In the

Supreme Court of the United States

CITY OF MILWAUKEE ET AL.,	)	
	)	
PETITIONERS,	)	
	)	
V.	)	No. 79-408
	)	
STATES OF ILLINOIS AND MICHIGAN,	)	
	)	
	)	
RESPONDENTS.	)	

Washington. D. C.
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CITY OF MILWAUKEE ET AL., Petitioners,	:	
v.	:	No. 79-408
STATES OF ILLINOIS AND MICHIGAN, Respondents.	:	

Washington, D. C.

Tuesday, December 2, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

ELWIN J. ZARWELL, ESQ., 780 North Water Street, Milwaukee, Wisconsin 53202; on behalf of the Petitioners.

JOSEPH V. KARAGANIS, ESQ., Special Assistant Attorney General, State of Illinois, 150 N. Wacker Drive, Chicago, Illinois 60606; on behalf of the Respondents.

ANDREW J. LEVANDER, ESQ., Assistant to the Solicitor General, United States Department of Justice, Washington, D.C., 20530; on behalf of the United States as amicus curiae.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in City of Milwaukee v. Illinois and Michigan.

Mr. Zarwell, you may proceed whenever you're ready.

ORAL ARGUMENT OF ELWIN J. ZARWELL, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ZARWELL: Mr. Chief Justice, and may it please the Court:

This case, pursuant to a decision written by Justice Douglas for a unanimous Court in the original and forerunner of this case, Illinois v. Milwaukee, is a federal question case. The Court, through Justice Douglas, enunciated both a basic principle and set the stage for the question that is now before the Court.

The basic principle? That federal law controls the rights and obligations of dischargers to interstate waters, where the same are called into question in an interstate dispute, and such federal law controls to the exclusion of state law.

The federal law at the time of this Court's initial decision was common law, primarily because of the absence of a complete and effective statutory scheme covering the same subject matter. The stage was set for the question of the effect of subsequently enacted legislation on that statutory law by Justice Douglas.

He first acknowledged that federal law excluded

state law. And then he talked in terms of the possibility of preemption of the federal common law by federal statutory law. Note that he spoke of preemption of federal common law by federal statutory law.

QUESTION: He said that might happen some day.

MR. ZARWELL: He said it might happen. That's right, Your Honor. But he spoke in terms of a preemption of federal law. It's not the context in which we usually look at the word, preemption. The word, preemption, is usually thought of in terms of federal law overriding state law or occupying the field in such a way so that the state law and other law cannot operate there. Here Justice Douglas, speaking for a unanimous Court, spoke in terms of federal legislation displacing or preempting federal common law.

His exact language was: "New federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." And we have the citation at page 7 of our brief.

In this frame of reference, the present Federal Water Pollution Control Act Amendments of 1972, modified in 1977 by the Clear Water Act -- the two I will speak of as the Federal Water Pollution Control Act, was adopted.

QUESTION: Do you think that Congress in the exercise of its legislative function could say that there shall be neither federal common law in this area, nor federal statutory

law, but state law shall govern?

MR. ZARWELL: No, Your Honor, I do not believe that Congress would have that power constitutionally under the federal system that we have, because that would then lead the states to legislate one against the other in an area where there is a paramount federal interest.

QUESTION: But, even though Congress said, there is no paramount federal interest?

MR. ZARWELL: Well, whether Congress said so or not, I think this Court has held several times in this type of a controversy between states, either in apportionment of waters or utilization of waters or, I submit, the pollution of waters, this is a paramount federal interest where you have interstate waters.

QUESTION: Well, but in the cases involving the allocation of waters, it was more or less a question where this Court had to derive some system of law because of its jurisdiction, wasn't it? That's the scope of your original jurisdiction cases.

MR. ZARWELL: That is correct, Your Honor, but I submit that whether it be state against state or state against citizen, or citizen against state or citizen against citizen, where we are crossing the boundaries and a state has a particular interest, two states have a particular interest in waters crossing the boundary, that the federal interest there is so

paramount that Congress could not abdicate under the Constitution.

QUESTION: There you're reading Justice Douglas' statement which you quoted apparently as meaning that as soon as Congress legislated in the area, the general area, automatically that operated as a preemption?

MR. ZARWELL: No, Your Honor, I'm not reading it in that precise way. I'm reading it in terms of Congress may, in regulations adopted under Congress's acts, may in time preempt. I don't think that Justice Douglas was saying, as soon as they enter the field at all, they have thereby excluded completely the common law. But to the extent that there is federal legislation, to the extent that there are regulations under that federal legislation, to that extent the common law would be preempted. In other words, the statute, the regulations control the common law, rather than totally displace it as soon as Congress wants into the area.

And it was in this frame of reference that the Federal Water Pollution Control Acts were written. And because of the Federal Water Pollution Control Act, the courts are no longer free to walk into the area and operate as they were before those enactments and fashion their own remedies, their own law, in relationship to interstate water pollution, but rather are controlled by the congressional Act and the regulations adopted thereunder, to the extent that they exist.

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QUESTION: Do you think that the preemption analysis which would be applied in deciding whether federal statutory law preempted federal common law is the same kind of analysis as the Court has applied in other situations not dealing with water, as to whether a congressional statute preempted a state statute?

MR. ZARWELL: It's the same kind of a preemption, I believe, but here we're dealing, because we're in the same sovereign and the legislature is dealing with something on a policy level, where the courts are dealing with it in the absence of legislation, I think that the legislation of Congress controls the activity and the conduct of the courts in a different way than a total displacement that you would have, congressional act as against state enactment.

We are here primarily because, as we view it, the courts below have not followed the mandates of Congress in the regulations in connection with the suit brought by Illinois against these defendants. Two sections of the Act are relied on and analyzed in considering the question of the effect of the Act on other law in the general sense. Those sections are Section 505(e), which in essence permits access to other law; and the 505(e) section is written in terms of, in essence, permitting persons to have access to the law that is out there, common law, statutory law, whatever law is there from time to time. And Congress has specifically said that

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litigants may have access to the law that is there, in 505(e).

However, Congress did not say in 505(e) or in any other portion of the Federal Water Pollution Control Act that we are preserving and establishing the law that exists at the time of the adoption of this Act as being the rights, remedies, and the law available to any litigant choosing to avail himself, herself, or itself of that particular body of law.

