common law, would that be consistent?

6 GENERAL KATYAL: I -- I don't think we have
7 a position at this time on that. That's I think an
8 enormously complicated question we can get to at an
9 appropriate time. Our central -- our central submission
10 to you on displacement is this: That there is literally
11 no precedent for the argument that they are making here,
12 which is that the Federal Government has to regulate the
13 precise jot and tittle, the specific relief that they
14 are seeking before displacement occurs.

15 JUSTICE KAGAN: Do you have a position on
16 whether there's anything to be displaced here? Do you
17 have a position on whether there is, in fact, a Federal
18 cause of action?

19 GENERAL KATYAL: Well, we think, again, the
20 Court doesn't need to get into that question because
21 it -- you know, the -- there are few Federal common law
22 causes of action in the area of nuisance -- I mean, and
23 there have been two that the Federal Government has
24 filed since 1970 and three that we can find all together
25 in the Federal courts of appeals, all of which have

1 failed for various displacement reasons, and the others.

2 We think none of those look anything like
3 the -- the common law cause of action here. And, so, it
4 would at least require this Court to extend quite
5 dramatically Federal common law to cover this type of
6 situation in which everyone is a potential perpetrator
7 and everyone is a potential victim. And it would
8 require the Court, in fashioning relief, to think
9 through a number of things that the Federal courts
10 haven't ever had to grapple with from the nature --

11 JUSTICE ALITO: So, if there were -- if
12 there were no Clean Air Act, you would still say that
13 this suit, a suit like this, would -- would fail
14 prudential standing, but you don't have a position as to
15 whether there would be a claim under Federal common law?

16 GENERAL KATYAL: That is correct. We think
17 it would still fail prudential standing because of the
18 quantity and quality of the nature of the problem here,
19 and the multitude of different policy judgments that
20 would be required -- that this Court would be required
21 to undertake to adjudicate a Federal common law cause of
22 action in the absence of a statute.

23 JUSTICE KAGAN: But I'm sorry, General,
24 because I was understanding your answer differently, and
25 maybe I misheard you, as saying that if there were no

1 legislation here, you doubted that there was a Federal
2 law cause of action. Is that correct?

3 GENERAL KATYAL: I doubted that there was
4 prudential standing.

5 JUSTICE KAGAN: No, but as to whether the
6 cause of action exists under Federal common law in a
7 case like this, where you said it was so different from
8 the other Federal common law cases that the Court has
9 seen.

10 GENERAL KATYAL: I -- I -- I think I put it
11 as we doubt it. I mean, I think that it would require a
12 dramatic extension, Justice Kagan, of a case like
13 Tennessee Copper and the other cases that this Court has
14 heard, which are essentially: A pollutes a river or
15 something and hurts B. A here is the world and B is the
16 world, and that is such a difference in scale and scope
17 to pose enormously difficult questions as to whether
18 this Court should recognize such a cause of action.

19 JUSTICE KENNEDY: Same -- same hypothetical,
20 assume no Federal statute, and -- and assume no Federal
21 common law. What about State law? Does State common
22 law become displaced because it's a matter of Federal
23 concern? We don't -- we don't -- we don't usually have
24 preemption of Federal common law.

25 GENERAL KATYAL: Well -- well, there may be

1 arguments, Justice Kennedy -- I'm not sure if the
2 premise of your question has a Clean Air Act in
3 existence or not. There may be some sort of arguments
4 about displacement or preemption under the Clean Air
5 Act --

6 JUSTICE KENNEDY: The hypothetical is that
7 the Federal law -- Federal statutory law doesn't apply.

8 GENERAL KATYAL: Then I think that again for
9 purposes of State common law, I think this Court would
10 approach that question the same way it did in Milwaukee
11 II, which is to say that's a really separate
12 policy-based question that the Court doesn't use to
13 answer the questions about whether a cause of action
14 should be recognized or whether displacement has
15 occurred. But I would point out that the States that
16 have sued generally have doctrines like prudential
17 standing, doctrines like political question, that may
18 very well bar the reaching of these claims in State
19 courts as well.

20 JUSTICE KENNEDY: It would be very odd to
21 say that there's no Federal common law, but also that
22 there's no -- no displacement of State law. That --
23 that seems to me odd.

24 GENERAL KATYAL: That's precisely the
25 situation that -- that this Court was grappling with in

1 Milwaukee II, and it said that --

2 JUSTICE GINSBURG: Can we get to -- to the
3 situation that now exists? They are seeking standards
4 for existing sources. I asked Mr. Keisler, and do you
5 agree with him, this is not a -- this is not a new
6 source or a modified source; we're talking about
7 existing sources. Does EPA, could EPA, regulate and set
8 standards for existing sources?

9 GENERAL KATYAL: Absolutely, Justice
10 Ginsburg. Let me say three things about that. First
11 is, EPA is currently regulating existing sources. To
12 the extent that a power plant is modified in any way to
13 increase carbon dioxide above a certain amount -- and
14 this is one of the so-called tailoring rules -- then
15 those power plants right now are subject to regulation.
16 Indeed, one has already had to get a permit. These
17 regulations just went into effect in January 2011 for
18 existing power plants that seek to modify.

19 Second, there is a settlement agreement in
20 place that commits EPA by May of 2012 to deciding how
21 and whether to regulate existing power sources, the
22 existing stationary sources.

