No. 14-6499

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KATHY LITTLE, on behalf of themselves and all others similarly situated; DEBRA L. WALKER, on behalf of themselves and all others similarly situated; RICHARD EVANS, on behalf of themselves and all others similarly situated; PHILLIP WHITAKER; FAYE WHITAKER; GREG WALKER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

LOUISVILLE GAS AND ELECTRIC COMPANY and PPL CORPORATION,

Defendants-Appellants.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
CASE NO. 3:13-cv-01214-JHM-DW

BRIEF OF *AMICUS CURIAE* THE UTILITY AIR REGULATORY GROUP IN SUPPORT OF DEFENDANTS-APPELLANTS LOUISVILLE GAS AND ELECTRIC COMPANY AND PPL CORPORATION URGING REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-6499 Case Name: Little et al. v. Louisville Gas & Elec. Co.

Name of counsel: J. Philip Calabrese

Pursuant to 6th Cir. R. 26.1, Utility Air Regulatory Group
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on March 20, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ J. Philip Calabrese
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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GLOSSARY OF TERMS AND ACRONYMS

Act	Clean Air Act
Agency	United States Environmental Protection Agency
Board	Louisville Air Pollution Control Board
CAA	Clean Air Act
CWA	Clean Water Act
District	Louisville Metro Air Pollution Control District
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
SCRs	Selective Catalytic Reductions
SIP	State Implementation Plan
UARG	Utility Air Regulatory Group

STATEMENT OF INTEREST

This brief is filed on behalf of the Utility Air Regulatory Group ("UARG"), an *ad hoc* group of individual electric generating companies and national trade associations.[1] Many of UARG's 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 in Clean Air Act ("CAA") proceedings and litigation affecting the interests of electric generators.

Electric generating facilities, including the Cane Run facility at issue in this case, are subject to pervasive regulation under the CAA. The U.S. Environmental Protection Agency ("EPA" or "Agency") and state and local agencies establish standards and limits for air pollutants, based on health and welfare considerations and accounting for technological and economic factors. These standards are comprehensively listed in operating permits under the CAA, which UARG members rely on to include all applicable pollution-control requirements. The decision below would expose UARG members to liability under state common law

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or 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.

for activities authorized by these permits. Thus, UARG has a direct interest in this case.

Pursuant to Federal Rule of Appellate Procedure 29(a), UARG represents that all parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Congress established in the CAA a comprehensive system for air pollution control under which requirements are proposed, adopted, issued, and enforced by EPA and state and local agencies in a cooperative, transparent, and deliberative process. This federal-state regime provides the public, including Plaintiffs, multiple avenues for formulating, revising, challenging, and enforcing regulatory requirements. The result was a permit regulating emissions from Louisville Gas and Electric Company's Cane Run power plant, a permit enforceable by EPA, the state, and citizens. In fact, the emissions Plaintiffs contest in this lawsuit have already been addressed and fully resolved by proceedings before the Louisville Air Pollution Control Board ("Board").

Plaintiffs opted to operate outside of this comprehensive regulatory regime, ignoring the CAA's multiple avenues of recourse, and instead ran straight to the courthouse to mount a collateral attack on the facility's permit and the Board's determination. The Board investigated complaints about the Cane Run facility and resolved them through an Agreed Board Order No. 13-07, RE29-2, Page ID #443-

446. The Plaintiffs could have appealed this decision, Kentucky Revised Statutes Annotated § 77.315, but chose instead to file this litigation.

This procedural history highlights how nuisance suits such as this one undermine the CAA's purposes and methods for achieving its goals. They destroy the regulatory certainty CAA permits are supposed to provide. They circumvent the CAA's public participation provisions, bypass the technical expertise of the agencies to which Congress delegated standard-setting authority, and instead force trial courts and juries to tackle complex scientific problems and competing values. A decision to affirm the district court would be a prescription for chaos. For many of the same reasons the Supreme Court found federal common-law claims were displaced by the CAA in *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011) (hereinafter "*AEP*"), this Court should find Plaintiffs' state common-law claims preempted as well. This Court should reverse.

ARGUMENT

I. The District Court Failed to Apply the Correct Conflict Preemption Standard.

This appeal presents a straight-forward question: are the state common-law tort actions at issue here preempted by the CAA? For the cooperative federalism regulatory regime set forth in the CAA, the answer turns on whether the state actions conflict with the federal statute. The district court, however, erred by

confusing conflict preemption analysis with complete preemption, and, as a result, failed altogether to undertake a conflict preemption analysis.

A. The District Court Misunderstood the Standard for Conflict Preemption.

A key flaw with the district court's analysis stems from its incomplete analysis of *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989) (hereinafter "*Her Majesty*"), which addressed the jurisdictional issue of complete preemption. Because the district court did not distinguish the defense of *conflict preemption* from the jurisdictional concept of *complete preemption*, it misapprehended the significance of *Her Majesty* and failed to apply the correct legal standard.

