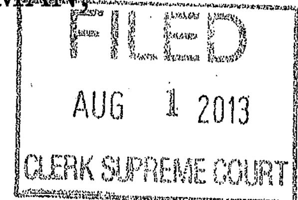
IN THE SUPREME COURT OF IOWA

Supreme Court No. 13-0723

LAURIE FREEMAN, SHARON MOCKMORE, BECCY BOYSEL, GARY D. BOYSEL, LINDA L. GOREHAM, GARY R. GOREHAM, KELCEY BRACKETT and BOBBIE LYNN WEATHERMAN,
Plaintiffs-Appellants,



vs.

GRAIN PROCESSING CORPORATION,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY, CASE NO. LACV 012182

BRIEF OF AMICUS CURIAE ENVIRONMENTAL LAW & POLICY CENTER AND IOWA ENVIRONMENTAL COUNCIL

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INTRODUCTION

The district court's ruling is apparently the first time that an Iowa state court has abrogated the longstanding common law rights and remedies of Iowa citizens to protect their public health and the environment from air pollution. Moreover, amici are not aware of *any* state court that has abrogated the longstanding common law rights and remedies of its own state citizens to protect their public health and the environment from air pollution following the United States Supreme Court's decision in *American Electric Power v. Connecticut*, 564 U.S. __, 131 S. Ct. 2527 (2011).

The district court's ruling is based on several fundamental errors of law and a misconstruction of the United States Supreme Court's decision in *American Electric Power*, and of the cooperative federalism structure of the Clean Air Act, 42 U.S.C. § 7401, et seq. The district court's result is especially disturbing in this particular case in which the court specifically recognizes:

> [Plaintiffs'] expert observed leaking valves, pumps and unions that "are sources of volatile, odorous and corrosive fugitive emissions which expose both

> workers and the community. He reported "horrible neglect" of dryer units, "antiquated" control room and "a complete breakdown of environmental awareness and safety" in management operations. If half the expert's findings are true, there has been blatant disregard for the environment and the community of Muscatine. The report also indicates that the above deficiencies have gotten worse in 2012, which is after the civil action was filed by the DNR.

District Court Ruling ("Ruling") at 21 (emphasis added, internal citations omitted).

If the district court's ruling is allowed to stand, it could potentially constrain and improperly restrict all Iowa citizens' abilities to exercise their full legal rights and seek all appropriate remedies to achieve cleaner air and protect public health, safety and welfare in their local communities. Accordingly, for the reasons explained in this brief, this Court should reverse the district court's ruling as contrary to law and remand for further proceedings consistent with the Plaintiffs' long-established state common law rights not being improperly abrogated and their claims being allowed to go forward.

STATEMENT OF THE IDENTITIES OF THE AMICI CURIAE AND THEIR INTERESTS IN THIS CASE

The *amici curiae* are two not-for-profit environmental organizations engaged in protecting Iowa residents' rights to breathe cleaner air and reduce pollution across the state. These public interest public health and environmental rights, the scope of applicable federal and state laws and common law rights and remedies, and the public's rights to implement, enforce and achieve remedies could be constrained and impaired if the district court's ruling is allowed to stand on appeal.

The Environmental Law & Policy Center (ELPC) is a not-for-profit public interest environmental protection and economic development advocacy organization with offices and staff in: Des Moines, Iowa; Chicago, Illinois; Columbus, Ohio; Jamestown, North Dakota; Madison, Wisconsin; St. Paul, Minnesota; and Sioux Falls, South Dakota. ELPC has members residing in Iowa, Illinois and each of the states where it has offices. ELPC works to achieve cleaner air and cleaner water, among other goals, in order to protect public health and

the environment in Iowa and the Midwest. ELPC engages in litigation and other forms of policy advocacy before state and federal courts, state and federal administrative agencies and federal, state and local legislative bodies. In particular, ELPC has devoted significant time and resources to advancing cleaner air and cleaner water in Iowa.

