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

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BRIEF OF *AMICUS CURIAE* AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a civil justice system that produces fairness, balance, and predictability in civil litigation. ATRA's members have a substantial interest in ensuring that courts follow constitutional and traditional tort law principles. ATRA files *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The nature of this case extends far beyond the parties in this case. It represents an effort to circumvent the legislative and executive branches on national energy policy issues with national and international implications. Should the Third Circuit ruling stand and subject utilities and other businesses to liability for impacts of lawful, permitted operations, ATRA's members would be adversely affected.

STATEMENT OF THE CASE

ATRA adopts Petitioner's Statement of the Case.

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[1] Per Rule 37.2, at least 10 days notice was given to the parties of *amici's* intention to file this brief. The parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Per Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The Court should hear this case to assure implementation of a fundamental public policy decision it unanimously set forth in *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("AEP"). In *AEP*, the Court held that all *federal* common law claims alleging injury over emissions that are covered under the Clean Air Act ("CAA") have been displaced. *Id.* at 2537. In its reasoning, the Court went to considerable lengths to discuss the institutional deficiencies with putting judges in the position of adjudicating such claims, stating that courts do not possess the tools to assess all of the important national energy policy factors that must be considered when determining whether a certain level of emissions is reasonable or unreasonable. *See id.* at 2539-40. The Court concluded that there is "no room for a parallel track" of such tort litigation. *Id.* at 2535. If a court were to determine that emissions were, in fact, unreasonable, it would have to establish new, lower emission levels that would interfere with Congress's delegation to the Environmental Protection Agency ("EPA") of establishing a national regulatory regime for CAA emissions. *Id.*

This fundamental public policy underlying *AEP* would be seriously undermined if the lower court's decision in the instant case is allowed to stand. The Third Circuit has allowed tort-based claims for emissions covered under the CAA to be brought under *state* common law. In *AEP*, the Court wisely anticipated such a case. During oral argument, for example, Justice Scalia said, "Of course, you're going to have to struggle with the preemption question sooner or later." Transcript of Oral Argument at 15, *AEP*,

131 S. Ct. 2527 (No. 10-174). Justice Kennedy similarly observed that "It would be very odd to say that there's no Federal common law, but also that there's no displacement of State law. That seems to me odd." *Id*. at 32.

ATRA respectfully urges the Court to grant the Petition and address the state law issues that were anticipated, but not before the Court in *AEP*. The Court should find the state law claims preempted by the regulatory regime put in place under the CAA because Congress has preempted the field and state law obligations would conflict with federal CAA regulations. Allowing the Third Circuit ruling to stand will open the door to the precise type of improper regulation through litigation that the Court specifically rejected in *AEP*.

ARGUMENT

I. THIS CASE PROVIDES THE COURT WITH THE OPPORTUNITY TO ENSURE THAT ITS RULING IN *AEP* IS PROPERLY FOLLOWED

A. Most Federal Courts Have Consistently Set Aside Claims, Under Displacement and Preemption, That Regulate CAA Emissions

In *AEP*, the Court recognized that Congress delegated to EPA the responsibility for regulating emissions covered under the CAA. While that holding was limited to displacement of federal common law claims seeking injunctive relief, an essential part of the Court's opinion provided a road map for lower courts to follow in other cases given the various forms in which common law claims that compete with these regulations can arise. *See AEP*, 131 S. Ct.

at 2539-40. The Court was clear that, regardless of the way the claims are presented, regulating emissions covered under the CAA is "undoubtedly an area within national legislative power," and that it was altogether fitting that "Congress designated an expert agency, here EPA, as best suited to serve as primary regulator." *Id.* at 2535.

