No. 09-1623

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

STATE OF NORTH CAROLINA *ex rel.* ROY COOPER, ATTORNEY GENERAL,

Plaintiff-Appellee,

v.

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellant,

STATE OF ALABAMA,

Defendant-Intervenor-Appellant.

On Appeal from the United States District Court
for the Western District of North Carolina

FINAL BRIEF OF *AMICI CURIAE* REPRESENTATIVES JIM COOPER, PHIL ROE, STEVE COHEN, MARSHA BLACKBURN, LINCOLN DAVIS, ZACH WAMP, BART GORDON, JOHN TANNER, PARKER GRIFFITH, AND TRAVIS CHILDERS IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF *AMICI*

Representatives Jim Cooper, Phil Roe, Steve Cohen, Marsha Blackburn, Lincoln Davis, Zach Wamp, Bart Gordon, John Tanner, Parker Griffith, and Travis Childers are Members of Congress from Tennessee (5th, 1st, 9th, 7th, 4th, 3rd, 6th, & 8th Districts, respectively), Alabama (5th District), and Mississippi (1st District). Their interest in this case stems both from their roles as elected Representatives of the States directly or potentially affected by the decision below and as Members of Congress concerned with the proper functioning of the Clean Air Act. *Amici* thus offer a unique perspective on the roles that Act reserved for the States, the federal government, and the federal courts.

Amici's authority to file this brief comes from FRAP 29(a), and the consent of each of the parties.

INTRODUCTION

In allowing North Carolina to invoke the public nuisance law of its sister States to enjoin the specifically authorized operation of power plants within those States, the decision below represents a novel and far-reaching extension of state public nuisance law in an area strictly cabined by the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401, *et seq*. The district court effectively used North Carolina law to impose regulation more onerous than CAA or source-state requirements on

distant TVA sources in Alabama and Tennessee. Such imposition allows North Carolina to avoid much cheaper and more substantial pollution reductions available locally. *North Carolina ex rel. Cooper* v. *TVA*, 593 F. Supp.2d 812, 826-31 (W.D.N.C. 2009) ("*TVA-FJ*"). The district court reached that result through the invocation and expansion of source-state public nuisance law in a manner inconsistent with the allocation of authority under the CAA and the Constitution, and inappropriate for the federal courts.

The details of the decisions below have been aptly described by Appellants, TVA Br. 17-20, Alabama Br. 14-21, and need not be repeated in full here. Several aspects of those decisions, however, bear reemphasis for purposes of the arguments in this brief. First, although the district court recognized its obligation under *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), to apply source-state law, and the CAA's preemption of both federal common law and affected-state law, such recognition found little application in practice. *North Carolina ex rel. Cooper* v. *TVA*, 549 F. Supp.2d 725, 729, 732, 734 (W.D.N.C. 2008) ("*TVA-SJ*") (citing *Ouellette*). Instead, the district court relied primarily on federal common law and North Carolina law for the public-nuisance standards it attributed to the law of Alabama, Kentucky, and Tennessee.

For example, the district court refused to hold North Carolina to the ordinary source-state standing requirement that a plaintiff, other than the source-State or its

subdivisions, show "special harm," different in kind from that suffered by the public at large, in order to bring a public nuisance suit. Rather, citing pre-CAA federal common law cases and its own arbitrary notion of how source-state law "should be interpreted," the district court allowed North Carolina to assert the undifferentiated interests of North Carolina and its citizens, as a "foreign quasi-sovereign," despite conceding the complete "dearth of authority on the specific issue from the source states themselves." *TVA-SJ*, 549 F. Supp.2d at 730-31.[1] The district court thus reached the anomalous conclusion that source-state law would allow a *foreign* sovereign to step into the policy-making role otherwise reserved for in-state sovereigns in bringing public nuisance suits.

Regarding its substantive findings of a public nuisance from certain TVA sources, the district court again paid no attention to source-state law. Rather, after citing generic and open-ended descriptions of source-state public nuisance law, the district court proceeded to make its own policy judgments regarding what level of pollution was unreasonable, and what pollution control measures and costs were appropriate. *See TVA-SJ*, 549 F. Supp.2d at 735-36; *TVA-FJ*, 593 F. Supp.2d at

[1] Remarkably, the district court claimed support for its expansion of source-state public nuisance law in the complete absence of source-state cases in which a foreign sovereign sued in its *parens patriae* capacity and in a New York case discussing New York law. 549 F. Supp.2d at 730-31. Suffice it to say that such claimed "support" simply highlights that the district court was inventing the supposed source-state law out of whole cloth.

