No. _____

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA EX REL. ROY COOPER,
ATTORNEY GENERAL,
Petitioner,

v.

TENNESSEE VALLEY AUTHORITY
AND STATE OF ALABAMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, preempts a public nuisance action against a stationary source when that action is based on the common law of the State where the source is located.

2. Whether the Fourth Circuit's conclusion that the issuance of an air quality permit bars a public nuisance action under Alabama and Tennessee law is contrary to this Court's directive that a federal court is bound to accept interpretations of state law by the State's highest court.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioner is the State of North Carolina ex rel. Attorney General Roy Cooper.

The respondents are Tennessee Valley Authority, defendant in this action, and the State of Alabama, who intervened on appeal over the objection of North Carolina.

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The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-42a) is reported at *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010). The opinion of the Fourth Circuit denying rehearing and rehearing en banc (Pet. App. 168a-170a) is unreported. The final judgment (Pet. App. 43a-50a) and opinion (Pet. App. 51a-92a) of the district court are reported at 593 F. Supp. 2d 812. The district court's decision with respect to the parties' motions for summary judgment (Pet. App. 93a-118a) is reported at 549 F. Supp. 2d 725. The district court's order denying Respondent's motion to dismiss (Pet. App. 119a-142a) is reported at 439 F. Supp. 2d 486. The Fourth Circuit's opinion, on an interlocutory appeal, affirming the denial of Respondent's motion to dismiss (Pet. App. 143a-167a) is reported at 515 F.3d 344.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 26, 2010. (Pet. App. 2a) A timely petition for rehearing was filed on September 8, 2010 and denied on September 21, 2010. (Pet. App. 168a) On November 23, 2010, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including February 3, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this petition. (Pet. App. 171a-195a)

STATEMENT

1. The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, "was the first modern federal environmental statute to employ a 'cooperative federalism framework,' assigning responsibilities for air pollution control to both federal and state authorities." Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming,* 50 Ariz. L. Rev. 799, 817 (2008). Under that framework, the federal government sets the *minimum* level of air quality throughout the country. States are charged with implementing air quality programs to achieve these minimum standards. *Id.* States, however, retain the authority to impose restrictions and requirements upon stationary sources within their borders that are more stringent than the federal minimum. *Id.* at 819; *see* 42 U.S.C. § 7401(a)(3) (2006) (Pet. App. 171a) ("air pollution control at its source is the primary responsibility of States and local governments"); 42 U.S.C. § 7416 (2006) (Pet. App. 173a) ("nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce * * * any requirement respecting control or abatement of air pollution"); 42 U.S.C. § 7604(e) (2006) (Pet. App. 181a) ("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 emission standard or limitation or to seek any other relief * * * *").

Under Section 108 of the Clean Air Act, the Environmental Protection Agency is required to set National Ambient Air Quality Standards ("NAAQS") for certain criteria pollutants. 42 U.S.C. § 7408 (2006). States are then required to draft State Implementation Plans ("SIPs") to achieve the federal minimum standards. Each State is given "wide discretion" in formulating its SIP. *Union Electric Co. v. EPA*, 427 U.S. 246, 250 (1976); *see* 42 U.S.C. § 7410 (2006). Once a SIP has been approved by EPA, the State plays the primary role in the attainment and maintenance of the NAAQS while the role of EPA becomes secondary. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

EPA has approved the SIPs for both Tennessee and Alabama. Consequently, both States have the authority under the Clean Air Act to issue air quality permits. *See* 42 U.S.C. § 7661a (2006). The legislatures of both States have stated that the issuance of such a permit does not insulate a stationary source from state tort law. The Tennessee Air Quality Act states that it shall not "be construed to abridge or alter any rights of action, civil or criminal, arising from statute, common law or equity." Tenn. Code Ann. § 68-201-114 (2006). (Pet. App. 195a)

Similarly, the Alabama Air Pollution Control Act provides that the Act shall not be construed "to limit or abrogate any private remedies now available to any person." Ala. Code § 22-28-23(a) (2006). (Pet. App. 187a)

2. Defendant Tennessee Valley Authority ("TVA") is a corporate agency and instrumentality of the United States, created and existing pursuant to the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831-831ee. TVA operates numerous electricity-generating facilities in the southern United States, including four coal-fired power plants within 100 miles of the North Carolina border. Of these four plants, three are located in Tennessee and one is located in Alabama.

These four plants emit an average of 260,000 tons of sulfur dioxide and nitrogen oxides into the air each year.[1] These emissions form fine particulate matter that penetrates the lungs and airways of persons downwind of TVA's plants, resulting in premature deaths, increased incidents of asthma attacks and increased inflammation of the lungs, particularly

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[1] For the five-year period prior to the filing of the complaint (2001-05), the combined annual emissions of sulfur dioxide and nitrogen oxides for these four plants were 263,420 tons. *See* TVA Air Quality Emissions Data (available at www.tva.com/environment/air/index.htm; go to "Emissions Data" and select "Bull Run," "Kingston," "John Sevier" and "Widows Creek").

among persons who are struggling with lung disease such as emphysema. In addition to the substantial impact on human health, TVA's emissions have scarred one of our Nation's greatest natural treasures, the Great Smoky Mountains. These pollutants have resulted in acidification of the soils in this fragile ecosystem, substantially diminishing the number and variety of plants and wildlife that this ecosystem will support. TVA's emissions have also greatly increased haze in the region. As a result, the breathtaking views that were once prevalent in the mountains of western North Carolina have been substantially diminished. The impact of TVA's excessive emissions has been extremely costly to North Carolina and its citizens.

With the installation of readily available pollution control equipment, the emissions from these four plants could easily be reduced from 260,000 tons per year to less than 45,000 tons per year. *See* 593 F. Supp. 2d at 827 (Pet. App. 82a) (installation of proper pollution control equipment would reduce annual sulfur dioxide and nitrogen oxide emissions to 44,321 tons per year). Such a reduction would result in an immediate decrease in the deaths and other harms occurring within North Carolina.