Rather, 505(e) says, you shall have access to the law that may be there as we read it. Then, there is another section that also deals with the type of area that we're looking at, were state law involved. And it's one of the areas of argument that we have reached in the various briefs. That is Section 510. 510 does preserve something. It recognizes that the states have sovereign rights over water pollution discharges, etc., within the confines of the particular state. Section 510 preserves that right to the states.

To the extent that the states control discharges within their own geographical sovereignty, where they are dealing with something that they have a right to deal with, this has been preserved by the congressional Act at Section 510, and that continues on with one very important consideration that the Congress engrafted on the rights of the states, and that is, the states may not legislate a lesser control than Congress does under the Act, or that is adopted in the regulations under the Act, federally.

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QUESTION: So that if all of this had taken place in one state, say, in the State of Wisconsin, Wisconsin could have required higher standards either by statute or by the law of nuisance?

MR. ZARWELL: Absolutely. No question but what the fact that the various states have sovereignty in their own geographical area and can create both statutory and common law-related material.

QUESTION: But your argument's going to be, I take it, that resort may not be had to federal common law?

MR. ZARWELL: We don't have to reach that argument, Your Honor. But I believe that is true, within a particular state.

QUESTION: Well, no; no, I mean, in this case, particular case?

MR. ZARWELL: In this case we don't have to reach it because of the fact that the discharges are being challenged by Illinois across the state lines and we're in an interstate body of water.

QUESTION: That's what I mean. In this case -- well, I said, federal common law. And you're going to say that the Court has no business imposing higher standards?

MR. ZARWELL: Yes. We are saying here that the Act, the regulations adopted under the Act, and the permits issued under the Act have totally controlled this precise situation.

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QUESTION: So that there may not be a resort to a body of federal law that would have been available had the Act not been passed?

MR. ZARWELL: That is correct, Your Honor. However, again going back to the earlier question of the Court, Wisconsin would be able to impose --

QUESTION: I understand that. That isn't involved in this case?

MR. ZARWELL: Right. Again, that is the impact of 505 and 510 and those are the two sections that are most commonly referred to in both the briefs of the plaintiffs and the defendants in these cases.

QUESTION: You would not suggest, I take it, that Congress could preempt the original jurisdiction of this Court in an area of this kind, would you?

MR. ZARWELL: No, sir, I would not so suggest. Under the enactments of Congress one of the things that is prevalent throughout the various portions of the enactment and one of the things that we have referred to at some length in our brief is the question of costs, and the relevance of cost to the type of imposition that may be imposed upon various discharges in various areas. Congress has explicitly said, insofar as the regulatory agency, the EPA, is concerned, and the various state agencies operating under the federal system, that one of the things they must look at is cost and look at

cost effective systems and see what the relationship is between the cost that's being expended to procure a particular level of effluent, as against what would be required to reach a higher level of effluent.

QUESTION: Let me pursue the point I was just raising that you responded to. Suppose this Court had appointed this particular district judge as the special master retaining original jurisdiction and he had conducted exactly the hearings which he had conducted here, and came out with precisely what we have now. I take it, as a natural extension, you would not question the validity of that action?

MR. ZARWELL: I would not question the jurisdiction of this Court to take it.

QUESTION: Well, you might be arguing here on the original jurisdiction case, you mean?

MR. ZARWELL: Yes.

QUESTION: You might be challenging his findings?

MR. ZARWELL: But I would challenge the results that came out, whether it be from the --

QUESTION: The results, but not the power?

MR. ZARWELL: That is correct, Your Honor.

QUESTION: Well, you certainly would argue, if it were to your advantage, I take it, that the master appointed in an original jurisdiction case by this Court was obligated to follow an Act of Congress if that Act was applicable,

wouldn't you?

MR. ZARWELL: That is correct, Your Honor.

QUESTION: If it applied.

QUESTION: If it applied under a statutory law standard and not any common law standard, that would govern both the special master and this Court, wouldn't it?

MR. ZARWELL: That is correct, Your Honor --

QUESTION: In other words, you'd be making the same argument as you're making here.

MR. ZARWELL: That is correct. I would suggest that in the situation such as that, at the very least, if this Court were to exercise its original jurisdiction in that type of case and if it were not to look at the totality of the statutory and regulatory system that is out there, it should at least refer to the EPA and the systems under it and under the statute to get the facts found rather than going to a district court master.

QUESTION: But doesn't it get down to a question of congressional intent? When Congress enacted the statute, did it mean that the statutory standards, whatever they be, should displace any federal common law standard?

MR. ZARWELL: Yes, Your Honor, that's exactly --

QUESTION: And if they can't say that the statute is to be read that way, then I gather that the common law standards are not displaced?

MR. ZARWELL: That is correct. Now, when Congress acts in a particular area so as to completely dispose of that area -- all we're dealing with here is point-source discharges -- all point-source discharges are covered by the congressional enactment. There are no exceptions, and they are referred to the administrative agency for control; again, no exceptions. There isn't any place for a court to step in and operate.

QUESTION: Well, it wouldn't have taken Congress very many words to achieve the result you're arguing for, to write into the statute a clear, unequivocal statement, would it?

MR. ZARWELL: It wouldn't have taken any particular expertise or difficulty to do so, but I believe they have done so. As soon as they say, we are legislating as to each and every point source, it doesn't leave any room for anyone else to operate. So that, in essence, it becomes superfluous for them to say, we are legislating for each and every point source, we are covering every one, and by the way, please don't apply common law to it under the federal system.

QUESTION: Well, suppose Congress in legislating as to every point source, however, had said, "except with respect to certain pollutants"? That's not legislating with respect to them.

MR. ZARWELL: If Congress had definitely left some pollutants open and some areas where it was not legislating, the courts would have the opportunity to go into that area.

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QUESTION: So, if in this case there are some discharges that are not forbidden by the statute or by regulations, may -- certainly the state proscribed them, but how about federal common law?

MR. ZARWELL: Saying certain discharges are not covered? All of our discharges are covered. I think what we're dealing with here is a particular constituent of the effluent. If there were some constituent not covered, but the entire permit process covers them all, if the EPA wants to enter into control of various effluents it can, so it's repeating--

QUESTION: Are you arguing that the EPA has not only decided that certain discharges are to be forbidden, but no others are to be forbidden?

