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 OF AMICUS CURIAE DRI – THE VOICE OF THE DEFENSE BAR IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar, is a 22,500-member international association of defense lawyers who represent individuals, corporations, insurance carriers, and local governments involved in civil litigation. DRI has long been a voice for a fair and just system of civil litigation, seeking to ensure that it operates to effectively, expeditiously, and economically resolve disputes for litigants. To that end, DRI participates as amicus curiae in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

DRI's interest in this case stems from its members' representation of clients engaged in litigation under the Clean Air Act, 42 U.S.C. § 7401 *et seq*. DRI members' extensive litigation experience counsels that when vague and undefined terms – in this case "public nuisance" as defined in any number of state statutes and by state common law – govern liability with respect to emissions of air pollutants, the outcome of litigation is less predictable and the job of advising or defending clients increases in difficulty. Additionally, vague and ill-defined terms or causes of action with broad, malleable parameters increase litigation. An increase in litigation in such circumstances is of particular concern, given the threat of class action suits

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[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(b), amicus notified counsel of record for all parties of its intention to file an amicus curiae brief 10 days prior to the due date for its brief and consent was granted.

such as this one. In DRI members' experience, "[c]lass certification magnifies and strengthens the number of unmeritorious claims," "makes it more likely that a defendant will be found liable and results in significantly higher damage awards." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Thus, as recognized by this Court, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). If defendants must face such extensive liability and pressure to settle, the claims should be limited to the plain language of the Act and accompanying regulations, which aids in predictability and consistency of outcomes.

Additionally, Congress intended the Clean Air Act to establish a comprehensive national regulatory framework. DRI members represent manufacturers subject to these regulations, many of whom have nationwide operations. Members are tasked with advising their clients on the applicable law. When manufacturers are forced to alter their operations because of state statutes and common law that differ from what Congress intended under the Clean Air Act, it results in an enormous expense. In addition, advance guidance regarding applicable standards is difficult if not impossible under a myriad of state common law theories, in which judges and juries establish the law on an ad hoc after-the-fact basis.

DRI believes that this Court should grant certiorari to consider this important issue. A ruling that Congress intended the Clean Air Act to establish

uniform national standards and preempt state law public nuisance claims with respect to air pollution will reduce the amount and length of litigation and help ensure that like cases are treated alike.

SUMMARY OF ARGUMENT

The extensive litigation experience of amicus curiae DRI's members suggests that following the plain language of the Act and accompanying regulations results in predictability and consistency of outcomes in litigation, limits potential lawsuits, and protects reliance interests. By contrast, allowing state law claims based on vague and malleable notions of public nuisance prevents industry players from knowing the applicable standards in advance with any certainty, increases litigation, and undermines reliance interests. This is of particular concern given the threat of class action suits and their tendency to force settlements of unmeritorious claims. *Coopers & Lybrand*, 437 U.S. at 476.

The comprehensive regulatory framework that Congress established through the Clean Air Act will be undermined if state law public nuisance actions are allowed to go forward. In *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2532 (2011) ("*AEP*"), this Court determined that *federal* common law public nuisance claims are displaced by the Clean Air. The same rationale employed in *AEP* should apply to preempt state common law claims because, as made clear in that case, the Clean Air Act "is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985), quoting *Rice v.*

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). This is especially true where the states are involved in implementing, maintaining, and enforcing the Act. 42 U.S.C. § 7410(a)(1).

By contrast, nuisance is a vague and malleable theory inconsistent with the comprehensive provisions of the Act. Allowing such claims to go forward will "scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air." *N. Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010).

ARGUMENT

This Court Should Grant Certiorari To Affirm That The Comprehensive Provisions Of The Clean Air Act Preempt Actions With Respect To Emissions And Air Pollution Under State Common Law Nuisance Theories

This Court should grant certiorari to affirm that the Clean Air Act preempts actions under state common law nuisance theories. Congress created a comprehensive regulatory framework in the Clean Air Act, which will be undermined if state law actions under vague and malleable notions of public nuisance are allowed to go forward.

The Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. *AEP*, 13 S. Ct. at 2532, citing *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Act is "a comprehensive national program" 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). Accordingly, emissions nationwide have been "extensively regulated" under the Act for 40 years. *Cooper*, 615 F.3d at 298. Indeed, to say that the Clean Air Act's "regulatory and permitting regime is comprehensive would be an understatement." *Id*.

Under the framework created by the Act, "the federal government develops baseline standards that the states individually implement and enforce." *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013). The Environmental Protection Agency is "responsible for developing acceptable national ambient air quality standards ("NAAQS"), which are meant to set a uniform level of air quality across the country in order to protect the populace and the environment." *Id*., citing 42 U.S.C. § 7409(b)(1). Decisions regarding how to meet NAAQS are left to individual states. *Id*., citing 42 U.S.C. § 7410(a)(1). Under the Act, each state is required to create and submit to the EPA a State Implementation Plan ("SIP") which provides for implementation, maintenance, and enforcement of NAAQS within the state. *Id*. citing 42 U.S.C. § 7410(a)(1). As part of the enforcement, states must implement a permitting program for stationary sources. *Id*., citing 42 U.S.C. § 7410 (a)(2)(C). The permit programs limit the amounts and types of emissions that each permit holder is allowed to discharge. *Cooper*, 615 F.3d at 299, citing 42 U.S.C. §§ 7661a(d)(1), 7661c(a). Once a SIP is approved by the EPA, "its requirements become federal law and are fully enforceable in federal court." *Bell*, 734 F.3d at 190, quoting *Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332, 335 (6th Cir. 1989).

A. This Court should grant certiorari to affirm that all state common law nuisance claims with respect to air pollution are preempted by the Clean Air Act, which will ensure predictability in the law, prevent increased litigation, and protect reliance interests.

The extensive litigation experience of amicus curiae DRI's members suggests that following the plain language of the Act and accompanying regulations results in predictability and consistency of outcomes in litigation, limits potential lawsuits, and protects reliance interests. By contrast, allowing state law nuisance claims to proceed prevents industry players from knowing the applicable standards in advance with any certainty, increases litigation, and undermines reliance interests. This Court should grant certiorari to affirm that all state common law nuisance claims with respect to air pollution are preempted by the Clean Air Act.

As this Court recognized, allowing individual federal judges to determine what amount of air pollution is "unreasonable" could result in thousands of lawsuits. *AEP*, 131 S. Ct. at 2540. An increase in litigation based on vague common law definitions of public nuisance is of particular concern, given the threat of class action suits, such as this one. In DRI members' experience, "[c]lass certification magnifies and strengthens the number of unmeritorious claims," "makes it more likely that a defendant will be found liable and results in significantly higher damage awards." *Castano*, 84 F.3d at 746. Additionally, it "is in class counsel's financial interest for the class to be as large as possible – the more claimants in the class . . .

the higher the eventual fee." Tanya J. Monestier, Transnational Class Actions and the Illusory Search for Res Judicata, 86 Tul. L. Rev. 1, 73 (2011). Thus, as this Court has recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476. See also *Castano*, 84 F.3d at 746 ("[C]lass certification creates insurmountable pressure on defendants to settle . . . . These settlements have been referred to as judicial blackmail.") If defendants must face such extensive liability and pressure to settle, the claims should be limited to the plain language of the Act and accompanying regulations, not infinitely expanded by an individual judge or jury's interpretation of state nuisance law.

Equally concerning, "[t]o replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country." *Cooper*, 615 F.3d at 301. Allowing state law nuisance claims with respect to emissions and air pollution thus endangers reliance interests created by the Clean Air Act. The framework of the Act "reflects the extensive application of scientific expertise and . . . has set in motion reliance interests and expectations on the part of those states and enterprises that have complied with its requirements." *Id*. Unlike statutory standards, of which a company has knowledge and with which it can comply in advance, the practical application of many state nuisance theories cannot be known until after the

fact. Thus, the uniform standards created by Congress will not control, but rather, control will rest with individual juries and judges.

