U.S. Court of Appeals Docket No. 19-2197

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Joe C. Allen *et al.*,
Plaintiffs/Appellees,

vs.

Environmental Restoration, LLC,
Defendant/Appellant,

and

GOLD KING MINES CORPORATION *et al.*,
Defendants.

APPELLANT'S REPLY BRIEF
(ORAL ARGUMENT REQUESTED)

On Appeal From
The United States District Court
For The District of New Mexico
The Honorable William P. Johnson, Chief Judge
U.S.D.C. Case No. Case # 1:18-cv-00744-WJ-KK

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INTRODUCTION

Appellee's response brief clocks in at nearly three times the length of Environmental Restoration's opening brief, yet, through it all, Appellees fail to address the core issue on this appeal: if the Supreme Court had meant to rule that the Clean Water Act compelled application only of the source-state's ***substantive*** law, it could easily have done so. Instead, the Supreme Court did no such thing, and wrote in sweeping and categorical terms that the ***only*** law that can apply is that of the source-state, rather than any of the downstream states.

To evade the plain and categorical language of *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987), the Appellees are forced to make increasingly convoluted arguments.

First, they attempt to argue that the word "law," as used by the Supreme Court, really means "substantive law." This is, of course, misguided—ever since adopting the distinction in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), the Supreme Court can, and does, refer to "substantive law" when it wishes to draw a distinction between substantive and procedural laws, and any decision not to draw such a distinction must be understood as intentional.

Second, Appellees' arguments regarding whether allowing New Mexico to apply its statute of limitations in order to expand the rights and remedies Colorado offers fail to address the fact that such efforts are the essence of what is prohibited by *International Paper:* attempts to regulate conduct beyond what the source state intends, including state efforts to extend the availability of remedies that the source state does not. Appellees also give short shrift to the equally important goal of the Clean Water Act to provide predictable and consistent guidance to entities regulated by the states regarding their water use.

Finally, after arguing for a ***wider*** role for the subordinate downstream states, Appellees shift focus in the other direction, and argue that ***federal*** law not

specifically aimed at the Clean Water Act should impose the relevant statute of limitations. Just as with their efforts to increase the role of the subordinate downstream states, this argument ignores Congress's intent in enacting the Clean Water Act and should be rejected.

In sum, none of Appellees' arguments can overcome the simple fact that *International Paper* clearly stated that the law of the source state, and ***only*** the law of the source state, applies. The District Court's ruling below is contrary to this controlling opinion of the Supreme Court and should be vacated.

ARGUMENT

I. The Supreme Court's Use of Categorical Language in *International Paper* is Not Limited By Procedural History Or Subsequent Rulings

As explained in Environmental Restoration's opening brief (AOB at 7-8), the Supreme Court's ruling in *International Paper* used unqualified, categorical language in ruling that the Clean Water Act "pre-empts state law to the extent that the state law is applied to an out-of-state point source." *International Paper*, 479 U.S. at 500. Nothing in the procedural history of *International Paper*, and nothing in subsequent court decisions, justifies the creation of a "procedural" vs. "substantive" distinction in its holding, as Appellees argue and the District Court erroneously concluded in the decision below.

As an initial matter, the "savings clause" in the Clean Water Act that gave rise to the analysis in *International Paper* is, itself, more expansive than Appellees' arguments would suggest—by its very language the savings clause applies to "any statute or common law. . ." 33 U.S.C. § 1365(e). The concept that the Clean Water Act's preemption, or *International Paper's* analysis of that preemption, exempts statutory laws as important as the statute of limitations, finds no basis in the law itself.

Nor does the procedural history of *International Paper* imply that its holding

can or should be read to include a limitation not expressly set forth in the opinion. That the context of *International Paper* involved a question of which state's nuisance laws should apply does not in any way limit its applicability to other laws, such as on when a claim may be brought.