MR. ZARWELL: In essence, yes. All are before it; all can be brought into the permit process. Every state, including the plaintiff states in this situation, could have come into the permit process and made sure that various elements would be covered if they were interested in them.

QUESTION: Well, is any federal regulation or statute or permit being violated when there is an overflow during a storm?

MR. ZARWELL: Not in this particular instance, no, sir.

QUESTION: Well, why may not a court insist that those overflows be stopped?

MR. ZARWELL: Because the regulatory agency under the statute has dealt with that particular --

QUESTION: Well, you're saying they've in a sense decided that no one else should stop the overflows either?

MR. ZARWELL: That is correct, Your Honor.

QUESTION: Except that they have authorized these individual states within their own boundaries to adopt more stringent standards?

MR. ZARWELL: Oh, absolutely. The states could control much more severely any one of the discharges in any one of the areas, as long as it's within the sovereignty of that state, within its own political jurisdiction. But the problem here is that Congress has said, so far as point-source discharges are concerned, this is the way they will be handled and every one of them will be handled this way.

QUESTION: Well, that isn't quite right, is it? Unless the state requires a different handling.

MR. ZARWELL: A higher level; that's correct, Your Honor. But, Congress has covered every one from a federal standpoint, it has covered every one to a particular level, regardless of state activity. And states can raise the level of the effluent above that. But they cannot decrease it.

QUESTION: So Congress has not entirely preempted the lawmaking function with respect to any particular point?

MR. ZARWELL: It has clearly not preempted state

activity in these areas and has expressly said that the states do have the right to act in this area, and that is Section 510 of the Act.

QUESTION: Hasn't it also said common law remedies shall survive?

MR. ZARWELL: No, it doesn't say common law remedies shall survive. 505(e), I believe, is what the Justice is referring to, and in that section all it says is that the people shall have access to the statutory and common law that is in existence.

QUESTION: "Nothing in this section shall restrict any right which any person may have under any statute or common law."

MR. ZARWELL: Precisely.

QUESTION: Now, if that statute had not been passed and if Illinois had a right under common law without the statute, doesn't this say that right survives?

MR. ZARWELL: I don't believe so, Your Honor, because, again, at the time of the adoption of the statute 505(e), it said nothing will restrict the right which it had but it doesn't say that that right is going to remain, that is, that the common law is going to stay the law.
or that statutory law that's in existence at the time of the adoption of the Federal Water Pollution Control Act is going to stay in existence. All it says is, we will not restrict

the right to come into any area of law. However, if that area of law disappears, and this Court created the area of law we're talking about, because of the absence of federal statutory and regulatory law at the time --

QUESTION: Because of the absence of "adequate federal statutory law."

MR. ZARWELL: That's correct, Your Honor. But in any event, it was fillings --

QUESTION: Illinois contends the federal law is still inadequate because it doesn't say, overflows.

MR. ZARWELL: Illinois contends that any examination of the Act, the regulations under it, and the permits will indicate that Illinois is absolutely wrong. We have absolute coverage of these particular discharges.

Another area that we think is exceedingly important to this case is the area of proof and the type of nuisance that was found by the trial court and sustained by the appellate court. And in that area we again point to the decisions of this Court: Missouri v. Illinois, New York v. New Jersey, which had nuisance cases and looked at what happens when you have testimony of experts in opposition to testimony of experts, but the physical facts which can be seen by a layman are to the contrary. And this Court held that physical facts control. We say the same is true here, in that there is absolutely no evidence anywhere of a pathogen actually being

in Illinois water. There are fecal coliform counts but there are no pathogens shown to be in Illinois water. There have been no outbreaks of diseases shown over the lengthy period that these discharges have been in existence.

QUESTION: Are there any findings to the contrary below?

MR. ZARWELL: There are no findings to the contrary, no. There are findings to the effect that pathogens can be transported X times a year. What that is based on is that there are pathogens in human waste. Human waste does get into the rivers and into the lakes in and around Milwaukee; that there are currents that travel from Milwaukee to Illinois; that they are of length and duration sufficient to carry a body of water. We can say, a body of water, as distinguished from what's in the body of water, particularly the non-conservative type of --

QUESTION: Well, this isn't an argument that these discharges are not being made into the Lake?

MR. ZARWELL: Absolutely not, Your Honor.

QUESTION: It's just that you claim there's no proof that they were carried into Illinois?

MR. ZARWELL: It is an argument that pathogens are not in the Lake.

QUESTION: Yes, but you don't deny that pathogens were discharged into the Lake?

MR. ZARWELL: Yes, we do. We have not seen a single -- we're talking about the evidence in the record here -- we have not seen evidence of a single pathogen in Lake Michigan.

QUESTION: What is a pathogen?

MR. ZARWELL: A pathogen is something that could create a disease, either a bacteria or a virus that could create a disease in a human being.

QUESTION: Well, is there evidence of sewage discharges into the Lake?

MR. ZARWELL: There is evidence of treated sewage discharges into the Lake --

QUESTION: How about untreated sewage?

MR. ZARWELL: Some overflows, Your Honor.

QUESTION: Well, some overflow. Now, let's talk about that. You say that that is not evidence of pathogens being discharged into the Lake?

MR. ZARWELL: All that is shown is that there is --

QUESTION: Well, is it evidence?

MR. ZARWELL: It is.

QUESTION: Well, then, don't say there isn't evidence of it.

MR. ZARWELL: Well, what I said is we didn't find a single pathogen in the Lake, Your Honor, and that the reason for this is --

QUESTION: It seems to me you didn't hunt for them.

MR. ZARWELL: Precisely. And the plaintiffs didn't hunt for them.

QUESTION: Well, I know, but there's evidence that raw sewage was discharged into the Lake.

MR. ZARWELL: We can get it to the rivers and to the Lake in Milwaukee. We have none of anything but speculation that gets them down to Illinois. This is the reason that I say we haven't found any in the Lake, period, much less in Illinois water.

QUESTION: Was there no expert testimony as to pathogens being discharged into the Lake before the district court?

