No. 10-174

In The
# Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,

*Petitioners,*

v.

STATE OF CONNECTICUT, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF *AMICUS CURIAE* NICHOLAS JOHNSON IN SUPPORT OF PETITIONERS

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FEBRUARY 7, 2011

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued



CONSTITUTIONAL PROVISIONS



STATUTES



COURT DOCUMENTS

## INTEREST OF *AMICUS CURIAE*[1]

Nicholas Johnson is Professor of Law at Fordham University School of Law, where he teaches environmental law. Professor Johnson has published numerous articles, and is the author of two forthcoming books on topics of constitutional law, environmental law and federalism. Through teaching and scholarship, he has devoted substantial attention to legal doctrine and principles that maintain government power within constitutional boundaries. He received a J.D. from Harvard Law School in 1984.

Professor Johnson is concerned about the development of case law in these fields and about the role of the judiciary in public policy. He is highly concerned about the instant case, because of its potential to shift a serious public policy debate into the forum of the federal judiciary, making narrow disputes between litigants the vehicle for sweeping economic, policy and social changes.

The views expressed in this brief are those of *amicus curiae* and not necessarily of any organization with which he is affiliated.

[1] No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution for the preparation or submission of this brief. The parties have filed consents to the filing of briefs by *amici.*

## SUMMARY OF ARGUMENT

There is no basis for the federal courts to take jurisdiction under 28 U.S.C. § 1331 of a federal-common-law nuisance claim, because the term "laws" in that section does not include federal common law as a cause of action. To the extent *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*") holds otherwise, it should be overruled. *Milwaukee I* could and should have been resolved under the long-arm jurisdiction of the forum state, pursuant to state law. Treating § 1331 as giving the federal judiciary the authority to create common-law causes of action would violate separation of powers and the principle of a national government of limited, enumerated powers. Disclaiming the power to create common-law causes of action would not impede the federal judiciary from using federal common law as a rule of decision, in cases arising under the Constitution, federal statutes and treaties, where state law does not apply.

## ARGUMENT

### I. THE FEDERAL COURTS LACK JURISDICTION OVER THE CAUSE OF ACTION ASSERTED UNDER 28 U.S.C. § 1331, BECAUSE THE TERM "LAWS" IN THAT SECTION DOES NOT INCLUDE FEDERAL COMMON LAW

In two complaints filed in the United States District Court for the Southern District of New York, eight states, the City of New York and three land trusts have sued six electric power companies in tort, seeking abatement of emissions alleged to be contributing to global warming. Joint Appendix, at 56-59, 117-19. The court dismissed the case for failure to state a claim as a nonjusticiable political question, which divested the court of jurisdiction under 28 U.S.C. § 1331. *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265, 270, 274 (S.D.N.Y. 2005) ("*American Electric I*"). On appeal, the United States Court of Appeals for the Second Circuit held, among other things, that the complaint stated a claim under the federal common law of nuisance, which was encompassed by § 1331 jurisdiction. *See Connecticut v. American Electric Power Co.*, 582 F.3d 309, 392-93 (2d Cir. 2009) ("*American Electric II*").[2]

[2] This brief does not address jurisdiction related to the claims against the Tennessee Valley Authority under 28 U.S.C. § 1337 or the state-law claims under 28 U.S.C. § 1367. *See* Joint Appendix, at 67, 126.

Subject-matter jurisdiction over such a claim must be based, if at all, on § 1331, which gives the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The Respondents have relied solely on a federal common law of nuisance as being within the "laws" of the United States to obtain § 1331 jurisdiction in federal district court. Joint Appendix, at 67, 126.

The Second Circuit's decision follows *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"). *See American Electric II*, 582 F.3d at 392-93. In *Milwaukee I*, the State of Illinois filed a public nuisance action against cities and municipal commissions in Wisconsin to stop them from polluting Lake Michigan with sewage. *Milwaukee I*, 406 U.S. at 93. *Milwaukee I* turned on the question of "whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331." *Id.* at 99.

