No. 13-1013

In The
Supreme Court of the United States

GENON POWER MIDWEST, L.P.,

Petitioner,

v.

KRISTIE BELL AND JOAN LUPPE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Clean Air Act 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," except that the state standards or requirements may not be "less stringent" than those established under the Act. 42 U.S.C. § 7416. Respondents are neighbors of petitioner's power plant in Allegheny County, Pennsylvania, who alleged that they have suffered serious harms to their property and individual well-being as a result of coal dust, fly ash, and other emissions from the plant, and who seek damages and other relief under Pennsylvania common law. The question presented is whether the Third Circuit correctly held, in accord with the only other court of appeals to have addressed the issue, that the Act does not preempt such state-law claims.

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INTRODUCTION

This case is a state-law nuisance, negligence, and trespass action, in which Pennsylvania homeowners located near petitioner's coal-burning power plant sued petitioner under Pennsylvania common law, seeking damages and other relief for injuries resulting from the plant's operation. Straightforward state common-law actions like this one proceeded in courts throughout the country for decades before the 1970 enactment of the modern Clean Air Act (CAA or Act), as amended, 42 U.S.C. §§ 7401, *et seq.*, and have continued in courts throughout the country since then. Indeed, state common law has long been, and remains, the predominant (usually the only) means for individual property owners and businesses to obtain relief for physical injury, property damage, and other harms resulting from neighboring owners' release of smoke, dust, poisonous chemicals, and noxious odors.

Petitioner faults the Third Circuit for not holding the claims here preempted by the Act. Pet. 2. Petitioner's position has never been accepted by any court of appeals or state supreme court, and no decision of this Court supports it. It depends on the startling premise that, in enacting the CAA in 1970 (or at some unspecified later point), Congress stripped the people of their longstanding common-law rights to seek damages for health and property harms suffered from airborne pollutants and, at the same time, stripped the States of their historic authority to provide individual relief for such harms. That premise is the opposite of what Congress actually said and did in the CAA.

Even as it enacted an ambitious new federal regulatory framework in 1970, Congress affirmed that air

pollution prevention and control remains the "primary responsibility" of the States and local governments. 42 U.S.C. § 7401(a)(3). Congress expressly preserved States' authority to maintain and impose air pollution control requirements more "stringent" than the Act's federal minima, *id.* § 7416, with express (and carefully qualified) exceptions preempting state regulation of new mobile sources, *id.* § 7543. And when Congress enacted a new citizen suit provision to aid enforcement of the Act's regulatory requirements, *id.* § 7604, it did not provide a federal right of action through which those harmed by air pollution could seek compensation, instead leaving that task to the States and expressly affirming that the citizen suit provision did not disturb private parties' rights to seek relief "under common law," *id.* § 7604(e).

Indeed, it is hornbook law that the CAA preserves injured parties' rights to resort to state common law to redress injuries suffered from air pollution. This Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), which relied on savings clause language in the Clean Water Act (CWA) that tracks the CAA's—confirms what the statute (and hornbooks) make plain: that the statute does not annul States' authority to impose common law requirements on sources within their borders and to provide private remedies to parties harmed by air pollution that violates those standards.

Petitioner attempts (Pet. 19) to claim a "nationwide" division of authority on the question presented, but does not cite a single court of appeals or state high court case holding that source state common-law claims like the ones here are preempted. The solitary

appellate decision from which petitioner seeks to manufacture a "conflict," *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010) (*TVA*), is entirely consistent with the decision below.

Nor does the Court's decision in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*), support petitioner's plea for certiorari. *AEP*, which held—in a suit asking courts to enjoin five large utilities' interstate emissions of greenhouse gases—that the CAA displaced a *federal* common-law right of action, does not undermine the Third Circuit's conclusion that respondents' *state*-law claims against a local facility are not preempted. On the contrary, *AEP* highlighted the fundamental analytical—and constitutional—distinction between (1) judicial creation of a federal common-law rule in a field where Congress has acted and (2) application of state common law rules where Congress has not expressed a clear and manifest purpose to extinguish state authority.

This case, unlike *AEP* and *TVA*, is not about interstate or global air pollution; rather, it is the type of common-law suit courts have long entertained—both before the enactment of the modern CAA framework in 1970 and throughout the more than four decades since. The Third Circuit's interlocutory decision allowing respondents' claims to proceed is straightforward and correct, does not implicate a circuit split, and does not warrant further review.

STATEMENT OF THE CASE

A. State Common-Law Remedies for Harms from Air Pollution.

For centuries, landowners and others have had remedies at common law against those who injure them by releasing smoke, fumes, dust, or noxious odors that harm health, damage crops, injure business, or otherwise interfere with the use or enjoyment of their property. See*, e.g.*, W. Page Keeton, *et al.*, PROSSER & KEETON ON TORTS § 87 at 619-20 & nn. 11, 12 (5th ed. 1984). In the decades before the enactment of the CAA, scores of decisions from state courts throughout the country attested to the availability and practical importance of suits under common-law causes of action like public and private nuisance, negligence, and trespass, which provide relief for those harmed by various forms of air pollution.[1] The availability of relief, including damages, under the common