815-17, 830-31. Indeed, the only state-law pollution standard even remotely in evidence in such analysis was North Carolina's own more stringent standards that the North Carolina Legislature had directed its Attorney General to impose upon neighboring States. *Id*. at 816 n. 2; *see also id*. at 829-30 (rejecting application of Alabama Air Pollution Control Act). Thus, without citing a single source-state decision addressing comparable circumstances, the district court found four TVA sources in Alabama and Tennessee to constitute public nuisances and ordered them to adopt pollution reduction measures far more expensive and less effective than measures available locally in North Carolina. *Id*. at 830-32.

SUMMARY OF ARGUMENT

The CAA is a comprehensive congressional response to the national problem of air pollution. Designed to provide a degree of uniformity and coordination, particularly with respect to the interstate effects of air pollution, the CAA retains a well-defined but narrow role for individual States. Above the federal air quality standards set by the CAA, individual States may impose more stringent standards on sources within the State, according to such State's own policy choices regarding the added costs and benefits of such standards. Regarding interstate and regional pollution, however, the CAA specifically confines affected-state involvement to a few specific channels consistent with the need for interstate coordination and cooperation, and final federal authority in the area.

Contrary to such allocation of authority, the district court permitted North Carolina to proceed with a novel interstate suit, purporting to invoke source-state public nuisance law but ultimately exporting North Carolina's own more stringent pollution standards to those sister States. Allowing North Carolina effectively to usurp the roles of its sister sovereigns in bringing a public nuisance suit, and allowing a federal court to make the policy choices normally made by state courts in such suits, is contrary to the CAA's mechanisms for addressing interstate pollution and the limited authority reserved to source States to impose greater restrictions.

To avoid such conflict with the CAA and the exclusive rights reserved to source States, this Court should take one or more of the following measures. First, in a public nuisance suit by an affected State purporting to apply source-state law, federal courts should more vigorously apply the rule against expanding state law, should take special care to narrowly interpret source-state law, and should decline to impose more stringent pollution controls absent clear and specific standards and precedents from source-state courts themselves. In most cases, and here, such an approach will lead to dismissal of the complaint as lacking a basis in source-state law. Second, insofar as source-state law would clearly allow a foreign quasi-sovereign public nuisance suit to proceed, the inherent uncertainty and policy-making aspects of such suits strongly support federal court abstention or

certification to source-state Supreme Courts. Finally, if not readily disposed of in other ways, this Court should hold that interstate quasi-sovereign public nuisance suits are preempted. Such suits substitute the policy choices of affected States and federal courts sitting in equity for the authority specifically and exclusively reserved to source States and thus conflict with the CAA.

ARGUMENT

I. THE CLEAN AIR ACT IS COMPREHENSIVE AND BROADLY PREEMPTIVE OF THE FIELD OF INTERSTATE POLLUTION CONTROL.

As recognized by the Supreme Court and the court below, the CAA is "a lengthy, detailed, technical, complex, and comprehensive response to a major social issue." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 848 (1984); *TVA-FJ*, 593 F. Supp.2d at 815 (same). The comprehensive and careful crafting of remedies in the CAA leaves no room for statutory or common law responses to air pollution other than what is specifically reserved by the CAA.

A. The CAA Is Comprehensive and Contains Numerous Provisions Addressing and Providing Detailed Remedies for Interstate Pollution.

Numerous briefs in this case describe the many ways in which the CAA establishes comprehensive federal air pollution standards, relies upon each State initially to determine how best to regulate in-state sources, and leaves it to individual States whether to impose more stringent pollution controls than required by federal standards. *See* TVA Br. 11-15, 25 (describing NAAQS, SIPs, acid rain

amendments, visibility protections, state permitting processes, and opportunity for stricter state standards); Alabama Br. 6-8 (describing similar and also PSD program, Title V federal requirements for state permitting programs, Alabama Air Pollution Control Act, and Alabama administrative authority and permitting standards); Brief of Kentucky, Louisiana, North Dakota, South Dakota, Utah, and Wyoming ("Kentucky Br.") 4-7 (similar).

Others have likewise set out the detailed mechanisms under the CAA through which States affected by interstate pollution can have their interests taken into account through: notice and comment regarding source-state SIPs and permitting decisions; requirements that source States not significantly impede affected-state compliance with federal standards; petitions under CAA § 126 seeking stricter regulation of interstate emissions; cooperative interstate and regional programs; EPA regional rulemaking requiring comprehensive solutions; and emergency requests for more stringent EPA regulation. *See* TVA Br. 12-15, 26 (describing SIP requirements protecting States from interstate interference with NAAQS and PSD compliance, the NO_X SIP Call establishing a 22-State cap-and-trade program, the Regional Haze Rule Program, the Clean Air Interstate Rule ("CAIR"), comment and hearing opportunities concerning state permits, and the § 126 petitioning process); Alabama Br. 9-10 (similar); Kentucky Br. 5-8 (describing similar and also § 110 authorization for regional pollution control

programs, North Carolina's § 126 petition); Chamber of Commerce Br. 3-4, 6-10 (describing similar and also Title IV concerning acid deposition).[2]

This brief will not revisit the specifics of such comprehensive means of addressing interstate pollution. Rather, this brief accepts the thorough descriptions of the regime established by the CAA and notes that such regime was carefully and specifically designed as a comprehensive response to a national problem affecting interstate commerce, and carefully allocated the authority of the federal government and the States to ensure a workable and efficient regulatory system. And, in respect for our constitutional structure of federalism and the continuing sovereignty of States within their territories, the CAA reserved authority to each source-State to decide whether and how much to regulate pollution more stringently than required by federal law. 42 U.S.C. § 7416.