The *Milwaukee I* Court held that it did. *Id.* at 99-101. However, the Court did not rely on any act of Congress creating such a cause of action. Instead, the Court quoted a dissenting (in part) opinion in *Romero v. International Terminal Operating Co.,* which would have held that "laws" within the meaning of § 1331 "embraced claims founded on federal common law." *Id.* at 99 (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (Brennan, J., dissenting and concurring)).

The problem with the *Milwaukee I* Court's reliance on the dissent in *Romero* is that the majority holding in *Romero* was directly to the contrary.[3] The majority opinion in *Romero,* by Justice Frankfurter, rejected the contention that the word "laws" in § 1331 included a federal-common-law cause of action for a seaman's injury.[4]

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[3] *Milwaukee I* could and should have been decided in state court under long-arm jurisdiction, applying the public nuisance law of the forum state. Just a year earlier the Court decided *Ohio v. Wyandotte Chemicals Corp.*, in which the State of Ohio sought leave to file a complaint in the Court's original jurisdiction to enjoin out-of-state companies from introducing mercury into streams that drain into Lake Erie. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 494-95 (1971). The Court declined jurisdiction, finding "no necessity" to decide and that the "issues bottomed on local law" posed "no serious issues of federal law." *Id.* at 497-98. Instead, the Court pointed to state long-arm jurisdiction as the proper course: "The simultaneous development of 'long-arm jurisdiction' means, in most instances, that no necessity impels us to perform such a role." *Id.* at 497. The Court said that the cause of action raised no federal question sufficient to invoke a district court's jurisdiction under § 1331. *Id.* at 499 n.3.

*Milwaukee I* should have gone the way of *Wyandotte.* Long-arm jurisdiction would have given the courts of Illinois jurisdiction over the entities in Wisconsin that were polluting Illinois's waters of Lake Michigan. The case would have been decided under Illinois's law of public nuisance.

[4] *See Romero*, 358 U.S. at 359-80. In *Romero*, the petitioner apparently wanted to establish a cause of action under § 1331, so that he could have a jury trial "on the law side" of the district court, instead of having a nonjury trial in admiralty jurisdiction. *Id.* at 356.

The *Milwaukee I* Court did not even mention Justice Frankfurter's learned exegesis of § 1331 for the majority in *Romero*. Nor did the Court explicitly overrule *Romero,* instead leaving many unanswered questions. Does *Romero* still stand and is it in conflict with *Milwaukee I*? If *Milwaukee I* tacitly overruled *Romero,* are claims that would otherwise go to admiralty now free to be brought in district courts for jury trials? Or if *Milwaukee I* impliedly only partially overruled *Romero,* which part did it overrule? As applied by the Second Circuit in this case, *Milwaukee I* raises the question of what other new federal-common-law torts are waiting to be discovered as part of the "laws" of the United States.

The flawed premise of *Milwaukee I* has never been examined by this Court.[5] This is, perhaps, because its holding has been overshadowed by the

[5] *Obiter dictum* in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians* merely cites *Milwaukee I* for the proposition that "[i]t is well settled that [§ 1331] 'will support claims founded upon federal common law as well as those of a statutory origin.'" *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (quoting *Milwaukee I*, 406 U.S. at 100). The holding in *National Farmers* was that an Indian tribal court should have the first say over whether it is exceeding its jurisdiction, before a federal district court addresses the issue. *Id.* at 857. Statutory jurisdiction is not a common-law issue.

Court's subsequent focus on "displacement" of federal common law by federal statutes.[6]

In the years since *Milwaukee I,* Congress enacted numerous environmental statutes that address impacts on water, air and land and that regulate the production, use and disposal of toxic and hazardous substances. Under the "displacement" doctrine, these statutes and their explicit remedies have obviated any expansion of the concept of a federal common law of nuisance.

