NO. 93, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OKLAHOMA,
Plaintiff,

v.

STATE OF ARKANSAS, et al.,
Defendants.

On Motion For Leave To File Complaint

BRIEF OF THE PEOPLE OF THE STATE OF ILLINOIS AND THE PEOPLE OF THE STATE OF TENNESSEE AS AMICI CURIAE

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INTERESTS OF THE *AMICI*

This brief is filed under Rule 36.4 and in response to the Clerk's letter of January 17, 1983 sent to counsel for Illinois and Tennessee in response to their joint motion for leave to file a brief in support of Oklahoma.

Illinois and Tennessee take no position on whether this Court should grant Oklahoma leave to file its complaint if the Court's mandatory jurisdiction has not been invoked. Brief for the United States as Amicus Curiae ("U.S. Brief") at 1-2. Illinois and Tennessee respectfully submit, however, that Oklahoma's complaint states a claim to relief.

If Oklahoma cannot invoke either federal common law, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), or the "interstate common law" historically applied in disputes arising in this Court's original jurisdiction, *Kansas v. Colorado*, 206 U.S. 46, 98 (1907), questions not addressed herein, the complaint states, or could be amended to state, claims to relief under Oklahoma or Arkansas law. This brief does not address which State's law might apply. But nothing precludes resort to either State's law in the *absence* of a preemptive body of federal or interstate common law. The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.*, not only does not preempt resort to state law remedies extrinsic to the administrative scheme, but affirmatively authorizes all States to police the pollution of their "boundary waters," *id.* § 1370(2), and to resort to "any" relief available under "any" State's law, *id.* § 1365(e), including the damages sought by Oklahoma, a remedy which could never interfere with the administrative scheme.

Oklahoma's motion raises several issues being litigated by Illinois in the Seventh Circuit on remand of *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"). The District Court found that Milwaukee discharges

into Lake Michigan "significant quantities" of sewage containing bacterial and viral disease-causing agents carried into Illinois waters that pose a "significant" danger to the health of Illinois citizens. *People of the State of Illinois v. City of Milwaukee*, 599 F.2d 151, 167 (7th Cir. 1979) ("*Milwaukee (7th Cir.)*"), *vacated and remanded*, 451 U.S. 304 (1981).

The Court of Appeals "carefully reviewed" the evidence and concluded it supported the District Court's finding of liability, whether tested under a "preponderance" or a "clear and convincing" standard. 599 F.2d at 167. Indeed, in a 38-page supplemental order, the Court said the defendants could not even "seriously contend" the evidence was insufficient. *People of the State of Illinois v. City of Milwaukee*, No. 77-2246 at B-2 (7th Cir. Apr. 26, 1979). The Court also concluded that, with certain exceptions, the injunctive relief granted to abate the public health hazard was warranted. 599 F.2d at 169-77.

This Court said federal common law had been displaced by the CWA, "vacated" the judgment of the Court of Appeals, and remanded "the case" for further proceedings without addressing whether state law was available as a basis for relief.[1] *Milwaukee II*, 451 U.S. at 310 n.4, 332.

Illinois has other actions pending in which it seeks, on the basis of state law, abatement of public nuisances

[1] As the United States recognizes, denial of Illinois' cross-petition left the question of the availability of state law remedies open. U.S. Brief at 13-14. The cross-petition was mooted by the Court's prior mandate in *Milwaukee II*, which had remanded "the case" for further proceedings. 451 U.S. at 332. As denial of the cross-petition, 451 U.S. at 982, intimates no views on the merits, *Hughes Tool Co. v. TWA, Inc.*, 409 U.S. 363, 365 n.1 (1973), the three Justices who said the inevitable "effect" of *Milwaukee II* was to "encourag[e] recourse to state law . . . against pollution outside the State" did not dissent from the denial. *Milwaukee II*, 451 U.S. at 353 (*Blackmun*, Marshall & Stevens, JJ., dissenting).

