No. 14-307

IN THE

Supreme Court of the United States

GRAIN PROCESSING CORPORATION,
Petitioner,
v.
LAURIE FREEMAN, SHARON MOCKMOORE, BECCY BOYSEL, GARY D. BOYSEL, LINDA L. GOREHAM, GARY R. GOREHAM, KELCY BRACKETT & BOBBIE LYNN WEATHERMAN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Iowa

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, NUCLEAR ENERGY INSTITUTE, CORN REFINERS ASSOCIATION, COUNCIL OF INDUSTRIAL BOILER OWNERS, METALS SERVICE CENTER INSTITUTE, AND NATIONAL SHOOTING SPORTS FOUNDATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTERESTS OF *AMICI CURIAE* [1]

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

The **National Mining Association** ("NMA") is a national trade association whose members produce most of America's coal, metals and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources. *See* NMA's website at http://www.nma.org/

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

The **Nuclear Energy Institute** (NEI) is the organization responsible for establishing and advocating a unified policy on matters affecting the nuclear energy industry. NEI represents the commercial nuclear energy industry in litigation and on the regulatory aspects of generic operational and technical matters. NEI's members include every entity licensed by the U.S. Nuclear Regulatory Commission ("NRC") to operate commercial nuclear power plants or to store commercial used nuclear fuel, as well as nuclear plant designers, architect-engineer firms, nuclear fuel fabricators, and other organizations involved in the nuclear energy industry. *See* NEI's website at http://www.nei.org/

The **Corn Refiners Association** ("CRA") is the national trade association representing the corn refining industry of the United States. The association and its predecessors have served this important segment of American agribusiness since 1913. The six member companies of CRA use over 1.4 billion bushels of U.S.-grown corn to produce a broad array of food, industrial, and feed products for Americans and for the world market. *See* CRA's website, at http://www.corn.org.

The **Council of Industrial Boiler Owners** ("CIBO") is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates with members representing major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of industrial, commercial and institutional ("ICI") boiler and fuel combination currently in operation. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost-

effective energy and environmental regulations for ICI boilers. *See* CIBO's website at http://www.cibo.org.

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

The **National Shooting Sports Foundation, Inc**. ("NSSF") is the trade association for America's firearms industry. NSSF's mission is to promote, protect and preserve hunting and shooting sports. NSSF's over 10,000 members include businesses such as firearms manufacturers and owners and operators of shooting ranges. *See* NSSF's website at http://www.nssf.org/

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

and predictability necessary for successful business planning and operations.

INTRODUCTION

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

SUMMARY OF THE ARGUMENT

The parties' arguments frame strikingly different positions regarding how air pollution in the United States should be controlled. Petitioners argue that the CAA sets forth a comprehensive system of "cooperative federalism" under which a unitary permitting program governs emission levels by each source, and under which the exclusive methods for controlling air pollution are specified. Respondents assert that the CAA's system exists concurrently with common law remedies under state law, such as public nuisance, under which emissions can be controlled prospectively by equitable relief, and influenced retrospectively by awards of injunctive relief or money damages. They insist that such relief is available even when sources are in full compliance with CAA permits.

In this brief, *Amici* focus on three reasons why this Court should grant certiorari to review the Iowa Supreme Court's decision:

First, this case presents an ideal opportunity to resolve the lingering question presented by the remand of *American Electric Power v. Connecticut*, 131 S.Ct. 2527 (2011). In *AEP*, the Court decided that public nuisance claims under federal common law were "displaced" by the CAA, but remanded the question of whether state claims were preempted to the Second Circuit for consideration. After remand, the Second Circuit was unable to resolve the issue because plaintiffs withdrew their complaints. The issue then arose in other federal and state courts – which reached an array of conflicting decisions. As a result, there is not only a significant "split" between decisions in the Circuit Courts, but also between and within the judiciaries of states – creating a confusing quagmire of disparate decisions that is especially "ripe" for this Court's review and clarification.

