

Wiley Rein Files *Amicus* Brief in Support of Certiorari in Key Global Warming Case, Addressing Important Justiciability Doctrines

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Wiley Rein LLP has filed an *amicus curiae* brief urging the Supreme Court of the United States to grant certiorari in *AEP v. Connecticut*, No. 10-174, the first "global warming" case to reach the Court after its 2007 decision in *Massachusetts v. EPA*. In this remarkable case, several states and private land trusts sought a federal court order compelling percentage reductions in six defendants' carbon dioxide emissions for at least the next decade. This is the first in a series of "global warming" cases seeking monetary damages or judicial decrees limiting carbon dioxide emissions in the energy, oil and gas industries, which are intended to alter the way energy is produced and sold throughout this country.

The Court of Appeals for the Second Circuit concluded, contrary to all the trial courts to have evaluated these types of cases, that this suit was cognizable in the federal courts. Among other things, the panel found that the plaintiffs had standing to sue the defendant energy companies, despite the undifferentiated nature of global emissions, which are produced by millions of other global actors and diverse natural phenomena and should preclude them from establishing the "causation" aspect of constitutional standing. The panel also rejected the applicability of the political question doctrine, under which courts have traditionally declined to resolve cases that are brought "without an initial policy determination of a kind clearly for nonjudicial discretion." The Second Circuit was unfazed by the fact that Congress and the EPA, the democratically accountable branches, have to date been unable or unwilling to impose the very sort of emissions caps here sought.

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The brief was filed in support of the Petitioner energy companies on behalf of the Cato Institute, which promotes principles of limited constitutional government, and is concerned that allowing judges to determine policy issues would improperly expand the role of the federal courts, relieving the legislative and executive branches of political accountability for sweeping changes to national policy. The brief argues that, "[i]f allowed to proceed, this case and others like it will require federal judges to assume the role of environmental, industrial, and economic policy czars, forcing them to act as Article III administrators over some of the most hotly-contested and momentous issues of our time."

Wiley Rein recently represented the Cato Institute in another global warming case, *Comer v. Murphy Oil*, which sought millions in damages from Hurricane Katrina, which was allegedly made more destructive by global warming. There, the district court dismissed the case for lack of standing and on the basis of the political question doctrine. A panel of the United States Court of Appeals for the Fifth Circuit reversed that decision, but the panel decision was subsequently vacated by the *en banc* court. Wiley Rein submitted an *amicus* brief to the *en banc* court prior to its dismissal of the appeal, arguing that the case was properly decided by the district court due to a lack of standing and the political question doctrine. That case is presently before the Supreme Court of the United States on a petition for a writ of mandamus related to the *en banc* proceeding. *In re Comer et al.*, No 10-294 (Aug. 30, 2010).

The Wiley Rein brief in *AEP v. Connecticut* was submitted by Andrew G. McBride, Megan L. Brown, Brendan T. Carr and Emily F. Schleicher.