C.A. No. 09-17490

__SET FOR ARGUMENT IN SAN FRANCISCO ON NOV. 28, 2011__

In the United States Court of Appeals for the Ninth Circuit

NATIVE VILLAGE OF KIVALINA AND CITY OF KIVALINA,
Plaintiffs-Appellants,

v.

EXXON MOBIL CORPORATION; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; CONOCOPHILLIPS COMPANY; SHELL OIL COMPANY; PEABODY ENERGY CORPORATION; THE AES CORPORATION; AMERICAN ELECTRIC POWER COMPANY, INC.; AMERICAN ELECTRIC POWER SERVICES CORPORATION; DTE ENERGY COMPANY; DUKE ENERGY CORPORATION; DYNEGY HOLDINGS, INC.; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; PINNACLE WEST CAPITAL CORPORATION; GENON ENERGY, INC.; THE SOUTHERN COMPANY; AND XCEL ENERGY INC.,
Defendants-Appellees,

On Appeal from the United States District Court for the Northern District of California, Case No. C-08-1138-SBA
The Honorable Saundra Brown Armstrong, United States District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

INTRODUCTION

Defendants demonstrated in their answering briefs that the extraordinary claims asserted here—in which Plaintiffs seek to hold selected U.S. companies liable for "contributing" to the alleged "nuisance" of global warming—must be dismissed because, *inter alia*, the claims cannot be maintained under federal common law; Plaintiffs lack Article III standing; and their claims raise nonjusticiable political questions. The Supreme Court's recent decision in *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"), confirms these conclusions. *AEP* squarely held that federal common law tort claims based on alleged global warming—like those asserted here—are displaced by the Clean Air Act ("CAA"). *AEP*'s reasoning also supports Defendants' other grounds for dismissal. The district court's judgment should be affirmed.

ARGUMENT

I. *AEP* Confirms That Plaintiffs' Claims Have Been Displaced

AEP held that, even if a plaintiff "could state a federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming," any such claim "would be displaced" by the CAA, which establishes a framework under which EPA may consider "regulat[ing] carbon-dioxide emissions." 131 S. Ct. at 2537. *AEP*'s displacement holding is dispositive here.[1]

[1] This Court may affirm on displacement grounds without resolving jurisdictional issues such as standing. *Greensprings Baptist Christian Fellowship Trust v. Cilley*,

A. *AEP* Held That the CAA Displaces Federal Common Law Claims Based on Emissions of Greenhouse Gases

AEP recognized that, even in the limited situations where federal common law might otherwise properly be invoked, "'the need for such an unusual exercise of law-making by federal courts disappears'" when "'Congress addresses a question previously governed by a decision rested on federal common law.'" *AEP*, 131 S. Ct. at 2537 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) ("*Milwaukee II*")). Thus, where a federal statute "'speak[s] directly to [the] question'" addressed by a putative federal common law claim, that claim is displaced. *Id*. (citation omitted). This standard for "displacement of federal common law" reflects the fact that "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *Id*. Applying this standard, the Court held that the CAA displaces any "federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming." *Id*.

In reaching this conclusion, the Court noted that *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007), had held that "emissions of carbon dioxide qualify as air pollution" under the Act. *AEP*, 131 S. Ct. at 2537. Accordingly, the CAA

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629 F.3d 1064, 1066 n.1 (9th Cir. 2010) (noting that "[s]ome circuits" have held that courts may skip over jurisdiction "if squarely controlling precedent would, if jurisdiction existed, 'foreordain' the decision on the merits against the party alleging the existence of jurisdiction").

authorizes EPA—if it can make valid findings in accordance with the relevant standards and if it otherwise complies with the applicable legal requirements—to take a number of regulatory actions with respect to carbon-dioxide emissions. *Id*. These include (if the statutory prerequisites are met) setting "emissions limits for a particular pollutant or source of pollution" from both new and existing sources within specified categories. *Id*. at 2538. In addition, the Act "provides multiple avenues for enforcement," not only through "civil actions [by EPA] against polluters" but also through petitions for review of agency action by both "States and private parties." *Id*.[2] The Act also authorizes private "civil enforcement action[s]" for equitable relief and civil penalties, *id*., and the plaintiff may request that, in lieu of depositing all such penalties in the U.S. Treasury, a portion should be applied to "beneficial mitigation projects." 42 U.S.C. § 7604(g)(2).