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[1] See, *e.g.*, *Davis v. Georgia-Pac. Corp.*, 445 P.2d 481 (Or. 1968) (damages judgment for harm to plaintiffs' residence and vegetation from emissions by pulp and paper plant); *Smith v. Pittston Co.*, 127 S.E.2d 79 (Va. 1962) (suit against coal processing plant for damages to farm from coal dust); *Kornoff v. Kingsburg Cotton Oil Co.*, 288 P.2d 507 (Cal. 1955) (neighboring landowners' trespass action against cotton ginners for depositing dust, lint and other ginning waste on their land); *Searcy v. Kentucky Utilities Co.*, 267 S.W.2d 71 (Ky. 1954) (nuisance action by farmers seeking damages against utility for interference with use of land caused by pollution from coal-burning power plant); *Kovacovich v. Phelps Dodge Corp.*, 156 P.2d 240 (Ariz. 1945) (damages judgments for injuries to crops from pollution from nearby smelters); *Green v. Arnold*, 150 S.W.2d 1075 (Tenn. App. 1940) (damages judgment for farmers whose property was harmed by nearby lead smelting plant); *N. Indiana Pub. Serv. Co. v. W.J. & M.S. Vesey*, 200 N.E. 620 (Ind. 1936) (private nuisance judgment against gas plant that emitted soot, smoke, "vile odors," and other offensive

law was well recognized on the eve of the CAA's enactment.

B. The Clean Air Act and its Express Preservation of State Authority to Enforce More Stringent Requirements.

The CAA—enacted in its modern form in 1970, with substantial amendments in 1977 and 1990—"seeks to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Even as it increased the federal role in air pollution control, the Act affirmed that prevention and control of air pollution at its source remains "primar[ily the] responsibility" of the States and local governments, 42 U.S.C. § 7401(a)(3), and employs a "cooperative federalism" structure, Pet. App. 3a, under which the States and the federal government are "partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). Among other things, the Act requires the EPA to establish national ambient air quality standards (NAAQS) for certain air pollutants and requires states to adopt plans achieving those standards. *See* 42 U.S.C. §§ 7409-10. It requires EPA to set standards for categories of facilities whose emissions are found to endanger public health, *id.* § 7411, and to regulate specified hazardous air pollutants, *id.* § 7412. The Act also establishes various permitting programs, including ones for controlling pollutants from new major pollution sources in clean air areas, *id.* §§ 7471-79,

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substances into neighbors' property); *Burford Coil Co. v. Wadley*, 41 S.W.2d 689 (Tex. Civ. App. 1931) (nuisance judgment against oil refinery that emitted oily and sooty substances, objectionable odors, and black smoke that reached neighbors' dairy).

and for consolidating administration of CAA requirements, *id.* § 7661a.

With certain exceptions (most notably, preemption of state emissions standards for new mobile vehicles), the Act expressly preserves States' traditional authority by making its federal standards a minimum that States may supplement with more stringent requirements under state law. See, *e.g.*, Jim Rossi, *et al.*, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. Rev. 1283, 1295-96 (2013) (citing Clean Air Act as a "paradigm example" of "floor preemption," in which federal law establishes minimum standards and States remain free to adopt more stringent ones); see also *Union Elec. Co. v. EPA,* 427 U.S. 246, 265 (1976) ("States may submit implementation plans more stringent than federal law requires and ... the [EPA] must approve such plans if they meet the minimum [Clean Air Act] requirements").

This Court's pre-Clean Air Act decisions established that control of local air pollution "clearly falls within the exercise of even the most traditional concept of ... the police power," *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 442 (1960) (upholding city smoke abatement ordinance against preemption challenge), so that federal preemption of States' regulation of local air pollution may in no circumstances be lightly inferred. *See id.* at 445.[2] In the

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[2] In *Huron Portland Cement*, this Court noted that Congress, in the 1955 Air Pollution Control Act, had "recognized the importance and legitimacy" of States' efforts at "elimination of air pollution to protect the health and enhance the cleanliness of the local community." 362 U.S. at 445 (citing 69 Stat. 322, and quoting legislative history disclaiming intent to interfere with state authority to address local pollution). The early version of the

1970 Act, however, Congress took special care to ensure that, while *less* stringent state laws would be superseded, States' choices to impose *more* stringent standards on local pollution sources would continue to be respected. Of particular significance here, Section 116 of the Act states that:

> Except as otherwise provided ... nothing in [the Clean Air 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; except that if [a federal or federally-approved] standard or limitation is in effect ..., such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent….

42 U.S.C. § 7416. This broad reservation echoes Congress's confirmation that "air pollution prevention (that is, the reduction or elimination, *through any measures*, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. 7401(a)(3) (emphasis added).

Section 116 reflected a congressional intent to preserve the existing base of state law, including state

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Clean Air Act, enacted in 1963, and the 1967 Air Quality Act likewise left intact state authority over air pollution control. See, *e.g.*, Pub. L. 90-148, § 2, 81 Stat. 485 (1967) (Air Quality Act's declaration that "prevention and control of air pollution at its source is the primary responsibility of States and local governments"); Pub. L. 88–206, § 1(a)(3), 77 Stat. 392 (1963) (identical language in original Clean Air Act).

common law. As a leading treatise explains, with the enactment of the modern CAA in 1970,

> [T]he experience of hundreds of years of attempting to combat air pollution by nuisance and other common law doctrines was not summarily swept aside. The retention of the common law as part of the deep background of the legislation is probably best expressed in Section 116 of the Act [42 U.S.C. 7416].

William H. Rodgers, Jr., ENVIRONMENTAL LAW § 3:1 (2009).

The 1970 Act includes a citizen-suit provision, 42 U.S.C. § 7604, which enables private citizens to enforce various provisions of the Act and allows for injunctive relief and civil penalties accruing to the Treasury, *id.* § 7604(g). Congress affirmed, however, that this provision does not "restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." *Id.* § 7604(e). The 1970 Senate Report described this provision as

> specifically preserv[ing] any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with standards under this Act would not be a defense to a common law action for pollution damages.