Second, this case presents an opportunity to resolve the serious conflicts currently existing between the Federal Circuits and within the state courts regarding the CAA's preemption of nuisance claims under state common law. Although this Court declined to review *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) ("*Bell*") earlier this year, *Bell* remains in stark conflict with *North Carolina ex. Rel. Cooper v. Tennessee Valley Authority*, 615 F.2d 291, 306 (4th Cir. 2010) ("*TVA*") and other federal authorities. Moreover, apart from the present case, state courts are also in conflict, most notably in Kentucky, where dueling state courts based there have reached conflicting results regarding the same facility. Whether examined as a macrocosm or a

microcosm, the preemption issue is still divisive in the nation's courts – and the situation will not improve without a definitive resolution only this Court can provide.

Third, public nuisance litigation threatens one of the CAA's most important methods of pollution control, namely, the permits issued pursuant to the CAA's authority. These permits specify clear standards that guarantee certainty, predictability, and evenhandedness to the regulated community. They are an essential part of the CAA's system by which the federal and state governments control air pollution. Such a process – which substitutes *ad hoc* decisions for considered regulatory policy – cannot be reconciled with the goals and purposes of the CAA. Unless this Court grants review and reverses the Third Circuit's decision, the predictability and certainty of the CAA's carefully designed permitting system will be replaced by the mutability and malleability of state common law – and the efficacy of the CAA's pollution control system will surely be compromised.

I. The "Unanswered Questions" of *AEP v. Connecticut* Should be Addressed.

This Court has not been silent regarding the danger that public nuisance litigation poses to the nation's ability to control pollution effectively. Under the Clean Water Act, the Court held that interstate nuisance suits stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-492 (1987) (quoting *Hillsborough County v. Automated Medical Laboratories, Inc*., 471 U.S. 707, 713 (1985), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In *Ouellette*, the Court also admonished

against the "tolerat[ion]" of "common-law suits that have the potential to undermine this regulatory structure," *id.* at 497, and singled out nuisance standards in particular as "vague" and "indeterminate." *Id.* at 496 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)) (internal quotation marks omitted); *see also North Carolina ex. Rel. Cooper v. Tennessee Valley Authority*, 615 F.2d 291, 306 (4th Cir. 2010) ("TVA").

Recently, the Court rejected an attempt to use public nuisance litigation under "federal common law" to control air pollution. *See American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"). Although the issue in *AEP* concerned "displacement" of federal common law, rather than "preemption" of state common law, the same concerns justify review of Petitioner's preemption arguments here. Significantly, the Court remanded *AEP* for consideration of the precise preemption question raised by Petitioners here, *AEP*, 131 S. Ct. at 2540, but the plaintiffs withdrew their complaints and the issue was not addressed on remand. Since that time, both federal and state courts have addressed the preemption question – and reached conflicting decisions. Accordingly, it is a logical and essential "next step" to decide whether the state tort remedy is preempted. Unless that issue is addressed by granting certiorari here, the scope and reliability of the CAA's programs will remain clouded by uncertainty.

This Court's reasoning supporting three of its holdings in *AEP* strongly supports granting certiorari. The first holding clarifies the CAA's clear allocation of regulatory responsibility to "EPA in the first instance, in combination with state regulators." *Id.* at 2539. Although the CAA requires a "complex balancing" of

competing interests by administrative authorities, *id*., neither *AEP* nor the CAA recognizes any role for federal or state courts in the "balancing process" that underlies air pollution control. Although parties aggrieved by administrative decisions may seek judicial review, *id*., neither federal nor state courts have the authority to interfere with that process through tort law. By its terms, the CAA concentrates all regulatory authority in the EPA and state regulators – and "leaves no room" for judges and juries to participate by tort actions. There is no reason why this plenary allocation to EPA and state regulators should not be given effect according to its terms.