MR. ZARWELL: Pathogens being discharged into -- being in sewage and sewage being discharged to the rivers and some to the Lake? Yes, Your Honor. In that context. But no evidence of the pathogen actually being found either in the water at Milwaukee or in Illinois.

QUESTION: How far is Milwaukee from the Illinois border, 50 miles?

MR. ZARWELL: Approximately 25.

QUESTION: 25 miles.

MR. ZARWELL: And incidentally in that context, Milwaukee draws its own drinking water from intakes within a mile and a half to eight miles of the various

discharges that we're talking about. If I could reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Karaganis.

ORAL ARGUMENT OF JOSEPH V. KARAGANIS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. KARAGANIS: Mr. Chief Justice, and may it please the Court:

While listening to Mr. Zarwell and reading the briefs filed before this Court, one wonders why the State of Illinois has been doing what it's been doing for the last ten years. We were before this Court ten years ago after this Court gave us two very distinct remedies. The first was a recognition by this Court in the case of Ohio v. Wyandotte Chemicals that a state has the right to apply its statutory and common law to abate the tortious conduct of a nonresident when that conduct causes injury within the forum state. That is Ohio v. Wyandotte Chemical, which, I might add, sustained the case law that had been developing for more than 100 years dealing with what I consider to be textbook or horn book examples of this kind of conduct.

QUESTION: What do you think the status of that case is now?

MR. KARAGANIS: The status of that case, Your Honor, is still good law. We think that was an 8-1 decision, Justice Douglas in his dissent wanting to take the case as an original

jurisdiction case.

QUESTION: Well, we're going to get to your second remedy.

MR. KARAGANIS: If I may, Your Honor, the case has not been overruled by this Court. It's still good law. More than that, Your Honor, the Ohio v. Wyandotte case, similar to, as we have emphasized several times, such famous cases as The Salton Sea Cases. They've stated it in a hypothetical example of a man firing a bullet across a state line, a man irrigating across a state line, where he dams up a river, across in one state, and then releases that dam to the injury of people in another state.

QUESTION: So is your -- what is your suggestion going to be? That this is not a federal question?

MR. KARAGANIS: No, Your Honor. We went back to the district court after this Court told us what to do in Illinois v. Milwaukee, and did exactly what these two cases told us to do We filed a three-count complaint, one is based on the federal common law enunciated by this Court in Illinois v. Milwaukee. The second was based on our state statute which is a long-arm statute exactly designed to deal with the situation of tortious conduct on coming across a state line, as well as our state common law. It was a three-count complaint.

The federal district court in hearing the evidence which I'll get to, found liability on all three counts.

Not only federal common law, but also state common law and state statutes. I must say, Your Honor, that the argument in Milwaukee is, is that ILlinois v. Milwaukee preempted all state law, so that when the Congress got around to saving all state law, there wasn't any state law to save.

QUESTION: In a case like this.

MR. KARAGANIS: Except, Your Honor, that in Ohio, as Ohio v. Wyandotte points out --

QUESTION: It saved, certainly saved state law within its own boundaries.

MR. KARAGANIS: Except, Your Honor, that since The Salton Sea cases there are a variety of cases where torts across state lines -- the examples go back into the 19th century, where torts across state lines, where, if the injury occurs in the victimized state, that state has authority to apply its law and to exercise in personam jurisdiction.

QUESTION: But what if it's preempted by Congress?

MR. KARAGANIS: No question. If Congress preempts it can't apply any state law. If Congress says, you shall not apply state law, there is no dispute. Congress can take --

QUESTION: Do you apply the same type of analysis, preemption analysis, to congressional preemption of federal common law as you do to congressional preemption of state law?

MR. KARAGANIS: Yes. You look for clear and unequivocal intent, Your Honor. Exactly. Clear and unequivocal

intent or a direct conflict, and that conflict --

QUESTION: Well, how about occupying the field?

MR. KARAGANIS: Your Honor, when you talk about occupying the field, there is a misstatement with respect to the occupation of the field, not only as to the --

QUESTION: I don't mean as to the facts of this particular case, but I mean, if one were to conclude that Congress in the Water Act of 1977 had occupied the field, so to speak, except as to the specific exceptions, would that be a preemption?

MR. KARAGANIS: I don't believe so, Your Honor, unless they explicitly stated so. For this reason; if you hold that Congress by regulating in this field and saying, we're intending to cover, we intend to cover all of the areas of water pollution; if you hold that that prevents the federal government or anybody else who has standing to invoke federal common law, from ever pursuing federal common law, you are then preventing primarily the Federal Government -- because we feel we still have state remedies -- primarily the Federal Government from ever dealing with a pollution situation, or indeed, as the Government has pointed out in its amicus brief, a variety of situations which either Congress could not have foreseen or because the regulatory structure has not been able to meet. Now, we're not as concerned about that because we do feel that for 200 years it has been recognized that a state

may seek to abate conduct which is causing injury inside the state. That's been black letter law for as long as this Court has virtually been in existence, and it can apply to state law. That's what Ohio v. Wyandotte was about. And indeed, one of the points we're trying to make to this Court --

QUESTION: I gather this argument is, no matter how explicit Congress may have been in the statute and said, no state law, no common law, nothing but this shall govern, you still say you'd be able to --

MR. KARAGANIS: Not at all, Your Honor. I concede your point. As Mr. Justice Stevens pointed out, Section 505(e) says, your state common law and state statutes shall be preserved. If Congress had said, no state law shall govern, we wouldn't be here under a state law claim. We have been following the instructions of this Court as to what to do.

QUESTION: In other words, the few words that I suggested to your friend, had they been uttered, might have taken state jurisdiction away?

MR. KARAGANIS: In this and literally dozens of other regulatory areas where there is currently a concurrent regulatory body of state statutory and common law.

QUESTION: And you say that this exception preserves state jurisdiction even as to discharges into interstate waters?

MR. KARAGANIS: It preserves what existed in common

law prior to the statute.

QUESTION: All right. And -- well, your argument is that it permits the state courts to adjudicate claims based on discharges into interstate waters?

MR. KARAGANIS: Yes, Your Honor, and I might add, when I say state courts -- and this is part of the constitutional scheme that Justice Harlan referred to in Ohio v. Wyandotte, we came here, just as Ohio did, as an original action. And Justice Harlan's analysis of the constitutional framework that existed, namely, that there are only two forums where a state with this kind of grievance can be constitutionally compelled to come, either this Court or, under the constitutional scheme, it was original but not exclusive jurisdiction where a state sued a citizen of another state.

