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 *AMICUS CURIAE* UTILITY AIR REGULATORY GROUP IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

STATUTORY BACKGROUND 3

I. Federal and State Standard-Setting 3

II. Modes of Redress for Citizens 5

ARGUMENT 5

I. The Question Presented Implicates Issues of National Importance for Regulated Sources Operating in Compliance with the CAA. 5

A. Regulation by Common Law Would Yield Conflicting and Unpredictable Requirements. 6

B. The Third Circuit's Approach Would Flood the Judiciary with Collateral Attacks on CAA Standards and Permits. 12

C. Allowing Common Law Claims Would Violate Fundamental Separation of Powers Principles. 14

II. The Question Presented Has Divided Federal and State Courts. 15

III. The Third Circuit's Decision Conflicts with Relevant Decisions of This Court. 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Federal Cases:

Am. Elec. Power Co. v. *Connecticut*, 131 S. Ct. 2527 (2011) .....*passim*

AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011) 25

Comer v. *Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013) 16, 17, 23

Geier v. *Am. Honda Motor Co.*, 529 U.S. 861 (2000) 18, 23

Gutierrez v. *Mobil Oil Corp.*, 798 F. Supp. 1280 (W.D. Tex. 1992) 18

Her Majesty the Queen in Right of the Province of Ontario v. *City of Detroit*, 874 F.2d 332 (6th Cir. 1989) 18

Int'l Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) .....*passim*

Jesso v. *Hatfields Ferry Power Station*, No. 13-cv-1232 (W.D. Pa. filed Aug. 27, 2013) 12

Lucas v. *S.C. Coastal Council*, 505 U.S. 1003 (1992) 11

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 3

N. Carolina ex rel. Cooper v. *Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) .....*passim*

Train v. *Natural Res. Def. Council*, 421 U.S. 60 (1975) 4

State Cases:

Freeman v. *Grain Processing Corp.*, No. LACV021232, 2013 WL 6508484 (Muscatine Cnty. (Iowa) Dist. Ct. Apr. 1, 2013).....17, 18, 23

Merrick v. *Brown-Forman Corp.*, Civ. Action No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 July 30, 2013) 10, 18

Merrick v. *Brown-Forman Corp.*, Civ. Action No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 Nov. 26, 2013).....18, 23

Mills v. *Buffalo Trace Distillery, Inc.*, Civ. Action No. 12-CI-743 (Franklin Cir. Ct. (Ky.), Div. II Aug. 28, 2013).....10, 18

Statutes:

5 U.S.C. § 553(e) 5

33 U.S.C. § 1370 21

Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*

42 U.S.C. § 7401(a)(3) 3

42 U.S.C. § 7401(a)(4) 3

42 U.S.C. § 7409 3

42 U.S.C. § 7410(a)(1) 4

42 U.S.C. § 7410(a)(2) 4

42 U.S.C. § 7416 .....4, 21

42 U.S.C. § 7602(g) 3

42 U.S.C. § 7604 7

42 U.S.C. § 7604(a)(2) 5

42 U.S.C. § 7607(b) 5

42 U.S.C. § 7607(d) 5, 15

42 U.S.C. § 7661a(a) 4

42 U.S.C. § 7661a(b)(6) 4, 5, 15

42 U.S.C. § 7661a(d) 4

42 U.S.C. § 7661c(a) 4

42 U.S.C. § 7661d(a) 4

42 U.S.C. § 7661d(b) 4

42 U.S.C. § 7661d(b)(2) 5

Legislative History:

S. Rep. No. 91-1196 (1970), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 397(1974) 21

Regulations:

40 C.F.R. § 50.6 20

40 C.F.R. § 50.7 20

40 C.F.R. § 70.4(b)(3)(xii) 5

Federal Register:

76 Fed. Reg. 10,530 (Feb. 25, 2011) 13

77 Fed. Reg. 9304 (Feb. 16, 2012) 20

Miscellaneous:

U.S. Energy Information Administration, *AEO2014 projects more coal-fired power plant retirements by 2016 than have been scheduled*, Today in Energy (Feb. 14, 2014), http://www.eia.gov/todayinenergy/detail.cfm?id=15031 9

INTEREST OF *AMICUS CURIAE*

The Utility Air Regulatory Group (UARG) is a non-profit, unincorporated trade association of individual electric utilities and national industry trade associations.[1] UARG members own and operate facilities that generate electricity for residential, commercial, industrial, and institutional customers throughout the country. UARG's purpose is to participate on behalf of its members collectively in Clean Air Act (CAA or Act) proceedings affecting electric generators' interests and related litigation.

