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DEFENDERS OF WILDLIFE · EARTHJUSTICE  
FRIENDS OF THE EARTH · OCEANA  
PHYSICIANS FOR SOCIAL RESPONSIBILITY  
SIERRA CLUB · THE WILDERNESS SOCIETY**

January 28, 2003

The Honorable Orrin Hatch  
Chairman, Senate Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Patrick Leahy  
Ranking Member, Senate Committee on the Judiciary  
United States Senate  
Washington, DC 20510

RE: Sixth Circuit Nomination of Jeffrey S. Sutton

Dear Chairman Hatch and Ranking Member Leahy:

We are writing to express our very serious concerns with the nomination of Jeffrey S. Sutton to a lifetime position on the U.S. Court of Appeals for the Sixth Circuit, which decides the fate of federal environmental and other safeguards in Kentucky, Michigan, Ohio, and Tennessee.

In his writings and speeches, Mr. Sutton has advanced a view that pits the federal government against the states, doing violence to notions of cooperative federalism that underlie most environmental, health, and safety legislation. He has characterized a string of cases challenging the federal government's authority to regulate as "invariably a battle between the states and the federal government over legislative prerogative" and a "zero-sum game—in which one, or the other law making power must fall." Mr. Sutton's views on states' rights are not even shared by the vast majority of states. For example, thirty-six states advocated in favor of the federal Violence Against Women Act in *United States v. Morrison*. Only one state, Alabama, represented by Mr. Sutton, advocated against federal authority. Likewise, nine northeastern states recently sued the Bush Administration for not aggressively enforcing the Clean Air Act. These states clearly do not share Mr. Sutton's view that federal rules "invariably" and improperly encroach on state legislative prerogatives.

Mr. Sutton's positions on federal constitutional power and citizen access to the courts are extreme and go far beyond the already disturbing 5-to-4 Rehnquist Supreme Court rulings on these topics. For example:

- Mr. Sutton argued to the U.S. Supreme Court in *Solid Waste Authority of Northern Cook County (SWANCC) v. U.S.* that the federal government did not have authority under the Constitution's Commerce Clause to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds. No less an authority than Justice Oliver Wendell Holmes writing for a 7-2 majority of the Supreme Court in 1920 called the protection of migratory birds a "national interest of very nearly the first magnitude" and held that "[i]t is not sufficient to rely upon the States." By contrast, Mr. Sutton called these concerns "uniquely a matter of local oversight." The *SWANCC* Court decided the case on statutory grounds, declining to decide Mr. Sutton's constitutional argument.
- Mr. Sutton has been a leading advocate for aggressively limiting private causes of action that permit citizens to bring civil rights and environmental justice claims to the courts. In *Alexander v. Sandoval*, he convinced a deeply divided Supreme Court that regulations under Title VI of the Civil Rights Act, which form the primary source of rights to ensure environmental justice, did not permit citizens to sue the states directly. Mr. Sutton asked the *Sandoval* Court to go much further: his position would have also prevented vindication of environmental claims under § 1983 of the Civil Rights Act, a question specifically left open by the *Sandoval* Court.
- Mr. Sutton has also advocated for a dramatic narrowing of the category of federal rights that can be enforced under the Court's landmark 1908 ruling in *Ex Parte Young*. Effective, enforceable, cooperative federalism in environmental laws is dependant upon *Ex Parte Young*, which permits suits to enjoin state officials from violating federal law even where the Eleventh Amendment would bar a suit against the state seeking money damages. In *Westside Mothers v. Haveman*, Mr. Sutton took the extreme position that federal legislation passed under the Constitution's Spending Clause never creates federal mandates that can be enforced under *Ex Parte Young*.

Another disturbing aspect of the briefs Mr. Sutton filed in the cases discussed above is his tendency to cavalierly disregard precedent that is unfavorable to his position and his willingness to instruct judges to ignore such precedent in ruling in his favor. For example, in his opening brief in *Westside Mothers*, Mr. Sutton ignored a landmark Supreme Court case on point, *Maine v. Thiboutot*, and in a reply brief, admitting his error, advised the district judge not to "be overly concerned with whether its decision can be reconciled with the facts—as opposed to the rationale—of *Thiboutot* and its progeny." In that same brief, he argued that Spending Clause legislation creates a federal/state "contract" despite a 1985 Supreme Court ruling in *Bennett v. Kentucky Dep't of Education* to the contrary, which he again failed to cite. After convincing a district court

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to adopt his position, the Sixth Circuit reversed, finding that "binding precedent has put the issue to rest."

In the words of Chief Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals, we are in the midst of a "third wave of judicial activism," activism being led by judges and advocates who purport to be conservatives. Mr. Sutton's extreme views on federal authority and environmental access to courts, coupled with his apparent disdain for unfavorable precedent, give every indication that he would be a leading supporter of this new and virulent form of activism that is advancing an anti-environmental policy agenda from the federal bench. We urge you to give Mr. Sutton's nomination the closest scrutiny.

Thank you considering these important environmental concerns with Mr. Sutton's record and for taking seriously your Constitutional advise and consent responsibility.

Sincerely,

Paul Schwartz  
 National Campaigns Director  
 Clean Water Action

William Snape  
 Vice President and Chief Counsel  
 Defenders of Wildlife

Sara Zdeb  
 Legislative Director  
 Friends of the Earth

Robert K. Musil, PhD, MPH  
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Leslie Jones  
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Doug Kendall  
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c: Members, Senate Committee on the Judiciary

Contact: Doug Kendall, Community Rights Counsel 202 296-6889  
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#### Executive Summary

#### Sixth Circuit Nominee Jeffrey S. Sutton A Threat to the Constitution and the Nation's Environmental Protections

Jeffrey S. Sutton, President Bush's nominee for a lifetime position on the U.S. Court of Appeals for the Sixth Circuit, is one of the country's leading advocates for an extreme and virulent form of judicial activism that would limit citizen access to justice and seriously undermine the ability of the federal government to protect the environment.