Now, however, the instant case presents an opportunity for the Court to consider the unexamined jurisdictional premise of *Milwaukee I,* before the lower courts are launched into a vast new field of litigation that has the potential to ensnare every business, every governmental unit, and indeed every carbon-based organism, human and nonhuman, in the United States and even extraterritorially.

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[6] The *Milwaukee I* Court stated: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Milwaukee I*, 406 U.S. at 107. The Court later granted *certiorari* in *City of Milwaukee v. Illinois* ("*Milwaukee II*") only "to consider the effect of [the Federal Water Pollution Control Act Amendments of 1972] on the *previously recognized cause of action*" to abate nuisance under federal common law in *Milwaukee I*. *Milwaukee II*, 451 U.S. 304, 307 (1981) (emphasis added) (citation omitted). The *Milwaukee II* Court said that "the issue before us is simply whether federal legislation has supplanted federal common law." *Id.* at 310 n.4.

Although the parties have not directly raised the issue, the Court should examine it *sua sponte* because the question of a cause of action under § 1331 goes to the subject-matter jurisdiction of the federal courts. This Court is obligated to resolve the threshold jurisdictional questions of whether federal common law of nuisance is a valid cause of action and, if so, whether it qualifies as "laws" under § 1331. *See Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

The Court should apply the holding in *Romero* to this case and should decline to find subject-matter jurisdiction under § 1331 over federal-common-law torts. It should overrule the decision in *Milwaukee I* that relied only upon the dissent in *Romero*.

Justice Frankfurter's majority opinion in *Romero* stressed the importance of refraining from broad interpretations of jurisdictional statutes. *Romero*, 358 U.S. at 379-80. Regarding the legislation enacting § 1331, Justice Frankfurter said:

> The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding.

*Id.* at 379 (footnote omitted). In rejecting incorporation of maritime common law into § 1331, the *Romero*

majority stressed that courts must refrain from broad interpretations of the statute:

> The considerations of history and policy which investigation has illuminated are powerfully reinforced by the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes. A reluctance which must be even more forcefully felt when the expansion is proposed, for the first time, eighty-three years after the jurisdiction has been conferred. Mr. Justice Stone, speaking of the Act of 1875, pointed out that "the policy of the statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

*Id.* at 379-80 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).[7]

In contrast, the dissent in *Romero* assumed that the federal courts are as capable of "lawmaking" as state courts:

> In another context, that of state law, this Court has recognized that the statutory word

[7] In the removal context, the Court, just after the Judiciary Act of 1875, said that "laws" are those that "grow out of" legislation. *See Albright v. Teas*, 106 U.S. (16 Otto) 613, 618 (1883); *R.R. Co. v. Mississippi*, 102 U.S. (12 Otto) 135, 141 (1880).

> "laws" includes court decisions. *Erie* [*R.R.*] *Co. v. Tompkins,* 304 U.S. 64 [(1938)]. The converse situation is presented here in that federal courts have an extensive responsibility of fashioning rules of substantive law in maritime cases. . . . These rules are as fully "laws" of the United States as if they had been enacted by Congress.

*Id.* at 393 (Brennan, J., dissenting and concurring) (footnote and citations omitted). The premise of the dissent was flawed in two respects.

First, the *Romero* dissent conflated federal common law created and used as rules of decision with a common-law cause of action.

Second, the *Romero* dissent misperceived *Erie,* which was founded on the view that the state courts are in fact different than federal courts. In *Erie*, the Court explained:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

*Erie*, 304 U.S. at 78.

The federal courts are inherently different than state courts. State courts have the competence as courts of general jurisdiction to make common law, while "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been

vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (citation omitted). As courts of limited jurisdiction, federal courts merely enjoy power authorized either by the Constitution or by statute, and this power cannot be expanded by judicial interpretation or decree. *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377 (1994) (citations omitted).

