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Critical Legal Issues: WORKING PAPER SERIES

DÉJÀ VU ALL OVER AGAIN:
CASE STUDIES IN JUDICIAL RELUCTANCE TO INDULGE CLIMATE CHANGE REGULATION-BY-LITIGATION

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INTRODUCTION

In 2017, several local governments in the United States filed common-law tort lawsuits against some of the world's largest privately held energy companies, asserting that those companies should pay the local governments' costs of responding to climate change. The lawsuits seek billions of dollars in abatement funds or damages. As one might expect, the lawsuits face many practical obstacles to success.

This summer, the local-government plaintiffs encountered some major setbacks. In separate decisions, two U.S. district judges issued decisions dismissing three suits brought by Oakland, San Francisco (and San Francisco County), and New York City.

These judicial decisions are only chapters in a larger story. The cities have already appealed the decisions to the U.S. Courts of Appeals for the Second and Ninth Circuits. Nonetheless, the two U.S. District Court decisions are a reminder that federal courts will very closely scrutinize plaintiffs' use of civil litigation as an alternative to executive or legislative action on the global problem of climate change.

In short, courts are likely to continue to reject the claims asserted in the new mini-wave of climate lawsuits. That is not just because the lawsuits fit uneasily with existing legal doctrine. It is also because the lawsuits, if allowed to progress, would

require courts to decide complex and sensitive policy questions with global ramifications—questions that political actors, including foreign governments and international organizations, are better suited to contemplate and resolve.

If this story seems familiar, that's because it is: In *American Electric Power Co., v. Connecticut*, 560 U.S. 410 (2011) (*AEP*), the U.S. Supreme Court held that the Clean Air Act (CAA) displaced a public-nuisance action under federal common law against several utilities for abatement of greenhouse gases. The plaintiffs in the new lawsuits have worked hard to escape the Court's holding in *AEP*. In the end, it is unlikely that the governments will succeed, but it may take the U.S. court system some time to sort the issues out.

I. BACKGROUND

A. Oakland and San Francisco, and then the City of New York, File Suit

In September 2017, San Francisco and Oakland filed suit in California state courts against "the five largest investor-owned fossil fuel corporations in the world as measured by their historic production of fossil fuels."[1] Three of the defendants are based in the U.S. (Chevron, ConocoPhillips, and ExxonMobil); two of them are based in Europe (BP and Royal Dutch Shell). No state-owned companies were named as defendants. After the cases were removed to federal court, they were assigned to

[1]First Am. Compl. for Public Nuisance, *City of Oakland v. BP P.L.C.*, No. 3:17-cv-06011-WHA, Dkt. No. 199, at 2 (N.D. Cal. Apr. 3, 2018).

Judge William H. Alsup of the U.S. District Court for the Northern District of California, who decided the cases together.

The plaintiff municipalities originally asserted a single cause of action under California law, alleging that the defendants had created a public nuisance by contributing to climate change over many years. The plaintiffs alleged the following facts: First, the defendants, taken together, were responsible for over 11% of all the carbon dioxide and methane pollution that had accumulated in the atmosphere since the Industrial Revolution. Second, the resulting climate change caused sea-level rise, temperature increases (with resulting public health impacts), and adverse weather, phenomena that forced the cities to undertake costly mitigation efforts. Third, the defendants had known for decades about the harmful impacts of greenhouse gas emissions that result from the use of their products (or, at any rate, about the serious risk that such impacts might occur).

The plaintiffs pled their claim in a somewhat counter-intuitive fashion: they did *not* claim that the defendants were liable for emitting greenhouse gases themselves. That's because plaintiffs' counsel sought to avoid the *AEP* plaintiffs' fate. They also needed to escape the holding in *Native Village of Kivalina v. ExxonMobil Corp.*, in which the Ninth Circuit had concluded that the CAA displaced a similar suit for

damages, rather than for abatement. 696 F.3d 849, 857 (9th Cir. 2012).[2]

Seeking to avoid dismissal under *AEP* and *Kivalina*, Oakland and San Francisco alleged a theory of harm based on the effects of *indirect*, or "downstream," carbon dioxide emissions. In other words, the plaintiffs alleged that the defendants committed a tort by producing, refining, marketing, and selling fossil fuels and fossil-fuel products for entry in the stream of international commerce. That tort caused an injury to the plaintiffs when third parties purchased and used the products (both direct purchasers and purchasers from intermediaries), resulting in greenhouse gas emissions, which in turn contributed to global warming. The plaintiff did not, however, name any such third parties as defendants in the litigation. (One reason for this omission may be that the plaintiffs themselves seem likely to be among the class of third parties who combusted the defendants' and other parties' fossil-fuel products and caused significant greenhouse gas emissions.) Again trying to distinguish *AEP* and *Kivalina*, the plaintiffs alleged state common-law claims against the defendants, not federal common-law claims.