Other potential problems stemming from a multitude of state common law claims include, "[t]he prospects of forum shopping and races to the courthouse, the chances of reversals on appeal, [and] the need to revisit and modify equitable decrees in light of changing technologies or subsequent enactments. . . ." *Cooper*, 615 F.3d at 306. Accordingly, this Court should grant certiorari to affirm that all state common law nuisance claims with respect to air pollution are preempted by the Clean Air Act.

B. This Court should grant certiorari because the rationale for displacement articulated in *Am. Elec. Power Co., Inc. v. Connecticut* applies equally to state common law claims under the Clean Air Act.

In *AEP*, this Court determined that *federal* common law public nuisance claims are displaced by the Clean Air Act, but left open the question whether state law claims are similarly preempted. 131 S. Ct. at 2532. This Court should grant certiorari to answer that question in the affirmative. The same rationale employed in *AEP* should apply to preempt state common law claims because, as made clear in that case, the Clean Air Act "is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough Cnty.*, 471 U.S. at 713, quoting *Rice*, 331 U.S. at 230. This is especially true where the states are involved in implementing, maintaining, and enforcing the Act. 42 U.S.C. § 7410(a)(1).

In *AEP*, the Court explained that federal common law "addresses subjects within national legislative power where Congress has so directed or where the basic scheme of the Constitution so demands." 131 S. Ct. at 2535, quoting Friendly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U.L.Rev. 383, at 408, n. 119, 421-22 (1964) (internal punctuation omitted). Federal common law exists in the realm of "air and water in their ambient or interstate aspects." *Id*., quoting *Illinois v. City of Milwaukee, Wis*., 406 U.S. 91, 103 (1972). The Court however, "does not have creative power akin to that vested in Congress," and therefore, when determining whether congressional legislation displaces federal common law, the Court asks whether the statute "speaks directly to the question at issue." *Id*. at 2536-37 (internal punctuation and citations omitted). Applying this analytical framework, the Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of . . . emissions from fossil-fuel fired power plants." *Id*. Importantly, although acknowledging that there is a higher standard when considering whether state law is preempted, this Court found it critical that "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law." *Id*. at 2538-39.

The Court's reasoning in *AEP* is equally relevant to the application of state common law theories because of the states' role in creating the regulations under the Clean Air Act. The Court highlighted the states' involvement when it discussed the "prescribed order of decisionmaking" of the Act. *AEP*, 131 S. Ct. at 2539.

The Act requires the "informed assessment of competing interests" to develop emissions regulations, and Congress "entrusts such complex balancing to EPA in the first instance, *in combination with state regulators*." *Id*. (emphasis added). Indeed, "[t]he Act envisions extensive cooperation between federal and state authorities . . . ." *Id*. citing § 7401(a),(b), § 7411(c)(1), (d)(1)-(2). The existence of this framework thus counsels against "setting emissions standards by judicial decree . . . ." *Id*. The agency is "better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions" because "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id*. at 2539-40.[2] Judges lack the same capacity for informed decision-making regardless of whether they are applying federal or state common law. This Court should grant certiorari to affirm that state common law nuisance actions with respect to air pollution are preempted by the Clean Air Act.

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[2] The Fourth Circuit also found it highly unlikely "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." *Cooper,* 615 F.3d at 305.

C. This Court should grant certiorari so that it can affirm that state common law nuisance claims are preempted under the Clean Air Act because nuisance is a vague and malleable theory inconsistent with Congress's intent to create comprehensive, uniform, regulatory provisions addressing air pollution.

The pitfalls of "setting emissions standards by judicial decree," *AEP*, 131 S. Ct. at 2539, are all the more evident when attempting to apply nuisance standards, which are often "vague" and "indeterminate," *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981). Justice Blackmun commented that "one searches in vain . . . for anything resembling a principle in the common law of nuisance." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). This Court should grant certiorari so that it can affirm that state common law nuisance claims are preempted under the Clean Air Act. Nuisance is a vague and malleable theory inconsistent with the comprehensive provisions of the Act.