Sen. Rep. No. 91-1196, 91st Cong, 2d Sess. 39 (1970), *reprinted in* 1 A Legislative History of the Clean Air Amendments of 1970 at 438 (1970 Leg. Hist.). The Conference Committee Report confirmed that this section means that "[t]he right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected." Conf. Rep. No.

91-1783, 91st Cong., 2d Sess. 56 (1970), *reprinted in* 1970 Leg. Hist. at 206.[3]

Throughout the history of the CAA, state common law has played a central role in addressing an aspect of air pollution that the Act left *entirely* to the states: compensation of injured citizens. Because the Act provides no statutory or administrative compensatory remedy, private tort suits have remained "the only significant avenue for legal redress by those who suffer personal injuries and property damage due to the release of air pollutants." Arnold W. Reitze Jr., STATIONARY SOURCE AIR POLLUTION LAW § 1 at 4 (Envtl. Law Inst. 2005); *see also* Ronald J. Rychlak, *Common-Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 Miss. L.J. 657, 660-61 (1989). Since the modern CAA's enactment in 1970, tort actions for public and private nuisance, trespass, and negligence seeking to remedy injuries caused by air pollution have continued to be adjudicated throughout the country.[4]

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[3] The 1970 Act's broad preservation of state authority to adopt more stringent standards was retained when Congress significantly strengthened federal requirements in 1977 and 1990. See, *e.g.*, S. Rep. No. 101-228, 101st Cong., 2d Sess. 197 (1989) ("To assure that such preemption of State or local law, whether *statutory or common*, does not occur, environmental legislation enacted by the Congress has consistently evidenced great care to preserve State and local authority and the consequent remedies available to the citizens injured by the release of harmful substances to the environment.") (emphasis added).

[4] See, *e.g.*, *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 714 (Mo. 2007) (plaintiff class allegedly harmed by toxic emissions from smelter); *Miller v. Rohling*, 720 N.W.2d 562, 571 (Iowa 2006) (upholding in part damages judgment for neighbors of

grain storage facility from which chaff and dust blew onto plaintiffs' properties); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004) (steel manufacturing plant that emitted dust onto neighbors' land created nuisance under Kentucky law); *Amerada Hess Corp. v. Garza*, 973 S.W.2d 667, 678 (Tex. App. 1996) (approving class treatment of suit by neighbors of refineries, seeking damages for harmful emissions); *Thomsen v. Greve*, 4 Neb. App. 742 (1992) (upholding private nuisance judgment based on injury from smoke from neighbor's wood-burning stove, *cf.* 40 C.F.R. Pt. 60, Subpart AAA (performance standards for residential wood heaters)); *Foreign Car Ctr., Inc. v. Salem Suede, Inc.*, 660 N.E.2d 687 (Mass. App. 1996) (damages judgment against owner of leather finishing plant for lost business and other harms to local auto shop caused by fumes emanating from plant); *Arnoldt v. Ashland Oil, Inc.*, 412 S.E.2d 795 (W. Va. 1991) (affirming availability of private nuisance claim against refinery, but reversing judgment based on failure to prove material reduction in property value as required by Kentucky (source state) law); *Shutes v. Platte Chem. Co.*, 564 So. 2d 1382 (Miss. 1990) (remanding for trial on property owners' claims for negligence, trespass, and nuisance against neighboring chemical company); *Galaxy Carpet Mills, Inc. v. Massengill*, 255 Ga. 360 (1986) (coal-fired boilers that emitted soot, ash, and loud sounds created a nuisance); *Bradley v. Am. Smelting & Ref. Co.*, 709 P.2d 782, 784 (Wash. 1985) (action for damages in trespass and nuisance by neighbors of ASARCO's copper smelter based on deposit of heavy metals particles on plaintiffs' property); *Tant v. Dan River, Inc.*, 345 S.E.2d 495 (S.C. 1986) (upholding damage judgment against manufacturing plant that emitted soot that damaged plaintiffs' property); *Smejkal v. Empire Lite-Rock, Inc.*, 547 P.2d 1363 (Or. 1976) (rock-processing plant owner liable in damages to neighbor whose land and timber were harmed by air pollution from plant); *Barci v. Intalco Aluminum Corp*, 522 P.2d 1159 (Wash. 1974) (remanding for trial on claim for damages to plaintiff's property caused by pollutants from aluminum plant); *Meyer v. Harvey Aluminum*, 501 P.2d 795 (Or. 1972) (remanding for retrial of action for damages to crops caused by fumes from plant).

The CAA's broad preservation of state law and its preemption only of "less stringent" state pollution requirements is a foundational feature of the Nation's system of shared air pollution control responsibility. In addition to the availability of state-law causes of action for injured parties, state legislatures and agencies frequently adopt pollution standards more stringent than those promulgated under the Act.[5]

C. Facts and Proceedings Below

Respondents Kristie Bell and Joan Luppe own homes in Springdale, Pennsylvania, near the Cheswick Generating Station, a coal-fired power plant operated by petitioner GenOn. The power plant releases chemicals, odors, and particulates into respondents' neighborhood and onto their properties. These emissions include fly ash and unburned coal combustion byproducts that fall and settle as black dust and white powder, requiring "constant cleaning." Pet. App. 7a. The complaint alleges that the emissions have substantially damaged respondents' properties, lowered their property values, and interfered with their use and enjoyment of their land. *Id.*

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[5] See, *e.g.*, New Jersey Dept. of Env. Protection, "Air Toxics Program" available at http://www.nj.gov/dep/airtoxics/njatp.htm (noting presence of state air toxics standards that are "more stringent" than federal requirements); Bay Area Air Quality Management District, Air Quality Standards and Attainment Status (Table comparing California and federal air quality standards for various pollutants), available at http://hank.baaqmd.gov/pln/air_quality/ambient_air_quality.htm; Pamela D. Harvey & C. Mark Smith, *The Mercury's Falling: The Massachusetts Approach to Reducing Mercury in the Environment*, 30 Am. J.L. & Med. 245, 275 (2004) (discussing Massachusetts' mercury controls).