created in the Illinois waters of Lake Michigan by citizens or resident corporations of other States. In *Scott v. City of Hammond*, 519 F.Supp. 293 (N.D. Ill. 1981), *appeal pending*, No. 81-2236 (7th Cir.), the District Court denied motions to dismiss Illinois' state law claims, the viability of which is being addressed on an interlocutory appeal consolidated with *Milwaukee*. Illinois' *Hammond* complaint alleges that discharges from Hammond, Indiana sewers have created a public health hazard in Illinois waters that, *inter alia*, caused Chicago beaches to be closed 21 times during the summer of 1980 because of human fecal matter and industrial wastes that were washing up on the beaches and causing unsafe bacterial levels in the waters.[2]

Were this Court to say Oklahoma's complaint fails to state a claim under either federal or state common law, the *stare decisis* effect possibly could foreclose the People of Illinois from abating the viruses, feces and industrial wastes infecting the beaches they bask on, the lake they swim in, the fish they eat, and the Illinois waters of Lake Michigan that they and generations to come must drink. Moreover, if no cause of action exists at common law, the States and private parties damaged by interstate pollution will have no right to recompense at all. No damages remedy, express or implied, exists under the CWA. *Middlesex County Sewage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1982).

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[2] In a related case, the Chicago Park District sued to recover the thousands of dollars it spent to clean up the beaches. The District Court, holding that there was no damages remedy under state law, dismissed the case. *Chicago Park District v. Sanitary District of Hammond*, 530 F.Supp. 291 (N.D. Ill. 1981), *appeal pending*, No. 81-2896 (7th Cir.). In another related case that also has been dismissed, *People of the State of Illinois v. Lever Brothers Company*, 530 F.Supp. 293 (N.D. Ill. 1981), *appeal pending*, No. 81-2799 (7th Cir.), Illinois charges a private corporation with discharging excessive levels of oil and grease into the Hammond sewers.

Tennessee and its citizens also would be adversely affected by such a disposition of *Oklahoma*. Its waters, too, are being polluted by citizens of neighboring States. The only truly adequate remedy may be through resort to the common law of nuisance that Congress expressly authorized and preserved for "boundary waters," 33 U.S.C. § 1370(2), as well as intrastate waters, as a supplement to the regulatory scheme of cooperative federalism created by the CWA.

STATEMENT

Oklahoma alleges that Arkansas is permitting its citizens and resident corporations to eutrophy Oklahoma waters. Having ceded its right to redress this wrong by force of arms, Oklahoma calls upon this Court to enforce its right to relief from unreasonable interference with its natural environment caused by sources outside the State. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-39 (1907).

The United States appears to say there is no judicial remedy for this wrong[3] because federal common law was preempted by the CWA and because there was no Oklahoma law for Congress to "save" when it enacted the CWA. U.S. Brief at 15. Absent "previously unavailable information," Oklahoma must suffer the eutrophication of its waters until existing discharge permits expire. *Id.* at 12 & n.15. The permits are based on water quality standards established by Arkansas. *Id.* at 7-8 & n. 11. Oklahoma cannot challenge Arkansas water quality standards in the permit proceedings which purportedly constitute an adequate administrative remedy, or on

[3] Actually, its position is not clear. It concedes Arkansas law could apply to intrastate discharges into the Illinois River and other interstate waters, U.S. Brief at 14, but it does not say whether Oklahoma or its citizens could obtain the relief under Arkansas law that cannot be obtained under Oklahoma law. See pp. 5-6 *infra*.

judicial review. *E.g., United States Steel Corp. v. Train*, 556 F.2d 822, 835-39 (7th Cir. 1977). *See also Milwaukee (7th Cir.)*, 599 F.2d at 160, discussing 33 U.S.C. §§ 1342(d)(2)(A), (B); *District of Columbia v. Schramm*, 631 F.2d 854, 859-62 (D.C. Cir. 1980), discussing 33 U.S.C. §§ 1342(d)(3), (e), 1369(b)(1)(f); 5 U.S.C. § 701(a)(2) ("committed to agency discretion").