UARG members own and operate sources extensively regulated under standards promulgated by the U.S. Environmental Protection Agency (EPA) and by states, contained in state-issued operating permits under Title V of the CAA. UARG members rely on compliance with their permit requirements to ensure their emissions do not subject them to liability. The decision below would expose UARG members to liability under state common law for activities authorized by these permits. Thus, UARG has a direct interest in this case.

All parties have consented to the filing of this Brief.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

STATEMENT OF THE CASE

UARG is filing this brief in support of the petitioner because of its concern over the chaos that would ensue if common law nuisance suits were to serve as the basis for regulation inconsistent with the CAA. The Third Circuit's decision sets a dangerous and unworkable precedent. The common law claims Respondents assert would upend the CAA's careful balance of federal and state regulatory authority, giving instead unelected judges and juries the power to regulate emissions based on vague and indeterminate common law nuisance principles. Allowing this decision to stand would invite collateral attacks on sources' operations that fully comply with federal and state requirements under the CAA, each resolved differently based on the inclinations of different judges and juries, leaving utilities and other emissions sources without any way to determine the requirements applicable to their operations.

The Third Circuit's decision conflicts with this Court's precedent, reflecting disagreement among lower courts regarding the proper analysis for CAA preemption of state common law claims. That decision improperly dismissed the perils this Court identified in *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2539-40 (2011) (*AEP*), with allowing judges "issuing ad hoc, case-by-case injunctions" to make decisions about the reasonableness of emissions the CAA "entrusts … to EPA in the first instance, in combination with state regulators." Instead, the Third Circuit misapplied this Court's decision in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), by relying on a wooden reading of the CAA's

savings clause and foregoing *Ouellette*'s functional "conflict preemption" analysis.

STATUTORY BACKGROUND

After witnessing the failure of the piecemeal efforts of state regulation and the common law to address air pollution effectively, Congress amended in 1970 a weaker version of the CAA. The modern CAA establishes a detailed and comprehensive framework for joint federal-state regulation of air pollution. The Act harmonized the discordant and disjointed requirements that had resulted from independent action by state courts and legislatures by adopting a system of "cooperative federalism," in which an expert federal agency adopts air quality standards and states have primary responsibility for implementing those standards through legislation and rulemaking. Congress recognized that "[f]ederal financial assistance and leadership is essential" for the control of air pollution, while leaving "primary responsibility" for air pollution control at its source to state and local governments. 42 U.S.C. § 7401(a)(3)-(4).

I. Federal and State Standard-Setting

The scope of the CAA's regulatory portfolio is "sweeping," *Massachusetts* v. *EPA*, 549 U.S. 497, 528 (2007); see Pet. 5-8. States play an essential, but carefully defined, role within this framework. EPA sets national ambient air quality standards (NAAQS) to protect against harms from air pollution, including "damage to and deterioration of property," 42 U.S.C. §§ 7409, 7602(g), while states develop state implementation plans (SIPs) providing for the "implementation, maintenance, and enforcement" of these

NAAQS and other CAA requirements within each state, *id.* § 7410(a)(1). State regulators must determine "enforceable emission limitations and other control measures," establish "timetables for compliance," and adopt a control strategy for enforcement. *Id.* § 7410(a)(2). Although EPA reviews and approves SIPs, states retain substantial discretion "to adopt whatever mix of emissions limitations [each state] deems best suited to" meet the NAAQS. *Train* v. *Natural Res. Def. Council*, 421 U.S. 60, 79 (1975). States may adopt standards in their SIPs that are more stringent than the CAA alone would require. 42 U.S.C. § 7416.

To ensure compliance with these extensive requirements, sources must obtain operating permits under Title V of the Act. *Id.* § 7661a(a), (d). States typically issue Title V permits, which act as "a source-specific bible for Clean Air Act compliance," compiling the source's state and federal requirements in one document. *N. Carolina ex rel. Cooper* v. *Tenn. Valley Auth.*, 615 F.3d 291, 300 (4th Cir. 2010) (*TVA*). States must prescribe enforceable emission limitations, a compliance schedule, requirements for submitting monitoring data, and any other conditions necessary to assure compliance with applicable federal and state regulations. 42 U.S.C. § 7661c(a). Obtaining a Title V permit involves a thorough review process requiring an opportunity for public participation. *Id.* § 7661a(b)(6). The permitting state must notify EPA and potentially affected states of any permit application, and no permit may issue over EPA's objection. *Id.* § 7661d(a)-(b).

In short, "[t]o say this regulatory and permitting regime is comprehensive would be an understatement." *TVA*, 615 F.3d at 298.