Since *AEP*, most lower courts have properly dismissed claims that, while packaged slightly differently than *AEP*, would have resulted in the same end-game: regulating CAA-covered emissions through the common law. Specifically, the Ninth Circuit followed the Supreme Court's rationale to dismiss such a claim for property damages. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). The Ninth Circuit wrote that while the "case presents the question in a slightly different context" – "Kivalina does not seek abatement of emissions; rather, Kivalina seeks damages for harm caused by past emissions" – "the Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." *Id.* at 857. The court continued that "[i]f a federal common law cause of action has been extinguished by Congressional displacement, it would be incongruous to allow it to be revived in another form." *Id.*

Similarly, a Federal District Judge in a case that was affirmed in the Fifth Circuit dismissed claims comparable to *AEP* that were brought under Mississippi state common law. *See Comer v Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd* 718 F.3d 460 (5th Cir. 2013). The judge explained that while plaintiffs "contend that they are

not asking this Court to regulate emissions," *id.* at 865, "the state law causes of actions asserted by the plaintiffs hinge on a determination that the defendants' emissions are unreasonable" and the Supreme Court in *AEP* instructed courts that it is not the role of the judiciary to determine "what level of reduction is practical, feasible, and economically viable." *Id.* (citing *AEP*, 131 S. Ct. at 2540)

The year before *AEP*, the Fourth Circuit applied the same rationale to dismiss claims over allegations involving local effects of a power plant's traditional emissions, which is comparable to the case at bar. *See North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 306 (4th Cir. 2010) ("TVA"). The Fourth Circuit detailed the complex regulatory regime that has long been in place under the CAA for these emissions, stating that adjudicating this and other such cases would put courts in the position of second-guessing "decades of thought by legislative bodies and agencies." *Id.* at 298. As this Court has appreciated, the case for preempting state claims is particularly strong when the "fields of regulation . . . have been substantially occupied by federal authority for an extended period of time." *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, n.3 (6th Cir. 2005) (citation omitted), *aff'd*, 550 U.S. 1 (2007).

In sum, over the past few years, federal courts have properly followed this Court's guidance to dismiss claims that would regulate CAA governed emissions, whether for injunctive relief or private property damages, under federal common law or state common law, and over GHGs or traditional substances. The common theme through all these rulings is recognition that to adjudicate these claims,

courts would need to set emissions policy that would have a substantial impact on the production and use of energy in this country and that the judiciary is not the place for making such policy judgments. This institutional concern with courts making political decisions applies with the same force to a determination of displacement and preemption.

B. The Third Circuit Is Out Of Step With the Court's Reasoning In *AEP* and With Other Federal Courts

There is now division in the federal circuits, as the Third Circuit's ruling to allow such state claims in the instant case is inconsistent with this body of cases. It also directly undermines *AEP*. As this Court has recognized, regulating the emissions of the nation's power plants requires a careful balancing of local, national and international issues and that Congress entrusted this "complex balancing to EPA." *AEP*, 131 S. Ct. at 2539. The "competing interests" and strategic determinations for how to meet "our Nation's energy needs" are the same here as in *AEP*, as is the potential for "economic disruption" if the cost of reducing emissions to satisfy new judicial requirements will make electricity less affordable for many Americans. *Id.*

As *Amicus* understands will be discussed in detail by other *amici*, the regulations at issue here result from careful risk-benefit and risk-risk balancing by experts in the production of energy. Allowing tort claims that focus on one aspect of this policy to the exclusion of all others can disturb this equilibrium. The result can lead to "multiple and conflicting standards" that undermine, not advance, the public will. *TVA*, 615 F.3d at 302. Courts have been care-

ful not to "upset the balance [an] agency struck and contravene [its] policy judgments." *Murray v. Motorola, Inc.*, 982 A.2d 764, 777 (D.C. 2009).

The Fourth Circuit took particular comfort in the fact that Congress specifically ensured involvement of states in developing regulations and permits for power plant emissions. *See TVA*, 615 F.3d at 302. This regime gives state governments and local communities the ability to contribute to how local risks and impacts are managed. *See id.*; *Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848 (1984) (calling the CAA "a lengthy, detailed, technical, complex, and comprehensive response to a major social issue"). It does not require the power plant to generate electricity without emissions or with no external risks or impact. Thus, EPA and state regulators in issuing its permits and allowing Petitioner's emissions have already taken into account the conduct and harms Plaintiffs allege, *i.e.*, the emissions of substances and particulates and their potential impact on nearby communities. *See* Pet. Br. at 3-13.