ARGUMENT

The United States posits that, because of *Milwaukee I*, *Milwaukee II* and the CWA, Oklahoma cannot obtain relief under either federal common law or its own law. Yet it concedes that state law has not been "completely preempted" by the CWA, and that each State may, as this Court said in *Milwaukee II*, establish common law discharge limitations "more stringent" than those contained in permits issued pursuant to the administrative scheme and "apply them to in-state discharges," 451 U.S. at 328. U.S. Brief at 14.

Given this concession and *Milwaukee II*'s observation, it must be further conceded, at a minimum, that nothing in *Milwaukee I*, *Milwaukee II* or the CWA prevents an Arkansas citizen or Arkansas itself from obtaining from an Arkansas court under Arkansas nuisance law the *very same relief* extrinsic to the administrative scheme that Oklahoma seeks in this Court. If so, what prevents Oklahoma or its citizens from filing suit in the courts of Arkansas against the municipal and private corporations that are defendants here and obtaining—through application of Arkansas nuisance law—the very same relief? And, if that is permissible, what prevents Oklahoma or its citizens from asking an Oklahoma court to grant relief under Arkansas nuisance law? Or, what prevents Oklahoma or its citizens from asking an Arkansas court, through application of choice-of-law principles, to apply Oklahoma substantive law? If the CWA preserves the law

of the State in which the discharges occur, does it not preserve the *whole* law of that State, including choice-of-law rules which might dictate application of the substantive law of another State? *See, e.g., Widmer v. Wood*, 243 Ark. 457, 420 S.W.2d 828, 830 (1967); *Dobbins v. Martin Buick Co.*, 216 Ark. 861, 227 S.W.2d 620, 622 (1950). And, if that be conceded, why can Oklahoma not ask its courts, *or this Court*, to perform the same choice-of-law function?

The United States says that "it would be somewhat incongruous if the 1972 Amendments, in preempting . . . federal common law . . . had the effect of permitting a state to invoke *its own law* directly in a suit against dischargers in another state." U.S. Brief at 15 (emphasis added). Is it not even more "incongruous" to say that Arkansas or its citizens can obtain from its own courts under its own law the *very same relief* extrinsic to the administrative scheme that the United States says Oklahoma cannot obtain under its own law *from this Court*; that Arkansas law can be applied but Oklahoma law cannot; that Arkansas substantive law can apply, but any Arkansas choice-of-law rules which might dictate application of Oklahoma substantive law presumably cannot; that Oklahoma or its citizens can seek relief in the courts of Arkansas, but not in the courts of Oklahoma *or in this Court*? The constitutional issues arising out of the anomalous position taken by the United States are beyond the scope of this brief. They need not be addressed, however, for nothing in *Milwaukee I*, *Milwaukee II* or the CWA precludes this Court from granting Oklahoma relief under whichever State's law this Court deems fit to apply,[4] in the absence of a preemptive body of federal law, whether common or statutory.

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[4] So far as constitutional restraints on choice of law are concerned, Oklahoma and Arkansas each would appear to have an interest sufficient to support application of its own law. *E.g.*,

(Footnote continued on following page)

1. In *Milwaukee I* this Court said that "it is federal, not state, law that *in the end* controls the pollution of interstate or navigable waters." 406 U.S. at 102 (emphasis added). This teaching is consistent with longstanding Supremacy Clause principles used to resolve any conflicts created by the exercise of *concurrent* lawmaking powers. While it existed, federal common law may have governed to the exclusion of state law. *See* U.S. Brief at 13. But continuing reliance on *Milwaukee I* and its progeny is misplaced. The body of federal common law which may have preempted the application of state law no longer exists. And, if it no longer exists, it surely cannot preempt the application of any State's law.