To understand the district court's error, it is helpful to set out the framework of preemption law. The Supremacy Clause provides Congress's authority to preempt state law. *Watts v. United Parcel Serv., Inc.*, 701 F.3d 188, 191 (6th Cir. 2012). Preemption can be express or implied. *Kurns v. R.R. Friction Prods. Corp.*, 132 S.Ct. 1261, 1265 (2012). There are two kinds of implied preemption. Field preemption preempts state law "when the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively." *Id.* at 1266 (alteration in original) (citation and quotation omitted). Conflict preemption preempts state law "to the extent of any conflict with a federal statute." *Hillman v. Maretta*, 133 S.Ct. 1943, 1949-50 (2013) (citation and quotation omitted).

Complete preemption, on the other hand, concerns federal jurisdiction. Whether a case arises under federal law is typically determined using the well-pleaded complaint rule, which states "if the plaintiff's complaint relies only on state law claims, the case may not be removed," even if the defendant raises a preemption defense. *Powers v. Cottrell, Inc.*, 728 F.3d 509, 515 (6th Cir. 2013). Complete preemption is an exception to this rule: "if a state law has been completely preempted, any claim purportedly based on the preempted state law is considered a federal claim, and therefore removable." *Id*.

Complete preemption thus differs greatly from conflict preemption.[2] "A state law is *completely preempted* if the force of the federal statute is so '*extraordinary*' that it 'converts an ordinary state common-law complaint into one stating a federal claim.'" *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)) (emphasis added). "[C]omplete preemption is a very limited exception . . . largely limit[ed] . . . to a handful of federal statutes . . . and is applied only when the federal statutory language demonstrates that Congress has manifested a clear intent that claims not only be preempted under the federal law,

[2] *See Lehmann v. Brown*, 230 F.3d 916, 919 (7th Cir. 2000) ("[T]he phrase 'complete preemption' has caused confusion . . . by implying that preemption sometimes permits removal. Unfortunately 'complete preemption' is a misnomer, having nothing to do with preemption and everything to do with federal occupation of a field.").

but also that they be removable." *Hampton v. R.J. Corman R.R. Switching Co., LLC*, 683 F.3d 708, 713 (6th Cir. 2012) (quotations omitted). Conflict preemption, however, asks whether "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman*, 133 S.Ct. at 1950 (citation and quotation omitted).

This distinction is critical to understanding *Her Majesty*, where the "principal issue on appeal" was whether the plaintiffs' claims "were improvidently removed from state court." 874 F.2d at 334. In *Her Majesty*, the plaintiffs brought claims in state court under the Michigan Environmental Protection Act. *Id.* at 335. The defendants removed to federal court; the plaintiffs sought remand, arguing no federal question jurisdiction existed because their claims were based solely on state law. *Id.* The Sixth Circuit analyzed federal jurisdiction under complete preemption, which sets a higher standard than conflict preemption. *See id.* at 342-44 (heading "Complete Preemption"); *id.* at 343 ("The Court held that the savings clause 'negates the inference that Congress '*left no room*' for state causes of action . . . .'") (emphasis added) (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987)); *id.* at 344 ("[T]he defendants acknowledge that this area of law has not been completely preempted by Congress, but argue only what we perceive to be a defense of federal preemption. . . . However, the fact that a preemption defense can be raised *is not enough to justify removal*.") (emphasis added). Although the

court quoted part of *Ouellette* regarding preemption, it did so to emphasize how meritless it was to argue that the entire area of pollution control was *completely* preempted. *See id.* at 343.

This understanding of *Her Majesty* is not only dictated by its text, but it is the most logical given what the court decided. Whether there was complete preemption went directly to the court's jurisdiction. *Id.* at 344. Without complete preemption, there was no authority for the court to analyze the merits of the case, including the potential conflict preemption defense. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. . . . [W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.") (citation and quotation omitted); *Siding & Insulation Co., Inc. v. Acuity Mut. Ins. Co.*, 754 F.3d 367, 369 (6th Cir. 2014).

While the district court correctly stated that *Her Majesty* "only goes so far with regard to the facts of this case; the Sixth Circuit has not considered state common-law claims," *Little v. Louisville Gas & Electric Co.*, 33 F.Supp.3d 791, 817 (W.D. Ky. 2014), it erroneously concluded that *Her Majesty*, along with the Third Circuit's decision in *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), nonetheless "captures the prevailing law for CAA preemption," 33 F.Supp.3d at 817 (quoting *Merrick v. Diageo Ams. Supply, Inc.*, 5 F.Supp.3d 865

(W.D. Ky. 2014)). The Sixth Circuit was addressing complete preemption, not *conflict preemption*.[3]

B. The District Court Failed to Undertake the Conflict Preemption Analysis Compelled by *Ouellette* and This Court's Precedent.

