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VIA ELECTRONIC FILING

Blake A. Hawthorne
Clerk, Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Re: *Sciscoe v. Enbridge Gathering (North Texas), L.P., et al*, No. 15-0613

Dear Mr. Hawthorne:

The National Association of Manufacturers, the American Chemistry Council, the American Coatings Association, the Association of American Railroads, the Council of Industrial Boiler Owners, the American Foundry Society, and the Metals Service Center Institute respectfully submit this letter as Amici Curiae in support of the petitions for review in *Sciscoe v. Enbridge Gathering (North Texas), L.P., et al*, No. 15-0613.[1]

Identities of Amici Curiae

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. Further information may be found at the NAM's website: http://www.nam.org/

The **American Chemistry Council** ("ACC") represents the leading companies engaged in the business and science of chemistry, a $770 billion enterprise and a key element of the nation's economy. *See* ACC's website, http://www.americanchemistry.com.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Tex. R. App. P. 11.

The **American Coatings Association** ("ACA") represents both companies and professionals working in the paint and coatings industry. *See* ACA's website, http://www.paint.org.

The **Association of American Railroads** ("AAR") is an incorporated, non-profit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak and several commuter rail authorities. AAR's members operate approximately 85% of the rail industry's line-haul mileage, produce 97% of its freight revenue and employ 95% of rail workers. AAR frequently appears before Congress, the courts and administrative agencies on behalf of the railroad industry, including by participating as amicus curiae in cases that raise issues of vital interest to its members. See AAR's website at https://www.aar.org/

The **Council of Industrial Boiler Owners** ("CIBO") is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates with over 100 members representing 20 major industrial sectors. CIBO has not issued shares to the public, although many of CIBO's individual members have done so. *See* CIBO's website at https://www.cibo.org/

The **American Foundry Society** ("AFS") is a not-for-profit organization formed in 1896. With its headquarters in Schaumburg, Ill., AFS is the leading U.S. based metalcasting society, assisting member companies and individuals with information and services to promote and strengthen the metalcasting industry. The association is comprised of more than 7,500 individual members representing over 3,000 metalcasting firms, including foundries, suppliers, and customers. The majority of our member companies employ less than 100 employees. *See* the AFS website at http://www.afsinc.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. *See* MSCI's website at http://msci.org.

Interests of Amici Curiae

Amici Curiae are very concerned about the issues raised in this case. Respondents seek to impose liability under vague common law torts as a method to control otherwise lawful activities, such as emissions already expressly permitted by federal and state regulatory

agencies.[2] As manufacturers, many of Amici's members operate under rules, regulations and permits issued under the auspices of the Clean Air Act or other federal and state environmental programs.

But this problem is not limited to the manufacturing industry. Other businesses, such as the railroads, are covered by extensive federal regulations governing a wide range of their activities. At the same time, they are often targeted state-based lawsuits seeking to regulate the very conduct that is the subject of federal regulations. Like Petitioners herein, railroads often find themselves facing dilemmas created by distinct and often incompatible regulatory regimes.

If Plaintiffs' arguments are accepted, Amici Curiae's members will face uncertain, unpredictable, unforeseeable and potentially unbearable liabilities which arise on a "case by case" basis in state tort suits, rather than specific regulatory requirements which permit rational and reliable business planning. Amici are concerned that such liabilities will adversely influence investment, operations, and industrial growth not only in Texas, but also nationally.

The Importance of Granting Review

This case presents the Court with an issue that urgently merits review, namely, whether the federal Clean Air Act ("CAA") and its Texas counterpart, the Texas Clean Air Act ("TCAA"), preempt state tort claims for damages against facilities which lawfully operate in compliance with permits issued pursuant to those statutes.[3] The urgency of this question is underscored by the relentless pursuit of state tort remedies as an alternative means to control air pollution – a pursuit that, if allowed to continue in Texas, threatens to create a confusing and, ultimately, destructive "dual track" system where federal agencies and state courts use conflicting standards to redress the same concerns.[4]

To date, federal and state appellate courts have reached conflicting conclusions regarding this issue, and the United States Supreme Court has not yet resolved the divergence. *Compare North Carolina ex. rel. Cooper v. Tennessee Valley Authority*, 615 F.2d 291 (4th Cir. 2010),

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[2] There is no dispute that Petitioners were operating in compliance with federal and state regulations. *See Sciscoe v. Enbridge Gathering (North Texas), L.P., et al*, No. 07-13-00391-CV (Tex. App. – Amarillo, Jun 01, 2015), at 8-9.

[3] For purposes of this letter, these two statutes will be referred to collectively herein as the "CAA."

[4] *See generally,* Donald W. Fowler and Richard O. Faulk, *Federal Clean Air Act Preemption of Public Nuisance Claims: The Importance of Supreme Court Review*, 75 CONTEMP. LEG. NOTES (Wash. Leg. Found., Nov. 2014) available at http://www.wlf.org/upload/legalstudies/contemporarylegalnote/FowlerFaulkCLN3.pdf;

("TVA"), Comer v. Murphy Oil USA, 839 F.Supp.2d 849, 865 (S.D.Miss. 2012), and *United States v. EME Homer City Generation L.P.*, 823 F.Supp.2d 274, 296-97 (W.D.Penn.2011) (concluding that simultaneous regulation by permitting authorities and state court nuisance actions is inconsistent with the CAA) *with Merrick v. Diageo Americas Supply Inc.*, ___ F.3d ___, 2015 WL 6646818 (6th Cir., Nov. 2, 2015); *Bell v. Cheswick Generating Station,* 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) and *Grain Processing Corporation v. Freeman,* 848 N.W.2d 58 (Iowa 2014), *cert. denied,* 135 S.Ct. 712 (2014)(holding that compliance with CAA permits does not preempt state nuisance claims).