Milwaukee I does not hold that, in the *absence* of a preemptive body of federal law, whether common or statutory, the States lack *power* to police the pollution of their boundary waters, whether the pollution is of in-

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[4] *continued*

Allstate Ins. Co. v. Hague, 449 U.S. 302, 307-09 (1981); *Richards v. United States*, 369 U.S. 1, 15 (1962); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70-73 (1954). That the pollution crossed state lines would not preclude application of either State's law. This Court abandoned that notion long ago. *E.g., Young v. Masci*, 289 U.S. 253, 258 (1933); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 156 (1932). There is, of course, nothing unusual about using choice-of-law rules to reconcile competing state interests implicated in all types of torts having interstate contacts, even when a State is a party plaintiff or defendant in the courts of another State. *E.g., Nevada v. Hall*, 440 U.S. 410 (1979). Interstate water pollution disputes do not differ in principle from other types of interstate torts in which competing state interests are reconciled through choice-of-law rules. As the District Court recognized in *Hammond*, interstate water pollution disputes do not present the irreconcilable clash of sovereign interests involved in determining interstate boundaries or apportioning interstate waters, for the issue is not dividing the pie but enhancing its quality for everyone. *Scott v. City of Hammond*, 519 F.Supp. 293, 297 (N.D. Ill. 1981), *appeal pending*, No. 81-2236 (7th Cir.).

trastate or interstate origin.[5] If *Milwaukee I* were construed as so holding, *sub silentio*, it was wrongly decided and should be overruled. As this Court said in *Milwaukee II*, there never was any doubt that, prior to the creation of federal common law in *Milwaukee I*, "*state* common law control[led]" the interstate pollution of boundary waters.[6] 451 U.S. at 327 n.19 (emphasis in original). And,

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[5] The "interstate or navigable waters" of the United States comprehended by *Milwaukee I*, 406 U.S. at 102, include many waters wholly within a single State that always have been within the concurrent regulatory power of the States; and, prior to *Milwaukee II*, the federal common law applied to interstate waters even in the *absence* of interstate effects. *People of the State of Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 625-30 & n.14 (7th Cir. 1980), *vacated and remanded*, 453 U.S. 917 (1981), *on remand*, 680 F.2d 473 (7th 1982). *But see* U.S. Brief at 14 n.18.

If Oklahoma lacks *power* to police the pollution of interstate or navigable waters, so does Arkansas. *But see Milwaukee II*, 451 U.S. at 327-28. And, if neither State has such power, what criminal sanctions are available if someone were to release toxic poisons into these waters that infect the drinking water supply of either State and cause the death of their citizens? Would Oklahoma, in such a case in which its citizens and boundary waters were affected, be precluded from bringing homicide charges against the culprits under its own law simply because the poisons were released from the shores of Arkansas? Or is the normative reach of its criminal law not coextensive with the reach of its civil law? See n.4 *supra*. The CWA "embraces within [its] regulatory purview" the discharge of "*any* pollutant from *any* point source." U.S. Brief at 8 (emphasis in original). Does it therefore preclude the application of Oklahoma law in such a case? Illinois and Tennessee respectfully submit that the United States has not carefully considered the implications of its views and has overlooked what the Founding Fathers understood so well—that *all* federal law evolves against the backdrop of state law. *See generally* Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954).

[6] In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), this Court, citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), remitted Ohio to its own state courts with the observa-

(Footnote continued on following page)

if federal common law no longer governs, there now is nothing to prevent the States from exercising their "historic police power" in this field unless it was "'the clear and manifest purpose of Congress'" to preempt state law in enacting the CWA. *Milwaukee II*, 451 U.S. at 316, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

It may be that the United States' continued reliance on *Milwaukee I* is premised on the unstated assumption that this Court has exercised some previously unknown constitutional power to effect an *irreversible* displacement of state law or somehow to erase state law out of existence simply by promulgating federal common law. The United States says, for example, that there was no Oklahoma law for Congress to "save" because it had been preempted by *Milwaukee I*. U.S. Brief at 15. If that truly is the *considered* view of the United States, it abandons almost two hundred years of American constitutional jurisprudence and, if adopted by this Court, would stand the basis of "Our Federalism" on its head. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