This Court has enunciated a clear conflict preemption test. "'What is a sufficient obstacle' to warrant preemption 'is a matter of judgment, to be informed by examining the federal statute as a whole and *identifying its purpose and intended effects*.'" *Mik v. Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 165 (6th Cir. 2014) (emphasis added) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)). "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Id.* (citations and quotations omitted). "In any preemption analysis, the 'purpose of Congress is the ultimate touchstone,' as discerned from the statutory language and structure of the statute as a whole." *Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578, 584 (6th Cir. 2013) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)). "In order to

[3] Accordingly, even if *Her Majesty* could be read as discussing CAA conflict preemption, that discussion would be "dicta and not binding on subsequent panels." *Morrison v. Bd. of Trs. of Green Twp.*, 583 F.3d 394, 404 (6th Cir. 2009); *see also Mich. Spine & Brain Surgeons, PLLC v. State Farm Mut. Auto. Ins. Co.*, 758 F.3d 787, 792 (6th Cir. 2014).

develop 'a fair understanding of congressional purpose,' a reviewing court must study . . . the surrounding statutory structure and regulatory scheme, and *how Congress intended 'to affect business, consumers, and the law'* through these combined factors." *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 522 (6th Cir. 2001) (emphasis added) (quoting *Medtronic*, 518 U.S. at 485-86).

The district court committed its second fatal error when it failed to analyze this case under this Court's—and *Ouellette*'s—conflict preemption test and, instead applied the holding of *Merrick*, which relied on the Third Circuit's decision in *Bell*.

In *Bell*, the Third Circuit interpreted *Ouellette* as having "found that the Clean Water Act's savings clauses clearly preserved *some* state law tort actions, but that the text of the clauses did not provide a definitive answer to the question of whether suits based on the law of the *affected* state were preempted." 734 F.3d at 194 (citing *Ouellette*, 479 U.S. at 492, 497). *Bell* applied *Ouellette* to the CAA by comparing its savings clause to the CWA's. *Id.* at 195. The Third Circuit's analysis was not tied to whether state nuisance claims would have the same impact under both statutes; rather, the court first determined, on the basis of the similarity between the statutes' saving clauses, that there was "no meaningful difference between the [CWA] and the [CAA] for the purposes of our preemption analysis," and therefore *Ouellette*'s "no preemption" holding for source-state law applied. *Id.*

at 196-97. Only after the Third Circuit decided *Ouellette*'s holding applied did it look to the "regulatory structure established by the" CAA. *Id.* at 197. That is not a conflict preemption analysis, but only confirmation that it viewed the savings clause analysis as determinative.

The "saving clause . . . does *not* bar the ordinary working of conflict pre-emption principles." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000) (emphasis in original). *Ouellette* did not turn on the saving clauses but on a broader reading of the statute and its framework. 479 U.S. at 493 ("After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress.") (citation and quotations omitted); *id.* at 494-97 (lengthy analysis of how the CWA's methods would be impacted by affected-state nuisance suits). The Supreme Court stated because "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 the law of an affected State." *Id*. at 493. When the Court determined source-state common law actions were not preempted, it did not merely read the savings clauses but analyzed whether those suits would "frustrate the goals of the CWA." *See id.* at 498-500.

When the Fourth Circuit employed *Ouellette*'s functional conflict analysis, it determined the CAA preempts state common-law claims. *N. Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 303-04 (4th Cir. 2010) (hereinafter "*TVA*"). The court began its analysis by describing the CAA scheme in detail, showing how comprehensive, inclusive, and predictable the CAA was intended to be. *Id.* at 301. Based on this analysis, the court concluded Congress intended states to have "an extensive role in the Clean Air Act's regulatory regime through the SIP and permitting process," and thus it was cautious to "accord[] states a wholly different role and allow[] state nuisance law to contradict joint federal-state rules so meticulously drafted." *Id.* at 303. The court stated *Ouellette* held that the CWA's savings clauses "did not preserve a broad right for states to 'undermine this carefully drawn statute,'" and therefore looked at how nuisance suits would undermine the CAA's structure. *Id.* at 304. The Fourth Circuit noted such suits would undermine the CAA's emphasis on expert agencies determining emission controls using the best scientific and technical information available. *Id.* The court stressed that agencies had procedural tools courts lacked, such as notice-and-comment rulemaking that allows for input from "the varied practical perspectives of industry and environmental groups." *Id.* at 305. The court contrasted the predictability of agency standard-setting with "virtually impossible" to forecast

nuisance suits, which would make permits essentially "meaningless." *Id.* at 306 (quoting *Ouellette*, 479 U.S. at 497).