II. Modes of Redress for Citizens

The CAA offers numerous avenues for concerned citizens to seek additional emission restrictions or enforce those already in place. See Pet. 9. Citizens can petition EPA to conduct rulemaking and challenge EPA's failure to do so. 5 U.S.C. § 553(e); 42 U.S.C. § 7604(a)(2). Individuals can comment on EPA rulemakings and challenge them once final. 42 U.S.C. § 7607(b), (d). And individuals can comment on proposed Title V permits and challenge their provisions once issued. *Id.* § 7661a(b)(6). Any citizen may petition EPA to object to a permit and challenge EPA's refusal in court. See *id.* § 7661d(b)(2). But in all of these processes, the CAA makes clear that (1) the person who objects must have participated in the regulatory process and presented its objections to the agency in comments, and (2) the person must challenge final agency action within a specific period. *E.g., id.*; 40 C.F.R. § 70.4(b)(3)(xii) (challenge within 90 days of final permit action is "exclusive means for obtaining judicial review").

ARGUMENT

I. The Question Presented Implicates Issues of National Importance for Regulated Sources Operating in Compliance with the CAA.

One of Congress's primary purposes in enacting the CAA was to replace earlier uncoordinated efforts

to control air pollution with a comprehensive regulatory framework laying out uniform and predictable requirements that protect public health and welfare. Allowing state common law claims to supplant this framework would impermissibly create a "parallel track" for regulating air pollution, depriving sources of the certainty the CAA provides. The claims at issue in this case are of particular national importance because, if allowed to proceed, they would make emission control requirements unpredictable and unmanageable, open the door for a host of new litigation collaterally attacking federal and state requirements, and invite courts to usurp the role of expert agencies.

A. Regulation by Common Law Would Yield Conflicting and Unpredictable Requirements.

The uniformity, certainty, and predictability of the CAA are essential to the businesses and other organizations subject to emissions regulation. The CAA's detailed regulatory framework directs federal and state agencies to adopt and implement standards addressing the full range of air quality issues, and sources must undergo a thorough and open permitting process to ensure compliance with these extensive requirements. In turn, source owners and operators rely on state permits issued under the CAA, and the emission standards they contain, to guide their efforts to operate in compliance with all applicable requirements. See *TVA*, 615 F.3d at 301, 306 (recognizing CAA "has set in motion reliance interests and expectations on the part of those states and enterprises that have complied with its requirements").

The certainty these permits provide is imperative for businesses whose operations involve air emissions: to pay for the costs of CAA compliance, these businesses must be able to operate. For example, a UARG member would hesitate to invest billions of dollars to construct a power plant (and equip it with the required pollution controls) without assurance that it can recover that investment by generating electricity in compliance with its permit requirements.

The state common law claims authorized by the Third Circuit's decision would eliminate the certainty and predictability that allow industries to operate under the CAA's complex regulatory demands. These claims do not seek to compel compliance with standards adopted by federal or state regulators after careful deliberation and extensive public input: Respondents have not alleged that Petitioner violated its applicable permit requirements. See Pet. App. 32a. If that were the case, the CAA provides a remedy. 42 U.S.C. § 7604. Rather, common law claims invite courts to "determine, in the first instance, what amount of … emissions is unreasonable, and then decide what level of reduction is practical, feasible, and economically viable." *AEP*, 131 S. Ct. at 2540 (quotations and citation omitted).

As a result, sources operating in compliance with their CAA permits could never be certain they are safe from liability due to the ever-present threat of litigants calling for additional emission controls or seeking damages for the source's lawful conduct. Even the most well-meaning company "would be simply unable to determine its obligations ex ante

under such a system, for any judge in any nuisance suit could modify them dramatically." *TVA*, 615 F.3d at 306. The uncertainty these suits create would make it difficult for source owners to secure financing and make decisions for future operations, limiting opportunities for investment in these businesses. Coupled with the expense of repeatedly litigating what emissions level is "reasonable," this scheme of regulation by common law would impose enormous costs on regulated industries.

This uncertainty would also affect the public. Much of the additional cost of operating in an atmosphere of unsettled legal obligations would be passed on to consumers. Further, many sources could be forced to limit their operations or shut down altogether due to injunctions or damage awards[2] holding them to different standards than those required under the Act and contained in state-issued permits. Compounding the problem, the unpredictable regulatory landscape and constant threat of nuisance litigation would discourage investment in new sources to take the place of those forced out of business by tort suits.

These results would be particularly damaging in the energy industry, where UARG members generate the electricity that is the backbone of modern life.

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[2] As this Court has recognized, there is no basis for distinguishing between actions seeking injunctions and actions seeking damages when evaluating the preemptive effect of a statute like the CAA. See *Ouellette*, 479 U.S. at 498 n.19 (damages award "might … compel[] [defendant] to adopt different or additional means of pollution control from those required by the Act").

