No. 14-6499

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KATHY LITTLE, *et al.*,

Plaintiff-Appellees,

v.

LOUISVILLE GAS & ELECTRIC COMPANY, *et al.*,

Defendant-Appellants,

On Appeal from the United States District Court
for the Western District of Kentucky (No. 3:13-cv-01214)

BRIEF OF AMICI CURIAE THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANT-APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(c)(1), and Sixth Circuit Rule 26.1, *amici curiae* the American Chemistry Council, the American Fuel & Petrochemical Manufacturers, the Chamber of Commerce of the United States of America, and the National Association of Manufacturers make 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.

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INTEREST OF *AMICI CURIAE*[1]

Amici and their members have a strong interest in this case. The American Chemistry Council ("ACC") is a not-for-profit trade association that represents the leading companies engaged in the business of chemistry, a $812 billion a year enterprise that constitutes a key element of the Nation's economy and the Nation's top exporting sector. 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 large industrial facilities that are among the most heavily regulated in the country. The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation; it represents 300,000 direct members and indirectly represents the interests of three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The National Association of Manufacturers ("NAM") is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 states; the NAM is the preeminent U.S.

[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored the brief in whole or in part, no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

manufacturers' association as well as the Nation's largest industrial trade association.

The business community, including *amici* and their members, have a particular interest in the national system of regulation for air pollutant emissions. Businesses currently must comply with regulations developed through a defined regulatory process, pursuant to the Clean Air Act, that gives all stakeholders a voice and allows businesses to plan investments and anticipate costs. The decision of the district court in this case fundamentally undermines that process by allowing courts to create and enforce as a matter of state common law restrictions on emissions of air pollutants that differ from those adopted pursuant to the Act by expert agencies, after consideration of the full range of relevant environmental and technological information and with input by all interested stakeholders. Companies operating in full compliance with the requirements of the Act, as well as any related state regulations permitted under the Act, would nonetheless face a material and continuing risk that they may be held monetarily liable for their emissions or enjoined from operating (or even forced to close) because they did not adopt any additional, unstated, and undefined emission-reduction methods that might be imposed in a common law suit. This is precisely the situation that the Clean Air Act was designed to avoid, and upsets the delicate balance between the benefits and burdens that regulations under the Act are intended to achieve.

Reversal of the district court's decision is urgently needed. If that decision is allowed to stand, it will encourage litigants to use the nearly limitless range of liability theories available under state common law to try to impose their own preferred emissions restrictions on enterprises and businesses. Litigants in prior cases have in fact already attempted to do so. *E.g.*, *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 852-53 (S.D. Miss. 2012) (nuisance, negligence, trespass), *aff'd*, 718 F.3d 460 (5th Cir. 2013). This Court should hold that the Clean Air Act preempts state common law nuisance claims of the type asserted in this case, and direct that plaintiffs' claims be dismissed.

INTRODUCTION AND SUMMARY

The Clean Air Act defines a single expert agency, the U.S. Environmental Protection Agency (EPA), as the "primary regulator" of air pollutants throughout the country. *Am. Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) ("*AEP*"). It sets forth in great detail the process by which EPA determines which pollutants should be regulated, how they should be regulated, and the specific role of state authorities in administering and enforcing the regulations. *Id.* As the U.S. Supreme Court recently held in *AEP*, the Act establishes a uniform and comprehensive national system of regulation, with "no room for a parallel track," and thus displaces all claims under federal common law seeking to impose air emissions standards different than those adopted pursuant to the Act. *Id.* at 2538.

The reasoning of *AEP* applies directly in this case. The claims here, like those in *AEP*, seek to hold the defendant liable under the common law of nuisance for alleged violations of emissions standards different from those adopted and imposed pursuant to the Act. While these claims are fashioned as arising under state common law, rather than federal common law, the fact remains that the claims in this case present precisely the same conflicts and inconsistencies with the Act as did the claims in *AEP*, and thus they are likewise precluded.