The permit issued by Pennsylvania for petitioner's power plant makes explicit that federal standards reflected in the permit do not override the permittee's common-law obligations. It states:

> Nothing in this permit shall be construed as impairing any right or remedy now existing or hereafter created in equity, common law or statutory law with respect to air pollution.

Pet. App. 6a-7a.

Respondents filed this case in the Court of Common Pleas of Allegheny County on behalf of themselves and others who own and live on residential property within a mile of the power plant, asserting, in relevant part, claims of nuisance, negligence/recklessness, and trespass under Pennsylvania common law, and seeking damages and injunctive relief. GenOn removed the case to federal court based on diversity jurisdiction and moved to dismiss, arguing that the plaintiffs' common-law claims were preempted by the CAA. The district court granted the motion and dismissed the case.

The Third Circuit reinstated plaintiffs' complaint, rejecting GenOn's federal preemption defense. The court of appeals grounded its decision in *Ouellette*, 479 U.S. 481, in which this Court concluded that, while the Clean Water Act's permitting regime precluded parties in downstream States from relying on that "affected" State's law as the basis for relief against an out-of-state polluter, "'nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the laws of the *source* State." Pet. App. 12a (quoting *Ouellette*, 479 U.S. at 497) (emphasis in *Ouellette*). The court of appeals explained that *Ouellette* had highlighted that "'[b]y its

terms the [CWA] allows States ... to impose higher standards on their own point sources,' and 'this authority may include the right to impose higher common-law as well as higher statutory restrictions.'" *Id.* (quoting *Ouellette*, 479 U.S. at 497).

The Third Circuit undertook "a textual comparison" of the CWA saving clause interpreted in *Ouellette* and the CAA provisions here, discerning "no meaningful difference between them." Pet. App. 13a. The court noted that all "other circuit courts to have examined this issue in depth" have reached the same conclusion. *Id.* at 14a-16a. Finding no relevant difference between the CAA's and CWA's treatment of common-law claims, the Third Circuit followed *Ouellette* and held that the CAA does not preempt plaintiffs' Pennsylvania common-law claims against petitioner. *Id.* at 16a-17a.

Finally, the court of appeals addressed GenOn's argument that allowing common-law suits to go forward would lead to inconsistent standards, emphasizing that this Court in *Ouellette* had rejected that same contention, concluding that "'[a]n action brought … under [source state] nuisance law would not frustrate'" the operation of the federal environmental protection statute. *Id.* at 18a (quoting *Ouellette*, 479 U.S. at 498).

GenOn petitioned for en banc review, which was denied, with no judge recording a dissent. Pet. App. 41a-42a.

REASONS FOR DENYING THE WRIT

The Third Circuit's decision reinstating respondents' complaint does not conflict with any decision of any federal or state appellate court and is fully consistent with the decisions of this Court. This Court's review is not warranted.

I. There Is No Circuit Split on The Question Presented.

Petitioner is unable to identify a circuit split on the question whether the CAA preempts claims under the law of the source state. Indeed, other than the decision below, petitioner cites only one court of appeals decision addressing the issue, *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989). That decision, like the Third Circuit's, followed *Ouellette* and held that the CAA does not preempt source state common-law claims. *See id.* at 344 ("If the plaintiffs succeed in state court, it will simply be an instance where a state is enacting and enforcing more stringent pollution controls as authorized by the CAA . ... [P]rinciples of comity and federalism require us to hold these [state-law] actions are not preempted by federal law.").

Nonetheless, Petitioner contends that there is a circuit split, claiming a conflict between the Third Circuit's decision here and the Fourth Circuit's in *TVA*, 615 F.3d 291. But that interstate pollution case did not decide the question presented here—whether Congress precluded states from enforcing common-law requirements on sources within their borders—much less indicate that it would do so differently than did the Third Circuit.

In *TVA*, the State of North Carolina brought a public nuisance suit seeking an injunction against all of

the TVA's coal-fired power plants in Alabama and Tennessee. After a trial, the district court entered an injunction against the four plants closest to North Carolina. The Fourth Circuit reversed, highlighting, in a part of its opinion liberally quoted by petitioner, the risk of "a patchwork of nuisance injunctions." 615 F.3d at 302. But the opinion then rejected "preemption of each and every conceivable suit under nuisance law," noting that *Ouellette* had "explicitly refrained from categorically preempting every nuisance action brought under source state law." *Id.* at 303.

The Fourth Circuit explained that the district court had erred in allowing enforcement of *North Carolina* common law against plants located in Alabama and Tennessee, in contravention of the "explicit" teaching of "[t]he Supreme Court's decision in *Ouellette*," 615 F.3d at 306. Confirming that it had the same understanding of CAA and of the source state/affected state preemption dichotomy the Third Circuit applied here, the Fourth Circuit then considered whether North Carolina had stated a claim under Alabama and Tennessee nuisance law, a step that would have been unnecessary had it embraced petitioner's preemption theory. 615 F.3d at 309-10. There is no conflict between *TVA* and the decision below.