The level of emissions established in Petitioner's operating permits, therefore, has been deemed reasonable as a matter of federal statutory and regulatory law. This Petition should be granted because the Third Circuit ruling would allow courts to use state common law to second-guess these determinations. Even when a plant is in full compliance with its permits, it could still face a state-based liability claim for alleged harms from its operations. Such claims should be preempted because they would "scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air." *TVA*, 615 F.3d at 296.

II. STATE TORT LIABILITY REQUIRES A JUDICIAL DETERMINATION THAT PETITIONER'S SITE-SPECIFIC APPROVED EMISSIONS ARE "UNREASONABLE"

This case does not involve allegations that Petitioner operated its power plant in ways that were inconsistent with its federal permits. By contrast, Petitioner states that it "has been, and continues to be, operating in full compliance with all requirements of the permit issued by the state permit authority, and submitted to EPA, under Title V of the [CAA]." Br. at 11, n2.

The reason state tort claims should be preempted is because state tort liability requires a finding that this level of emissions is *unreasonable*. *See* Pl. Compl. at 49 (alleging Petitioner "*unreasonably* interfered with Plaintiffs' use and enjoyment of their property") (emphasis added). As this Court has appreciated in *AEP* and preemption cases, determinations of unreasonableness in tort law "directly regulate" a defendant's conduct the same as legislation and regulation. *See*, *e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324-25 (2008). State liability claims, therefore, "disrupt[] the federal scheme no less than state regulatory law to the same effect." *Id.*

As discussed below, Pennsylvania tort law, including for nuisance, negligence and trespass, which are invoked in this case, is no different. If this case proceeds, courts applying state law would be empowered to find that Petitioner's emissions, even though in full compliance with exacting federal regulations are, nonetheless, *unreasonable*.

A. Pennsylvania Tort Law Does Not Permit Courts to Regulate Lawful Conduct

Public nuisance theory, albeit under federal common law, was the tort vehicle in *AEP*, just as it is the primary tort being pursued under Pennsylvania law here. This is no accident. For more than forty-years, there has been an effort to turn the centuries-old tort of public nuisance into a modern-day catch-all tort for regulating conduct that could lead to environmental and other harms regardless of fault. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003); Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006).

Starting in the 1960s, when Deans William Prosser and John Wade were capturing public nuisance doctrine in the Restatement (Second), plaintiff environmental lawyers pursued changes to the Restatement's public nuisance chapters that would have, in their words, "[broken] the bounds of traditional public nuisance." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule,* 28 Ecology L.Q. 755, 838 (2001). The primary purpose of their efforts was to use public nuisance litigation, generally under state law, to regulate conduct, much as with the case at bar, that was expressly permitted by federal or state regulations. *See id.* Among other changes to the tort, they sought to eliminate the tort's wrongful conduct requirement. *See id.*

Dean Prosser, though, explained that public nuisance requires a judgment that the conduct at issue

is objectively wrong: a "public or 'common' nuisance [was] always a crime . . . a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure."[2] William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1005 (1966); cf. *Tull v. United States*, 481 U.S. 412, 421 (1987) (public nuisance provides "a civil means to redress a miscellaneous and diversified group of minor criminal offenses") (internal quotation omitted). The purpose of the tort was to give governments tools to stop someone from wrongfully infringing on a public right, and, to the extent the unreasonable infringement harmed public property, require remediation.

Consequently, a public nuisance claim, both under the Restatement (Second) and Pennsylvania tort law, requires a court to determine that the defendant's conduct constituted an "*unreasonable* interference" with the public right at issue. *See* Restatement (Second) §821B cmt. e; *Muehlieb v. City of Phila.*, 574 A.2d 1208, 1211 (Pa. Commw. Ct. 1990) ("A public nuisance is an unreasonable interference with a right common to the general public.").