The Iowa Environmental Council (IEC) is a not-for-profit public interest environmental advocacy organization, based in Iowa, with an office and staff in Des Moines. IEC has members residing in Iowa and works to achieve cleaner air and cleaner water, among other goals, in order to protect public health and the environment in Iowa. IEC is a party in litigation and engages in other forms of policy advocacy before state and federal courts, state and federal administrative agencies and federal, state and local legislative bodies.

ELPC and IEC represent statewide public interest environmental and public health interests that extend beyond the scope of the local private lawsuit that is on appeal. ELPC and IEC work to reduce pollution by advocating, implementing and enforcing laws to achieve clean air and clean water, and

seek to enforce rights and remedies, including damages and injunctive relief, under both federal and state law and under common law. The district court's ruling, if allowed to stand, could potentially constrain and improperly impair the ELPC's and IEC's abilities to assert longstanding common law rights and remedies on behalf of their organizations, their members and public in order to protect the environment and public health and achieve cleaner air for all Iowans.

ARGUMENT

The Clean Air Act operates through a "cooperative federalism" approach that relies heavily on states and local government to achieve air pollution reductions in order to remove endangerments to public health and welfare. 42 U.S.C. §§ 7401(a)(1), (a)(3&4) and 7408 – 7410 (2013). States and local governments craft "state implementation plans" and use other laws to achieve emissions reductions necessary to accomplish the goal of attaining clean air that is sufficiently protective of public health and welfare. Ruling at 4-6. There is no language in the Clean Air Act stating any Congressional direction or intent to preempt state common law, and none

should be "implied" or inferred as the district court has done here. *See, e.g., Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001) ("[W]e find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."); *U.S. v. Texas,* 507 U.S. 529, 534 (1993) ("courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'")

In reaching its extraordinary result of displacing and abrogating Iowa citizens' long-standing state common law rights and remedies to protect their public health, safety and welfare, the district court:

(1) Misconstrued, misunderstood and misapplied the United States Supreme Court's decisions in *American Electric Power v. Connecticut, International Paper v. Ouellette,* 479 U.S.

481 (1987), and *U.S. v. Texas* by abrogating state common law nuisance and other remedies even though the relevant structures of the federal Clean Water Act and Clean Air Act are the same and there is no support for Congress "speaking directly" to abrogating state common law rights and remedies;

(2) Failed to recognize that its misconstruction of the Clean Air Act to abrogate longstanding state common law nuisance and other tort actions, if upheld, without specifically providing an offsetting "reasonable just substitute" or *quid pro quo*, would violate the Due Process Clause of the United States Constitution. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 87-93 (1978); *New York Central R. Co. v. White*, 243 U.S. 188, 198, 201 (1917); and

(3) Ignored consistent, controlling case law establishing that the "economic well-being of a large local employer" (Ruling at 22) cannot be allowed to stand as a barrier to implementing and enforcing Clean Air Act and other air quality improvements and emissions reductions needed to remove endangerments to public health, safety and welfare.

These are errors of law by the district court in its ruling that should not be accorded any deference on appeal and warrant reversal as explained below.

I. THE DISTRICT COURT MISCONSTRUED THE SUPREME COURT'S *AMERICAN ELECTRIC POWER* DECISION WHICH SUGGESTS THAT STATE COMMON LAW RIGHTS AND REMEDIES ARE *NOT* DISPLACED AND PREEMPTED BY THE CLEAN AIR ACT.

The district court confused and misconstrued the United States Supreme Court's decision in *American Electric Power*, which holds that the Clean Air Act displaces federal common law, to also find that it displaces state common law rights and remedies as well, even though the Supreme Court expressly pointed in the opposite direction. *Compare* Ruling at 23 ("The Supreme Court's reasoning regarding federal common law in *American Electric Power Co.* must be applied to lawsuits filed under state common or statutory law when they conflict with the purpose of the Clean Air Act and the State SIP.") *and* *American Electric Power*, 564 U.S. at __, 131 S. Ct. 2527, 2540 (2011) (citing *International Paper Co. v. Ouellette*'s holding "that the Clean Water Act does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the