23 And third, and I think most fundamentally,
24 there is no precedent, Justice Ginsburg, that says that
25 the government must regulate the specific industry, the

1 specific thing that the plaintiff isolates, in order for
2 displacement to occur. Rather, Sea Clammers and
3 Milwaukee II I think make explicit that that's the wrong
4 question. And so long as the nuisance is being
5 addressed -- and here the nuisance is undoubtedly being
6 addressed with a panoply of different Federal actions in
7 the area of global warming, and an executive order that
8 says that fighting global warming is one of the
9 government's highest priorities -- and concrete steps
10 taken, such as the 500-page tailoring rule, the
11 400-page -- the -- the other hundreds of pages that EPA
12 has done with its experts to appropriately regulate
13 greenhouse gas emissions, as opposed to a Federal common
14 law court of action doing something which would frankly
15 put you all at sea in terms of the complexity,
16 economics, international nature of the problem.

17 JUSTICE KAGAN: General, could I take you
18 back on that last point to another threshold question,
19 which is the political question doctrine? Because a lot
20 of your arguments really sound like prongs two and three
21 from Baker v. Carr, but you say that we shouldn't go
22 there, that we should instead address this matter on
23 prudential standing grounds. But the political question
24 doctrine actually seems more natural, given the kinds of
25 arguments you're making. So why not?

1 GENERAL KATYAL: Well, Justice Kagan, I'm
2 not going to tarry too long on which different way we
3 should win this case. I think either is an appropriate
4 way.

5 (Laughter.)

6 GENERAL KATYAL: But I think that the
7 prudential standing doctrine is a bit narrower because
8 it -- it contemplates a variety of factors, including
9 the fact that this is a Federal common law cause of
10 action where the Court is fashioning relief in the first
11 place, as opposed to the political question doctrine
12 which looks -- looks more to the standardless nature of
13 the adjudication.

14 We agree that -- that the political question
15 doctrine is an appropriate way to dismiss of this case,
16 but we think that, like Newdow, like Kowalski, this
17 Court can handle this case on prudential standing first
18 and recognize that this is an unprecedented action
19 involving literally the world, and it is not suited for
20 judicial resolution, and that flows quite naturally from
21 the precepts of the prudential standing doctrine.

22 JUSTICE GINSBURG: It's not an area where
23 the Court can't go. To take a political question we all
24 agree on, I think, the courts can't mess with the
25 impeachment of a president, just -- but here the Court

1 does deal with the subject matter all the time. It
2 reviews decisions that the EPA has made.

3 GENERAL KATYAL: Justice Ginsburg, we quite
4 agree, and that is why we say that if a statute were --
5 were announced to provide standards, that that would
6 provide a way around the political question problem that
7 exists in this case.

8 CHIEF JUSTICE ROBERTS: Thank you, General.
9 General Underwood.

10 ORAL ARGUMENT OF BARBARA D. UNDERWOOD
11 ON BEHALF OF THE RESPONDENTS

12 MS. UNDERWOOD: Mr. Chief Justice, and may
13 it please the Court:

14 This case rests on the longstanding
15 fundamental authority of the States to protect their
16 land, their natural resources, and their citizens from
17 air pollution emitted in other States. It rests on
18 three propositions: One, the interests of the States
19 are harmed by global warming; two, these defendants, as
20 the five largest U.S. emitters of carbon dioxide, are
21 significant contributors to it; and, three, these
22 defendants could take reasonable, cost-effective
23 measures to reduce their emissions in a way that would
24 slow the effects of global warming.

25 We will have to prove these propositions,

1 and after we do the district court will have to
2 determine whether it can frame an appropriate equitable
3 injunction. That's what discovery and trials are for.
4 But this Court should not close the courthouse door to
5 this case at the outset. The common law action for
6 public nuisance has been around for hundreds of years,
7 has been adapted by courts to cover new environmental
8 threats, and there's no reason why the courts can't do
9 the same thing here.

10 The defendants say there are too many
11 plaintiffs, too many potential defendants, and that
12 adjudication of this case will require courts to solve
13 the entire problem of global warming, but that is simply
14 not so.

15 On the plaintiffs' side, this is about the
16 States. We are alleging the kind of injury to States
17 that has been traditionally recognized by this Court;
18 their lands, their citizens, their businesses are being
19 injured by pollution emitted in other States.

20 JUSTICE GINSBURG: General Underwood, the --
21 the relief that you're seeking, asking a court to set
22 standards for emissions, sounds like the kind of thing
23 that EPA does. I mean, Congress set up the EPA to
24 promulgate standards for emissions, and now what -- the
25 relief you're seeking seems to me to set up a district

1 judge, who does not have the resources, the expertise,
2 as a kind of super EPA.

3 MS. UNDERWOOD: It's not as a super EPA.
4 It's something much smaller. It's a different question.
5 Interstate pollution disputes have historically been
6 entrusted to the courts, including the determination of
7 how much is unreasonable, which is --

8 JUSTICE GINSBURG: But if we just
9 concentrate on I think the relief you want, you say:
10 District court, if we pass everything else, you set
11 emissions standards, you put a cap immediately, you set
12 a cap, and then annually you require further reductions.
13 Well, that just sounds to me like what EPA does when it
14 sets emission standards.

15 MS. UNDERWOOD: Well, it's also like what
16 the Court did in Tennessee Copper. That is to say, this
17 case doesn't ask the Court to decide how much, contrary
18 to what Petitioners suggest, to decide how much emission
19 reduction is required to solve the whole problem of
20 global warming and then allocate a portion to these
21 defendants. It asks the Court to do something simpler,
22 and that is to decide whether these defendants can take
23 reasonable cost-effective measures that would help to
24 slow the pace of global warming. So --

25 JUSTICE ALITO: How does a district judge

1 decide what is reasonable and cost-effective? There are
2 considerations -- this is not a situation in which the
3 emission of greenhouse gases can be totally prohibited.