Mr. Zarwell made an incredibly telling point as far as I'm concerned with respect to the law applied. We think, Your Honor, that if we were up here on a state claim, a state suing a citizen on a state claim in this Court, this Court under Erie v. Tompkins would be bound to it by an original action state law. Similarly, a federal district court or a state court --

QUESTION: Even though it's not -- even though a state versus individual is not a mandatory part of our original jurisdiction?

MR. KARAGANIS: Law applied, Your Honor, yes.

On a law applied basis, either the lower court, the state court, or this Court would have to apply Erie. Namely, it would have to look to the source of the law being asserted, the source of the substantive right being asserted. And the lower court, if the source of the substantive right were based on federal law, it would have to apply federal law, as this Court would. If the source of the right were based on state law, it would have to apply state law.

I might add, Your Honor, that Mr. Zarwell says -- and consider this situation: a private victim, a private victim of a tort across on the Illinois line, suffering from the pollutional conduct of Wisconsin or Illinois, he goes to sue and somebody says, no, you can't bring a private action for damages. The federal law has preempted not only state law -- and this is one of the points we're trying to make here. We've got state substantive rights and state remedies. And the only reason why we went to the federal district court and pursued our federal common law remedy is because this Court told us this was the thing to do. And when we went back there, we knew that several people would say that the outer limits of this federal common law are as yet uncharted. So we came in with state law --

QUESTION: I was under the impression that when you were here before that the Court when it remanded said that the application of federal law in this case was required.

MR. KARAGANIS: Excuse me, Your Honor, and this is one of the points we go through in detailed analysis. There are two lines of cases coming out of Erie v. Tompkins. There is the so-called --

QUESTION: I'm just asking you about one case.

MR. KARAGANIS: Well, okay.

QUESTION: In one --

MR. KARAGANIS: In that case, that case did not say. It said that in the interpretation, as we interpret the Illinois v. Milwaukee decision, it says that in the interpretation of the federal common law, federal law must govern the interpretation of that federal common law. We have no dispute with that question.

QUESTION: Well, the case expressly said that the application of federal law was required in this kind of case.

MR. KARAGANIS: Well, Your Honor --

QUESTION: Didn't it or not?

MR. KARAGANIS: We don't believe it did, Your Honor.

QUESTION: If I can find it, could I read it to you? Is it --

MR. KARAGANIS: Yes.

QUESTION: Well, Footnote 6 said, "Thus we are required to apply federal law in this case."

MR. KARAGANIS: With all due respect to the Court, Footnote 6 is based on the Lincoln Mills decision, and we've

gone back to the Lincoln Mills decision and what Lincoln Mills says is that, as Deitrick v. Greaney and D'Oench, Duhme, and a variety of other cases --

QUESTION: Well, you may think it was based on Lincoln Mills, but the text of it came out of interstate waters.

MR. KARAGANIS: Your Honor --

QUESTION: That footnote was to text that was discussed in interstate waters cases.

MR. KARAGANIS: With all due respect to the Court --

QUESTION: Not to the Court, to me.

MR. KARAGANIS: To you, Justice White. With all due respect to you, we have read Justice Douglas's opinion and this Court's opinion with great care. We find that the constitutional basis that he is asserting, or articulating this federal common law -- now this is between a state and a citizen, now, not between a state and a state -- is based on an interstitial -- providing an interstitial remedy for the --

QUESTION: He said it was not only because of the nature of the parties in this case.

MR. KARAGANIS: It was the nature of the federal interest as manifested by about ten statutes. And he chain-cited about ten statutes and he said, these are interstitial remedies.

QUESTION: But you're suggesting to us now that as a result of that case you were told to go back and make a state law claim?

MR. KARAGANIS: As a result of that case we were told to go back and make a federal law claim, and as a result, Your Honor, of Ohio v. Wyandotte, we also inserted our state law claims. Now the irony and the anomaly that this Court faces is that this Court says, look, in Illinois v. Milwaukee we destroyed state law. We destroyed the application of state law --

QUESTION: In this kind of case.

MR. KARAGANIS: -- in this kind of case, which has existed for 200 years. And then, five months later, Congress comes back and says, well, look, we wanted to preserve any kinds of state common law remedies that were available and that had long been available. And I might add, Your Honor, that five months later in the '72 Water Act is a direct pickup from the 1970 Air Act. And that savings clause, Your Honor, was developed and dealt with law that preexisted prior to Illinois v. Milwaukee. So what we're trying to say here is that there are parallel state and federal substantive wrongs and remedies.

QUESTION: Isn't it possible that that exception should be read as limited to discharges within the four corners of the state itself? State law applies there, but not to a situation like this?

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MR. KARAGANIS: As Mr. Justice Burger suggested, if Congress had wanted to do that, Congress could have said it did, because --

QUESTION: There is no question Congress in this whole displacement or preemption or whatever you call it, never gives us the help it ought to give us.

MR. KARAGANIS: Your Honor, and what I'm suggesting to you is, as this Court has suggested many times, if Congress wants the Court to treat state law as gone, all it need do is say so. And the problem we have here --

QUESTION: No, but my question to you is, whether or not the exception may not be read as limited to discharges within the four corners of the state?

MR. KARAGANIS: We don't believe so, Your Honor, because if it meant that it would have said so, and it meant preexisting common law, which included these kinds of state law remedies.

Now, if I can, there's been a number of things that have been said here about the proofs in this case, and what -- the so-called conflicts with respect to the federal statutes. Let me suggest to you that this was not a question of experts coming in and hypothesizing with one another. The court asked several times, are there controls on the overflows under the federal scheme? The answer is, zero. No controls. What are we talking about here? Measured values found by

Judge Tone -- found by Judge Grady in the district court -- and what happened here, I might add, is that -- and when we talk about the two-court rule in a review of the facts, that -- Judge Grady entered findings of fact, Judge Tone and Judge Fairchild, who happens to come from Wisconsin, the Chief Judge of the 7th Circuit, ordered us to file supplemental memoranda where he wanted an exhaustive, the court wanted an exhaustive review of the facts. We did that. Judge Tone then went through another exhaustive review of the facts where he found, one, billions of gallons of fecally contaminated water coming from this material into Lake Michigan. Two, the court asked, are there pathogens going into Lake Michigan?