Overruling *Milwaukee I* would give effect to what the Court has said more recently: "'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (holding that neither Title VI nor agency regulations pursuant to Title VI imply a private cause of action to enforce the regulations pursuant to § 601) (citation omitted).

## II. READING § 1331 TO INCORPORATE FEDERAL COMMON LAW INTO THE TERM "LAWS" WOULD VIOLATE SEPARATION OF POWERS BY GIVING THE FEDERAL JUDICIARY UNBOUNDED LEGISLATIVE AUTHORITY

The Constitution gives Congress alone the lawmaking power granted to the United States: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1.

If the term "laws" in § 1331 includes causes of action that are judicially created by the federal courts as federal common law, then § 1331 is essentially an unbounded grant of lawmaking power to the federal judiciary. Even if the courts observed self-imposed bounds, such an unlimited grant of lawmaking authority in § 1331 would still be unconstitutional as an abridgment of the doctrine of separation of powers. Construing § 1331 as granting the federal courts the power to cut new federal-common-law causes of action from whole cloth would create a boundless legislative power in the federal courts.

For example, could the federal courts create a tort action under § 1331 for cases of gender-motivated violence? In *United States v. Morrison*, the Court struck down a provision of the Violence Against Women Act as unconstitutional because Congress' attempt to provide victims of gender-motivated violence with a federal tort remedy could not be sustained under the Commerce Clause or the Fourteenth Amendment. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

Yet, because Congress perceived a national need and expressed a policy preference for federal action to deal with gender violence, can the federal judiciary now fill the gap by creating a common-law cause of action? Obviously not since, if Congress lacks authority under Article I or the Fourteenth Amendment to legislate in the area, it cannot lateral a ball it does not possess to the federal judiciary by means of § 1331.

A less expansive argument might be that the federal-common-law causes of action included in § 1331 are limited to matters that would fall within the legitimate legislative power of the United States. Here, for example, the alleged global warming is claimed to be an indirect effect of economic activities by the Petitioners and others. Joint Appendix, at 84-86, 136-37. Economic activity is ostensibly within the scope of regulation under the Commerce Clause (*cf. Morrison*) and, therefore, Congress could validly authorize, through § 1331, the federal judiciary to superintend such activity by entertaining actions at common-law arising from it. This argument, though, would change the judiciary from the neutral adjudicator of causes of action created by Congress to a quasi-legislative organ that decides how to exercise the Commerce Power vested in Congress.[8] There is, moreover, a notable absence of standards in § 1331 to support such a delegation.[9]

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[8] This would be quite different than enforcing the dormant aspect of the Commerce Clause, a violation of which presents a case "arising under" the Constitution itself. *See* U.S. CONST. art. III, § 2. It is also different than crafting a remedy for a violation of the Constitution as the Court did in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390-97 (1971).

[9] The delegation doctrine, however attenuated, is still with us and still important. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which has never been overruled.

It might also be argued that federal-common-law torts are included within the meaning of "the Laws of the United States" in Article III, section 2 of the Constitution and are, therefore, likewise within the scope of § 1331. This would be a radical proposition that would flout the very notion of a government of limited, enumerated powers that has been accepted since the Constitution's ratification. It would turn out that the anti-federalist Brutus was right in his critique of the inherent power of the federal judiciary:

> [The] Anti-Federalist, Brutus, argued that the equity power would allow federal courts to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." . . . This, predicted Brutus, would result in the growth of federal power and the "entire subversion of the legislative, executive and judicial powers of the individual states."

*Missouri v. Jenkins*, 515 U.S. 70, 128-29 (1995) (Thomas, J., concurring) (citations omitted).

It might be argued here, on policy grounds, that using § 1331 to support a federal-common-law nuisance suit is a better and more effective alternative to varied, inconsistent state-law nuisance standards.[10]

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[10] Uniformity, however, is not a positive value in a federal system, which by its nature values diversity. Of course, within each jurisdiction there must be uniformity in applying the law, even while there is diversity among jurisdictions in the substance of the law.

