BEFORE THE IOWA SUPREME COURT

No. 13-0723

LAURIE FREEMAN, JOSEPH PRESTON, SHARON MOCKMOORE, BECCY BOYSEL, GARY D. BOYSEL, LINDA L. GOREHAM, GARY R. GOREHAM, KELCEY BRACKETT & BOBBIE LYNN WEATHERMAN,
Plaintiffs-Appellants,
vs.
GRAIN PROCESSING CORPORATION,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF MUSCATINE COUNTY
HON. MARK J. SMITH

APPELLEE'S PAGE PROOF BRIEF

Mark McCormick AT0005111
Charles F. Becker AT0000718
Michael R. Reck AT0006573
Kelsey J. Knowles AT0004233
BELIN McCORMICK, P.C.
666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 243-7100
Facsimile: (515) 558-0609
E-Mail: mmccormick@belinmccormick.com
cfbecker@belinmccormick.com
mrreck@belinmccormick.com
kjknowles@belinmccormick.com

Steven J. Havercamp AT0003324
Eric M. Knoernschild AT0004243
Stanley, Lande & Hunter
A Professional Corporation
301 Iowa Avenue, Suite 400
Muscatine, Iowa 52761
Telephone: 563-264-5000
Facsimile: 563-263-8775
Email: shavercamp@slhlaw.com
ekchild@slhlaw.com

Joshua B. Frank (*pro hac vice motion pending*)
Charles A. Loughlin (*pro hac vice motion pending*)
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004-2400
Email: joshua.frank@bakerbotts.com
charles.loughlin@bakerbotts.com

ATTORNEYS FOR APPELLEE

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ROUTING STATEMENT

The Supreme Court should retain this appeal pursuant to Iowa Rule of Appellate Procedure 6.1101(2) because it presents substantial, important issues of first impression.

STATEMENT OF THE CASE

This case involves Plaintiffs' request that a jury and court usurp the role Congress granted the Environmental Protection Agency ("EPA") and Iowa's Department of Natural Resources ("DNR") to establish permitted air emission levels. (*See* Am. Pet. at ¶¶ 17, 21, 27, E) On April 23, 2012, Plaintiffs sued Defendant Grain Processing Corporation ("GPC")[1] demanding changes to GPC's operation and pollution control equipment and for alleged damages based on nuisance, negligence and trespass theories. (Am. Pet.) On December 20, 2012, GPC sought summary judgment because federal and state law preempt Plaintiffs' claims and the political question doctrine bars them.

On April 1, 2013, the Iowa District Court for Muscatine County (Smith, J.) granted GPC's Motion because Plaintiffs' claims conflict with Congress's methods and goals for addressing air emissions embodied in the

[1] The district court granted Plaintiffs' Motion to Amend their Petition on March 22, 2013.

Clean Air Act ("CAA" or "the Act"), Iowa Code Chapter 455B and the regulations thereunder. Further, the political question doctrine barred Plaintiffs' claims because the court lacked "judicially discoverable and manageable standards" to resolve the issues and would need to make "policy determinations" Congress vested in regulatory agencies. (Ruling at 19) Plaintiffs appealed on May 2, 2013.

STATEMENT OF FACTS

I. LEGISLATIVE HISTORY AND APPLICABLE REGULATIONS

Clean air legislation's modern era began in 1970 when Congress amended the Air Pollution Control Act of 1955 to create the Clean Air Act. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 63-64 (1975). The Act requires EPA to issue National Ambient Air Quality Standards ("NAAQS") for each pollutant that "cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A) (2012). EPA must identify potentially harmful emissions and determine appropriate standards. Environmental investment and job creation depend on companies' ability to rely on permitted levels. *See North Carolina, ex rel. Cooper v. Tenn. Valley Auth. ("TVA")*, 615 F.3d 291, 305-06 (4th Cir. 2010).

States have "primary responsibility for assuring air quality" within their borders, 42 U.S.C. § 7407(a), and must, by federal law, submit for EPA approval state implementation plans ("SIP") to meet relevant NAAQS. *Id.* at § 7410. The Act employs "cooperative federalism" with a "division of labor between individual States and EPA" to attain and maintain national air quality goals. *Sierra Club v. EPA*, 315 F.3d 1295, 1300 (11th Cir. 2002). EPA implemented extensive emission regulations, including comprehensive enforcement provisions and penalties. *See* 40 C.F.R. Subchapter C. EPA also promulgated NAAQS for "criteria" pollutants, including sulfur dioxide ("SO_2") and particulate matter. *See* 40 C.F.R. §§ 50.4, 50.5 (SO_2), 50.6, 50.7, 50.13 (particulate matter) (2012).

With EPA approval and oversight, DNR adopted intricate emission rules, *see* 40 C.F.R. Part 52, Subpart Q, and implemented parallel standards binding GPC's facility. *E.g.,* Iowa Admin. Code r. 567-23.3(455B) (particulate matter (23.3(2)) and sulfur compounds (23.3(3)). Iowa Code § 455B.133(4) mandates: "[t]he standards or limitations adopted under this section shall not exceed the standards or limitations promulgated by the administrator of the United States environmental protection agency or the requirements of the federal Clean Air Act...." (the "Stringency Clause"). Because the Stringency Clause prohibits DNR from establishing standards

stricter than EPA's, and the Act prohibits less stringent standards, Iowa's standards necessarily match federal standards.

Amendments to the Act in 1977 included a permitting program aimed at "prevention of significant deterioration" ("PSD") in air quality. 42 U.S.C. §§ 7470-92. The program requires agency review before construction of new major air pollutant sources or major modifications of existing major air pollutant sources. 42 U.S.C. § 7475. PSD promotes continued air quality in areas meeting NAAQS, while allowing economic growth. *See* 42 U.S.C. § 7470. PSD does not preclude all increased emissions, but ensures concerns are considered and balanced. After all, communities seek businesses that emit—offering various incentives—because of accompanying jobs and taxes. PSD seeks to:

1. protect public health and welfare;
2. preserve, protect and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores and other areas of special national or regional natural, recreational, scenic or historic value;
3. insure economic growth will occur in a manner consistent with the preservation of existing clean air resources;
4. assure emissions from one state do not interfere with air quality in another state; and
5. assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision

> and after adequate procedural opportunities for informed public participation in the decision making process.

42 U.S.C. § 7470. PSD requires emitters to comply with NAAQS and apply for a best available control technology ("BACT") determination for regulated pollutants expected to increase significantly due to major air pollution source construction or modification. 42 U.S.C. § 7475(a). Further, for non-attainment[2] areas, more stringent standards are imposed. 42 U.S.C. § 7503.

In 1990, Congress again overhauled the Act with amendments "represent[ing] a significant departure from the past." Reilly, W., The New Clean Air Act: An Environmental Milestone, EPA Journal, (January/February 1990) (found at http://www2.epa.gov/aboutepa/new-clean-air-act-environmental-milestone last accessed August 22, 2013). The 1990 amendments reflect Congress's attempt to balance improving air quality with ensuring economic stability and prosperity:

- "The intent of this bill was to have a balance, a balance of America's air and America's jobs. The ecology and the economy. For the most part, we were able to put that in balance." 136 Cong. Rec. H2915-01, 1990 WL 68355.

[2] A "non-attainment area" is a geographical area that does not meet national ambient air quality standards established by EPA for one of six common air pollutants.

- "We do need to revamp our clean air law. But we cannot do that from fantasyland. We have to strike a balance between stronger rules to protect our environment and the economic impact they will have on our industries and our lifestyles." 136 Cong. Rec. H2511-02, 1990 WL 66714.

- "Like any bill, this one is a compromise-which means that the final product is far from perfect ... . I believe that it is essential that we strike a balance between two competing considerations: stronger environmental protection and a strong economy with jobs for all Americans. While the provisons (sic) in the bill place new restrictions and demands on industry, much of the cost of those restrictions will be passed on to consumers in the form of more expensive cars and gasoline, increased utility rates and higher prices on a broad range of goods and services." 136 Cong. Rec. H12848-01, 1990 WL 165511.

- "The regulators, the courts, and others who will administer and enforce the new clean air law should be mindful of the President's statement to us last year that sound ecology and a strong economy need not be mutually exclusive. That delicate balance will only be maintained in practice if the new law is administered firmly, but also fairly and flexibly." 136 Cong. Rec. H12911-01, 1990 WL 290318.

- "Mr. Speaker, it was also important to the final agreement on this legislation that the economics of clean air be considered. We cannot ruin the economy of specific regions of the country or certain industries to meet over-zealous and unrealistic goals. This legislation attempts to balance the environmental concerns with the economic realities of this country, and I support its passage." 136 Cong. Rec. H12911-01, 1990 WL 290318.

Congress's balancing involved both the Act's goals *and* the method to achieve them:

- "Nonetheless, I want to make clear that I think this bill is needed; that the goals it sets are largely appropriate; and that the methods of achieving those goals have generally been crafted in a

> thoughtful manner so as to minimize unnecessary costs." 136 Cong. Rec. S3928-01, 1990 WL 46808.

Reflecting Congress's balancing, "[t]he Administrator ... shall conduct a comprehensive analysis of the impact of this Act on the public health, economy, and environment of the United States ..." and "[t]he Administrator shall consider the effects ... on **employment, productivity, cost of living, economic growth, and the overall economy of the United States.**" 42 U.S.C. §§ 7612(a), (c) (emphasis added).