Even apart from the distinction between source state and affected state law, this case and the *TVA* litigation differ markedly. *TVA* was a "public nuisance" case, *id.* at 296, brought by a State seeking an injunction against multiple power plants in other States. In contrast, this case is brought by private plaintiffs seeking damages for private nuisance, trespass, and negligence against a local facility in their own State. This case is a typical nuisance case that does not raise

interstate or national issues, or any concern about remedial "patchworks," and it does not conflict with *TVA*.[6]

II. The Third Circuit's Decision Is Broadly Supported by this Court's Precedents.

A. The Decision Below Follows From *Ouellette*.

As the Third Circuit explained, its rejection of petitioner's sweeping preemption defense follows from this Court's decision in *Ouellette*, which considered the effect of the CWA on private actions under state-common law. In holding preempted a common-law nuisance claim brought under Vermont law against a source located in New York, *Oullette* observed that "the control of interstate pollution is primarily a matter of federal law," 479 U.S. at 492. But the Court saw no basis in law for denying States' authority to apply their own common law to *in-state* sources. *Id.* at 492. Because the Act's saving clause "specifically allows source States to impose stricter standards," *Oullette*

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[6] Petitioner also cites *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), in which a district court found that the CAA preempted a damages action involving greenhouse gas emissions and climate change, noting that it was affirmed by the Fifth Circuit. That affirmance, however, was based not on preemption, but on the res judicata effect of a judgment of dismissal for lack of standing. See 718 F.3d 460 (5th Cir. 2013). In addition, petitioner cites *Freeman v. Grain Processing Corp.*, No. 021232 (Iowa Dist. Ct. Apr. 1, 2013), *appeal pending*, No. 13-0723 (Iowa Sup. Ct.). That trial-level decision (which relied on the since-reversed district court decision in this case) is not even authoritative within the State of Iowa, and petitioner's reliance on it only underscores the utter absence here of the kind of developed division among high courts and federal circuits that ordinarily precedes this Court's intervention.

explained, "the imposition of source-state law does not disrupt the regulatory partnership established by the [CWA's] permit system." *Id.* at 499.[7] The Court recognized that the "saving clause negates the inference that Congress 'left no room' for state causes of action," *id.*, and concluded that "nothing in the Act bar[red]" injured parties from "bringing a nuisance claim pursuant to the law of" the source state. *Id.*

Given the nearly identical language of the CAA's and CWA's saving clauses and the similar cooperative federalism structure of both Acts, as the Third Circuit observed, *Ouellette* provides powerful support for the conclusion that actions like those here, brought under the State's own law, are not preempted by the CAA.

Petitioner's efforts to distinguish *Ouellette* are unavailing. First, petitioner points out that while the saving clauses of the two statutes are strikingly parallel, the CWA includes additional language, not found in the CAA, preserving the "right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370.

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[7] The CWA's saving clause affirms "the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution," except that state standards may not be "less stringent" than required under the Act. 33 U.S.C. § 1370; *see also id.* § 1365(e) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief[.]"). The CWA was enacted in 1972, and closely tracked the CAA model from two years earlier. *E.g.*, H.R. Rep. 92-911 at 133 (1972) (Clean Water Act citizen suit provision "closely follows the concepts utilized in section 304 of the Clean Air Act").

Petitioner insists that the decision in *Ouellette* was grounded on this unique provision in the CWA's saving clause. Pet. 27. As the Third Circuit noted, however, *Ouellette* relied upon that language only as an additional basis for finding preemption of the affected downstream State's law: the Court reasoned that the "with respect to the waters" phrase "arguably limits the effect of the clause to discharges flowing *directly* into a State's own waters, *i.e.,* discharges from within the State." *Ouellette*, 479 U.S. at 493. The Court did not rely on this language in its subsequent holding that *source* state common-law claims were not preempted, *id.* at 497-99; there, the Court relied upon the express "terms" allowing the source state "to impose higher standards on their own point sources," *id.* at 497, plainly a reference to the "not ... less stringent" language also found in the CAA.

Nor may *Ouellette* be shunted aside by asserting vaguely that the "goals and policies" of the CWA and CAA "differ in crucial respects." Pet. 28. Petitioner points to the CAA's EPA-established NAAQs and argues that state-law claims would be inconsistent with this "uniform" system "depending as it does on the issuance of prospective standards based on EPA's considered judgment." *Id.* at 28-29. But the text of the statute refutes petitioner's argument. Congress expressly stated, in 42 U.S.C. § 7416, that States *could* continue to adopt and enforce standards that differ from federal ones (and from one another's), so long as they did not "adopt or enforce any … *less stringent*" ones. *Id.* (emphasis added). Congress thereby expressed its conclusion that respect for the historic "primary responsibility" of the States, and concern for the public health and the environment should prevail

over any desire for uniformity and centralized decisionmaking.[8]

Both the CWA and the CAA impose a regulatory floor, not a ceiling. Source states may "impose stricter standards" than federal law provides, but they may not relax controls below what the federal regime requires. *Ouellette*, 479 U.S. at 499. This federal floor figured prominently in the *Ouellette* Court's reasoning. After the Court observed that its decision did not "leave respondents without a remedy" because they could pursue their claims under source state common law, it hastened to add that the source State's emissions standards might be stricter than the applicable federal ones. *Id.* at 497 ("By its terms the CWA allows States such as New York to impose higher standards on their own point sources, and … this authority may include the right to impose higher common-law as well as higher statutory restrictions.").

