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 Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AND AMERICAN PETROLEUM INSTITUTE SUPPORTING PETITIONER


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## QUESTION PRESENTED

Whether the Clean Air Act, which provides a comprehensive system for the regulation of air pollution in the United States and leaves "no room for a parallel track," *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2538 (2011), preempts state common law nuisance claims that would impose emissions restrictions different from those adopted pursuant to the Act and expose companies operating in compliance with all applicable emissions standards under the Act to liability for their emissions.

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## INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly repre-

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both Petitioner and Respondents were timely notified of this brief, and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

sents the interests of three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates issues of vital concern to the nation's business community and has frequently participated as an *amicus curiae* before this Court and other courts. Many of the Chamber's members are subject to the permitting provisions of the federal Clean Air Act ("CAA").

The American Petroleum Institute ("API") is a nonprofit trade association headquartered in Washington, DC, which represents over 590 oil and natural gas companies that are leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, have invested nearly $2 trillion in U.S. capital projects to advance all forms of energy, including alternatives. API members are subject to the permitting provisions of the CAA, and API frequently represents its members in regulatory and judicial matters involving the CAA.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM members operate 122 U.S. refineries comprising approximately 98 percent of U.S. refining capacity. AFPM petrochemical members support 1.4 million American jobs, including approximately 214,000 employed directly in petrochemical manufacturing plants. AFPM members operate large industrial facilities and are subject to the permitting provisions of the CAA.

*Amici* have a strong interest in the development of a reasonable and functional system for regulating air pollutant emissions. Businesses currently must comply with regulations developed through a defined regulatory process that gives all stakeholders a voice and allows busi-

nesses to plan investments and anticipate costs. The Court of Appeals' decision will introduce significant uncertainty into that system by exposing regulated businesses to tort liability for emissions that fully comply with their permits. Under the Court of Appeals' decision, private plaintiffs may wait until after businesses begin operating in full compliance with their permits, and then sue those businesses for damages and injunctive relief under tort theories. *Amici* respectfully urge the Court to grant the Petition for a Writ of Certiorari to address the critically important question of whether the CAA preempts state tort claims that would prohibit emissions that are permitted by EPA and state regulating bodies.

## SUMMARY OF ARGUMENT

It is difficult to overstate the importance of this case for the regulated business community. If allowed to stand, the Court of Appeals' decision will empower courts and juries to use open-ended state-law nuisance claims to interfere with and effectively override permitting decisions made by EPA and state regulators after careful regulatory review and public notice and comment. That would be incompatible with the system of cooperative federalism envisioned by Congress when it passed the CAA to regulate the emission of air pollutants.

As a practical matter, the comprehensive regulatory system established by Congress to police air pollutant emissions cannot coexist with a separate and parallel quasi-regulatory liability regime grounded in state tort law. A court or jury asked to decide whether a given level of emissions already subject to a permit requirement nonetheless comprises a tort will be asked to assess the reasonableness of those emissions without the benefit of the regulatory infrastructure and expertise available to EPA and state agencies. If, after considering those emissions, the court or jury find them to be unreasonable, new limitations may be imposed that necessarily will

diverge from the applicable permit requirements. Moreover, that process of re-weighing and re-setting limitations will be open to continual revision as different plaintiffs bring new claims involving the same emissions.

Subjecting the regulated community to such an open-ended and unpredictable process of re-evaluation would undermine the goal of Congress to provide certainty and balance the benefits of regulation with its economic costs, thereby enabling businesses to engage in long-term planning, investment, and operations with confidence. Instead, it would impose crippling uncertainty and costs on an already overburdened business community. Because such tort claims would interfere with the system devised by Congress and implemented by EPA and state agencies through a cooperative form of federalism, they are preempted by the CAA.

The Court of Appeals incorrectly found that source-state-law nuisance claims may proceed despite their direct interference with the aims of the CAA and its application through the permitting process. The Petition for Certiorari should be granted to correct this error and prevent the mischief and deleterious economic consequences that are certain to follow in its wake.

