



FLAWED FEDERAL JURISDICTION RULING GRANTS STATE COURT NATIONAL CLIMATE-CHANGE POLICYMAKING POWER

by Lincoln Davis Wilson

Jurisdiction matters. Questions of jurisdiction are questions of “who decides,” from the Latin roots concerning “speaking the law.” And the court that gets to speak the law in a particular dispute is often every bit as important as the law itself. So it is with the Tenth Circuit’s recent decision in *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*¹ In the first decision on remand from the Supreme Court after *BP v. Mayor and City Council of Baltimore*,² the Tenth Circuit held that federal courts lack the power to decide certain disputes about national environmental policy—specifically, tort and consumer protection claims by a state county seeking to hold energy companies liable for the effects of climate change. That decision has potentially massive consequences not just for the parties in *Suncor*, but for anyone who might be affected by climate change policy. That is to say, everybody.

How Did We Get Here? One would think these were federal issues for federal courts. Unlike a more localized oil spill or chemical emissions from a facility, there is little question of the interstate character of greenhouse gas emissions, whatever their source. In fact, because those emissions are essentially fungible on a worldwide basis, the climate change debate is just as much a matter of international diplomacy as it is of domestic policy (as the Paris Climate Change Agreement illustrates). Thus, the EPA can and does regulate those emissions under the Clean Air Act,³ and the Act and regulations displace the federal common law rules that would otherwise control.⁴ In fact, EPA’s changing and expanding regulations for facilities are again before the Supreme Court this Term.⁵

So how did the Tenth Circuit come to the conclusion that federal courts lacked power to adjudicate Boulder County’s claims about greenhouse gas emissions? The Supreme Court held last term in *BP v. Baltimore* that, on an appeal of remand of a case removed under the federal officer removal statute, a court of appeals must consider jurisdiction on any and all asserted bases.⁶ Following that ruling, the Supreme Court reversed the Tenth Circuit’s original decision in *Suncor*, which had considered federal officer jurisdiction only and ignored other bases.⁷ Now, on remand from the Supreme Court, the Tenth Circuit ticked through each of the jurisdictional grounds asserted by the energy companies: federal officer removal, federal common law, complete preemption, substantial federal question, federal enclaves, and the Outer Continental Shelf Lands Act. And it held that none was sufficient to support federal jurisdiction.⁸

¹ ___ F.4th ___, 2022 WL 363986 (10th Cir. Feb. 8, 2022).

² 141 S. Ct. 1532 (2021).

³ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁴ *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011).

⁵ See *West Virginia v. EPA*, 20-1530 (S. Ct.).

⁶ See *BP*, 141 S. Ct. at 1543.

⁷ See *Suncor*, 2022 WL 363986, at *3.

⁸ *Id.* at *4.

For the most part, the Tenth Circuit’s reasoning was narrow and doctrinal—it held, for example, that the energy companies did not act under a federal officer, that the plaintiffs’ claims did not necessarily raise issues of federal law on their face, and that the Clean Air Act did not completely preempt state law. But its most significant holding concerned federal common law. The Tenth Circuit said federal common law did not completely displace plaintiffs’ claims because “Congress has not clearly manifested an intent that the federal common law for transboundary pollution will completely preempt state law.”⁹ One would think that climate change, like other interstate pollution issues governed by federal common law, implicates “an overriding federal interest in the need for a uniform rule of decision.”¹⁰ That was why the Second Circuit held last year, in a similar case filed in federal court, that federal common law displaced the state-law claims in *City of New York v. Chevron*.¹¹ It was also why the energy companies argued in *BP v. Baltimore* that the Supreme Court should assert federal jurisdiction over these claims under federal common law. But the Supreme Court declined to reach the issue in *BP*, leaving it to the courts of appeals to decide.¹² And now the Tenth Circuit has decided it does not apply.

Why Does It Matter? While it might be surprising that the Tenth Circuit held this case was outside federal jurisdiction, it should not be surprising that the plaintiffs wanted a state court to decide it, since plaintiffs’ counsel often prefer the state court system. And even apart from that ordinary dynamic, the filing of these actions in state court serves objectives far beyond this case. *Suncor* is just one of many similar lawsuits filed by governmental entities around the country that seek to hold energy companies liable for the effects of climate change. Those suits matter not just for their requests for damages, which motivate plaintiffs’ attorneys to bring them, but for their demands for injunctive relief—orders remediating or abating the alleged nuisance of the defendants’ contributions to greenhouse gas emissions.¹³ Ordinarily, abatement might involve closing a facility or cleaning up a particular waste site, but here, because of the fungible and global character of greenhouse gas emissions, plaintiffs can say that abatement requires changes of a national or worldwide scale. That is exactly what the lawyers filing these lawsuits are looking for: an aggressive order that will allow them to use state law to dictate national—and international—climate policy.

Depending on your perspective, the quest for that order might be a race to the bottom or a race to the top. But under either view, it poses a massive political and jurisdictional problem because it affects all Americans without any political checks. Regardless of any climate benefits that plaintiffs say will come from a state-court order curbing emissions, given our economic dependence on fossil fuels, there is scarcely an American who would not feel its cost—in prices at the pump, consumer goods, utility bills, and elsewhere. If EPA were to issue such controversial greenhouse gas regulations, Americans at large would at least have some political power to change them by voting in a new President. In fact, that is just what we have seen in the EPA’s ever-shifting regulations from Bush to Obama to Trump to Biden.¹⁴ But if Americans don’t like an order from a state-court judge that affects their lives every day, there is almost nothing they can do about it. All that exists is the indirect power to vote the judge out, which only lies for those who happen to live inside the judge’s narrow geographic constituency.

And so a theory of jurisdiction that would keep these cases in state court would suddenly make national and international issues of the greatest economic and political significance turn on the decision-making of any individual state court willing to take the step. It might not even matter if most state-court judges reject these claims, so long as one judge accepts them. If that happens, the answer to “Who decides international climate policy?” might end up being “Whichever state-court judge is most restrictive.”

⁹ *Id.* at *13.

¹⁰ *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972).

¹¹ *City of New York v. Chevron Corp.*, 993 F.3d 81, 90 (2d Cir. 2021).

¹² See *BP*, 141 S. Ct. at 1543.

¹³ See *Suncor*, 2022 WL 363986, at *3.

¹⁴ See Petition at 1-13, *West Virginia v. EPA*, 20-1530 (S. Ct.).

Where to Next? Our constitutional structure dictates that these claims must be governed by federal law, and *Suncor* erred in holding otherwise. But *Suncor* is only the first court of appeals decision post-*BP* to weigh in on jurisdiction in these cases—many more, including *BP* itself, are still pending. So it remains to be seen whether other circuits will recognize federal common law displacement or some other theory of removal. And *Suncor* has already split from the Second Circuit in *Chevron* (though that case was filed in federal court), which held that federal common law exclusively governs these claims. That conflict alone may well be enough to send this back to the Supreme Court.

No matter what the Supreme Court does, Congress has the power to intervene through legislation. It could expressly provide that the Clean Air Act preempts these actions, or it could confer federal jurisdiction over these lawsuits. But given Congress's reluctance to bring legislative control to EPA's ever-shifting standards, we shouldn't hold our breath (even if doing so would be net carbon negative).