Granting review of this case offers an important opportunity to clarify the respective roles of federal and state environmental authorities and state courts in Texas air pollution control. Denying review, however, creates and prolongs doubt, uncertainty, and confusion, both in the regulated community and in the administrative agencies charged with protecting the public at large.

Arguments Supporting Review

The parties' arguments frame strikingly different positions regarding how air pollution in the Texas should be regulated. Petitioners argue that the federal Clean Air Act ("CAA") sets forth a comprehensive and exclusive system of "cooperative federalism" under which a unitary permitting program governs emission levels by each source, and under which the exclusive remedies for pollution control are specified. Respondents' argument, advanced in the courts below, asserts that the CAA's system is supplemented by common law remedies in state courts, such as trespass and nuisance.

The resolution of these arguments requires a comparative examination of the CAA and state common law remedies, followed by determinations of whether the state tort remedies interfere with the methods by which the CAA reaches its goals, and whether those remedies have the potential to undermine the CAA's regulatory scheme. *See International Paper Co. v. Quellette,* 497 U.S. 481, 494, 107 S.Ct. 805, 93 L.Ed. 2d 883 (1097)(holding that state tort remedy "interferes with the methods" by which the federal Clean Water Act "was intended to reach [its] goal, and that it has the potential "to undermine the regulatory structure.").

In this letter, Amici focus on how the state tort remedies sought by Respondents "interfere with" and potentially "undermine the regulatory structure" by which the CAA controls air pollution, namely, the specification of clear standards in permits that guarantee certainty, predictability, and evenhandedness to the regulated community. These standards establish a system by which the federal and state governments work together – with notice and comment opportunities to citizens and potentially impacted organizations – to ensure that all constituencies have an opportunity to be heard, and that all concerns are addressed before solutions are specified. Once permits are issued, they provide 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 American Electric Power v. Connecticut,* 131 S. Ct. 2527, 2538-39 (2011)("*AEP*"). For example, the Act expressly directs EPA to consider the economic impact of its actions,[5] as well as the employment effects of the administration or enforcement of the Act,[6] and even provides a mechanism for employees and employee representatives to request an investigation of employment impacts.[7] The CAA's program creates a "level playing field" for industry that ensures that all 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 – permits which can be relied upon for future business planning, capital investments, and predictable operations.

The decision below undermines this carefully balanced system. Common law tort remedies, particularly trespass and nuisance, are framed by nebulous criteria. They have a much narrower focus and unpredictable economic results. Unlike regulatory agencies, which apply clear standards to derive specific requirements for compliance, public nuisance lawsuits have liability standards which are notoriously vague.[8] Even the Texas Pattern Jury Charges fail to clarify the liability standards adequately – allowing juries to find a nuisance merely because something is "abnormal or out of place" with its surroundings.[9]

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[5] *See* 42 U.S.C. § 7617

[6] *See id.* at § 7621.

[7] *See id.* at § 7621(b)

[8] *See generally*, Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom: The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 947-950 (2007); Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L. J. 541 (2006); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745 (2003).

[9] *See* Eric J. Mayer and Brian Lowenberg, *Nuisance Joins the PJC*, THE ADVOCATE 54 (2012). Although a finding that the alleged nuisance is "abnormal or out of place in its surroundings" is essential to liability, "[t]here is no definition of "abnormal and out of place" in any Texas Supreme Court decision." *Id.*

Permit holders caught in the crossfire of these disparate forums will face a series of "Hobson's Choices" provided by tribunals that depend on the limited information provided by litigants, define their own standards, and impose unpredictable remedies. Capital investments made in reliance on permitted operations permits may be compromised or vitiated without regard to their beneficial economic effects on the community, state and nation. Under such circumstances, the carefully constructed system for public "notice and comment" in regulatory proceedings can be undermined by local judges and juries operating under amorphous criteria evaluated *ad hoc* in uncoordinated judicial tribunals.

These proceedings interfere with the regulatory process by redefining the circumstances by which permitted operations are allowed to continue. No longer will the term "permit" refer to an activity which is allowed after careful deliberation and plenary opportunities for public commentary. Instead, permitted business activities are *subject to jury nullification.* Under such circumstances, "[t]he uncertain twists and turns of litigation" will "leave whole industries at sea and 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. Such scenarios ultimately leads one to question "[w]hich standard is the hapless source to follow?" *Id.* at 302 (citing *Quellette,* 479 U.S. at 496, n. 17).

Surely, the narrowly focused perspective of local courts and jurors should not be allowed to undermine the CAA's considered and carefully constructed permitting process. Although the Act "envisions extensive cooperation between federal and state authorities," it conspicuously fails to include the federal and state judiciaries as regulators because courts are not equipped to pursue such exercises. *See AEP,* 131 S. Ct. at 2540. Although the Supreme Court's language in *AEP* addresses the disabilities of federal courts to create and enforce environmental policy through federal common law, the same limits also apply to state courts. 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 neither forum can bind judges in other venues to follow their reasoning and judgments.

Ultimately, Texas manufacturers, Texas employers, and the Texas economy will bear the consequences of the court of appeals' decision to undermine the existing regulatory process with judicially-created remedies. Those interests will be further compromised by competitive advantages provided to manufacturers located in other states which do not impose these enlarged liabilities. This Court should grant the petition for review to prevent these erroneous holdings from undermining the permitted operations of Texas businesses.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 12th day of November, 2015, a true and correct copy of the foregoing document was delivered via electronic filing on the following counsel of record for all parties:

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