law of the *source* State'" and leaving the matter of a state law claim open for consideration on remand). The district court then relies on: (1) a U.S. Court of Appeals for the Fourth Circuit decision (*North Carolina v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010)), which was decided before *American Electric Power* and which the Supreme Court declined to adopt, and a federal lower court decision in *Bell* v. *Cheswick Generating Station*, 2012 WL 4857796 (W.D. Pa., Oct. 12, 2012) that is not controlling here and is on appeal pending before the U.S. Court of Appeals for the Third Circuit. Finally, the district court here ruled that Plaintiffs' clean air claims were non-justiciable and barred under the political question doctrine (Ruling at 18 - 19) even though the United States Supreme Court in *American Electric Power* affirmed the U.S. Court of Appeals for the Second Circuit in finding jurisdiction and rejecting the "political question" argument (131 S. Ct. at 2530), just as the U.S. Supreme Court did in finding the Plaintiffs' claims to be justiciable in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

The district court's ruling: (1) misconstrues the U.S. Supreme Court's decision in *American Electric Power,* (2) recognizes, as it must, the congruence between the Clean Water Act's and Clean Air Act's comprehensive statutory structures, but dodges the precedential impact of the U.S. Supreme Court's decision in *International Paper Co.* v. *Ouellette,* 479 U. S. 481, 488, 489, 491, 497 (1987), holding that the Clean Water Act does not preclude state common law nuisance claims, and (3) ignores the U.S. Supreme Court's decision in *U.S. v. Texas,* 507 U.S. 529, 534 (1993), that preemption is disfavored and that common law rights and remedies can only be abrogated if Congress "speaks directly" in the statute stating its intention, which Congress did not do in the Clean Air Act.

A. In *American Electric Power,* the U.S. Supreme Court Cites *Ouellette* and Points in the Direction of Allowing Plaintiffs' State Common Law Nuisance Claims To Go Forward.

Let's look at what the Supreme Court actually did say about state common law rights and remedies in *American Electric Power*. The Court recognizes that: "None of the parties

have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand." 131 S. Ct. 2540. The Court, however, specifically refers to *International Paper Co.* v. *Ouellette*, 479 U. S. 481, 489, 491, 497 (1987) as "holding that the Clean Water Act does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State.'" (parentheticals omitted). *Id.* at 2540. The Supreme Court thus cites *Ouellette* as favoring retention of state common law nuisance actions to protect local ("source state") clean water. There is no meaningful difference between the comprehensive structures of the Clean Water Act and the Clean Air Act on this point, and the district court essentially concedes that there is not. Ruling at 17. Therefore, the Supreme Court's citation of *Ouellette* points in the direction of retention of state common law claims when addressed under the Clean Air Act.

B. The U.S. Supreme Court's *Ouellette* Decision Holds that the Clean Water Act Does Not Preclude State Common Law Nuisance Actions from Going Forward, and the Clean Water Act and the Clean Air Act Are Structured the Same in this Respect.

Under the Clean Water Act, plaintiffs are not precluded from asserting state common law rights and remedies in their home "source" states. The district court recognized the force of the U.S. Supreme Court's decision in *Ouellette*, 479 U.S. 481 (1987), as it must: "in *Ouellette* the Court held that the Clean Water Act did not preclude common law nuisance claims pursuant to the law of the 'source state' or state where the polluter was located. 479 U.S. at 485. The Court found that a nuisance action brought under New York law against the New York paper mill would not frustrate the goals of the CWA [Clean Water Act] *Id.* at 498." Ruling at 15.

The "savings clause" of the Clean Water Act – saving the rights of states to adopt more stringent clean water standards than provided under the federal Clean Water Act – is construed to allow, rather than abrogate, state common law remedies brought by plaintiffs against local, "source state"

polluters. 33 U.S.C. §1370 (2013); *Ouellette,* 479 U.S. at 495, 498.