## STATUTORY BACKGROUND

### I. Through the CAA, Congress established a comprehensive system for regulating air pollution emissions.

Few subjects have received more sustained legislative and regulatory attention than air pollution. The body of statutes and regulations addressing air pollution "represents decades of thought by legislative bodies and agencies and the vast array of interests seeking to press upon them a variety of air pollution policies." *North Carolina, ex rel. Cooper* v. *Tenn. Valley Auth.*, 615 F.3d 291, 298 (4th Cir. 2010) (hereinafter "TVA"). "To say this regula-

tory and permitting regime is comprehensive would be an understatement." *Id.*

Both federal and state governments share responsibility for implementing the CAA. In this "cooperative federalism" arrangement, EPA sets national standards for the emission of air pollutants, while states craft State Implementation Plans ("SIPs") that, subject to EPA approval, provide for the implementation, maintenance, and enforcement of those standards. *See EME Homer City Generation, L.P.* v. *EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012) (finding that Congress "set up a federalism-based system of air pollution" under which "both the Federal Government and the States play significant roles").

The CAA's coverage of air pollution emissions is sweeping in scope. The CAA requires that EPA regulate air pollutants that could affect the public health. *See, e.g.,* 42 U.S.C. § 7409(b)(1) (requiring that National Ambient Air Quality Standards ("NAAQS") "protect the public health" and allow for an "adequate margin of safety"); 42 U.S.C. § 7411(b), (d) (requiring emission performance standards for sources that "endanger public health or welfare" using the "best system of emission reduction"); 42 U.S.C. § 7412(f) (requiring that emissions standards for hazardous pollutants "provide an ample margin of safety to protect public health"); 42 U.S.C. § 7521(a)(1) (requiring EPA to regulate emission of air pollutants from vehicles when the pollutants "may reasonably be anticipated to endanger public health or welfare"). EPA has identified a broad range of "regulated air pollutants" that must be addressed in a source's Clean Air Act Title V permit. *See* 40 C.F.R. § 70.2. Under EPA's regulations, regulated air pollutants include those subject to NAAQS, nitrogen oxides and volatile organic compounds, various ozone-depleting substances, "hazardous" air pol-

lutants, non-conventional pollutants,[2] and a variety of other air pollutants. *Id.*

To implement these requirements, EPA or state agencies issue permits that set limitations on the quantities of air pollutants that a source may lawfully emit. These permits include Title V operating permits, which list limitations for major sources of air pollution. *See* 42 U.S.C. § 7602. Each Title V permit "is intended to be 'a source-specific bible for Clean Air Act compliance' containing 'in a single, comprehensive set of documents all CAA requirements relevant to the source.'" *TVA*, 615 F.3d at 300 (quoting *Virginia* v. *Browner*, 80 F.3d 869, 873 (4th Cir. 1996)). In addition, new sources and sources that make major modifications that result in a significant increase in certain air emissions are subject to the Prevention of Significant Deterioration ("PSD") program and must obtain PSD permits. *See* 42 U.S.C. §§ 7475, 7479(1).

## II. Congress frequently requires EPA to consider economic costs when regulating.

The CAA requires in many instances that EPA regulate in a manner that will not impose economic burdens and costs that are out of proportion to the environmental benefits achieved. One of the central purposes of the CAA is "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3); *see Sierra Club* v. *Costle*, 657 F.2d 298, 325–26 (D.C. Cir. 1981) (finding that "one of the agreed upon legislative purposes [of the CAA]

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[2] This Court is currently reviewing whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit greenhouse gases. *See Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 418 (2013) (mem.); *S.E. Legal Found., Inc.* v. *EPA*, 134 S. Ct. 419 (2013) (mem.); *Chamber of Commerce of the U.S.* v. *EPA*, 134 S. Ct. 468 (2013) (mem.).

requires that the standards must maximize the potential for long term economic growth 'by reducing emissions as much as practicable'"); *see also* Exec. Order No. 13,432, 72 Fed. Reg. 27,717, 27,717 (May 14, 2007) (noting that it is the policy of the United States to regulate greenhouse gas emissions from motor vehicles "in a manner consistent with sound science, analysis of benefits and costs, public safety, and economic growth").

