No. 13-1013

IN THE

Supreme Court of the United States

GENON POWER MIDWEST, L.P.,
Petitioner,
v.
KRISTIE BELL AND JOAN LUPPE,
Respondents.

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

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, AMERICAN COATINGS ASSOCIATION, AMERICAN COALITION FOR CLEAN COAL ELECTRICITY, AMERICAN IRON AND STEEL INSTITUTE, CORN REFINERS ASSOCIATION, COUNCIL OF INDUSTRIAL BOILER OWNERS, GLASS PACKAGING INSTITUTE, MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION, METALS SERVICE CENTER INSTITUTE, TREATED WOOD COUNCIL, AND SPECIALTY STEEL INDUSTRY OF NORTH AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE* [1]

Amici Curiae are coalitions and trade organizations whose members include organizations and companies doing business in the United States including some companies that are both directly and indirectly affected by the public nuisance litigation governed by this Court's decisions. As regulated entities, many of *Amici's* members operate under permits issued under the authority of the Clean Air Act ("CAA"). *Amici* are concerned by the intrusion of standardless public nuisance litigation into areas traditionally reserved for the federal and state regulatory agencies under the CAA. Such forays threaten the regulatory clarity and predictability necessary for successful business planning and operations.

The **National Association of Manufacturers** (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, and has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and

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[1] The parties consented to the filing of this brief after receiving 10 days notice of *amici curiae*'s intention to file, pursuant to Supreme Court Rule 37.2(a). Letters from the parties consenting to the filing have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

create jobs across the United States. *See* the NAM's website, http://www.nam.org.

The **American Chemistry Council** ("ACC") represents the leading companies engaged in the business and science of chemistry, a $770 billion enterprise and a key element of the nation's economy. *See* ACC's website, http://www.americanchemistry.com.

The **American Coatings Association** ("ACA") represents both companies and professionals working in the paint and coatings industry. *See* ACA's website, http://www.paint.org.

The **American Coalition for Clean Coal Electricity** ("ACCCE") is a partnership of the industries involved in producing electricity from coal. ACCCE supports policies that will ensure affordable, reliable, domestically produced energy, while supporting the development and deployment of advanced technologies to further reduce the environmental footprint of coal-fueled electricity generation – including advanced technologies to capture and safely store CO_2 gases. *See* ACCCE's website at http://www.cleancoalusa.org.

The **American Iron and Steel Institute** ("AISI") is a non-profit, national trade association headquartered in the District of Columbia. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI represents member companies accounting for more than three quarters of U.S. steelmaking capacity. *See* AISI's website at http://www.steel.org.

The **Corn Refiners Association** ("CRA") is the national trade association representing the corn refining industry of the United States. The association and

its predecessors have served this important segment of American agribusiness since 1913. The six member companies of CRA use over 1.4 billion bushels of U.S.-grown corn to produce a broad array of food, industrial, and feed products for Americans and for the world market. *See* CRA's website, at http://www.corn.org.

The **Council of Industrial Boiler Owners** ("CIBO") is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates with members representing major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of industrial, commercial and institutional ("ICI") boiler and fuel combination currently in operation. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost-effective energy and environmental regulations for ICI boilers. *See* CIBO's website at http://www.cibo.org.

The **Glass Packaging Institute** ("GPI") is a national trade association representing the interests of the North American glass container industry to promote understanding of the industry and promote sound environmental and health regulatory policies. GPI member companies bring a broad array of products to consumers, producing glass containers for food, beer, soft drinks, wine, liquor, cosmetics, toiletries, medicines and other products. *See* GPI's website at http://www.gpi.org.

The **Manufacturers Alliance for Productivity and Innovation** ("MAPI") is a member organization focused on building strong leadership within manufacturing, and driving the growth, profitability, and stature of global manufacturers. For 80 years, MAPI has been dedicated to increasing productivity

and innovation in manufacturing through quality research, executive education, and support for industry leaders. MAPI is committed to helping America's leaders understand the essential role of manufacturing in the nation's economic growth. *See* MAPI's website at https://www.mapi.net.

The **Metals Service Center Institute** ("MSCI"), more than 100 years strong, is the broadest-based, not-for-profit association serving the industrial metals industry. As the premier metals trade association, MSCI provides vision and voice to the metals industry, along with the tools and perspective necessary for a more successful business. MSCI's 400 member companies have over 1,500 locations throughout North America. Reliable permitting processes under the Clean Air Act are key to its members' ability to not only expand their businesses but to their profitable operations. *See* MSCI's website at https://www.msci.org.