The district court looked to the Clean Air Act's similar "savings clause" (42 U.S.C. §7416 (2013)) – saving the rights of states to adopt more stringent clean air standards than provided under the federal Clean Air Act. Likewise, the district court concluded, as it must, that: "This [Clean Air Act savings] clause is similar to the savings clause in the Clean Water Act, which the [U.S. Supreme] Court held preserved state common law nuisance claims pursuant to the state law of the pollutant's source in *Ouellette.*" Ruling at 17.

That should be the conclusion and the end of the story. However, the district court then goes on to essentially elevate one federal District Court's decision in *Bell,* now on appeal, as trumping both a plain reading of the similar "savings clauses" in the Clean Water Act and Clean Air Act, respectively, and the United States Supreme Court's decisions in *American Electric Power* and *Ouellette.* With due respect, the district court has misconstrued both the federal statutes and the two Supreme Court decisions.

The continued viability of state common law nuisance and other tort actions are and should be construed in the same manners under the Clean Water Act and Clean Air Act. The district court recognized that *Ouellette* allows state common law claims to proceed, but then created an unjustified distinction between the Clean Water Act and the Clean Air Act. The district court states that in the Clean Air Act "Congress has enacted a comprehensive scheme to regulate air emissions and has afforded states a large part in its enforcement. Thus, a savings clause preserving the State's prerogative to regulate its in-state emissions more stringently than the CAA cannot be construed to also preserve a common law right of action." Ruling at 17.

However, the Clean Water Act is likewise "an all-encompassing program of water pollution regulation." *Ouellette*, 479 U.S. at 492 (internal citations omitted). The states likewise have a large role in enforcing the Clean Water Act. *See id.* at 495. In particular, as explained above, "[t]he Clean Water Act and the Clean Air Act have strikingly similar

[savings clause] provisions." *Gutierrez v. Mobil Oil Corp.*, 798 F.Supp. 1280, 1283 (W.D. Tex. 1992).

The Clean Air Act and the Clean Water Act are similar regulatory schemes with similar savings provisions. Multiple courts have looked to the U.S. Supreme Court's decision in *Ouellette* as allowing state common law claims to go forward under the Clean Air Act, including the federal district court that heard the *Ouellette* case on remand. *See, e.g., Her Majesty The Queen v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989) ("[T]hat Congress did not seek to preempt actions such as involved in this appeal is clearly indicated by the Court's holding in *International Paper Co. v. Ouellette*."); *Technical Rubber Co. v. Buckeye Egg Farm*, 200 U.S. Dist. LEXIS 8602, *16 (S.D. Ohio 2000) (holding the Clean Air Act does not preempt plaintiffs' state common law nuisance claims); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1285 (W.D. Tex. 1992) ("The Clean Air Act does not preempt source-state common law claims against a stationary source."); *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58 at 62 (D.Vt. 1987) ("We feel that the same concerns that led the *Ouellette* Court to require

application of the source state's law in interstate water disputes are equally applicable to plaintiffs' air claims.").

The Iowa district court's ruling below fails to follow *Ouellette,* creates an unwarranted distinction between the retention of state common law remedies under the Clean Water Act and Clean Air Act, respectively, and creates the extraordinary situation of a state court abrogating its own state citizens' common law rights and remedies to protect their local public health, safety and welfare. The district court's ruling is contrary to law and unsupported.

C. The District Court Points to No Language in the Clean Air Act Where Congress Has "Spoken Directly" to An Intent to Abrogate and Preempt State Common Law Rights and Remedies And, Therefore, Is Contrary to the U.S. Supreme Court's Decision in *U.S. v. Texas* and Other Precedent.

The United States Supreme Court has made clear that: "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law. . . . [C]ourts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the

contrary is evident.' " *U.S. v. Texas,* 507 U.S. 529, 534 (1993) (internal citations omitted). There is a presumption against preemption, and courts require a clear statement in legislation showing that Congress intends to preempt, especially when it comes to abrogating common law rights and remedies. In short, as *U.S. v. Texas* holds, if Congress did not "speak directly," then common law remedies are not preempted or abrogated.