In his writings and speeches, Mr. Sutton has advanced a view that pits the federal government against the states, doing violence to notions of cooperative federalism that underlie most environmental, health, and safety legislation. He has characterized a string of cases challenging the federal government's authority to regulate as "invariably a battle between the states and the federal government over legislative prerogative" and a "zero-sum game—in which one, or the other law making power must fall." Mr. Sutton's views on states' rights are not even shared by the vast majority of states. For example, thirty-six states advocated in favor of the federal Violence Against Women Act in *United States v. Morrison*. Only one state, Alabama, represented by Mr. Sutton, advocated against federal authority. Likewise, nine northeastern states recently sued the Bush Administration for not aggressively enforcing the Clean Air Act. These states clearly do not share Mr. Sutton's view that federal rules "invariably" and improperly encroach on state legislative prerogatives.

Mr. Sutton's positions on federal constitutional power and citizen access to the courts are extreme and go far beyond the already disturbing 5-to-4 Rehnquist Supreme Court rulings on these topics. For example:

- Mr. Sutton argued to the U.S. Supreme Court in *Solid Waste Authority of Northern Cook County (SWANCC) v. U.S.* that the federal government did not have authority under the Constitution's Commerce Clause to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds. No less an authority than Justice Oliver Wendell Holmes writing for a 7-2 majority of the Supreme Court in 1920 called the protection of migratory birds a "national interest of very nearly the first magnitude" and held that "[i]t is not sufficient to rely upon the States." By contrast, Mr. Sutton called these concerns "uniquely a matter of local oversight." The SWANCC Court decided the case on statutory grounds, declining to decide Mr. Sutton's constitutional argument.
- Mr. Sutton has been a leading advocate for aggressively limiting private causes of action that permit citizens to bring civil rights and environmental justice claims to the courts. In *Alexander v. Sandoval*, he convinced a deeply divided Supreme Court that

## Nomination of Jeffrey S. Sutton – Page 2

regulations under Title VI of the Civil Rights Act, which form the primary source of rights to ensure environmental justice, did not permit citizens to sue the states directly. Mr. Sutton asked the *Sandoval* Court to go much further: his position would have also prevented vindication of environmental claims under § 1983 of the Civil Rights Act, a question specifically left open by the *Sandoval* Court.

- Mr. Sutton has also advocated for a dramatic narrowing of the category of federal rights that can be enforced under the Court's landmark 1908 ruling in *Ex Parte Young*. Effective, enforceable, cooperative federalism in environmental laws is dependant upon *Ex Parte Young*, which permits suits to enjoin state officials from violating federal law even where the Eleventh Amendment would bar a suit against the state seeking money damages. In *Westside Mothers v. Haveman*, Mr. Sutton took the extreme position that federal legislation passed under the Constitution's Spending Clause never creates a federal mandate that can be enforced under *Ex Parte Young*.

Another disturbing aspect of the briefs Mr. Sutton filed in the cases discussed above is his tendency to cavalierly disregard precedent that is unfavorable to his position and his willingness to instruct judges to ignore such precedent in ruling in his favor. For example, in his opening brief in *Westside Mothers*, Mr. Sutton ignored a landmark Supreme Court case on point, *Maine v. Thiboutot*, and in a reply brief, admitting his error, advised the district judge not to "be overly concerned with whether its decision can be reconciled with the facts—as opposed to the rationale—of *Thiboutot* and its progeny." In that same brief, he argued that Spending Clause legislation creates a federal/state "contract" despite a 1985 Supreme Court ruling in *Bennett v. Kentucky Dep't of Education* to the contrary, which he again failed to cite. After convincing a district court to adopt his position, the Sixth Circuit reversed, finding that "binding precedent has put the issue to rest."

Mr. Sutton's extreme views on federal authority and environmental access to courts, coupled with his apparent disdain for unfavorable precedent, strongly suggest that Mr. Sutton's nomination to the Sixth Circuit poses a threat to the Constitution and enforcement of our nation's core environmental protections.

Contact: Doug Kendall, Community Rights Counsel 202 296-6889  
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**Sixth Circuit Nominee Jeffrey S. Sutton  
A Threat to the Constitution and Fundamental Environmental Protections**

Jeffrey S. Sutton, nominated by President Bush for a lifetime position on the U.S. Court of Appeals for the Sixth Circuit, is one of the country's leading advocates for a new and virulent form of judicial activism that is advancing an anti-environmental policy agenda from the federal bench with little regard for precedent and constitutional text. In his writings and speeches, Mr. Sutton has been extraordinarily outspoken in his views on limiting federal constitutional power and citizen access to justice. Mr. Sutton's views are extreme and go far beyond the already disturbing 5-to-4 Rehnquist Supreme Court rulings on these topics. His views threaten enforcement of environmental protections across the board.

In the past decade, the Supreme Court has struck down federal legislation at a rate rivaled only by the discredited "Lochner-era" Court, which blocked the labor reforms of the Progressive Era and the Congressional response to the Depression in the early stages of the New Deal.<sup>1</sup> The Court's recent rulings, often grouped together under the inaccurate label of "federalism," have undermined important laws protecting women, senior citizens, minorities, the disabled, and the environment.