4 MS. UNDERWOOD: Correct.

5 JUSTICE ALITO: There are other -- there are
6 countervailing interests. So how does the court -- how
7 can a district court balance those interests?

8 MS. UNDERWOOD: Well, I would say two things
9 about that. One, it was also true in Tennessee Copper
10 that it was not the case that the sulfur emissions could
11 be eliminated or that the plant was to be put out of
12 business. The Court in that case ordered a reduction of
13 sulfur, a quite specific reduction of sulfur emissions
14 in one season and more in another season. And how
15 does --

16 JUSTICE ALITO: But do you seriously argue
17 this isn't -- this isn't orders of magnitude more
18 complicated than that case?

19 MS. UNDERWOOD: It's somewhat more -- it's
20 larger. I don't know if it's more complicated. The way
21 a court would do that is presumably the way it did it in
22 Tennessee Copper. That is, there could be expert
23 testimony, there could also be evidence about whether --
24 what other emitters are doing, what they do that is
25 feasible and cost-effective to reduce their emissions.

1 In Tennessee Copper, one of the defendants settled, and
2 the other was subject to an order, and it would have
3 been available to the Court to look to what the settling
4 defendant did for some indication of what the
5 nonsettling defendant might well be ordered to do. So
6 there is evidence available from which a court could
7 conclude what is reasonable.

8 CHIEF JUSTICE ROBERTS: What -- what is the
9 -- what factors go into the cost-benefit analysis that
10 would have to be undertaken to decide what level of
11 emissions are reasonable in light of the threat of
12 global -- global warming?

13 MS. UNDERWOOD: The available technology,
14 the cost of that technology --

15 CHIEF JUSTICE ROBERTS: Obviously the
16 greatest benefit to reduce global warming would be, of
17 course, to shut down the power plants, right?

18 MS. UNDERWOOD: Well, we haven't asked for
19 that and nobody suggests that that would be appropriate.
20 It's not, any more than it was in Tennessee Copper.

21 CHIEF JUSTICE ROBERTS: Because -- right.
22 But I mean, across the economy, the whole problem of
23 dealing with global warming is that there are costs and
24 benefits on both sides, and you have to determine how
25 much you want to readjust the world economy to address

1 global warming, and I think that's a pretty big burden
2 to post -- to impose on a district court judge.

3 MS. UNDERWOOD: Well, it's also a burden
4 that the plaintiffs would have to bear. That is to say,
5 we have alleged, and are entitled to try to prove -- and
6 we might fail; that would be for the district judge to
7 determine -- that "the defendants have available to them
8 practical, feasible" -- I'm reading from the
9 complaint -- "and economically viable options for
10 reducing carbon dioxide emissions without significantly
11 increasing the cost of electricity to their customers,
12 including changing fuels, improving efficiency, and
13 altering" --

14 CHIEF JUSTICE ROBERTS: We're dealing with
15 an electric grid that connects I don't know how vast an
16 area, but certainly a vast area here. And the fact that
17 they can reduce their emissions in a way that doesn't
18 affect their customers is based on the fact that other
19 power plants that are part of the grid will serve part
20 of those -- will serve the customers' needs to some
21 extent.

22 MS. UNDERWOOD: It may or may not be based
23 on this. These are facts that can be proven or not
24 proven at trial.

25 JUSTICE KAGAN: But, General, they're

1 usually facts that are determined by an administrative
2 agency. I mean, even just reading that part of your
3 complaint, it sounds like the paradigmatic thing that
4 administrative agencies do rather than courts.

5 MS. UNDERWOOD: But if there were no agency
6 and if there were no Clean Air Act and somebody was
7 shooting poison into the air in a way that injured
8 people in another State, the States would have the --

9 JUSTICE KAGAN: But if there were no and if
10 there were no, we would be living in a different world.
11 There is an administrative agency and there is a Clean
12 Air Act.

13 MS. UNDERWOOD: But those -- those are
14 questions about what has been called the merits or
15 displacement. The question of Article III standing, the
16 question of justiciability, the question of political
17 question, those are the same questions whether there's
18 an agency or not.

19 JUSTICE KENNEDY: We can concede that, but
20 we still have the displacement argument --

21 MS. UNDERWOOD: Yes.

22 JUSTICE KENNEDY -- in front of us, and I
23 thought that's what we were addressing.

24 MS. UNDERWOOD: We can talk about the
25 displacement argument. I just wanted to be sure that --

1 I understood the question of standards to be a question
2 addressed to the political question point. And even if
3 it might be desirable to have an agency set standards,
4 it is not something that is beyond the power of a court
5 to do.

6 JUSTICE BREYER: Can the courts set a tax?

7 JUSTICE GINSBURG: The agency -- the agency
8 is engaged in that, in it right now, and that's another
9 facet of this case, the potential for conflict. The
10 EPA, after acting for a while, has now agreed that it
11 does have authority to classify this as a pollutant and
12 it has taken the first steps.

13 One argument that the EPA -- that the United
14 States is presenting is the way agencies go about this
15 is incrementally, so they're starting with motor
16 vehicles and then maybe they will go to new sources, and
17 then they'll get to maybe where you are. But you want
18 the Court to start with the existing sources, to set
19 limits that may be in conflict with what an existing
20 agency is doing.

21 Do we ignore the fact that the EPA is there
22 and that it is regulating in this area?

23 MS. UNDERWOOD: No, we do not ignore that.
24 This is a very peculiar moment in time for this case to
25 arrive in this Court, because what is offered as

1 displacing is something that is said to be imminent, not
2 something that actually exists, and something that is
3 imminent may never happen. It was, of course, for that
4 reason that I believe the United States suggested a GBR
5 and we suggested that the case be dismissed so that the
6 lower courts could deal with the unfolding events as
7 they occur.