Unreasonable conduct is similarly a core element of the other torts pleaded here, namely negligence,

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[2] The "common law crimes" that can give rise to public nuisance liability include threatening public health, such as by keeping diseased animals or explosives in a city; violating public morals, including vagrancy; and blocking public roads and waterways. *See* Restatement (Second), *supra*, §821B cmt. B.

trespass and potentially private nuisance.[3] As the Federal District Court explained in *Comer*, these state tort claims all "hinge on the determination that the defendants' emissions are unreasonable." *Comer v. Murphy Oil*, 839 F. Supp.2d at 854 (dismissing claims for negligence, trespass and nuisance). Pennsylvania follows the traditional definitions of these claims. *See, e.g., Shamnoski v. PG Energy, Div. of S. Union Co.*, 858 A.2d 589, 602 (Pa. 2004) (concluding that subjecting a hydroelectric company to liability for downstream harms would require a determination of failure to abide by a reasonable standard of care); *Kopka v. Bell Tel. Co. of Pa.*, 91, A.2d 232, 235 (Pa. 1952) (requiring for trespass that the person intentionally entered another's land); *Kramer v. Pittsburgh Coal Co.*, 19 A.2d 362, 381 (Pa. 1941) (stating private nuisance can arise only "from the unreasonable, unwarrantable, or unlawful" use of property).

Lawsuits seeking to regulate otherwise lawful conduct as unreasonable under state law have ranged from attempts to subject businesses to liability for Los Angeles's smog to gun violence in cities to lead paint in homes. *See Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008). As the California court explained in the L.A. smog case, any determination of unreasonableness amounts to substituting the court's assess-

[3] The Supreme Court of Pennsylvania has dismissed private nuisance claims comparable to the ones at bar. *See Waschak v. Moffat*, 109 A.2d 310, 317 (Pa. 1954) (holding emissions from industrial operations that settle on neighboring lands do not give rise to liability under private nuisance theory).

ment of reasonable emissions for that of the federal and state regulators. *See Diamond*, 97 Cal. Rptr. at 645 (Plaintiffs are "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the court."). Indeed, when such claims have been allowed, some courts have candidly admitted to taking shortcuts in order to find for liability. *See, e.g., State v. Schnectady Chems. Inc.*, 549 N.Y.S.2d 971, 976 (Sup. Ct. 1983) (acknowledging that regulating the conduct at issue was "essentially a political question to be decided in the legislative arena," but nonetheless allowed it because "[s]omeone must pay to correct the problem").

Allowing courts to assess whether federal approved emission levels are reasonable or not under state tort law is directly at odds with the Court's deference to the CAA in *AEP*. Petitioner's operation of a power plant in full accordance with federal government permitting obligations reflects the considered judgment of federal regulators. Courts should find that when the conduct is "fully authorized by statute, ordinance or administrative regulation," it is *per se* reasonable and it should "not subject the actor to tort liability." Restatement (Second) of Torts § 821B cmt. f (1979); *cf. Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (otherwise there would be liability "regardless of the defendant's degree of culpability."). But, as discussed above, that has not always been the case.

Experience has shown, however, that the vagaries of tort law are such that courts could reach different results under different tort theories and in different

times. Tort law presents subjective and uncertain standards, and the Court should grant this Petition and find the claims preempted to ensure that power plant emissions are not adjudged as unreasonable, wrongful or quasi-criminal under state law.

B. Tort Law's Wrongful Conduct Requirement Provides Needed Notice of Potential Liability

The Court should make sure that power plants can operate under objective standards because they provide notice for what actions could lead to liability. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998) (concluding that it stretches constitutional limits to impose "severe retroactive liability on a limited class of parties that could not have been anticipated the liability, and [when] the extent of that liability is substantially disproportionate to the parties' experience"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44 (1991) (O'Connor, J., dissenting) (explaining the vagueness doctrine applies to court-made law, such as tort liability). If Plaintiffs' tort claim were allowed to proceed, Petitioner, "no matter how well-meaning, would be simply unable to determine its obligations ex ante." *TVA*, 615 F.3d at 306.

For example, if the element of wrongdoing is removed, the nation's power companies could be subject to strict liability for any external risks associated with their operations even though these risks were known, considered and regulated when their permits were approved by federal regulators. As one court warned in a parallel context, allowing strict liability under such circumstances would mean that "[a]ll a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort

that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and . . . a lawsuit [would be] born." *Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 96 (N.Y. App. Div. 2003).