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[6] *continued*

tion that "an action such as this, if otherwise cognizable in federal district court [on the basis of diversity], would *have* to be adjudicated under state law." 401 U.S. at 498 n.3 (emphasis added). With the creation of a federal common law remedy "this statement," of course, had to be overruled. *Milwaukee II*, 451 U.S. at 327 n.19. Because federal question jurisdiction then could be invoked on the basis of a claim arising under federal law to which *Erie* was inapplicable, actions to abate an interstate nuisance no longer would "*have* to be adjudicated under state law," 401 U.S. at 498 n.3 (emphasis added), particularly as the federal common law would preempt the application of conflicting state law. In overruling this particular statement, however, *Milwaukee I* does not impeach the teaching of *Wyandotte* and two centuries of American history that the States have inherent power to police the pollution of their boundary waters, whether of intrastate or interstate origin, in the *absence* of a preemptive body of federal law.

The national government is one of enumerated powers. The reserved lawmaking powers of the States, however, do not derive from, or depend for their existence upon, the Constitution of the United States. At least so far as that Constitution is concerned, they are inherent. *See* U.S. Const. amend. X; *United States v. Darby*, 312 U.S. 100, 124 (1941). Moreover, the police powers of the States are plenary in the scope of their reach excepting in areas "*exclusively* delegated" to the national government by the text of the Constitution. *Goldstein v. California*, 412 U.S. 546, 552-53 (1973) (emphasis in original), quoting A. Hamilton, *The Federalist* No. 32 at 241 (Wright ed. 1961). Even in areas in which the Constitution confers power on the national government, the police power of the States almost always coexists and may be exercised until the national government not only steps into the field but also affirmatively declares its "clear and manifest" purpose to preempt the concurrent exercise of state power. *Milwaukee II*, 451 U.S. at 316.

If a genuine conflict is created by the concurrent exercise of lawmaking power, the Supremacy Clause comes into play and commands that federal law control. U.S. Const. Art. VI, § 2. Even then, however, the police power of the States to act in the field continues to *exist* because it does not derive from the Constitution of the United States in the first place. And, if and when the national government retires from the field, the disability that the Supremacy Clause imposes on the exercise of the inherent police powers of the States dissipates.

This is long settled constitutional doctrine. As Chief Justice Marshall wrote for this Court in *Sturges v. Crowinshield*, 4 Wheat (17 U.S.) 122 (1819), not even Congress has power to effect an irreversible displacement of state law:

> "It has been said, that Congress has exercised [its bankruptcy] power, and, by doing so, has extinguished the power of the States, which cannot be revived by repealing the law of Congress.
>
> We do not think so. If the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished, it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the States: but it removes a disability to its exercise, which was created by the act of Congress." *Id.* at 196.

If Congress has no power to displace state law irreversibly, this Court surely cannot do so simply by choosing to apply federal common law.

If the inevitable effect of *Milwaukee I* is to preclude resort to any State's law in the *absence* of federal common law even though Congress has authorized resort to state law in the course of enacting a statute displacing the federal common law, *Milwaukee I* must be overruled as inconsistent not only with the foundations of "Our Federalism," *Younger v. Harris*, 401 U.S. 37, 44 (1971), but also with separation of powers principles dictating that Congress, not this Court, have at least the last word on the displacement of state law in any area in which both the national government and the States are empowered to act. 33 U.S.C. §§ 1365(e), 1370(2). *Milwaukee I* no more bespeaks the States' lack of *power* to police the pollution of their boundary waters in the *absence* of federal common law than would Congress's decision to enact a statute in a sphere previously subject only to state regulation. To be sure, when the national government acts in a field, its action may have constitutional consequences under the Supremacy Clause. It does not follow, however, that the States lacked power to regulate the subject matter in the first place, or that such power can-

not again be exercised once any superseding body of federal law has been repealed or otherwise displaced.

Whatever preemptive effect *Milwaukee I* had on state law dissipated upon the demise of federal common law in *Milwaukee II*. And, unless the CWA itself preempts the application of state law, the States cannot be disabled from policing the pollution of their boundary waters.