The **Treated Wood Council** (TWC), based in the District of Columbia, is a not-for-profit corporation, representing more than 440 companies and organizations throughout the United States that produce pressure-treated wood products, manufacture wood preservatives, harvest and saw wood, and serve the treated wood industry. The TWC monitors and responds to legislation and regulatory activities related to the treated wood industry, including environmental issues, and advocates for environmentally sound standards for treated wood manufacture and use. *See* TWC's website at http://treated-wood.org.

The **Specialty Steel Industry of North America** (SSINA) is the leading industry trade association representing virtually all the producers of specialty

steel in North America. The member companies produce a variety of products including bar, rod, wire, angles, plate, sheet and strip, in stainless steel, electrical, tool, magnetic, and other alloy steels. These products are used in a wide variety of applications, including aerospace and national defense, medical, power generation, food and drug processing, construction and numerous other consumer and commercial uses. SSINA member companies operate pursuant to federal and state Clean Air Act permits. See SSINA's website at http://www.ssina.com/index2.html.

INTRODUCTION

This case presents an issue that urgently merits review, namely, whether state tort claims involving air pollution, especially public nuisance, are preempted by the federal Clean Air Act ("CAA"). The urgency of this question is underscored by the persistent pursuit of public nuisance as an alternative means to control air pollution – a pursuit that, if allowed to continue, will create a confusing and, ultimately, destructive "dual track" system where federal agencies and courts use conflicting standards to redress the same concerns. Granting review of this case offers an important opportunity for this Court to clarify the respective roles of the federal and state regulatory authorities and courts in air pollution control.

SUMMARY OF THE ARGUMENT

The parties' arguments frame strikingly different positions regarding how air pollution in the United States should be controlled. Petitioners argue that the federal Clean Air Act ("CAA") sets forth a comprehensive system of "cooperative federalism" under which a

unitary permitting program governs emission levels by each source, and under which the exclusive methods for controlling air pollution are specified. Respondents assert that the CAA's system is supplemented by common law remedies, such as public nuisance, under which emissions can be controlled prospectively by equitable relief, and influenced retrospectively by awards of money damages. They insist that such relief is available even when sources are in full compliance with CAA permits.

The resolution of this dispute requires a comparative examination of the CAA and state common law remedy to determine whether the state tort remedy "interferes with the methods" by which the CAA "was designed to reach [its] goal," and whether it has the potential "to undermine the regulatory structure." *See International Paper Co. v. Ouellette*, 497 U.S. 481, 494, 497 (1987). When such an examination is conducted, it reveals that state public nuisance remedies are irreconcilably inconsistent with the comprehensive system of air pollution control provided by the CAA. As a result, they threaten the CAA's salutary programs and are necessarily preempted.

In this brief, *Amici* focus on the threat public nuisance litigation poses to one of the CAA's most important methods of pollution control, namely, the various permits issued pursuant to the CAA's authority. These permits, which are subject to public notice and comment, specify clear emission and operating standards that guarantee certainty, predictability, and evenhandedness to the regulated community. They are an essential part of the CAA's system by which the federal and state governments control air pollution. Once permits are issued, they provide sufficient regulatory certainty and finality for industries to

make the necessary capital investments to ensure compliance without sacrificing competitiveness.

In this way, the CAA's regulatory and permitting programs provide an "informed assessment of competing interests" – an assessment that is "not limited to environmental benefits," but which also considers a broad array of other factors, including "our nation's energy needs and the possibility of economic disruption." *See American Electric Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 2538-39 (2011)("*AEP*") The CAA's permitting process creates a "level playing field" for industry that ensures that members of the regulated community are regulated similarly, thereby precluding any particular member from enjoying an unreasonable competitive advantage. The end results of this process are permits that provide definitive emission requirements – and which can be relied upon for future business planning and operations.

By contrast, common law suits, as adversary proceedings, view the issues from a narrower perspective and entail unpredictable economic results. Unlike regulatory agencies, which must apply clear standards to derive specific requirements for compliance, public nuisance lawsuits have liability standards which are notoriously vague. Public nuisance lawsuits provide no coordination or collaboration between proceedings in different states – or even between similar proceedings within the same state. Since the evidence, rulings, and outcomes can vary according to the unique record of each case, there is no guarantee of consistent results even between similar facilities.