3. On January 30, 2006, the State of North Carolina brought a public nuisance action against TVA in the United States District Court for the Western District of North Carolina to address air emissions from TVA's coal-fired electric generating units located in Tennessee, Alabama and Kentucky. The

jurisdiction of the district court was based on 28 U.S.C. §§ 1331 and 1337.

The complaint alleges that TVA has failed to undertake reasonable measures to abate its emissions, thereby resulting in substantial harm to North Carolina and its citizens. The complaint asserts that TVA is liable for the creation of a public nuisance under the laws of the States of Tennessee, Alabama and Kentucky. Despite the enormous costs that TVA's excess emissions have imposed upon North Carolina, North Carolina sought no monetary damages from TVA. Instead, North Carolina requested only that TVA be required to install and operate readily available pollution control equipment to abate the ongoing nuisance.

TVA moved to dismiss the complaint, asserting that such an action was not appropriate against an instrumentality of the United States. The district court denied TVA's motion to dismiss, concluding that Section 118 of the Clean Air Act, 42 U.S.C. § 7418(a), expressly authorized the filing of nuisance and other common law causes of action against federal facilities such as TVA's plants. This provision of the Clean Air Act states that federal facilities must comply with all state and local "requirements * * * respecting the control and abatement of air pollution." 42 U.S.C. § 7418(a) (2006). (Pet. App. 174a) The district court concluded that "[g]iven such authorization for treating federal entities as private entities for air pollution purposes, and the fact that state law nuisance claims

against private entities for the abating of air pollution survived passage of the Clean Air Act, it follows that TVA is likewise subject to suit, in nuisance, for abatement of its emission of air pollutants." 439 F. Supp. 2d at 497. (Pet. App. 141a) The district court certified its order for an interlocutory appeal.

On interlocutory appeal, the Fourth Circuit agreed with the district court's conclusion that a public nuisance action may properly be brought against TVA under the Clean Air Act. 515 F.3d at 352-53. (Pet. App. 161a) Based on its reading of Section 118, the Fourth Circuit concluded that Congress intended the word "requirements" to sweep broadly and to include common law requirements such as those imposed by a State's nuisance laws. 515 F.3d at 351-53 (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996)). (Pet. App. 156a-160a) The Fourth Circuit rejected "TVA's argument that the CAA does not mandate compliance with state 'requirements' enforced through a common-law tort suit." 515 F.3d at 352-53. (Pet. App. 161a) The Fourth Circuit affirmed the district court's denial of TVA's motion to dismiss and remanded the action for further proceedings.

Following remand, both North Carolina and TVA moved for summary judgment. In its ruling on those motions, the district court rejected various affirmative defenses asserted by TVA, including a defense that the issuance of air quality permits to TVA's plants rendered it immune from a public nuisance action.

The district court concluded that this Court's decision in *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987), "conclusively" refutes TVA's assertion that because it is in compliance with its permits under the Clean Air Act, it cannot be liable in nuisance. 549 F. Supp. 2d at 732. (Pet. App. 106a) The district court noted that this Court, in *Ouellette,* "discussed the potential tension between state nuisance law and federal permitting systems" and rejected an argument that the issuance of a federal permit would bar a claim under state nuisance law. 549 F. Supp. 2d at 731. (Pet. App. 106a) Citing various appellate decisions in Tennessee and Alabama, the district court pointed out that these States are "unanimous in concluding that otherwise lawful actions may be the subject of nuisance lawsuits." *Id.* at 732. (Pet. App. 107a) Throughout its order, the district court recognized that under this Court's decision in *Ouellette,* it was required to apply the nuisance law of the source States, rather than the law of North Carolina. 549 F. Supp. 2d at 729, 732, 735. (Pet. App. 99a, 106a, 113a-115a)

Following a twelve-day bench trial, the district court held that North Carolina had established that TVA's three Tennessee plants (Bull Run, Kingston and John Sevier) located within 100 miles of North Carolina constituted a nuisance under the law of the State of Tennessee. The district court further held that TVA's Widows Creek plant (which is also within 100 miles of the North Carolina border) constituted a nuisance under the law of the State of Alabama. The

district court rejected North Carolina's assertion that TVA's plants that were further away were also a nuisance to North Carolina.

The district court proceeded to issue an injunction requiring TVA to install readily available pollution control equipment at the four plants at issue. The district court required TVA to install scrubbers and selective catalytic reduction ("SCR") technology at these plants – equipment that TVA had stated it planned to install even in the absence of an injunction.[2] *See, e.g.,* 593 F. Supp. 2d at 832 (Pet. App. 45a) ("As to John Sevier, TVA indicated at trial that it plans to build scrubbers and SCRs sufficient to cover all four [electric generating units]."). The district court, however, concluded that this equipment could be installed on a shorter time schedule than that set out in TVA's construction plan and required TVA to comply with this shorter construction schedule.

Retreating from the Fourth Circuit's interlocutory opinion that allowed this nuisance action to proceed, a newly constituted panel of the Fourth Circuit reversed the district court and remanded with instructions that

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[2] TVA tendered its construction plan to the district court with the apparent hope of convincing the court that it was not necessary to issue an injunction. At trial, North Carolina presented evidence that TVA had in the past used its construction plan in an effort to forestall litigation and then altered that plan after the impending litigation was averted.

the district court dismiss the action.[3] The Fourth Circuit concluded that: (1) the Clean Air Act preempts a public nuisance action in which the harm arises from air emissions; (2) the district court improperly relied on the law of the State of North Carolina, rather than the law of Alabama and Tennessee, in analyzing the claim; and (3) the issuance of air quality permits immunized TVA's plants from a nuisance claim under the laws of Alabama and Tennessee.