A second holding in *AEP* concludes that courts lack the resources and tools needed to accomplish CAA's regulatory goals:

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

Id. at 2539-2540. This holding provides the reasons why Congress entrusted the EPA with "primary" regulatory authority "in the first instance," and empowered the agency to work "in combination with state regulators." *Id.* at 2539. Although the CAA "envisions extensive cooperation between federal and state authorities," *id.*, the Act conspicuously fails to include the federal and state judiciary as regulators because courts are not suited for these exercises. *See also TVA*, 615 F.3d at 305 ("[W]e doubt seriously that

Congress thought that a judge holding a twelve day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider.").

To make these judicial "disabilities" crystal clear, the *AEP* Court described a number of their limitations:

> Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined to a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decision binding other judges, even members of the same court.

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

Finally, a third holding in *AEP* rejected an alarming scenario raised in oral argument. Notwithstanding the disabilities discussed above, counsel for the plaintiffs insisted that "individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions are and then decide what level of

reduction is "practical, feasible and economically viable." *Id.* These determinations would be made for the defendants named in the two lawsuits launched by the plaintiffs, but "[s]imilar lawsuits could be mounted . . . against "thousands or hundreds or tens" of other defendants fitting the description of "large contributors" to greenhouse gas emissions." *Id*. The Court unanimously rejected this concept, holding that "the judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision-making scheme Congress enacted." *Id*.

When the claims in this case are matched with *AEP's* reasoning, it is apparent that the state tort remedy "interferes with the methods" by which the CAA "was designed to reach [its] goal," and that it has the potential "to undermine the regulatory structure." *See International Paper Co. v. Quellette*, 497 U.S. 481, 494, 497, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987). Here, plaintiffs seek injunctive relief and damages against GPC to compensate them for injuries and to require emission controls and equipment upgrades beyond those specified in permits issued under the CAA. That they do so in a state court under Iowa common law, rather than in a federal court under federal common law, is a distinction without a difference. Under the reasoning of *AEP*, public nuisance claims in either forum have the same disruptive and undermining effect on federal statutory and regulatory programs. Moreover, state judges do not have any greater resources or tools to address this issue than their federal counterparts. Both forums also lack the scientific, economic and technological resources readily available to administrative agencies.

Given *AEP's* serious concerns about the intolerable effects of public nuisance cases, and the limits of judicial power to resolve these controversies, it would be strange indeed if those problems were resolved merely because the claim is based on state common law. If that were so, federal courts acting under *diversity* jurisdiction would be required to adjudicate nuisance claims under state law despite the "disabilities" that precluded them from presiding over federal nuisance claims. Surely claims that are non-justiciable under federal common law do not become justicable merely because they are made under state law. Accordingly, since the same limitations that preclude adjudication in the federal judiciary apply equally to the state judiciary, *AEP's* reasoning should apply equally to both systems.

II. Significant Conflicts Between the Federal Circuits and Within the Nation's State Courts Should be Resolved.

The Iowa Supreme Court's decision represents just one example of the conflicting rulings that have accumulated regarding preemption of state tort remedies by the CAA. In view of the Court's denial of certiorari in *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014), a significant division regarding preemption persists between the Federal Circuits and within the nation's state courts. Only a decision by this Court can resolve these conflicts and the resulting uncertainties that threaten to exacerbate this controversy.

In *Bell*, the Third Circuit acknowledged that the Court in *AEP* "explicitly left open" the question of whether the CAA preempted public nuisance claims under state law. 734 F.3d at 196 at n.7. The *Bell* court

then held that state nuisance claims were not preempted because they were preserved by the CAA's "savings clause." *Id.* at 196-197. Other decisions have reached similar results. *See Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1285 (W.D. Tex. 1992).

The Fourth Circuit, however, took a different path. In *North Carolina ex. Rel. Cooper v. Tennessee Valley Authority*, 615 F.2d 291 (4th Cir. 2010) ("TVA"), the court held that basing air pollution controls on "vague public nuisance standards" is inconsistent with the CAA's regulatory system. *Id.* at 302. The court observed that "[t]he contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark," *Id.* at 304, and explained that Congress "opted rather emphatically for the benefits of agency expertise in setting standards for emissions controls," especially in comparison with "judicially managed nuisance decrees." *Id.* at 305.