The 1990 Amendments added two new titles to the Act—Title IV and Title V—and established the National Emissions Standards for Hazardous Air Pollutants program to address hazardous air emissions in a systematic, all-encompassing manner. 42 U.S.C. §§ 7412, 7651-7651o, 7661-7661f. Title IV established an acid rain program to reduce annual SO_2 emissions ten million tons below 1980 levels and required a two million ton nitrogen oxide emission reduction by 2000. 42 U.S.C. §§ 7651-7651o. Title V introduced an operating permit program. 42 U.S.C. §§ 7661-7661f. For the first time, emission sources required a comprehensive permit covering all air emissions. "In addition to other practical problems that arose after the 1977 amendments, citizens, regulators, and even the owners and operators of pollution sources had difficulty knowing which of the Clean Air Act's many

requirements applied to a particular pollution source ... . Congress fixed that problem by enacting Title V." *United States v. EME Homer City Generation, L.P.*, ___ F.3d ___, 2013 WL 4437219 *3 (3d Cir. Aug. 21, 2013). DNR issues Iowa's Title V permits. Iowa Admin. Code r. 567-22.100. DNR required multiple air permits for GPC's facility. GPC's operating permit (No. 03-TV-029) is over 220 pages long and regulates virtually every aspect of GPC's operation, including equipment used, types and levels of emissions and manner and frequency for measuring releases. (App. p. ___)

The 1990 Amendments also established a comprehensive plan to reduce air emissions not previously systematically regulated. Section 112 identified over 185 hazardous air pollutants. 42 U.S.C. § 7412(b). Finally, the 1990 Amendments gave district courts authority to impose civil penalties in citizen enforcement suits. *See* 42 U.S.C. § 7604(a). Congress found "[t]he assessment of civil penalties for violations of the Act is necessary for deterrence, restitution and retribution." S. Rep. No. 101-228 at 373 (1989), as reprinted in 1990 U.S.C.C.A.N. 3385, 3756. The Act allows district courts to order penalties "be used in beneficial mitigation projects" to "enhance public health or the environment." 42 U.S.C. § 7604(g)(2). Where a district court finds violations, Section 113(e)

establishes criteria to determine what penalties, if any, to impose. *Id.* at § 7413(e)(1).

Beyond statutory changes, EPA dramatically expanded the Act's *regulatory* reach. For example, EPA issued:

- a carbon monoxide NAAQS, 40 C.F.R. § 50.8;
- a lead NAAQS, 40 C.F.R. § 50.12;
- a primary nitrogen dioxide NAAQS, 40 C.F.R. § 11(a);
- a secondary nitrogen dioxide NAAQS, 40 C.F.R. § 50.11(g);
- two revisions of the ozone NAAQS, 40 C.F.R. §§ 50.9-.10, 50.15; *see* 73 Fed. Reg. 16436 (Mar. 27, 2008) and 62 Fed. Reg. 38856 (July 18, 1997);
- three revisions to the particulate matter NAAQS, 40 C.F.R. §§ 50.6-.7, 50.13, 50.18; *see* 78 Fed. Reg. 3086 (Jan. 15, 2013), 71 Fed. Reg. 61144 (Oct. 17, 2006) and 62 Fed. Reg. 38652 (July 18, 1997); and
- an SO_2 NAAQS, 40 C.F.R. §§ 50.4-.5, 50.17.

EPA continued enforcement efforts including designating Muscatine County as a non-attainment area under the 2010 SO_2 NAAQS, causing greater oversight and ameliorative measures. *See* http://www.epa.gov/so2designations/region7i.html (last accessed Sept. 19, 2013).

EPA and DNR actively are addressing Muscatine air quality, including pursuing complex testing and modeling to formulate area-wide

control strategies on precisely the subjects on which Plaintiffs, without expertise or congressionally mandated perspective, ask the judiciary to intrude. (App. p. ___) EPA emphasizes its extensive involvement developing Muscatine action plans:

> With input from a diverse group of stakeholders, EPA has developed a comprehensive implementation strategy for the future actions that focuses resources on identifying and addressing unhealthy levels of SO_2. The strategy is available at: http://www.epa.gov/airquality/sulfurdioxide/implement.html.
>
> The EPA will continue to work closely with you and your other partners in the state, tribal and local levels to ensure health-protective, commonsense implementation of the 1-hour SO_2 standard.

(App. p. ___) Now, "stakeholders," whose interests already were considered to develop a "comprehensive implementation strategy," ask the courts to override the balance expert agencies struck and replace the "comprehensive ... strategy" with piecemeal litigation.

II. CITIZEN INVOLVEMENT

Beyond presenting "a comprehensive program to address" hazardous air pollutants, the Act prescribes avenues for citizens to address air emissions. 40 C.F.R. § 51.102 (2007). For DNR rulemaking, public hearings are mandated and citizen input is sought and considered. *See* Iowa Admin. Code r. 11-6.5 (2008). If individuals are dissatisfied with

EPA/DNR rulemaking, or if EPA/DNR fails to act, citizens can initiate rulemaking. Iowa Admin. Code r. 11-5.1(2008); *see American Elec. Power, Inc. v. Conn. ("AEP"),* 131 S.Ct. 2527, 2538 (2011). Citizens also can bring statutory enforcement actions if the government fails to do so. 42 U.S.C. § 7604; Iowa Code § 455B.111. Thus, EPA and DNR receive input to balance all interests. Further, any air permit GPC seeks goes through a comment period allowing public objection regarding any aspect from equipment used to emission limits considered. 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.7(h); Iowa Admin. Code r. 567-22.2(2). If an individual is dissatisfied with the proposed permit after public comment, s/he can petition EPA to object. 40 C.F.R. § 70.8(d). EPA has 60 days to address the citizen's petition. *Id.*

III. PLAINTIFFS' CLAIMS

GPC has owned and operated a Muscatine grain processing facility since the 1930s—long before any plaintiff arrived or the Act existed. (Pet. ¶ 2) GPC processes corn and other products to meet food and ethanol needs. (*Id.*) Plaintiffs seek to represent a class of Muscatine residents who have resided within one-and-a-half miles of GPC's perimeter. (Am. Pet. ¶ 8) Plaintiffs claim GPC releases particulate matter, SO_2, and VOCs that constitute a nuisance and trespass on their property. (Am. Pet. ¶¶ 2, 5)

Plaintiffs allege GPC "used, and continues to use, outworn machineries, outdated manufacturing technologies and outworn pollution-abating technologies." (Am. Pet. at ¶ 2; *see also* Pls.' Resp. to Interrog. No. 15, App. p. ____) ("[P]laintiff ... believes equipment was available to reduce the emissions and GPC chose not to use it... .") Plaintiffs' expert claims GPC should have changed its equipment in 1995 (App. p. ___), despite EPA/DNR expressly permitting GPC's equipment. Plaintiffs assert GPC should install different equipment including regenerative thermal oxidizers and exhaust systems equipped with HEPA filters. (App. p. ___) Plaintiffs insist GPC should stop using dryers DNR specifically permitted. (App. p. ___)

Plaintiffs seek monetary damages and an injunction "tailored to ensure the cessation of Defendant's harmful conduct" based on the court's "discretionary authority" to "consider public interest, the relative burdens on the parties, and any other factors it deems appropriate," the "form and scope" of which is undetermined. (Am. Pet. at E; Am. Appellant Br. at 53 n.35) Plaintiffs ask the court to duplicate EPA's and DNR's work, but impose different standards, requirements and penalties.

ARGUMENT

Some public issues require public solutions. Air pollution is one. *See Lubrizol Corp. v. Train*, 547 F.2d 310, 313 (6th Cir. 1976). Congress recognized improving air quality, without destroying the economy, requires nationwide oversight and devised a statutory and regulatory scheme to address issues. *Id.* The Act represents Congress's recognition that air pollution's best solution is a nationwide regulatory system imposing standards to protect health and the environment while simultaneously preserving jobs and the economy.

Our Constitution's Framers recognized certain issues are committed to the legislative and executive branches and not properly resolved by the judiciary. The district court correctly concluded this is one. The district court also found Plaintiffs' claims interfere with Congress's decisionmaking scheme and are preempted. United States Supreme Court precedent compels this conclusion:

> (1) "[A] state law is preempted 'if it interferes with the methods by which the federal statute was designed to reach [its] goal.'" *TVA*, 615 F.3d at 303 (quoting *International Paper Corp. v. Ouellette*, 479 U.S. 481, 494 (1987)).

and:

> (2) "The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot

> be reconciled with the decisionmaking scheme Congress enacted." *AEP*, 131 S.Ct. at 2540.

Anything interfering with the Act's method and goals is preempted and suits like Plaintiffs' cannot be reconciled with the decisionmaking scheme.

I. THE DISTRICT COURT CORRECTLY APPLIED THE POLITICAL QUESTION DOCTRINE

Plaintiffs ask a jury to determine reasonableness of GPC's emissions and the court to grant an injunction to "prevent future harms." (*See* Am. Pet. at ¶¶ 17, 21, 27, E; Am. Appellant Br. at 53 n.35) Plaintiffs' claims necessarily entail determining what emissions are reasonable. *McGill v. Pintsch Compressing Co.*, 118 N.W. 786, 787-88 (Iowa 1908) ("Only when an unreasonable amount of smoke is emitted or is emitted in an unreasonable manner so as to inflict injury on another will the courts interfere."). With the 1970 Clean Air Act, Congress designated agencies, not courts, to establish this balance:

> Congress, ... , thought the problem required a very high degree of specialized knowledge in chemistry, medicine, meteorology, biology, engineering, and other relevant fields that agencies rather than courts were likely to possess. "Congress has entrusted the Agency with the responsibility for making these scientific and other judgments, and we must respect both Congress' decision and the Agency's ability to rely on the expertise that it develops."