The Supreme Court has the full authority to announce expansive decisions, and the procedural history of any case that comes before that Court does not limit its ability to act. Instead, at least as far as matters arising from federal courts are concerned, the proposition that the Supreme Court would not address matters not raised below is "prudential only." *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992) (citing *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980)). However, the Court freely acknowledges that it has the power to do so where appropriate. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (collecting examples and itself reaching matter not raised below).[1]

Consequently, whether the majority in *International Paper* announced a rule that went beyond the narrow confines of the procedural history—as Justice Stevens accused the majority of doing in his partial dissent, *International Paper,* 479 U.S. at 509 (Stevens, J., concurring in part and dissenting in part)—the fact remains that the *International Paper* majority nevertheless ruled broadly, and did not limit itself to "substantive law" as Justice Stevens urged his colleagues, or as the Appellees urge this Court to do. Justice Stevens recognized this fact when he wrote the unanimous opinion in *Arkansas v. Oklahoma,* 503 U.S. 91 (1992). Given the opportunity, Justice Stevens did not attempt to limit the holding he criticized in

[1] Indeed, to conclude otherwise "would be to render automatons of judges, forcing them merely to register their reactions to the arguments of counsel at the trial level." *Rentways, Inc. v. O'Neill Milk & Cream Co.,* 308 N.Y. 342, 349 (1955).

International Paper.[2] Instead, he reaffirmed *International Paper's* expansive holding, observing that "[t]he Court held the Clean Water Act taken 'as a whole, its purposes and its history' pre-empted an action based on the law of the affected State and that the ***only*** state law applicable to an interstate discharge is 'the law of the State in which the point source is located." *Arkansas,* 503 U.S. at 100 (discussing and quoting *International Paper*, 479 U.S. 487 & 493) (emphasis added).

The unanimous holding in *Arkansas* is fatal to the Appellees' efforts to claim that the rule announced in *International Paper* was limited to "common law" and not statutes like a statute of limitations (*see* Appellees' Brief at 15). Once again, the Supreme Court spoke in categorical terms about the scope of the Clean Water Act's preemption of downstream laws and drew no distinction whatsoever between "substantive" and "procedural" law, nor between statutory and common law. If the Supreme Court wished to have done so, it could easily have written that the Clean Water Act "pre-empted an action based on the ***common*** law of the affected State" or that "the only ***substantive*** state law applicable to an interstate discharge is the ***substantive*** law of the State in which the point source is located."

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[2] Justices of the Supreme Court frequently issue concurrences where they highlight their continued disagreement with rulings that they recognize are binding. *See, e.g., White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J. concurring in part and concurring in the judgment) ("The Court reaches the correct result under our precedents. I write separately only to suggest that our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself."). Justice Stevens' decision not to do so in *Arkansas* should, therefore, be understood as his acceptance of the expansive ruling he criticized in *International Paper*.

The Supreme Court wrote no such thing, because that is not what the Clean Water Act requires; instead, it requires that ***all*** law of a downstream state—statutory, common, or regulatory—yield to that of the point source state.

With no support from the procedural history or text of *International Paper*, the Appellees next turn to subsequent decisions to justify creating a distinction that does not exist. This effort fares no better than the effort to rely on *International Paper's* procedural history, not least of all because no such cases exist. The closest Appellees can come is to refer to a ***state*** court decision that purportedly supports their arguments.

Apart from being utterly irrelevant to the interpretation of a Supreme Court ruling, Appellees mischaracterize the state court decision in order to bolster their claim asserting that the West Virginia Supreme Court "appl[ied *International Paper]* to preempt substantive law only." (Appellees' Brief at 19). In fact, the case that Appellees cite, *Ashland Oil, Inc. v. Kaufman,* does nothing of the sort. The specific procedural issue at play there was how due process rights were served by preliminary injunction proceedings in West Virginia state courts, and the West Virginia Supreme Court specifically ruled that the state's "existing rules pertaining to the issuance of preliminary injunctions in West Virginia do not adequately protect the due process rights of parties that are enjoined." 384 S.E.2d 173, 176 (W. Va. 1989). The West Virginia Supreme Court even proceeds to adopt some of Federal Rule of Civil Procedure 65 as superior to the state's own statutes. *Id.* at 178.

Only after this discussion does the West Virginia Supreme Court turn to *International Paper,* an issue that it notes "merits only brief discussion at this point in the proceedings." *Id.* The West Virginia Supreme Court ultimately ***refused*** to act on *International Paper,* noting that because "the exact nature and/or composition of the 'unusual emissions' from Ashland's plant" were unknown,

"whether these emissions are regulated by the Clean Air Act, thereby preempting West Virginia's statutory or common law, is also unknown at this point." *Id.* at 179-80. As a result, the West Virginia Supreme Court simply notes that "the procedural law of West Virginia shall be followed when the issues are being litigated in this State's courts." *Id.* at 180.