Although this Court in *Ouellette* allowed a nuisance action to proceed against a facility permitted under the Clean Water Act, the Fourth Circuit held that a nuisance action could not be brought against a facility permitted under the Clean Air Act. In doing so, the Fourth Circuit recognized that this Court's holding in *Ouellette* was "equally applicable" to the Clean Air Act. 615 F.3d at 306. (Pet. App. 30a) Nevertheless, the Fourth Circuit read the *Ouellette* decision as narrowly defining the role of an affected State, such as North Carolina. According to the Fourth Circuit, that role does not include bringing a nuisance action under the law of the source State if doing so would upset the reliance interests of permit holders. *Id.* (Pet. App. 30a) The Fourth Circuit concluded that Congress did not intend for the Clean Air Act's savings clause to apply to actions brought by a downwind State. *Id.* at 304. (Pet. App. 24a-25a)

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[3] The State of Alabama moved to intervene in the appeal. The Fourth Circuit granted Alabama's motion over North Carolina's objection.

The Fourth Circuit further concluded that the district court had applied North Carolina law, rather than the law of Alabama and Tennessee, in this action.[4] Rather than remanding the action and instructing the district court to apply the law of these source States, the Fourth Circuit directed the district court to dismiss the action in light of its determination that the action was preempted by the Clean Air Act.

Finally, the Fourth Circuit concluded that "it would be difficult to uphold the injunctions because TVA's electricity-generating operations are expressly permitted by the states in which they are located." 615 F.3d at 309. (Pet. App. 35a) The Fourth Circuit stated that "[i]t would be odd" for a State to allow its nuisance laws to restrict activity for which the State has issued a permit. *Id.* (Pet. App. 35a-36a) In doing so, the Fourth Circuit rejected the district court's conclusion that under Alabama and Tennessee law, the issuance of a permit does not immunize a facility from a nuisance action. The Fourth Circuit's decision fails to cite to the applicable provisions of the Alabama Air Pollution Control Act and the Tennessee Air Quality Act which expressly provide that these

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[4] Throughout the trial of this matter, the district court repeatedly stated that it was obligated to apply and was applying the nuisance laws of the source States rather than North Carolina law. *See* 549 F. Supp. 2d at 729, 732, 735; 593 F. Supp. 2d at 829-31. (Pet. App. 100a, 106a, 113a-115a; Pet. App. 86a-92a)

statutes do not limit or abrogate common law causes of action.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's refusal to apply this Court's holding in *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987), merits review by this Court. In *Ouellette,* this Court expressly recognized that a nuisance action may be brought to address interstate pollution, provided the action is based on the law of the source State. The Fourth Circuit, however, has held to the contrary. Additionally, the decision below is in conflict with decisions of both the Second and Sixth Circuits. *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 178 L. Ed. 2d 530 (2010) (No. 10-174); *Her Majesty the Queen v. City of Detroit,* 874 F.2d 332 (6th Cir. 1989).

The present appeal is of exceptional importance. The district court, in factual findings that were not challenged on appeal, concluded that TVA's excess air emissions result in premature deaths (as well as numerous other adverse health effects and environmental harms) within the State of North Carolina. Failure to correct the Fourth Circuit's erroneous decision will ensure that these deaths and other harms – which could be avoided by the installation of readily available pollution control technology – will continue.

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *INTERNATIONAL PAPER CO. v. OUELLETTE*.

In *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987), this Court considered and rejected the very arguments on which the Fourth Circuit now relies. In *Ouellette*, residents of Vermont brought a public nuisance action seeking injunctive and other relief in connection with International Paper's discharge of pollutants into an interstate body of water. The discharge originated in New York. *Id.* at 484. The discharge was authorized by a permit that was issued under the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*., and was administered by the State of New York. 479 U.S. at 490 n.10; *see* 33 U.S.C. § 1342 (2006). This Court expressly held that the plaintiffs' public nuisance action could proceed, provided it was based on the law of the State in which the pollution source was located (New York) rather than the law of the affected State (Vermont). 479 U.S. at 497. The Court rejected the defendant's claim that the CWA preempted all common law actions. *Id.* at 497-99. To the contrary, the Court held – unanimously – that although claims based on the nuisance law of the downstream State were preempted, "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *Id.* at 497; *see also id.* at 500 (Brennan, J., concurring in part and dissenting in part); *id.* at 508-09 (Stevens, J., concurring in part and dissenting in part). Under

Ouellette, the State of North Carolina may proceed with its public nuisance action provided the action is based on the law of the source States – Alabama and Tennessee.

The only arguable distinction between the facts of the present case and those in *Ouellette* is that the present case involves air pollution crossing state lines and thus involves the Clean Air Act, whereas the *Ouellette* facts involved water pollution and the CWA. The Court's analysis in *Ouellette* clearly demonstrates that this is a distinction without a difference.

In *Ouellette*, this Court concluded that the CWA's "saving clause specifically preserves" common law actions under source state law. 479 U.S. at 497. That "saving clause" is found in Sections 505(e) and 510 of the CWA. 33 U.S.C. §§ 1365(e), 1370 (2006). The Clean Air Act analogs of these sections are Sections 304(e) and 116, respectively. 42 U.S.C. §§ 7416, 7604(e) (2006). (Pet. App. 173a, 181a) Section 304(e) is *identical* to Section 505(e) of the CWA. *Compare* 33 U.S.C. 1365(e) *with* 42 U.S.C. § 7604(e); *see also Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989).

Section 116 of the Clean Air Act explicitly saves from pre-emption "any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. (Pet. App. 173a) As this Court has concluded, a plain "reference to a State's 'requirements' includes its common-law duties." *Riegel v. Medtronic, Inc.*, 552

U.S. 312, 324 (2008). Thus, the Clean Air Act specifically saves the enforcement of state common law, which is the heart of this matter. *See Ouellette*, 479 U.S. at 492, 497-98. The Fourth Circuit, however, fails to even discuss Section 116 in its analysis of this issue.