The district court nevertheless concluded that, notwithstanding the clear conflict between state common law air pollution claims and the regulatory system established by the Clean Air Act, such claims *cannot* be preempted because they fall within the "savings clause" of the Act, 42 U.S.C. § 7416. But that provision by its terms preserves only those state claims seeking to enforce emissions standards adopted by EPA or by state statute or regulation, not the much broader universe of claims under state common law. *Id.* The district court also suggested that its holding was required by *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), in which the Supreme Court concluded that certain common law water pollution suits are not preempted by the Clean Water Act. This fails to recognize, however, that the Court in *Ouellette* discussed unique language in the savings provision of that Act, *id.* at 485 (citing 33 U.S.C. § 1370(2))—language that is notably (and, as the legislative history shows, deliberately) excluded from the Clean Air Act.

In short, the decision below is inconsistent with *AEP*, *Ouellette* and other decisions of the Supreme Court and other courts, as well as the language, structure, and purpose of the Clean Air Act. That decision should be reversed.

STATUTORY BACKGROUND

The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, first passed by Congress in 1963, and amended several times thereafter,[2] is "a lengthy, detailed, technical, complex, and comprehensive response" to air pollution in the United States. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848 (1984). It vests in EPA responsibility to consider regulating any "air pollutant," defined broadly to encompass "any physical, chemical, [or] biological … substance … [which] enters the ambient air," 42 U.S.C. § 7602(g), and it authorizes EPA to adopt emissions standards and limitations for particular pollutants and sources—both mobile and stationary—when the agency makes particular findings as specified under the statute, *id.* §§ 7409, 7411, 7502, 7521. The Act is, in short, "sweeping" and "capacious." *Massachusetts v. EPA*, 549 U.S. 497, 528-32 (2007); see *North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291, 298 (4th Cir. 2010) ("*TVA*") ("To say this regulatory and permitting regime is comprehensive would be an understatement.").

[2] Pub. L. No. 88-206, 77 Stat. 392 (1963); Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2399 (1990).

Congress intended for the states to play a significant, but carefully delineated, role in implementing and enforcing these federal standards in collaboration with federal regulators. *See* 42 U.S.C. § 7401(a)(3) ("[A]ir pollution prevention [and] control at its source is the primary responsibility of States and local governments ...."); *id.* §§ 7413, 7477. This relationship between the federal government and the States, frequently called "cooperative federalism," allows state agencies to tailor environmental policies to local conditions without sacrificing national oversight and uniformity. See, *e.g.*, Jonathan H. Adler, *The Green Aspects of Printz*: *The Revival of Federalism and its Implications for Environmental Law*, 6 Geo. Mason L. Rev. 573 (1998).

1. Several programs under Title I of the Act authorize EPA to establish standards for emissions of "air pollutants" from stationary sources, including emissions of coal ash and other types of "fugitive dust". Among the most important is the system for promulgation and enforcement of the "[n]ational primary and secondary ambient air quality standards" (NAAQS). 42 U.S.C. § 7409. These standards, developed by EPA with public input, set the maximum permissible concentrations of a pollutant that may safely be present in the local ambient air with an adequate margin for safety. *Id.* §§ 7408-7409. The pollutants subject to a NAAQS are those that, in EPA's judgment, pose special risks to the public health and welfare—currently including ozone, sulfur dioxide, particulate

matter, nitrogen oxides, carbon monoxide, and lead. *See* 40 C.F.R. §§ 50.1-50.12. The Act requires the NAAQS to be reviewed and revised, as appropriate, every five years to ensure continued protection of the public health and welfare. 42 U.S.C. § 7409(d)(1).

While the NAAQS are established by EPA, decisions regarding how to meet those standards are assigned initially to the regulatory bodies of individual States. *Id.* § 7410(a)(1). Each State is required to undertake notice and comment rulemaking to develop a "state implementation plan" (SIP) that "provides for implementation, maintenance, and enforcement of [NAAQS] … within such State," *id.*, through "emission limitations and other control measures, means or techniques … as may be necessary or appropriate to meet the applicable requirements of [the Act]." *Id.* § 7410(a)(2)(A). All SIPs must be submitted to EPA for approval before they become final. *Id.* § 7410(a)(1), (k). Once approved, SIP requirements become federal law and are fully enforceable in federal court. *Id.*

The NAAQS and SIPs are, however, only one piece of the comprehensive statutory regime for regulating emissions from stationary sources. Under the "new source performance standard" (NSPS) program, for any category of stationary source that in the agency's view "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," EPA can issue ''standard[s] of performance'' requiring those sources

(both new and, under certain circumstances, existing) to attain "the degree of emission limitation achievable through the application of the best system of emission reduction." *Id.* § 7411(a), (b), (d).