Far from being an adoption of the distinction foreclosed by the plain language of *International Paper*, *Ashland Oil* merely states that ***if*** the emissions are regulated by the Clean Air Act, ***then*** the law is preempted. In the interim, however, until there was a finding of preemption, the case would remain litigated as though it was not preempted, and pursuant to the West Virginia procedural rules (as altered by the West Virginia Supreme Court in the *Ashland Oil* decision).

The second time that case came before the West Virginia Supreme Court likewise presents no support for Appellees' position. The second appeal came after trial and included a dispute over which state's law controls the award of punitive damages. There, the West Virginia Supreme Court brushed aside the choice of law dispute, again without any analysis, because "the issue of awarding punitive damages is a matter of substantive law rather than procedural law." *Arnoldt v. Ashland Oil, Inc.*, 412 S.E.2d 795, 805 (W. Va. 1991). The only other issue where choice of law was mentioned was the scope of impeachment evidence, again with no analysis. *Id.* at 808 n.16.

The final case, *Bocook v. Ashland Oil, Inc.*, 819 F. Supp. 530 (S.D.W. Va. 1993), which ***also*** arises from the same Ashland Oil pollution event as the state cases, is the only case from a federal court that Appellees rely on. Once again, no analysis is made of any substantive/procedural distinction; the district court merely observed in a footnote that the substantive law of the source state governs. *Id.* at 532 n.1. ***Nowhere*** in this opinion does the district court even address procedural rules or laws, let alone the statute of limitations; instead, the court merely denied a

Rule 12(b)(6) motion to dismiss.

In conclusion, neither the procedural history leading to the Supreme Court's decision in *International Paper,* nor off-the-cuff comments by a state court made without analysis or support and in a different context, support ignoring the Supreme Court's own words and instead inserting "substantive" before every use of the word "law" in *International Paper,* as Appellees urge. The Supreme Court's ruling was clear, unambiguous, and left no room for exceptions such as that created by the District Court in the decision below and urged by Appellees.

II. The Clean Water Act's "Point Source" Rule is Intended to Ensure Predictability and a Single Standard for Regulated Entities

The next major argument Appellees make is that the imposition of a downstream state's statute of limitations that exceeds that of the source state does not impact the sovereign powers of the point source state and would not frustrate the Clean Water Act's allocation of regulatory authority among the federal government and the states.

The enactment of the Clean Water Act cast aside the prior framework of federal common law and instead elevated the states where potential sources of pollution are located to the primary position for regulations. *See City of Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 318-19 (1981) (describing the Act's rejection of federal common law); *International Paper,* 479 U.S. at 489 (holding that the source states had a significant role in regulation of conduct within their borders). Downstream or affected states occupy a "subordinate position" to source states. *International Paper,* 479 U.S. at 491. In this subordinate position, downstream states are prevented from doing "indirectly what they could not do directly—regulate the conduct of out-of-state sources." *International Paper,* 479 U.S. at 495.

In this light, the statute of limitations cannot be breezily dismissed as a mere

procedural quirk that does not affect any of the substantive regulations. It is well-accepted that even rules that are seemingly procedural are so bound up with the right or remedy they govern that they serve to define the scope of the substantive remedy. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 555 (1949) ("Rules which lawyers call procedural do not always exhaust their effect by regulating procedure"). Thus, "procedural" rules that make it more difficult to bring a claim have frequently been upheld. *See, e.g., id.* (requirement for plaintiff to post bond before bringing suit). Statutes of limitations themselves fall into this category of "procedural" rules that define the limits of a substantive right and that are to be applied in federal court. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-110 (1945); *Racher v. Westlake Nursing Home Limited Partnership*, 871 F.3d 1152, 1164 (10th Cir. 2017) ("[W]hen state law creates a cause of action, it also defines the scope of that cause of action. … This includes the applicable burdens, defenses, ***and limitations***.*"*) (emphasis added).

The consequences of permitting a downstream state's statute of limitations to enlarge the time period to bring claims under the source state's laws therefore amounts to nothing less than a downstream state usurping the source state's authority to impose limitations and burdens on permitted entities within its state. The Clean Water Act and the Supreme Court prohibit this.