TVA, 615 F.3d at 305 (quoting *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir. 1980)). The district court's ruling is reviewed for

errors of law. *See Stevens v. Iowa Newspapers*, 728 N.W.2d 823, 827 (Iowa 2007).

"It is a well-established principle that the courts will not intervene or attempt to adjudicate a challenge to a legislative action involving a 'political question.'" *King v. State*, 818 N.W.2d 1, 16 (Iowa 2012) (citing *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W. 491, 495 (Iowa 1996) and *Powell v. McCormack*, 395 U.S. 486 (1969)). The political question doctrine rests on constitutional separation of powers, "requir[ing] we leave intact the respective roles and regions of independence of the coordinate branches of government." *Id.* (quoting *Dwyer*, 542 N.W.2d at 495). Any of the following renders a claim nonjusticiable:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the issue; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Vieth v. Jubelirer, 541 U.S. 267, 277-78 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The district court held Plaintiffs' claims (1) lack

judicially discoverable and manageable standards for resolving the issues, and (2) cannot be decided without initial policy determinations of a kind clearly for nonjudicial discretion. *See id.*[3]

There are no judicially discoverable and manageable standards to resolve this case. Determining what is reasonable requires balancing competing interests in jobs and the environment. Plaintiffs seek to replace entire agencies dedicated to this balancing with a nuisance claim.

> [T]here is perhaps no more **impenetrable jungle** in the entire law than that which surrounds the word "nuisance." It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. **There is general agreement that it is incapable of any exact or comprehensive definition.**

Guzman v. Des Moines Hotel Partners, L.P., 489 N.W.2d 7, 10 (Iowa 1992) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 86, at 616–17 (5th ed. 1984)) (emphasis added).

> Thus, while public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application. If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bullfights, we will be hard pressed to derive any manageable criteria... .

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[3] The district court did not find the case presented a matter "constitutionally" committed to another governmental branch. The district court rested its decision on the two listed grounds. (Ruling at 18-19)

> The contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark. We are hardly at liberty to ignore the Supreme Court's concerns and the practical effects of having multiple and conflicting standards to guide emissions.

TVA, 615 F.3d at 302 (citations omitted). Nor are Plaintiffs' other claims more manageable. Air emission trespass claims properly are analyzed as nuisances because emissions do not affect exclusive possession.[4] *See also Decker v. Gibson Prods. Co. of Albany, Inc.*, 679 F.2d 212, 216 (11th Cir. 1982) (describing "the peculiarly elusive nature of negligence" law).

Seeking to avoid the political question bar, Plaintiffs ignore their claims' substance and focus on form by arguing nuisance, trespass and negligence claims are longstanding and, thus, manageable. "The crux of this inquiry is not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint." *People of State of Cal. v. General Motors Corp.*, 2007 WL 2726871 *15 (N.D. Cal. Sept. 17, 2007). "Rather, courts must ask whether

[4] *See Bormann v. Board of Supervisors*, 584 N.W.2d 309, 315 (Iowa 1998) (trespass comprehends a physical invasion by tangible matter relative to exclusive possession of land); *see also Beal v. W. Farmers Elec. Coop.*, 228 P.3d 538, 541 (Okla. Civ. App. 2009); *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 550 (Minn. Ct. App. 2003).

they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Id.* (quoting *Vieth*, 541 U.S. at 278).

The Act's policy goal is "[a] proper balance between environmental controls and economic growth in the dirty air areas of America .... There is no other single issue which more clearly poses the conflict between pollution control and new jobs." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 852 n.25 (1984) (quoting Representative Waxman); *see also* Br. at 16-18.

> As the Supreme Court has recognized, to resolve typical air pollution cases, courts must strike a balance "between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs." . . . Balancing those interests, together with the other interests involved, is impossible without an "initial policy determination" first having been made by the elected branches to which our system commits such policy decisions, namely, Congress and the President.

People of the State of Cal., 2007 WL 2726871, at *7. Determining the "appropriate amount of regulation in any particular greenhouse gas-producing sector requires informed assessment of competing interests" and was entrusted by Congress to EPA and state regulators. *AEP*, 131 S. Ct. at 2539-40.

> Regardless of the type of relief sought, the Court must still make an initial policy decision in deciding whether there has

> been an "unreasonable interference with a right common to the general public." ... Plaintiff insists that in order to adjudicate its claim, "[t]he Court will not be required to determine whether [D]efendants' actions have been unreasonable, but [instead] whether the interference suffered by California is unreasonable." ... This distinction is unconvincing because regardless of the relief sought, the Court is left to make an initial decision as to what is unreasonable in the context of carbon dioxide emissions. Such an exercise would require the Court to create a quotient or standard in order to quantify any potential damages that flow from Defendants' alleged act of contributing thirty percent of California's carbon dioxide emissions. Just as in AEP, the adjudication of Plaintiff's claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development ... . **The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court.**

People of State of Cal., 2007 WL 27268714 at *8 (emphasis added).

Air emission claims outside the Act reorder "the respective functions of courts and agencies," and, "litigation that amounts to 'nothing more than a collateral attack' on the system, [] risks results that lack both clarity and legitimacy." *TVA*, 615 F.3d at 301, 304; *see also Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (applying political question doctrine to air emissions due to (1) "initial policy determinations," and (2) lack of "judicially discoverable and manageable standards for resolving the issues"). As Justice Kagan noted during *AEP* oral argument,

the political question doctrine is perhaps the "more natural" way to handle claims like Plaintiffs'. (App. p. ____)

Like in *People of State of California*, *Comer* and *TVA*, Plaintiffs seek to re-strike the balance EPA and DNR struck as to what is "reasonable." (*See* Am. Pet. at 17, 21, 27; Am. Appellant Br. at 53) The proper balance between jobs and the environment is a policy question not amenable to judicial resolution, however. If this were a simple property dispute as Plaintiffs claim (Am. Appellant Br. at 5), EPA would be superfluous. Plaintiffs' request to substitute an "impenetrable jungle" for Congress's careful regulatory balancing is precisely what the political question doctrine bars.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THE CLEAN AIR ACT PREEMPTS PLAINTIFFS' CLAIMS

Where a dispute presents a legal question, summary judgment is appropriate. Iowa R. Civ. P. 1.981(3); *Gardin v. Long Beach Mortgage Co.*, 661 N.W.2d 193, 196-97 (Iowa 2003). The district court's summary judgment ruling is reviewed for legal error. *See Stevens,* 728 N.W.2d at 827. The district court correctly found the Act preempts Plaintiffs' claims.

Federal preemption analysis begins with the United States Constitution.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. State law conflicting with or frustrating federal law *must* yield. *Chapman v. Lab One*, 390 F.3d 620, 624 (8th Cir. 2004); *accord Lubben v. Chicago Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 599 (Iowa 1997). A statute's preemptive effect "necessarily includes *all* laws that are inconsistent with the 'full purposes and objectives of Congress.'" *Ouellette*, 479 U.S. at 499 n.20 (emphasis in original). Federal regulations have the same preemptive effect as statutes where Congress delegated an agency authority. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010).

By oversimplifying preemption analysis, Plaintiffs overlook their claims' fundamental failing. The issue is not whether Congress left room for states to regulate air emissions. The issue is whether Congress left room for private plaintiffs to bring claims that *interfere with* Congress's method to regulate air emissions and upset the balance Congress required. When

Plaintiffs' claims are examined under the appropriate standard, and in light of recent Supreme Court precedent, the answer is "no."

A. The Clean Air Act's Evolution Makes Clear It Created An Expansive Regulatory Scheme

The Act preempts non-source state[5] law, *TVA*, 615 F.3d at 296, and federal common law, *AEP*, 131 S. Ct. at 2540, but the Supreme Court has not addressed whether the Act preempts source state common law, *AEP*, 131 S. Ct. at 2540. Thus, courts grapple with whether private common-law suits challenging operations the Act regulated, and permitted, are preempted. *See, e.g., Bell v. Cheswick Generating Station*, ___ F.3d ___, 2013 WL 4418637 (3d Cir. Aug. 20, 2013); *Comer*, 839 F. Supp. 2d 849; *Merrick v. Brown-Forman Corp.*, No. 12-CI-3382, slip op. (Ky. Cir. Ct. July 30, 2013) (App. p. ___).

Plaintiffs appear to believe *Ouellette* decides this issue in their favor. (Appellant Br. at 19-21) Plaintiffs err, however, by focusing on one aspect of *Ouellette*, while ignoring the animating principle leading to the opposite outcome. The critical statement is clear: A statute's preemptive effect "necessarily includes *all* laws that are inconsistent with the 'full purposes and objectives of Congress.'" *Ouellette*, 479 U.S. at 499 n.20 (emphasis *in*

[5] "Source state" refers to the state that is the emission's source.

original). The court did not arbitrarily emphasize the word "all." Instead, the court highlighted the fundamental principle arising from both the Constitution's Supremacy Clause and the Separation of Powers Doctrine. *All* laws, whether federal common law or state constitutional, statutory or common law, conflicting with federal statutes or regulations fail.