To implement that intent, the CAA is replete with requirements that agencies consider the economic impact of specific types of environmental regulations. For example, when setting Best Available Control Technology ("BACT") to be used by new and modified sources, the permitting authority must take into account "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3); 40 C.F.R. § 52.21(b)(12); *see also United States* v. *EME Homer City Generation, L.P.*, 727 F.3d 274, 288 (3d Cir. 2013) (noting that "BACT determinations are products of the permitting process, tailored to each facility on a case-by-case basis using cost-benefit analysis specific to each pollution source" (quoting *Sierra Club* v. *Otter Tail Power Co.*, 615 F.3d 1008, 1017 (8th 2010))).[3]

Similarly, when setting New Source Performance Standards ("NSPS") that apply generally to new or modified sources of air pollution, emission limits must "tak[e]

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[3] In *Sierra Club*, the U.S. Court of Appeals for the Eighth Circuit dismissed a citizen suit action challenging the adequacy of permit conditions as a collateral attack on the carefully crafted CAA permitting process. 615 F.3d at 1022. The Court reasoned that allowing plaintiffs to "raise issues resolved during the permitting process long after that process is complete would upset the reasonable expectations of facility operators and undermine the significant investment of regulatory resources made by state permitting agencies." *Id.* As discussed herein, nuisance suits present an even greater threat to certainty and investment decisions than citizen suits.

into account the cost of achieving such reduction." 42 U.S.C. § 7411(a)(1). Thus, the limits are designed to reasonably be met by all new or modified sources in an industrial category, even though some individual sources are capable of lower emissions. EPA's decision to set NSPS standards will not be sustained if the economic costs are "exorbitant." *Lignite Energy Council* v. *EPA*, 198 F.3d 930, 933 (D.C. Cir. 1999).

EPA must also give due regard to economic impact and costs when setting "above-the-floor" requirements, called National Emission Standards for Hazardous Air Pollutants ("NESHAPS"), governing emission of hazardous air pollutants from existing and new sources. *See Portland Cement Ass'n* v. *EPA*, 665 F.3d 177, 183 (D.C. Cir. 2011). The CAA requires that EPA promulgate standards that will "require the maximum degree of reduction of hazardous air pollutants . . . taking into consideration the cost of achieving such emission reduction." 42 U.S.C. § 7412(d)(2).

In each case, the regulating authority must conduct its balancing of costs and benefits of specific limitations within the confines of the regulatory process, where agency expertise may be brought to bear, and all stakeholders may have a voice. Ripping that balancing process from its regulatory home and forcing it instead into the litigation context would transfer it from a deliberative, prospective, technical process to one subject to ad hoc and near standard-less assessments.[4]

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[4] Indeed, in concluding that the Medical Device Act preempted tort claims challenging the safety and effectiveness of devices afforded pre-market approval, this Court observed that a jury, when called upon to re-weigh the costs and benefits of a regulatory decision, look only to the impact on the allegedly injured plaintiff while ignoring the more diffuse social benefits of the regulated activity. *Riegel* v. *Medtronic*, 552 U.S. 312, 325 (2008). This concern is equally pertinent to regulatory decisions concerning emissions limitations.

## ARGUMENT

### I. State-law nuisance claims undermine the CAA by directly interfering with permitting decisions.

Nuisance claims—like the claim in this case—directed at regulated sources will force courts and juries to use vague tort-law standards to re-evaluate emissions limitations created after lengthy regulatory review and public notice and comment. Use of common law nuisance in this manner amounts to an improper collateral attack on the regulatory and permitting process.