In any event, the Clean Water Act's vesting of sole regulatory power in the source state is not the only goal of the law. The Clean Water Act is also intended to aid regulated entities by ensuring that they would be subject to a single set of regulations and laws, and therefore able to know with certainty their obligations, potential liabilities, and responsibilities. Indeed, the entire purpose of the Clean Water Act is "to create and manage a ***uniform*** system of interstate water pollution regulation." *Arkansas*, 503 U.S. at 110 (emphasis added).

The Supreme Court recognized the potential for chaos and unpredictability

that would occur if there was not a single controlling law for any given entity permitted under the Clean Water Act, pointing out that, for example, a source in Minnesota discharging into the Mississippi River would be subject to the "nuisance laws of any of the nine downstream States." *International Paper,* 479 U.S. at 496 n.17.

Subsequent courts have repeated the Supreme Court's concerns when explaining the importance of the point source rule. For example, in a case involving the Deepwater Horizon oil spill in the Gulf of Mexico, the Fifth Circuit rejected efforts to have multiple states' laws apply to various claims, writing that "[a]llowing up to five states along the Gulf Coast to apply their individual laws to discharges arising on the Shelf would foster the legal chaos described by *[International Paper]." In re Deepwater Horizon*, 745 F.3d 157, 170-71 (5th Cir. 2004). Or, as the Fourth Circuit put it in a Clean Air Act case, permitting the imposition of the law of any purportedly affected state would lead to "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *North Carolina ex rel. Cooper v. Tennessee Valley Authority,* 615 F.3d 291, 296 (4th Cir. 2010).

Finally, the Clean Water Act's abrogation of federal common law in favor of states' regulatory authority precludes the application of the five-year federal "catch all" statute of limitations found at 28 U.S.C. § 2462. The Clean Water Act's rejection of federal common law in favor of state laws itself counsels against impositions of federal statutes of limitations where the source state's law itself provides the relevant limitation.

Moreover, adoption of the federal catch-all statute of limitations would run afoul of the requirement "that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery." *Guaranty Trust Co.*, 326 U.S. at 110. Here, ***both*** Colorado law (as the point source law) and

New Mexico law (as the downstream forum state) provide for a more limited time than the five-year federal catch-all. Colorado requires tort actions to be commenced within two years of the injury or its discovery, Colo. Rev. Stat. § 13-80-102(1)(a), while New Mexico's personal injury and negligence statute of limitations is three years. N.M. Stat. § 37-1-8. In either case, adoption of the federal catch-all statute of limitations would expand the availability of recovery in a federal court as opposed to a state court, regardless of this Court's interpretation of *International Paper*, and should therefore be rejected.

III. A Choice of Law Analysis Is Unnecessary and Contrary to the Clean Water Act and *International Paper*

The final major argument in Appellees' brief presents a traditional choice of law analysis, much like the District Court engaged in below. For the same reasons the District Court's reasoning was error, so too does Appellees' argument have no bearing on the outcome of this appeal and should be disregarded. A traditional choice of law analysis is only required where there is not a more specific choice of law procedure set forth in the statute or court decisions. Here, there is: the point-source rule from *International Paper*, *Arkansas*, and subsequent decisions.

CONCLUSION

The Clean Water Act is a comprehensive piece of legislation that displaced all prior federal common law and was designed by Congress to ensure predictable and uniform laws for all regulated entities. The Supreme Court recognized as much in *International Paper* when it adopted the point source rule that ***only*** the laws of the state in which the regulated entity discharging materials into the waterways applied to suits over those discharges.

Nothing in Appellee's arguments change these facts, and none of those convoluted arguments can create a distinction between procedural and substantive law in this context. The District Court's decision that drew that distinction in order

to apply New Mexico's statute of limitations was contrary to binding precedent—so contrary, in fact, that it echoed the reasoning of, and relied on the very same authorities as, Justice Brennan's dissent in *International Paper*. Just as Justice Brennan's views stood in opposition to the *International Paper* majority, so too does the District Court's ruling at issue in this appeal.

This Court should correct the District Court's error, vacate the decision below, and instruct the District Court to apply *International Paper* as it is written: to displace, without qualification or distinction, any and all laws other than those of the source state.

DATED: May 15, 2020

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CERTIFICATION OF COMPLIANCE WITH
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this reply brief contains 3,306 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and 10th Cir. R. 32(A) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word/Microsoft 365 with the Times New Roman font at 14 points.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on May 15, 2020.

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