Throughout its opinion, the Fourth Circuit sets out several justifications for why a public nuisance action should not be brought. Each of those justifications was rejected by this Court in *Ouellette*. The Fourth Circuit attempted to distinguish *Ouellette* based on this Court's admonition that "'affected States'" should not be "'allowed to impose separate * * * standards'" on sources. 615 F.3d at 304 (Pet. App. 24a-25a) (quoting *Ouellette*, 479 U.S. at 493-94). From this, the Fourth Circuit concluded that North Carolina – an "affected State" – should not be "allowed to impose separate * * * standards" on TVA. (Pet. App. 25a) The Fourth Circuit clearly misconstrued this Court's analysis. In making its observation, this Court was not referring to the nature of the plaintiff but instead to whether the "affected State" could impose *its own law* on sources in another State. Indeed, in the very next sentence this Court "conclude[d] that the CWA precludes a court from applying *the law of an affected State* against an out-of-state source." *Ouellette*, 479 U.S. at 494 (emphasis added). In this case, the district court acted at the behest of an affected State, but it applied the law of the source States, which is the precise course charted by *Ouellette*.

The Fourth Circuit's concern that state law nuisance actions would undermine the "single system of permitting" embodied in the federal Clean Air Act was likewise considered and dismissed by this Court in *Ouellette*. 615 F.3d at 306. (Pet. App. 28a-29a) Although a source State's nuisance law "may impose separate standards and thus create some tension with the permit system," application of such standards "does not disrupt the regulatory partnership established by the permit system." *Ouellette*, 479 U.S. at 499. Indeed, in *Ouellette*, the fact that the defendant had been issued a CWA permit did not bar a common law nuisance action. Applying the common law of the *affected* State, the Court reasoned, "would allow respondents to circumvent the * * * permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act." *Ouellette*, 479 U.S. at 494. But, "[b]ecause the Act specifically allows *source* States to impose stricter standards, the imposition of *source*-state law does not disrupt the regulatory partnership established by the permit system." *Id.* at 499 (emphasis added).

The Fourth Circuit also focused on the "structure of the Clean Air Act in order to emphasize the comprehensiveness of its coverage." 615 F.3d at 301. (Pet. App. 18a) But the Fourth Circuit's reasoning runs afoul of this Court's conclusion that although the CWA was "the most comprehensive and far reaching provisions that Congress ever had passed" regarding water pollution control, it left intact common law actions under the law of the source State. *Ouellette*,

479 U.S. at 489 (internal quotations and citation omitted). As this Court has cautioned, "merely because * * * federal provisions [a]re sufficiently comprehensive to meet the need identified by Congress d[oes] not mean that States * * * [a]re barred from * * * imposing further requirements." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717 (1985).

The *Ouellette* decision also foreclosed the Fourth Circuit's conclusion that it cannot "allow multiple courts in different states to determine whether a single source constitutes a nuisance." 615 F.3d at 302. (Pet. App. 21a) This Court expressly rejected this argument, finding that nothing "prevents a court sitting in an affected State from hearing a common-law nuisance suit" under these circumstances. *Ouellette*, 479 U.S. at 500. The Court specifically concluded that limiting common law claims to those under the law of the source State cured the ill identified by the Fourth Circuit: "[T]he restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations." *Id.* at 499. Moreover, the Clean Air Act clearly recognizes the authority of the source State to maintain common law standards that go beyond federal requirements. 42 U.S.C. § 7416 (Pet. App. 173a); *accord Milwaukee v. Illinois*, 451 U.S. 304, 327-28 (1981); *Ouellette*, 479 U.S. at 497-98.

The net effect of the Fourth Circuit's decision is far greater than avoiding having "multiple courts in different states * * * determine whether a single source constitutes a nuisance." 615 F.3d at 302. (Pet. App. 21a) Instead, its effect is to deny injured plaintiffs even the right to pursue a remedy. This is hardly the result counseled by *Ouellette.*

The Fourth Circuit also derided the use of "vague public nuisance standards," which, in its view, would work "to the detriment of industry and the environment alike." 615 F.3d at 296 (Pet. App. 7a); *see also id.* at 298, 302 (Pet. App. 12a, 21a). In *Ouellette,* however, this Court found no such problem with allowing such claims to proceed so long as they were based on the law of the source State. Contrary to the Fourth Circuit's assertion that this Court "created the strongest cautionary presumption against" allowing nuisance claims to proceed, 615 F.3d at 303 (Pet. App. 23a), the Court in *Ouellette* approved of the use of state law nuisance actions so long as they were based on the correct State's law. In the twenty-plus years since *Ouellette*, the "balkanization" and "confused patchwork of standards" that the Fourth Circuit feared, *id.* at 296 (Pet. App. 7a), has not come to pass under the CWA.

Finally, the Fourth Circuit's assertion that "[s]eeking public nuisance injunctions against TVA * * * is not an appropriate course," 615 F.3d at 311 (Pet. App. 41a), directly conflicts with this Court's specific rejection of any distinction between claims for

damages and injunctive relief. The Court declined to "draw a line between the types of relief sought," noting that "unless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is available." *Ouellette*, 479 U.S. at 498 n.19.