Nuisance has been described as "the great grab bag, the dust bin, of the law;" it is "so comprehensive a term, and its content is so heterogeneous, that it scarcely does more than state a legal conclusion that for one or another of widely varying reasons the thing stigmatized as a nuisance violates the rights of others." *Awad v. McColgan*, 357 Mich. 386, 389-90, 98 N.W.2d 571 (1959) (overruled on other grounds by *Mobil Oil Corp. v. Thorn,* 401 Mich. 306, 258 N.W.2d 30 (1977)), citing Warren A. Seavey, Nuisance: Contributory Negligence and Other Mysteries, 65 Harv. L. Rev. 984

(1952) and Ezra Ripley Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914).

Prosser agrees that "nuisance," is "a sort of legal garbage can," "used to designate anything from an alarming advertisement to a cockroach baked in a pie." William L. Prosser, Nuisance Without Fault, 20 Tex. L. Rev. 399, 410 (1942). The term is "broad enough to cover all conceivable torts." *Id.* Indeed, Blackstone defined it "as to include almost all types of actionable wrong, that is, 'any thing that worketh hurt, inconvenience or damage'." *People v. Lim*, 18 Cal. 2d 872, 880, 118 P.2d 472 (1941), quoting 2 Cooley's Blackstone, 4th Ed. 1899, p. 1012. The concept of nuisance has likewise been described as amorphous and malleable. See *City of Bakersfield v. Miller*, 64 Cal. 2d 93, 99, 410 P.2d 393 (1966) ("the term 'nuisance' is peculiarly amorphous"); *Grove Press, Inc. v. City of Philadelphia*, 418 F.2d 82, 88 (3d Cir. 1969) (nuisance doctrine is elastic and amorphous); Albert C. Lin, Public Trust and Public Nuisance: Common Law Peas in A Pod?, 45 U.C. Davis L. Rev. 1075, 1083 (2012) ("recent litigation seeking to apply public nuisance to lead paint, handgun violence, and climate change underscores the malleability of the doctrine.").

The two kinds of nuisance recognized under the common law are related only "in the vague general way that each of them causes inconvenience to someone." *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 315 (3d Cir. 1985), quoting Prosser, Private Action for Public Nuisance, 52 Va.L.Rev. 997, 999 (1966) (footnotes omitted). "A private nuisance is narrowly restricted to the invasion of interests in the use and enjoyment of land. It is only a tort, and the remedy for

it lies exclusively with the individual whose rights have been disturbed." *Id*. A public nuisance on the other hand, which is at issue here, "is a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large . . ." *Id*.

Both of these common law theories are vague and open-ended in definition. The amorphous and malleable nature of public nuisance is also evident in the variety of state statutes found to pass constitutional muster. See *Wilbros, LLC v. State*, S13A1410, 2014 WL 695212 (Ga. Feb. 24, 2014) (Ordinance not impermissibly vague which defines nuisance as "whatever is dangerous or detrimental to human life or health and whatever renders or tends to render soil, air, water or food impure or unwholesome."); *City of Lincoln Ctr. v. Farmway Co-Op, Inc*., 316 P.3d 707 (Kan. 2013) (City's nuisance ordinance, which proscribed maintaining public nuisance by intentionally causing or permitting condition to exist that injured or endangered public health, safety, or welfare was not unconstitutionally vague; a nuisance is "that which annoys or causes trouble or vexation, that which is offensive or noxious, or anything that works hurt, inconvenience or damage" and municipalities must define "nuisance" in light of this understanding.); *Stanfield v. Glynn Cnty*., 280 Ga. 785, 631 S.E.2d 374 (2006) (County nuisance ordinance, prohibiting "anything having an offensive odor," was not unconstitutionally vague under due process principles.); *State v. Monoco Oil Co., Inc*., 185 Misc. 2d 742, 713 N.Y.S.2d 440 (Sup. Ct. 2000) (Provisions of town's commercial zoning ordinance barring processing of products that were "unreasonably odorous" or the