Finally, air pollutants defined as "hazardous" are subject to the "national emission standards for hazardous air pollutants" (NESHAP) program. That program separately directs EPA to impose stringent technology-based limits that "require the maximum degree of reduction in emission of the hazardous air pollutant[]" that is achievable. *Id.* § 7412(d)(2).

Under all of these programs, the process of adopting or amending regulations is lengthy and deliberative, with ample opportunity for public participation. When proposing a rule, EPA generally must allow a period for public notice and comment, and the final rule must respond appropriately to those comments and justify any significant changes from the proposed rule based on those comments or related considerations. *See, e.g.*, *id.* § 7607(d). The comments on any given rule can be extensive, both in range and number. For a recent proposal to adopt standards of performance for certain power plants, for instance, the agency has already received more than 1.5 million comments—and expects to receive hundreds of thousands more before the comment period closes. *See* Anya Litvak, *EPA's Comment Dilemma*, Pittsburgh Post Gazette, Dec. 2, 2014. For these and other regulations, the rulemaking process can and often does take years

and involve contributions from stakeholders and interested persons across the Nation.

2. These programs are complemented and reinforced by the permitting provisions of Title V of the Act. Those provisions require States to administer a comprehensive permit program for sources emitting air pollutants, as necessary to satisfy applicable requirements for each source under the Act, including the NAAQS, NSPS, and NESHAP standards. 42 U.S.C. § 7661c. Permits must indicate how much of which regulated air pollutants a source is allowed to emit, and the standards to which it is subject. *Id.* "[E]ach permit is intended to be a source-specific bible for Clean Air Act compliance containing in a single, comprehensive set of documents, all [Clean Air Act] requirements relevant to the particular polluting source." *TVA*, 615 F.3d at 300.

All sources subject to the Title V permitting program must prepare a compliance plan and certify—at the time of the application and at least annually thereafter—compliance with all applicable requirements. 42 U.S.C. § 7661b. Permit applications must be approved by the relevant state permitting authority before a source may commence or continue operations. *Id.*; *see also id.* § 7661b(d) (providing that, for renewal applications, operating without a permit will not be deemed a violation if a timely application has been submitted but not yet acted upon).

3. The Act also provides several methods by which other parties (such as the plaintiffs in this case) may seek to impose new or different emissions standards than those developed by EPA or a state permitting authority, or challenge a source's compliance with existing standards. Any person may, for example, petition EPA to consider rulemaking with respect to any category of air pollution sources he or she contends poses a risk to the public. *See Massachusetts*, 549 U.S. at 516-17. The denial of such a petition is subject to judicial review in the courts of appeals, with the option of further review in the federal courts. *Id.* (citing 42 U.S.C. § 7607(b)).

With respect to particular sources subject to permitting requirements, any person may petition EPA to object to a permit application. 42 U.S.C. § 7661d(b)(2). Denial of such a petition is subject to review in federal court. *Id.* § 7607(b). Once a permit is approved, a "citizen suit" provision of the Act allows individuals to bring suit against any source "alleged … to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." *Id.* § 7604(a)(1). This provision offers yet another means by which individuals may seek to enforce the emissions standards imposed by EPA in conjunction with the state permitting authority.

4. Only *after* an emissions standard or restriction has been promulgated by EPA or a state permitting authority (under authority assigned by EPA), does the Act contemplate that a court may become involved in addressing or enforcing those requirements. The statute expressly "designate[s] an expert agency, … EPA, as … primary regulator" of air pollutant emissions. *AEP*, 131 S. Ct. at 2539; *see also TVA*, 615 F.3d at 304 ("Congress … opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with … judicially managed nuisance decrees"). This approach is eminently reasonable, given that "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *AEP*, 131 S. Ct. at 2539-40; *see id.* 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.").

This design is consistent with the "savings clause" of the Act. That provision states that "nothing in this [Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. This clause allows a "State or political subdivision thereof" to adopt affirmative emissions standards

and requirements through statutory enactment or regulatory procedures, subject to standard legislative and administrative process and review, which may thereafter be enforced in state or federal courts. *Id.* It does not, however, provide any authority for individuals to seek or judges and juries to create and then impose new emissions standards under state common law that have not otherwise been approved by any state regulatory body. *See id.* Such a result, as the Supreme Court and other courts have said, "cannot be reconciled with the decisionmaking scheme Congress enacted." *AEP*, 131 S. Ct. at 2540; *see also*, *e.g.*, *TVA*, 615 F.3d at 300.