Foreshadowing this Court's reasoning in *AEP*, the Fourth Circuit concluded that "we doubt seriously that Congress thought a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider." As a result, the Court held that "conflict preemption principles" caution against "allowing state nuisance law to contradict joint state-federal rules so meticulously drafted." *Id.* at 303; *see also Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013) (state nuisance claims would require court to determine "what amount of carbon-dioxide emissions is unreasonable as well as what level of reduction is

practical, feasible, and economically viable," a task "entrusted by Congress to the EPA." *Id*.

Although the preemption issue has just begun its divisive run in the state courts, the early results suggest that conflicts remain the trend. For example, two Kentucky courts recently disagreed regarding CAA preemption in *Merrick* v. *Brown-Forman Corp.*[2] and *Mills* v. *Buffalo Trace Distillery, Inc.*[3] In those cases, plaintiffs brought tort claims based on ethanol emissions from distilled spirits producers in neighboring counties. Although the cases were based on similar allegations, each court reached a different decision regarding whether the emissions can be regulated beyond the limits imposed by the CAA. Significantly, *Merrick* emphasized the functional conflict preemption analysis described in *AEP, TVA*, and *Ouellette* to find the tort claims preempted – while Mills relied on the "savings clause" analysis used in *Bell*.[4]

This example is particularly compelling because it demonstrates that sources can be subjected to conflicting requirements by neighboring courts in the same state. This emerging situation is consistent with the Fourth Circuit's prediction that "the uncertain

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[2] Order, *Merrick* v. *Brown-Forman Corp.*, Civ. Action No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 July 30, 2013) (finding CAA preemption of common law claims).

[3] Opinion & Order, *Mills* v. *Buffalo Trace Distillery, Inc.*, Civ. Action No. 12-CI-743 (Franklin Cir. Ct. (Ky.), Div. II Aug. 28, 2013) (rejecting CAA preemption of common law claims).

[4] *Compare* Merrick, Order at 3-4 *with* Mills, Opinion & Order at 6; *see also* Order on Reconsideration at 2, *Merrick v. Brown-Forman Corp*., Civ. Action No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 Nov. 26, 2013) (declining to reconsider ruling in light of *Bell*).

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" leading to "results that lack both clarity and legitimacy." *TVA*, 615 F.3d at 301. It also demonstrates that the conflicts between *TVA* and *Bell* are actively producing additional conflicts – even in states where neither case is a controlling precedent.

Given the Kentucky situation in microcosm, and the conflicts between *TVA* and *Bell* in macrocosm, the daunting dilemma described by Judge Wilkinson in *TVA* has already been realized:

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

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

Such a scenario strikes at the structural heart of the CAA, namely, the Act's allocation of priorities and responsibilities within a system of "cooperative federalism." When Congress passed the CAA, it "made the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990) (emphasis added). If courts are permitted to conduct

these independent evaluations under state common law, they will exercise authority that conflicts with the "cooperative federalism" structure created by the CAA.

In such proceedings, the balance struck by administrative agencies could be "reopened" and "reexamined" *de novo* by nuisance lawsuits under state common law. There are no assurances or requirements that courts presiding over such actions will apply the same criteria or reach the same conclusions regarding the "reasonableness" of a defendant's emissions. The chaos and confusion resulting from multitudes of conflicting standards will irreparably compromise the CAA's cooperative structure.

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

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

III. The Threat Posed by Nuisance Litigation to the Reliability of Permits Issued Under the CAA Should be Removed.

Although the United States has made great progress in controlling and reducing air pollution, that progress is now threatened by the public nuisance litigation filed pursuant to state common law. Such litigation undermines the reliability of permits issued under the CAA to control air pollution and substitutes the judgments of state courts as the controlling authority – rather than the considered decisions of federal and state agencies to which Congress explicitly granted approval, implementation, and oversight, of air pollution standards and controls.