Rather than focus on *Ouellette's* animating principle to ask whether their claims conflict with the Clean Air Act *existing today*, Plaintiffs focus on dictum that the Clean *Water* Act, as it existed a quarter century ago, would not preempt source state common law.[6] Dictum is not law because courts have neither occasion nor opportunity to consider an issue's nuances. *See Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006). Even assuming analysis under the Clean *Air* Act would have been identical in

[6] Plaintiffs are not alone in their error. The Third Circuit Court of Appeals likewise found the *Ouellette* dictum decided the issue. *Bell*, 2013 WL 4418637. The *Bell* decision ignores two fundamental issues discussed below. First, *Bell* failed to account for almost thirty years of legal development since *Ouellette*. It is error to rely on 1987 dictum as deciding the preemptive effect of a very different 2013 law. *See City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("Milwaukee II") (recognizing that a change in statutory law after the Supreme Court's decision in *Illinois v. Milwaukee*, 406 U.S. 91 (1972) ("Milwaukee I") preempted federal common law and changed the outcome from *Milwaukee I*). Second, *Bell* incorrectly presumes the Supreme Court's dictum in *Ouellette* applies to the Clean Air Act. As recognized in *AEP*, that issue is undecided. *AEP*, 131 S. Ct. at 2540.

1987 to analysis under the Clean *Water* Act, focusing on *Ouellette's* dictum nonetheless causes error.

Since the 1987 *Ouellette* decision, Congress amended the Clean Air Act, Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990), and EPA promulgated hundreds of new regulations, *see* James McCarthy and Claudia Copeland, EPA Regulations: Too Much, Too Little, or on Track? Congressional Research Service (July 16, 2013). Analyzing the Act's preemptive effect based on whether a conflict existed in 1987 ignores the "extensive" 1990 amendments. *TVA*, 615 F.3d at 301. Those amendments mandated careful balancing:

> The Administrator ... shall conduct a comprehensive analysis of the impact of this Act on the public health, economy, and environment of the United States ... .

42 U.S.C. § 7612(a).

> The Administrator shall consider the effects ... on **employment, productivity, cost of living, economic growth, and the overall economy of the United States.**

42 U.S.C. § 7612(c) (emphasis added). Because the 1990 amendments requiring careful balancing did not exist in 1987, the *Ouellette* court could not consider them as this Court now must.

Further, the 1990 amendments merely began the regulatory tsunami that swept the air emission field. In *Massachusetts v. EPA*, 549 U.S. 497,

534 (2007), the Supreme Court established that the Act not only authorized, but compelled, EPA to regulate carbon dioxide and other "greenhouse" gases, and EPA violated the law by denying such rulemaking. *Massachusetts* resulted in additional EPA rulemaking and realization that the Act was far broader than previously thought. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857-58 (9th Cir. 2012).

As the Supreme Court determined in reviewing the Clean Water Act's evolution, statutory changes can result in preemption that did not previously exist. *See Milwaukee II*, 451 U.S. at 317-23. Relying on 1987 dictum from *Ouellette* may be the easy answer, but it is not the correct answer. As *Milwaukee I* and *II* establish, this Court must engage in preemption analysis based on *today's* statutes and regulations to predict how the Supreme Court would rule now. *See id.*; *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 322 (Iowa 2010). Analysis of the likely outcome under today's Act begins with *AEP*.

B. Plaintiffs' Claims Are Preempted Because They Conflict With The Clean Air Act's Goals And Methods

AEP addressed the Act preemption of federal common law, not state common law. 131 S.Ct. at 2540. Its analysis is critical, however, because the court addressed *today's* Clean Air Act rather than a different act a

quarter century ago. When *Ouellette*'s key principle, that a statute's preemptive effect "necessarily includes *all* laws that are inconsistent with the 'full purposes and objectives of Congress,'" 479 U.S. at 499 n.20, is combined the Supreme Court's analysis in *AEP* that suits like Plaintiffs "cannot be reconciled with the decisionmaking scheme Congress enacted," it becomes apparent that today's Act causes preemption.

The "critical point," "is that Congress delegated to EPA the decision whether and how to regulate ... emissions... ." *AEP*, 131 S.Ct. at 2538. The Act's "prescribed order of decisionmaking—the first decider under the Act is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emission standards by judicial decree under federal tort law." *Id.* at 2539. The court emphasized the "complex balancing" entrusted to EPA:

> The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.

Id. Recognizing Congress's careful balance, the court found federal common law preempted because common law judgments interfere with the

Act's regulatory scheme:

> The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.
>
> Notwithstanding these disabilities, the plaintiffs propose that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable," and then decide what level of reduction is "practical, feasible and economically viable".
>
> * * *
>
> The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme Congress enacted.

Id. at 2539-40 (citations omitted).

The Fourth Circuit Court of Appeals also recognized Congress's balancing of environmental concerns against economic needs:

> The system of statutes and regulations addressing the problem represents decades of thought by legislative bodies and agencies and the vast array of interests seeking to press upon them a variety of air pollution policies. To say this regulatory and permitting regime is comprehensive would be an

> understatement. To state that it embodies carefully wrought compromises states the obvious.

TVA, 615 F.3d at 298.

> One can, of course, debate the respective merits of agency and judicial roles in addressing the problem of air pollution. But 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 the judicially managed nuisance decrees... .

Id. at 304. The Act precludes separate remedies requiring different emission controls. *Id.* at 296.

> It ill behooves the judiciary to set aside a congressionally sanctioned scheme of many years' duration—a scheme, moreover, that reflects the extensive application of scientific expertise and that has set in motion reliance interests and expectations on the part of those states and enterprises that have complied with its requirements. To 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.

Id. at 301. The risks from "well-meaning attempt[s] to reduce air pollution" are severe:

> The district court's ... decision threatens to scuttle the extensive system of anti-pollution mandates that promote clean air in this country. If courts across the country were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be

> increasingly difficult for anyone to determine what standards govern.

Id. at 298.

AEP's holding left open whether the Act preempts state common law, 131 S.Ct. at 2540, but its reasoning did not. Two Supreme Court holdings decide this case: (1) anything interfering with the "methods by which the federal statute was designed to reach [its] goal" is preempted, *Ouellette*, 479 U.S. at 494; and (2) private air emission nuisance suits "cannot be reconciled with the decisionmaking scheme Congress enacted," *AEP*, 131 S. Ct. at 2540. As Justice Ginsburg noted during *AEP* oral argument, "Congress set up the EPA to promulgate standards for emissions, and now ... the relief you're seeking seems to me to set up a district judge who does not have the resources, the expertise, as a kind of super EPA." Plaintiffs seek the same "super EPA."

AEP follows long-established conflict preemption principles. Conflict preemption bars claims conflicting with a federal statute's ***goals*** **or** "interfere[ing] with the ***method*** by which the federal statute was designed to reach [its] goal." *TVA*, 615 F.3d at 303 (emphasis added) (quoting *Ouellette*, 479 U.S. at 494); *see Geier v. American Honda Motor Co.* 529 U.S. 861, 881 (2000) (preempting claims standing "as an obstacle to the

accomplishment and execution of the important means-related federal objectives"). Plaintiffs' suit interferes with both.[7]

1. Plaintiffs' Suit Interferes With The Clean Air Act's Goals

Plaintiffs ignore two of the Act's critical goals: (1) balancing competing interests; and (2) establishing certainty.

a. Plaintiffs Seek To Upset The Balance Federal Law Struck

Extensive 1990 amendments recognized that achieving clean air must be balanced against employment needs. *See* 42 U.S.C. §§ 7612, 7617; *see also EME Homer*, ___ F.3d ___, 2013 WL 4437219 at *10. Congress was clear that agencies charged with governing this field must balance the "environmental benefit potentially achievable" versus the "possibility of economic disruption." *AEP*, 131 S. Ct. at 2539; *see also Chevron*, 467 U.S.

[7] Plaintiffs appear to misunderstand the fundamental nature of conflict preemption and incorrectly emphasize that Congress must *intend* preemption to occur. Preemption need not be express. *Goebel v. City of Cedar Rapids*, 267 N.W.2d 388, 389 (Iowa 1978). "[C]onflict pre-emption is different." *Geier*, 529 U.S. at 884. "[T]he Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict. ... To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." *Id.* at 884-85.

at 852 n.25; *EME Homer*, ___ F.3d ___, 2013 WL 4437219 at *10. Congress committed to agencies the delicate balance between environment and jobs. *AEP*, 131 S. Ct. at 2539 ("The Clean Air Act entrusts such complex balancing to EPA ... ."). Conflict preemption bars Plaintiffs' attempt to strike a different balance than Congress and the agencies struck. Indeed, "regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption." *Farina*, 625 F.3d at 133.

Among the balances Plaintiffs seek to upset, existing plants, including GPC's, may transition to lower emitting equipment gradually as they replace or modify equipment. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979). Only when modification, replacement or construction occurs are new emission controls required. Conversely, new plants must employ more advanced emission controls. *Id.* "This system is intended to achieve environmental controls without unduly hampering economic growth." *National Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1319 (11th Cir. 2007). Pursuant to their delegated decisionmaking power, EPA/DNR balanced clean air with economic needs to allow gradual phase-in of greater emission controls. Plaintiffs challenge this balance by claiming GPC is liable for not replacing equipment faster

than EPA specified and complaining of "outworn machineries, outworn manufacturing technologies and outdated pollution-abating technologies." (Am. Pet. at ¶ 2) Plaintiffs' expert claims GPC should install specific new equipment and take other equipment offline, and this should have occurred by 1995. (App. p. ___) *Geier* precludes Plaintiffs' claim. 529 U.S. 861.