ARGUMENT

Claims of the type at issue in this case, seeking to impose liability on companies based on emissions standards crafted as a matter of common law rather than pursuant to statute or regulation, are flatly inconsistent with the Clean Air Act and cannot be allowed to proceed. Such claims conflict directly with the structure and purpose of the Act, *infra* Part I, and indeed the Supreme Court has already held that these claims—when brought as a matter of federal common law—are displaced and unavailable, *infra* Part II. The savings clause of the Act, upon which the district court relied, does not by its terms and cannot be read to preserve nuisance claims such as these. *Infra* Part III. This Court should, in accordance with the statutory language and prior decisions of the Supreme Court and other

courts, declare these claims preempted by the Act and reverse the contrary decision below.

I. STATE COMMON LAW AIR POLLUTION CLAIMS CONFLICT WITH AND ARE PREEMPTED BY THE CLEAN AIR ACT.

State law, including state common law, is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (citation omitted); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000). There can be no doubt that state common law claims of the type asserted here, seeking to impose emissions standards and limitations different than those authorized by the Clean Air Act, would frustrate the "purposes and objectives" of the Act.

1. The Clean Air Act was, the Supreme Court has recognized, designed to provide a "comprehensive" approach to the regulation of air pollution in the United States. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). It tasks a single expert agency, EPA, with the responsibility to assess the problems associated with emissions of air pollutants from stationary sources across the country. *AEP*, 131 S. Ct. at 2538-39. When appropriate, based on the agency's assessment of the benefits and burdens of regulation, including considerations regarding "our Nation's energy needs and the possibility of economic disruption," the Act directs EPA to develop and promulgate a uniform set of standards

governing those emissions. *Id.*; *see* 42 U.S.C. §§ 7409-7412. To implement those standards, the Act establishes a permitting system to be administered by state authorities under EPA supervision. *AEP*, 131 S. Ct. at 2538-39; 42 U.S.C. §§ 7661a-7661d. The underlying purpose of these provisions—indeed, a preeminent goal of the Act itself—is to ensure some level of uniformity, certainty, and predictability in the application of air emissions standards throughout the Nation. *AEP*, 131 S. Ct. at 2538-39; *see also Gen. Motors*, 496 U.S. at 532.

That goal will be critically, perhaps fatally, undermined if claims of the sort alleged in this case are allowed to proceed. These claims do not seek to apply emissions standards developed by EPA, or adopted by a state legislature or regulatory body pursuant to the Act, but instead ask a court to create and enforce different emissions standards, as a matter of judicial common lawmaking, based on its own assessment of what is "reasonable[]" under the circumstances. Courts addressing these claims would not be bound to follow or even consider the determinations of EPA or state authorities concerning, for example, the appropriate technological standards and the benefits or burdens of regulation. In any individual case a judge (or jury) would be free to decide upon a permissible level of emissions absent from any established standard, and then to impose sanctions—either in the form of monetary damages or an injunction—if the facility's emissions exceeded that level.

Nothing could be more damaging to the interests in uniformity and predictability that the Clean Air Act was structured to advance. No longer could regulated entities, having successfully satisfied (often at great expense) all of the requirements imposed by the Act (including any state requirements imposed as prescribed by the Act) and obtained an operating permit approved by state and federal regulators following a public review, be certain that they will be allowed to operate in accordance with that permit. Quite the contrary, a company operating in full compliance with its permit and all other requirements under the Act, as well as any related state regulations adopted pursuant to the Act, would nonetheless face a significant and ongoing risk that it may be sued in court and held liable for its emissions. This would render it at least difficult, and likely impossible, for companies to manage their operations or plan investments, since "[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.

