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

REPLY BRIEF

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May 12, 2014

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REPLY BRIEF

The brief in opposition does not—and cannot—dispute the critical importance of the question presented. Indeed, this case presents the same compelling reasons for certiorari as *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*). Common law nuisance suits of the type at issue in both *AEP* and here, which would allow local judges and juries to impose emissions restrictions different than those adopted pursuant to the Clean Air Act, are fundamentally incompatible with the Act's "comprehensive" national regulatory system and pose risks to the Nation's economy and, indeed, to the environment itself. *Id.* at 2535-39. The extraordinary importance of this case is underscored by the number of parties that have filed briefs as *amicus curiae*, representing a wide range of commercial association, trade groups, and public interest organizations—all stressing the urgent need for this Court's review.[1]

Instead of challenging the grounds for certiorari, respondents focus instead on the merits of the question presented, hyperbolically characterizing petitioners' position as seeking "unprecedented ... im-

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[1] Br. of Chamber of Commerce of the United States of America, American Fuel & Petrochemical Manufacturers, and American Petroleum Institute (Chamber Br.); Br. of National Association of Manufacturers, American Chemistry Council, American Coatings Association, American Coalition for Clean Coal Electricity, American Iron and Steel Institute, Corn Refiners Association, Council of Industrial Boiler Owners, Glass Packaging Institute, Manufacturers Alliance for Productivity and Innovation, Metals Service Center Institute, Treated Wood Council, and Specialty Steel Industry of North America (NAM Br.); Br. of Utility Air Regulatory Group (UARG Br.); Br. of American Tort Reform Association (ATRA Br.); Br. of DRI—The Voice of the Defense Bar (DRI Br.).

munity" from any and all tort suits. Opp. 27. These assertions are far off the mark. The claims that would be preempted under the approach advocated by petitioners (and adopted by the district court) are those that would impose, as a matter of judicial common lawmaking, emissions restrictions different from and in addition to those adopted pursuant to the Act. Pet. 9-12, 24-25. Claims that are not inconsistent with the Act—such as those addressing unregulated emissions or seeking additional remedies for violations of state or federal statutory or regulatory standards—would not necessarily be barred. Far from "a breathtaking and historically aberrant incursion upon States' traditional authority," Opp. 26, this represents a straightforward application of basic conflict preemption principles.

At the end of the day, the arguments raised by respondents do nothing more than confirm that the question presented is subject to debate and, as the divide among federal and state courts shows, one on which this Court's guidance is needed. Certiorari should be granted.

I. THIS CASE CONCERNS ISSUES OF EXCEPTIONAL NATIONAL IMPORTANCE.

Respondents argue at length that the decision below is correct on the merits, and that the Clean Air Act does not preempt their claims. Opp. 16-31. What they do not and cannot do, however, is dispute the importance of the question presented—or that this case raises precisely the same concerns that warranted certiorari in *AEP*.

A principal purpose of the Clean Air Act is to provide certainty and predictability in the application of air emissions standards throughout the Nation. *Gen. Motors Corp.* v. *United States*, 496 U.S. 530, 532

(1990). Without advance notice of the emissions standards that will be imposed upon them, companies cannot effectively manage their investments or expand their operations—resulting in decreased revenues and increased costs. *E.g.*, Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 Econometrica 623, 625 (2009). Those costs will be passed on to the public in the form of higher prices (including higher energy prices), reduced job opportunities, and slower technological advancement. *E.g.*, Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability*, 88 Geo. L.J. 2167, 2174 (2000). A lack of clear standards governing emissions could even result in harm to the environment, by inhibiting investment in new technologies and "creat[ing] perverse incentives for ... companies to increase utilization of plants in regions subject to less stringent" rules. *North Carolina ex rel. Cooper* v. *Tenn. Valley Auth.*, 615 F.3d 291, 300-02 (4th Cir. 2010) (*TVA*).