The *Geier* plaintiff claimed a car manufacturer negligently failed to install air bags known to be safer. The Department of Transportation, however, "deliberately imposed" a "gradual passive restraint phase-in" allowing transition to passive restraints like air bags over time. *See id.* at 881. Plaintiff's suit seeking a different phase-in was preempted "'as an obstacle to the accomplishment and execution of ... important ... objectives.'" *Id.; see also U.S. Bank Nat'l Ass'n v. Schipper,* 812 F. Supp. 2d 963, 973 (S.D. Iowa 2011). The same is true here where EPA and DNR, exercising their discretion, chose gradual equipment replacement to lower emissions, yet Plaintiffs demand something different. Plaintiffs cannot use state law as an obstacle to accomplishing Congress's full purposes and objectives—including gradual phase-in of greater controls. *See id.*

Also uncontested is that every piece of GPC's pollution control equipment is expressly permitted after agency review:

> It would be odd, to say the least, 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.
>
> While North Carolina points out that an activity need not be illegal in order to be a nuisance, that is not the situation before us. There is a distinction between an activity that is merely not illegal versus one that is explicitly granted a permit to operate in a particular fashion.

TVA, 615 F.3d at 309; *Goodell v. Humboldt County*, 575 N.W.2d 486, 501 (Iowa 1998) ("Another situation that could give rise to inconsistent local laws is one where the state has conditioned pursuit of an activity upon compliance with certain requirements. Any attempt by a local government to add to those requirements would conflict with the state law, because the local law would in effect prohibit what the state law permits."); *see also* Restatement (Second) of Torts § 821B cmt. f. Because it creates irreconcilable conflict to say that what is permitted is forbidden, Plaintiffs' attempt to override EPA/DNR's balancing is preempted.

b. Plaintiffs Interfere With The Certainty The Clean Air Act Provides

Another "purpose[] of the Act is to provide regulated entities with a degree of finality and certainty once regulatory determinations have been

made for a facility." *U.S. v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1101 (W.D. Wis. 2001); *see TVA*, 615 F.3d at 301 (holding collateral attacks on areas the Act regulates risks its "predictability," "clarity" and "legitimacy"). Plaintiffs' suit thwarts "finality and certainty":

> If courts across the country were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern.

TVA, 615 F.3d at 298.

> Indeed, a patchwork of nuisance injunctions could well lead to increased air pollution. Differing standards could create perverse incentives for power companies to increase utilization of plants in regions subject to less stringent judicial decrees.

Id. at 302.

A company considering investing in infrastructure, technology and jobs will require regulatory approval of environmental permits. *See* 42 U.S.C. § 7475. *TVA* explained:

> Regulations and permits, while hardly perfect, provide an opportunity for predictable standards that are scientifically grounded and thus give rise to broad reliance interests. TVA, for example, spent billions of dollars on power generation units that supply electricity to seven different states in the belief that its permits allowed it to do so. There is no way to predict the effect on TVA or utilities generally of supplanting operating permits with mandates derived from public nuisance law, but one suspects the costs and dislocations would be heavy indeed. Without a single system of permitting, '[i]t would be virtually

> impossible to predict the standard' for lawful emissions, and '[a]ny permit issued . . .would be rendered meaningless.'"

615 F.3d at 306 (quoting *Ouellette*, 479 U.S. at 497). With the Act's clarity and finality, a company can make permitted improvements knowing they meet environmental standards the expert agency deemed reasonable. Common law claims challenging that reasonableness destroy finality. An agency could never say a company's plans sufficed because the ultimate reasonableness test would be what a jury decides on any given day or injunctive relief a single judge fashioned following trial. "We seriously doubt that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider." *Id.* at 305.

2. Plaintiffs' Suit Interferes With The Law's Method To Achieve Its Goal

Plaintiffs assert there is no preemption because their goal matches the Act's. Not only is this inaccurate, it fails to recognize that state law conflicting with Congress's (or the agencies') *method* also is preempted:

> [I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate [air] pollution. A state law is also preempted if it interferes with the methods by which the federal statute was designed to reach this goal.

Ouellette, 479 U.S. at 494; *see Clean Air Markets v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003).

The Act provides individuals a method to participate in rulemaking. If a citizen believes a rule should exist, s/he may initiate the process. Iowa Admin. Code r. 11-5.1. If a citizen wishes to provide the agency views during rulemaking, s/he can. 40 C.F.R. § 51.102; Iowa Admin Code r. 11-6.5. After EPA gathers input from all sources and issues a rule (or chooses not to), a citizen cannot side-step that process to bring a common-law action conflicting with the agency's decision designed to incorporate all interests. *See Public Utility Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc.*, 379 F.3d 641, 649-650 (9th Cir. 2004) (finding preemption because claims "interfere with the method by which the federal statute was designed to reach its goals" and "make state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" where agency considered refunds, rejected proposal and state law would allow end run around decision).

Even where federal law allows states authority to impose their own requirements, preemption principles do not allow state laws to conflict with Congress's method to achieve its goals. *See, e.g., Verizon North, Inc. v. Strand,* 309 F.3d 935, 944 (6th Cir. 2002) (finding state laws preempted that "ignore[d] and bypasse[d] the detailed process for interconnection set out by Congress in the FTA."). The Supreme Court's Occupational Safety and

Health Act ("OSHA") analysis in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992), is instructive. OSHA provided federal standards, but allowed states to create a state plan that *could* preempt federal law if submitted for federal review and approval. *Id.* at 102. The court, nonetheless, found state worker safety laws preempted if the state failed to follow the Act's method:

> We cannot accept petitioner's argument that the OSH Act does not pre-empt nonconflicting state laws because those laws, like the Act, are designed to promote worker safety. In determining whether state law "stands as an obstacle" to the full implementation of a federal law, ... , "it is not enough to say that the ultimate goal of both federal and state law" is the same, "A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal." ... The OSH Act does not foreclose a State from enacting its own laws to advance the goal of worker safety, but it does restrict the ways in which it can do so. If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor, as described in § 18 of the Act.

Id. at 103-04 (internal citations omitted). EPA sets national standards states must reach and retains power to enforce those standards should the state agency not do so. Each state creates a state implementation plan, subject to EPA review and approval, to achieve EPA established standards. While a state retains authority to regulate air emissions, the Act specifies the method by which states do so, including the method for citizen input. Plaintiffs'

request for a different result through a different method is preempted. *Gade*, 505 U.S. at 103-04; *Ouellette,* 479 U.S. at 494.

C. The Legislature Occupied The Regulatory Field With A Comprehensive Statutory Scheme

Although this Court never need reach this issue, where conflicts between a statute and common law are inescapable because of the statute's pervasiveness, "field preemption" also preempts common law. *Gade*, 505 U.S. at 104 n.2 ("Although we have chosen to use the term 'conflict' pre-emption, we could as easily have stated that the promulgation of a federal safety and health standard 'pre-empts the field' for any nonapproved state law regulating the same safety and health issue."); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633-634 (1973) ("It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."). As *TVA* explained:

> [E]missions have been extensively regulated nationwide by the Clean Air Act for four decades. The real question in this case is whether individual states will be allowed to supplant the cooperative federal-state framework that Congress through the EPA has refined over many years.

615 F.3d. at 298. Where, as here, Congress and agencies pervasively regulate the subject on which Plaintiffs sue, field preemption applies.

D. The "Savings Clause" Does Not Allow Plaintiffs To Bring Claims Conflicting With The Clean Air Act

Plaintiffs devote much text to the Act's "savings clause," but ignore the Act's language, fundamental differences between the Clean Air and Clean Water Acts, basic *conflict* preemption rules and long-standing precedent. When these issues are considered, Plaintiffs' claims are preempted.

1. The Clean Air Act Does Not Preserve State Common Law Claims

The Act allows states to enact more stringent standards than EPA's:

> [N]othing in this chapter shall preclude or deny the right of any **State or political subdivision thereof to adopt or enforce** (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7416 (emphasis added). "State or political subdivision" does not include an individual or the judiciary. 42 U.S.C. § 7602(d) (defining "State" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands."); *Cannon v. Cooch*, 2011 WL 5925329 *4 (D. Del. Nov. 28, 2011) (finding courts not a "public body"

that includes "State or any political subdivision of the State"); *U.S. v. Amawi*, 552 F. Supp. 2d 679, 680 (N.D. Ohio 2008) (finding judiciary not a "government entity" that includes "any State or political subdivision thereof"); *Haudrich v. Howmedica, Inc.*, 642 N.E.2d 206 (Ill. Ct. App. 1994) (concluding courts were not "States or political subdivisions"). The Act did not retain authority for the judicial branch, or Plaintiffs, to create more stringent standards than EPA's. *See* 42 U.S.C. § 7416. Thus, although a "State" may craft more stringent standards, the judiciary may not.

Ouellette cannot alter the Clean Air Act's language. In dictum, *Ouellette* said the Clean *Water* Act's savings clause "***may***[8] include the right to impose higher common-law as well as higher statutory restrictions." 479 U.S. at 497 (emphasis added). The Court referenced *Milwaukee II*. *Id.* In rejecting federal common law claims, *Milwaukee II* stated

> It is one thing ... to say that States may adopt more stringent limitations through state administrative processes, or even that States **may** establish such limitations through state nuisance law, and apply them to in-state discharges. It is quite another to say that the States may call upon *federal* courts to employ

[8] The word "may" befits dictum where the court was not actually considering, as this Court must, whether a conflict exists.

> federal common law to establish more stringent standards applicable to out-of-state dischargers.

Milwaukee II, 451 U.S. at 327-28 (bold, underline added). The court did not actually consider whether state common law claims conflict with the Clean Water Act, let alone today's Clean Air Act.