Such a result would directly contravene the purpose of Petitioner's government-issued permits, which is to "permit" its operations. As the Fourth Circuit made clear, permits are a plant's "source-specific bible for Clean Air Act compliance containing in a single, comprehensive set of documents, all [CAA] requirements relevant to the particular polluting source." *TVA*, 615 F.3d at 300 (internal quotation omitted). The Court should grant the Petition to assure the nation's power plants are not subject to strict liability or uncertain tort law requirements when federal law expressly permits their emissions.

III. DETERMINING ACCEPTABLE EMISSIONS LEVELS FOR AMERICA'S POWER PLANTS IS A KEY COMPONENT OF THE NATION'S ENERGY POLICY AND A LEGISLATIVE FUNCTION GOVERNED BY THE CLEAN AIR ACT

Congress has been keenly aware that regulating various aspects of generating electricity, including for alleged environmental impacts, are key components of setting the nation's energy policy. *See* Peter S. Glaser, F. William Brownell, & Victor E. Schwartz, *Managing Coal: How to Achieve Reasonable Risk with an Essential Resource*, 13 Vt. J. of Envtl. L. 177 (2011). Electricity is a staple component of American society; the public relies on electricity for turning on lights, heating homes, running appliances, and meeting other basic needs. *See* George

Constable & Bob Somerville, *A Century of Innovation: Twenty Engineering Achievements That Transformed Our Lives* (Joseph Henry Press 2003) (noting the U.S. Academy of Engineering has called societal electrification the "greatest engineering achievement" of the past century). The Supreme Court's determination in *AEP* that courts do not have the tools to weigh all the factors considered in setting the nation's energy policy apply equally to federal and state common law claims. *See AEP*, 131 S. Ct. at 2539. A determination of liability here could impair national interests and make electricity less affordable for the public just the same as it would have in *AEP*.

A. Courts Do Not Have the Tools to Set Power Plant Emissions

As mentioned above, a core theme to this Court's rationale in *AEP* was the inability of litigation to broadly consider the importance of power generation, how large a role environmental allegations should play in setting national energy policy, whether such policy changes are needed, and what the consequences of any changes would be, including on consumers who would bear the costs of these changes. *See AEP*, 131 S. Ct. at 2539 ("Each standard of performance EPA sets must tak[e] into account the cost of achieving [emissions] reduction and any nonair quality health and environmental impact and energy requirements") (internal quotations omitted). These concerns apply with the same force to any court-made "regulations" sought through imposition of state tort liability in the case at bar.

Justice Ginsburg wisely observed in oral argument that the broad issue is the inappropriateness of claims that "set up a district judge . . . as a kind of

super EPA." Transcript of Oral Argument at 37-38, *AEP*. In the GHG suits, four cases were filed and each district court voiced the same concerns, concluding that assessing liability for harms allegedly caused by emissions governed by the CAA cannot be adjudicated under common law. *See Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011); *California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. 2007); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) ("*Comer I*"). For instance, the *Kivalina* judge decried the lack of objective standards that would allow a court to determine for itself what level of emissions of a particular pollutant might be "reasonable" in light of all relevant public health and policy considerations. *See Kivalina*, 663 F. Supp. 2d at 875.

When the Second Circuit turned a deaf ear to these concerns in *AEP*, this Court reversed. The Court explained that these claims, which are core to establishing national energy policy, require consideration of a broad spectrum of issues not before the courts and "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *AEP*, 131 S. Ct. at 2539-40. They cannot "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." *Id.* at 2540. "Rather, judges are confined by a record comprising the evidence the parties present"

in a single case. *Id.* Court decisions are also imposed retroactively on a case-by-case basis, leaving the potential for conflicting rulings from different courts, and creating confusion and unpredictability.

Opponents of preemption in this case will likely suggest that the CAA's federal regulatory regime sets only minimum standards for emission controls. But, the term "minimum standards" misses the mark. Regulations in this case represent a balance of considerations that include potential risks. Of equal importance is the fact that this line of attack does not change the fundamental problem with allowing state tort claims here. Courts would still be able to determine, under state tort law, that the federal regime is unreasonable and courts do not have the capacity to fully and fairly make this assessment.