The Clean Air Act was designed to prevent these deleterious consequences by directing EPA, working cooperatively with state agencies, to develop and promulgate specific standards to which regulated facilities will be subject. *Id.* Those standards are, for most facilities, set forth in a permit issued by relevant state or federal authorities, which is to serve as "a source-specific bible for Clean Air Act compliance containing ... all ... requirements relevant to the particular polluting source." *Id.*

There can be no doubt that allowing state common law suits such as these—just like the federal common law suits at issue in *AEP*—would seriously undermine the Clean Air Act's goals by allowing the imposition of standardless liability upon regulated entities despite compliance with their permits. These problems are especially stark with respect to claims of the

type at issue here, under the common law of nuisance. Nuisance has been aptly described as an "impenetrable jungle" with no identifiable guiding principle, which "has meant all things to all people." W. Page Keeton et al., *Prosser & Keeton on Torts* 616, 626 (5th ed. 1984); see NAM Br. 11-16. Judges and juries addressing such a claim would be essentially free to find any facility liable for any level of emissions of any pollutant that in their view is "unreasonable," even if those emissions were expressly authorized by federal or state regulators—and even if a prior judge or jury had found the same emissions to be "reasonable." Pet. 15-19. It is indeed all but certain that enterprises across the country will find themselves subject to differing and potentially inconsistent claims of alleged common law emissions violations, as class actions of the type under review proliferate and expand to include an ever-increasing number of defendants. Pet. 17-19; see DRI Br. 6-8.

Nothing could be more disruptive to the uniformity and predictability of the regulatory system established by the Clean Air Act, or more potentially costly to the regulated community and the Nation as a whole. Pet. 17-19; see ATRA Br. 8-21; Chamber Br. 12-16; NAM Br. 8-22; UARG Br. 7-11. Certiorari should be granted to review this critically important question.

II. THE DECISION BELOW IS INCONSISTENT WITH OPINIONS OF THIS AND OTHER COURTS.

Certiorari is additionally warranted in light of the demonstrable inconsistency between the decision below and *AEP*, as well as a number of other opinions of state and federal courts across the country. Pet. 19-25. While respondents argue that these cases did not address the precise question here, respondents make

no attempt to—and indeed could not—reconcile the reasoning of those cases with that of the Third Circuit.

1. That *AEP* addressed the displacement of federal common law rather than the preemption of state common law, as respondents repeatedly state, Opp. 21-24, is beyond dispute. But that does not mean, as respondents would have it, that *AEP* is wholly inapposite. Far from it: the rationale underlying the Court's holding, and its interpretation of the Clean Air Act, plainly conflict with Third Circuit's decision.

AEP explained that the Clean Air Act "entrusts" the setting of emissions standards to "EPA in the first instance, in combination with state regulators." 131 S. Ct. at 2538-40. Courts play, at most, the secondary role of reviewing challenges to the agencies' decisions. "[T]his prescribed order of decisionmaking" requires courts to "resist setting emissions standards by judicial decree." *Id.* Trial judges "lack the scientific, economic and technological resources an agency can utilize in coping with issues of this order," and do not possess the national or statewide authority of regulatory bodies, often unable even to "render precedential decisions binding other judges." *Id.* For these reasons, the Court held, suits asking courts to determine what amount of emissions is "unreasonable," and "what level of reduction is practical, feasible, and economically viable," therefore cannot "be reconciled with the decisionmaking scheme Congress enacted." *Id.*

This reasoning, ignored by respondents, applies equally whether the claims at issue are brought under federal common law (as in *AEP*) or state common law (as here). Pet. 22-25; see ATRA Br. 3-8; UARG Br. 19-20. Indeed, claims under state common law pose, if anything, a *greater* risk of interference with

the Act's regulatory scheme. Rather than a single, relatively uniform body of federal common law, subject always to this Court's review, fifty separate and independent state common law regulatory regimes could govern emissions restrictions across the Nation. This ever-changing patchwork of judicially crafted regulation is wholly inconsistent with the regulatory system discussed in *AEP*. 131 S. Ct. at 2539.