Further, although the Clean Air and Clean Water Acts have similarities, Plaintiffs ignore critical differences. The Clean Water Act includes the Clean Air Act's savings language, but *also* broader language. The Water Act also provides: "[N]othing in this chapter shall ... (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. This second component does not contain the limitation requiring that the "State or political subdivision" adopt or enforce standards. Although the court did not consider whether the Clean Water Act conflicts with common law, if it had reached such a conclusion, it cannot be imposed on the Clean Air Act's narrower language.

2. The Savings Clause Does Not Prevent Conflict Preemption

Plaintiffs' savings clause argument also ignores the fundamental problem with Plaintiffs' claims—***conflict*** preemption. Conflict preemption precludes state claims conflicting with an act's goals or means to achieve

them. A savings clause that might prevent *field* preemption cannot prevent *conflict* preemption or the exception subsumes the rule and federal law is overridden—precisely what the Supremacy Clause forbids. "[I]t is well-established that a savings clause does not 'save' common law actions that would subvert a federal statutory or regulatory scheme." *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1125 (3d Cir. 1990) (citing cases).

The Act allows states, or their political subdivisions, to impose more stringent standards than EPA imposed. 42 U.S.C. § 7416. Even ignoring that Iowa eschewed more stringent standards than EPA's, Iowa Code § 455B.133(4), the savings clause cannot save claims *conflicting* with the federal statutory or regulatory scheme. To enforce Congress's intent, an "act cannot be held to destroy itself." *America Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 228 (1998) (quoting *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). Thus, "the saving clause ... does *not* bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869; *see id.* at 871. The point is simple, but fundamental.

3. The Clean Air Act's Citizen Suit Savings Clause Has Limited Application

The Act's citizen suit savings clause also has limited reach. The clause is limited to "***this section***"–the citizen action provision. *See* 42 U.S.C. § 7604(e) ("Nothing in *this section* shall restrict....") (emphasis added); Iowa Code § 455B.111(5) ("This section ...."). This limitation does *not* prevent the Act's *other* sections from preempting.

The same language exists in multiple provisions with decades of precedent contradicting Plaintiffs' position.[9] In *Milwaukee II*, the Supreme Court noted that the savings clause's "common language" "cannot be read to mean that the Act as a whole does not supplant formerly available federal common law actions but only that *the particular section authorizing citizen suits does not do so*." 451 U.S. at 329 (emphasis added); *see id.* at 329 n.22. Despite over thirty years of precedent limiting this clause's impact to a single section, Congress never broadened it. *See Neal v. United States*, 516 U.S. 284, 295 (1996) ("One reason that we give great weight to *stare decisis* in the area of statutory construction is that 'Congress is free to change this

[9] *E.g.*, *Haynes v. Blue Ridge Paper Prods., Inc.*, 2010 WL 3075738 at *5 (W.D.N.C. Aug. 5, 2010); *Williams Pipe Line Co. v. City of Mounds View*, 651 F. Supp. 551, 567 (D. Minn. 1987); *U.S. v. Kin-Buc*, 532 F. Supp. 699 (P.N.J. 1982).

Court's interpretation of its legislation.'" (citation omitted)); *Mall Real Estate, L.L.C. v. City of Hamburg*, 818 N.W.2d 190, 196 (Iowa 2012).

Consistent with precedent, the savings clause in the citizen's action provision cannot save Plaintiffs' claims from conflict or field preemption by the Act's other provisions.

III. IOWA CODE CHAPTER 455B PREEMPTS PLAINTIFFS' COMMON LAW AND STATUTORY CLAIMS

Plaintiffs' appeal of the district court's state preemption ruling also raises questions of law reviewed for legal error. *Stevens,* 728 N.W.2d at 827. Even if federal law did not bar Plaintiffs' claims, the district court correctly found that Iowa Code Chapter 455B preempts Plaintiffs' statutory and common law claims.

"It is the function of the Legislature, not the judiciary to make laws, and legislatively enacted laws will always take precedence over judge-made common law." *Kraft v. Detroit Entm't, L.L.C.*, 683 N.W.2d 200, 206 n.5 (Mich. Ct. App. 2004); *accord Eddy v. Casey's Gen. Store, Inc.*, 485 N.W.2d 633, 638 (Iowa 1992) ("[W]e are bound to follow the legislature's scheme, regardless of the fact that it may create a situation which leaves the present plaintiffs without statutory relief.").

A. Plaintiffs' Common Law Claims Are Preempted

Once the Legislature establishes a method to address an issue, plaintiffs cannot sidestep those procedures to address the same issue through common law. *See, e.g., Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996) ("Where the legislature has provided a comprehensive scheme for dealing with a specified kind of dispute, the statutory remedy provided is generally exclusive." (quoting 1A C.J.S. Actions § 14 n.55 (1985)). Like federal preemption, state law preemption can arise from either conflict preemption or occupying the field. *See Goodell v. Humboldt County*, 575 N.W.2d 486, 493 (Iowa 1998). State common law inconsistent with a regulatory framework is preempted. *See Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 197 (Iowa 1985). Because state law preemption is substantively identical to federal conflict and field preemption, arguments regarding federal preemption apply and will not all be repeated.

Plaintiffs assert state law preemption exists only when it is impossible for a state statute and preempted claims to co-exist. They are incorrect. *E.g., Northrup*, 372 N.W.2d at 196-97 (finding Iowa Civil Rights Act exclusive remedy without finding impossibility, for wrongful discharge based on disability); *see also U.S. Bank Nat'l Ass'n,* 812 F. Supp. 2d at

968 ("Conflict preemption manifests itself in two forms—impossibility preemption and obstruction preemption."). An action also becomes irreconcilable with an act by going beyond what it proscribes. *See Baker v. Iowa City*, 750 N.W.2d 93 (Iowa 2008) (finding ordinance allowing claims against employers with fewer than four employers was irreconcilable with statute providing claims against employers with four or more employees).

Plaintiffs argue nothing makes it "impossible (or even difficult)" for GPC to comply with the Legislature's scheme and common-law duties they ask a court to create. (Am. Appellant Br. at 43) Not only is showing "impossibility" unnecessary, Plaintiffs are mistaken. GPC must obtain DNR permission for new construction, modification of existing emission points, changed emission rates, increased production, altering or installing stacks, adding new equipment, modifying existing equipment, taking operational limits or changing fuel sources. Despite DNR/EPA regulating virtually every aspect of GPC's emissions, Plaintiffs ask the court to direct GPC to operate differently without the scientific expertise and extensive rulemaking DNR employs. This relief would place GPC squarely at odds with the regulators' process for reviewing and permitting, or denying, operational changes.

For example, the court could find using biogas benefits the environment and order GPC to use biogas. DNR, however, may not approve biogas because it may have other environmental implications (e.g., increased SO_2 emissions). Or, the court could order GPC to install new pollution control equipment. Even with a court order, however, GPC would need a DNR permit. DNR may not agree the court-ordered equipment is appropriate and may deny the permit or require something different. GPC could not meet its obligations to the court and satisfy DNR/EPA's review process. DNR even may ultimately permit court-imposed changes, but not within court-allowed time. DNR sometimes needs extensive analysis to approve a permit, and GPC could not even lawfully *begin* construction without DNR's approval. During this time, GPC could not both comply with the court order and DNR's requirements.[10] GPC would be in a catch-22: violate a court order and risk contempt of court, or comply without

[10] The only remedy a court could impose not conflicting with the regulatory scheme Congress and Iowa's Legislature created would be directing GPC to comply with DNR/EPA directives. GPC, of course, already must abide as a matter of law and this merely highlights that preemption should occur. If Plaintiffs seek compliance with DNR directives, the Act and Chapter 455B provide a citizen suit.

DNR approval committing a civil and, possibly, criminal violation. The law does not require, or allow, this result.[11]

Indeed, this Court *already* addressed the permitting process and described the very conflict Plaintiffs create:

> Another situation that could give rise to inconsistent local laws is one where the state has conditioned pursuit of an activity upon compliance with certain requirements. Any attempt by a local government to add to those requirements would conflict with the state law, because the local law would in effect prohibit what the state law permits. Stated another way, the local ordinance would prohibit an activity absent compliance with the additional requirements of local law, even though under state law the activity would be permitted because it complied with the requirements of state law. In this situation,

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[11] Monetary damages present the same problem. For example, if the court ordered GPC to pay fifty cents per day until it took certain steps, GPC would be at DNR's mercy to approve permits to comply with court-imposed limits. GPC would incur damages it could not legally avoid. Nor can retroactive damages be assessed without showing DNR permitted the changes Plaintiffs claim were needed. "[I]f an injunction requiring a particular repair would 'interfere' with the federal regulatory scheme—so too would a damages award based on the failure to make such a repair." *Kent v. DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208, 1217 (N.D. Cal. 2002). Deferring to the agency's method also means deferring to the remedy Congress (or the agency) selected as that is "a fundamental part of the comprehensive system established by Congress." *Wisconsin Dep't of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 287 (1986); *Wyoming Premium Farms v. Pfizer, Inc.*, No. 11-CV-282-J, 2013 WL 1796965 at *9 (D.Wy. Apr. 29, 2013); *see Ouellette*, 479 U.S. at 499 n.19. Thus, damage claims are preempted just like injunctive claims. *Kivalina*, 696 F.3d at 857. Plaintiffs did not argue otherwise.

> the local regulation would be inconsistent with state law and preempted.

Goodell, 575 N.W.2d at 501. This Court already reached the conclusion that compels preemption. Because "add[ing] to th[]e requirements ***would conflict*** with the state law," Plaintiffs' claims are inconsistent with state (and federal) law and, thus, preempted. *Id.* (emphasis added).