2. *Milwaukee II* teaches that this Court must now look to the statute itself which preempted the application of the federal common law, not to *Milwaukee I*, to determine whether the States are preempted from exercising their inherent power to police the pollution of their boundary waters. As this Court emphasized in *Milwaukee II*,

> "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully isolated from democratic pressures, but by the people through their elected representatives in Congress." 451 U.S. at 312-13.

Whether to enact a federal rule and whether to displace state law in so doing are analytically distinct questions that involve very different considerations. There is nothing "incongruous" about enacting a federal rule yet choosing *not* to displace supplementary state law in doing so. U.S. Brief at 15. *Milwaukee II* makes plain that Congress, in which the people of our States are institutionally represented by constitutional design, not the Justices of this Court, who by constitutional design "represent" the people of no State, has at least the last word not only on whether a federal rule should be enacted, but also on whether any federal rule enacted should preempt or be regarded as inconsistent with the concurrent application of state law.

Throughout *Milwaukee II* the Court emphasized its decision was based *solely* on considerations respecting the separation of powers between the legislative and judicial branches of the national government. The quite *different* considerations respecting the division of powers between the national government and the States did not come into play. 451 U.S. at 316-17 & n.9. Though the Court concluded that the statute had occupied the field to the exclusion of judicially created federal law, the Court also went out of its way carefully to emphasize that "the comprehensive character of a federal statute" is "an insufficient basis to find pre-emption of state law" and, indeed, is not even "relevant" to the question whether state law can be concurrently applied. *Id.* at 319 n.14.

Because *Milwaukee II* makes plain that Congress has the last word on the displacement of state law, the question whether the historic powers of the States to police the pollution of their boundary waters have been preempted now turns on whether Congress indicated a "clear and manifest" purpose to preempt them. 451 U.S. at 316. Congress had no such purpose or intent. Indeed, it expressly authorized and encouraged resort to any State's law as a supplement to the CWA's administrative scheme.

3. Preemption is a question of Congressional intent. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). When Congress's intent controls, the statutory *text* must be the first source consulted. *Reiter v. Sonotone*, 442 U.S. 330, 337 (1979). The "comprehensive" scope of the statute is "an insufficient basis to find preemption of state law." *Milwaukee II*, 451 U.S. at 319 n.14. Absent a "clear and manifest purpose" of Congress to preempt state law, "the assumption that the historic police powers of the States were not to be superseded by the Federal Act" controls. *Id.* at 316.

This Court will search the statutory text in vain for affirmative evidence of a "clear and manifest" intent to preempt the States' historic power to police the pollution of their boundary waters. And, the assumption mandated by *Milwaukee II* as the "start[ing]" point for preemption analysis would be rendered meaningless if the mere existence of a federal administrative remedy, whether adequate or not, were construed as affirmative evidence of a "clear and manifest" purpose to preempt concurrent state law remedies. 451 U.S. at 316; *cf. Monroe v. Pape*, 365 U.S. 167, 183 (1961).

The United States concedes, as it must, that Oklahoma and Arkansas may apply their own law to intrastate polluters of the Illinois River and other interstate waters, and that the administrative and other remedies available against intrastate polluters under the CWA do *not* preclude resort to state law remedies. U.S. Brief at 14. The *text* of the statute does not even support, let alone compel, the anomalous conclusion that Congress intended to preempt state law remedies against interstate polluters but not intrastate polluters, or that it intended to preempt Oklahoma law, but not Arkansas law. When Congress intended to preempt any State's law it declared its intent in "clear and manifest" terms. *Milwaukee II*, 451 U.S. at 316. *E.g.*, 33 U.S.C. § 1322(f)(1) ("no State . . . shall"). There is no comparable language of preemption in § 402. 33 U.S.C. § 1342.

This Court need not even rely on the constitutionally based presumption of non-preemption. Congress affirmatively authorized the adoption and enforcement of any State's more stringent law in § 510:

> "Except as *expressly* provided in this chapter, *nothing* in this chapter *shall* (1) *preclude* or deny *the right* of *any* State or political subdivision thereof or interstate agency *to adopt or enforce* (A) *any* standard or limitation respecting discharges of

> pollutants, or (B) *any* requirement respecting control or abatement of pollution; *except* that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent standard, prohibition, pretreatment standard, or standard of performance which is *less stringent* than the effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (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 (emphasis added).