2. These problems are greatly exacerbated by the vagaries of nuisance law across the Nation. The standards imposed by nuisance are vague and amorphous; indeed, "one searches in vain ... for anything resembling a principle in the common law of nuisance." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). In nearly all jurisdictions the governing

standard is one of "reasonableness," to be assessed by "weighing ... the gravity of the harm against the utility of the conduct." Restatement (Second) of Torts, § 821B cmt. e (1979); *see also, e.g.*, W. Page Keeton et al., *Prosser & Keeton on Torts* 626 (5th ed. 1984). The breadth of this standard means that, even within a single jurisdiction, a company cannot be certain of how any particular factfinder will rule. Keeton et al., *supra*, at 616 ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people ...."). If two companies in the same jurisdiction are subject to the same permitting requirements and have the same level of air emissions, one may nevertheless be found liable and exposed to crushing damages, while the other's conduct may be declared to be in perfect conformity with the law. This is absolutely contrary to the Clean Air Act, particularly the citizen-suit provision, which allows individuals to enforce rules adopted under the Act—not to create and impose a new and different regulatory scheme.

These suits may indeed exacerbate the very problem they are supposed to address: air pollution. "Differing standards [across jurisdictions] could create perverse incentives for ... companies to increase utilization of plants in regions subject to less stringent judicial decrees." *TVA*, 615 F.3d at 302. Companies forced by judicial order to undertake immediate emissions control measures may not adopt those measures that would ultimately produce the greatest net reduction

in overall air pollution, as would be the case under EPA regulations, but instead may be driven by their need to respond quickly to "the most pressing legal demands." *Id.* In some circumstances, complying with the directives of an injunction will cause other emissions—potentially more harmful overall to the environment—to increase. *Id.* This result is avoided through the review and analysis provisions of the Clean Air Act, but is possible and probable under a regime governed by state common law standards. And the ever-present threat of unrestrained common law suits, with the possibility of huge damages awards, will prevent or deter many companies from investing in the construction of new facilities—facilities that will almost invariably be cleaner and more efficient than the older ones they replace.

The decision below, in short, threatens "to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air," resulting in a "balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Id.* at 296. That decision should be reversed, and common law claims of this sort declared preempted.

II. OTHER COURTS, INCLUDING THE U.S. SUPREME COURT, HAVE RECOGNIZED THAT COMMON LAW AIR POLLUTION CLAIMS CONFLICT WITH THE CLEAN AIR ACT.

This conclusion, that common law air pollution claims are preempted by the Clean Air Act, is not only required by the statute but also dictated by precedent—most notably the decision of the U.S. Supreme Court in *AEP*.

1. The specific issue presented in *AEP* was whether "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of … emissions from [regulated] plants … [of] air pollution subject to regulation under the Act." 131 S. Ct. at 2537. The Supreme Court held unequivocally that any such common law claims are indeed displaced. *Id.* The Act creates a precise and carefully balanced relationship between federal regulatory bodies, state regulatory bodies, and courts. *Id.* It "entrusts ... complex balancing to EPA in the first instance, in combination with state regulators," and with "extensive cooperation between federal and state [regulatory] authorities." *Id.* at 2539. Courts, by contrast, have only a secondary role, to review the expert agencies' decisions and ensure compliance with statutory requirements. *Id.* at 2539-40.

This "prescribed order of decisionmaking," the Court explained, is "altogether fitting" given that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."

Id. They cannot, for example, "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." *Id.* at 2540. Instead, they "are confined by a record comprising the evidence the parties present," and thus limited to a narrow assessment that takes into account only the potential impact on the parties before the court. *Id.* In short, "[t]he expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* at 2539.

There is no difference whatsoever between the claims in this case and those in *AEP* as regards their inconsistency with the regulatory system of the Clean Air Act. These claims, like those in *AEP*, are brought by private plaintiffs against a defendant subject to regulation under the Clean Air Act and seek to hold the defendant liable, under the common law of nuisance, for alleged violations of emissions restrictions that differ from the standards established by federal and state regulators pursuant to the Act. These claims, like those in *AEP*, would have judges and juries making decisions concerning appropriate emissions regulation that the Act entrusts in the first instance to EPA.

The only distinction is that these claims are fashioned as arising under state common law, whereas the claims in *AEP* (at least those addressed by the Court) were characterized as based on federal common law. But, whatever distinctions

normally exist between displacement and preemption analysis, they cannot change the fact that the claims in this case present precisely the same conflicts and inconsistencies with the Act as did the claims in *AEP*, and that the reasoning in *AEP* compels that these claims are precluded. *See id.* at 2537-38.