8 But the case is here now, and there is no
9 Federal statute or regulation that currently regulates
10 the emission of greenhouse gases by existing unmodified
11 power plants, like the ones operated by the defendants.
12 And the Clean Air Act works very differently from the
13 Clean Water Act. It did not put in place a permit
14 system for all emissions when it was enacted in 1970.
15 Unlike the Clean Water Act 2 years later, which forbids
16 all discharges until they're authorized by permit, the
17 Clean Air Act doesn't regulate anything until the EPA
18 makes findings and imposes restrictions.

19 CHIEF JUSTICE ROBERTS: I -- I suppose there
20 were reasons that Congress adopted that approach, and
21 your suit would override those determinations.

22 MS. UNDERWOOD: No, our suit is consistent
23 with those determinations. That is to say, the design
24 of the statute leaves preexisting law in place until EPA
25 steps in.

1 If the Clean Air Act were thought to
2 displace the common law before any regulation occurred,
3 that would mean the immediate effect of this
4 antipollution law in 1970 was to reduce pollution
5 control because --

6 CHIEF JUSTICE ROBERTS: How much -- how much
7 regulation do you need before you would admit that there
8 is displacement? Is it -- is it a preemption analysis
9 that you're adopting or a displacement analysis?

10 MS. UNDERWOOD: It's a displacement
11 analysis. I believe it's a displacement analysis.
12 What -- what we start from is that the States have a
13 historic right to go to court under the Federal common
14 law and that to -- to -- to deal with the problem of
15 interstate pollution, and that that was a promise that
16 they obtained, the Federal remedy, in exchange for the
17 surrender of sovereignty in joining the Union. So there
18 has to be -- there's a strong Federal interest in there
19 being a Federal remedy.

20 Now, when the Clean Air Act was -- was
21 passed, without any regulations, if it displaced the
22 Federal common law, there would be no Federal law
23 applicable at all, because the Federal common law would
24 be displaced and there would be no Federal regulatory
25 law. The States would have recourse at that point to

1 State common law, as has been suggested. That would be
2 available still.

3 But this Court has said repeatedly, and it's
4 correct, that there is a strong Federal interest in
5 regulating this subject matter of interstate pollution
6 with Federal law. Federal common law is the default
7 position, and when some -- when -- when Congress and the
8 agency act to displace Federal law and put in place --
9 to displace Federal common law and put in place Federal
10 regulatory law, that's when the displacement occurs. So
11 when --

12 CHIEF JUSTICE ROBERTS: What is -- what is
13 your test for displacement? When do we tell whether
14 there's displacement or not? Has there been some
15 displacement in this case but just not total
16 displacement or --

17 MS. UNDERWOOD: There's been displacement as
18 to automobiles. The EPA made a considered judgment
19 about emissions of carbon dioxide with respect to light
20 motor vehicles. The EPA has made no judgment with
21 respect to stationary sources.

22 JUSTICE KAGAN: What if the EPA made a
23 judgment, but it just was not the judgment that you
24 liked? Suppose that the EPA said: We've looked at
25 stationary sources; we're not going to regulate. Would

1 that displace?

2 MS. UNDERWOOD: I think if it were a
3 judgment that the amount of carbon dioxide emission from
4 stationary sources that was currently happening was
5 the -- was the correct amount, that would displace. If
6 the --

7 CHIEF JUSTICE ROBERTS: That sounds like --
8 that sounds like preemption to me and not displacement,
9 or at least preemption with another label.

10 MS. UNDERWOOD: Well, of course, there are
11 some similarities between the two. In each case we're
12 talking about whether Federal -- whether one law
13 substitutes for another, whether one law ousts another.

14 CHIEF JUSTICE ROBERTS: Well, maybe you can
15 tell me in what -- to what extent displacement is
16 different from preemption. Tell me in this area you're
17 going to have displacement but not preemption. Or I
18 guess it's the other way around, in which there's going
19 to be preemption but not -- well, what's the difference?

20 You said in response to Justice Kagan that
21 if they've made a considered decision that this is the
22 amount and no other amount higher or lower, then there
23 would be displacement. In what way is that different
24 from preemption?

25 MS. UNDERWOOD: Well, the difference isn't

1 on that front. The difference is that with respect to
2 preemption Congress has to decide that it does -- that
3 it wishes to override State law expressly. Here what
4 we're talking about is simply whether Congress or the
5 agency has acted. It's a little different. They don't
6 have to have in mind Federal common law. They simply
7 have to act in a way that over -- that -- that
8 substitutes for Federal common law, because the promise
9 of the republic really for the States was that the
10 States would have a Federal law applicable to their
11 interstate pollution disputes, and until --

12 JUSTICE SCALIA: Well, I don't think --

13 MS. UNDERWOOD: -- there's a new one, they
14 have the old one.

15 JUSTICE SCALIA: I don't think that they
16 have to have in mind State law for preemption, either.
17 If indeed the State law just positively conflicts with a
18 Federal statute, it doesn't matter whether Congress had
19 State law in mind, does it? I don't know --

20 MS. UNDERWOOD: No, but -- perhaps not. But
21 we -- we talk about, though, whether there was intent --
22 that -- that preemption is ultimately a matter of
23 congressional intent and whether Congress intended
24 and -- and preemption should not be lightly inferred.
25 It's probably the case that preemption should be harder

1 to find in a close case.

2 JUSTICE SCALIA: But you haven't told us
3 how. It -- it -- it's certainly not harder to find
4 because for preemption you require congressional intent,
5 whereas here -- whereas for displacement you don't.
6 That's not the -- that's not the difference. What --
7 what is the difference?