These rulings have engendered withering criticism from both sides of the political spectrum. For example, Judge John Noonan, a conservative appointed by President Reagan to the Ninth Circuit, declared in a recent book entitled *Narrowing the Nation's Power* that the Rehnquist Court has already acted "without justification of any kind" in doing "intolerable injury to the enforcement of federal standards."<sup>2</sup> "The present damage," Judge Noonan warns, "points to the present danger to the exercise of democratic government."<sup>3</sup>

A July 2001 report entitled *Hostile Environment: How Activist Federal Judges Threaten Our Air, Water, and Land*, released jointly by Natural Resources Defense Council, Community Rights Counsel, and Alliance for Justice, details how Supreme Court rulings and even more extreme rulings by lower federal courts are "threatening the very core of environmental law."<sup>4</sup>

<sup>1</sup> See JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER* 13 (2002) ("This state of affairs invites comparison with other moments in the history of the United States produced by positions taken by the Supreme Court - with *Dred Scott v. Sandford*, holding that Congress could not constitutionally prevent property, including slaves, from being brought into federal territory; with *Lochner v. New York*, holding that a state could not constitutionally regulate the hours of work of employees of business; and with *Carter v. Carter Coal Company*, holding that Congress could not constitutionally regulate the labor relations of a corporation whose business was coal mining. \* \* \* Each decision is recognized today as unjustified by the Constitution.").

<sup>2</sup> NOONAN, *supra* note 1, at 154-55.

<sup>3</sup> *Id.* at 140.

<sup>4</sup> HOSTILE ENVIRONMENT is available on line at [www.communityrights.org/combatjudicialactivism/he/hemain.asp](http://www.communityrights.org/combatjudicialactivism/he/hemain.asp). The report was published by the Environmental Law Reporter as Douglas T. Kendall, Timothy J. Dowling, Sharon Buccino & Elaine Weiss,

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Jeffrey Sutton advocated for many of the rulings attacked in Judge Noonan's book and some of those discussed in *Hostile Environment*,<sup>5</sup> but what's most troubling is that the arguments advanced by Mr. Sutton are considerably more extreme than those accepted to date by the Supreme Court.

*Sutton's Legal Philosophy: Of Zero Sum Games and Neutral Principles*

Repeatedly in briefs and in speeches expressing his personal views,<sup>6</sup> Mr. Sutton has characterized cases challenging federal constitutional authority as “invariably a battle between the states and the federal government over a legislative prerogative.”<sup>7</sup> In his words, these cases represent a “zero-sum game—in which one, or the other law-making power must fall.”<sup>8</sup>

But the states themselves overwhelmingly disagree with Mr. Sutton's perspective on this critical point. In *United States v. Morrison*, for example, thirty-six states advocated in favor of the federal Violence Against Women Act. Only one state, Alabama, represented by Mr. Sutton, advocated against federal authority. In the environmental arena, nine northeastern states recently sued the Bush Administration for not being aggressive enough about enforcing the provisions of the Clean Air Act. These states clearly do not share Mr. Sutton's view that an exercise of federal authority is “invariably” an encroachment into state legislative prerogative. Instead, states, by and large, recognize that a federal role is critical in combating national issues such as environmental degradation.

In urging courts to strike down federal laws, Mr. Sutton has repeatedly asserted that he is advancing a “neutral principle” that “says nothing about what particular policies should be adopted.”<sup>9</sup> But his positions would invalidate innumerable federal minimum protections that now have the force of law in every state in the nation. Even if every state responded by passing legislation addressing the problem (an enormously unlikely proposition), the states would inevitably create a patchwork of protections that would be less effective than the existing federal programs. While states and local governments play an invaluable role in addressing

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*Conservative Judicial Activism and the Environment: An Assessment of the Threat*, 32 ENV'T L. REP. 10835 (2002).

<sup>5</sup> Mr. Sutton argued before the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and filed briefs in favor of the states' rights position in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), *United States v. Morrison*, 529 U.S. 598 (2000), and *Buckhannon v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

<sup>6</sup> See, e.g., *Federalism Revived? The Printz and City of Boerne Decisions*, Oct. 17, 1997, available at [www.fed-soc.org/Publications/practicegroupnewsletters/federalism/fd020103.htm](http://www.fed-soc.org/Publications/practicegroupnewsletters/federalism/fd020103.htm). See also, Brief of Amicus Curiae the State of Alabama at \*14, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (No. 99-1178), available at 2000 WL 1052159 (hereinafter “SWANCC Brief”).

<sup>7</sup> *Federalism Revived? The Printz and City of Boerne Decisions*, *supra* note 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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problems such as environmental degradation, in the wise words of Justice Oliver Wendell Holmes from 80 years ago, “it is not sufficient to rely on the States.”<sup>10</sup>

*Undermining Commerce Clause Authority to Protect the Environment*

A good example of Mr. Sutton's disturbing views on the federal power to protect the environment comes from the brief<sup>11</sup> that Mr. Sutton filed in the U. S. Supreme Court in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*. In *SWANCC*, he expressed the view that the Constitution's Commerce Clause does not grant the federal government authority to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds.<sup>12</sup> Despite the paramount federal interests in protecting migratory birds, Mr. Sutton characterized these topics as “uniquely a matter of local oversight.”<sup>13</sup>

Congress has rooted most of this nation's federal environmental protections in its authority under the Commerce Clause of the Constitution, which grants Congress the right to “regulate commerce among the several states.” The reason is simple. Pollution and environmental degradation are external costs of many land uses and manufacturing processes. These external costs are frequently borne by residents outside of the state in which the pollution or degradation originates. Even wholly intrastate pollution can have significant impacts on interstate commerce, for example, where the despoliation of a lake or river reduces tourism dollars spent by out-of-state vacationers. For decades, the courts have recognized that the Commerce Clause authorizes Congress to regulate such intrastate activities that have a significant effect on interstate commerce.<sup>14</sup> Indeed, between 1937 and 1995, the Supreme

