

No. 10-174

In the
Supreme Court of the United States

AMERICAN ELECTRIC POWER
COMPANY INC., et al.,

Petitioners,

v.

CONNECTICUT, et al.,

Respondents.

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

**BRIEF AMICUS CURIAE OF CENTER
FOR CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Amicus addresses the following question:

1. Do federal courts have jurisdiction to create remedies for claims based on the theory of the “federal common law tort of public nuisance” for contributing to global warming when this Court has already ruled that Congress has given the Environmental Protection Agency the power to regulate “greenhouse gas emissions” as part of a comprehensive scheme to regulate air pollution?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence¹ is dedicated to upholding the principles of the American Founding, including separation of powers and due respect for the proper limit on those powers, including the judicial power. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes that the issue presented in the Petition for Writ of Certiorari in this case raises critical question regarding the scope of the judicial power. Where Congress has spoken to an issue and has provided a comprehensive regulatory structure, there is no longer any room for the courts to create

¹ Pursuant to this Court's Rule 37.2(a), all parties have filed consents to the filing of amicus briefs in this matters. Amicus has also given notice of intent to file this brief to all parties more than 10 days before this brief was filed.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

remedies in response to claims based on “federal common law torts.”

REASONS FOR GRANTING THE PETITION

The Second Circuit has authorized a suit to move forward based on a claim of a federal common law tort of public nuisance. State and private parties are claiming injury from global warming and assert that the Defendants in this action are responsible, at least in part, for that warming. The court below recognized that Congress has authorized the EPA to regulate greenhouse gasses in a comprehensive fashion. However, because EPA had yet to issue such comprehensive regulations the Second Circuit ruled that federal courts have the authority to create federal common law imposing emission limitations. As the brief of the United States points out, EPA is currently working on developing appropriate emission limitations that are consistent with the Clean Air Act. Intervention of federal courts at this point can lead to conflicting requirements and, more importantly, exceed the bounds of judicial authority. Review by this Court is necessary to preserve the proper role of the judiciary in the federal system.

This Court long ago rejected the notion that the federal judiciary could create a general federal common law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *Erie* was based on the recognition that both Congress and the Judiciary are limited to their enumerated powers. Because no clause in the Constitution authorized the courts to create “substantive rules of Common Law applicable in a state,” the courts had no authority to entertain claims based on a general federal common law. *Id.*

This lack of authority was not an oversight by the Framers. It was the design.

The legislature not only commands the purse, but *prescribes the rules by which the duties and rights of every citizen are to be regulated*. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. *It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.*

The Federalist, No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). This Court has long noted that: “[i]t is emphatically the province and duty of the judicial department to say what the law is” (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) but has not claimed the authority for the judiciary to say what the law *should be*.

The Court has allowed the creation of federal common law in limited areas where necessary to adjudicate disputes between states. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (*Milwaukee I*). Even in those instances, the authority of federal courts to create remedies is displaced once Congress has acted. “When Congress has not spoken to a particular issue, however, and when there exists a ‘significant conflict between some federal policy or interest and the use of state law,’ the Court has found it necessary, in a ‘few and restricted’ instances

to develop federal common law.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (*Milwaukee II*) (citations omitted). However, the judicial authority to create federal common law is “subject to the paramount authority of Congress.” *Id.* (citation omitted). Where Congress has acted, the Court presumes “that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.” *Id.* at 317. Thus, the Court ruled, regarding the federal common law public nuisance claims raised by the states for water pollution, that Congress had “not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.” *Id.*

Whether the Clean Air Act similarly displaces any authority of the federal judiciary to set limits on emission of greenhouse gasses is one of the important issues raised in this case. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), this Court noted that the scope of the definition of an “air pollutant” under the Clean Air Act is exceedingly broad. *Id.* at 528, 529. Contrary to EPA’s conclusions, this Court found that this expansive definition reflected Congress’s intent to imbue the Clean Air Act’s regulatory scheme with the flexibility necessary to address future scientific research and developments. *Id.* at 532. Thus, this Court held that “[b]ecause greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant,’” “EPA

has the statutory authority to regulate the emission of such gases from new motor vehicles.” *Id.*

Notwithstanding the authority given by Congress to the EPA to regulate on this issue, the Second Circuit was concerned that EPA had not fully exercised that regulatory authority. The court found EPA’s proposed 2009 finding that greenhouse gases are a danger to public health and welfare to fall short of actual regulation, stating that “until EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact speak directly to the particular issue raised” by the claimants. *Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309, 380 (2nd Cir. 2009) (citations omitted).

This approach differs markedly from the approach taken by this Court in *Milwaukee II*. Instead of looking to whether Congress has spoken on the issue, the Second Circuit formulated the test as whether the administrative agency has fully exercised its authority to regulate. Such an approach, however, invites judicial interference in the administrative process not countenanced since *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984).

In any event, during the 11 months that have followed the ruling of the Second Circuit, actions taken by EPA have substantially altered the basis for that court’s distinction between actual regulation and mere research. Two rules in particular erode the Second Circuit’s finding of a lack of regulation by EPA. On May 7, 2010, EPA, in conjunction with the Department of Transportation’s National Highway

Traffic Safety Administration, published a final rule that will dramatically reduce the amount of greenhouse gases emitted by light duty vehicles. 75 Fed. Reg. 25,324. On June 3, 2010, EPA published another final rule that tailors “the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas [] emissions under the Prevention of Significant Deterioration [] and title V programs of the Clean Air Act.” 75 Fed. Reg. 31,514. By issuing these rules, EPA has clearly moved beyond mere research of greenhouse gas emissions and entered into the field of actual regulation.

In addition to settling this important question of judicial power under the Constitution, review by this Court is also necessary to ensure that there is one national standard for greenhouse gas emissions. The development of a patchwork of distinct public nuisance law among the federal circuit courts in the absence of a clear definition of the scope of federal regulation under the Clean Air Act will be chaotic.

Nuisance claims require courts to determine whether the harm suffered was unreasonable—that is whether the gravity of the harm outweighs the utility of the conduct. Where a nuisance claim is based on contributing to global warming through the emission of greenhouse gases, courts will be required to determine a level of acceptable greenhouse gas emissions. The factors that courts will consider in making this determination--geography, meteorology, and economic necessity, for example--are likely to differ greatly from one circuit to another.

Determinations of standards of reasonable greenhouse gas emissions made under such a system will therefore be inherently incongruous. Additionally, these unique doctrines will necessarily affect private interests across circuit boundaries, due to the inherently transient nature of greenhouse gas emissions, making any determination of fault or responsibility for global warming inherently suspect.

CONCLUSION

The Petition for Writ of Certiorari raises critical questions of judicial power. Do federal courts have the power to set environmental rules after Congress has formulated a policy and delegated regulation to an administrative agency? *Milwaukee II* seems to answer that question in the negative. However, the Second Circuit has ruled that there is still space for federal judicial regulation if the administrative agency has yet to exercise the full extent of its powers. This Court should grant the Petition for Writ of Certiorari to address this important question.

DATED: September, 2010.

Respectfully submitted,

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