The American economy depends on a ready supply of affordable, reliable electricity. The tort claims the Third Circuit authorizes could significantly increase electricity's cost by imposing expensive emission limits beyond those the CAA requires; by raising the capital cost of investing in new energy capacity and maintaining existing units; and by requiring some sources to curtail operations, resulting in less supply to satisfy demand.

Moreover, forced retirements and curtailed operations could impact the reliability of the nation's electricity grid. In some regions of the country, a single judgment enjoining a large source from operating would be enough to reduce the available supply of electricity below demand. Without sufficient generation capacity available, businesses could be forced to cut operations, particularly during peak demand periods. Given the wave of plant retirements expected in the near future,[3] the economy cannot withstand the strain a new flood of common law suits would place on the energy industry.

Adding to the confusion, allowing state common law suits would create a "patchwork" of inconsistent emission control requirements, both within and among jurisdictions. *Id.* at 302. Although CAA regulations appropriately may result in different standards for different types of sources based on geography

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[3] U.S. Energy Information Administration, *AEO2014 projects more coal-fired power plant retirements by 2016 than have been scheduled*, Today in Energy (Feb. 14, 2014), http://www.eia.gov/todayinenergy/detail.cfm?id=15031.

or other relevant factors, such variation is generally logical, predictable, and set transparently, with the input of scientists, state regulators, industry, and the public. *Id.* at 305 (doubting that "a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider"). Under the Third Circuit's approach, the CAA's consistent and predictable regulatory framework would be undermined by a proliferation of injunctions or damage awards imposed by courts on a case-by-case basis, resulting in identical sources becoming subject to different requirements. This approach would make it "increasingly difficult for anyone to determine what standards govern." *Id.* at 298.

Two recent Kentucky cases illustrate this danger. In *Merrick* v. *Brown-Forman Corp.*[4] and *Mills* v. *Buffalo Trace Distillery, Inc.*,[5] plaintiffs brought identical tort claims based on ethanol emissions from distilled spirits producers in neighboring counties. Although the cases were indistinguishable in all relevant respects, each court reached a different decision regarding whether the defendants' emissions could be subject to additional limits beyond those the CAA requires. See *Merrick*, Order at 3-4 (finding CAA preempts state common law claims); *Mills*, Opinion & Order at 6 (finding no preemption and allowing

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[4] Order, *Merrick* v. *Brown-Forman Corp.*, Civ. Action No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 July 30, 2013).

[5] Opinion & Order, *Mills* v. *Buffalo Trace Distillery, Inc.*, Civ. Action No. 12-CI-743 (Franklin Cir. Ct. (Ky.), Div. II Aug. 28, 2013).

claims to proceed). That two identical sources located within miles of each other could be subject to different requirements demonstrates why common law regulation would lead to "results that lack both clarity and legitimacy." *TVA*, 615 F.3d at 301 ("[T]he uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country.").

The potential for unpredictable and inconsistent requirements is exacerbated by the "'vague' and 'indeterminate'" standards governing nuisance law. *Ouellette*, 479 U.S. at 496 (citation omitted). Unlike CAA standards, which are "inclusive[] and predictab[le]," *TVA*, 615 F.3d at 301, nuisance is "an ill-defined omnibus tort of last resort" that addresses environmental concerns "at such a level of generality as to provide almost no standard of application," *id.* at 302. Indeed, "'one searches in vain … for anything resembling a principle in the common law of nuisance.'" *Id.* (quoting *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)).

The nuisance standard of "reasonableness" is so broad and vague that a court "w[ould] be hard pressed to derive any manageable criteria" for applying it to emissions regulated by the Act. *Id.* at 302. Sources would find it difficult, if not impossible, to predict what level of emissions might be deemed reasonable by a court or jury hearing a claim for nuisance. "It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure." *Id.* (quotations and citation omitted).

B. The Third Circuit's Approach Would Flood the Judiciary with Collateral Attacks on CAA Standards and Permits.

Endorsing a nuisance-based approach to air quality regulation would encourage litigants to use a range of tort liability theories to impose their own preferred emission restrictions on sources, and "would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air." *Id.* at 296. Indeed, within weeks of the Third Circuit's decision, plaintiffs filed similar class action claims within that circuit. See *Jesso* v. *Hatfields Ferry Power Station*, No. 13-cv-1232 (W.D. Pa. filed Aug. 27, 2013). A list of recent common law actions based on emissions is included in Attachment A. Individual courts should not be empowered to strike a different balance between the competing interests and technical considerations involved in regulating air emissions than that reached by federal and state agencies after careful consideration of the factors specified in the CAA.