<sup>10</sup> *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

<sup>11</sup> See *SWANCC* Brief, 2000 WL 1052159. Reports confirm that Mr. Sutton's litigating positions parallel his personal views. See Tony Mauro, *The Limbo Bar*, AMERICAN LAWYER, October 2001 (“Sutton developed a specialty of arguing the states' rights side of federalism cases before the Supreme Court. He also happens to believe in that point of view . . .”); Tony Mauro, *An Unlikely High Court Specialist*, LEGAL TIMES, Nov. 2, 1998 (quoting Mr. Sutton, “I love these issues. I believe in this federalism stuff.”). In most of the cases cited in this memorandum, Mr. Sutton has appeared as counsel of record for an amicus or “friend of the court,” frequently the State of Alabama, a position that gives an advocate considerable flexibility in expressing his own views before the U.S. Supreme Court and lower federal courts. Finally, Mr. Sutton has been an officer of the Federalist Society's Separation of Powers and Federalism practice group and he has personally adopted many of the positions that he has taken in his briefs in articles written for Society publications and speeches delivered to the Society. In one of these speeches he actually reprimanded state and local governments for opposing his positions regarding the reach of federal authority, demanding that they “develop a little more courage when it comes to litigating these structural issues.” See, e.g., *Federalism Revived? The Prinz and City of Boerne Decisions*, *supra* note 6.

<sup>12</sup> 531 U.S. 159 (2001). The Court in *SWANCC* ultimately interpreted the Clean Water Act narrowly to avoid the Commerce Clause question discussed in Mr. Sutton's brief. See *SWANCC*, 531 U.S. at 173.

<sup>13</sup> *SWANCC* Brief, 2000 WL 1052159 at \*12.

<sup>14</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (intrastate activity “may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . .”); *United States v. Darby*, 312 U.S. 100, 118 (1941) (rejecting a Commerce Clause challenge to the Fair Labor Standards Act because Congress's Commerce Clause power “extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end . . . .”).

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Court did not invalidate a single federal statute as being outside the scope of the Commerce Clause.

Since 1995, the Court's 5-to-4 rulings in *United States v. Lopez*<sup>15</sup> and *United States v. Morrison*<sup>16</sup> struck down portions of two federal laws that it deemed beyond Congress's Commerce Clause authority. These are deeply divisive rulings that have been roundly criticized. They are also, however, narrow in an important manner: in both cases, the Court stressed that the regulated activity (handgun possession in *Lopez* and violence against women in *Morrison*) was not economic in nature and fell within traditional state police powers. As a result, *Lopez* and *Morrison* do not necessarily pose much of a threat to environmental safeguards, because environmental laws focus on harms resulting from commercial activity.

The "Migratory Bird Rule" in *SWANCC* is a good example. The rule protects intrastate water bodies and wetland areas that provide important habitat to migratory birds. Protecting migratory birds is quintessentially a task for the federal government. As Justice Holmes declared for the Supreme Court in 1920, the protection of migratory birds is a "national interest of very nearly the first magnitude."<sup>17</sup> Justice Holmes explained that the federal government must provide protection because action by the states individually would be ineffectual:

*[Migratory birds] can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States.*<sup>18</sup>

The activity regulated in *SWANCC* was plainly economic in nature. The sewer authority wanted to fill more than 200 ponds and small lakes in order to build a large municipal landfill that would accept trash from a large portion of Illinois' Cook County.<sup>19</sup> This is typical: filling of waters and wetlands virtually always is undertaken for commercial purposes.<sup>20</sup> The birds themselves also generate a considerable amount of economic activity. More than 120 bird species had been seen at these ponds and lakes, and the waters served as a large breeding ground for great blue herons. The commercial value of migratory birds is manifest: each year millions of people spend more than a billion dollars in commerce on recreational pursuits

<sup>15</sup> 514 U.S. 549 (1995).

<sup>16</sup> 529 U.S. 598 (2000).

<sup>17</sup> *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

<sup>18</sup> *Id.*

<sup>19</sup> The Rehnquist Supreme Court has repeatedly held that trash is an object of commerce, see, e.g., *C&A Carbone, Inc. v. Town of Clarkson, New York*, 511 U.S. 383 (1994), and has repeatedly struck down local efforts to regulate the flow of trash. *Id.*

<sup>20</sup> *SWANCC*, 531 U.S. at 192-93 (Stevens, J., with whom Souter, Ginsburg, & Breyer, JJ., join, dissenting).

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related to migratory birds.<sup>21</sup> These birds also protect crops and forests by feeding on insects that would otherwise damage these commercial enterprises.<sup>22</sup>

The Migratory Bird Rule, in other words, was plainly distinguishable from laws struck down in *Morrison and Lopez*. Mr. Sutton, however, could see no distinction. Mr. Sutton characterized the federal government's "interstate justifications for asserting power" as "bird watching and hunting" and dismissed these interests as "non-economic in nature."<sup>23</sup> Where Justice Holmes saw in 1920 a "national interest of very nearly the first magnitude," Mr. Sutton saw in 2000 an "an area that is uniquely a matter of local oversight."<sup>24</sup> Where Holmes saw protections of migratory birds as necessary to save "the protectors of our forests and our crops," Mr. Sutton saw a federal law designed to allow "bird watchers and hunters to pursue their hobbies."<sup>25</sup>

Mr. Sutton's Commerce Clause analysis in *SWANCC* mirrors the reasoning applied by District Judge Brevard Hand in his decision in *United States v. Olin Corp.*,<sup>26</sup> which struck down key provisions of the federal Superfund toxic-waste cleanup law. In *Olin*, Judge Hand ruled that because the site was no longer active, the cleanup of the site was essentially a local real estate matter, not "economic activity."<sup>27</sup> Because "the law regulating real property has been traditionally a local matter," Judge Hand declared that Congress under the Commerce Clause could not regulate such activities.<sup>28</sup>

Judge Hand's view was rejected by other courts<sup>29</sup> and was quickly reversed on appeal.<sup>30</sup> It indicates, however, the breadth of the threat that judicial activism poses to federal environmental safeguards and the danger presented by nominees such as Jeffrey Sutton. After all, if regulation of waste disposal operations (at issue in both *Olin* and *SWANCC*) does not fall within the scope of the Commerce Clause, then a wide array of environmental protections would also fall outside the Clause.