The Fourth Circuit indicated that it could not "state categorically that the *Ouellette* Court intended a flat-out preemption of each and every conceivable suit under nuisance law." 615 F.3d at 303. (Pet. App. 22a) To do so, of course, would be contrary to *Ouellette*'s very holding. The Fourth Circuit's reasoning, however, represents no less than a broadside attack on public nuisance law. The Fourth Circuit's logic impugns the spectrum of conceivable public nuisance actions, leaving nothing of the tort in its wake. This is anathema to Congress' preservation of a State's authority to hold sources to more stringent standards than the federal minimum. *See* 42 U.S.C. § 7416. (Pet. App. 173a) The fact that nuisance law is a common law, case-by-case determination makes it no less the binding policy and preserved law of a State than any numeric emissions limit that a source State may promulgate. The salient fact is that Alabama and Tennessee impose numeric emissions limits and also maintain the common law tort of public nuisance. Congress respected that decision in the Clean Air Act, but the Fourth Circuit did not, thus allowing an unwarranted intrusion upon state authority.

The Fourth Circuit's repeated departures from and outright conflicts with *Ouellette* suggest that the Fourth Circuit was focused more on what it believes the law ought to be rather than what this Court and Congress have already said it is. Review is warranted to ensure that the *Ouellette* decision is followed by the Fourth Circuit.

II. THE DECISION OF THE FOURTH CIRCUIT CREATES A CONFLICT AMONG THE CIRCUIT COURTS.

The Fourth Circuit's decision stands in conflict with decisions of the Second and Sixth Circuits. *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 178 L. Ed. 2d 530 (2010) (No. 10-174); *Her Majesty the Queen v. City of Detroit,* 874 F.2d 332 (6th Cir. 1989). The Second and Sixth Circuits have expressly recognized that the Clean Air Act does not preempt nuisance-type actions. In contrast, the Fourth Circuit has now concluded that the Clean Air Act preempts North Carolina's efforts to pursue a nuisance action to protect its citizens from emissions emanating from TVA's power plants. As reflected by this Court's recent grant of certiorari in the Second Circuit case, review by this Court is necessary to resolve this conflict.

In *American Electric Power Co.,* the Second Circuit considered whether a public nuisance action based on federal common law could proceed against TVA and various other utilities that emitted greenhouse gases.

Each of the plants at issue in that action had been issued valid permits under the Clean Air Act. In fact, the complaint in that action includes the TVA plants that are the subject of the present action filed by North Carolina. The Second Circuit held that the plaintiffs' complaint stated a claim for relief and reversed the district court's dismissal of the action.

Despite the Second Circuit's decision to allow a nuisance action to proceed against TVA and other utilities as a result of emissions of greenhouse gases, the Fourth Circuit has refused to allow a public nuisance action based on state law on the theory that such an action "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," resulting in a "balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." 615 F.3d at 296. (Pet. App. 7a) According to the Fourth Circuit, "Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with * * * judicially managed nuisance decrees." *Id.* at 304. (Pet. App. 25a) The Fourth Circuit therefore held that the Clean Air Act preempts a nuisance action against a facility operating pursuant to a Clean Air Act permit when the plaintiff is asserting that emissions from that facility are excessive.

If the Second Circuit is correct that this Court's precedents allow Connecticut to pursue a public nuisance action against TVA in connection with TVA's emissions of greenhouse gases, North Carolina's nuisance action must be permitted to proceed as well.[5] The considerations articulated by the Fourth Circuit (e.g., the vague and indiscriminate nature of public nuisance actions) as the basis for concluding that the Clean Air Act preempts nuisance actions applies equally to nuisance actions brought under state law and to nuisance actions brought under federal common law. Thus, the Second Circuit's decision to allow a nuisance action to proceed under federal common law is inconsistent with the Fourth Circuit's conclusion that a nuisance action based on state law is preempted. This is particularly true given that this Court has previously recognized that state nuisance law is not preempted under the Clean Water Act.

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[5] Connecticut's action in the Second Circuit case is based on federal common law. The Clean Air Act does not specifically preserve federal common law, but it does specifically save state common law, and *Ouellette* did not address federal common law. Accordingly, the Fourth Circuit's conclusion that the Clean Air Act preempts state law nuisance actions cannot be squared with the Second Circuit's decision that nuisance actions based on federal common law may go forward. Should this Court conclude in No. 10-174 that the Clean Air Act displaces federal common law, however, such a holding would not necessarily resolve the issue presented by this petition given Congress' express preservation of state common law.

International Paper Co. v. Ouellette, 479 U.S. 481 (1987).

In their petition for writ of certiorari to this Court, American Electric Power and other electrical utilities named as defendants in the Second Circuit case argued that certiorari should be granted based, in part, on the inherent conflict between the decisions of the Second and Fourth Circuits. *See* Petition for Writ of Certiorari, *Am. Elec. Power Co. v. Connecticut*, No. 10-174, pp. 3, 23-24, 27, 29, 32 (filed Aug. 2, 2010); *see also* Br. for Petitioners, p. 40, *Am. Elec. Power Co. v. Connecticut*, No. 10-174 (filed Jan. 31, 2011) (noting conflict between the decisions of the Second and Fourth Circuits). They argued that the considerations on which the Fourth Circuit relied in support of preemption of state common law claims require the "displacement of the federal common law." Petition for Writ of Certiorari*, Am. Elec. Power Co. v. Connecticut*, p. 24. As these utilities recognize, the decisions of the Second and Fourth Circuit cannot be reconciled.

The Fourth Circuit's decision also conflicts with the Sixth Circuit's decision in *Her Majesty the Queen v. City of Detroit,* 874 F.2d 332 (6th Cir. 1989). In that case, the plaintiffs asserted that they would be harmed by emissions from a waste incinerator that had been issued a permit under the Clean Air Act. Plaintiffs brought their claim under the Michigan Environmental Protection Act, Mich. Comp. Laws Ann. §§ 691.1201-.1207, a state statute that effectively codified a nuisance-like cause of action. This statute

left to the judiciary the task of "developing a state common law of environmental quality." 874 F.2d at 338. The district court held that the Clean Air Act preempted the plaintiffs' state law claims. The Sixth Circuit reversed, concluding that the Clean Air Act "displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute." 874 F.2d at 342.