B. This Court's Decisions Establish that State Common Law Can Impose "Requirements."

Petitioner concedes, as it must, that 42 U.S.C. § 7416 preserves States' authority to regulate air pollution more strictly than federal law requires. It contends, however, that the saving clause "preserves only those state law claims seeking to enforce an emissions standard established through statute or regulation, not claims under state common law." Pet. 26. Petitioner's assertion ignores the breadth of the statutory

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[8] Even for purposes of federal regulation, the NAAQs are by no means intended to serve as a limit on how clean the air should be. See, *e.g.*, 42 U.S.C. § 7470(1) (expressing purpose to address harms to public health and welfare that occur "notwithstanding" attainment of the national standards).

language, which preserves states' authority to adopt and enforce "*any* standard" or "requirement" respecting air pollution, 42 U.S.C. § 7416 (emphasis added), and it contradicts both *Ouellette*, 479 U.S. at 497-98 and *City of Milwaukee v. Illinois*, 451 U.S. 304, 328 (1981) (*Milwaukee II*), which recognized that identical language in the CWA embraced common-law claims.[9]

But even apart from *Ouellette* and *Milwaukee II*, petitioner's position runs square against this Court's precedents. The Court repeatedly has held that the word "requirements" in a preemption provision includes common-law duties. See*, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("Absent other indication, reference to a State's 'requirements' includes its common-law duties."); *Bates v. Dow Agrosciences, LLP*, 544 U.S. 431, 443 (2005) ("[T]he term 'requirements' …reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties.").[10] And since the petition was filed, this

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[9] Even were the question open, petitioner's proposed line between (preserved) state "statutes" and "regulations" and (preempted) "common law" would have been a peculiar one for Congress to have drawn. Most States have nuisance *statutes* that authorize private actions based on standards that track (sometimes subject to legislative qualification) traditional common-law rules. See, *e.g.*, Cal. Civ. Code § 3479 (California nuisance statute, enacted in 1872); Iowa Code § 657.1 (legislatively defining a nuisance and providing that "a civil action by ordinary proceedings may be brought to enjoin and abate the nuisance and to recover damages sustained on account of the nuisance").

[10] In other preemption cases, petitioner's amici have been vocal exponents of the principle that the common law operates as a form of regulation, and, in particular, of the conclusion that common-law rules are "requirements." See, *e.g.*, Br. of the Chamber of Commerce of the United States in Support of Respondent at 5,

Court has explained that "there surely can be no doubt" that a federal preemption provision that refers to "rule[s]" and "standard[s]" encompasses common-law requirements as well. *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1429 (2014).

In short, the CAA's saving clause, like the CWA's, plainly preserves state common-law causes of action.

C. *AEP* Does Not Support Petitioner.

Petitioner claims support from the Court's decision in *AEP*, 131 S. Ct. 2527. Pet. 22. But *AEP* did not decide a question of federal preemption of state law; rather, it held that a *federal* common-law remedy was unavailable to parties seeking redress for harms from greenhouse gas emissions. The Court did not purport to overrule historic principles of federalism, expressly incorporated in the CAA's saving clauses, let alone impose petitioner's rule requiring States to effectuate their air pollution policies exclusively through statute or executive rulemaking, rather than common-law adjudication. Indeed, *AEP* highlighted the constitutional and analytical distinction between displacement of a federal common-law remedy and preemption of a state-law remedy and recognized that its displacement analysis does not apply to preemption cases. *Id.* at 2537.

As this Court explained in *Milwaukee II*, "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." 451 U.S.

5-11, *Bates v. Dow AgroSciences, LLC*, No. 03-388 (entire brief section entitled "This Court's Decisions Clearly Establish That Common Law Duties Impose 'Requirements'").

at 312. Thus, unlike state common law, which is pervasive and generally applicable, federal common law exists in only a "few and restricted" instances. *Id.* at 313 (citation omitted). And unlike state common law, which regularly exists side by side with both federal and state statutes, federal common law is operative only "in absence of an applicable Act of Congress." *Id.* at 314 (quotation marks and citation omitted); *see also id.* at 327-28 (States' authority to adopt state-law standards more stringent than federal standards does not mean they "may call upon *federal* courts to employ *federal* common law") (emphasis in original).

Accordingly, in *AEP*, the Court explained that "legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest [congressional] purpose demanded for preemption of state law." 131 S. Ct. at 2537 (quoting *Milwaukee II*, 451 U.S. at 317). Rather, "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *Id.* (citations omitted). The Court determined that the CAA spoke directly to emissions of carbon dioxide from the defendants' plants, and thus that the federal common-law claims were displaced.

In contrast, state law is not preempted whenever Congress has spoken to a question. Rather, federal and state law very regularly co-exist on "parallel track[s]." *Id.* at 2538. As the Court recognized in *AEP*, when preemption is at issue, the analysis includes "'[d]ue regard for the presuppositions of our embracing federal system . . . as a promoter of democracy,'" and state law is not preempted unless that is the

"'clear and manifest'" purpose of Congress. *Id.* at 2537 (quoting *Milwaukee II*, 451 U.S. at 316-17).

Ouellette itself illustrates the distinction between displacement of federal common law and preemption of state common law. Prior to that decision, the Court held that amendments to the CWA had displaced the federal common law that had until then been applied in interstate water pollution disputes. *See Milwaukee II*, 451 U.S. 304. Nonetheless, *Ouellette* concluded that the statute did not preempt *source state* common law. And, in fact, *AEP*'s reference to preemption law is accompanied by a citation to *Ouellette*'s conclusion that the CWA "does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the source State.'" 131 S. Ct. at 2540 (quoting *Ouellette*, 479 U.S. at 497).