The district court nonetheless concludes that because the federal Clean Air Act is a comprehensive law, it thereby preempts the state common law remedies of Iowa citizens. Ruling at 13-14, 17-18. However, the district court cites no specific language at all in the Clean Air Act by which Congress is "speaking directly" to require that extreme result. This is directly contrary to the legal standard that the United States Supreme Court applied and explained in *U.S. v. Texas,* 507 U.S. 529, 534 (1993) and many other cases:

> Just as longstanding is the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."

> *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 783 (1952); *Astoria Federal Savings & Loan Assn.* v. *Solimino,* 501 U. S. 104, 108 (1991). In such cases, Congress does not write upon a clean slate. *Astoria, supra,* at 108. In order to abrogate a common-law principle, the statute must "speak directly" to the question addressed by the common law. *Mobil Oil Corp.* v. *Higginbotham, supra,* at 625; *Milwaukee* v. *Illinois,* 451 U. S. 304, 315 (1981).

507 U.S. at 534.

This presumption against implicit or somehow construed preemption of common law rights and remedies is especially strong when it involves state, rather than federal, common law. The Supreme Court held in *U.S. v. Texas,* 507 U.S. at 534 (1993): "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'" 501 U. S. at 108 (quoting *Isbrandtsen, supra,* at 783).

Congress has made no clear statement in the Clean Air Act that it intends to preempt state common law. No "statutory purpose to the contrary is evident." *U.S. v. Texas,* 507 U.S. at 534 (1993). The district court points to no language of Congress "speaking directly." The presumption

against preemption applies to the Clean Air Act, especially when state common law remedies are at stake, and the district court's ruling to the contrary is legal error.

II. THE DISTRICT COURT'S RULING MISCONSTRUING THE CLEAN AIR ACT TO ABROGATE STATE COMMON LAW ACTIONS RAISES SERIOUS CONSTITUTIONAL DUE PROCESS CONCERNS UNDER THE U.S. SUPREME COURT'S *DUKE POWER* DECISION.

If, assuming *arguendo*, the Clean Air Act does preempt and abrogate state common-law nuisance and other tort damages remedies, as the district court has ruled, without providing a corresponding *quid pro quo* economic value, then that would raise serious constitutional Due Process Clause problems with the Act itself. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 87-93 (1978). That result is unnecessary and need not be reached if the district court's ruling is reversed on the grounds explained in Part I above.

In *Duke Power Co*, the Supreme Court upheld the federal Price-Anderson Act, which limits state common-law tort damage actions following a nuclear power plant accident, because the Act included a "reasonably just substitute"

remedy. Absent that *quid pro quo*, the Court's opinion raises, but reserves and leaves open, the question of whether the statute would violate the Due Process Clause:

> The remaining due process objection to the liability limitation provision is that it fails to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common law rights of recovery which the Act abrogates. Initially, it is not at all clear that the Due Process Clause, in fact, requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here, since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common law or state tort law remedies it replaces. *Cf. New York Central R. Co. v. White,* 243 U.S. 188 (1917); *Crowell v. Benson,* 285 U.S. 22 (1932) (footnotes omitted).

Duke Power, 438 U.S. at 88.

New York Central R. Co. v. White, 243 U.S. 188 (1917), involves the constitutionality of a state workmen's compensation law. While denying any person's vested interest in the continuation of any particular right to sue (id. at 198), the Supreme Court twice suggested that abrogation of common law remedies without a reasonable substitute would raise constitutional due process problems. 243 U.S. at 201.

Recent Supreme Court decisions generally supporting states' rights and limiting perceived federal intrusion in areas of traditional state authority disfavor federal abrogation of state common law remedies. *See gen., Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *United States v. Lopez*, 514 U. S. 549 (1995). This jurisprudence points in the direction of retaining state common law damage actions for harmful air pollution, especially in light of the *American Electric Power's* specific reference to *Ouellette* as not preempting state common-law nuisance actions under the Clean Water Act. Abrogating state common law rights and remedies, without a readily apparent "reasonably just substitute" or *quid pro quo* provided in the Clean Air Act, raises serious constitutional concerns under the U.S. Supreme Court's decision in *Duke Power*.