As relief for their alleged injuries, the municipal plaintiffs asked that the defendants be required to create a multi-billion-dollar abatement fund to pay for infrastructure, including seawalls and other protection for low-lying property, to

[2]The defendants in *Kivalina* included the five defendants in the Oakland and San Francisco suits. In addition, some of the lawyers who represented the plaintiffs in *AEP* and *Kivalina* also represent the plaintiffs in the Oakland and San Francisco suits.

respond to rising sea levels.[3]

In January 2018, New York City—represented by (among others) the same plaintiffs' firm that represents Oakland and San Francisco in their cases—filed a similar lawsuit, naming the same five companies as defendants. New York City asserted claims relying on theories of public nuisance, private nuisance, and trespass under New York State law. The city seeks both billions of dollars in compensatory damages for past and future costs as well as an equitable order granting an injunction that would take effect if the defendants failed to pay those damages.[4] The case was assigned to Judge John F. Keenan of the U.S. District Court for the Southern District of New York.

Several other government entities—most recently, the State of Rhode Island (the first and thus far the only state government to have filed suit) and the City of Baltimore—have filed similar lawsuits in the twelve months since San Francisco and Oakland filed their initial complaints. These other suits have not been decided.

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[3] *See* First Am. Compl. for Public Nuisance, *City of Oakland v. BP P.L.C.*, No. 3:17-cv-06011-WHA, Dkt. No. 199, at 52-55 (N.D. Cal. Apr. 3, 2018); *see id.* at 3 (infrastructure "will cost billions of dollars"); *id.* at 48, 51.

[4] Amended Complaint, *City of New York v. BP P.L.C.*, No. 1:18-cv-00182-JFK, Dkt. No. 90, at 73-74 (Mar. 16, 2018); *see id.* at 6 (City "is spending billions of dollars" on resiliency measures to protect public safety, public health, and City property and infrastructure from climate change); *id.* at 7, 63; *id.* at 67 ("many billions"). Although New York City alleged violations of state law, its complaint was filed in federal district court as a diversity-jurisdiction suit. *See id.* at 23.

B. The Oakland, San Francisco, and New York City Cases are Dismissed

This summer, Judges Alsup and Keenan dismissed the Oakland, San Francisco, and New York City cases. Their rulings, along with a significant preliminary ruling by Judge Alsup, are briefly summarized here.

1. Judge Alsup Denies Remand

After the defendants removed the Oakland and San Francisco cases to federal district court, the plaintiffs moved to remand the cases to state court, arguing that the federal court lacked subject-matter jurisdiction. On February 27, 2018, Judge Alsup issued a decision denying the plaintiffs' remand motions, concluding that "plaintiffs' claims, if any, are governed by federal common law."[5]

Relying on *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), *AEP*, and *Kivalina*, Judge Alsup concluded that "a uniform standard of decision," provided by federal law, was required. He reasoned that "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem" of climate change—a phenomenon with multifarious causes and consequences, "involving all nations of the planet (and the oceans and atmosphere)." Alsup Order Denying Remand 4, 8; *see id.* at 5. "A patchwork of fifty different answers to the same fundamental global issue

[5] *People of the State of California v. BP PLC*, No. 3:17-cv-06011-WHA, Dkt. No. 134, at 8 ("Alsup Order Denying Remand"); *see id.* at 3.

would be unworkable."[6]

Judge Alsup rejected the plaintiffs' argument that because the CAA displaced any federal common-law claims in the case, remand was warranted on the theory that "once federal common law is displaced, state law once again governs." Alsup Order Denying Remand 6. He reasoned that the CAA does not displace claims against producers and sellers of fossil fuels—particularly claims for emissions and conduct *outside* the United States. *Id.* at 6-7.

Judge Alsup certified the jurisdictional question resolved by his order for interlocutory appeal. Alsup Order Denying Remand 8-9. However, Oakland and San Francisco did not appeal. Instead, they filed amended complaints, adding a claim for public nuisance under federal common law. The defendants filed new motions to dismiss.