***Eleventh Amendment and Ex Parte Young: Ensuring State Compliance with Federal Environmental Mandates***

Environmental statutes are textbook examples of cooperative federalism. Almost every major environmental law authorizes state environmental agencies to implement federal environment programs in their state. For these programs to work, states must be held

<sup>21</sup> *SWANCC*, 531 U.S. at 173.

<sup>22</sup> *Missouri v. Holland*, 252 U.S. at 431.

<sup>23</sup> *SWANCC* Brief, 2000 WL 1052159 at \*4.

<sup>24</sup> *Id.* at \*12.

<sup>25</sup> *Id.*

<sup>26</sup> 927 F. Supp. 1502 (S.D. Ala. 1996).

<sup>27</sup> *Id.* at 1532-1533.

<sup>28</sup> *Id.* at 1533.

<sup>29</sup> See *Nova Chemicals, Inc. v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996); *U.S. v. NL Indus., Inc.*, 936 F. Supp. 545 (S.D. Ill. 1996).

<sup>30</sup> *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).

Nomination of Jeffrey S. Sutton – Page 6

accountable for ensuring the minimum environmental standards mandated by federal law. To ensure this accountability, many environmental laws have citizen suit provisions that permit citizens to sue states in federal court when state agencies fail to implement federal mandates.

Activist interpretations of the Constitution's Eleventh Amendment are undermining state accountability under federal environmental laws and thus the federal/state partnerships at the center of these critical statutes. The Eleventh Amendment's plain language prevents a federal court only from hearing a suit brought against a state by a citizen of *another* state or another country.<sup>31</sup> The Court, however, has ruled that the amendment applies to suits brought by a state's own citizens, effectively extracting the word "another" from the amendment. In 1996, in a 5-4 ruling in *Seminole Tribe of Florida v. Florida*, the Supreme Court overruled a landmark case called *Pennsylvania v. Union Gas*,<sup>32</sup> and held that the Commerce Clause – the basis for most environmental legislation – could not be used to abrogate state immunity. Thus, the Court made it impossible for citizens to ensure that states are held financially responsible for their contributions to hazardous waste sites that must be cleaned up under the Superfund law.

Effective, enforceable, cooperative federalism in environmental laws remains viable after *Seminole Tribe* because of the Supreme Court's 1908 ruling in *Ex Parte Young*, which permits suits to enjoin state officials from violating federal law even where the Eleventh Amendment would bar a suit against the state seeking money damages.<sup>33</sup> *Ex Parte Young* thus constitutes an essential linchpin of our nation's federal environmental laws: without it, almost every environmental statute would have to be re-written, or retained in a much less effective form.

Jeffrey Sutton has been a leading advocate for expanding Eleventh Amendment immunity from suit and limiting the reach of *Ex Parte Young*. Most remarkably, in a brief that he filed in *Westside Mothers v. Haveman*,<sup>34</sup> Mr. Sutton took the unequivocal position that federal statutes passed under the Constitution's Spending Clause<sup>35</sup> "create a contract between the Federal Government, which has offered the State federal funding in exchange for compliance with certain conditions, and the State, which has agreed to these conditions by accepting the proffered funds."<sup>36</sup> "States" in Sutton's view, "are bound only by the

<sup>31</sup> U.S. CONST. amend. XI. The Amendment states simply: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

<sup>32</sup> 490 U.S. 1 (1989), *overruled by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

<sup>33</sup> 209 U.S. 123 (1908).

<sup>34</sup> 133 F. Supp. 2d 549, *rev'd* 289 F.3d 852 (2002), *cert. denied*, 123 S. Ct. 618 (2002).

<sup>35</sup> U.S. Const. Art. 1, § 8 (providing the power to tax and spend for the "general welfare"). In *United States v. Butler*, 297 U.S. 1 (1936), the Court rejected Madison's view and held that the "power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *Id.* at 66.

<sup>36</sup> Brief of Amicus Curiae Michigan Municipal League at 2, *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (2001) (No. 99-73442).

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unambiguously expressed terms of such Spending Clause contracts.<sup>37</sup> Because Spending Clause legislation merely creates contracts, according to Mr. Sutton, these mandates cannot be enforced under *Ex Parte Young*.<sup>38</sup> The District Court adopted Mr. Sutton's novel views on both of these points.<sup>39</sup>

A Sixth Circuit panel that included Judge Danny Boggs, the court's most prominent conservative, unanimously and pointedly overruled the district court in *Westside Mothers*. With regard to Mr. Sutton's argument about Spending Clause legislation creating only a contract, the Circuit Court concluded that "[b]inding precedent has put the issue to rest."<sup>40</sup> The court also made short shrift of Mr. Sutton's views on *Ex Parte Young*, declaring: "Medicaid is not merely a contract, but a federal statute. This suit seeks only to compel state officials to follow federal law,"<sup>41</sup> and thus may be enforced under *Ex Parte Young*.