Given this regulatory framework, it was "plain" that the plaintiffs' federal common law claims concerning emissions from the defendants' power plants were displaced. 131 S. Ct. at 2537. Indeed, the Court noted that "EPA is currently engaged" in a "rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired power plants." *Id*. at 2538. The Court held, however, that displacement was *not* dependent upon any such rulemaking. "The critical point is

[2] Indeed, multiple petitions for review are pending in the D.C. Circuit concerning various greenhouse gas rules issued by EPA. *See*, *e.g.*, *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322 (D.C. Cir.).

that Congress delegated to EPA the decision *whether* and *how* to regulate carbon-dioxide emissions from power plants; the *delegation* is what displaces federal common law." *Id*. (emphasis added).

AEP is controlling here. Just as in *AEP*, Plaintiffs' claims would require a court to "determine, in the first instance, what amount of carbon-dioxide emissions is 'unreasonable'"—an exercise in "complex balancing" that would require consideration of the "particular greenhouse gas-producing sector" at issue (*e.g.*, the oil, coal, electric, or other industries), and an "informed assessment of competing interests," including "our Nation's energy needs and the possibility of economic disruption." 131 S. Ct. at 2539-40; *see also*, *e.g.*, Oil Brief at 21-29. The CAA "entrusts" such issues in the first instance to EPA, which is "better equipped" to evaluate them "than individual district judges issuing ad hoc" decisions. 131 S. Ct. at 2539. It is irrelevant that Plaintiffs here seek to have such assessments made by a jury applying common law rather than a court sitting in equity; "'regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality) (citation omitted). Here, as in *AEP*, "[t]he judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme Congress enacted." *Id.* at 2540. Accordingly, Plaintiffs' federal common law claims are displaced.

B. *AEP* Refutes Plaintiffs' Arguments for Evading Displacement

Plaintiffs' reply brief ("RB") raised two counter-arguments. Neither survives *AEP*.

First, Plaintiffs argued that there can be no displacement absent *actual* regulation of Defendants' emissions (RB 31-37), but the Supreme Court expressly rejected this view. 131 S. Ct. at 2538. The "delegation is what displaces federal common law," not whether and how it has been exercised by EPA. *Id*. And, contrary to Plaintiffs' view that displacement occurs only when the statute *requires* EPA to promulgate regulations (RB 36), the Court held that federal common law claims would be displaced even "were EPA to decline to regulate carbon-dioxide emissions altogether." *Id.* at 2538-39.

AEP also rejected the argument—repeated by Plaintiffs (RB 32, 37, 39 n.23)—that *Milwaukee II* supports a contrary view. While the *Milwaukee II* statute prohibited "'[e]very point source discharge' of water pollution … 'unless covered by a permit,'" the fact that such regulatory requirements were already effective was not what gave rise to displacement. 131 S. Ct. at 2538 (citation omitted). Rather, "the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" *Id*. (citation omitted). "Of necessity, Congress selects different regulatory regimes to address different problems." *Id*. The "across-the-board" prohibited-unless-covered-by-a-

permit approach of the *Milwaukee II* statute (RB 39 n.23) "could hardly" have been applied to carbon dioxide since, as the Court noted, that would prohibit breathing. 131 S. Ct. at 2538. The need to determine under the CAA the "appropriate amount of regulation in any particular greenhouse gas-producing sector" is *itself* sufficient to give rise to displacement. *Id*. at 2539.