2. Judge Alsup Dismisses the Oakland and San Francisco Cases on the Merits

On June 25, 2018, Judge Alsup dismissed the amended complaints on the merits. *City of Oakland v. BP PLC*, No. 3:17-cv-06011-WHA, Dkt. No. 283 ("Alsup Dismissal Order"). His reasoning has two basic components.

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[6] *Id.* at 5; *see also City of Milwaukee*, 406 U.S. at 103 ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law[.]"), *quoted in AEP*, 564 U.S. at 421; *Kivalina*, 696 F.3d at 855 ("Post-*Erie* [*Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)], federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution."); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 770 (7th Cir. 2011) ("It is our federal system that creates the need for a federal common law to govern interstate disputes over nuisances.").

First, Judge Alsup reasoned that the plaintiffs could not avoid *AEP* and *Kivalina* by targeting emissions caused by downstream users' combustion of the defendants' products. Alsup Dismissal Order 9. Judge Alsup's discussion of this issue implies that the CAA displaces the plaintiffs' claims insofar as they pertain to domestic conduct. *Id.* at 9-10. At the same time, Judge Alsup's opinion indicates that the Act does "not necessarily" displace claims for foreign conduct and emissions. *Id.* at 9.

Second, Judge Alsup held that the plaintiffs' claims for foreign conduct and emissions "are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems." Alsup Dismissal Order 10. He observed that in recent decisions, "[t]he Supreme Court has given us caution in formulating new claims under federal common law." *Id.* (citing *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727, 728 (2004); *AEP*, 564 U.S. at 422).

In particular, the presumption against extraterritoriality applies not only to statutes but to judicial lawmaking via common-law adjudication. *Id.* at 10-11 (quoting and discussing *Jesner*, *Sosa*, and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)). *Jesner* is the latest of a series of Supreme Court Alien Tort Statute (ATS) cases that make clear courts should be reluctant to create new federal common-law causes

of action that could provoke foreign relations problems.[7]

If successful, Judge Alsup reasoned, the suits would "allow plaintiffs to govern conduct and control energy policy on foreign soil," even though "many foreign governments actively support the very activities targeted by plaintiffs' claims." *Id.* (citation omitted). Global warming is "already the subject of international agreements" and presents "the classic scenario for a legislative or international solution," given that "[e]veryone has contributed to the problem of global warming and everyone will suffer the consequences." *Id.* at 12. Balancing the "worldwide negatives" of climate change "against the worldwide positives of the energy itself," and allocating "the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate." *Id.* In his judgment, "nuisance suits in various United States judicial districts" not only are "far less likely to solve the problem," but "could interfere with reaching a worldwide consensus." *Id.*[8]

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[7] *See Jesner*, 138 S. Ct. at 1402 (noting "this Court's general reluctance to extend judicially created private rights of action"); *id.* at 1403 ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns."). This principle is not limited to the ATS. The ATS does not create any causes of action; it merely grants federal courts subject-matter jurisdiction to hear federal-common-law causes of action. *See id.* at 1397-98.

[8] *Cf. AEP*, 564 U.S. at 428 ("[EPA] is surely better equipped to do the job [of regulating greenhouse gas emissions] than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. … [And] federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.").

Judge Alsup then rejected a number of the cities' contrary arguments. Alsup Dismissal Order 12-15; *see also id.* at 15 (dismissing plaintiffs' state-law claim, relying on prior order denying remand). For instance, the plaintiffs suggested that their tort claims did not require a determination of whether the defendants' conduct was reasonable, because they were simply seeking financial compensation. *Id.* at 12-14. Judge Alsup disagreed. He noted that San Francisco and Oakland alone sought billions of dollars in compensation, and that similar judgments in other suits would make it infeasible for the defendants to continue producing fossil fuels. *Id.* at 13-14.[9]

In late August, the cities appealed to the Ninth Circuit.

3. Judge Keenan Dismisses the New York City Case on the Merits

On July 19, 2018, Judge Keenan dismissed the New York City case. *City of New York v. BP P.L.C.*, No. 1:18-cv-00182-JFK, Dkt. No. 153 ("Keenan Dismissal Order"). His analysis is quite similar to that of Judge Alsup in his dismissal of the Oakland and San Francisco cases.