III. THE DISTRICT COURT'S RELIANCE ON "THE ECONOMIC WELL-BEING OF A LARGE LOCAL EMPLOYER" CANNOT LEGALLY TRUMP PUBLIC HEALTH PROTECTIONS UNDER THE CLEAN AIR ACT.

Amici ELPC and IEC do care about economic considerations and jobs in Iowa in addition to cleaner air that

is vital to protect public health and our environment. However, the district court misconstrues and misapplies the Clean Air Act's governing standards, and it overreaches in ruling that "when an individual's right to seek damages for economic or physical harm conflict with the economic well-being of a large local employer, those rights must be carefully weighed and reconciled through political compromises achieved by the legislative and rule-making process." Ruling at 22.

When it comes to the Clean Air Act, however, the "political compromises" and determinations made by Congress are that economic hardship for an employer must give way to protecting public health of individuals and the community. When there is such a conflict, achieving cleaner air to protect the public and economic and physical health harms wins out. "[The CAA] and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980).

"Congress made it abundantly clear that considerations of economic or technological feasibility are to be subordinated to the goal of protecting health by prohibiting any consideration of such factors." *Lead Indus.*, 647 F.2d at 1153. This principle was reaffirmed by the Supreme Court in *Whitman v. Am. Trucking Ass'ns, Inc.,* 531 U.S. 457, 464 (2001), which recognized the long-settled law that the EPA, in setting national ambient air quality standards, is not permitted to consider economic costs or hardships.

The rationale is three-fold. First, the Clean Air Act is a health-based statute in which Congress determined that the national imperative is to protect public health and reduce air pollutants to levels that no longer endanger public health. Second, when emitting air pollutants, manufacturing facilities are shifting and imposing economic costs on the public; they are externalizing their own costs. Third, it's always cheaper for a particular business to pollute more, externalize costs to public and thereby seize an economic advantage over its market competitors. The Clean Air Act shouldn't create

economic disadvantage to those businesses that do comply and reduce pollution and reward those that stall and do not.

Moreover, any economic hardship to the Defendant Grain Processing Corporation must be considered in light of the impacts on public health as pointed out by the district court:

> [Plaintiffs'] expert observed leaking valves, pumps and unions that "are sources of volatile, odorous and corrosive fugitive emissions which expose both workers and the community. He reported "horrible neglect" of dryer units, "antiquated" control room and "a complete breakdown of environmental awareness and safety" in management operations. <u>If half the expert's findings are true, there has been blatant disregard for the environment and the community of Muscatine. The report also indicates that the above deficiencies have gotten worse in 2012</u>, which is after the civil action was filed by the DNR.

Ruling at 21 (emphasis added, internal citations omitted).

CONCLUSION

The Environmental Law & Policy Center and Iowa Environmental Council respectfully request that the Court reverse the district court's ruling as contrary to law and remand for further proceedings consistent with the Plaintiffs'

state common law rights not being improperly abrogated and their claims being allowed to go forward.

Dated: July 26, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 4,420 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally space typeface using Microsoft Office 2010 in font size 14 and type style Bookman Old Style.

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CERTIFICATE OF FILING & SERVICE

I, Howard Learner, Attorney for Environmental Law & Policy Center and Iowa Environmental Council, hereby certify that I or someone acting on my behalf will file the attached Amended Amicus Curiae Brief in compliance with Iowa Rules of Appellate Procedure by filing eighteen(18) copies thereof with the Clerk of the Iowa Supreme Court, Iowa Judicial Branch Building, 111 East Court Avenue, Des Moines, Iowa 50319 on the 29h day of July, 2013 by regular U.S. Mail.

I, Howard Learner, Attorney for Environmental Law & Policy Center and Iowa Environmental Council, hereby certify that I or someone acting on my behalf served via regular mail, postage prepaid, a copy of the attached Amended Amicus Curiae Brief in compliance with Iowa Rules of Appellate Procedure upon all other attorneys of record as listed below, on the 29h day of July, 2013 by regular U.S. Mail.

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