The Third Circuit's approach would also provide an avenue for collateral attacks on federal and state standards and permits by parties unsatisfied with the outcome of the regulatory process, "threaten[ing] to put at naught the process established by Congress." *TVA*, 615 F.3d at 302 (alteration omitted). Nuisance claims would give groups seeking more stringent emission limits a second bite at the regulatory apple under the guise of plaintiffs seeking tort

recovery for the emissions authorized by state and federal agencies.

Preempting state common law would not deny parties a right of redress. The CAA provides numerous opportunities for interested parties to influence the standards and permit provisions governing sources. See *supra* p. 5. If these parties cannot persuade state and federal regulators to adopt more stringent emission requirements with the opportunities Congress provided, they should not be allowed to circumvent the CAA's regulatory framework and ask courts to adopt conflicting requirements. Nor should they be allowed to circumvent the Act's provisions requiring that objections to agency actions be presented to agencies first and precluding persons who sleep on their rights from challenging agency actions and permits years later.

Indeed, the Third Circuit's approach could have the counterproductive effect of *increasing* overall air pollution. See *TVA*, 615 F.3d at 302. Measures to reduce pollutants at issue in common law complaints may actually increase emissions of other pollutants. For example, the use of selective catalytic reduction, a stringent control technology for reducing emissions of nitrogen oxides, may increase sulfuric acid mist emissions. See, *e.g.*, 76 Fed. Reg. 10,530, 10,534-35 (Feb. 25, 2011). While expert state and federal agencies can account for unintended consequences due to their expertise, broad focus, and ability to solicit public input, courts considering the limited facts of individual cases would find it extremely difficult to anticipate such eventualities.

C. Allowing Common Law Claims Would Violate Fundamental Separation of Powers Principles.

The Third Circuit's approach would improperly insert courts into the role Congress granted to expert executive agencies. This Court has recognized Congress's "prescribed order of decisionmaking"—in which "the first decider under the Act is the expert administrative agency" and courts participate only through "review [of] agency action"—provides a compelling reason to "resist setting emissions standards by judicial decree" via tort law. *AEP*, 131 S. Ct. at 2539. The "complex balancing" inherent in emissions regulation is "entrust[ed] … to EPA in the first instance, in combination with state regulators." *Id.* Yet the Third Circuit's approach would improperly place courts applying state common law on equal footing with these agencies.

Congress's decision to allocate primary regulatory responsibility to specialized executive agencies rather than courts reflects the relative expertise and institutional capabilities of these two branches. See *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."). Recognizing the need for "a very high degree of specialized knowledge … that agencies rather than courts were likely to possess," Congress "opted rather emphatically for the benefits of agency expertise" to develop emission requirements in place of judicially-managed common law doctrines. *Id.* at 304-05.

Unlike courts, agencies act through notice-and-comment rulemaking, see 42 U.S.C. § 7607(d), which helps inform agency decisions by providing opportunities for input from "the varied practical perspectives of industry and environmental groups" with the added benefits of "providing proactive instead of reactive control, … allowing flexibility in developing rules, and lowering the likelihood of disturbing reliance interests." *TVA*, 615 F.3d at 305. Likewise, agencies issuing permits can explore the science underlying pollution control and collaborate with industry and the public in making decisions that balance the respective interests. See 42 U.S.C. § 7661a(b)(6).

In contrast, courts are ill-suited for developing emission requirements. As this Court observed, agencies are "surely better equipped to do the job [of setting emission levels] than individual district judges issuing ad hoc, case-by-case injunctions." *AEP*, 131 S. Ct. at 2539. Courts lack agencies' "scientific, economic, and technological resources," cannot "commission scientific studies or convene groups of experts for advice," and are limited to the evidence presented by the parties. *Id.* at 2539-40. Further, trial judges "lack authority to render precedential decisions binding other judges," increasing the risk courts will impose conflicting requirements. *Id.* at 2540. This Court left little doubt as to which government branch is best suited to determine appropriate emission limits.

II. The Question Presented Has Divided Federal and State Courts.

Division on this issue has grown more pronounced recently. The Third Circuit's decision reflects a divi-

sion that only this Court can reconcile concerning both the CAA's preemptive effect on state common law claims and the proper analysis for determining that issue.