Respondents also assert that *AEP* is distinguishable because these claims allege damages caused by "local pollution" rather than greenhouse gas emissions or "interstate or global air pollution." Opp. 3, 23-24. But there is nothing in respondents' legal theory that would justify such a distinction. The claims here, although targeting a "local" emissions source, are worded broadly enough to include harms from "global" pollutants, including greenhouse gases. See, *e.g.*, Pet. App. 34a (challenging emissions of all "chemicals, air pollutants, odors, and particulates"); Complaint ¶¶ 33-38, No. 12-929 (W.D. Pa.) (challenging defendant's "discharge[ ] into the atmosphere ... [of] gaseous, chemical, and particulate [emissions]"). There is no apparent reason why, if these claims are upheld, the same cause of action might not be brought by individuals residing in a different area of the State, in a neighboring State, or indeed in another part of the country or the world—against any number of defendants, whether (to quote *AEP*) "thousands or hundreds or tens." 131 S. Ct. at 2540. Just as in *AEP*, a single group might attempt to effectively dictate nationwide air emissions policy through common law claims in state and federal courts across the country.

Furthermore, regardless of whether these claims address only "local" emissions, they are still plainly inconsistent with this Court's interpretation of the

Act as establishing a comprehensive national system of regulation with "no room for a parallel track." *Id.* The conflict between *AEP* and the decision below amply warrants review.

2. Respondents nevertheless argue that certiorari should be denied because a definite "circuit split" has not yet developed. Opp. 14-16. Even if that were a prerequisite to this Court's review—which of course it is not, particularly given the importance of these issues and the conflict with *AEP*—the decision below does in fact widen an existing divide among federal and state courts. Pet. 19-22.

The Third Circuit relied largely on pre-*AEP* cases, principally *Her Majesty the Queen in Right of the Province of Ontario* v. *Detroit*, 874 F.2d 332 (6th Cir. 1989), for its holding that the Act does not preempt state common law suits of this type. Pet. App. 14a. Those cases are, however, demonstrably inconsistent with more recent decisions, including the Fourth Circuit's opinion in *TVA*. Pet. 21-22. That opinion explained, in language that could be applied without change here, that "[i]f 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." 615 F.3d at 298. To allow such claims to proceed would permit "individual states ... to supplant the cooperative federal-state framework that Congress through the EPA has refined over many years." *Id.*

Respondents do not endeavor to reconcile these statements with the decision below—with good reason, as it would be impossible to do so. Rather, they simply assert that *TVA* is irrelevant because the claims there were brought under the law of the affected State, while the claims here were brought un-

der the law of the source State. Opp. 14-15. However, the concerns underlying the Fourth Circuit's holding plainly did not depend on whether the claim was brought under the law of the source or the affected State. Those concerns—that nuisance claims of this sort "threaten[ ] to scuttle the extensive system of anti-pollution mandates that promote clean air in this country," 615 F.3d at 298—compel preemption of claims of this sort whatever law they are based upon. Pet. 21-22; see UARG Br. 15-18.

Other courts around the country have also recognized, particularly since this Court's decision in *AEP*, that such claims are inconsistent with the Act. *Comer* v. *Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012); *Freeman* v. *Grain Processing Corp.*, No. 021232, 2013 WL 6508484 (Iowa Dist. Ct. Apr. 1, 2013); *Merrick* v. *Brown-Forman Corp.*, Civ. Action No. 12-CI-3382 (Jefferson, Ky. Cir. Ct. July 30, 2013). While the brief in opposition attempts to downplay these decisions as either immaterial or merely "trial-level," Opp. 16 & n.6, they simply confirm that this issue is a substantial one that has caused, and will continue to cause, division among the lower courts—as indeed it did in this case.

III. THE DECISION BELOW IS CONTRARY TO BASIC CONFLICT PREEMPTION PRINCIPLES.

Unable to dispute the cert-worthiness of the question presented, the brief in opposition focuses largely on the merits of the question presented, arguing that the claims at issue are not preempted because they fall within the Clean Air Act's savings clause. Opp. 16-31. These arguments do not, as an initial matter, undermine the importance of the issue or obviate the existing divide among state and federal courts, and thus do not lessen the need for this Court's review

even if correct. Pet. 14-25. However, the arguments also fail on their own as legal matter.