Bell contends that *Ouellette* addressed and dismissed these concerns. But the Supreme Court's analysis could not have addressed these concerns for the CAA because the CAA was not before the Court in *Ouellette*. Even with respect to state-source law under the CWA, the Court did not address the specific concerns presented here. In context, that is not surprising, because the petitioner in *Ouellette* primarily argued that affected-state common law was preempted. Pet'r's Br. in *Ouellette*, 1985 WL 670243, at *11-13, 15, 17-18.

Ouellette's source-state law statements should not automatically apply here. As to the CAA, those statements are dicta, and nothing in *Ouellette* indicates whether the CWA's details are similar to those of the CAA discussed here. Although the Court considered "the [CWA's] balance among federal, source-state, and affected-state interests," 479 U.S. at 499, it did not address the CAA's distribution of authority between expert agencies and courts, based on their differing institutional strengths. *See AEP*, 131 S.Ct. at 2539 ("It is altogether fitting that Congress designated an expert agency, here EPA, as best suited to serve as primary regulator of [air] emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions."); *see also infra* pp. 16-17. Although the Court acknowledged the

possibility of "an indeterminate number of potential regulations" from multiple states, *Ouellette*, 479 U.S. at 499, it did not consider the possibility of multiple inconsistent rulings within the same jurisdiction by different judges and juries, given the lack of "'anything resembling a principle in the common law of nuisance,'" *TVA*, 615 F.3d at 301-02 (quoting *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)). *See also infra* pp. 20-21.

Although the Court stated that "tension with the permit system" from nuisance suits would be manageable because "a source only is required to look to a single additional authority, whose rules should be relatively predictable," *Ouellette*, 479 U.S. at 499, it did not consider what would happen if those rules were not, in fact, predictable. *Cf. N. Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 593 F.Supp.2d 812, 830-31 (W.D.N.C. 2009), *rev'd*, 615 F.3d 291 (4th Cir. 2010) ("[W]hether a particular use is an unreasonable invasion of another's use and enjoyment of his property cannot be determined by exact rules") (hereinafter "*Cooper*"); *see also infra* pp. 20-21. Although the Court predicted states "can be expected to take into account their own nuisance laws in setting [CWA] permit requirements," *Ouellette*, 479 U.S. at 499, it did not consider a scenario like the one here, where Kentucky has specifically declined to employ its authority under 42 U.S.C. § 7416 to issue stricter emissions standards, KY. REV. STAT. ANN.

§§ 13A.120(1)(a), 224.10-100(26). Nor did it address a situation where the relevant state authority has evaluated and completely resolved complaints about emissions. The Court did not assess how nuisance suits would render irrelevant public participatory mechanisms or jeopardize the scientific basis for emissions standards because of the restrictions of the judicial process. *AEP*, 131 S.Ct. at 2540 ("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 by a record comprising the evidence the parties present."); *see also infra* pp. 20-21, 30.

In short, both the Third Circuit and the district court failed to evaluate whether these nuisance suits were inconsistent with the full purpose and objectives of Congress under the CAA. This error is particularly glaring given that *Ouellette*, despite concluding the CWA did not generally preempt source-state law, identified at least one instance in which source-state law would nonetheless be preempted because it would frustrate the CWA regulatory regime:

> [W]e note that the preemptive scope of the CWA necessarily includes *all* laws that are inconsistent with the full purposes and objectives of Congress. . . . [I]f, and to the extent, the law of a source State requires the application of affected-state substantive law on this particular issue, it would be pre-empted as well.

479 U.S. at 499 n.20 (citations and quotations omitted). These statements emphasize the Supreme Court's focus in conflict preemption analyses is whether the particular state laws actually "are inconsistent with the 'full purposes and objectives of Congress.'" *Id.* Here, that concern is especially relevant because the Board investigated complaints about Cane Run and resolved these issues in its Agreed Board Order. As the district court noted, this Order "specifically found that: (1) the required measures would 'fully address' the alleged violations cited in the [Notices of Violation]; (2) LG & E 'demonstrated compliance at the Cane Run Generating Station' by submitting to the Order's control plan; and (3) the proposed resolution in the Agreed Board Order was 'reasonable and adequate under the circumstances.'" *Little*, 33 F.Supp.3d at 796 (citation omitted). These nuisance claims frustrate the full purposes and objectives of Congress because they are a collateral attack on the CAA's proscribed order of decisionmaking and interfere with the Board's role under the CAA.

II. The District Court's Ruling Runs Contrary to Congress's Purpose in Enacting the Clean Air Act.

The district court's failure to apply the correct legal standard led it to ignore the practical impact of allowing these nuisance suits to proceed. The panoply of problems that will result from these nuisance suits is directly relevant to the conflict preemption analysis.