The decision below conflicts with recent holdings by other federal and state courts finding state common law claims cannot coexist with the CAA. Most notably, it conflicts with the Fourth Circuit's reasoning in *TVA*, which, although it preceded *AEP*, cited similar concerns in holding that allowing state common law claims would throw the CAA's comprehensive regulatory framework into disarray. *TVA*, 615 F.3d at 298 (Such claims "threaten[] to scuttle the extensive system of anti-pollution mandates that promote clean air in this country."). *TVA* recognized that "[w]here Congress has chosen to grant states an extensive role in the [CAA's] regulatory regime…, field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted." *Id.* at 303. The Fourth Circuit applied the conflict preemption analysis that was the basis of this Court's decision in *Ouellette*, which employed the "strongest cautionary presumption" against "nuisance actions seeking to establish emissions standards different from federal and state regulatory law." *Id.*

Several other courts have interpreted this Court's *AEP* decision to require the same conclusion. In *Comer* v. *Murphy Oil USA, Inc.*, the court found the CAA preempted state nuisance claims alleging harm from greenhouse gas emissions. 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd on other grounds*, 718

F.3d 460 (5th Cir. 2013). The court noted, like the federal common law claims at issue in *AEP*, state nuisance claims would require it to determine "what amount of carbon-dioxide emissions is unreasonable as well as what level of reduction is practical, feasible, and economically viable," a task this Court held "had been entrusted by Congress to the EPA." *Id.* Similarly, in *Freeman* v. *Grain Processing Corp.*, an Iowa court relied on *AEP* to dismiss Iowa common law claims as preempted by the CAA. No. LACV021232, 2013 WL 6508484 (Muscatine Cnty. (Iowa) Dist. Ct. Apr. 1, 2013). The court agreed with this Court's conclusion that "EPA is better equipped to make these decisions [regarding what emissions are reasonable] than district court judges or juries." *Id.* at *6.

Courts that have found state common law claims preempted relied on a functional "conflict preemption" test to assess whether the claims would interfere with the comprehensive CAA regulatory program. See *TVA*, 615 F.3d at 303-04; *Comer*, 839 F. Supp. 2d at 865; *Freeman*, 2013 WL 6508484 at *3-6. In contrast, the Third Circuit based its decision almost exclusively on the CAA's savings clauses. Pet. App. 16a. The court determined that because the savings clauses in the CAA are similar to those in the Clean Water Act (CWA), this Court's *Ouellette* decision—which held the CWA preempts water pollution-based common law claims under the law of affected states, but not that of the source's state—compels a finding of no CAA preemption in this case. *Id.* at 10a-17a. This is a misreading of *Ouellette*, however, as this Court has made clear that a savings clause "does not bar the ordinary working of conflict pre-

emption principles." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000); see also *TVA*, 615 F.3d at 303-04; *Freeman*, 2013 WL 6508484 at *8.

Decisions by other courts that have been characterized as rejecting CAA preemption of state common law claims applied *Ouellette* in much the same manner as the Third Circuit. See *Her Majesty the Queen in Right of the Province of Ontario* v. *City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989); *Gutierrez* v. *Mobil Oil Corp.*, 798 F. Supp. 1280, 1285 (W.D. Tex. 1992). Each court's treatment of *Ouellette* conflicts with the approach taken by the Fourth Circuit in *TVA* and other courts finding state common law claims preempted by the Act.

Even within individual jurisdictions, this question has divided courts. As discussed above, two Kentucky courts considering the CAA's preemptive effect recently reached opposite conclusions. *Merrick*, Order at 3-4; *Mills*, Opinion & Order at 6. True to the pattern above, *Mills* relied on the similarity between the CWA's and CAA's savings clauses to preserve the plaintiffs' claims, while *Merrick* emphasized the functional conflict preemption analysis described in *AEP*, *TVA*, and *Ouellette* to find the tort claims preempted. Compare *Mills*, Opinion & Order at 6; with *Merrick*, Order at 3-4; see also Order on Reconsideration at 2, *Merrick* v. *Brown-Forman Corp.*, Civ. Action No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 Nov. 26, 2013) (declining to reconsider ruling in light of Third Circuit's decision in this case). This Court should grant certiorari to address the division among the courts.

III. The Third Circuit's Decision Conflicts with Relevant Decisions of This Court.

In *AEP*, this Court unequivocally held federal common law claims based on activities within the Act's regulatory ambit are inconsistent with the CAA's comprehensive framework. 131 S. Ct. at 2540. Although *AEP* did not address state common law claims, *id.*, the Court's reasoning applies equally to these claims under a conflict preemption analysis. Indeed, the concerns driving this Court's *AEP* decision are even more pronounced for state common law claims.

Like *AEP*, the claims advanced here would disrupt the "complex balancing" that Congress "entrust[ed] … to EPA in the first instance, in combination with state regulators." *Id.* at 2539. Respondents' claims seek to hold Petitioner to a higher standard of emission control than that deemed reasonable and expressly authorized by federal *and* state regulators after careful deliberation and public input. Pet. App. 8a. This approach "cannot be reconciled with the decisionmaking scheme Congress enacted," regardless of whether the judgments Respondents would entrust to courts are to be guided by federal or state common law. *AEP*, 131 S. Ct. at 2540.