What this brief *will* address are the implications of such a careful and conscious allocation of authority between individual States and the federal government, the threat of interstate suits to upset that balanced system, and the

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[2] *See also* 42 U.S.C. § 7401(a)(4) (need for federal leadership to develop "cooperative Federal, State, regional and local programs"); 42 U.S.C. § 7401(b)(4) (purpose to encourage and assist "regional air pollution prevention and control programs"); 42 U.S.C. § 7402(a) (EPA to encourage cooperative interstate and regional pollution-control activities); 42 U.S.C. § 7406 (interstate air quality agencies); 42 U.S.C. § 7506a (interstate transport commissions); 42 U.S.C. § 7603 (EPA emergency powers to act against any source that presents "an imminent and substantial endangerment to public health or welfare").

proper response of federal courts to interstate suits seeking more stringent regulation under the guise of source-state public nuisance law.

B. The CAA and *International Paper v. Ouellette* Preserve State Law Only within Narrow Bounds.

As the district court and the parties all recognize, the Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), sets the baseline and parameters for federal preemption of state law in the area of pollution control. Reviewing a statutory scheme for water pollution that was similar to, though less comprehensive than, the CAA, *Ouellette* found that the statute there preempted all federal common law and carefully cabined the roles of the States. 479 U.S. at 489-90. "While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for … [affected States]. … [A]n affected State has only an advisory role in regulating pollution that originates beyond its borders." *Id.* at 490; *id*. ("affected States occupy a subordinate position to source States in the federal regulatory program"). The Supreme Court also observed that a savings clause allowing source States to regulate more stringently did not save any attempt to apply the law of "an affected State against an out-of-state source," and hence interstate application of affected-state law was preempted. *Id*. at 494.

In addition to the broad field preemption and limited preservation of source-State law, *Ouellette* held that even source-state law coming within the savings

clause was preempted if it was "inconsistent with the 'full purposes and objectives of Congress.'" *Id*. at 499 n. 20 (citation omitted). Just as affected States were preempted from applying their law to interstate pollution, so too were source States preempted from delegating to other States their reserved authority to adopt stricter pollution standards for themselves. *Id*. ("interference [with the federal regulatory scheme] would occur, of course, whether affected-state law applies as an original matter, or … pursuant to the source State's choice-of-law principles"). In short, the authority reserved for source States is non-transferrable.

II. INTERSTATE "QUASI-SOVEREIGN" PUBLIC NUISANCE SUITS POSE A SEVERE THREAT TO THE ALLOCATION OF AUTHORITY ESTABLISHED BY THE CAA.

As explained above, authority to regulate air pollution is carefully allocated by the CAA, with Congress and the EPA setting minimum standards, individual States adopting SIPs to meet such standards (and, if they so choose, more stringent pollution control requirements applicable to in-state sources), and the EPA ensuring the adequacy of such SIPs and resolving disputes concerning interstate pollution. Indeed, in the interstate pollution context, Congress provided the specific and carefully channeled § 126 remedy for States aggrieved by interstate pollution, determining not only what kind and extent of interstate pollution

requires remediation, but also the timing and nature of such remediation. *See* 42 U.S.C. § 7426(b)-(c).[3]

Furthermore, the reservation of greater source-state authority over in-state pollution, and the preemption of interstate application of affected-state law, reflect not merely Congress's own policy choices in the CAA, but also a healthy respect for constitutional limits imposed by the Commerce Clause, the fundamentals of federalism, and the Tenth Amendment. Alabama Br. 35-42 (discussing CAA preemption and prohibition of extra-territorial regulation under Commerce Clause and federalism principles); Kentucky Br. 9-16 (discussing federalism and Tenth Amendment concerns); Academics Br. 22-24 (discussing federalism concerns); Chamber of Commerce Br. 10-21 (discussing CAA field and conflict preemption).