emission of a substance "detrimental to the health, well-being and general safety of the community" was not unconstitutionally vague; ordinance set a standard which was essentially the definition of public nuisance.). But see *Guidi v. City of Atl. City*, 286 N.J. Super. 243, 245, 668 A.2d 1098 (App. Div. 1996) (Language prohibiting "any matter, thing, condition or act which is or may become an annoyance or interfere with the comfort or general well-being of the inhabitants of this municipality" subjected defendants to an unascertainable standard.); *City of Festus v. Werner*, 656 S.W.2d 286, 287 (Mo. Ct. App. 1983) (Ordinance impermissibly vague that prohibits the rendering, heating or steaming of any animal or vegetable product which creates disagreeable odors because "disagreeable" is not defined, "nor is any quantum of such odor established as necessary for violation" and the ordinance "does not provide who shall make the determination of 'disagreeable,' nor provide any standard for making such a determination.) Thus, as the Fourth Circuit keenly observed in *Cooper*, 615 F.3d at 302, when considering the Clean Air Act, "[t]he contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark." This Court should grant certiorari so that it can affirm that state common law nuisance claims are preempted under the defined standards of the Clean Air Act.

D. The reasoning in *Cooper* provides additional support for a finding that the Clean Air Act preempts state common law claims and this Court should grant certiorari so that it can affirm that all state common law nuisance actions – not simply those in non-source states – are preempted by the Clean Air Act.

In *Cooper*, 615 F.3d at 296, the Fourth Circuit relied on *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) and held that state common law claims under the Clean Air Act were permissible only in the source state.[3] But the court's reasoning focuses on the states' role in developing emissions regulations and demonstrates why state common law nuisance claims in the realm of air pollution should be preempted entirely. This Court should grant certiorari so that it can affirm that all state common law nuisance claims are preempted by the Clean Air Act.

The Fourth Circuit observed that, despite the Clean Air Act's comprehensive provisions and regulations controlling interstate emissions, North Carolina, the non-source state, brought a state law public nuisance suit against the Tennessee Valley Authority. *Cooper*, 615 F.3d at 297. The court thus viewed the "real" issue as "whether individual states will be allowed to supplant the cooperative federal-state framework [of

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[3] The *Oullette* Court held that the Clean Water Act does not preempt all state law nuisance claims, but a court "must apply the law of the State in which the point source is located." 479 U.S. at 496. The Court concluded that the application of numerous state nuisance laws would "undermine the important goals of efficiency and predictability in the [Clean Water Act's] permit system." *Id.*

the Clean Air Act] that Congress through the EPA has refined over many years." *Id*. at 298.

Although it held state law claims permissible in the source state, the Fourth Circuit noted that "[c]ourts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government." *Cooper*, 615 F.3d at 309. Indeed, the court found it "difficult to understand how an activity expressly permitted and extensively regulated by both federal *and state* government could somehow constitute a public nuisance." *Id.* at 296 (emphasis added). It would be particularly odd "for specific state laws and regulations to expressly permit a power plant to operate and then have a generic statute countermand those permissions on public nuisance grounds." *Id.* at 309. Under the Clean Air Act, states should be "expected to take into account their own nuisance laws in setting permit requirements." *Id*., quoting *Ouellette*, 479 U.S. at 499.

In reversing the district court's decision to apply the non-source state's law, the Fourth Circuit recognized that upholding the lower court's injunction "would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Cooper*, 615 F.3d at 296. Thus, although the court did not hold that the Clean Air Act entirely preempted state common law claims in the field of emissions regulation, it nevertheless found it "essential" to "respect the system

that Congress, the EPA, and the states have collectively established." *Id.* at 202-303. And given that Congress granted the states "an extensive role in the Clean Air Act's regulatory regime through the [State Implementation Plan] and permitting process," it is critical to consider field and conflict preemption principles, which "caution at a minimum against . . . allowing state nuisance law to contradict joint federal-state rules so meticulously drafted." *Id*. at 303. This Court should grant certiorari so that it can affirm that all state common law nuisance claims – not simply those in non-source states – are preempted by the Clean Air Act.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed and this Court should affirm that state common law nuisance claims with respect to emissions and air pollution are preempted by the Clean Air Act.

Respectfully submitted,

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