Such a process – which substitutes ad hoc decisions for considered regulatory policy – cannot be reconciled with the goals and purposes of the CAA. Unless this Court grants review and reverses the Third Circuit's

decision, the predictability and certainty of the CAA's carefully designed permitting programs will be replaced by the mutability, malleability, and inconsistency of state common law. Unless the Court grants review of the Third Circuit's decision, the efficacy of the CAA's pollution control programs will surely be compromised.

I. The Clear Standards Specified Pursuant to the CAA's Permitting Programs Are Essential to Successful Business Planning and Operations.

The history of environmental regulation reflects that "[e]conomic incentives have assumed a prominent position among the tools for environmental management," and "[n]owhere is this role more explicit than in the 1990 Clean Air Act Amendments." *See* Robert C. Anderson and Andrew Q. Lohof, *The United States Experience with Economic Incentives in Environmental Pollution Control Policy* (Env. L. Inst. 1997). Those amendments enhanced the EPA's permitting programs by which the agency provides specific standards governing air pollution within the regulated community.

The EPA's permitting programs reflect a "maturing" process influenced by the increasing costs of pollution control. In that environment, "standards for evaluating performance in pollution prevention" have played a "more important role." Frederick R. Anderson, *From Voluntary to Regulatory Pollution Prevention*, THE GREENING OF INDUSTRIAL ECOSYSTEMS, 98, at 102 (Nat'l Academy Press, 1994). As Dean Anderson explains:

> When large reductions in pollution are easy, everyone can afford to be lenient about how

> a baseline is measured or how different methods of pollution are compared. As the easy reductions play out, that leniency fades. *As competition heats up, the certainty, predictability, and evenhandedness of pollution reduction requirements become centrally important.*

Id. (emphasis added). Since failing to prevent pollution and voluntary industry collaboration were not viewed as acceptable options, the "last hope" for the "future of pollution prevention" was a "level playing field among companies undertaking (or failing to undertake) pollution prevention." *Id.* at 103. Since this option is "indispensable" to effective pollution control, the government recognized that its role was "to provide that level field." *Id.* at 103. (emphasis added).

Congress acted to establish the "level playing field" with the 1990 amendments to the CAA, which specifically incorporated pollution prevention into the fabric of EPA operations. Shortly thereafter, EPA began "busily incorporating pollution prevention into the regulatory process and into targeted Clean Air Act regulations." *Id.* at 105. Because the EPA was charged by law to review its regulations to determine their impacts on reducing pollution at its sources, the agency created a "Regulatory Targeting Project" that covered rulemaking for all media affected by 17 major industries. Under this broad program, EPA required that rules and permits contain pollution reduction measures whenever possible. *Id.*

As a result of these efforts, pollution control became the "basis for regulatory standard setting" throughout the agency's operations, including permitting and enforcement. *Id.* at 106. Permitting and enforcement

placed the agency into a position of "considerable bargaining power," and incorporating pollution control into those issues was "clearly an effective means for EPA to mandate particular pollution prevention methods or standards." *Id.*

Since their enhancement in 1990, the various permits issued pursuant to the CAA have remained one of the EPA's most important tools for air pollution control. Simultaneously, they have also served as trustworthy guideposts for regulated parties in the planning and execution of business operations. The reliability, predictability, certainty and finality of CAA permits provide the stability needed for businesses to make investments that improve and expand their facilities and empower the development and improvement of their products. By providing clear regulatory standards to guide the regulated community's conduct, strong incentives to conform to those standards, and a secure permitted environment within which businesses conduct their operations, EPA has made great strides to reduce and control air pollution.[2]

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[2] *See generally*, EPA, *The Clean Air Act – Highlights of the First 40 Years* (September 2010), available at http://epa.gov/oar/caa/Clean_Air_Act_40th_Highlights.pdf (last visited March 12, 2014); EPA, *The Clean Air Act: Highlights of the 1990 Amendments*, available at http://www.epa.gov/air/caa/pdfs/CAA_1990_amendments.pdf (last visited March 12, 2014); (Remarks of Lisa P. Jackson, former EPA Administrator, on the 40th Anniversary of the Clean Air Act, http://yosemite.epa.gov/opa/admpress.nsf/12a744ff56dbff8585257590004750b6/7769a6b1f0a5bc9a8525779e005ade13!OpenDocument (last visited March 12, 2014).

II. Allowing Courts to Regulate Emissions from Federally Permitted Facilities Using the Common Law of Public Nuisance Will Undermine the Reliability, Predictability, Finality and Certainty of the Clean Air Act's Permitting Programs.