In light of such statutory and constitutional limitations on affected-state authority to control out-of-state pollution sources, interstate suits outside the specific mechanisms provided by the CAA and based on state law are highly questionable endeavors. Even assuming, however, that a State might subject itself

[3] Recognizing conflicting interests regarding interstate pollution, the House Interstate and Foreign Commerce Committee noted that "if one State wants cleaner air and its neighboring State wants to permit more pollution which would prevent the first State from achieving its objectives, *some Federal policy is necessary* to resolve interstate disputes." H.R. REP. NO. 95-294, at 151 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1230 (emphasis added); *id*. at 330, *reprinted in* 1977 U.S.C.C.A.N. at 1409 ("These new provisions are intended to establish an effective mechanism for prevention, control, and abatement of interstate air pollution.").

to stricter requirements concerning interstate pollution and could allow foreign sovereigns to enforce such self-imposed burdens, federal courts should be extremely skeptical of claims by foreign sovereigns that a source-State in fact has done so. Indeed, federal courts should be loathe to be the agent of implementing such unlikely policy choices, particularly in the common-law context of public nuisance suits. Such common-law suits, ordinarily involving the exercise of public-policy discretion by state courts, are generally inappropriate exercises by federal courts of policy-making authority reserved to individual States.

A. Sovereign Public Nuisance Suits are Policy-Making Exercises by the Executive and Judicial Branches of State Government.

As the States of Alabama and Kentucky have made abundantly clear in their briefs, public nuisance suits are a fundamental element of state sovereignty intimately bound to the State's police power. *See* Alabama Br. 43-44 (initiation of public-nuisance abatement process generally reserved for the Alabama AG, municipalities, and counties); *id*. 47 ("abatement of a public nuisance is an 'exercise of the police power,' which is itself 'an attribute of sovereignty'" (Alabama citation omitted); noting "quasi-criminal nature of the [public nuisance] action and the sovereign prerogatives it entails"); *id*. 53-54 (enforcement authority rests with the Alabama AG, "who enjoys broad prosecutorial discretion both in identifying and in abating public nuisances"; Alabama AG's "forbearance should

be treated as a determination, even if implicit," that there is no "public nuisance that requires abatement"; North Carolina suit usurped AG's "prosecutorial discretion" and "Alabama's sovereign authority"); Kentucky Br. 19, 24-25 (pollution control determination "requires a careful balancing of the relative benefits and costs of environmental standards and programs"; source-State's pollution control measures based on its "own rule of reason and balancing" environmental protection, costs of controls, and impact on rate payers).

The very nature of public nuisance suits – addressing collective harms common to the public as a whole, and hence subject to a collective balancing and remedy – calls for essentially legislative and policy judgments, not the protection of individual rights. Academics Br. 23 (public nuisance law and enforcement involve discretionary decisions concerning the public interest).[4] Indeed, in most

[4] The inaptly named public nuisance suits by private individuals are limited to situations where the plaintiff has suffered some unique harm different from the public at large, and thus such harm would not have been taken into account in the balance of public costs and benefits of pollution control generally. But where the harm to individuals is the same as the harm to the public generally, and hence has been considered in the State's public policy determinations regarding an acceptable level of pollution, individuals and other affected entities have no separate right to sue for greater protections. In fact, the court below recognized that the impact of TVA's plants is greatest within the source-States themselves. Any harm to North Carolinians is not merely similar in kind to that suffered by source-state citizens, but is materially *less* than those source-state harms and less than the harms to North Carolinians generated by North Carolina sources themselves. Any harms to North Carolinians from TVA sources, common in kind and lesser in magnitude than those borne by source-state citizens, cannot possibly entitle North Carolina

States, the balancing of public interests concerning major pollution sources is in fact made by the legislature with the details delegated to administrative agencies. *See* Alabama Br. 7-8, 58-59; Kentucky Br. 24-25. Such legislative and administrative judgments typically displace any common-law authority of state courts to find authorized activities to be public nuisances without some further finding of fault. TVA Br. 38-44; Alabama Br. 56-59; Kentucky Br. 20-24.

But even where state courts retain a role in determining whether pollution sources are public nuisances, the very nature of the claim demands a balancing of interests, including the harm to the public, the costs and burdens on the sources, the State's and its citizens' interests in economic growth and affordable power generation, and a variety of other factors. While common-law state courts (absent legislative displacement) are empowered to determine and implement public policy as it relates to such interests – in effect "making" law – federal courts have no such inherent authority. Such courts merely apply existing state law, may not "make" new state law, and are ill-suited and inappropriate agents for the open-ended policy judgments inherent in public nuisance suits. *See infra* 20-27.

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citizens to greater consideration – via a *parens patriae* suit – under source-state law than that given to source-state citizens.

B. The Potential for Abuse of Interstate Public Nuisance Suits is Tremendous.

Even under the best of circumstances, interstate public nuisance suits are fraught with the potential for abuse. This case is particularly illustrative. Despite CAA preemption of federal common law and strict allocation of regulatory authority between the EPA and source States, the district court inevitably turned to federal common law for the principles and precedent that animated its purported application of source-state law. Such abuse is not merely case-specific error, it is the almost inevitable result of a quasi-sovereign public nuisance suit and the open-ended policy-making inquiries it invites. Alabama Br. 39 n. 6. Even where the district court was not expressly turning to federal common law, it was imposing its own value choices regarding what level of pollution was unreasonable, what preventive measures were appropriate, and what competing considerations to take into account or, as here, simply ignore. Absent on-point decisions from source-state courts, such inappropriate judicial policymaking by federal courts is virtually inevitable once they entertain public nuisance suits on behalf of quasi-sovereign plaintiffs rather than specially injured private parties.