As this Court has explained, Congress's purpose can be understood by studying "the . . . statutory structure and regulatory scheme, and *how Congress intended to affect business, consumers, and the law* through these combined factors." *Tyrrell*, 248 F.3d at 522 (emphasis added) (citations and quotations omitted). The CAA envisions a role for states in establishing more stringent emission standards. *See* 42 U.S.C § 7416. The question remains whether nuisance suits are consistent with that role. Answering that question requires understanding what the world will look like if these suits are allowed to proceed across the nation. Therefore, the practical problems UARG and others have highlighted are not mere public policy arguments. *Cf. Bell*, 734 F.3d at 197. They are crucial to the conflict preemption analysis because they illustrate that Congress could not have intended to allow a regime that creates such substantial problems. *See TVA*, 615 F.3d at 301-02, 304-06.

A. Regulating Air Pollution Through Nuisance Law Will Produce Chaotic Results.

More than forty years ago, "Congress enacted the [CAA], . . . a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). "Federal, state, and local authorities extensively regulate and comprehensively oversee the operations of the [Cane Run facility] pursuant to their authority under the [CAA]." *See Bell*, 734 F.3d at 191. In this

cooperative federalism regime, EPA determines standards based on its expert judgment and input from scientists, regulated entities, and the public. *See* 42 U.S.C. § 7409 (National Ambient Air Quality Standards ("NAAQS")); *id.* § 7411(b) (standards of performance for stationary sources). States are then tasked with setting source-specific standards to meet the national standards. *Id.* § 7410 (state implementation for NAAQS); *id.* § 7411(c) (state implementation of standards of performance). The CAA requires states to include the "enforceable emission limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable [CAA] requirements" in their Title V operating permits. 42 U.S.C § 7661c(a).

The CAA's proper functioning depends on the certainty and predictability Congress designed its provisions to supply. Regulated sources rely on these elements, which Congress understood in enacting the CAA. *See Tyrrell*, 248 F.3d at 522 ("In order to develop a fair understanding of congressional purpose, a reviewing court must study . . . *how Congress intended to affect business, consumers, and the law* . . . .") (emphasis added) (citations and quotations omitted).

The CAA requires regulated sources to undergo a thorough and lengthy permitting process, which sets "in motion reliance interests and expectations on the part of those states and enterprises that have complied with its requirements."

TVA, 615 F.3d at 301; *see also id.* at 306 ("Regulations and permits . . . provide an opportunity for predictable standards that are scientifically grounded."). Sources expend significant resources to construct and operate their facilities. Pollution-control measures can cost over a billion dollars at a single large facility, possibly tilting the balance of when building or operating a facility makes economic sense. The ability of companies to make sound business plans depends in no small part on their ability to determine CAA compliance costs accurately. A company would hesitate to invest billions of dollars constructing a power plant with the required pollution controls without assurance it could recover that investment by generating electricity in compliance with its permit.

The CAA reflects Congress's balance of competing environmental, economic, and energy considerations. *See, e.g.*, 42 U.S.C. § 7401(a); *id.* § 7617 (requiring EPA to prepare economic impact assessments in certain rulemakings). A decision to affirm the district court below would cast aside this balancing in favor of case-by-case judicial determinations. Congress could not have created such a complicated, thorough system with the intention of having it so easily bypassed.

Nuisance suits entirely disrupt this regime. As Defendants-Appellants note, the district court "concluded that Plaintiffs' complaint . . . amounts to nothing more than an improper collateral attack on LG&E's permits, which authorize emissions,

and on [the District's] decision concerning the limits and conditions in those permits." Appellants' Br. at 23 (quotations omitted). The possibility of alternative emissions standards eliminates the certainty and predictability that allow industries to operate under the CAA's complex regulatory demands. Rather than seek compliance with standards adopted by expert agencies after careful deliberation and public input, 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 (citations and quotations omitted).

Given the ever-present threat of common-law litigation, regulated sources could never be certain what standards they were subject to. Companies "would be simply unable to determine [their] obligations ex ante under such a system, for any judge in any nuisance suit could modify them dramatically." *TVA*, 615 F.3d at 306. This uncertainty would make it difficult for source owners to secure financing and make decisions for future operations, limiting investment opportunities. Coupled with the expense of repeatedly litigating what emissions level is "reasonable," duplicative regulation by common law would impose enormous costs on sources.

Furthermore, nuisance standards are "'vague' and 'indeterminate,'" making it difficult to anticipate their outcomes. *Ouellette*, 479 U.S. at 496 (citation

omitted). The CAA's standards are "inclusive[] and predictab[le]," *TVA*, 615 F.3d at 301, whereas nuisance law 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. "'[O]ne searches in vain . . . for anything resembling a principle in the common law of nuisance.'" *Id*. (alteration in original) (quoting *Lucas*, 505 U.S. at 1055 (Blackmun, J., dissenting)). As such, courts would "be hard pressed to derive any manageable criteria." *Id.* at 302. This inevitably creates severe uncertainty for sources, which would be unable to forecast what level of emissions might be deemed reasonable by a court or jury. "It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure." *Id.* (citation and quotations omitted).