8 MS. UNDERWOOD: Well, I think in this
9 context they probably work pretty similarly. I would
10 just say that in each case the question is, what is
11 the -- what does the new law do with respect to the law
12 that it is said to replace? And --

13 CHIEF JUSTICE ROBERTS: I think you're right
14 that under your theory they operate pretty similarly and
15 I thought the whole point of Milwaukee v. Illinois was
16 that they are two very distinct propositions.

17 MS. UNDERWOOD: Well, they have different
18 reasons for existing, that's certainly what Milwaukee v.
19 Illinois said. That doesn't mean they have to in every
20 instance operate differently. The point of preemption
21 is about the Federal-State balance, and displacement is
22 simply -- is about separation of powers and the
23 interaction of various agencies within the Federal
24 Government. It shouldn't be surprising --

25 JUSTICE GINSBURG: Your point is that EPA,

1 unless and until EPA gets to the point of setting
2 standards for existing sources, the court can be side by
3 side with the agency; we know that the agency is
4 beginning, it starts with light motor vehicles, and then
5 it's moving forward. But you say as long as the EPA
6 hasn't gotten to stationary sources, the court can be
7 conducting a similar function with -- one of many
8 differences is that if the EPA is setting the standards
9 they will set -- they will do it through notice and
10 comment, everybody will be able to put in a submission;
11 but the court substituting for the EPA, how does the
12 court replicate that notice and comment process?

13 MS. UNDERWOOD: Well, you say the court
14 substituting for the EPA. It would be the EPA
15 substituting for the court. That is, the default, the
16 beginning position before there was legislation, before
17 there was an agency, was a common law remedy.

18 JUSTICE GINSBURG: But now there is an
19 agency, and we know that it operates in a certain way,
20 through notice and comment rulemaking.

21 MS. UNDERWOOD: I --

22 JUSTICE GINSBURG: And here is the court and
23 how does it operate to get to those standards?

24 MS. UNDERWOOD: Well, TVA suggests that
25 there's an inexorable march, that there's a regulatory

1 program underway. But what they point to is an
2 agreement by EPA to begin considering whether to
3 regulate new and existing power plants. That can't be
4 enough. The Federal common law exists for the purpose
5 of giving States a remedy for interstate pollution, and
6 if it's displaced when -- when the EPA begins thinking
7 about it, then EPA could think about it for a long time.
8 They've said when they hope to complete this rulemaking,
9 but it is not uncommon for delays to -- to enter into
10 such processes, and it could be a long time before EPA
11 actually arrives at a judgment. A lot can happen to
12 delay or derail the fulfillment of a promise.

13 JUSTICE KAGAN: General, do you think that
14 you have a Federal common law cause of action against
15 anybody in the world? Your briefs talk a lot about how
16 these are the five largest emissions producers, but I
17 saw nothing in your theory to limit it to those five.
18 Is there something that you think limits it to large
19 emissions producers rather than anybody in the world?

20 MS. UNDERWOOD: Yes. I think limitations, a
21 limitation to substantial sources -- and I'll talk in a
22 minute about what that might mean -- comes from the
23 Restatement definition, from garden variety State cases
24 about -- involving nuisance, and also perhaps from the
25 requirements of standing itself.

1 This case asks the Court to recognize that
2 the States can sue the largest emitters of carbon
3 dioxide. These defendants produce 650 million tons a
4 year or 10 percent of U.S. emissions, and individually
5 they produce amounts ranging from 1 to 3 and a half
6 percent of U.S. emissions. There is no other company
7 that comes close except perhaps for a handful of the
8 next largest power companies.

9 JUSTICE SCALIA: You're -- you're lumping
10 them all together. Suppose you lump together all the
11 cows in the country. Would -- would that allow you to
12 sue all those farmers? I mean, don't you have to do it
13 defendant by defendant?

14 MS. UNDERWOOD: Courts sometimes --

15 JUSTICE SCALIA: Cow by cow, or at least
16 farm by farm?

17 MS. UNDERWOOD: Courts sometimes aggregate
18 joint contributors to pollution, particularly where the
19 remedy that's sought is injunctive relief. If this were
20 a damage action there would be a different problem of
21 allocating to each individual defendant. But the relief
22 that's sought here is the same injunction.

23 JUSTICE SCALIA: So you can lump everybody
24 together, so you can lump together all the people in the
25 United States --

1 MS. UNDERWOOD: Well --

2 JUSTICE SCALIA: -- who breathe, I suppose.

3 MS. UNDERWOOD: No. I think that breathers
4 are not really -- for one thing, they don't even really
5 contribute carbon dioxide because they absorb as well as
6 -- as exhale it. For another thing, there's no way that
7 breathing --

8 JUSTICE SCALIA: All right. All -- all
9 homes --

10 MS. UNDERWOOD: -- could be found
11 unreasonable.

12 JUSTICE SCALIA: -- all homes that -- that
13 emit carbon dioxide in their -- in their heating
14 systems.

15 MS. UNDERWOOD: No, we're talking --

16 JUSTICE SCALIA: The whole country, and you
17 lump them all together, and --

18 MS. UNDERWOOD: No.

19 JUSTICE SCALIA: -- you say that, you know,
20 that equals 10 percent or whatever. Does that give you
21 a basis?

22 MS. UNDERWOOD: It is not necessary to
23 aggregate to have these five defendants stand apart from
24 everybody else.

25 JUSTICE SCALIA: Well, then don't give us a

1 10 percent figure.