Michael Gerrard, a long-time litigator turned Columbia Law School professor, tried to pull the curtain back on what a judge would have to consider in such a suit and how unwieldy such a proceeding would be. *See* Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 Yale L.J. Online 135 (2011). He asks how courts could weigh "the social value of fossil fuel use":

> What is the relevance of more than a century of U.S. policy encouraging fossil fuel use and the historical dependence of the U.S. economy on fossil fuel use? Does it matter whether the fossil fuels were used to support a very comfortable lifestyle (e.g., United States, Canada, Europe, Japan, Australia) or to lift a population out of poverty (e.g., China, India)? . . . [Also,] is the fact that a facility has

> operated under governmental permits a complete defense to a nuisance claim?

Id. at 137.

"Public risk" cases, which include both *AEP* and the one at bar, expose the limitations of the judiciary to administer cases where there is no objectively wrongdoing. *See* 2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991). The same obstacles in *AEP* are present here: "If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern." *TVA*, 615 F.3d at 298. "[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." *Id.* at 305.

For the same reason the Court found displacement in *AEP*, it should find preemption here. If liability is allowed to be pursued under state tort law, the entire body of law safeguarding the regulatory process would be supplanted by judicial decree. National energy policy decisions will be decided on the basis of personal policy preferences of self-selected litigants, district court judges, and juries. The elected representatives and appointed officials accountable to the American public for these decisions would have to blindly follow court ordered emission reductions. Also, the American public, who may be negatively impacted, would have no avenue for recourse.

B. Congress and Regulators Consider a Broad Array of Issues in Regulating Power Plant Emissions

The remedy from Plaintiffs' lawsuit, *i.e.*, a reduction in emissions based solely on environmental factors related to the production of fossil fuels, stands in stark contrast to the long-standing tenets of congressional energy policy of weaving together progressive, cogent strategies for managing risks, benefits, and capabilities of American energy sources. While *amicus* has no position on these substantive determinations, it has become clear that Congress, along with federal and state regulators, have approached the regulation of power plant emissions with purposeful deliberation. *See* Glaser et al., *supra,* at 177.

Congress and federal regulators continue to weigh both the pros and cons of the various forms of energy that have been critical to maintaining a stable and affordable power grid. These energy sources include coal, natural gas, nuclear plants, hydroelectric dams, wind, solar and biomass. Julio Friedmann of Lawrence Livermore National Laboratory has explained that none of them are fungible; each form of energy is "limited by cost, limited by scale, limited by physics and chemistry, [or] limited by thermodynamics." *See* James Fallows, *Dirty Coal, Clean Future*, The Atlantic (2010).

When EPA approves operating permits for the nation's power plants, consideration is given to ensuring the right amount of production from coal, nuclear, and natural gas because these energy sources form the backbone of electricity generation. They are "base-load fuels" because plants operating on these fuels can run around the clock to provide a steady,

inexpensive output of energy that provides the "base" amount of electricity the public needs throughout the day. Other fuels supplement this "base" usage when consumer demand spikes. *See id.* (quoting Friedmann: "Solar and wind power are going to be important, but it is really hard to get them beyond 10 percent of total power supply").

Environmental risks of energy production, including those at issue in this case, are included in that calculation and have been steadily reduced. New power plants emit 90 percent fewer pollutants, such as SO_2, NO_x, particulates and mercury, than the plants they replace. *See* National Mining Ass'n, Clean Coal Technology, *at* http://www.nma.org/pdf/fact_sheets/cct.pdf (last visited Mar. 25, 2014) (citing findings of the National Energy Technology Laboratory). As a result, while the use of coal for electricity generation has tripled since the 1970s, overall CAA regulated emissions from coal-based power plants has decreased by nearly 40 percent. *See id.*

This Court has provided federal agencies with the opportunity to develop comparable long-term health and safety strategies under the principles of federal preemption. *See*, *e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-74 (2000) (preempting state common law claims that would have interfered with the National Highway Transportation Administration's deliberate position to not mandate air bags while assessing the effectiveness of other passive restraint systems). Such a balanced, incremental approach to regulating power plant emissions recognizes that regulating the generation of electricity has an impact on many aspects of the economy. The Court should grant this Petition so that these regulations can con-

tinue to be made through a proper, informed process and that its fundamental public policy underlying *AEP* is not undermined by state common law claims.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

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