The amorphous nature of nuisance law would create a "patchwork" of inconsistent emission control requirements across the nation, even for sources within the same jurisdiction. *Id.* at 302; *see also AEP*, 131 S.Ct. at 2540 ("[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court."). The CAA contemplates different geographical regions may require different standards for the same categories of sources, but this variation would be based on criteria established in the CAA and would not be arbitrary. Further, it would result from the input of scientists, state regulators, industry, and the public, while

nuisance suits are determined by judges with much less time to familiarize themselves with the complex scientific issues, and less access to scientific and policy evidence. The CAA's predictable regulatory framework would be undermined by 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." *TVA*, 615 F.3d at 298.

The district court decision the Fourth Circuit overturned in *TVA* provides a prime example of the problems nuisance suits present. After holding a twelve-day bench trial, the district court issued an opinion recounting the evidence it heard on the general effects of air pollutants on human health and the environment, *Cooper*, 593 F.Supp.2d at 821-25, the impact of TVA's plants on air quality in North Carolina, *id.* at 825-26, and the availability of control measures beyond those required by the state-issue permits for these plants, *id.* at 820-21. Based on this, the district court concluded, with hardly any analysis, that several of TVA's plants were public nuisances and, therefore, required "scrubbers" and "SCRs" (selective catalytic reductions) to be installed—control equipment costing hundreds of millions of dollars. *See id.* at 826, 827-28. The court did not engage in a fact-specific balancing of the harm from pollution as compared to the cost of pollution controls. The benefits of electrical generation only arose once, and there the court

summarily declared that although TVA's low-cost generation of power has a high social utility, "the vast extent of the harms caused in North Carolina by the secondary pollutants emitted by these plants outweighs any utility that may exist from leaving their pollution untreated." *Id.* at 831. The Fourth Circuit properly reversed.

This cost-benefit analysis is precisely what the CAA intends EPA and the states to do, not district courts. Nuisance suits turn courts into independent, duplicate regulators instead of reviewers of agency action. Further, the nuisance standards recited by the court were vague and open to varying interpretations under identical facts. *Id.* at 830 (evaluating whether the air pollutants "work[] significant hurt, inconvenience [and] damage") (alteration in original) (citation and quotations omitted); *id.* at 830-31 ("[W]hether a particular use is an unreasonable invasion of another's use and enjoyment of his property *cannot be determined by exact rules*, but must necessarily depend upon the circumstances of each case, such as locality and the character of the surroundings, the nature, utility and social value of the use, the extent and nature of the harm involved, the nature utility and social value of the use or enjoyment invaded, and the like.") (emphasis added) (citations and quotations omitted).

Even for sources located only miles apart, or the same source being sued in two different district courts, nuisance standards grant such wide decision-making

authority as to seriously undermine any attempts to predict their outcomes. The result would depend not on science and careful balance of statutory criteria by an expert agency, but on little more than the personal view of a judge or jury on "the circumstances of each case, such as locality and the character of the surroundings, the nature, utility and social value of the use, the extent and nature of the harm involved, the nature utility and social value of the use or enjoyment invaded, and the like." *Id.* at 830-31 (citations and quotations omitted). As the Fourth Circuit warned, "the 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." *TVA*, 615 F.3d at 301. This chaotic regime cannot be reconciled with the comprehensive and predictable system Congress put in place.

B. Affirming the District Court's Approach Will Result in a Flood of Collateral Attacks on CAA Standards and Permits.

The panel must reverse the district court's decision to prevent litigants from rushing to tort law to seek redress for what are complex regulatory problems. Just weeks after the Third Circuit's decision in *Bell*, another class action alleging similar claims was filed in Pennsylvania. Compl., *Jesso v. Hatfields Ferry Power Station*, No. 2:13-cv-01232-DSC (W.D. Pa. filed Aug. 27, 2013). Several other cases have also been filed, listed in Attachment A. This appeal concerns not just this particular case, but the viability of the CAA as a reliable and predictable system of regulation across the nation. Allowing these suits to go forward will

"scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air." *TVA*, 615 F.3d at 296. National environmental policy should not be established through ad hoc litigation, and yet that is what plaintiffs across the nation seek.