While the views Mr. Sutton expressed in *Westside Mothers* about the Spending Clause and *Ex Parte Young* have now been thoroughly rejected by the Sixth Circuit, similar views on *Ex Parte Young* suits have recently been adopted by courts in two critical environmental cases. In the past 18-months, the Third and Fourth Circuits have ruled that citizens could not enjoin Pennsylvania<sup>42</sup> or West Virginia<sup>43</sup> under *Ex Parte Young* for non-compliance with the essential mandates of the federal Surface Mining Control and Reclamation Act (SMCRA). In *Bragg v. West Virginia Coal Association*, for example, the Fourth Circuit reversed a district court ruling which held that state officials had violated SMCRA by permitting one of the most environmentally-destructive practices imaginable: mountaintop removal coal mining that buries and destroys valleys, rivers, and streams. The Fourth Circuit bypassed *Ex Parte Young* by declaring that in states that have an approved program to administer SMCRA, the federal minimum standards "drop out" and a claimant's only cause of action is under state law, which cannot be enforced under *Ex Parte Young*.<sup>44</sup>

The argument made by Mr. Sutton in *Westside Mothers* directly parallels the argument adopted by the courts in *Bragg* and *Hess*: both arguments limit the category of federal rights that can be enforced under *Ex Parte Young*. If anything, Mr. Sutton's argument in *Westside*

<sup>37</sup> *Id.*

<sup>38</sup> See Reply Brief of Amicus Curiae Michigan Municipal League at 7, *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (2001) ("*Ex Parte Young* explicitly approved the holding and rationale of *In re Ayers*, 123 U.S. 443 (1887), distinguishing that case as involving 'an attempt to make the state itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance' and recognizing that it properly denied relief because '[t]he State alone had any interest in question, and a decree in favor of plaintiff would affect the treasury of the state'"). In other words, Mr. Sutton argued that because Spending Clause legislation created a federal/state contract, such legislation could not be enforced under *Ex Parte Young*. The District Court adopted Mr. Sutton's argument on this point. See *Westside Mothers v. Haveman*, 133 F. Supp. 2d at 562.

<sup>39</sup> See 133 F. Supp. at 561-62, 574-575.

<sup>40</sup> 289 F.3d at 858.

<sup>41</sup> *Id.* at 861.

<sup>42</sup> *Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310 (3d Cir. 2002).

<sup>43</sup> *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002).

<sup>44</sup> See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981).

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*Mothers* is more extreme than the one accepted in *Bragg* and *Hess*, because, as the Sixth Circuit explained, Mr. Sutton's argument in *Westside Mothers* was ruled out by binding Supreme Court precedent. There is every reason to believe that, if confirmed, Mr. Sutton would interpret *Ex Parte Young* in a way that undermines enforcement of a host of federal environmental statutes.<sup>45</sup>

*Eviscerating Private Actions for Environmental Injustice*

Mr. Sutton has been a leading advocate for aggressively limiting private causes of action against states, including the private cause of action that permits vindication of claims of environmental injustice.

Mr. Sutton served as counsel of record for the state of Alabama in *Alexander v. Sandoval*<sup>46</sup> and successfully convinced the Supreme Court to find that there is no private cause of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act—regulations that form the primary source of rights to ensure environmental justice.<sup>47</sup> By a 5-to-4 vote, the Court, through Justice Scalia, ruled that the well-established private cause of action to enforce § 601 of the Civil Rights Act<sup>48</sup> did not extend to disparate impact regulations promulgated under § 602 of Title VI.<sup>49</sup>

The *Sandoval* decision by itself is enormously controversial.<sup>50</sup> But our concern is not primarily that Mr. Sutton advocated for this result. Our most significant concern is that the

<sup>45</sup> As explained above, Mr. Sutton believes that cases challenging federal constitutional authority are "invariably a battle between the states and the federal government over legislative prerogative." See *supra* text accompanying note 7.

<sup>46</sup> 532 U.S. 275 (2001).

<sup>47</sup> See discussion of the *South Camden* case below.

<sup>48</sup> This cause of action under Title VI was originally implied by the Court but has subsequently been recognized and expanded by Congress.

<sup>49</sup> § 602 authorizes federal agencies "to effectuate the provisions of [§ 601] \* \* \* by issuing rules, regulations, or orders of general applicability" (42 U.S.C. 2000d-1). DOJ promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individual to discrimination because of their race, color or national origin..." (28 C.F.R. § 42.104(b)(2) (1999)). See *Buckhannon*, 532 U.S. at 278.

<sup>50</sup> The *Sandoval* decision effectively overruled a line of earlier Supreme Court rulings that had, at the very least, presumed that § 602 regulations could be privately enforced. Interpreting these Supreme Court rulings, ten federal circuit courts had addressed the question of whether there was a private cause of action to enforce regulations validly promulgated under Title VI and every one of these courts had concluded that such a right existed. As Justice Stevens notes in dissent: "This Court has already considered the question presented today and concluded that a private right of action exists." 532 U.S. at 295 (Stevens, J., dissenting). *Stare decisis* alone demanded that the *Sandoval* plaintiffs prevail. Justice Stevens ends his *Sandoval* dissent with a stinging critique of the majority's activism in denying the *Sandoval* class a day in court:

The question the Court answers today was only an open question in the most technical sense. Given the prevailing consensus in the Courts of Appeals, the Court should have declined to take this case. Having granted certiorari, the Court should have answered the question differently by simply according respect to our prior decisions. But most importantly, even if it were to ignore

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position Mr. Sutton staked out in his briefs on behalf of Alabama is considerably more extreme than the position ultimately adopted by the Supreme Court.

The *Sandoval* decision left open the question of whether victims of disparate impact discrimination could enforce § 602 regulations under 28 U.S.C. § 1983.<sup>51</sup> In dissent, Justice Stevens thus raised the question of whether *Sandoval* was simply “something of a sport” and suggested that “litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain this relief.”<sup>52</sup> The *Sandoval* majority never responded to this assertion by the dissent.

Mr. Sutton’s position would have eliminated this alternative avenue for seeking relief and left victims of environmental injustice and other forms of disparate impact discrimination without any means of obtaining redress. Indeed, Mr. Sutton argued that where the federal government acts within its Spending Clause authority, a state must “express[] unequivocally that it waives its immunity,” in order to be subject to suit in federal court.<sup>53</sup> This waiver by the states must be “altogether voluntary” and cannot be assumed even if Congress expresses “unequivocally its intention that if the state takes certain action it shall be deemed to have waived that immunity.”<sup>54</sup> In his brief in the *Westside Mothers* case, Mr. Sutton was even more sweeping, asserting that states can never be sued under § 1983 for federal mandates imposed in legislation passed under the Spending Clause.<sup>55</sup> This is an extremely broad position that would have required the Supreme Court to overrule a host of well-established precedent.