2 MS. UNDERWOOD: I --

3 JUSTICE SCALIA: Give us the, you know, the
4 maximum figure for a single one of them.

5 MS. UNDERWOOD: 3 1/2 percent of U.S.
6 emissions.

7 CHIEF JUSTICE ROBERTS: Well, why do you
8 stop at U.S. emissions? What percentage of worldwide
9 emissions, every one of which I assume harms your
10 clients, do these five power plants represent?
11 Infinitesimal, right?

12 MS. UNDERWOOD: Not infinitesimal, actually.
13 I believe that U.S. emissions are a quarter of world
14 emissions, so you would divide these numbers by four
15 approximately.

16 CHIEF JUSTICE ROBERTS: From power plants or
17 total emissions?

18 MS. UNDERWOOD: Total emissions. And --

19 JUSTICE ALITO: And anybody who is a
20 substantial contributor could be sued?

21 MS. UNDERWOOD: Yes. And in terms of
22 determining what -- who is a substantial contributor,
23 there are -- because I do think that at some point a
24 company's emissions or a cow's would be too small to
25 give rise to a standing or -- to either standing or a

1 nuisance claim, and there are various ways to draw the
2 lines. It's a familiar task for common law courts to
3 decide how much is substantial, too. But for an
4 example, if the cut-off were producers of 100,000 tons
5 per year, as in the EPA tailoring rule for new sources,
6 just to take an example, then according to EPA's own
7 technical data there would be at most a few thousand
8 potential defendants.

9 CHIEF JUSTICE ROBERTS: Do you agree --
10 General Katyal began his argument in fairly dramatic
11 fashion by saying we've never in 222 years had a case
12 where the relief, the damages and the relief sought,
13 were as broad as they are here. Do you have anything to
14 rebut his proposition? Any case where it has been as
15 broad as it is here?

16 MS. UNDERWOOD: Well, of course it depends
17 on what you call broad. There are -- there are many
18 cases, small cases involving an attempt to limit
19 discharges by companies.

20 CHIEF JUSTICE ROBERTS: What's your best --
21 what's your candidate to rebut his proposition?

22 MS. UNDERWOOD: Well --

23 CHIEF JUSTICE ROBERTS: A broader case with
24 respect to the infliction of damage and the need for
25 relief.

1 MS. UNDERWOOD: Well, I guess what I would
2 say is that cases allowing suits against large
3 contributors, with or without others, and dismissing
4 against small and remote contributors, I give you three
5 State cases that are cited in our briefs: A California
6 case about a large mine that was sued for polluting a
7 river when lots of -- lots of others polluted it and
8 were not before the court.

9 CHIEF JUSTICE ROBERTS: Well, not as many as
10 contribute to global warming?

11 MS. UNDERWOOD: No, that's correct. But we
12 could talk about -- if we talk about large contributors
13 here, then we're not talking about so many contributors.
14 We could have it -- we could have it down to, to
15 thousands or hundreds or tens, depending on how we
16 defined large.

17 JUSTICE GINSBURG: One aspect of the
18 litigation process as opposed to the agency process, the
19 agency makes its rule and that can be challenged in
20 court, but suppose your plaintiffs lost this case on
21 merits. I take it this is not a class action, there's
22 no certification of any class. Other plaintiffs before
23 another district court could launch a similar action
24 against these very same defendants, right? There would
25 be nothing to preclude that?

1 MS. UNDERWOOD: No. Well, the parens
2 patriae actions by the States might have some
3 consequence for the citizens of those States, but, yes.

4 JUSTICE GINSBURG: That means you have --

5 MS. UNDERWOOD: There would be others who
6 have -- would have -- who would have the ability, other
7 States, I suppose. I mean, our claim here is that this
8 Federal common law nuisance is available first and
9 foremost for the States; and the question of whether the
10 land trusts or any other private parties could even
11 bring it is --

12 JUSTICE ALITO: Even if you won and the
13 district court imposed some sort of limit would be there
14 any other obstacle to other plaintiffs bringing suits
15 and another district court issuing a different standard?

16 MS. UNDERWOOD: Well, the -- ultimately such
17 things would be resolved by appeal and by -- by the
18 circuit courts. I mean, there are conflicts in many
19 areas. That's true about every district court
20 litigation.

21 CHIEF JUSTICE ROBERTS: Well, no, it's not,
22 and it's not true of every litigation in this sense,
23 that everyone is harmed by global warming. So unless
24 you limit your suits to the States, which would -- I'm
25 not aware of a principled basis for doing that -- every

1 individual can bring -- every individual in the world if
2 they can establish jurisdiction can bring one of these
3 cause of -- causes of action.

4 MS. UNDERWOOD: Well, a principal basis to
5 limit -- the common -- the Federal common law of
6 nuisance, as I said, exists principally for the States,
7 for the reason it survived Erie was the Court spoke of
8 the strong Federal interest in providing the States with
9 a remedy for interstate pollution. So there is a
10 principle there.

11 And then beyond the States, plaintiffs would
12 have to, to bring a common law nuisance claim as well as
13 to have standing, would have to have a special injury of
14 some kind that would distinguish them from the
15 general -- from the general public. The Land Trusts
16 here argue that they, because they hold their lands in
17 trust for the public, they have special standing.
18 That's -- there's no need to reach that question. This
19 case could turn and should turn on the right of the
20 States to protect their people from -- and their -- and
21 their land from -- from interstate --

22 JUSTICE KAGAN: But, General, much of your
23 argument depends on this notion that this suit is really
24 like any other pollution suit, but all those other
25 pollution suits that you've been talking about are much

1 more localized affairs. One factory emitting discharge
2 into one stream. They don't involve these kinds of
3 national/international policy issues of the kind that
4 this case does. I mean, there's a huge gap, a chasm
5 between the precedents you have and this case, isn't
6 there?