As in *AEP*, the common law claims in this case would entrust complex regulatory decisions to judges "lack[ing] the scientific, economic, and technological resources an agency can utilize." *Id.* at 2539. Expert agencies are "surely better equipped to do the job [of regulating emissions] than individual district judges." *Id.* Courts lack technical expertise and cannot look beyond the record in a particular case to consid-

er important factors such as "the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption." *Id.*

The state common law claims in this case present an even greater conflict with the CAA than those in *AEP* because they concern emissions that federal and state regulators have already addressed. In *AEP*, this Court held the plaintiffs' common law claims would interfere with the CAA's regulatory scheme although EPA had not yet issued standards applicable to the emissions in question. *Id.* at 2538. In contrast, Respondents' claims are based on Petitioner's emissions of pollutants already extensively regulated by EPA through NAAQS and hazardous air pollutant standards, and by state regulators through their SIPs. See 40 C.F.R. §§ 50.6-50.7 (particulate matter NAAQS); 77 Fed. Reg. 9304 (Feb. 16, 2012) (hazardous air pollutant standards for power plants). Indeed, Petitioner's operations were explicitly authorized in a Title V permit containing detailed requirements, issued by the state under the Act. Pet. App. 31a-32a. Thus, the common law claims here invite a court to overrule these expert agencies' judgments regarding what emissions are reasonable and what level of reduction is practical, feasible and economically viable.

Despite these similarities, the Third Circuit failed to evaluate the effect of this Court's *AEP* decision in any meaningful way. Instead, the court relegated its discussion of *AEP* to a single footnote, where it dismissed *AEP* with the conclusory observation that the Court "left open the question" of state common law preemption. *Id.* at 16a-17a n.7.

Rather than analyze this Court's more recent decision in *AEP*, the Third Circuit's holding relies almost entirely on a fundamental misinterpretation of this Court's decision in *Ouellette*. *Id.* at 16a. The court based its decision on a textual comparison between the savings clauses of the CWA and the CAA, finding "no meaningful difference between them." *Id.* at 13a. That conclusion is both incorrect and irrelevant to the Act's preemptive effect on common law claims.

This Court in *Ouellette* focused entirely on language unique to the CWA's provision specifically preserving state authority "with respect to the waters (including boundary waters) of such Stat[e]." *Ouellette*, 479 U.S. at 493 (citing 33 U.S.C. § 1370) (quotations omitted). It *never considered* the language common to both the CWA and CAA savings clauses. Moreover, the Third Circuit misread the CAA's savings clause (42 U.S.C. § 7416)—which preserves states' authority to adopt and enforce "standard[s]," "limitation[s]," or "requirement[s]" more stringent than the CAA's—to include "requirements" imposed through state common law judgments. This provision applies only to standards adopted by state statute or regulation, as the relevant legislative history suggests. S. Rep. No. 91-1196, at 14-15 (1970), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 414-15 (1974). This stands to reason. The entire structure of the CAA is based on prospective regulatory action—whether in promulgating standards, adopting SIPs, or issuing permits—by EPA and the states. A state statute or regulation that goes beyond the federal minimum operates prospectively and predictably, and its require-

ments must be reflected in sources' Title V permits. Accordingly, they do not "interfere[] with the methods by which the federal statute was designed to reach [its] goal." *Ouellette*, 479 U.S. at 494. But a judicial determination of liability—which is inherently retrospective—does. In addition to imposing substantive requirements at odds with those EPA *and* the states imposed under the CAA, it is inconsistent with the CAA's procedures, under which a reviewing court may consider only timely objections first presented to the agencies.

In any event, the Third Circuit's singular focus on the CAA's savings clause was misplaced: this Court's decision in *Ouellette* was based on a functional conflict preemption analysis, not a wooden recitation of the CWA's savings clauses. Indeed, finding the CWA's savings clauses to be inconclusive at best, this Court held that affected-state common law claims were preempted based on the *effect* of allowing them to proceed in the context of the CWA's overall regulatory framework. *Id.* at 493 ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on" state common law.). This Court "examin[ed] the CWA as a whole, its purposes and its history" and determined the affected-state common law claims were preempted because "the inevitable result" of allowing such claims "would be a serious interference with the achievement of the full purposes and objectives of Congress." *Id.* (citation and quotations omitted). By the same token, this Court held that most—though not all—source-state common law was not preempted because, it reasoned, these laws

did *not* interfere with the methods of the CWA. *Id.* at 498, 499 n.20 (action under source-state law generally "would not frustrate the goals of the CWA as would a suit governed by" affected-state law, but would be preempted "if, and to the extent" it actually does).