In *Morrison,* for example, the dissent argued that the Violence Against Women Act created an appropriate federal forum for "a federal civil rights remedy . . . as an alternative to the generic state tort causes of action found to be poor tools of action." *Morrison,* 529 U.S. at 653-54 (Souter, J., dissenting) (citation omitted). To justify Congress' creation of a federal action, the petitioners had argued that state courts perpetuated gender bias and prevented an effective state remedy. *Id.* at 619-20 (majority opinion).

In *Morrison*, the dissent was justifying an act of Congress that had a "mountain of data" to support it. *Id.* at 628-29. (Souter, J., dissenting). Here, without congressional enactment of a remedy, the creation of a federal-common-law cause of action cannot possibly be justified merely because it may be perceived as a better alternative to state law. This is true despite any perceived shortcomings in state law and potential bias within any state forum. Instead, as the Court in *Morrison* held, "under our federal system" such a civil remedy "must be provided by the [states]." *Id.* at 627 (majority opinion). Or by Congress. Or not at all. There is no constitutional basis for thinking that the lack of sufficient state remedies causes a federal-common-law cause of action to spring into being.

## III. DISCLAIMING THE POWER TO CREATE COMMON-LAW CAUSES OF ACTION WOULD NOT IMPEDE THE FEDERAL JUDICIARY FROM USING FEDERAL COMMON LAW AS A RULE OF DECISION, IN CASES ARISING UNDER THE CONSTITUTION, FEDERAL STATUTES AND TREATIES, WHERE STATE LAW DOES NOT APPLY

### A. State-Versus-State Cases

The Court has original jurisdiction over controversies between states. U.S. CONST. art. III, § 2.[11] In these state-versus-state cases, the Court has out of necessity fashioned its own rules of decision because adopting one state's laws over another's would create partiality when determining their respective rights. In other words, state-versus-state cases constitute a unique realm wherein federal common law is necessary as a rule of decision. Water-allocation controversies often present this problem. *See, e.g.*, *Kansas v. Colorado*, 185 U.S. 125, 142-43 (1902).

In the Court's jurisprudence of state-versus-state controversies, *Missouri v. Illinois* ("*Missouri I*") is an aberration because the Court misperceived it as a state-versus-state case when it was really a case of a state versus a citizen of another state. *Missouri I*, 180 U.S. 208, 241-42 (1901). In *Missouri I*, the State of Missouri filed a complaint based on nuisance under

[11] This jurisdiction is made exclusive by 28 U.S.C. § 1251(a).

the original jurisdiction of the Court against Illinois and the Sanitary District of Chicago, a municipal corporation created under Illinois law, to enjoin them from diverting sewage toward the tributaries of the Mississippi River. *See id.* at 218-19, 240-43. The Court erroneously held that joinder of Illinois as a defendant was proper by reasoning that the Sanitary District of Chicago was "an agency of the State" which was responsible for the alleged nuisance because its "existence and operations [were] wholly within the control of the State." *Id.* at 241-42. As the Court later recognized in *Milwaukee I*, and in many other cases since then, municipal entities are not the "state." *Milwaukee I*, 406 U.S. at 98. However, proceeding from its flawed premise, the Court in *Missouri I* believed that, having exclusive jurisdiction, it had to create neutral federal common law to resolve a dispute between states. *See Missouri I*, 180 U.S. at 249-50 (Fuller, J., dissenting).

This mistake laid the foundation for a later misstep in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). This was plainly no state-versus-state case. It was another case of transboundary pollution. *Id.* at 236-37.