Second, Plaintiffs argued that the CAA cannot displace their claims because the Act does not include a damages remedy for past emissions. (RB 32-33.) But as *AEP* confirms, displacement occurs when (as here) Congress *addresses* the question at issue, and there is no requirement that Congress do so "'in a particular manner.'" 131 S. Ct. at 2538 (citation omitted). The courts may not use federal common law to create a "parallel track" that second-guesses the administrative structure Congress created. *Id*. It would be particularly incongruous to recognize a right of action for damages here, when Congress had chosen to authorize only limited monetary remedies in citizen suits under the CAA. *See supra* at 3.

Once Congress legislates on a subject, related federal common law claims are displaced regardless of whether the statute expressly addresses the precise situation or claim raised by the plaintiffs, or affords them relief. *Milwaukee II*, 451 U.S. at 314-15, 325; *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 477-78 (7th Cir. 1982). Indeed, the Supreme Court rejected this very argument in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), which

held that, because the Clean Water Act displaced federal common law claims for injunctive relief, it also necessarily displaced claims for *monetary* damages, even though the Act provided no equivalent right to such damages. *Id*. at 21-22.

II. *AEP* Supports Other Grounds of Dismissal Raised by Defendants

A. Article III Standing

Although the Court was evenly divided on the standing question in *AEP*—and therefore did not render a precedential ruling on that issue, *see Rutledge v. United States*, 517 U.S. 292, 304 (1996)—the Court's analysis confirms that Plaintiffs here lack standing.

The *AEP* plaintiffs included six States, and the Court's opinion noted that four Justices "would hold that at least *some* plaintiffs have Article III standing under *Massachusetts*, which permitted a *State* to challenge EPA's refusal to regulate greenhouse gas omissions." 131 S. Ct. at 2535 (emphases added). The remaining four Justices "would hold that none of the plaintiffs have Article III standing." *Id*. Because even the Justices who favored standing stated that they did so as to "some" plaintiffs, and based on *Massachusetts*'s holding that "a State" had standing there, *AEP* strongly suggests that standing would not exist in an alleged global-warming nuisance case, like this one, brought by non-State parties. *See*, *e.g.*, Utilities' Brief at 27-31.

B. Political Question Doctrine

Although *AEP* likewise produced no precedential ruling concerning the political question doctrine, the Court underscored the "complex balancing" entailed in any assessment of whether greenhouse gas emissions in particular sectors were "unreasonable," and it held that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." 131 S. Ct. at 2539-40. Moreover, the Court noted that allowing the claims in *AEP* to proceed would mean "[s]imilar suits could be mounted" in "any federal district" against "'thousands or hundreds or tens' of other defendants." *Id.* at 2540 (citation omitted). These conclusions support Defendants' arguments that adjudication of Plaintiffs' claims raises political questions because (*inter alia*) they call for "an initial policy determination of a kind clearly for nonjudicial discretion" and there is "a lack of judicially discoverable and manageable standards for resolving" them. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

C. Scope of Federal Common Law

AEP supports this Court's holding that "federal common law nuisance claim[s] based on air pollution" can be recognized only when "a *state* su[es] sources outside of its own territory because they are causing pollution within the state." *National Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1205 (9th Cir. 1988) (emphasis added). Consistent with *National Audubon*, the *AEP* Court noted

that its prior federal common law interstate "pollution" cases had all involved "suits brought by one *State* to abate pollution emanating from another State" and that it had never held that non-State actors could likewise "invoke the federal common law of nuisance." 131 S. Ct. at 2535-36 (emphasis added). The Court further emphasized the unprecedented nature of alleged global-warming nuisance claims by noting that it had never applied the federal common law of nuisance to allegations of comparable scale. *Id*. at 2536 ("Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders.").

Accordingly, the holding of *National Audubon*—that only *States* may bring "nuisance" actions under federal common law to address out-of-State pollution—still controls. Because Plaintiffs are not States, they cannot invoke the federal common law of nuisance.

CONCLUSION

The judgment of the district court should be affirmed.

DATE: November 4, 2011

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I certify pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 1,999 words, which is less than the 2,000 words permitted by this Court's October 26, 2011 order.

Dated: November 4, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have today caused the foregoing document to be sent by U.S. Mail to the following non-CM/ECF participants:

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