These cases are troubling collateral attacks on the CAA process, including permits issued by federal, state, or local authorities. This is particularly concerning given that there are multiple avenues for citizen involvement in the setting and enforcement of emission standards in the CAA.[4] Citizens can petition EPA to conduct a rulemaking, 5 U.S.C. § 553(e), and if EPA declines, they may challenge this decision, 42 U.S.C. § 7607(b). Citizens can comment on EPA rulemakings and challenge them once final. *Id*. § 7607(b), (d). Individuals can comment on proposed Title V operating permits and challenge their provisions once issued. *Id.* § 7661a(b)(6). Citizens may petition EPA to object to a permit, and if EPA refuses, citizens may judicially challenge this refusal. *Id.* § 7661d(b)(2). What is key, however, is that judicial review stemming from these participatory avenues is

[4] The CAA's citizen suit provision grants a broad right for citizens to enforce the emission standards or limitations issued under the CAA's authority, but this right is limited to allow deference to enforcement by expert agencies. *See* 42 U.S.C. § 7604(b) (requiring notice to EPA or the state of the alleged violation and barring a citizen suit from being brought if EPA or the state "is diligently prosecuting" the violation).

cabined by exhaustion provisions requiring Plaintiffs to raise only issues that were previously raised in the rulemaking or permitting process.[5]

Common-law tort suits allow parties a second bite at the apple, or even worse, to bypass these participatory structures entirely. Here, the process worked as it should: complaints were investigated by the Board and the Board resolved these issues through its proceedings and final Order. The Plaintiffs could have appealed the Board's decision but they chose to relinquish that opportunity and instead filed this action. This case and others will reduce confidence in government decisions, because the public will come to expect that any decision, no matter how thoroughly considered, can be overturned by arguments or information that were not presented during the decision-making process. Congress cannot have intended to create participatory mechanisms that could be so easily made irrelevant.

C. The Prospect of Nuisance Liability Will Make Operation and Development of Sources Difficult, Costly, and Uncertain.

The possibility of nuisance liability for permitted emissions brings unmanageable uncertainty to regulated sources. As discussed below, these suits

[5] *See* 42 U.S.C. § 7607(d)(7)(B) ("Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review."); *id.* §§ 7661a(b)(6), 7661d(b)(2) (same for permits); *see also* 40 C.F.R. § 70.4(b)(3)(xii) (challenge within 90 days of final permit action is "exclusive means for obtaining judicial review").

increase the costs of generating electricity and could decrease the reliability and availability of electricity. These costs would be passed on to consumers. A facility could comply with all pertinent CAA regulations and permits and still not confidently know the full cost of required pollution controls. That is precisely what happened here: the Board's Order determined that the control plan "demonstrated compliance at the Cane Run Generating Station," *Little*, 33 F.Supp.3d at 796 (citation omitted). But these nuisance claims seek additional action, above and beyond that required by the Board. A facility would have great difficulty forecasting its likely liability, both in terms of scope and timing, and this would discourage investment. Congress cannot have intended to create a system where a company, "no matter how well-meaning, would be simply unable to determine its obligations ex ante . . . for any judge in any nuisance suit could modify them dramatically." *TVA*, 615 F.3d at 306.

These results would be particularly damaging to UARG members, who generate the electricity that makes modern life possible. The American economy is structured around the assumption that electricity is readily available, affordable, and reliable. Nuisance claims against power plants endanger this assumption by allowing endless attacks on emissions standards outside of the comprehensive CAA system that accounts for the costs and benefits of pollution controls. And the suits themselves could be costly to plants, both because of the high cost of

litigation and because of the possibility that additional controls or operational restrictions would be required. These extra costs could significantly increase the price of electricity.

Further, to the extent additional controls required by nuisance suits outweigh the benefits of further operating, plants may choose to retire prematurely or reduce operations. This could have negative effects on the reliability of America's energy supply. In some regions of the country, a single judgment enjoining a large source from operating could 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,[6] the economy cannot withstand the strain a new flood of common-law suits would place on the energy industry. 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 sources forced out of business by tort suits.

[6] *AEO2014 Projects More Coal-Fired Power Plant Retirements by 2016 Than Have Been Scheduled*, U.S. ENERGY INFORMATION ADMINISTRATION (Feb. 14, 2014), http://www.eia.gov/todayinenergy/detail.cfm?id=15031.

D. Nuisance Suits Disrupt the Role Congress Intended the Expert Agencies to Play in Applying Their Expertise to Setting Emissions Standards.

The touchstone of preemption is Congress's purpose. It is therefore highly relevant that Congress chose expert agencies and state regulators, not the courts, to determine emission standards. As the U.S Supreme Court explained:

> The appropriate amount of [air pollution] regulation . . . cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.
>
> The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators.