The Sixth Circuit held that the plaintiffs' claim that a Michigan plant operating under a Clean Air Act permit must meet "more stringent standards selected by the Michigan courts" is not preempted by the Clean Air Act. 874 F.2d at 341. The Sixth Circuit concluded that state common law that imposes more stringent requirements than a Clean Air Act permit is "unaffected by federal law." *Id.* Thus, in the Sixth Circuit, the issuance of a valid Clean Air Act permit does not preempt a cause of action sounding in nuisance in which the plaintiff seeks to abate excess emissions.

In contrast to the Sixth Circuit, the Fourth Circuit's decision provides that a State cannot "supplant[] operating permits" with "mandates derived from public nuisance law." 615 F.3d at 306. (Pet. App. 28a) The Fourth Circuit reasoned that allowing a nuisance action to be brought against a facility that had been issued a permit under the Clean Air Act would "upset the reliance interests" of permit holders "in favor of the nebulous rules of public nuisance." *Id.* (Pet. App. 30a) Under the Fourth Circuit's decision, a

State where a stationary source is located cannot, through its own nuisance laws, impose more stringent requirements on a facility than is set out in the facility's air emission permit. Thus, the Fourth Circuit's decision is in direct conflict with the holding of the Sixth Circuit.

Prior to the Fourth Circuit's decision, federal courts had consistently held that the issuance of a discharge permit does not preempt an action in nuisance. Philip Weinberg, *"Political Questions": An Invasive Species Infecting the Courts*, 19 Duke Envtl. L. & Policy Forum 155, 163 (2008) ("The courts have long and consistently rejected assertions that the enactment of regulatory statutes like the Clean Air Act and Clean Water Act preempt states from public nuisance actions."). Thus, the Fourth Circuit's decision is in conflict with not only this Court's decision in *Ouellette* but also with the decisions of the circuit and district courts that have faithfully applied that precedent. *See, e.g., Her Majesty the Queen,* 874 F.2d at 343 (Clean Air Act does not preempt state law causes of action that impose more stringent requirements than a federal permit given that "Congress did not wish to abolish state control"); *Am. Elec. Power Co.,* 582 F.3d at 326 (rejecting defendant's argument that "vague and indeterminate nuisance concepts" should have no role in the resolution of complex disputes relating to air emissions); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1285 (W.D. Tex. 1992) ("This Court holds that the Clean Air Act does not preempt the plaintiffs' various common law

claims."); *Ouellette v. International Paper Co.*, 666 F. Supp. 58, 62 (D. Vt. 1987) ("plaintiffs' state law nuisance claim is not preempted by the CAA"); *see also* Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law,* 34 B.C. Envtl. Aff. L. Rev. 1, 9 (2007) ("Like the CWA, the CAA does not preempt state common law nuisance claims.").

The issue presented by this petition will divide the circuit courts until resolved by this Court. Here, the Fourth Circuit declined to reconsider its decision en banc. Thus, it is clear that the Fourth Circuit will be unlikely to retreat from its reading of *Ouellette*. The circuit split thus appears to be firmly entrenched. To the extent that this split is not resolved by this Court in *American Electric Power Co. v. Connecticut*, No. 10-174, the present petition should be granted in order to bring uniformity among the circuit courts on this important issue.

III. THE ISSUES PRESENTED ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THE COURT.

It is difficult to overstate the importance of this case. In factual findings that were uncontested by TVA on appeal, the district court found that exposure to particulate matter and ozone formed from emissions from TVA's four plants closest to North Carolina have resulted in significant adverse health effects in North Carolina. Exposure to these pollutants results in an

increase of premature deaths from adverse pulmonary inflammation, cardiac arrhythmia and sudden infant death syndrome. 593 F. Supp. 2d at 821-22. (Pet. App. 69a-70a) These pollutants result in scarring of the lungs, acute respiratory pain, and increased incidence of asthma and chronic bronchitis. *Id.* at 822-24. (Pet. App. 69a-76a) Deposition of particulate matter also causes the release of toxins in soils and lowers the nutrient content of soils, stunting the growth of vegetation. *Id.* at 823. (Pet. App. 73a) Finally, the district court found that particulate matter diminishes visibility in the "cherished, pristine wilderness areas" of western North Carolina. *Id.* at 823. (Pet. App. 74a)

The decision below has a tremendous impact on the environment and public health. At issue is whether people in North Carolina will continue to die as a result of TVA's excess emissions – even though these deaths could be readily averted by installing and operating modern pollution control equipment. Accordingly, the decision below has profound consequences on the ability of States to protect their citizens from deadly emissions emanating from plants such as TVA's.

For well over a century, this Court has recognized that the ability of States to bring a nuisance action in order to protect their citizens from air pollution is a core aspect of state sovereignty. *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907). In that case, this Court emphasized that States must have "the last

word as to whether * * * [their] inhabitants shall breathe pure air." *Id.* The interest of the affected State is particularly acute where, as here, the offending facilities are near the State line, and so the effects are felt fully in the downwind State. *See id.* at 238 (facilities in question were "near the Georgia line"). More recently, in *Massachusetts v. EPA,* 549 U.S. 497, 519 (2007), this Court reiterated that States have a strong interest in "preserv[ing] [their] sovereign territory" from the impacts of air pollution. The Clean Air Act was drafted with the intent of preserving the ability of States to use nuisance law to protect against environmental harm. 42 U.S.C. §§ 7401(a)(3), 7416, 7604(e); *see* William H. Rodgers, Jr., Environmental Law § 3.1, at 125 (2d ed. 1994); H.R. Rep. No. 1146, 91st Cong., 2d Sess. 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5388. The Fourth Circuit's decision not only flies in the face of express congressional intent, it profoundly affects the interest of States, recognized for over a century by this Court, in protecting natural resources and the health of their citizens.