The United States apparently would urge this Court to read § 510 as preserving the right of the States to adopt more stringent regulations only for discharges occurring within their boundaries. This strained construction is refuted by the plain language of § 510(2). In § 510(2) Congress made explicit that "nothing" in the Act, including the discharge-permit process established by § 402, was to be "construed" as impairing the "jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370(2). Congress used the *plural*, "States," not the singular. *Id.* Jurisdiction is, by definition, *power*. Boundary waters are, by definition, *interstate* waters. The text defies the meaning the United States puts on it.

The only possible meaning of § 510(2) is that, although Congress did not declare *which* State's law would apply in the context of the interstate pollution of "boundary waters," 33 U.S.C. § 1370(2), a choice-of-law question traditionally left to the judiciary, n. 4 *supra*, Congress intended to authorize the States to police the pollution of their boundary waters except when Congress "expressly" provided otherwise in the Act, as in § 312(f)(1), 33 U.S.C. § 1322(f)(1) ("no State . . . shall"). No other meaning can

be ascribed to § 510(2) if the statute is to be construed in light of its underlying policies, one of which is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

The legislative history of § 510(2), as well as the text, defies any assertion that Congress intended to preempt the States' police power over their boundary waters. The present § 510(2) was drawn *in haec verba* from § 1(b) of the Act as it stood in 1972. Section 1(b) itself was first enacted into law as part of the Water Pollution Control Act Amendments of 1956, P.L. 660, 70 Stat. 498. It was drafted by a Senate committee after hearings at which several witnesses had assailed the threat to State prerogatives that might be posed by the bill without § 1(b). S. Rep. No. 543, 84th Cong., 1st Sess. 4 (1955). One of the prerogatives which Congress intended to protect was the application of some State's law to abate or provide redress for the interstate pollution of boundary waters.

Consider the following colloquy among Senator Kerr, Assistant Secretary of Health, Education and Welfare ("HEW") Roswell B. Perkins, and Sidney Saperstein of the Office of the General Counsel of HEW:

> "Senator KERR. What would be the effect of this law against the United States Steel Co.—let's say, against Monsanto Chemical Co., at St. Louis—from whose plant obnoxious sewage and materials were permitted to get into the Mississippi River, and somebody with a farm at Cairo, Illinois would be ruined by chemical substances in that overflow which he identified as either being Monsanto Chemical Co. products or similar in character to it. Would he then, under the provisions of this act, have a basis for suit for damages against the chemical company in St. Louis?
>
> Mr. PERKINS. There would be no change—

> Senator KERR. I did not ask that.
>
> Mr. SAPERSTEIN. Senator, just as under existing law, this act does not give the private party a basis for a cause of action against another private party. This law *merely* authorizes the *Federal* Government *to step in* when the interests—health or welfare—of the citizens of one State are adversely affected by the pollution originative of another State. It does not give those private parties which are adversely affected the right to come into court and sue. They would have to do that under *the common law* or statutes *now in existence.*
>
> Senator KERR. They have that right under the law now?
>
> Mr. SAPERSTEIN. Yes, sir."
>
> *Proposed Amendments to the Water Pollution Control Act: Hearings on S. 890 and S. 928 Before a Subcomm. of the Senate Comm. on Public Works*, 85th Cong., 1st Sess. 48 (April 22, 1955) (emphasis added).

This exchange—which presages the factual context of *Oklahoma* and came 15 years before any *federal* common law remedy existed—shows Congress intended that some State's law would apply to the *interstate* pollution of "boundary waters" when it enacted § 1(b) in 1956. The same intent must have existed—simultaneous with its intent to displace federal common law—when Congress reenacted § 1(b) as § 510(2) in the 1972 Amendments, 33 U.S.C. § 1370(2). *See also Milwaukee II*, 451 U.S. at 327 n.19.