First, Judge Keenan held that federal common law displaced the City's state-law claims, which inevitably raised interstate and international questions that could not be resolved by state law. Keenan Dismissal Order 10-11; *see also id.* at 11-13 (quoting

[9]Before entering judgment, Judge Alsup granted separate motions to dismiss for lack of personal jurisdiction filed by all defendants except Chevron. *City of Oakland v. BP PLC*, No. 3:17-cv-06011-WHA, Dkt. No. 287 (Jul. 27, 2018); *see id.*, Dkt. No. 288 (Jul. 27, 2018) (entering judgment for defendants). He reasoned that the plaintiffs had not shown that their injuries would not have occurred but for the contacts between these defendants and California (or, for that matter, the contacts between them and the United States). Dkt. No. 287, at 5-8.

Judge Alsup's decision denying remand motion).

Second, Judge Keenan held that the CAA displaced the City's claims involving domestic emissions. He reasoned that the claims would require a fact finder to decide whether emissions traceable to the defendants' products unreasonably interfered with, and unlawfully invaded, City property. He concluded that under the CAA, such a determination is within the EPA's exclusive purview. *See* Keenan Dismissal Order 16-18. Further, he rejected the City's argument that upon displacement of the federal common-law claims, state-law claims should become available (if not preempted). *Id.* at 18-19. The damages claims were "for global greenhouse gas emissions resulting from [global] combustion," raising interstate and international questions requiring a "uniform, national solution." *Id.* at 19; *see id.* at 22 (claims "implicate countless foreign governments and their laws and policies," as well as international agreements).

Third, Judge Keenan held that to the extent the City alleged claims based on foreign emissions, the claims were "barred by the presumption against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'" Keenan Dismissal Order 20-21 (quoting *Jesner*, 138 S. Ct. at 1407).

In late July, New York City appealed to the Second Circuit.

II. DISCUSSION

What is likely to happen next in the two suits?

First, although much is uncertain, the Second and Ninth Circuits will likely have several doctrinal paths available to them on which they could rely to uphold the district courts' decisions. On choice of law, the defendants can convincingly argue that a lawsuit over "[w]idespread global dispersal" of greenhouse gases is "exactly the type of 'transboundary pollution suit' to which federal common law should apply," and that a court should not select the law of a particular state to resolve such a dispute. Keenan Dismissal Order 11 (quoting *Kivalina*, 696 F.3d at 855) (brackets omitted).

On whether a federal common-law claim should be allowed to proceed, the defendants seem to have strong statutory displacement and judicial curtailment arguments. Such arguments are based not only on the CAA's comprehensive provisions and the regulatory scheme that the law creates, but also on the need to avoid expanding federal common-law liability so that it becomes an extraterritorial regulatory mechanism—that is, one that would "allow plaintiffs to govern conduct and control energy policy on foreign soil." Alsup Dismissal Order 11.

Second, even if federal common law did not override the role of state law (or even if there were otherwise some conceivable residual role for state law) in regulating the global impacts of greenhouse gas emissions, the cities face other

formidable obstacles to prevailing. Cases such as *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), and *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010), seem to firmly support the conclusion that state-law claims for global warming are simply not viable.

In *Cooper*, the Fourth Circuit held that the CAA barred a public-nuisance suit, brought by North Carolina under state law, that alleged unlawful air pollution originating in Alabama and Tennessee. The lawsuit sought to "appl[y] home state law extraterritorially." 615 F.3d at 296; *see id.* at 301. The court of appeals followed the Supreme Court's reasoning in *Ouellette*, a Clean Water Act case that involved savings-clause provisions similar to the CAA's savings-clause provisions.[10] The suit, if allowed, would have "scuttle[d] the nation's carefully created system for accommodating the need for energy production and the need for clean air," resulting in "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." 615 F.3d at 296.

Again following *Ouellette*, the Fourth Circuit did allow "the law of the states where emissions sources are located"—so-called source-state law—to apply "in an

[10] *Ouellette* had held that the Clean Water Act "precludes a court from applying the law of an affected State against an out-of-state source," 479 U.S. at 494, noting that "if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress." *Id.* at 493, *quoted in Cooper*, 615 F.3d at 304 (quotes omitted). For "a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states." 479 U.S. at 496 (quotes omitted), *quoted in Cooper*, 615 F.3d at 301.

interstate nuisance dispute."[11] In the cities' climate cases, the source-state principle would seem to be of little help to the plaintiffs, given the nature of their claims. The plaintiffs seek to hold the defendants liable for the *worldwide* combustion—indeed, combustion *by other parties*—of fuels and fuel products that the defendants placed into the global stream of commerce. The plaintiffs' suits thus do not, and cannot, purport to be grounded in the laws of any particular "source state" for greenhouse gas emissions. Every state in the Union and every nation on the planet is a "source state" (or "source nation") for such emissions.