The issues raised by this petition are particularly important given that this Court has previously addressed the role that nuisance actions should play in the context of interstate pollution. For over two decades, this Court has recognized that when pollution crosses state lines, an action may be brought for common law nuisance provided it is based on the law of the State from which the harmful emissions originate – notwithstanding a comprehensive federal

permitting scheme addressing such emissions. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). As set out above, the Fourth Circuit effectively ignored both the holding and language of the *Ouellette* decision. Opinions of this Court must not be circumvented by the lower courts. Review by this Court is necessary to bring the Fourth Circuit back in line with the precedents of this Court.

Finally, the split that the Fourth Circuit's decision creates with the Second and Sixth Circuits further highlights the importance of the issues raised by the petition. The significance of this split is magnified by the fact that electrical utilities are typically large, multi-state businesses whose service area reaches into multiple circuits. TVA's service area, for example, extends into seven different States within the Fourth, Fifth, Sixth and Eleventh Circuits.[6] Thus, a plaintiff who brings a public nuisance action against TVA can file that action in any one of four different circuits. Given the fact that public utilities will generally be subject to suit in multiple circuits, uniformity among the circuit courts is particularly important.

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[6] As a further example, the service area of American Electric Power Co. (one of the utilities that petitioned for certiorari in the Second Circuit case) spans eleven States within the Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits.

The issue of whether the Clean Air Act preempts public nuisance actions relating to emissions from a permitted facility is an important and recurring issue of federal law. The resolution of this issue significantly impacts our environment, States and the regulated community. Given the tremendous burdens and costs that TVA's excessive emissions unfairly place on North Carolina and its citizens, this Court should grant the petition and resolve this important issue.

IV. THE FOURTH CIRCUIT'S DISREGARD OF CONTROLLING DECISIONS OF THE SUPREME COURTS OF ALABAMA AND TENNESSEE MERITS SUPERVISORY REVIEW BY THIS COURT.

Apparently recognizing that its holding was a remarkable break from this Court's decision in *International Paper Co. v. Ouellette,* the Fourth Circuit attempted to buttress its holding by asserting that because "TVA's facilities operate under permits," they "cannot logically be public nuisances under Alabama and Tennessee law." 615 F.3d at 310. (Pet App. 38a) In doing so, however, the Fourth Circuit's decision runs afoul of this Court's repeated directive that federal courts are bound to accept the interpretation of state law made by a State's highest court. *Alabama v. Shelton,* 535 U.S. 654, 674 (2002); *Hortonville Joint School Dist. v. Hortonville Educ. Assoc.,* 426 U.S. 482,

488 (1976). As set out below, both Alabama and Tennessee law clearly recognize that the issuance of an air quality permit does not insulate the permit holder from an action for nuisance. Accordingly, the Fourth Circuit's effort to provide an alternative basis for its holding should not insulate its decision from certiorari.[7] Moreover, supervisory review by this Court is appropriate whenever a circuit court flouts binding Supreme Court precedent – even when the

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[7] The Fourth Circuit purports to set out three bases for its opinion. First, the Fourth Circuit held that North Carolina's action is preempted by the Clean Air Act. Second, the Fourth Circuit concluded that the district court applied North Carolina law rather than the law of the source States. Third, the Fourth Circuit found that under Alabama and Tennessee law, the issuance of a permit to TVA bars a nuisance action. Assuming the Fourth Circuit were correct that the district court improperly applied North Carolina law (which the record does not support), the remedy – in the absence of a determination that the action was preempted – would be to remand with instructions to apply Alabama and Tennessee law, rather than dismissal of the action. Accordingly, if the Fourth Circuit erred in holding that the action was preempted, North Carolina is entitled to relief irrespective of the second basis for the Fourth Circuit's opinion. Thus, only the third basis of the opinion appears to stand as a separate and independent ground for the Fourth Circuit's holding. As set forth below, however, the third basis for the Fourth Circuit's opinion should not deny this Court the opportunity to resolve an important issue of federal preemption.

lower court attempts to provide an alternative basis for its holding. *See* S. Ct. R. 10(a).

Alabama law could not be clearer that the issuance of a permit authorizing the discharge of pollutants does not insulate the permit holder from a nuisance action. In *Russell Corp. v. Sullivan,* 790 So. 2d 940 (Ala. 2001), the Alabama Supreme Court rejected the defendants' argument that the issuance of a valid waste water discharge permit by the Alabama Department of Environmental Management to defendants shielded them from a nuisance action:

> [E]ven a lawful and careful activity, when combined with culpable acts,[8] constitutes a nuisance if the activity hurts, inconveniences, or damages the complaining party. Therefore, although [defendants] argue that their actions were in accordance with state and federal regulations and that they were permissible under various permits, the plaintiffs may still maintain an action

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[8] The Alabama Supreme Court has long recognized that the failure to install readily available pollution control equipment may constitute a culpable act under Alabama law giving rise to an action in nuisance. *Martin Bldg. Co. v. Imperial Laundry Co.,* 124 So. 82, 85 (Ala. 1929). Here, the district court found as a fact that TVA's failure to install readily available pollution control equipment resulted in substantial harm to North Carolina and its citizens. 593 F. Supp. 2d at 830. (Pet. App. at 88a)

> against [defendants] if they can prove the elements of nuisance.

Id. at 951 (citation omitted). Remarkably, the Fourth Circuit's opinion fails to cite to this controlling decision of the Alabama Supreme Court, even though it was expressly relied on by the district court and cited in North Carolina's brief to the Fourth Circuit. 593 F. Supp. 2d at 829 (Pet. App. 86a); N.C. 4th Cir. Br, pp. 20, 50. Instead of relying on Alabama law as pronounced by the Alabama Supreme Court, the Fourth Circuit based its opinion on what it would like Alabama law to become. *See* 615 F.3d at 310 (Pet. App. 38a) ("As TVA's facilities operate under permits, required by Congress and EPA regulations, we cannot say that the plant emissions of which North Carolina complains are a public nuisance.").