1. Nuisance law has been described as an "ill-defined omnibus tort of last resort" where "one searches in vain . . . for anything resembling a principle." *TVA*, 615 F.3d at 302 (citing *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)). This Court has echoed that sentiment, citing Dean Keeton's observation that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" *Int'l Paper Co.* v. *Oullette*, 479 U.S. 481, 496 n. 17 (1987) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 616 (5th ed. 1984)).

Under Pennsylvania law, nuisance comprises a "class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal." *Kramer* v. *Pittsburgh Coal Co.*, 19 A.2d 362, 363 (Penn. 1941). To reach a conclusion as to whether the conduct at issue amounts to a nuisance, "the harm caused by the emission of offensive odors, noises, fumes, violations, etc., must be weighed against the utility of the operation" causing their emission. *Waschak* v. *Moffat*, 109 A.2d 310, 314 (Penn. 1954); *see also Hughes* v. *Emerald Mines Corp.*, 450 A.2d 1, 7 (Penn. 1982) (finding that Pennsylvania nuisance law requires that the "[u]tility of

an act must be balanced against the bad effects resulting from that act in determining its reasonableness").

2. Respondents seek to use this indeterminate and highly subjective standard to impose liability on Petitioner for its already-permitted and regulated emissions. In doing so, Respondents ask the fact finder to relitigate permitting decisions and cost-benefit analyses made by expert agencies.

The Cheswick Generating Station operates under a Title V permit that covers the emissions about which Respondents complain. The permit imposes specific limits on the emission of various particulate matter, gasses, chemicals, and compounds from coal combustion. Pet. App. at 32a. The permit requires, among other things, that GenOn ensure that air pollution equipment is properly installed, maintained, and operated at the plant, and "take all reasonable actions to prevent fugitive air contaminants from becoming airborne." *Id.* at 31a–32a. The permit also states that GenOn may not operate in a manner that emissions from the plant "[m]ay reasonably be anticipated to endanger the public health, safety, or welfare." *Id.* at 32a.

In their Complaint, Respondents take direct aim at the activities covered by the plant's permits. Respondents allege that all of the members of the class suffered "property damage from the particulate and odors emitted by the Defendant as a result of industrial operation." *Bell* v. *Cheswick Generating Station*, No. 12-cv-00929, ECF 1 (Complaint) ¶ 6 (W.D. Pa. filed July 6, 2012). Respondents claim that, as part of its normal operations, the plant "generates, utilizes, and discharges into the open atmosphere chemicals, gases, and particulates," *id.* ¶ 31, including "fly ash and unburned coal combustion byproducts," *id.* ¶ 24. Respondents also complain about the construction, design, engineering, maintenance, and operation of the facility, and allege that the plant lacks "best

available technology, or any proper air pollution control equipment." *Id.* ¶¶ 37–39.

Recognizing that the plant's permit covers the same activities that they complain about, Respondents allege that the plant, "by the very terms of its Operating Permit, is not allowed by its industrial operation to damage private property." *Id.* ¶ 45. Respondents do not dispute, however, that the plant is operating in full compliance with the specific emissions limitations imposed by its operating permit.[5] Nonetheless, Respondents allege that emissions subject to the plant's permits constitute a nuisance for which Respondents and members of the class are entitled to compensatory and exemplary damages and injunctive relief. *Id.* ¶ 50. Indeed, Respondents allege that GenOn "by and through current technological processes and current engineering standards could and should preclude the discharge of any particulates and extra hazardous substances onto Plaintiffs' properties." *Id.* ¶ 46.

3. Respondents ask that a court or jury ignore the emissions limitations imposed by GenOn's permit and impose new limitations driven by Respondents' individual property interests. The practical effect of Respondents' lawsuit is "to raise issues resolved during the permitting process long after that process is complete," thereby upsetting "the reasonable expectations of facility operators and undermin[ing] the significant investment of regulatory resources made by state permitting agencies." *See Sierra Club*, 615 F.3d at 1022.