A. The "Standardless Liability" Of Common Law Public Nuisance Is Unsuitable For Controlling Air Pollution.

Although the Third Circuit was content to authorize the use of public nuisance to regulate air pollution in this case, its decision differs profoundly from the Fourth Circuit's recent decision in *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296, 302 (4th Cir. 2010)("TVA"). In *TVA*, the Fourth Circuit rejected "vague public nuisance standards" – the "same principles we use to regulate prostitution, obstacles in highways, and bullfights" – as inconsistent with the CAA's regulatory system. *Id.* at 296, 302.

In so ruling, the Fourth Circuit recognized that the contrast between the clear standards specified by the CAA's permits and nuisance – an "ill-defined omnibus tort of last resort" where "one searches in vain . . . for anything resembling a principle" – could "not be more stark." *Id.* at 306 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)). The decision in *TVA* is consistent with the troubling jurisprudential history of public nuisance – a tort characterized by "standardless liability."

Confusion regarding the liability standards for nuisance is as ancient as the tort itself. Since its precepts have proven difficult to explain and apply,

nuisance historically has "meant all things to all people." W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS 616 (5th ed. 1984). Nuisance has even been characterized as a "chameleon word" because of its vagueness, mutability, and lack of defined boundaries. J. R. Spencer, *Public Nuisance: A Critical Examination*, 48(1) CAMBRIDGE L. J. 55, 56 (1989).

When Horace Wood published the first American treatise on nuisance in 1875, he described nuisance as a "wilderness of law." Horace Wood, THE LAW OF NUISANCES iii (3d ed. 1893). By 1949, the tort's boundaries were so "blurred" that nuisance had become a "mongrel" tort that was "intractable to definition." F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949). Later, William Prosser, reporter for the Restatement (Second) of Torts, described nuisance law as an "impenetrable jungle," and as a "legal garbage can" full of "vagueness, uncertainty and confusion." William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942).

Additional time and experience have not clarified the situation. *See, e.g.*, Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 984 (1952) (a "mystery"); John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L.Q. 241, 241 (1972) (a "quagmire"). Given this subjectivity, it is not surprising that more recent decisions still confess "bewilderment" regarding the tort's boundaries. *See, e.g., Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 520 (Mich. Ct. App. 1992) ("Suffice it to say that, despite attempts by appellate courts to rein in this creature, it, like the Hydra, has shown a remarkable resistance to such efforts.").

Because of these vagaries, courts have repeatedly expressed concerns about expanding the tort's application. In the early twentieth century, litigants argued that nuisance should be expanded to address activities that were not criminal and which did not implicate property rights or enjoyment. *See People v. Lim*, 118 P.2d 472, 475 (Cal. 1941) (noting that some advocates historically justified "nuisance" abatement because "public and social interests, as well as the rights of property, are entitled to the protection of equity."). Legal commentators and authorities objected, however, when public authorities sought to use nuisance to address broad societal problems. *See, e.g.*, Edwin C. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 397-99 (1903) (noting that the expanding boundaries of nuisance law made courts of equity of that time period careless of their traditional jurisdictional limits). They warned that this "solution" was planting seeds of abuse that would ultimately weaken the judicial system. *Id.* at 400-03.

Finally, when nuisance was used as a precursor to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to address environmental contamination in Love Canal, over a decade of litigation failed to produce a solution. *See* Eckardt C. Beck, *The Love Canal Tragedy*, EPA JOURNAL (Jan. 1979) ("no secure mechanisms [were] in effect for determining such liability"); Charles H. Mollenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 EXPERT EVIDENCE RPT. 474, 475-76 (Sept. 24, 2007).

After the failure in Love Canal, arguments urging expansion were increasingly rejected, most notably in California, where the state's Supreme Court ultimately deferred to the legislature's "lawmaking

supremacy" to define and set standards for determining liability. *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal.) *cert. denied*, 521 U.S. 1120 (1997). Significantly, the Court held that judicial creativity would otherwise result in "standardless" liability. *Id.* Thereafter, other states also refused to expand nuisance liability beyond its traditional boundaries. *See, e.g., State v. Lead Industries Ass'n*, 951 A.2d 428 (R.I. 2008) (rejecting use of nuisance in lead paint litigation); *In re Lead Paint Litigation*, 924 A.2d 484, 494 (N.J. 2007)(same).[3]

In today's legal landscape, a plethora of federal, state and local pollution laws has largely eliminated the need for nuisance litigation, except in those instances where the political branches have defined specific situations, instances and behaviors as nuisances. *See People v. Lim*, 118 P.2d 472, 475-476 (Cal. 1941)("In a field where the meaning of terms is so vague and uncertain, it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity."); *Acuna*, 929 P.2d at 606 ("This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a public nuisance.").