Third, given the holdings of *AEP* and *Kivalina* (and this summer's decisions by Judges Alsup and Keenan), it is understandable that a plaintiff would not only want to cast its causes of action as state-law claims, but would also prefer to litigate those claims in state court.[12] Yet one should not overstate the differences between how a

[11] *Cooper*, 615 F.3d at 306; *see id.* (quoting *Ouellette*); *id.* at 308; *see also Ouellette*, 479 U.S. at 499 ("the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations"); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 197 (3d Cir. 2013) (quoting *Ouellette*).

[12] Guidance may soon be forthcoming from the Ninth Circuit on whether at least some climate tort claims may be litigated in state court. Earlier this year, Judge Vince Chhabria of the Northern District of California ruled that other cases brought by California municipalities should be remanded to state court. *County of San Mateo v. Chevron Corp.*, No. 3:17-cv-04929-VC, Dkt. No. 223 (Mar. 16, 2018). Disagreeing with Judge Alsup, Judge Chhabria reasoned (1) that the Clean Air Act displaced federal common law as to the plaintiffs' claims and (2) that federal common law could not preclude the plaintiffs from asserting state-law claims. *Id.* at 2-3; *see also id.* at 3-5 (rejecting other arguments for removal). He did not decide the merits question whether federal law preempts the plaintiffs' state-law claims. *Id.* at 3, 5. Judge Chhabria's remand order is now on appeal to the Ninth Circuit. An analysis of the jurisdictional questions at issue in that appeal is beyond the scope of this WORKING PAPER.

federal court might approach such claims (whether framed either as state-law claims or as federal-law claims) and how a state court might approach them. Several of the federal-law doctrines and themes at play in Judge Alsup's and Judge Keenan's opinions would likely be highly relevant to state-court adjudications of any similar state-law claims, whether directly or by way of analogy.

The U.S. Constitution, of course, binds state courts as well as federal courts. Federal due process, preemption, and separation-of-powers arguments—including arguments grounded in the exclusive power of the federal legislative and executive branches to conduct foreign affairs—thus are directly relevant to state-court decisions applying state common law, just as they are relevant to federal-court decisions applying federal common law or state common law. Other federal-law arguments—such as Article III standing, the political-question doctrine, and the presumption against extraterritoriality—are not directly applicable in state courts, but state law often contains analogues to the federal-law doctrines undergirding such arguments.

Finally, if either the Second Circuit or the Ninth Circuit were to reverse Judge Keenan's or Judge's Alsup's dismissal decision, the defendants would likely have a more than plausible case for Supreme Court review. The outlook for Supreme Court review would also seem reasonably favorable if a state supreme court (or federal court of appeals) were to uphold a state-law claim for climate-change liability. It would be odd if a plaintiff could escape the ultimate impact of the Court's decision in

AEP, as well as the Ninth Circuit's decision in *Kivalina*, by artful pleading—whether under state law or under federal law.[13]

CONCLUSION

Judge Alsup's and Judge Keenan's decisions should not be regarded as great surprises. The cities must be aware that their lawsuits are long shots. For many of the reasons discussed above, such suits faced severe obstacles even before *AEP* was decided. After *AEP*, the cities face a far more daunting task.

Like *AEP*, the new round of climate lawsuits presents exceptionally important legal questions that deserve authoritative and expeditious adjudication. The lawsuits not only implicate billions of dollars, but also involve vitally important policy issues that call for "a comprehensive solution that weighs the global benefits of fossil fuel use with the gravity of the impending harms." Keenan Dismissal Order 22. If the tort lawsuits are bound to fail, it may be better for all stakeholders if the ultimate resolution comes sooner rather than later, so that energies can be focused on legislative, regulatory, and diplomatic responses to climate change—responses that are much more likely to work in the long run.

[13] *Cf. Amicus Curiae* Brief of United States in Support of Dismissal, *City of Oakland v. BP P.L.C.*, No. 3:17-cv-06011-WHA, Dkt. No. 245, at 5 (N.D. Cal. May 10, 2018) ("If federal common law is a poor fit, then state law is even less suited to address the international scope of the climate change problem."); *see id.* at 6, 10-11.