Indeed, *AEP*'s reasoning would seemingly apply with even greater force to claims under the law of individual States. State common law normally limits even further the class of interests that a judge or jury could consider, restricting them to the policy concerns of that particular jurisdiction—even though air pollutants by their very nature almost invariably implicate interstate and national interests. *See, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 103-05 & n.6 (1972) ("there is an overriding federal interest in the need for a uniform rule of decision" in air and water pollution cases); *Natural Res. Def. Council, Inc. v. EPA*, 478 F.2d 875, 880 (1st Cir. 1973) ("Air pollutants, by their nature, do not respect political boundaries ...."). In all events, the language and reasoning of *AEP*, and specifically its holding that the Clean Air Act contemplates a uniform national system of regulation with "no room for a parallel track," 131 S. Ct. at 2538, precludes common law claims like these, whether presented under federal or state law, that would impose different emissions standards than those adopted pursuant to the Act.

2. Other courts have properly recognized, in light of *AEP*, that these claims cannot be allowed to proceed. One federal court, addressing class action claims under state common law that sought to impose liability on sources of greenhouse gas emissions on grounds that those emissions contributed to global climate change and therefore constituted a "nuisance," held the claims preempted by the Clean Air Act. *Comer*, 839 F. Supp. 2d at 865. Citing *AEP*, it explained that "the plaintiffs were calling upon the federal courts to determine what amount of carbon-dioxide emissions is unreasonable as well as what level of reduction is practical, feasible, and economically viable"—determinations that "had been entrusted by Congress to the EPA." *Id.*

Most notable, however, is the decision of the Fourth Circuit in *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010). Addressing a claim brought under the law of the affected state, that opinion held that crafting air pollutant emissions limits based on "vague public nuisance standards," *id.* at 296—"the same principles we use to regulate prostitution, obstacles in highways, and bullfights," *id.* at 302 (citing Keeton et al., *supra*, at 643-45)—is fundamentally inconsistent with the regulatory system of the Clean Air Act. See *id.* ("The contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark."). In the Act, the court explained, "Congress … opted rather emphatically for the benefits of agency

expertise in setting standards of emissions controls, especially in comparison with … judicially managed nuisance decrees." *Id.* at 304; see also *id.* 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."). Particularly because the Act grants to States an "extensive" role in the regulatory system, including through the SIP and permitting process, "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," *TVA* held. *Id.* at 303.

This reasoning is flatly inconsistent with the decision of the district court. That decision, by allowing common law pollution claims to proceed, would upend the Clean Air Act's carefully balanced regulatory system and allow a private plaintiff to require a defendant to comply with different regulations and requirements than have been imposed by the expert agencies through the Act. The decision below therefore must be reversed and the claims in this case, like those at issue in *AEP* and *TVA*, must be deemed preempted.

III. THE SAVINGS CLAUSE OF THE CLEAN AIR ACT DOES NOT PRESERVE COMMON LAW AIR POLLUTION CLAIMS.

One reason given by the district court for its holding that these claims may proceed—notwithstanding their clear conflict with the federal regulatory structure—was that, in its view, they were expressly preserved by the savings

clause of the Clean Air Act. It noted that in *Ouellette* the Supreme Court had cited the savings clause of the Clean Water Act, which the district court described as "virtually identical" to that of the Clean Air Act, in holding the Clean Water Act does not preempt water pollution claims based on the common law of the source State.

1. This reflects a fundamental misreading of the savings clause of the Clean Air Act. The savings clause of the Act does not, by its own terms, preserve claims such as those raised in this case brought by individuals under the common law of nuisance. It provides that "nothing in this [Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. The plain language of this provision preserves only those state law claims seeking to enforce an emissions standard established through statute or regulation, not claims under state common law.[3] This reading is supported by other provisions in the Act,

[3] The Clean Air Act has an additional savings clause, located in the section of the Act creating a cause of action for citizen suits, which provides that "[n]othing *in this section* shall restrict any right which any person ... may have under any statute or common law to seek *enforcement* of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e) (emphasis added). However, by its terms, this savings clause provides only that the creation of a new cause of action in "this section"—that is, the citizen suit provision—does not preempt other causes of action that may exist. It says nothing about the preemptive effect of *other* sections of the Clean Air Act. *See, e.g.*, *Ouellette*, 479 U.S. at 493 (concluding that

which define the language in precisely this way, *id.* § 7604(f), and by the relevant legislative history, S. Rep. No. 91-1196, at 14-15 (1970).