7 MS. UNDERWOOD: I don't know if I would call
8 it a chasm, but there's a large distance between them,
9 and -- but I would like to separate two things. The
10 international aspects of this are simply, I think,
11 beyond -- we're not suggesting that this -- this -- that
12 the Federal common law of nuisance entails relief
13 against international defendants. It does exist for
14 interstate -- for conflicts between the States
15 essentially. So I would like to put those aside.

16 And then, in terms of the magnitude, well,
17 there are many cases, not just one factory, the
18 Milwaukee v. Illinois itself involved not just the
19 Milwaukee sewage district that -- that was sued, but
20 there were many other contributors to pollution in that
21 lake.

22 JUSTICE ALITO: In setting these standards,
23 there would somebody difficult trade-offs, wouldn't
24 there? Could you just explain in concrete terms how a
25 district judge would deal with those? Let -- and just

1 determining the facts is going to be hard enough, but
2 let's assume all the facts are proven, there's not a
3 dispute about the facts. So that if a certain reduction
4 in greenhouse gas emissions is ordered, that will have
5 this effect, it will increase the cost of electricity by
6 a certain amount, and that will produce certain effects.
7 It will result in the loss of a certain number of jobs,
8 it will mean that consumers will have less money to
9 spend on other -- other things. Some people will not be
10 able to have air conditioning in the summer. That will
11 have health effects.

12 How is the district judge -- what standard
13 does the district judge have to decide those? It's
14 just -- what is it, just what's reasonable?

15 MS. UNDERWOOD: Well, reasonableness is the
16 beginning. I -- I've suggested already first that we've
17 alleged that this can be done without increasing the
18 cost to the consumers. That may seem -- that -- that is
19 a subject for proof.

20 JUSTICE SCALIA: Implausible -- implausible
21 is the word you're looking for.

22 (Laughter.)

23 MS. UNDERWOOD: Thank you, Justice Scalia.

24 But a very good place to look is what other
25 companies have been able to do or have done, including,

1 as I suggested, in Tennessee Copper and perhaps in this
2 area as well, companies that settle this litigation or
3 companies that don't litigate but instead do adopt
4 measures that haven't been widely adopted. There --
5 there is a practice to examine in the world about what's
6 feasible and what's cost-effective, and that's not
7 different from --

8 JUSTICE BREYER: Well, I suppose
9 cost-effective -- suppose your complaint is the same but
10 you alleged, what I get from reading these might be the
11 best way to deal with the problem. I would like the
12 court to impose a tax of \$20 a ton on carbon, right?
13 And we bring all the polluters in, and the same injury
14 that you have, everything's the same, you have 14
15 experts who say this is how to get it done. It's
16 cost-effective, it will lead to substitution, it will
17 actually bring about a world without global warming, and
18 so let's do it.

19 Now, does the district judge, in your
20 opinion, have the power to enter that order?

21 MS. UNDERWOOD: I don't think so.

22 JUSTICE BREYER: All right, now next
23 question is going to be, if he does not have the power
24 to enter that order, which could be proved to be
25 extremely effective, and least possible harm to the

1 consumer, why does he have the power to enter the order
2 you want?

3 MS. UNDERWOOD: Because the common law of
4 nuisance is addressed to direct the polluter to abate
5 the nuisance.

6 JUSTICE BREYER: Oh, this will. This is
7 addressed to that. It says abate the nuisance, here's
8 how you're going to do it. You're going to put a \$20 a
9 tax ton on carbon, and lo and behold, you will discover
10 that nuisance will be abated. And we bring in 15
11 economists.

12 MS. UNDERWOOD: Actually, the order we're
13 asking for is less intrusive than that. We ask the
14 defendants to abate the nuisance, we ask the court to
15 order them to abate the nuisance by some amount,
16 informed by what information is available about methods.
17 And then --

18 JUSTICE BREYER: Well, why is it less
19 intrusive --

20 MS. UNDERWOOD: Because --

21 JUSTICE BREYER: -- to try to get into the
22 details of how an electricity company will in fact run
23 its operation, than to say all you have to do is make a
24 change in the dollar sign that you charge for your
25 product?

1 MS. UNDERWOOD: Well, because we're not
2 suggesting that the court would get into the details on
3 our theory, either. It would be the defendants that
4 would get into the details, that would figure out for
5 themselves what the best way was to meet these standards
6 -- to meet the objective.

7 JUSTICE SCALIA: I wish Justice Breyer had
8 made this argument in the EPA case. I don't think the
9 EPA case --

10 (Laughter.)

11 MS. UNDERWOOD: And of course it's true that
12 if you conclude that the Federal statutes displace the
13 Federal -- and the Federal regulations displace the
14 Federal common law either now or in the future, then
15 under Ouellette, the same Federal statute that replaces
16 Federal common law will revive source State common law,
17 because of the savings clause in that statute, because
18 of a choice Congress made; and that result, while less
19 -- less respectful of the Federal interest in providing
20 Federal law to govern these disputes, would nevertheless
21 leave common law courts in the business that they're --
22 of attempting to address pollution problems.

23 The suggestion has been made that the EPA
24 has entered the field of greenhouse gas, and that's
25 enough, but it isn't just one field. It only seems like

1 one because the EPA once said the whole subject was off
2 limits and beyond their jurisdiction. Once that
3 obstacle is removed, there still remain a series of
4 programs under the statute, a series of kinds of sources
5 that need to be regulated. The Clean Air Act regulates
6 by substance and by source. It's a collection of
7 statutory programs, and taking action under one program
8 can't displace the common law as it applies to matters
9 outside that program.