In addition to the inherent hazards of inviting federal courts into the surrogate policy-making role required by public nuisance law, allowing affected States to sue sources in other States for harms generic to the public has the potential to reach well beyond seeking additional pollution-control technology for

particular point sources. Indeed, if the incremental interstate addition of a few tenths of a $\mu g/m^3$ of $PM_{2.5}$ or a few ppb of ozone is sufficient to impose billions of dollars in pollution control costs on out-of-state point sources, there seems little to stop a federal court from enjoining or regulating numerous other activities that have a far greater interstate impact. *See* Chamber of Commerce Br. 22-29 (lack of standards and broad reasoning below would extend liability *ad absurdum* to distant and aggregated sources). For example, the millions of mobile sources of pollution such as cars, trucks, farm-equipment, and boats have a far greater impact on regional health than do four point sources in Alabama and Tennessee. Michael Q. Wang, *Examining Cost Effectiveness of Mobile Source Emission Control Measures*, 11 TRANSPORT POLICY 155, 167 (2004) (Table 10) (transportation produces 2-3 times the NO_X and 150 times the VOCs of EGUs); C. Boyden Gray & Andrew R. Varcoe, *Octane, Clean Air, and Renewable Fuels: A Modest Step Toward Energy Independence*, 10 TEX. REV. L. & POLITICS 9, 51 (2005). Under the virtually non-existent standards of the decision below, there is nothing preventing North Carolina – or any State – from suing to impose a host of additional pollution control measures on such sources in neighboring States. Driving restrictions certainly would be an obvious and "available" means of reducing such pollution. Likewise requiring different types of reformulated gasoline would have a significant impact on emissions. So too would an attempt to

declare older or inefficient vehicles to be inherent nuisances given the availability of newer and more efficient alternatives or the so-called "California Car." [5]

Such impositions based on interstate public nuisance suits seem absurd – and indeed they are. But under the reasoning of the decision below, because the absence of such measures is responsible for far more pollution – and hence more public harm in North Carolina or elsewhere – than TVA's four plants, they would seem fair game for a federal-court injunction purporting to apply broad and vague "state" nuisance law in the manner applied in this case.

And if suits such as this one are successful, then a battle of all against all would seem the natural result, with each State suing sources within all other States that conceivably could add to the interstate pollution load. Allowing North Carolina to sue TVA regarding Alabama, Kentucky, and Tennessee pollution sources invites similar suits by Virginia against North Carolina sources, Maryland and Pennsylvania against Virginia sources, and so on in a never-ending daisy-chain. *See* Kentucky Br. 27 (decision below makes States and citizens "targets for litigation by another state"); Chamber of Commerce Br. 22-29 (district court logic could create "near-universal liability"). The explosion of state suits would almost

[5] Imagine imposing the "Cash for Clunkers" program upon a neighboring State – only without the cash and without vehicle owners having a choice.

exactly parallel the wasteful proliferation of state § 126 petitions under the CAA that the EPA is currently blocking by issuing the interstate CAIR rule.

Furthermore, what makes this suit, and future ones like it, particularly galling and abusive is that North Carolina has far more cost-effective means of reducing pollution within the State to a far greater degree, yet has opted for the more costly and less meaningful pollution reductions to be had by attacking TVA's out-of-state plants. For example, North Carolina has numerous means of reducing NO_X on its own, including by regulating marine compression and spark ignition engines and non-road diesel engines, imposing stricter requirements for low-emission vehicles (LEVs), reducing the speed limit, and requiring retrofit technology for electricity generating units. Such measures range in cost from $200 to $4,220/ton of NO_X reduction for ozone control, as compared to TVA's estimate of $5,700/ton for the cost of the measures ordered by the district court.[6] Similarly with regard to SO_2 and other precursor emission reduction for $PM_{2.5}$ control, North Carolina has alternative means of reducing $PM_{2.5}$ pollution, the most important of which are VOC transport reductions that are essentially "free" because they are co-

[6] *See* EPA CAIR Final Rule, 70 FED. REG. 25162, 25208 (May 12, 2005) (Table IV-6) (Marine compression and spark ignition engines $200 and $1,800/ton, respectively; non-road diesel engines $400-$700/ton; retrofit technology (BART) for EGUs $800/ton); Wang, 11 TRANSPORT POLICY at 161 (Table 4) (LEV II (ULEV) $4,100/ton median cost); Lit-Mian Chen, *et al.*, *Evaluation of Candidate Mobile Source Control Measures* 3-29 to 3-30 (Environ Int'l Corp. Feb. 28, 2006) (reducing speed limit by 10 mph cost of $840/ton).

benefits of the locally available NO_X controls identified above. And there are further significant locally available SO_2 controls that cost from $400 to $2,100/ton, as compared to TVA's estimate of $2,500/ton for the cost of the measures ordered by the district court.[7] Indeed, the potential reduction of $PM_{2.5}$ from such alternative means is up to ten times greater than the reduction sought in this suit.