The implications of Mr. Sutton’s views on claims for environmental injustice are illustrated by the split decision of the Third Circuit in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*<sup>56</sup> holding that § 602 regulations could not be enforced under 28 U.S.C. § 1983. The *South Camden* case wiped off the books a significant environmental justice victory achieved by activists in New Jersey and leaves victims of environmental injustice in the Third Circuit without a reliable avenue for asserting these claims in court.

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all of our post-1964 writing, the Court should have answered the question differently on the merits.

532 U.S. at 317 (Stevens, J., dissenting).

<sup>51</sup> Section 1983 provides a cause of action against “every person who, under color of any statute \*\*\* causes \*\* \* the deprivation of any rights, privileges or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. As the D.C. Circuit has explained, Section 1983 “allows private parties to enforce federal laws against a special class of defendants – state and municipal actors – in much the same way that implied rights of action permit private enforcement of federal statutory obligations against any party, public or private.” *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985).

<sup>52</sup> *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting).

<sup>53</sup> Petitioners’ Reply Brief at \*6, *Alexander v. Sandoval*, 532 U.S. 275 (2001), available at 2000 WL 1911423.

<sup>54</sup> *Id.*

<sup>55</sup> Reply Brief of Amicus Curiae Michigan Municipal League at 1, *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (2001) (No. 99-73442) (“42 U.S.C. § 1983 should not be interpreted to support private actions to enforce Spending Clause legislation.”).

<sup>56</sup> 274 F.3d 771 (3d Cir. 2001).

*Eliminating Attorneys' Fees for Prevailing Plaintiffs*

A powerful innovation of modern environmental law is the authority Congress granted to citizens to ensure that these laws are carried out by regulatory agencies and obeyed by polluters. Concerned that agencies would be “captured” by regulated industries, Congress authorized suits against the government to force compliance with congressional mandates. Anticipating that enforcement budgets could be slashed, Congress enacted citizen-suit provisions deputizing citizens to act as “private attorneys general” to force polluters to comply with federal mandates. To ensure that these private attorneys general have the resources necessary to prosecute polluters, Congress ensured that “prevailing” environmental plaintiffs would be able to obtain reasonable attorneys fees from their adversaries.

Mr. Sutton has also taken the position that plaintiffs should not be allowed attorneys' fees under laws authorizing such fees for “prevailing parties” when, in response to a lawsuit, a polluting company does precisely what a plaintiff is requesting in the lawsuit.<sup>57</sup> Sadly, this position was adopted by the Supreme Court with regard to an important statute in a 5-4 ruling in *Buckhannon v. West Virginia Department of Health and Human Resources* that undermines Congress's intent “to place private actions, \* \* \* securely within the federal law enforcement arsenal.”<sup>58</sup>

*Buckhannon* involved what is known as the “catalyst” rule, under which an environmental claimant is deemed to have “prevailed” within the meaning of fee shifting provisions when a defendant responded to the filing of a lawsuit by voluntarily changing its conduct. Under the catalyst rule “aggrieved individuals were not left to worry, and wrongdoers were not led to believe, that strategic maneuvers by defendants might succeed in averting a fee award.”<sup>59</sup> While never endorsed specifically by the Supreme Court, the catalyst rule was deeply ingrained in the fabric of our nation's environmental and civil rights laws. Prior to 1994, every single court of appeals (with the exception of the Federal Circuit, which never had the opportunity to address the issue) had unanimously endorsed the catalyst rule.<sup>60</sup> So had Congress; both the Senate and House Reports for the 1976 Civil Rights Attorney's Fees Awards Act unambiguously endorse fee awards even where no formal relief is obtained.<sup>61</sup>

<sup>57</sup> Brief of Amici Curiae Los Angeles County and California State Association of Counties, *Buckhannon v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001), available at 2000 WL 1873811 (hereinafter “*Buckhannon* Brief”).

<sup>58</sup> *Buckhannon v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 634 (2001) (Ginsburg, J., dissenting).

<sup>59</sup> *Id.* at 636 n.10 (Ginsburg, J., dissenting).

<sup>60</sup> *See id.* at 602 n.3 (cases cited by the majority); *S-1 & S-2 v. State Bd. of Ed. of North Carolina*, 21 F.3d 49 (4th Cir. 1994) (en banc).

<sup>61</sup> *Buckhannon*, 532 U.S. at 637 (Ginsburg, J., dissenting) (citing S. REP. NO. 94-1011 at 5 (1976) (“For purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.”); H.R. REP. NO. 94-1558 at 7 (1976) (“A court should still award fees, even though it might conclude...no formal relief...is needed.”)).

The first challenge to the rule came in 1994, when the Fourth Circuit – the most conservative court in the country – voted 6-to-5 along purely ideological lines to jettison the catalyst rule.<sup>62</sup> The Fourth Circuit's ruling caused other circuits to look again at the catalyst rule. Nine courts of appeals revisited the issue and each one rejected the Fourth Circuit's ruling and reaffirmed the catalyst rule.<sup>63</sup>

In the face of this precedent, Mr. Sutton's brief was mostly devoted to policy. He argued that fee-shifting is a bad idea because it reverses the "historic presumption against shifting responsibility for attorney fees,"<sup>64</sup> but this was precisely Congress's intent in enacting fee shifting provisions. He argued that the catalyst rule forces "lower courts into utterly speculative debates over why parties voluntarily dismiss cases or voluntarily change their conduct after cases are filed"<sup>65</sup> but ignores that lower courts had been applying the catalyst rule for more than a decade with few recorded problems. Finally, Mr. Sutton argued that the plain meaning of the term "prevailing" precluded recovery when a claimant merely caused a change in behavior,<sup>66</sup> but he failed entirely to explain why appellate judges overwhelmingly concluded that the term "prevailing" was at least ambiguous in this regard.