Section 510 does not stand alone in authorizing resort to concurrent state law. Section 505(e) makes explicit that the remedies available under § 505 do not preempt resort to *"any* other relief" available under *"any* statute or common law." 33 U.S.C. § 1365(e) (emphasis added). One purpose of § 505(e) was to preserve the right to damages at common law, and Congress said that

"[c]ompliance with the requirements under this Act would not be a defense to a common law action for pollution damages."[7] S. Rep. No. 92-414, 93rd Cong., 1st Sess. 81 (1971), reprinted in 2 *Legislative History of the Water Pollution Control Act Amendments of 1972* 1499 (Sen. Pub. Works Comm. Print 1973). Damages is one of the remedies Oklahoma seeks in this case. If the complaint states no claim under federal common law or Oklahoma law, in what forum and under what body of law can Oklahoma or its citizens pursue the damages that Congress said they can obtain? They cannot obtain damages under the CWA. And, it makes little sense to say

[7] Compliance with the conditions of a discharge permit also would not constitute a defense to a public nuisance action brought under federal or state common law. *See, e.g., Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446-48 (1960); *New Jersey v. City of New York*, 283 U.S. 473, 477, 482-83 (1931). In *Milwaukee* there is not even a conflict between the law of Wisconsin and the law of Illinois in this regard to resolve. *Milwaukee (7th Cir.)*, 599 F.2d at 163 & n.21. It is rare that compliance with any regulatory scheme constitutes a defense to any common law action. And, the question of the type of relief that may be awarded is, of course, analytically distinct from the question whether a cause of action exists. *E.g., Davis v. Passman*, 442 U.S. 228, 239 (1980); *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 & nn. 32-33 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). When injunctive relief is sought, however, the adequacy of remedies at law is at issue. And, in the sound exercise of equitable discretion, account can be taken of the adequacy of any administrative remedies available under the CWA or otherwise to abate any nuisance found. But, if existing administrative remedies are inadequate to abate the nuisance, the relief awarded could not be regarded as inconsistent with the CWA's administrative scheme simply because the relief is different from the requirements imposed on the defendant under the CWA. As Congress itself recognized in § 510(1), 33 U.S.C. § 1370(1), requiring a defendant to do *more* than required by the CWA does not interfere with the achievement of its purpose, which is to *eliminate* the pollution of our waters, not to license the pollution of our waters. 33 U.S.C. § 1251(a)(1).

Oklahoma or its citizens can obtain damages or injunctive relief under Arkansas law, but not under Oklahoma law.

The "Act as a whole" can preempt *federal* common law notwithstanding the existence of § 505(e) and § 510. *Milwaukee II*, 451 U.S. at 329. The existence of these sections cannot be explained, however, if Congress intended that the Act as a whole be construed as also preempting all state law. Congress *must* have intended the courts to apply *some* body of law providing remedies extrinsic to the Act or § 505(e) is a nullity. And, as the text and legislative history of § 505(e) and § 510 make clear, Congress did not distinguish between Oklahoma law and Arkansas law, or between intrastate waters and "boundary waters," or between the state law applicable to intrastate polluters and the state law applicable to interstate polluters, when it affirmatively authorized resort to any and all state law excepting that "expressly" preempted by the Act. 33 U.S.C. §§ 1365(e), 1370. When Congress preempts state law, it preempts *any* State's law. *E.g.*, 33 U.S.C. § 1322(f)(1) ("no State"). Likewise, when Congress "save[s]" state law, it does not discriminate among the law of the several States; it does not preempt the application of *one* State's law, while simultaneously "sav[ing]" the application of *another* State's law. U.S. Brief at 15. The very existence and terms of § 505(e) and § 510 contradict the inference of any Congressional intent to preempt resort to any State's law in this case.

CONCLUSION

The Court should grant Oklahoma leave to file its complaint or take other action consistent with the view expressed herein that a claim to relief can be stated under

some State's law in the absence of any preemptive body of federal law, whether common or statutory.

Respectfully submitted,

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