Given the ready availability of far cheaper and more effective local means of reducing NO_X and SO_2 in North Carolina, the State's decision to impose more expensive and less effective burdens on out-of-state sources is particularly troubling. In effect, North Carolina is exporting the cost of pollution control to other States, and doing so in a highly discriminatory manner. Not only is such an imposition contrary to the allocation of pollution control authority established by the CAA, it is an affront to the Commerce Clause and the Tenth Amendment, and raises serious questions about the constitutionality of such discriminatory suits.

III. FEDERAL COURTS SHOULD TAKE PROPHYLACTIC MEASURES TO AVOID THE ABUSE INHERENT IN QUASI-SOVEREIGN PUBLIC NUISANCE SUITS.

Given the unavoidable difficulties posed by interstate assertion of "quasi-sovereign" public nuisance claims, federal courts should be particularly vigilant to not interfere with the allocation of authority established by the CAA and protected by the Constitution. Several measures are readily available.

[7] 70 FED. REG. at 25201 (Table IV-3) (Best Available Control Technology (BACT) $400-$2,100/ton).

A. Federal Courts Should Narrowly Construe State Public Nuisance Law.

It is well-established that, in deciding questions of state law, federal courts "'rule upon state law *as it exists* and do not surmise or suggest its expansion.'" *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783 (4th Cir. 1995) (citation omitted, emphasis added).[8] While federal courts thus are always bound to exercise restraint concerning state law when sitting in diversity, the need for added vigilance is particularly acute here. Given the CAA's general preemption of the field and specific allocation to source States of the authority to impose more stringent pollution standards, federal courts should be even more reluctant than usual to speculate on matters of state law and state policy.

This Court thus should hold that, in interstate pollution cases cabined by the CAA, federal courts must narrowly interpret source-state law and should decline to impose more stringent pollution controls absent clear and specific standards and precedents from source-state courts themselves. In most cases, as here, a vigilantly applied rule of narrow construction will resolve the suit in that federal courts will find no clear basis in source-state law for foreign quasi-sovereign standing or for holding that a regulated and expressly licensed activity constitutes a public

[8] *See Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989) (refusing to recognize new cause of action not yet recognized by state courts); *see also Burris Chem. Inc. v. USX Corp.*, 10 F.3d 243, 246-47 (4th Cir. 1993) (when

nuisance absent allegations and proof of additional wrongdoing. Alabama Br. 42-64 (discussing improper expansion of Alabama law below); Kentucky Br. 17 (district court "should have avoided creating new law or improperly expanding upon current state law"). In those unlikely cases where a public nuisance suit survives such threshold barriers under source-state law, a court should seek out specific and identifiable standards within source-state law regarding how much pollution does or does not constitute a nuisance and how to weigh the competing concerns of the public and the State. Absent clear and comparable precedent on such issues, federal courts should not proceed with their own speculative policy determinations or *ad hoc* balancing.

B. Federal Courts Should Abstain from Quasi-Sovereign Public Nuisance Suits or Certify Policy-Laden Questions to State Supreme Courts.

If a rule of narrow construction fails to dispose of a case and there are no clear and comparable state-law precedents, a federal court should avoid the morass of resolving such public nuisance claims by abstaining in favor of state-court application of state law. Given the inherent policy-making elements of public-nuisance suits, and the existence of state regulatory mechanisms for applying more stringent controls where desired, any further common-law balancing of the costs

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state courts have not addressed litigant's novel argument to sustain a cause of action the application of an untested theory results in the expansion of state law).

and benefits of stricter pollution controls should be made by state courts empowered to make law, rather than by federal courts with no such power.

As the Supreme Court has recognized in a variety of circumstances, federal courts sitting in equity should stay their hands when asked to act in areas touching upon significant questions of state public policy. Thus, in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498 (1941), the Supreme Court held that abstention is appropriate where a suit in equity "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." Abstention is particularly appropriate where the resolution of dispositive state-law questions is "far from clear" or "doubtful" and the federal courts are approaching such state-law questions "as outsiders without special competence" in the law of the State in question. *Id*. at 499. Indeed, the "public consequences" of the "extraordinary remedy of the injunction" point to a strong public interest in "the avoidance of needless friction with state policies" as reflected in a State's criminal or administrative law, or in "the final authority of a state court to interpret doubtful regulatory laws of the state." *Id*. at 500.; *see also Nivens v. Gilchrist*, 444 F.3d 237, 246 (4th Cir. 2006) ("*Pullman* abstention is appropriate when a plaintiff brings a federal case that requires the federal court to interpret an unclear state law.").