Not only is Alabama law clear that an environmental permit does not shield the permit holder from a nuisance action, this is particularly true with respect to air pollution. The Alabama Air Pollution Control Act expressly states:

> [N]othing in this section shall be construed to limit or abrogate any private remedies now available to any person for the alleviation, abatement, control, correction, or prevention of air pollution * * * *

Ala. Code § 22-28-23(a). (Pet. App. 187a) In *Borland v. Sanders Lead Co.,* 369 So. 2d 523, 526 (Ala. 1979),

the Alabama Supreme Court held that in light of this statute, the trial court erred in concluding that a permit holder's compliance with the Alabama Air Pollution Control Act shields the defendant from liability under common law causes of action.

The Fourth Circuit also attempted to re-write Tennessee law in its effort to craft an alternative basis for its opinion. Like Alabama, the Tennessee legislature has expressly recognized that neither compliance with the State's environmental statutes nor compliance with any permit issued under those statutes stands as a defense to a nuisance action. The Tennessee Air Quality Act expressly provides that the Act shall not "be construed to abridge or alter any rights of action, civil or criminal, arising from statute, common law or equity." Tenn. Code Ann. § 68-201-114. (Pet. App. 195a) In fact, the very permits issued by the Tennessee Department of Environment and Conservation provide that they do not authorize TVA to violate any state law – whether statutory or common law. 4th Cir. J.A. 1303, 1582, 1734.

Disregarding this controlling state statute, the Fourth Circuit asserts that "[a]n activity that is explicitly licensed and allowed by Tennessee law cannot be a public nuisance." 615 F.3d at 310. (Pet. App. 38a) No Tennessee appellate court has ever so

held.[9] Moreover, for well over a century, the Tennessee Supreme Court has recognized that licenses, permits and charters issued by the State do not immunize the holder from a nuisance action. *Louisville & Nashville Terminal Co. v. Lellyett,* 85 S.W. 881 (Tenn. 1904).

In *Lellyett,* the State of Tennessee granted the defendant a charter to construct a railroad terminal in

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[9] Although the Fourth Circuit cites to two Tennessee appellate court decisions in support of its view of Tennessee law, neither case supports the opinion below. 615 F.3d at 310. (Pet. App. 38a) In *O'Neil v. State ex rel. Baker*, 206 S.W.2d 780 (Tenn. 1947), the Tennessee Supreme Court, in a two page opinion, considered the validity of a referendum on the sale of liquor. The *O'Neil* opinion has no bearing on the issue that was before the Fourth Circuit. Similarly, the Fourth Circuit's citation to *Fey v. Nashville Gas & Heating Co.*, 64 S.W.2d 61 (Tenn. Ct. App. 1933), is misplaced. Tennessee courts have long held that any *unauthorized* obstruction of a public highway is a nuisance. *See Memphis Street Ry. v. Rapid Transit Co.,* 179 S.W. 635, 640 (Tenn. 1915). In *Fey,* the Tennessee Court of Appeals noted, in passing, that this doctrine had no applicability to the facts before it given that the defendant had been authorized to install gas pipes below the street's surface. 64 S.W. at 62. Here, North Carolina's nuisance action is not based on TVA impeding traffic on a public highway. The *Fey* decision simply does not stand for the proposition that a license or permit immunizes the defendant from a nuisance action.

Nashville. 85 S.W. at 881-82. An adjoining landowner brought a nuisance action as a result of noise and smoke emanating from the facility. *Id.* The Tennessee Supreme Court concluded that the fact that the legislature had authorized the defendant to operate a railroad terminal did not prevent the facility from constituting a nuisance. The Tennessee Supreme Court reasoned that although the Tennessee legislature had granted the defendant the power to condemn property for public use, the legislature could not grant defendant the right "to seriously impair or destroy property not so taken." 85 S.W. at 886. The Tennessee Supreme Court held that the State "'can give no license'" that will allow a defendant to operate "'in disregard of the rights of others'" and "'with immunity for the[] invasion'" of those rights. *Id.* at 887 (quoting *Louisville & Nashville Terminal Co. v. Jacobs,* 72 S.W. 954, 958 (Tenn. 1902)).

The Tennessee Supreme Court in *Lellyett* noted that any legislation that authorizes the holder of a license to engage in a nuisance would be "so utterly repugnant to our constitution and system of government * * * that it will never be attempted or upheld." 85 S.W. at 887. Accordingly, it is not surprising that the Tennessee Air Quality Act provides that it shall not "be construed to abridge or alter any rights of action, civil or criminal, arising from statute, common law or equity." Tenn. Code Ann. § 68-201-114. (Pet. App. 195a)

This Court should not generally concern itself with issues of state law (even if wrongly decided by a circuit court). When, however, a circuit court blatantly refuses to apply this Court's precedent and then seeks to insulate its holding from reversal by asserting an alternative basis arising from a clearly erroneous reading of state law, this Court should exercise its supervisory powers to ensure that this Court's prior decisions are not circumvented. Regardless of how much the panel below disliked this Court's holding in *International Paper Co. v. Ouellette,* it was obligated to follow that decision unless and until it is reversed by this Court. The lower court did not have the option of disregarding that holding. The fact that the panel did so and then tacked on to its opinion erroneous statements regarding Alabama and Tennessee law should not make this case any less worthy of certiorari – particularly given the fact that the Fourth Circuit clearly disregarded binding opinions of the highest courts of those two States.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *American Electric Power Co. v. Connecticut*, No. 10-174, and then disposed of accordingly.

Respectfully submitted,

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APPENDIX