Respondents rely principally upon this Court's opinion in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), which said that common law water pollution claims under the law of the source State are not preempted by the Clean Water Act. *Id.* at 485-87. Although respondents concede that the Clean Water Act's general savings clause includes language not found in the Clean Air Act, preserving the "right or jurisdiction of the States with respect to the waters (including boundary waters) of such States," 33 U.S.C. § 1370, they contend that *Ouellette* did not depend on that particular language for its holding. Opp. 17-18. This language was, however, the *only* part of the general savings clause quoted or discussed in the Court's opinion. 479 U.S. at 485. It defies common sense to suggest that the Court was nevertheless relying *sub silentio* on other language or provisions of the Act. The only reasonable conclusion is that this language—which does not appear in the Clean Air Act—was essential to the Court's decision, and thus *Ouellette* is not controlling here.

Turning to the actual language of the Clean Air Act's savings clause, 42 U.S.C. § 7416, that provision preserves only those "standard[s,] limitation[s] or ... requirement[s]" adopted by state statute or pursuant to state regulatory authority. State permitting authorities may and often do, for example, require that a facility comply with emissions standards that are more strict than those mandated by federal law. *Id.* These are the sorts of statutory and regulatory "standard[s,] limitation[s] or ... requirement[s]" preserved by the clause. *Id.*

In arguing that the clause should be read to also save common law claims, respondents cite a line of

cases stating that, "[a]bsent other indication, reference to a State's 'requirements' includes its common-law duties." Opp. 19-21 (quoting *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 324 (2008)). These cases are, however, by their terms limited to situations in which there is no "other indication" that Congress intended otherwise. *Riegel*, 552 U.S. at 324. Here, there exists just such a clear indication of contrary congressional intent: a separate provision of the Act, never mentioned by respondents, defines "standard[s] or limitation[s]" to include only those requirements established by statute or regulation—*not* those set through common law actions. 42 U.S.C. § 7604(f); see S. Rep. No. 91-1196, at 14-15 (1970).[2]

In all events, even if the clause might hypothetically be construed to encompass claims such as these, it is hornbook law that a savings clause does not "foreclose or limit the operation of ordinary pre-emption principles." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 869-71 (2000). A claim that falls within the scope of a savings clause is nevertheless preempted if it otherwise conflicts with a governing statute or regulation. *Id.* These claims would thus be preempted, however the savings clause may be construed, given their clear conflict with the Act's regulatory system. Pet. 27-28; see Chamber Br. 19.

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[2] The other savings clause cited by respondents, 42 U.S.C. § 7604(e), preserves only those claims seeking additional remedies—beyond those provided in the Act itself—for a violation of the Act or of standards established by state or federal authorities pursuant to the Act. Pet. 26 n.3. It clearly does not preserve common law claims that would create or enforce different substantive standards or restrictions—as *Ouellette* itself recognizes, in interpreting the same language in the Clean Water Act. *See* 479 U.S. at 493.

Holding the claims in this case preempted would, in other words, represent not "a breathtaking and historically aberrant incursion upon States' traditional authority," Opp. 25-26, but rather a straightforward application of basic conflict preemption principles. Nor would such a holding "silently immunize[ ] all air polluters from tort liability" or "strip injured parties of all common-law remedies." *Id.* To the contrary, the claims that would be preempted under the view of petitioners (and of the district court below) are those that would impose as a matter of judicial common lawmaking emissions restrictions different from those adopted pursuant to the Act. Pet. 9-12, 24-25. Other claims, including those challenging unregulated emissions or seeking additional remedies for violations of state or federal regulations, would not necessarily be barred. *Id.* It is precisely because the common law claims in this case would modify the emissions standards to which the defendant is subject, established pursuant to the Act and administered under a comprehensive federal-state permitting program, that they are preempted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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