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IN THE SUPREME COURT OF THE UNITED STATES

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AMERICAN ELECTRIC POWER :

COMPANY, INC., ET AL., :

Petitioners : No. 10-174

v. :

CONNECTICUT, ET AL. :

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Washington, D.C.

Tuesday, April 19, 2011

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

APPEARANCES:

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

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

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

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P R O C E E D I N G S

(10:13 a.m.)

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

Mr. Keisler.

ORAL ARGUMENT OF PETER D. KEISLER

ON BEHALF OF THE PETITIONERS

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

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

The States ask that the courts assess liability and design a new common law remedy for contributing to climate change, and to do so by applying a general standard of reasonableness to determine for each defendant, in this case and in future cases, what, if any, its share of global reductions in greenhouse gas emissions ought to be. That would require the courts not to interpret and enforce the policy choices placed 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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<b>A</b>				
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