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

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

> When large reductions in pollution are easy, everyone can afford to be lenient about how a baseline is measured or how different methods of pollution are compared. As the easy reductions play out, that leniency fades. *As competition heats up, the certainty, predictability, and evenhandedness of pollution reduction requirements become centrally important.*

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

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

As a result of these efforts, pollution control became the "basis for regulatory standard setting" throughout the agency's operations, including permitting and

enforcement. *Id.* at 106. Permitting and enforcement placed the agency into a position of "considerable bargaining power," and incorporating pollution control into those issues was "clearly an effective means for EPA to mandate particular pollution prevention methods or standards." *Id.*

Since their authorization in 1990, permits issued pursuant to the CAA have remained one of the EPA's most important tools for air pollution control. Simultaneously, they have also served as trustworthy guideposts for regulated parties in the planning and execution of business operations. The reliability, predictability, certainty and finality of CAA permits provide the stability needed for businesses to make investments that improve and expand their facilities and empower the development and improvement of their products. By providing clear regulatory standards to guide the regulated community's conduct, strong incentives to conform to those standards, and a secure permitted environment within which businesses conduct their operations, EPA has made great strides to reduce and control air pollution.[5]

Public nuisance litigation threatens this progress by undermining one of the CAA's most important

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

methods of pollution control, namely, the permits issued pursuant to the CAA's authority. These permits specify clear standards that guarantee certainty, predictability, and evenhandedness to the regulated community. They are an essential part of the CAA's system by which the federal and state governments control air pollution. Once permits are issued, they provide sufficient regulatory certainty and finality for industries to make the necessary capital investments to ensure compliance without sacrificing competitiveness.

In this way, the CAA's regulatory and permitting process provide an "informed assessment of competing interests" – an assessment that is "not limited to environmental benefits," but which also considers a broad array of other factors, including "our nation's energy needs and the possibility of economic disruption." *See AEP*, S. Ct. 2527, 2538-2539. The CAA's program creates a "level playing field" for industry that ensures that members of the regulated community are regulated similarly, thereby precluding any particular member from enjoying an unreasonable competitive advantage. The end results of this process are permits that provide definitive pollution control requirements – and which can be relied upon for future business planning and operations.

By contrast, common law lawsuits view the issues from a narrower perspective and entail unpredictable economic results. Courts presiding over such controversies lack the authority, tools, resources and expertise to ensure that their judgments maintain the "level playing field" so painstakingly created by the CAA's regulatory process. Moreover, unlike regulatory agencies, which apply clear standards to derive specific requirements for compliance, public nuisance lawsuits

have liability standards which are notoriously vague. There are no procedures to coordinate nuisance proceedings pending in different states – and many states lack procedural rules to coordinate similar proceedings within the same state. As a result, sources could be governed by a plethora of conflicting directives issued by state courts in multiple jurisdictions – or even by edicts issued by multiple state courts within the same state.

No consistent or informed environmental policies can emerge from such disparate proceedings. Since the evidence, rulings, and outcomes can vary according to the unique record of each case, there is no guarantee of consistent results even between similar facilities. Unless this Court grants review and reverses the Iowa Supreme Court's decision, the CAA's carefully designed permitting system will remain endangered by the vagaries of state common law.

CONCLUSION

The current "Circuit by Circuit" and "state by state" approach to the question of preemption precludes any uniform standards for environmental compliance and enforcement, and also vitiates any reliable basis for capital investment, expanded operations and workforce stability. Since the CAA was enacted to promote all of those goals – as well as to promote jobs and a healthy economy – delaying review prolongs the uncertainty and intensifies the dilemma facing not only the courts, but also the regulated community. Under these circumstances, granting certiorari now presents the best opportunity to resolve this difficult question.

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

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