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[3] For more detailed jurisprudential history regarding nuisance, *see generally*, Richard O. Faulk and John S. Gray, *Public Nuisance at the Crossroads: Policing the Intersection Between Statutory Primacy and Common Law*, 15 CHAPMAN L. REV. 485 (2012); Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 MO. ENVTL. L & POLICY REV. 1 (2011); Richard O. Faulk and John S. Gray, *Alchemy in the Courtroom: The Transmutation of Public Nuisance*, 2007 MICH, ST. L. REV. 941 (2007).

The official reporters of the Second and Third Restatements of Torts have each expressed concerns about the "standardless liability" of public nuisance litigation. In his comments to § 821B of the Restatement, Dean Prosser, the official reporter, warned that "[i]f a defendant's conduct . . . does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, *the court is acting without an established and recognized standard*." RESTATEMENT (SECOND) OF TORTS § 821B cmt.e. (1979) (emphasis added).

Dean Prosser's concerns were recently reinforced by one of the reporters for the Third Restatement, Professor James Henderson, who warned about the "lawlessness" of expansive tort liability, including nuisance litigation. *See* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005). According to Professor Henderson, these amorphous tort theories are not lawless simply because they are non-traditional or, court-made, or because the financial stakes are high. Instead, "the lawlessness of these aggregative torts inheres in the extent to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring damages." *Id*. at 338.

Such paths lead inevitably to controversies where liability is controlled by the discretion of individual courts, rather than by rules of law. If cases like the present controversy are allowed to proceed, judges and juries will be empowered "to exercise regulatory power at the macro-economic level of such a magnitude that even the most ambitious administrative agencies could never hope to possess." *Id*. In exercising these extraordinary regulatory powers via tort litigation,

courts and juries "exceed the legitimate limits of both their authority and their competence." *Id*. Aggregative torts, such as nuisance, raise unique "lawlessness" concerns that render public nuisance unsuitable for regulatory policy and control.

B. The Court Should Grant Certiorari In View Of Its Serious Reservations About The Use Of Public Nuisance For Environmental Regulatory Purposes.

This Court has not been silent regarding the danger that public nuisance litigation poses to the nation's ability to control pollution effectively. Under the Clean Water Act, the Court held that interstate nuisance suits stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987) (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In *Ouellette*, the Court also admonished against the "tolerat[ion]" of "common-law suits that have the potential to undermine this regulatory structure," *id*. at 497, and singled out nuisance standards in particular as "vague" and "indeterminate," *id*. at 496 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)) (internal quotation marks omitted*); see also TVA*, 615 F.3d 291 at 306.

Most recently, the Court rejected an attempt to use public nuisance litigation under "federal common law" to control air pollution. *American Electric Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527 (2011). Although the issue in *AEP* was "displacement" of federal common law, rather than "preemption" of state common law, the same concerns justify review of Petitioner's

preemption arguments here. Indeed, the Court remanded AEP for consideration of the precise preemption question raised by Petitioners here. *AEP*, 131 S. Ct. at 2540. It is now a logical and essential "next step" for the Court to decide whether the state tort remedy is preempted. Unless the issue is addressed by granting certiorari here, the scope and reliability of the CAA's programs will remain clouded by uncertainty.

There are good reasons to believe that Petitioner's preemption argument is worthy of review. Three of *AEP*'s holdings particularly support that conclusion.

The first holding clarifies the CAA's clear allocation of regulatory responsibility to "EPA in the first instance, in combination with state regulators." *Id.* at 2539. Although the CAA requires a "complex balancing" of competing interests by *administrative* authorities, *id.*, neither *AEP* nor the CAA recognizes any role for federal or state courts in the "balancing process" that underlies air pollution control. Although parties aggrieved by administrative decisions may seek judicial review, *id.*, neither federal nor state courts have the authority to interfere with that process through tort law.

By its terms, the CAA concentrates all regulatory authority in the EPA and state regulators – and "leaves no room" for judges and juries to participate by tort actions. There is no reason why this plenary allocation to EPA and state regulators should not be given effect according to its terms. Indeed, conflict preemption principles support such a result. *See TVA*, 615 F.3d at 303 ("Conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law

to contradict federal-state rules so meticulously drafted.").