10 It may well be that there will be a
11 regulation soon that displaces, but it would be very
12 surprising if this Court concluded that the promise of
13 regulation is enough to displace the Federal common law
14 as distinguished from the actuality of it.

15 The Court has suggested that a court might
16 impose standards that would conflict with what the EPA
17 is doing, but there's really no reason to think that
18 would happen because if what a court sets out to do is
19 find out what feasible methods there are for reduction
20 and then order the defendants to make reductions that
21 are feasible, that's a much less taxing inquiry, a much
22 less demanding inquiry than the EPA is likely ultimately
23 to make.

24 JUSTICE SCALIA: What if the EPA comes up
25 with a different number? Would it -- than the one you

1 achieve in this litigation; would the EPA prevail?

2 Would the EPA's number prevail or your number prevail?

3 MS. UNDERWOOD: You mean an emission

4 reduction?

5 JUSTICE SCALIA: Yes, yes. I mean you --

6 MS. UNDERWOOD: If the EPA -- when the EPA

7 speaks, the EPA's rule will displace the Federal common

8 law. We're talking entirely --

9 JUSTICE SCALIA: And will displace the
10 judgment that has been obtained under Federal law?

11 MS. UNDERWOOD: If -- it would presumably

12 provide a basis for the defendant to go back to the

13 court and -- and vacate the judgment or alter the

14 judgment to comply with regulations, should that happen.

15 JUSTICE SCALIA: Right. And the court says
16 no?

17 MS. UNDERWOOD: That's what appellate courts
18 are here for, isn't it?

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: Well, I guess, just
21 to follow up, what is the appellate court reviewing? Is
22 it reviewing the reasonableness of EPA's judgment or the
23 continuing validity of the injunction it entered
24 previously?

25 MS. UNDERWOOD: The continuing validity of

1 the injunction it entered previously because once the
2 EPA --

3 CHIEF JUSTICE ROBERTS: But that seems to be
4 a displacement of the normal process of administrative
5 law, which we would review the agency's determination of
6 how best and to what extent to regulate the emissions.

7 MS. UNDERWOOD: On a different litigation
8 track, it is -- would also be possible to challenge the
9 EPA's regulatory judgment, but in the case in which a
10 judgment had already been entered, it is the ordinary
11 litigation track to, if -- if intervening events make
12 equitable relief no longer equitable, to go back to the
13 court and ask the court to modify its injunction.

14 CHIEF JUSTICE ROBERTS: Yes. And I guess
15 that's the central problem. Once you turn it over to
16 litigation, it's an entirely different set of standards
17 that would regulate emissions as opposed to the
18 standards that would apply with respect to an agency's
19 determination.

20 MS. UNDERWOOD: I don't think it's a
21 different set -- yes, one set of standards for reviewing
22 an agency's determination, but the ultimate standards
23 that are reached are going to be a level of emission
24 reduction through either process.

25 When the agency speaks to the question, the

1 Federal common law is displaced. When it doesn't, and
2 during what could be a long period of time when it
3 doesn't, the States are entitled to a Federal law
4 governing their dispute. So we urge this Court to keep
5 the Federal courts open to States exercising their
6 historic power to protect their land and their citizens
7 from air pollution emitted in other States.

8 CHIEF JUSTICE ROBERTS: Thank you, General
9 Underwood.

10 Mr. Keisler, you have five minutes
11 remaining.

12 REBUTTAL ARGUMENT OF PETER D. KEISLER

13 ON BEHALF OF THE PETITIONERS

14 MR. KEISLER: Thank you, Mr. Chief Justice.
15 Just a few points.

16 First, with respect to the merits and what
17 it would involve to adjudicate this case, Justice Kagan,
18 it is a -- there's a reason that this issue is so
19 fraught and difficult in international negotiations and
20 at the EPA and in the halls of Congress, and that's
21 because it requires policymakers to allocate burdens
22 among critical social goods in favor of important
23 environmental considerations; and the remedies that are
24 being considered are potentially transformative because
25 they involve the way we use and supply and pay for

1 energy. And the problems with courts attempting to
2 replicate what's going on in those venues are not simply
3 the matter is complex, although of course it's extremely
4 complex, but there is no legal principle here to guide
5 the decision. It's a question of trade-offs, how the
6 country wants to balance the projected environmental
7 risks and benefits against the projected economic
8 benefits and costs.

9 If Congress enacts a statute providing a
10 standard, then our political question argument goes
11 away. It's not that this is permanently off limits to
12 the judiciary. It's that it requires a standard. And
13 in a big intractable issue like this, Congress can often
14 create an orderly framework for consideration within a
15 statutory context, which it has done in part by enacting
16 the Clean Air Act.

17 And the final point I would make my friend
18 and I come at this really from opposite angles, in the
19 following sense, which is the plaintiffs say that this
20 is a deeply historically rooted cause of action with a
21 very strong and ancient pedigree, and therefore it can't
22 possibly present justiciability problems, under
23 standing, political question doctrines; and we say that
24 the very powerful standing and political question
25 obstacles that we think are apparent on the face of this

1 are a signal that this is nothing like the historical
2 cause of action that they've relied on.

3 To classify climate change as a tort would
4 trigger a massive shift of institutional authority away
5 from the politically accountable branches and to the
6 courts, which we think would be inconsistent with
7 separation of powers, and for those reasons we ask that
8 the Court reverse the judgment and direct that the case
9 be dismissed.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Keisler, counsel. The case is submitted.

12 (Whereupon, at 11:28 a.m., the case in the
13 above-entitled matter was submitted.)
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