This conclusion is confirmed, not undermined, by *Ouellette*. That opinion, in holding that state common law water pollution claims were preserved by a savings clause in the Clean Water Act, 33 U.S.C. § 1370, discussed language that was unique to that clause—language that was, notably, excluded from the savings clause of the Clean Air Act. 479 U.S. at 485. In particular, the *Ouellette* Court quoted the additional language from the Clean Water Act stating that "nothing in this [Act] shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* (quoting 33 U.S.C. § 1370). This is the language on which the Court's holding in *Ouellette* was based, not the language that appears in the savings clause of the Clean Air Act. *See id.* at 485. That clause, as *Ouellette* affirms by implication, cannot operate to preserve claims such as those in this case.

2. The decision below is also, more generally, contrary to conflict preemption jurisprudence. The district court focused on the language of the savings clauses and did not, as Supreme Court precedent requires, consider

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the citizen-suit savings clause of the Clean Water Act "merely says that '[n]othing in this section' *i.e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act.") (emphasis omitted).

whether a state common law nuisance suit "actually conflicts" with the Act as a whole, *Geier*, 529 U.S. at 871, by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Boggs v. Boggs*, 520 U.S. 833, 844 (1997). It is well-settled that a savings clause "does *not* bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869. Indeed, courts may not "give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* at 870. "In other words, the act cannot be held to destroy itself." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

Indeed, the holding in *Ouellette*, upon which the district court relied, did not turn exclusively on the language of the Clean Water Act's savings clauses. To the contrary, *Ouellette* recognized that "the plain language of the [savings clause] provisions on which respondents rely by no means compels the result they seek." 479 U.S. at 493. Concluding that "the Act itself does not speak directly to the issue," the Court instead was "guided by the goals and policies of the Act in determining whether it in fact pre-empts an action." *Id.* The district court should have similarly examined the "goals and policies" of the Clean Air Act, rather than uncritically applying the holding on the Clean Water Act in *Ouellette*, to an entirely separate statute. As the Supreme Court recently admonished, courts "must be careful not to apply rules applicable under one statute to a different statute

without careful and critical examination." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

The "goals and policies" of the regulatory schemes enacted pursuant to the Clean Water Act and the Clean Air Act differ in crucial respects. A principal focus of the Clean Air Act is the establishment and enforcement of uniform standards for air quality. 42 U.S.C. §§ 7408, 7411. These standards are developed by EPA based on its consideration of the risks associated with particular emissions from categories of stationary sources, balanced against the availability and reliability of control technologies, the need for economic development, and the costs and benefits of regulation. *Id.* This system—depending as it does on the issuance of prospective standards based on EPA's considered judgment concerning the benefits and burdens of regulation—is fundamentally inconsistent with common law adjudication that would allow for the imposition of liability based on standards developed by a judge or jury and retroactively applied against a facility. The regulatory structure of the Clean Water Act, by contrast, depends more on individualized assessments of specific point sources, and the waters into which the pollutant will be discharged, to judge whether the discharge at issue will adversely impact water quality and, if so, at what levels if any the discharge may be allowed. *See* 33 U.S.C. § 1342. In this context, there is less cause to believe that a common

law adjudication of liability in a single district will directly interfere with or undermine federal regulatory methods and goals. Congress could then have chosen to preempt common law air pollution claims in the Clean Air Act, while deciding that water pollution claims could be preserved (through the distinct language that appears in the savings clause of that Act).

* * *

When the correct inquiry is considered—whether the state common law nuisance claims at issue here conflict with the complex and carefully calibrated structure of the Clean Air Act—the answer is clearly that the claims must be preempted. That conclusion is required by the reasoning of *AEP*, and supported by a long line of preemption jurisprudence of the Supreme Court and other courts. This Court should join that line of authority, and hold that the state common law claims in this case cannot proceed.

CONCLUSION

For all of these reasons, and those set forth in the brief of defendant-appellants, the judgment of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(c) and 32(a)(7)(B) because this brief contains 6,470 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the requirements of Federal Rule of Appellate Procedure 29(c), the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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