To date, every court that has applied this functional analysis has determined the CAA preempts state common law claims. See *TVA*, 615 F.3d at 303-04 (describing *Ouellette*'s focus on conflict preemption); *Comer*, 839 F. Supp. 2d at 865; *Freeman*, 2013 WL 6508484 at *6; *Merrick*, Order on Reconsideration at 2. These decisions recognized that a savings clause "does not bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869. By failing to apply a functional conflict preemption analysis, the Third Circuit misapplied *Ouellette*.

To the extent, however, this Court determines the Third Circuit's interpretation of *Ouellette* and its applicability to the CAA's preemptive effect is correct, this Court should reexamine that precedent. The Third Circuit's reading of *Ouellette* would allow individual courts in nuisance suits to determine and impose emission requirements on regulated sources that conflict with those authorized by expert agencies under the CAA, provided the courts applied source-state common law rather than that of a neighboring affected state. But as shown above, a system of regulation by common law is inherently incompatible with the CAA's comprehensive framework of joint federal-state regulation, no matter which state's law is applied. Cf. *AEP*, 131 S. Ct. at 2540.

Ouellette's distinction between "affected states" and "source states" is severely undercut by *AEP*: the

inherent tension between a well-defined system of standards and permits administered by expert agencies on the one hand, and an unpredictable common law system administered by judges and juries on the other, is not resolved by limiting a source's potential liability exposure to just one body of nuisance law instead of several. Regardless of which state's common law is applied, no source can predict what additional emission limits a judge might require when applying "vague" and "indeterminate" nuisance standards, leaving source owners uncertain as to how to operate within the law. *Ouellette*, 479 U.S. at 496. As the Fourth Circuit more colorfully put it, "[i]f we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bullfights, … we will be hard pressed to derive any manageable criteria." *TVA*, 615 F.3d at 302 (citation omitted). Any validity *Ouellette*'s approach may have had when adopted was severely undermined—regardless of what jurisdiction's common law is applied—by this Court's decision in *AEP*, which recognized the problems with entrusting to judges the delicate regulatory balancing Congress assigned to expert agencies.

Additionally, it is simply incorrect that allowing source state common law claims "does not disturb the balance among federal, source-state, and affected-state interests." *Ouellette*, 479 U.S. at 499. A state common law action most certainly affects both federal *and* source-state interests when a judge or jury overrides the conditions of a Title V permit issued by a source-state agency under the CAA's cooperative federalism structure. Moreover, Justice Powell's observation that "[s]tates can be expected to take into ac-

count their own nuisance laws in setting permit requirements," *id.*, weighs against allowing state tort claims to coexist with the CAA. If this is correct, then state permitting authorities can be expected to incorporate permit requirements preventing sources from causing a nuisance, thus negating the need for state tort claims independent of permit enforcement actions.

This Court has recognized "a federal statute's saving clause cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1748 (2011) (citations, alterations, and quotations omitted). The Third Circuit's interpretation of *Ouellette* would allow state common law claims to destroy the CAA's comprehensive regulatory program.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ATTACHMENT A

List of Cases Alleging State Common Law Claims Based on Emissions

Alleyne v. *Diageo USVI, Inc.*, SX-13-CV-143 (Super. Ct. V.I. filed Apr. 26, 2013).

Anderson v. *FirstEnergy Corp.*, No. 13-cv-141 (N.D. W.Va. filed Oct. 10, 2013).

Anderson v. *FirstEnergy Generation, LLC*, No. 13-cv-1733 (W.D. Pa. filed Dec. 5, 2013).

Comer v. *Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013).

Freeman v. *Grain Processing Corp.*, NO. LACV 021232, 2013 WL 6508484 (Muscatine Cnty. (Iowa) Dist. Ct. Apr. 1, 2013).

Little v. *Louisville Gas & Elec. Co.*, No. 13-cv-1214 (W.D. Ky. filed Dec. 16, 2013).

Martin v. *KCBX Terminals Co.*, No. 13-cv-8376 (N.D. Ill. filed Nov. 20, 2013), *removed from* No. 2013-CH-24614 (Cook Cnty. (Ill.) Cir. Ct. filed Oct. 31, 2013).

Merrick v. *Brown-Forman Corp.*, Civ. Action No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 July 30, 2013).

Merrick v. *Diageo Americas Supply, Inc.*, No. 12-cv-334 (W.D. Ky. Mar. 19, 2014).

Mills v. *Buffalo Trace Distillery, Inc.*, Civ. Action No. 12-CI-743 (Franklin Cir. Ct. (Ky.), Div. II Aug. 28, 2013).

N. Carolina ex rel. Cooper v. *Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010).

Native Village of Kivalina v. *ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied* 133 S. Ct. 2390 (2013).

United States v. *EME Homer City Generation, L.P.*, 823 F. Supp. 2d 274 (W.D. Pa. 2011).