The District Court correctly found that Respondents "seek a judicial examination of matters governed by the

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[5] Respondents also conceded in their sur-reply in opposition to Petitioner's Motion to Dismiss that Petitioner is "allowed to emit whatever millions of pounds of emissions the [EPA] has decided." Pet. App. at 29a.

regulating administrative bodies," and read the Complaint as "necessarily speaking to and attacking emission standards." Pet. App at 32a, 35a. The Court observed that "specific controls, equipment, and processes to which the Cheswick Generating Station is subject to are implemented and enforced by the EPA" and Pennsylvania agencies, and that the Complaint "would necessarily require [the District Court] to engraft or alter those standards." *Id.* at 37a.

In reversing the District Court, the Court of Appeals ignored the practical and substantial interference that state nuisance law would impose on the CAA's regulatory regime and failed to take into account the tremendous uncertainty and costs that a parallel regime of state tort law would impose on the regulated business community.

## II. The Court of Appeals' decision will impose intolerable uncertainty and costs on the regulated business community.

Businesses require a stable regulatory regime and the ability to predict costs to plan, grow, and make long-term investments. Through the CAA, Congress established a regime administered by expert federal and state agencies that establish rules and requirements through a deliberate regulatory process during which the views of experts, industry, the public, and other interested parties may be considered.

Allowing private plaintiffs to attack the results of the regulatory process by using state tort law to impose new and unpredictable requirements on emissions will impede Congress' goal of effectively balancing the need for environmental protection and economic growth. It will also impose substantial costs on the regulated community above the already-heavy toll exacted by current regulations.

1. American businesses in general, and the power generating industry in particular, already bear a heavy regulatory burden owing to existing and recent EPA regulations. EPA has recognized that the CAA directly affects a host of economic activities and imposes substantial costs on industry. Referring to just the 1990 amendments to the CAA (which broadly addressed acid rain, ozone depletion, and toxic air pollution) EPA found that "[t]he costs of complying with [those amendments] will affect all levels of the U.S. economy." EPA Office of Air and Radiation, The Benefits & Costs of the Clean Air Act from 1990 to 2020, at 3–1 (March 2011), *available at* www.epa.gov/air/sect812/prospective2.html. EPA estimates that the total annual cost in 2010 for electric utilities alone to comply with the 1990 amendments to the CAA was $6.64 billion. *Id.* at 3–8. That annual cost is expected to rise to $10.4 billion by 2020. *Id.*

The high price tag of complying with the 1990 amendments to the CAA is relatively modest, however, in comparison to the cumulative expected cost of complying with more recent EPA rules and proposals. On December 21, 2011, EPA announced final standards for mercury and other air toxic emissions from electric generating units commonly referred to as the Mercury and Air Toxics Standards or "Utility MACT." The rule imposes maximum achievable control technology requirements on new and existing power plants with respect to mercury and several other pollutants, including particulate matter. The Congressional Research Service has observed that Utility MACT "is among the most expensive rules that EPA has ever promulgated."[6] EPA estimates annualized costs to the electricity industry for Utility MACT at $9.6

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[6] James McCarthy, EPA's Utility MACT: Will the Lights Go Out? Congressional Research Service, Jan. 9, 2012, at 2, *available at* http://www.eenews.net/assets/2012/01/19/document_gw_03.pdf.

billion.[7] In addition, in June 2011, EPA finalized its Cross-State Air Pollution Rule (CSAPR) or Transport Rule that would require states to reduce power plant emissions that contribute to ozone and particulate pollution in other states.[8] EPA estimates annualized costs to the electricity industry from CSAPR at $800 million.[9] Those estimates are likely low—a study by National Economic Research Associates pegged combined annualized costs of Utility MACT and CSAPR compliance at $17.8 billion and the total present value of compliance costs at $184 billion.[10] Moreover, the costs of complying

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[7] *See* 77 Fed. Reg. 9,304, 9,425 (Feb. 16, 2012) (estimating costs in 2007 dollars).