> The ordinance conflicts with state law because its setback requirements would prohibit construction of the ValAdCo facilities, which the MPCA and county have already approved. The ordinance's fixed setback requirements run contrary to the MPCA's focus on site- and project-specific determinations of what are appropriate pollution control measures. The ordinance is not merely complementary to and in furtherance of state regulations. ValAdCo could be in compliance with MPCA requirements yet be prosecuted under the local ordinance.

Board of Supervisors of Crooks Tp., Renville County v. ValAdCo, 504 N.W.2d 267, 272 (Minn. Ct. App. 1993) (cited with approval in *Goodell*, 575 N.W.2d at 501). There is no "impossibility" standard under state law but, if there were, Plaintiffs' claims still would be preempted because they demand changes to GPC's equipment that, quite literally, are not "permitted" and demand regulation by a court outside the regulatory scheme.

B. Plaintiffs' Statutory Claims Are Barred

Plaintiffs also argue nuisance claims survive because Iowa Code Chapter 657 authorizes them and Chapter 455B did not repeal it. Plaintiffs misunderstand. GPC does not contend the legislature repealed Chapter 657; rather, the issue is conflict and preemption.

If statutes conflict, standard construction rules apply. Specific governs over general. *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 194 (Iowa 2011); *Goodell*, 575 N.W.2d at 507 (recognizing that where irreconcilable conflict exists between general and specific statute, the specific prevails). In *Oyens Feed*, a statute governed general agricultural collateral lien priority. 808 N.W.2d at 194. Thereafter, a specific statute was enacted regarding livestock feed. *Id.* The specific statute governed over the general statute that otherwise would govern. *Id.* Here, there is a general nuisance statute and a specific air emission statute. It is inconsistent with the law to argue a general statute trumps a subsequent specific statute. *Id.; TVA*, 615 F.3d at 309 ("It would be odd, to say the least, for specific state laws and regulations to expressly permit a power plant and then have a generic statute countermand those permissions on public nuisance grounds.")

Beyond obvious inconsistencies between the administrative approach the Legislature designed to balance competing concerns versus individual suits, Iowa's Legislators specifically protected Iowa industries from regulation more burdensome than EPA's. Iowa Code § 455B.133(4). It defies common sense that the Legislature specifically enacted a law forbidding agencies trained to deal with such issues from exceeding federal limits only to reserve the right to those untrained to do so. *AEP*, 131 S. Ct. at 2539. Inferences contrary to common sense are improper. *State v. Petithory*, 702 N.W.2d 854, 859 (Iowa 2005). Obliterating the legislature's balancing under Chapter 455B is untenable. *See Curlew Consol. Sch. Dist. v. Palo Alto County Bd. of Educ.*, 73 N.W.2d 20, 21 (Iowa 1955) (earlier statute "irreconcilable with" later statute must yield); *Erisman v. Chicago, B. & Q. Ry. Co.*, 163 N.W. 627, 630 (Iowa 1917) (statute eliminates common law that "would in effect deprive the subsequent statute of its efficacy" (quoting *T & P.R.R. Co. v. Abilene Oil Co.*, 204 U.S. 427 (1907))).

Rather than address the substance of GPC's argument, Plaintiffs focus on whether the legislature "repealed" Chapter 657—an argument not made. Even under the "repeal" or "abrogation" framework, however, Plaintiffs' claims fail because, "[w]here, as here, subsequent legislation which comprehensively and specifically treats a matter included in a prior general

statute results in an ambiguity or redundancy, the prior legislation is deemed repealed by implication." *Dan Dugan Transp. Co. v. Worth County*, 243 N.W.2d 655, 658 (Iowa 1976). The Act and accompanying state regulations are comprehensive and elaborate—Plaintiffs' claims are irreconcilable with that structure. *See TVA*, 615 F.3d. at 298. Indeed, this Court so indicated. *Goodell*, 575 N.W.2d at 501.

IV. PLAINTIFFS' BELATED CONSTITUTIONAL TAKINGS ARGUMENT DOES NOT PREVENT SUMMARY JUDGMENT

Although not raised below, Plaintiffs now argue the district court erred in finding state law preemption because its conclusion causes an unconstitutional taking.[12] "[I]ssues not raised in the trial court may not be first presented on appeal. This rule applies equally to constitutional questions which are belatedly urged." *Polson v. Meredith Pub. Co.*, 213 N.W.2d 520, 523 (Iowa 1973); *see also State v. Willis*, 218 N.W.2d 921, 923 (Iowa 1974) ("A constitutional challenge must be specific and such challenge may not be presented for the first time on appeal.").

Nothing in the record suggests a taking occurred. Plaintiffs offered no affidavits, transcripts or other evidence indicating a physical intrusion on

[12] Plaintiffs do not raise a takings argument in their opposition to the district court's *federal* preemption ruling.

their property, a reduction of property values since purchase or anything showing a taking.[13] *See, e.g.*, Iowa R. Civ. P. 1.981(5) (party opposing summary judgment "may not rest upon the mere allegations ... in the pleadings," but must present evidence showing "a genuine issue for trial"); *see also Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 293 (1st Cir. 1995) ("Beyond its general statement that its property interests have been invaded by radiation, CAN has not explained or argued even generally how this is so, nor does it offer any factual support for its claims regarding radiation.").

New arguments may not be raised for the first time on appeal partly because the record is not fully developed. *See DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). This case presents a classic example of the reason for such a rule. Even where a statute could constitute a taking, the Takings Clause *only* prevents the statute from barring recovery for diminution of the value of Plaintiffs' property:

> Because the recovery of diminution-in-value damages fully compensates the burdened property owners for the unlawful

[13] Plaintiffs do not even explain whether the alleged taking is *per se* or regulatory and provide no analysis on how the complex framework for analyzing takings applies to Chapter 455B. *See generally Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537-43 (2005) (summarizing developments and standards that apply in takings cases).

> taking of an easement, the restrictions of the Takings Clause end at that point. **The Takings Clause does not prohibit limitations on other damages recoverable under a nuisance theory.**

Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 175 (Iowa 2004) (emphasis added); *see Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656, 662 (Iowa 2010) (holding same). Plaintiffs are not seeking damages for diminution of property values. (*See* Am. Pet. at ¶¶ 18, 23, 31) Indeed, Plaintiffs intentionally amended their Petition to limit their damages claims by eliminating references to diminution in property values. Mot. for Leave to Submit, dated Mar. 19, 2013, at ¶ 2(c) (regarding motion to amend) ("Plaintiffs limit their claims to statutory common law nuisance, negligence and trespass claims for damages *for the loss of the use and enjoyment of their properties* ... ." (underlining added)); *compare* Pet. ¶ 17 (" ... have their real and personal property damaged, necessitating remediation, causing a reduction in the ability of Plaintiffs to use and enjoy their real and personal properties, and also causing a diminution in their property values") *with* Am. Pet. ¶ 2 ("These emissions have ... generally diminished

Plaintiffs' ability to use and enjoy their properties.").[14] Having expressly disclaimed the sole claim the Takings Clause could save, Plaintiffs' attempt to raise a new argument to the contrary on appeal is inappropriate.

Even if the Court reached the issue, however, Plaintiffs' takings argument is unavailing because: (1) government action allowing or causing a public nuisance is not a taking; and (2) Chapter 455B *reduces* emissions, with ample remedies provided, and thus is no "taking."

A. No Taking Occurs When Government Action Allows a Public Nuisance

Plaintiffs' taking argument fails because the nuisance alleged from GPC's plant is a "public nuisance" the Legislature may legalize. In *Bormann*, this Court relied heavily on *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), to conclude that a small number of property owners suffered a taking from county action immunizing certain farm operations from nuisance suits. *Bormann* recognized, among other things:

> [T]he state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards,* holding that

[14] Indeed, had Plaintiffs presented this argument at the district court level, as required, GPC would have presented evidence where Plaintiffs' counsel expressly stated Plaintiffs will not seek damages for diminution in value. Plaintiffs' failure to present these issues below impairs the record on appeal.

> **'while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking.'**

Id. at 320 (quoting *Richards*, 233 U.S. at 553) (emphasis added).

The *Richards* court held property owners living near railroad tracks suffered no "taking" despite government action allowing trains continually to pour smoke and exhaust onto their properties. 233 U.S. at 553-54. Inconvenience from smoke and exhaust was a "public nuisance" with a "common burden" borne equally by all people living near the tracks. *Id.* Allowing a public nuisance is not a taking. *Id.* A taking occurs only when there is a "peculiar" burden on a small number of landowners, not shared by others. *Id.* at 557-58 (finding taking only from smoke propelled by tunnel directly toward particular property); *accord Argent v. U.S.*, 124 F.3d 1277, 1283-84 (Fed. Cir. 1997) ("In analyzing the plaintiff's taking claim, the Supreme Court [in *Richards*] distinguished between public nuisances, borne by all owners of property adjoining a railroad, and private nuisances peculiar to a small number of landowners ... . With respect to exhaust from

trains passing on the tracks, the Court found this damage to be a public nuisance, and barred recovery for the plaintiff.").[15]

In *Batten v. United States*, 306 F.2d 580, 585 (10th Cir. 1962), for example, the court found no taking in the neighborhood surrounding a military base despite air traffic causing sound waves, shock waves and smoke to pervade the neighborhood. Citing *Richards*, the Court of Appeals noted that sound and smoke were not intentionally directed at any particular property, but rather were a "neighborhood inconvenience ... common to that found on all the private property surrounding the base." *Id.* The rationale for this rule reflects the common thread weaving through preemption and the political question doctrine: "Redress of the wrong to the community must be left to its appointed representatives." *Burton v. Dominion Nuclear Connecticut, Inc.*, 23 A.3d 1176, 1189 (Conn. 2011).