QUESTION: Do you think that had anything to do with his decision to resign from the bench?

MR. KARAGANIS: Your Honor, Judge Fairchild is still there. No, I don't think that had anything to do with it, Your Honor. And the fact is, is that we've got billions of gallons going in, we've got measured test data as to what's going in. The statement is made, well, maybe it comes down. We have measured tests by Milwaukee's own witnesses saying, of course it comes down. The only debating point is, how many times a year it comes down? The pollution coming out of Milwaukee clearly comes down. We also have test data, exhaustive test data, showing that the dilution that's involved under these circumstances is minimal.

Mr. Chief Justice, you asked the question, how did we get into this thing in the first place? Or you asked the question about, what if you'd appointed a special master?

Ironically, this Court appointed a special master years ago, in 1959, in the case of Wisconsin v. Illinois, and it was Judge Maris's work in the Wisconsin v. Illinois case where Wisconsin said to Chicago, dump your sewage into Lake Michigan, this is a good place to dump it. It was then that we learned of the consequences of low dilution, the consequences of long travel. Virtually all of the witnesses below were witnesses that were provided by either government agencies or some of the top universities, not based on hypothetical opinions.

QUESTION: Well, Wisconsin's stand in the '59 litigation was that Illinois was just draining Lake Michigan and dumping it all into the Chicago River.

MR. KARAGANIS: And down into the Mississippi; exactly. And in that case Wisconsin suggested as a remedy that we dump it back into Lake Michigan. And the master found, and this Court adopted, I think, that Lake Michigan is too fragile a body of water to sustain this kind of sewage under these kinds of circumstances. And that's what -- let's, if we can, go to the federal act, because this is one of the things, the misconceptions that's involved here.

The federal act is not all-encompassing. The federal

act not only -- while preserving state remedies, as this Court has been dealing with at a number of times -- deals with what they call technology-based effluent limitations. When we first were up before this Court we had one way to handle the thing. It was very similar to the Air Act. If you wanted a certain water quality out of a specialized body of water like Lake Michigan, you said, let's have an implementation plan to meet that quality.

We were up here because Milwaukee never developed implementation plans. We are still at a point where we're talking about planning 15 years later.

Number two, when the Act was passed, it said, we have had enough with squabbling about implementation plans. Across the board, uniformly, we're going to establish a minimum technology-based limitation, a minimum technology-based limitation. The interpretation of that minimum technology-based limitation by Wisconsin authorities is there is no technology so it will be zero. It's been that way for the last ten years.

The Act, the House of Representatives was not satisfied with this technology-based limitation. It said, look, that 1965 Federal Water Pollution Control Act gave us some good remedies. And with respect to those remedies, one of the things that we want to do is say, look, if we've got a Lake Tahoe, or if we've got a "Queddico," or if we've got a Lake Michigan, or if we've got some other body of water, these

technology-based limitations aren't going to be enough.

I suggest, Your Honor, and the record shows, that in the ten years we've been around -- under this Act eight years -- Wisconsin has never adopted technology-based effluent limitations, nor has it adopted water quality standards-based limitations. And it's not enough to say, well, Illinois could have jumped in and asked that these regulations be passed.

I happen as part of my practice to represent sewage treatment agencies like Milwaukee as well as the State of Illinois. The fact is that the regulations that would have allowed this kind of process to be developed under the federal scheme were not even promulgated in tentative form until December of 1978, almost a year after the judgment came down -- I'm sorry, several months after the judgment came down.

More than that, Your Honor -- and I must emphasize this -- where we're dealing right now is a situation where it is absolutely essential, 15 years after we've been into this litigation, with ample proof -- ample proof on the record, and the record's not up before this Court, because the Court hasn't asked for it yet, ample proof in the record for both the liability under state law, the liability under state statute, and the liability under federal common law.

We suggest that there must be an effective remedy that says, thou shalt stop within a reasonable period of time. Thirteen years is what the judge gave them, because they said

that's what they needed: thirteen years to do a cleanup. But in order to finish that thirteen-year job, you've got to get started now. In terms of cost effectiveness, let me suggest that the way the statute talks about cost effectiveness after you deal with technology-based, they said, if you think keeping a clean lake clean costs too much, don't call it clean anymore, call it dirty. It's called downgrading. And we cite the specific section of the federal regulations that deal with it.

We have a very precious lake there. It serves a lot of people for very valuable purposes. We don't think we should call that lake dirty. Neither did the federal district judge, neither did the 7th Circuit. We think that this Court should affirm, with respect to the collection remedy, it should affirm consistent with Ohio v. Wyandotte, consistent with Illinois v. Milwaukee, with the 200-year history of the states' rights to abate nuisances which are coming across their lines, to abate the bullet situation across the state line, to abate the floodwater situation across the state line, for a citizen now, this is directly related to Erie v. Tompkins -- for a citizen of another state, should be preserved. We think, also, that with respect to -- and I realize that it is part of another petition for certiorari -- that to the extent that there are fact questions involved, that the appellate courts are not the place to deal with those fact questions.

And we think that the 7th Circuit in raising, even modifying the judgment below, should have dealt with that.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Levander.

ORAL ARGUMENT OF ANDREW J. LEVANDER, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. LEVANDER: Thank you, Mr. Chief Justice, and may it please the Court:

The primary issue in this case, from the Government's point of view, is whether the Clean Water Act preempts the federal common law of nuisance that this Court recognized and applied in this very case eight years ago. And that question, as I'll point out in a moment, as Mr. Justice Brennan has said, is a question of congressional intent.

Now, at the outset I would like to point out that petitioners in this case in the Court of Appeals expressly conceded that the Clean Water Act does not preempt federal common law of nuisance. And I would point Your Honors' attention respectfully to page A7 of that act, where the Court of Appeals notes this concession.

In any event, that concession is well warranted, in the Government's view. As the Chief Justice has pointed out, it is very simple for Congress to put into an act an intent to preempt and it did so in Section 312(f) with regard to a very select kind of regulations.