[8] CSAPR was overturned by the District of Columbia Court of Appeals, *EME Homer City Generation, L.P.* v. *EPA*, 696 F.3d 7 (2012), and this Court has granted a writ of certiorari to review that decision, *EPA* v. *EME. Homer City Generation, L.P.*, 133 S. Ct. 2857 (2013) (mem.).

[9] U.S. EPA, "Regulatory Impact Analysis for the Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States; Correction of SIP Approvals for 22 States," June 2011, at 14, *available at* http://www.epa.gov/airtransport/pdfs/FinalRIA.pdf (estimating costs in 2007 dollars).

[10] This number is estimated in 2010 dollars. *See* NERA Economic Consulting, Proposed CATR + MACT, May 2011, at 3, *available at* http://www.americaspower.org/sites/default/files/NERA_CATR_MACT_29.pdf. Other industry estimates put likely compliance costs much higher than EPA estimates. For instance, a group of 22 energy providers estimated that their costs *alone* to comply with Utility MACT would come to $32.9 billion. Sam Batkins, American Energy Companies Report Over Three Times Higher Utility MACT Compliance Costs than EPA Projects, American Action Forum (June 11, 2012), http://americanactionforum.org/research/american-energy-companies-report-over-three-times-higher-utility-mact-compl (last visited Mar. 25, 2014).

with Utility MACT and CSAPR do not account for the numerous other regulations recently proposed by EPA.[11]

2. Regulation by tort law will add a new and unpredictable layer of requirements and costs on businesses that are already straining under their current regulatory burden. Unlike regulations imposed through the administrative process that apply prospectively and for which industry can plan, invest, and prepare well in advance of implementation, tort liability strikes suddenly and unpredictably and applies only retrospectively to past emissions that, in many cases, were already permitted by the relevant regulatory authority.

Attempting to predict potential liability from such tort claims would be nearly impossible. In this case alone, Respondents seek injunctive relief and economic damages for a proposed class of approximately 1,500 people living within a one-mile radius of the Cheswick Plant. Satisfying the demands of this arbitrarily drawn class, however, would not free Petitioner of liability (including the cost of complying with injunctive relief) for claims brought by those who live two, three, four, or four-hundred miles downwind of the Cheswick plant. Moreover, because emissions have varied effects and dispersion patterns at different distances from a source, the relief requested by each successive group of plaintiffs could differ in profound ways.

The result is that each regulated business in the nation would be exposed to the possibility of multiple, cross-cutting tort actions brought by different groups claiming a variety of different harms and seeking different

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[11] For a brief overview of several of these regulations, see American Coalition for Clean Coal Electricity, Major EPA Regulations Affecting Coal-Fueled Electricity (August 2012), *available at* http://www.americaspower.org/sites/default/files/may-issues-policies/EPA-Regulations-August-2012.pdf.

measures of injunctive relief. These lawsuits would undermine the regulatory process as businesses and power generators who formerly could plan around permit requirements are forced to anticipate new and heightened restrictions produced by the vagaries of tort law and adjudicated in court. Already faced with mounting and, at times, crippling costs imposed by existing EPA regulations, power plants faced with a new onslaught of tort liability may choose to cease operations instead of face prolonged, costly, and unpredictable litigation, thereby further exacerbating existing energy shortages. Moreover, there can be little doubt that the Court of Appeals' decision will encourage proliferation of nuisance litigation against permitted emissions.[12]

## III. Certiorari is warranted to prevent the creation of a "parallel track" of state tort-law regulation that will undermine the CAA.

The Court of Appeals' decision sanctions the creation of a "parallel track" of environmental regulation grounded in tort law. This Court has presciently warned on multiple occasions against the use of tort law for that purpose. Ignoring those warnings and this Court's injunction against using saving clauses to undermine the statutory scheme within which they reside, the Court of Appeals has opened the door to endless and costly litigation against businesses that faithfully comply with the limitations of their permits. That decision warrants this Court's review.