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[15] This Court, on occasion, has indicated that air emissions are a "private" nuisance. *See, e.g., Bormann*, 584 N.W.2d at 314; *Guzman v. Des Moines Hotel Partners, LP.*, 489 N.W.2d 7, 10 (Iowa 1992). The court presumably did not intend to contradict *Richards*, while simultaneously relying on it, by holding that air emissions *always* are a "private nuisance" even when the emissions' effects are borne by all neighboring property owners. Presumably, the limited number of estates affected in *Bormann* was more akin to the property at the end of the tunnel affected differently by the emissions than the remainder of the neighbors in *Richards*.

Although the Amici label this case a "private nuisance," Plaintiffs' petition is to the contrary. Plaintiffs' request to certify a class of 3,000 people residing within 1.5 miles of GPC's facility claiming they all were affected similarly makes clear they allege a public, not private, nuisance. (*See* Am. Pet. at ¶¶ 3, 8)

> Plaintiffs' petition affirmatively expresses the absence of special damages when it sets forth this case as a class action:
>
> > Plaintiffs bring this action on behalf of themselves and all other owners, operators and employees of restaurants, bars, motels and other retail establishments in South Sioux City, Nebraska and Sioux City, Iowa similarly situated. This class is so numerous that joinder of all members is impracticable.
>
> The fact that plaintiffs assert this claim on behalf of the entire retail business communities of South Sioux City, Nebraska, and Sioux City, Iowa, implies that whatever damages have been suffered by plaintiffs have also been suffered by the entire business community and, therefore, such damages are public in nature rather than special.

Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 130 (Iowa 1984). Plaintiffs' claim is indistinguishable (other than being broader) from *Nebraska Innkeepers*. Plaintiffs allege a public nuisance the Legislature properly may regulate, thus, the Act and Chapter 455B are not a taking.

B. Chapter 455B Does Not Grant Immunity To Create A Nuisance But Improves Air Quality

Perhaps more fundamentally, government possesses police power to regulate without every burden being a taking. *Miller v. Schoene*, 276 U.S. 272 (1928) (requiring destruction of red cedar trees to protect apple orchards did not result in a taking). "The government may be required to compensate a property owner if its action: (1) involves a permanent physical invasion of the property; or (2) denies the owner all economically beneficial or productive use of the land." *Perkins v. Board of Supervisors of Madison County*, 636 N.W.2d 58, 70 (Iowa 2001). Chapter 455B does neither. Rather, it promotes "abatement, control, and prevention of air pollution in this state." Iowa Code § 455B.133.

Chapter 455B is Iowa's contribution toward the Act's purpose "to control and improve the nation's air quality through a combination of state and federal regulation." *Arizona Pub. Serv. Co. v. U.S. E.P.A.*, 562 F.3d 1116, 1118 (10th Cir. 2009). "[T]he CAA has been upheld not only as constitutional, but as one of the greatest success stories in environmental law." Suriya Evans-Pritchard Jayanti, Learning from the Leader: The European Union's Renewable Energy Mandates As A Blueprint for American Environmental Federalism, 65 Rutgers L. Rev. 173, 205 (2012).

Plaintiffs do not explain how a law successfully ***improving*** air quality constitutes a taking.

"[A]n average reciprocity of advantage [] has been recognized as a justification of various laws." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). An unconstitutional taking is less likely "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 n.18 (1987). Some diminished value for the common good is not a taking. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Id.* at 491. The Act balances the good of reduced emissions and the advantages of jobs.[16]

Here, the Act is a broadly-based regulatory scheme, the emitter is the party primarily burdened by emission controls, and Muscatine benefits from cleaner air while maintaining a large employer.[17] Although residents absorb

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[16] Highlighting why Congress and the agencies get to decide this balance, it is likely that the jobs GPC creates actually *increase* property values.

[17] Ordinarily, it is the emitter that argues it suffered a taking because *its* estate was diminished by restrictions on its use. *E.g., J.W. Black Lumber Co., Inc. v. Arkansas Dep't of Pollution Control & Ecology*, 717 S.W.2d 807 (Ark. 1986).

some level of emissions, the burden is spread among many and the common good is shared by many. The fact that some bear a greater burden than others does not alter the analysis. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978) ("Legislation designed to promote the general welfare commonly burdens some more than others."). Where a law is "expected to produce a widespread public benefit and [is] applicable to all similarly situated property" it is not a taking absent physical appropriation or elimination of value. *Id.* at 134 n.30.

The tradeoff of benefits and burdens here contrasts sharply with *Bormann* and *Gacke*. Neither involved a class claim demonstrating that a public nuisance claim was involved and both involved statutes providing blanket immunity with no burden on the emitter and no avenues to control the nuisances alleged. *See Bormann*, 584 N.W.2d at 321; *Gacke*, 684 N.W.2d at 173-74. Here, there are both a burden on the emitter and ample avenues to control nuisances. Pollution regulations burdening the emitter are precisely the sort of statutes upheld as conveying burdens and benefits and, thus, secure from takings challenges. *See Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 102 n.9 (2d Cir. 1992) (upholding environmental regulation as creating average reciprocity of advantage); *K & K Const., Inc. v. Department of Envtl. Quality*, 705 N.W.2d 365, 369 (Mich. Ct. App.

2005) ("Clearly, all people, including property owners, are the intended beneficiaries of the regulation of wetlands.").

As noted above, "restitution" is a purpose of the Act's penalty provisions. S. Rep. No. 101-228 at 373 (1989), as reprinted in 1990 U.S.C.C.A.N. 3385, 3756; *see, e.g.*, Iowa Code § 455B.146 (fines of up to $10,000 per day). Section 304(g) allows district courts to order that penalty payments "be used in Iowa Code § 455B.146 beneficial mitigation projects" to "enhance public health or the environment." 42 U.S.C. § 7604(g)(2). Remedies exist. *See U.S. v. Questar Gas Mgmt. Co.*, 2010 WL 5279832, at *5 (D. Utah Dec. 14, 2010) ("Given that the CAA allows the Tribe to be part of the process but it has chosen not to be, the court does not believe that it should allow the Tribe to have an additional remedy that could be inconsistent with the CAA regulatory scheme."). If the state fails to enforce standards, citizens may sue. *See* Iowa Code § 455B.111. Citizens even may initiate rulemaking. Iowa Admin. Code r. 11-5.1; 40 C.F.R. § 51.102. In short, the Clean Air Act and Chapter 455B *eliminate* nuisances, rather than *allowing* them, *and* provide more remedies than the law otherwise allows.[18]

[18] In Iowa, a public nuisance claim does not allow damages that are not special or unique. *Nebraska Innkeepers, Inc.*, 345 N.W.2d at 130 (quoting *Stop & Shop Co. v. Fisher*, 444 N.E.2d 368, 373-74 (Mass. 1983)).

CONCLUSION

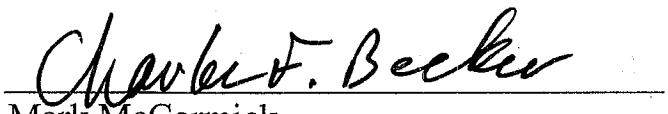
The district court's ruling granting summary judgment and dismissing Plaintiffs' claims should be affirmed. Plaintiffs' claims are barred by the political question doctrine and preempted by the Clean Air Act and Iowa Code Chapter 455B.

REQUEST FOR ORAL ARGUMENT

Appellee Grain Processing Corporation respectfully requests oral argument upon submission of this appeal.

Respectfully submitted,

BELIN McCORMICK, P.C.

By 

Mark McCormick
Charles F. Becker
Michael R. Reck
Kelsey J. Knowles
666 Walnut Street, Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 243-7100
Facsimile: (515) 558-0609
E-mail: mmccormick@belinmccormick.com
cfbecker@belinmccormick.com
mrreck@belinmccormick.com
kjknowles@belinmccormick.com

and

Eric M. Knoernschild
Steven J. Havercamp
Stanley, Lande & Hunter
A Professional Corporation
301 Iowa Avenue, Suite 400
Muscatine, Iowa 52761
Telephone: 563-264-5000
Facsimile: 563-263-8775
Email: ekchild@slhlaw.com
shavercamp@slhlaw.com

and

Charles Loughlin (*pro hac vice motion pending*)
Joshua B. Frank (*pro hac vice motion pending*)
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004-2400
Email: charles.loughlin@bakerbotts.com
joshua.frank@bakerbotts.com

ATTORNEYS FOR APPELLEE

ATTORNEY'S COST CERTIFICATE

I hereby certify that the actual cost of printing the foregoing Appellee's Page Proof Brief was $ n/a (exclusive of sales tax, delivery and postage).

Shannon Olson

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I hereby certify that I filed the foregoing Appellee's Page Proof Brief by hand delivering two copies to the Clerk of the Iowa Supreme Court on the 10th day of October, 2013.

Shannon Olson

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2013, I served the foregoing Appellee's Page Proof Brief by mailing a copy thereof to:

Sarah E. Siskind
Barry J. Blonien
David Baltmanis
Miner, Barnhill & Galland, P.C.
44 East Mufflin, Suite 803
Madison, WI 53703

James C. Larew
Claire M. Diallo
Larew Law Office
504 E. Bloomington Street
Iowa City, IA 52245

Andrew L. Hope
The Hope Law Firm
317 – 6th Avenue, Suite 700
Des Moines, IA 50309

Shannon Olson

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

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Dated: October 10, 2013

Shannon Olson

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