QUESTION: Well, we've held in many cases, have we not, that where Congress has occupied the field, even though it has not expressly said we intend to preempt state law, state law is nonetheless preempted?

MR. LEVANDER: State law? That is correct. But when one does that, that is a reflection of the Court's finding that the application of state law would interfere with congressional design and therefore it must have been Congress's intent to preempt.

Now, in this case, we have several provisions of the statute which reflect quite an opposite intent in our view. First, as was mentioned before, we have Section 505(e), which specifically says that people who have rights under the common law and other statutes still have those rights.

Second, we have Section 510 which says that the states may impose stricter requirements. Now, petitioners in their argument suggested that the statute clearly was the end-all-and-be-all for federal law, but they neglect to mention Section 511. Section 511 of the Act says that other federal law may impose higher requirements, and that nothing in the Act is intended to restrict or limit those other federal bodies of law.

Now, the legislative history of the Act shows that Congress was fully aware of and focused on federal common law of nuisance, and that it intended to preserve the rights and

remedies under that body of law. First, there is general language in both the reports emphasizing that the Section 505(e) makes clear that compliance with the Act is not a defense to nuisance actions or other kinds of actions. Second, there's a colloquy in the Senate between Senators Muskie, Griffin, and Hart, Senator Muskie being the primary sponsor of the Act, in which Senator Griffin inquires about the effect of this Act on then-pending litigation in the so-called Reserve Mining suit which was brought by EPA and which had three bases, one of which was, as Senator Griffin noted, a public nuisance claim; and if you go to the decision, they say the only public nuisance claim is a federal common law nuisance claim. Senator Muskie replies that, generally, that the Act will not affect that suit. And moments later, Senator Hart says, based on my understanding of what my brother has just said, from Maine, this Act, passage of this Act will not affect the counts of the Reserve Mining suit under the Refuse Act, under the old Pollution Control Act, and of other law, that is, the common law.

So, another piece of legislative history which is not explored fully in the briefs occurs in a House debate in which Representative Dingell, who is a sponsor of the Act in the House, refers with approval, and quotes from a report issued before the enactment of the Clean Water Act, but which was not issued in conjunction with the Clean Water Act. This is

HR 92-1401. That report urges as one of its conclusions in analyzing problems of oil discharges that the Coast Guard fully and vigorously employs the federal common law of nuisance -- Federal common law -- I mean, there's no equivocation -- to remedy oil spills. And it specifically discusses this Court's decision in Illinois v. Milwaukee, the Reserve Mining case, and another case called Ira S. Bushey, all of which were federal common law nuisance suits, and discusses them approvingly and in detail. And that's on pages 6 and 32 and 33 of that report.

So, insofar as the question of correction is a matter of congressional intent, this is not a situation in which we have to guess. Congress focused, and it said what it intended to do, that is, to let people preserve their rights under the federal common law of nuisance.

QUESTION: Are you relying on a quote from a single member of the House of Representatives on the floor of the House in reference to another report as being a statement of the will of Congress?

MR. LEVANDER: Well, first of all, we have the sponsor in the Senate and Senator Hart in particular who focused on the federal common law nuisance claim and said that the Act would not affect it. That's, it seems to me, a fairly focused discussion. Second, we have the statement in the Senate report accompanying the Act which says that compliance

with the Act will not be a defense to other kinds of actions. And third, we have Congressman Dingell who is a sponsor of the Act in the House referring and quoting from this report on the floor of the House. It's just not likely that Congress was therefore, as petitioners initially suggest in their briefs, completely unaware of the federal common law of nuisance. To the contrary, they -- at least some committees of Congress, and the report suggests that they were aware of this remedy.

Now, the Section 505(e), the savings clause, is part of a pattern of congressional enactment, I might point out. In numerous other acts concerning the environment, a similar savings clause appears and this, in our view, is indicative of continuing congressional intent to preserve these common law remedies. And I would point out to the Court legislation which is now pending in Congress and which may be enacted very shortly and of which the Court should be aware, and that is the so-called "superfund" legislation which has passed the Senate as S. 1480.

Now, Section 107(i) and -(j) of that bill, which is now pending before the House, specifically states that the remedies under the Act shall -- and I'm quoting now -- shall not "affect or modify in any way the obligations or liability of any person under any other provision of state or federal law, including common law."

So, I think that it is, this is indicative of Congress's continuing intent --

QUESTION: And why not turn that argument around and say that Congress wanted to be sure to preserve federal common law, knew how to do it, But it didn't do it quite that explicitly in 505(e)?

MR. LEVANDER: Well, but, it referred to the common law, and maybe they're just getting better at preserving it and making it absolutely clear.

Now, in the last couple minutes I wish to address, if I might, the claims that there are lots of adequate remedies for Illinois under the federal Act, and that therefore the doctrines of primary jurisdiction and exhaustion of administrative remedies are applicable here.

I would point out, first of all, that there is no remedy equivalent to a nuisance remedy that is decided or applied by EPA. In fact, when EPA thinks that there is a violation of the Act or a permit, it must go to district court to litigate that matter. Therefore, there is no agency expertise with regard to the particular violation, a particular situation or the fact that fecal coliform and pathogens are moving down a particular body of water. When EPA regulates, of course, it's regulating on a nationwide basis.

Second, I would point out that the issue in the instant suit, the presence of these pathogens, is not something

that EPA has regulated about. There is no EPA regulation regarding pathogens. And I would further point out that all the remedies that are pointed out at pages 34 and 35 of petitioners' brief consist and require --

QUESTION: There's a regulation against discharging raw sewage into the Lake, isn't there?

MR. LEVANDER: There is a regulation requiring that all discharges be covered by a permit, but there is no specific standard such as there is for, let's say, what they call biological oxygen demands.

QUESTION: What is there a standard about?

MR. LEVANDER: Biological oxygen demand, pH, and some other things which are quantifiable and they are regulated by EPA's regulations. That is, 30-30 rule, they call it. But there is no such regulation regarding pathogens.

Now, all the remedies that are suggested at pages 34 and 35 of petitioners' brief involve only asking, hat in hand, either Wisconsin or EPA to do something about this situation. There is no way for them to enforce their own standards or protect, necessarily, their waters.