In any event, even if *AEP* had issued a clarion call to reconsider the CAA's preemptive effect on common-law claims based on interstate greenhouse gas emissions, review would not be warranted here: No state supreme court or circuit court has even considered that issue. And the state-law claims to which *AEP* adverted (but that it did not decide) could hardly be more different from those here, as the *AEP* plaintiffs sought a federal court remedy that would order the country's largest utilities to cut emissions sufficiently to affect global greenhouse gas levels and global climate change. The *AEP* defendants and their amici themselves raced to catalogue ways—problems of causation, redressability, proof, separation of powers, and judicial administrability, among others—in which the plaintiffs' claims were utterly unlike "traditional" tort

litigation.[11] And the case involved a problem whose interstate, indeed international, character was beyond dispute.

In contrast, this case does not involve "questions of national or international policy," 131 S. Ct. at 2539, or require a court to address all the special features that the *AEP* defendants argued made greenhouse gas tort litigation uniquely unworkable and improper. The homeowners here are not challenging the plant's contributions to global warming, but rather seeking redress for damage the plant has caused their property. Determining an entity's liability for dropping coal, ash, and other pollutants onto its neighbors' yards is precisely within the traditional competency of state courts. This kind of case does not involve any of the special inter-jurisdictional and practical challenges of adjudicating actions seeking to mitigate risks of global climate change by decreeing reductions in greenhouse gas emissions.

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[11] *See*, *e.g.*, Br. for the Petitioners at 14-15, *AEP*, No. 10-174 (stating that a federal common law action to abate greenhouse gas emissions would allow suits against "any" economic actor, and would require judges "to resolve fundamental questions of social and economic policy regarding the response to climate change"); *id.* at 50 (arguing that "Far from an 'ordinary' nuisance suit, a climate change tort case such as this could become the largest and most complex in the history of jurisprudence."); Br. Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioners at 3, *AEP*, No. 10-174 at 3, 13 (describing "stark contrast" between plaintiffs' climate claims and "traditional nuisance claims" of the sort courts had entertained "for centuries," in which a "discrete set of defendants allegedly directly caused harm by releasing obviously toxic or dangerous substances in a particular and nearby locale").

III. Petitioner's Policy Arguments Are Meritless and Better Directed to Congress.

A. Congress Did Not Silently Immunize CAA-Regulated Sources from Tort Liability.

The gist of petitioner's preemption theory is that, in enacting the nation's landmark clean air law in 1970—or perhaps in some later amendment—Congress silently immunized all air polluters from tort liability, silently took away the only means for injured individuals to obtain redress, and silently divested States of their centuries-old authority to impose requirements and limitations on air polluters (and to protect property rights) through their common law.[12] But had Congress meant to strip injured parties of all common-law remedies, "its failure even to hint at it is spectacularly odd." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 491 (1996). Tort remedies for air pollution harms had been well established long before even the 1955

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[12] Petitioner's theory as to what CAA provisions or programs supposedly preempt state law is unclear. Petitioner cites (Br. 14, 15, 22) the Act's Title V "operating permit" program, 42 U.S.C. §§ 7661-7661f, which was enacted in the 1990 amendments, which contain no evidence of any congressional intent to annul state authority. See p. 9 n.3, *supra*. Furthermore, the Title V program does not impose substantive requirements; it is a broadly applicable administrative mechanism to collect sources' CAA obligations in one place, 42 U.S.C. § 7661C(A)-(C), and it does not remotely purport to shield permittees from obligations under state law. The Act's substantive emissions standards, such as those under *id.* §§ 7411, 7412, are, consistently with section 7416, all merely minimum federal standards, not maxima. And nothing in the CAA, nor any action by EPA of which counsel are aware, purports to reflect a determination that some level of harm to persons or property from air pollution is federally "optimal" and should therefore be noncompensable under state tort law.

and 1963 precursors to the modern Clean Air Act, and damages actions were well understood to be the only means for persons or companies harmed by air pollution to obtain compensation. See pp. 4-7 & nn. 1, 2, *supra.* "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates*, 544 U.S. at 449. This silence concerning any intent to preclude state common-law remedies "takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Here, as in *Kerr-McGee*, it is, to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.*

The result petitioner seeks would flout the CAA's emphasis on preserving states' historic authorities to protect their citizens' health, welfare, and use and enjoyment of their property. Petitioner ascribes to Congress, without evidence, an intent to strip States of their sovereign choice as to how to allocate responsibility between their own legislatures, administrative agencies, legislatures, and courts. What they seek here would be a breathtaking and historically aberrant incursion upon States' traditional authority to protect their citizens and ensure compensation of those who are injured. The root implausibility—the ahistorical character—of the dramatic tort immunity that petitioner claims helps to explain why, in the 44-year life of the Clean Air Act, no appellate court has adopted petitioner's theory.

B. Pleas for an Unprecedented Tort Immunity are Properly Directed to Congress

Without a circuit split or any inconsistency between the decision below and this Court's precedents, the petition reduces to an argument that petitioner should not be subject to being held liable under Pennsylvania law for its dumping of ash, chemicals, and foul odors on its neighbors' lands. Petitioner complains, for example, that, if certiorari is not granted, regulated entities that violate state-law requirements, but comply with federal ones, "may be sued in court and held liable for" their state-law violations. Pet. 15. But the risk petitioner faces of liability for violating state law (statutory, common, or other) is not a consequence of the decision below, but rather a feature of our dual sovereign system of government—and Congress's explicit affirmation that state law would remain operative in this field. Here, Congress has made clear that it intends state law to survive, and petitioner's arguments that state law should be preempted are better addressed to Congress.