AEP, 131 S.Ct. at 2539. Congress allocated primary regulatory responsibility to specialized agencies rather than courts because of their relative expertise and institutional capabilities. Congress's emphasis on EPA "as [the] primary regulator" of air pollutants is "altogether fitting" because an expert agency is "surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* Congress recognized the need for "a very high degree of specialized knowledge . . . that agencies rather than courts were likely to possess," and therefore "opted rather emphatically for the benefits of agency expertise" for developing emission standards. *TVA*, 615 F.3d at 304-05.

Agency decision-making also reflects the CAA's participation and public engagement values. When agencies issue permits, they listen to and interact with the public and industry to balance the multiple interests and values at play. *See* 42 U.S.C. § 7661a(b)(6). Agencies act through notice-and-comment rulemaking, *see id.* § 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.[7] The Board's proceedings reflected these public participation values. The Board held a public hearing prior to adopting the Agreed Board Order, providing members of the public, such as the Plaintiffs here, an opportunity to comment on the Board's suggested resolution. *Little*, 33 F.Supp.3d at 796.

The CAA's public participation provisions support Congress's goal of making environmental policy decisions comprehensive, responsive to public

[7] *See also International Cooperation - Public Participation Guide: Internet Resources on Public Participation - Benefits of Public Participation*, EPA, http://www2.epa.gov/international-cooperation/public-participation-guide-internet-resources-public-participation#benefits (last updated June 12, 2014) (noting National Science Academy study found public participation "improves the quality of federal agencies' decisions" and "increases the legitimacy of decisions in the eyes of those affected by them").

concerns, and legitimate in the eyes of the public. Courts, however, cannot receive extensive public comments on their decisions and are limited to receiving information from parties and *amici*. *AEP*, 131 S.Ct. at 2540 ("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 [state] regulators . . . ."). The CAA's public participation avenues have little purpose if plaintiffs can bring nuisance suits at any time over any emission standard contained in the facility's CAA permit.

The district court's decision improperly places trial courts in the place of the expert agencies, contrary to Congress's purpose. As the Supreme Court explained, Congress's "prescribed order of decisionmaking" made the expert administrative agency "the first decider under the [CAA]" and courts participate only through "review [of] agency action." *Id*. at 2539. As it did in *AEP*, the CAA's decision-making scheme should provide "yet another reason to resist setting emissions standards by judicial decree" via tort law. *Id.*

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32, I hereby certify that the foregoing Brief of *Amicus Curiae* Utility Air Regulatory Group in Support of Defendant-Appellant and Reversal of the United States District Court for the Western District of Kentucky contains 6,956 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court. The brief complies with the typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure as it was prepared using the Microsoft Word 2010 word processing program in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that on this 20th day of March, 2015, I served a copy of the foregoing Brief of *Amicus Curiae* Utility Air Regulatory Group in Support of Defendant-Appellant and Reversal of the United States District Court for the Western District of Kentucky electronically through the Court's CM/ECF system upon all counsel of record registered in CM/ECF.

s/ J. Philip Calabrese
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ATTACHMENT A

List of Cases Alleging State Common-Law Claims Based on Emissions

Alleyne v. Diageo USVI, Inc., No. SX-13-CV-143 (Super. Ct. V.I. filed Apr. 26, 2013).

Anderson v. FirstEnergy Corp., No. 5:13-cv-00141 (N.D. W.Va. filed Oct. 10, 2013).

Anderson v. FirstEnergy Generation, LLC, No. 2:13-cv-01733-CRE (W.D. Pa. filed Dec. 5, 2013).

Bell v. Cheswick Generating Station, 903 F.Supp.2d 314 (W.D. Pa. 2012), *rev'd*, 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S.Ct. 2696 (2014).

Cerny v. Marathon Oil Corp., No. SA-13-CA-562-XR, 2013 WL 5560483 (W.D. Tex. Oct. 7, 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. LACV021232, 2013 WL 6508484 (Muscatine Cnty. (Iowa) Dist. Ct. Apr. 1, 2013), *rev'd*, 848 N.W.2d 58 (Iowa 2014), *cert. denied*, No. 14-6264, 2014 WL 4542764 (Dec. 1, 2014).

Martin v. KCBX Terminals Co., No. 1:13-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., No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 July 30, 2013), *rev'd*, No. 2013-CA-002048-MR, 2014 WL 6092218 (Ky. Ct. App. Nov. 14, 2014).

Merrick v. Diageo Ams. Supply, Inc., 5 F.Supp.3d 865 (W.D. Ky. Mar. 19, 2014).

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

N. Carolina ex rel. Cooper v. Tenn. Valley Auth., 593 F.Supp.2d 812 (W.D.N.C. 2009), *rev'd*, 615 F.3d 291 (4th Cir. 2010), *cert. denied*, 132 S.Ct. 46 (2011).

Native Vill. of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Cal. 2009), *aff'd*, 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), *aff'd on other grounds*, 727 F.3d 274 (3rd Cir. 2013).