A second holding in *AEP* also supports the CAA's plenary allocation of regulatory power to administrative agencies by concluding that courts lack the resources and tools needed to accomplish CAA's regulatory goals:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator . . . The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal courts lack the scientific, economic and technological resources an agency can utilize in coping with issues of this order.

Id. at 2539-40. This holding provides the reasons why Congress decidedly entrusted the EPA with "primary" regulatory authority "in the first instance," and empowered the agency to work "in combination with state regulators." *Id.* at 2539. Although the CAA "envisions extensive cooperation between federal and state authorities," *id.*, the Act conspicuously fails to include the federal and state judiciary as regulators because courts are not suited for these exercises. *See also TVA*, 615 F.3d at 305 ("[W]e doubt seriously that Congress thought that a judge holding a twelve day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider.").

To make the "disabilities" of judges crystal clear, the Court describes a number of their limitations:

> Judges may not commission scientific studies or convene groups of experts for advice, or

> issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined to a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decision binding other judges, even members of the same court.

Id. at 2540. Although this language addresses the "disabilities" of *federal* courts to create and enforce environmental policy through federal common law, *the same limits also apply to state courts*. Irrespective of whether the trial court is a state or federal court, each forum lacks the resources to address the complexities of air pollution control. Each forum is limited by the unique record of each particular case – and cannot bind judges in other locations to follow their reasoning and judgments.

Finally, a third holding in *AEP* rejects an alarming scenario raised in oral argument. Notwithstanding the disabilities discussed above, counsel for the plaintiffs insisted that "individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions are unreasonable . . . and then decide what level of reduction is "practical, feasible and economically viable.". . . *Id.* These determinations would be made for the defendants named in the two lawsuits launched by the plaintiffs, but "[s]imilar lawsuits could be mounted . . . against "thousands or hundreds or tens" of other defendants fitting the description of "large contributors" to greenhouse gas emissions . . ." *Id.* The Court unanimously rejected this concept, holding that "*the judgments the plaintiffs*

would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision-making scheme Congress enacted. Id. (emphasis added).

If anything, the scenario envisioned in this case is even more extraordinary and complex. If the Third Circuit's decision stands, public nuisance litigation under state law could proliferate in federal and state courts throughout the nation. Each court could adopt its own common law standards to govern facilities already holding and acting in compliance with CAA permits, and each court could design and impose its own sanctions for disobedience. Under this scenario, the daunting dilemma described in *TVA* will be realized:

> Attempting to simultaneously resolve air pollution issues using common law claims will condone the use of multiple standards throughout the nation. In various states, facilities already subject to an EPA-sanctioned state permit could be declared "nuisances" when a judge in Iowa sets one standard, a judge in a nearby state sets another, and a judge in another state sets a third. Such a scenario ultimately leads one to question "[w]hich standard is the hapless source to follow?"

615 F.3d at 302 (4th Cir. 2010)(citing *Ouellette*, 479 U.S. at 496 n. 17).

Such a scenario strikes at the structural *heart* of the CAA, namely, the Act's allocation of priorities and responsibilities within a system of "cooperative federalism." When Congress passed the CAA, it "made the States and the Federal Government *partners* in

the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990) (emphasis added). If courts are permitted to conduct these independent evaluations under state common law, however, they will exercise authority that conflicts with the "cooperative federalism" structure created by the CAA. In such proceedings, the balance struck by administrative agencies could be "reopened" and "reexamined" de novo by nuisance lawsuits under state common law. There are no assurances or requirements that courts presiding over such actions will apply the same criteria or reach the same conclusions regarding the "reasonableness" of a defendant's emissions. The chaos and confusion resulting from multitudes of conflicting standards will irreparably compromise the CAA's cooperative structure.

Viewed in this light, the danger posed to the CAA's regulatory program by this case is even greater than the problems presented in *AEP*. If the Court does not grant certiorari to review the Third Circuit's decision, nothing will preclude public nuisance actions from spreading throughout the United States. The uncoordinated proceedings will impact regulated industries in wholly unpredictable and conflicting ways. Indeed, the process by which emissions are regulated could vary not only from state to state, but also from county to county within a single state – and from facility to facility within the same company.

Nothing in the CAA remotely contemplates such confounding consequences, but they are entirely foreseeable if review is not granted here. It is time, therefore, to resolve the preemption issue remanded in *AEP* – and to protect the clear standards of the CAA's permitting programs from erosion by standardless nuisance claims under state common law.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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