QUESTION: Is it your position that what the Court did with respect to the pollution standards here is inconsistent with your view of preemption?

MR. LEVANDER: Well, we have not taken any position on the remedy in this case.

QUESTION: Well, I'm asking you to. -- No, no, I'm asking whether what the Court below did in reversing the district court's permission, or imposition of higher treatment standards?

MR. LEVANDER: Well, we think that as the Court pointed out in Footnote 5 of the Illinois v. Milwaukee decision, that although the federal statute and regulations do not mark the outer bounds of federal common law, they are certainly guidelines.

QUESTION: Well, the Court of Appeals did reverse the district court in some respects.

MR. LEVANDER: That's right. Now, using federal standards as guidelines, where there were such federal standards --

QUESTION: Do you think that is inconsistent with your position in --

MR. LEVANDER: No, I don't, Your Honor.

QUESTION: And you think the Court of Appeals was simply saying that -- I suppose they're saying that the proof of nuisance had simply failed.

MR. LEVANDER: Or that the remedy was inappropriate to curb that particular kind of nuisance, that equity in applying nuisance law --

QUESTION: Well, they discovered there wasn't any violation.

MR. LEVANDER: Well, I think equity says that you should tailor the remedy to a particular kind of nuisance.

QUESTION: No, there -- there wasn't any nuisance.

MR. LEVANDER: Well, I think they found that there was a nuisance insofar as pathogens were being dumped into large amounts of -- a large number of pathogens were being dumped into Lake Michigan and entering Illinois waters.

QUESTION: Well, I know, but suppose there had been a lot of pathogens found in Illinois waters or where there was effluent being dumped into the Lake, but that the only place that came from was from treated sewage. Just suppose that. Now, I don't -- I wouldn't think --

MR. LEVANDER: And the treated sewage was --

QUESTION: Was full of pathogens, but otherwise it absolutely complied with the permit.

MR. LEVANDER: I would say in that case that if there was a showing that there was a health risk to Illinois inhabitants that the federal common law of nuisance would allow the judge to impose --

QUESTION: Well, that isn't what the Court of Appeals said.

MR. LEVANDER: Well, I think that the Court --

QUESTION: The Court of Appeals said that the district court was wrong in imposing higher standards on treated sewage.

MR. LEVANDER: Well, because it didn't believe that the extra limitations that were imposed by the district court were necessary to protect the health of Illinois inhabitants, I take it.

QUESTION: You mean, even though it was full of pathogens?

MR. LEVANDER: Well, but that those limits were sufficient to protect Illinois.

I see that my time has expired.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Zarwell?

ORAL ARGUMENT OF ELWIN J. ZARWELL, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. ZARWELL: Mr. Chief Justice, and may it please the Court:

A few comments on that last colloquy. The comment here of counsel is that there is no regulation of pathogens. This completely disregards EPA's own affidavit and one of the things that they are directing, the effluent limitations that they impose. One of the things they are directing those effluent limitations toward is the elimination of pathogens in the procedures that reduce those effluent levels.

Likewise, so far as the Court of Appeals reversing the level of the required effluent standards imposed by the district court, this was on the basis of a lack of proof of

any efficacy to a higher level of treatment related to the type of exposure that Illinois was claiming.

QUESTION: It wasn't because they thought there was any preemption?

MR. ZARWELL: No, it was not a preemption basis. No, sir, Your Honor.

We also have counsel saying that there's no equivalent remedy for EPA to a nuisance action. If they wanted to enforce a permit they'd have to go to court. I don't know where counsel figures that EPA is enforcing nuisance remedies. It's the same place. The only difference is that under the statute and under the regulations the Court knows how to enforce and must enforce the permit requirements.

As far as the "superfund" legislation is concerned, we were given a copy of its legislative history just before the lunch break and told that it would be referred to by counsel. We have reviewed it; I don't think that there's anything in that legislation that has any bearing upon this case whatsoever.

QUESTION: Well, it hasn't passed, has it?

MR. ZARWELL: It has not passed. It is just talk in the Congress at the present time. It has no validity whatsoever. It is just discussion.

So far as the commentaries between Senators Muskie, Griffin, and Hart, we have quoted the various colloquies

between those persons and one of the things that we said is there was a similar colloquy with Congressman Wright. Not only is it similar, it is identical to what Senator Muskie said, and it does not include federal common law.

As to the applicability of Section 511 as referred to by counsel, of course we did not refer to it. It's not applicable to this case. There is no other federal law that is being relied upon by Illinois or Michigan.

As to the concession of preemption that counsel talks about, we grant --

QUESTION: Mr. Zarwell, can I stop you on that 511 point?

MR. ZARWELL: Yes, sir.

QUESTION: My understanding is they are relying on another federal law in the sense of federal common law.

MR. ZARWELL: Federal common law; but this is -- 511 is going to other federal statutes not being --

QUESTION: But your point is that 511 in terms relates only to other federal statutes?

MR. ZARWELL: That's correct, Your Honor.

QUESTION: I see.

MR. ZARWELL: Going back to the so-called concession of no preemption being present, the Court of Appeals does make that statement in its decision. I have a transcript of the oral argument with me. There was no such concession.

There was a discussion and what it evolved around was whether or not there was a so-called common law of the statutes, which is the way Judge Tone dealt with it, and the way I dealt with it on argument before the Court of Appeals saying that, in essence, preemption is not the proper word to be used here in displacing federal common law by federal statutory law. Rather, it is the control or common law of the statute impacting on federal common law. But Judge Tone carried that into his decision as saying that there was a concession that there was no preemption. We disagree with that construction.

MR. CHIEF JUSTICE BURGER: Mr. Zarwell, your time has expired.

MR. ZARWELL: Sorry, Your Honor, thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Whereupon, at 2:02 o'clock p.m. the case in the above-entitled case was submitted.)

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No. 79-408

CITY OF MILWAUKEE ET AL.

V.

STATES OF ILLINOIS AND MICHIGAN

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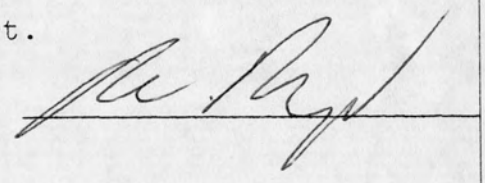
BY: 

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