Justice Ginsburg's stinging dissent to Chief Justice Rehnquist's majority opinion is equally forceful in response to Mr. Sutton's brief:

The Court states that the term "prevailing party" in fee-shifting statutes has an "accepted meaning." If that is so, the "accepted meaning" is not the one the Court today announces.

\* \* \*

When this Court rejects the considered judgment prevailing in the Circuits, respect for our colleagues demands a cogent explanation. Today's decision does not provide one. The Court's narrow construction of the words "prevailing party" is unsupported by precedent and unaided by history or logic. Congress prescribed fee-shifting provisions \* \* \* to encourage private enforcement of laws designed to advance civil rights. Fidelity to that purpose calls for court-awarded fees when a private party's lawsuit, whether or not its settlement is registered in court, vindicates rights Congress sought to secure.<sup>67</sup>

#### *Comments on Judicial Temperament*

A disturbing aspect of the briefs discussed in this memorandum is Mr. Sutton's tendency to cavalierly disregard precedent that is unfavorable to his position and his willingness to instruct judges to ignore precedent in order to rule in his favor. One example is Mr. Sutton's brief in *Buckhannon*, where he blithely asserted that "precedent confirms" his

<sup>62</sup> *S-1 & S-2 v. State Bd. of Ed. of North Carolina*, 21 F.3d 49 (4th Cir. 1994) (en banc).

<sup>63</sup> *Buckhannon*, 532 U.S. at 627 (Ginsburg, J., dissenting).

<sup>64</sup> *Buckhannon* Brief, *supra* note 57, at \*3.

<sup>65</sup> *Id.* at \*6.

<sup>66</sup> *Id.* at \*5-6.

<sup>67</sup> 532 U.S. at 643-44 (Ginsburg J., dissenting) (citations omitted).

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interpretation of attorneys fees statutes, even though at least nine courts of appeals cases, not cited by Mr. Sutton, had rejected his reading.

Even more telling are the district court briefs Mr. Sutton filed in *Westside Mothers*. In Mr. Sutton's opening brief, he confidently and unequivocally stated that federal rights created under the Spending Clause differ from federal rights created under other Constitutional grants of authority and that only the latter category of rights can be enforced through § 1983. But *Maine v. Thiboutot*, the landmark ruling that established that federal statutory rights could be enforced through § 1983 actions, involved rights established under the Social Security Act, a Spending Clause statute.<sup>68</sup> Mr. Sutton's failed entirely to mention this major problem with his theory in his opening brief and had to admit, rather sheepishly, in his reply brief that he was "aware that *Thiboutot* itself, as well as several of its progeny, arose in the context of Spending Clause legislation."<sup>69</sup>

Mr. Sutton's then argued that because the Court in *Thiboutot* and subsequent cases had "assumed but not squarely decided" the enforceability of Spending Clause mandates under § 1983, the question was an open one. He advised the district court not to "be overly concerned whether its decision can be reconciled with the facts – as opposed to the rationale – of *Thiboutot* and its progeny."<sup>70</sup>

Similarly, Sutton argued unequivocally in *Westside Mothers* that Spending Clause legislation creates a federal/state contract despite a 1985 Supreme Court ruling in *Bennett v. Kentucky Department of Education* that declared that Spending Clause legislation was "[u]nlike normal contractual undertakings" because they "originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy."<sup>71</sup> Mr. Sutton never cited *Bennett* in his brief and, perhaps as a result, the district court adopted his position. The Sixth Circuit, reversed, finding that "binding precedent has put the issue to rest."<sup>72</sup> The Supreme Court denied review in *Westside Mothers* and, in June 2002, Justice Scalia reaffirmed *Bennett*, stating "we have been careful not to imply that all contract-law rules apply to spending clause legislation, see, e.g., *Bennett v. Kentucky Dep't of Ed.* 470 U.S. 656, 669 (1985)".<sup>73</sup>

Even as a matter of advocacy, Mr. Sutton's *Westside Mothers* briefs push the envelope: ethical rules obligate lawyers to inform a court of binding precedent that contradicts their positions.

More important for present purposes, Mr. Sutton's *Westside Mothers* briefs provide a disturbing window into his views on the authority of a lower court judge regarding Supreme Court precedent. Mr. Sutton first ignored *Maine v. Thiboutot*, a Supreme Court decision that

<sup>68</sup> 448 U.S. 1 (1980).

<sup>69</sup> Reply brief at 2, *Westside Mothers*, *supra* note 55.

<sup>70</sup> Reply brief at 5, *Westside Mothers*, *supra* note 55.

<sup>71</sup> *Bennett v. Kentucky Dep't of Ed.*, 470 U.S. 656, 669 (1985).

<sup>72</sup> *Westside Mothers*, 289 F.3d at 858.

<sup>73</sup> *Barnes v. Gorman*, 122 S. Ct. 2097, 2101 (2002).

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was factually indistinguishable and directly in opposition to his position, and then instructed the district court not to be “overly concerned” with the ruling because the Supreme Court had backed away from other aspects of *Thiboutot* in subsequent cases. But backing away from binding Supreme Court precedent is the job of the Supreme Court, not a district judge. Mr. Sutton’s *Westside Mothers* briefs call into serious question his willingness to follow precedent and his understanding of the role and power of lower court judges in our federal judicial system.

*Conclusion*

Jeffrey Sutton is one of the nation’s leading and most extreme proponents of a judicial activism that is advancing an anti-environmental policy agenda from the federal bench. His aggrandized view of the authority of lower court judges indicates that he would feel little compulsion to follow precedent that runs contrary to his personal ideology. Mr. Sutton’s nomination to the Sixth Circuit Court of Appeals thus poses a significant threat to the enforcement of our nation’s core environmental protections.