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[12] Indeed, the website for Respondents' counsel already contains a tab for "noxious odor and environmental pollution lawsuits" listing several pending suits against power plants and other businesses for "particulate fallout." Macuga, Liddle & Dubin, P.C., Noxious Odor and Environmental Pollution Lawsuits, http://mldclassaction.com/current-cases/noxious-air-cases/#sthash.7wQiCAC9.dpbs (last visited Mar. 25, 2014).

1. The Court of Appeals held that the CAA does not prevent private plaintiffs from using state-law nuisance claims to attack businesses that fully comply with all relevant emission limitations in their permits. That holding necessarily requires courts to employ vague and subjective tort standards to review the reasonableness of emissions that EPA and the states regulate through permits issued after comprehensive regulatory consideration and public notice and comment. Congress did not leave room for such lawsuits, and nothing in the CAA—including its savings clause—requires such an odd and counterintuitive result.

In *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2538 (2011), this Court concluded that when Congress passed the CAA to address the problem of air pollution emissions, it left no room for a "parallel track" of regulation through federal nuisance law. This Court arrived at that conclusion for very practical reasons. Congress "designated an expert agency," EPA, to serve as the primary regulator of air emissions, and that expert agency is "surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* at 2539. Unlike EPA, judges "lack the scientific, economic, and technological resources an agency can utilize." *Id.* Moreover, 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." *Id.* at 2540.

Committing to judges the complex task of weighing the scientific, environmental, public health, and economic concerns necessary to produce balanced emissions limitations "cannot be reconciled with the decisionmaking scheme Congress enacted" in the CAA. *Id.* Indeed, "[i]t would be extraordinary for Congress, after devising an

elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *Int'l Paper Co.*, 479 U.S. at 497.

Nuisance claims, with their vague standards and uncertain applications, are particularly pernicious foes of the carefully balanced regulatory ecosystem established by Congress in the CAA. That system cannot realistically coexist with a second, independent layer of ad hoc regulations generated in courtrooms based on nearly standardless balancing inherent to the determination of nuisance liability. In particular, regulating power companies that are costly to build, maintain, and operate, and collectively spend billions of dollars every year to comply with the requirements of air permits through the uncertain medium of nuisance lawsuits is simply unworkable. As this Court has recognized, "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *City of Milwaukee* v. *Illinois & Michigan*, 451 U.S. 304, 317 (1981).

If courts were to use the vagaries of nuisance doctrine to decide what emissions were "unreasonable" and therefore subject to tort liability, "it would be increasingly difficult for anyone to determine what standards govern. Energy policy cannot be set, and the environment cannot prosper, in this way." *TVA*, 615 F.3d at 298. "[W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application." *Id.* at 302. If courts were to "regulate smokestack emissions by the same principles [they] use to regulate prostitution, obstacles in highways, and bullfights," they would be "hard pressed to derive any manageable criteria." *Id.*

2. Ignoring the myriad warnings against and challenges of regulating via nuisance law, the Court of Appeals employed the saving clauses of the CAA to allow the state-law tort claims in this case to proceed. That decision ignores Congress' intent to promote economic growth and regulatory certainty through the CAA, and will undermine the permitting regime established by Congress to achieve those goals. This Court should not allow the saving clause tail to wag the regulatory dog.

The CAA's saving clauses do not bless the use of nuisance claims to attack permits. The Court of Appeals grounded its decision largely on its conclusion that the savings clauses require preservation of state tort claims. This Court has "repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (quoting *United States* v. *Locke*, 529 U.S. 89, 106 (2000)). A saving clause, in other words, "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) (quoting *Tex. & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

The Court of Appeals' reading of the saving clauses runs counter to the bedrock purposes and principles of the CAA. More importantly, it will heap crushing cost and uncertainty on an already overtaxed industry and undermine the permitting regime established by Congress.

## CONCLUSION

The question posed in this case is of vital importance to the regulated business community—including the entire U.S. industrial base—and the basic scheme of regulating air emissions established by Congress. "To re-

place duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole . . . industries at sea and potentially expose them to a welter of conflicting court orders across the country." *TVA*, 615 F.3d at 301. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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