Similarly in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court spoke of the dangers of federal court intrusion into areas of significant state policy. "[I]t 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.'" *Id*. at 318 (citation and footnote omitted). The various competing interests under Texas oil and gas law in *Burford* are not unlike the competing interests involved in public nuisance law. The "adjustment of these diverse interests" was delegated by the State to specific regulatory authorities and state courts, and involved the exercise of "broad discretion" and *de novo* determinations of the "reasonableness" of particular orders with an eye toward striking the proper balance of state public policy. *Id*. at 320, 326. Federal court involvement in such state policy issues would inevitably lead to "[d]elay, misunderstanding of local law, and needless federal conflict with State policy." *Id*. at 327; *see also id.* at 335 (Douglas, J., concurring) (federal courts second-guessing state administrative decisions "would in effect actively participate in the fashioning of the state's domestic policy"). The Supreme Court thus held that the area of state law being addressed by the district court "so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." *Id*. at 332; s*ee also*, *Palumbo v. Waste Tech. Indus.*, 989 F.2d 156, 159-61 (4th Cir. 1993) (applying

Burford to a public nuisance claim reiterating "plaintiff's now-familiar dissatisfaction with" EPA hazardous waste permitting decisions); *Johnson v. Collins Entm't Co., Inc.*, 199 F.3d 710, 719-29 (4th Cir. 1999) (reversing district court for failing to abstain under *Burford*).

In this case, the animating concerns of *Pullman* and *Burford* exist in abundance. As noted earlier, public nuisance law is heavily laden with policy-making elements that go well beyond simple application of established "rules" to ascertainable facts. For example, determining whether a particular degree of pollution is "reasonable" calls not for a simple legal determination, but for a policy judgment from both the executive officer bringing suit and the court making the ultimate determination. The application of public nuisance law to air pollution thus plainly involves a "sensitive area of social policy" regarding which out-of-state federal courts are "outsiders without special competence"; such law involves the "adjustment of … diverse interests" and the exercise of "broad discretion" in evaluating the reasonableness of particular polluting conduct; the CAA has specifically reserved to source States a "rightful independence … in carrying out their domestic policy" regarding pollution control more strict than federal requirements; federal court decisions applying source-state public nuisance law would involve them "in the fashioning of the state's domestic policy"; and broad federal rulings would place source States in a difficult position of having to

respond to and correct such misapplication of State law. *See Burford*, 319 U.S. at 329 ("These federal court decisions on state law have created a constant task for the Texas Governor, the Texas legislature, and the Railroad Commission.").[9] Abstention is thus appropriate in this and similar cases.

Even absent abstention, however, federal courts generally, and this Court here in particular, should at least certify close or uncertain questions of state public nuisance law to state Supreme Courts. As the U.S. Supreme Court held in *Lehman Brothers v. Schein*, 416 U.S. 386, 390 (1974), certification of difficult or uncertain state-law questions to a state Supreme Court is an option "open to this Court and to any court of appeals of the United States."[10] Although not mandating certification in every case where state law was in doubt, the Supreme Court recognized that certification "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Id*. at 391. And in the *Lehman* case, as here, the Supreme Court noted that certification "would seem particularly appropriate in view of the novelty of the question," "the great unsettlement of [state] law," and

[9] In addition, *Pullman* addressed abstention in part as a means of avoiding "premature constitutional adjudication" where a question of state law might avoid a federal constitutional issue entirely. 312 U.S. at 500. In this case, difficult constitutional issues under the Commerce Clause and the Tenth Amendment would be avoided if source-state courts rejected foreign quasi-sovereign suits or held that authorized pollution sources were "reasonable" for public nuisance purposes.

[10] The certification option is certainly available to this Court in this case. *See* ALA. R. APP. P. 18(a); TENN. SUP. CT. R. 23, sec. 1.

the fact that the issues of state law were being considered by a distant federal court that was an "'outsider[]' lacking the common exposure to local laws which comes from sitting in the jurisdiction." *Id*.

In this case there were numerous novel or speculative applications of state law that had no specific basis in the statutes or case law of the source States. Imputing the quasi-sovereign standing doctrine from federal common law to source-state law was, at best, a stretch. Applying the generic rule that mere lawfulness does not preclude finding that an activity is a public nuisance is, at best, in tension with source-state cases (ignored by the district court) that specifically authorized activities cannot be a nuisance absent negligence or other improper activity. Alabama Br. 56-59. The determination that relatively minor and aggregate contributions to pollution in North Carolina (at levels less than such contributions in the source States themselves and less than from North Carolina sources) caused significant injury and were unreasonable had no basis in comparable source-state cases and involved the district court's own policy balancing of what is reasonable and whether competing considerations merited attention.