Petitioner and its amici seek to portray the decision below as something ominous and new that "will" and "would" have disruptive consequences. *E.g.*, Br. of Amici Curiae Chamber of Commerce of the United States of America, *et al.*, in Support of Petitioner 12, 15. Common-law courts, however, have been open to such claims throughout the life of the Clean Air Act. *See* pp. 9-11 & n.4. Yet the calamitous disruptions petitioners and amici insist will be unleashed by letting such tort suits proceed have not occurred.[13]

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[13] Extended discourses on the anticipated evils of public nuisance suits, *e.g.*, Br. of National Association of Manufacturers, *et*

State common-law systems are not the indiscriminate instruments petitioner and amici seek to portray. State judges (or federal judges sitting in diversity) are not inclined, as the arguments suggest, lightly to impose liability upon local pollution sources, or to second-guess expert agencies' technical judgments.[14]

Petitioner and its amici can point to nothing in *this* case—which was dismissed at the pleading stage, and in which the factual record is accordingly undeveloped—that bespeaks some fatal incompatibility between state common law and any federal requirements.[15] The procedural posture here precludes any

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al. as Amici Curiae in Support of Petitioner 11-20, are again notable for the absence of citation to real-life judgments that have had the feared consequences during the generations during which non-preemption has been the rule, and are, in any event, beside the point in this *private* nuisance case.

[14] See, *e.g.*, Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 Houston L. Rev. 679, 683 (1999) (discussing considerations that have made air pollution tort claims difficult to win in common-law courts, and noting, with respect to nuisance claims, that "judicial balancing rarely results in significant equitable relief being granted to plaintiffs").

[15] Petitioner and amici make scant effort to link respondents' claims in this case to any particular federal regulatory requirements with which they supposedly would be incompatible. Paying respondents' costs of cleaning petitioner's fly ash from their properties, for example, would not interfere with any federal program, nor would a thoughtfully designed injunction requiring that petitioner take reasonable steps to avoid dumping such ash in the future. As for the complaint's allegations regarding noisome odors, the federal EPA does not regulate odor emissions, based in part on its conclusion that "state and local odor controls and procedures [are] adequate" to the task. See *Concerned Citizens of Bridesburg v. E.P.A.*, 836 F.2d 777, 782 (3d Cir. 1987)

assessment of the role under Pennsylvania tort law of facts still to be determined concerning (among other things) the nature and magnitude of plaintiffs' injuries, petitioner's causal responsibility, and petitioner's adherence *vel non* to standards imposed by state and federal regulations or to industry practice. State tort law itself is far more nuanced than the caricature offered by petitioner's amici, and is alert to considerations of reasonableness and undue burden—and often marked by state legislative limitations responsive to the kinds of policy concerns amici raise.[16] And even under purely common-law doctrines of nuisance and negligence, whether a defendant is complying with federal and state statutes and regulations will generally be, at a minimum, highly relevant to whether it is liable in tort. Even where state law does not provide a complete defense for regulatory compliance, prospective plaintiffs often would have difficulty establishing that a source complying with state and

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(discussing U.S. EPA, Office of Air, Noise, and Radiation, *Regulatory Option for the Control of Odors* 5, 69-72 (1980)); *see also Friends of Agric. for Reform of Missouri Envtl. Regulations v. Zimmerman*, 51 S.W.3d 64, 79-80 (Mo. Ct. App. 2001) (upholding state odor regulations and noting absence of EPA regulation).

[16] The Iowa nuisance statute cited above, p. 20 n.9, for example, provides a defense for any electric utility that can prove that "in the course of providing electric services to its customers it has complied with engineering and safety standards as adopted by the [Iowa Utilities Board], and ... has secured all permits and approvals, as required by state law and local ordinances, necessary to perform activities alleged to constitute a nuisance." Iowa Code § 657.2. See also *TVA*, 615 F.3d at 309-10 (explaining that, under Alabama's and Tennessee's substantive law of public nuisance, defendants cannot be liable for activities expressly authorized by the government).

federal regulatory requirements nonetheless has caused injuries sufficiently serious to support liability under state law.

As the terms of the permit here exemplify, the possibility of being held to state-law requirements more stringent that federal requirements, is a commonplace for stationary sources of air pollution. See p. 12, *supra* (quoting petitioner's permit). The continued enforcement of state-law requirements is itself a part of the "the careful regulatory scheme established by federal law." Pet. at 27-28 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000)), specifically envisioned by Congress. *Cf. Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131, 1139 (2011) (noting impossibility of reconciling an approach that treats all federal standards as maxima with a saving clause contemplating a continuing meaningful role for state law).

At bottom, the petition does not place before the Court a legal question that has divided the lower courts, or even an undertreated but close problem of statutory construction. Rather, it advocates for a statutory reform proposal that would sweepingly immunize Clean Air Act-regulated sources from traditional common-law responsibility to those whom they harm. But such reforms are for Congress. And Congress would necessarily have to consider, along with the ostensible benefits of the proposed tort immunity, the costs that such a change could entail for society at large, including individuals who are injured and whose property is rendered less valuable or unusable by serious airborne insults like those alleged here. A major shift in the historic authority such as petitioner

proposes should come, if at all, only after careful consideration by the national legislature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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