*Missouri I* and *Tennessee Copper* have no vitality now. They should have been handled just as the Court did in its 1971 decision in *Wyandotte*.[12]

[12] Today, of course, the choice of law in *Wyandotte* would be governed by subsequently enacted federal statutory law.
(Continued on following page)

### B. Post-*Erie* Cases Using Federal Common Law as a Rule of Decision

*Erie* held that there is no such thing as federal *general* common law. *Erie*, 304 U.S. at 78. *Erie* restricted the use of federal common law to rules of decision that interpret the Constitution, federal statutes, and treaties. Admiralty and maritime law are also explicitly, under Article III, section 2, within the scope of federal judicial power and, therefore, are proper subjects for a body of federal-judge-made precedent that may be considered federal common law.

It is not inconsistent with *Erie* for federal courts to create a body of federal precedent when federal governmental activity is in question, such as in the issuance of commercial paper by the government. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 364-70 (1943). The Court may also create a body of federal common law when interpreting and applying a federal statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 449-57 (1957).

In contrast to creating federal common law as rules of decision in federal-question cases, the Court has refused to create federal-common-law causes of action, sometimes even when a federal statute is at issue but when the case does not "arise under" the statute. For example, the Court recently held that § 1331 did not support jurisdiction when an insurer

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*See International Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987).

did not have a federal cause of action to obtain reimbursement from a beneficiary, even though the funds were paid out under the Federal Employees Health Benefits Act. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 684-701 (2006). In *Empire*, the Court distinguished cases in which it determined federal jurisdiction through the character of the parties or based on constitutional and federal statutory rights. *Id.* at 690-701. The Court did not conflate federal common law as a rule of decision with federal common law as a cause of action. Nor did it create a cause of action. *Cf. id.* at 706 (Breyer, J., dissenting) (relying on *Milwaukee I* and the *dictum* in *National Farmers*).

### C. Indian Tribe Cases

"The decisions of this Court emphasize 'Congress' unique obligation toward the Indians.'" *County of Oneida v. Oneida Indian Nation* ("*Oneida II*"), 470 U.S. 226, 253 (1985) (quoting *Morton v. Mancari,* 417 U.S. 535, 555 (1974)). This emphasis has made the case law regarding Indian tribes both unique and complex.

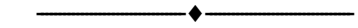
In *Oneida Indian Nation v. County of Oneida* ("*Oneida I*"), the Court held that the Oneida Indian Nation's claim to possession of alleged tribal land stated a federal cause of action sufficient to invoke § 1331 jurisdiction. *Oneida I*, 414 U.S. 661, 675-78 (1974). The claim arose from federal treaties and the Nonintercourse Acts. *Id.* at 676-78. The Court in *Oneida I* did not explicitly determine whether the cause of action arose under a specific treaty or

statute, but held only generally that it met § 1331 and remanded it for further proceedings. *Id.* at 682.

Later, the Second Circuit performed an analysis under *Cort v. Ash,* 422 U.S. 66 (1975), to determine whether the statute created a right of action for the Indians. *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 532-37 (2d Cir. 1983). The Second Circuit held that it did. *Id.* at 537.

On *certiorari* for a second time, the Court in *Oneida II* opined that "*Oneida I* implicitly assumed" a cause of action at federal common law. *Oneida II*, 470 U.S. at 236. *Oneida II* did not address the Second Circuit's finding of a statutory cause of action. Nor did *Oneida II* analyze § 1331. Instead, *Oneida II* adverted to cases that "implicitly" recognized that Indians have a federal-common-law right to sue. *Id.* at 234-36. *Oneida II* then invoked *Milwaukee I* for the proposition that there was a federal-common-law cause of action. *Id.* at 237-40 & n.7.

*Oneida II* avoided the question here, and in *Romero,* of whether § 1331 jurisdiction can be based on federal common law. It leapt to a conclusion that was unnecessary in light of the Second Circuit's determination. The Court has not recognized whether a general federal-common-law cause of action for matters affecting Indian tribes independently constitutes "laws" under § 1331. *See Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 712 (2003) (remanding the case for the jurisdictional question).



## CONCLUSION

*Amicus curiae* requests that this Court reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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