Each of those issues involves questions of state law that are at best uncertain, and policy judgments reserved to source-state courts in their law-making capacity as common-law judges. Absent abstention, certification represents not

merely a more efficient course of action, it respects the authority of state courts to be the final arbiter on the policy-laden judgments embodied in state public nuisance law. Rather than wade into the quagmire of state law itself, this Court should simply certify such state-law issues to the respective state Supreme Courts of Alabama and Tennessee. *See* TVA Br. 58 (requesting certification); Kentucky Br. 17 n. 7 (suggesting district court certification of state law questions).

C. Quasi-Sovereign Interstate Public Nuisance Suits Are Preempted by the CAA.

Finally, even if a federal court were to find sufficient state law to allow a quasi-sovereign interstate public nuisance suit to proceed, and for whatever reason declined to abstain, it would then have to confront the federal question whether such a suit is preempted by the CAA or unconstitutional. As other *amici* have argued, the specific provisions for the EPA to resolve interstate pollution disputes and to establish interstate and regional standards leave no room for interstate public nuisance suits even under source-state law; such suits pose a direct conflict with the purposes and mechanisms of the CAA and thus would be preempted notwithstanding the savings clause. Alabama Br. 35-39; Chamber of Commerce Br. 10-21; *see also* Tennessee Br. 3-12 (conflict preemption based on CAIR rulemaking). The Congressional *Amici* agree with such preemption analysis and find no need to repeat the well-made arguments of others. But regardless whether

the CAA preempts interstate public nuisance law generally, the principles set out in *Ouellette* would still preempt the type of "quasi-sovereign" suit endorsed by the court in this case.

As an initial matter, there is no dispute that the CAA has preempted the *federal* common-law doctrine of quasi-sovereign suits both as part of the "field" occupied by the CAA and because it is actually in conflict with the carefully crafted interstate remedies chosen by Congress.

The court below, of course, imputed that federal common-law doctrine to the source States, thereby avoiding the more obvious preemption of the CAA. But aside from the fact that such imputation is wildly implausible and not supported by a shred of case law from the source States at issue, the quasi-sovereign doctrine would be preempted even if it were indisputably part of source-state law. The reason for such preemption is that Congress has specifically reserved the option of more stringent pollution control to source States and only to source States. Congress has not authorized such States to delegate that authority either to other sovereigns or to the federal courts. The CAA preempts the field entirely save what is expressly reserved for the States, and there is no indication that Congress reserved such delegated policy-making. Indeed, in *Ouellette,* the Supreme Court expressly rejected the application of source-state choice-of-law rules – which, in effect, defer to the policy choices of sister States in certain circumstances – finding

such rules preempted by the CAA. 479 U.S. at 499 n. 20. While States may have the authority themselves to regulate more strictly within their own borders, they do not have the option of deciding that a foreign State has a greater interest in such in-state pollution sources and thus deferring to foreign law. The same is true regarding the interests of a foreign sovereign acting on behalf of its own citizens, rather than the citizens of the source-State. Source States may not delegate their reserved power to, or defer to the regulatory authority of, affected States when the CAA has confined the remedies available for affected States to specific and comprehensive federal mechanisms. Such delegation would upset the careful balance established by the CAA and stand as an obstacle to the "'full purposes and objectives of Congress.'" *Id*.

Thus, even if this Court declines to hold all interstate public nuisance suits preempted by the CAA, it should still hold that the CAA preempts this one particularly pernicious aspect of public nuisance law: the supposed availability of quasi-sovereign suits and the exemption of such suits from the specific-injury requirements for suits by private parties. Just as *Ouellette* held that even source-state choice of law rules could not pass policy-making discretion to injured States, and hence were preempted, the CAA likewise should be held to preempt any law permitting foreign sovereigns to exercise the policy-making discretion reserved to source States and inherent in public nuisance suits.

CONCLUSION

For the above reasons, this Court should reverse the decision below and direct entry of judgment for defendants. In the alternative this Court should abstain or certify questions of state public nuisance law to the Alabama and Tennessee Supreme Courts.

Respectfully Submitted,

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November 30, 2009

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Final Brief for *Amici Curiae* Jim Cooper, *et al.*, complies with the type-face requirements of Fed. R. Civ. P. 32(a)(6) and the 7,000 word type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) and the type-face requirements of Fed. R. Civ. P. 32(a)(6) and 29(d) in that it uses Times New Roman 14-point type and contains 6945 words, excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word.

s/ Erik S. Jaffe
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CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of November, 2009, I electronically filed the foregoing Final Brief for *Amici Curiae* Jim Cooper, *et al.*, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following registered CM/ECF users:

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