9th Circ. Sees Climate Problem But Rejects Plaintiffs' Solution

By **Paul Weiland and Benjamin Rubin**

Paul Weiland

Benjamin Rubin

A divided panel of the U.S. Court of Appeals for the Ninth Circuit found last month that a group of plaintiffs lacked standing under Article III of the United States Constitution to challenge the federal government's alleged failure to protect and promote a "climate system capable of sustaining human life."[1]

While scholars may debate the extent to which individual court decisions affect society, according to U.S. District Judge Josephine L. Staton, the author of the dissent, this decision could very well mean the destruction of "the United States as we currently know it." Remarkably, based on the statements in the decision, the panel majority actually concurs with that assessment.

As interpreted by the U.S. Supreme Court, Article III requires a plaintiff to demonstrate (1) a concrete and particularized injury, (2) caused by the challenged conduct, (3) that is likely redressable by a favorable judicial decision.[2] If a plaintiff cannot satisfy each of these elements, then the plaintiff lacks standing to maintain the action in federal court.

In this case, the majority and dissent have a fundamental disagreement over the issue of redressability. Specifically, they disagree over whether the plaintiffs' alleged injuries could be adequately redressed by a federal court decision. The majority found that they could not, whereas the dissent reached the opposite conclusion.

The lawsuit, filed by a number of young individuals, an environmental organization and a "representative of future generations," alleged that by permitting, authorizing and subsidizing fossil fuel use, the federal government was causing plaintiffs a variety of climate change-related injuries, including psychological harm, interference with recreational activities, exacerbated medical conditions and damage to property.

The lawsuit further alleged that these activities violated the plaintiffs' substantive constitutional rights under the Fifth Amendment's due process clause and equal protection clause, the Ninth Amendment, and the public trust doctrine. Specifically, the plaintiffs alleged that their substantive constitutional right to a climate system capable of sustaining human life was being violated.

With respect to whether such a substantive constitutional right exists, the majority found that reasonable minds could disagree on that issue, but for purposes of the decision they would assume without deciding that such a right does exist. Turning to the issue of injury, the majority and dissent both found that plaintiffs had established injury.

In fact, the majority found that the evidence:

establishes that the government's contribution to climate change is not simply a result of inaction. The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.

As for the potential impact of these actions, the majority also warned that "[a]bsent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies." With respect to the individual plaintiffs, the majority found that at least some of the injuries alleged were both concrete and ongoing, providing as an example that one plaintiff was forced to leave her home because of water scarcity caused by climate change.

On the issue of causation, the majority and dissent were also in agreement. Specifically, the majority found that the causal chain was sufficiently established because the plaintiffs alleged their injuries were caused by carbon emissions from fossil fuel production, extraction and transportation, the United States was a significant contributor to those carbon emissions, "[a]nd the plaintiffs' evidence shows that federal subsidies and leases have increased those emissions."

With the first two elements of Article III satisfied, the majority then turned to the issue of redressability. To satisfy this element, plaintiffs must demonstrate that the relief they seek is both substantially likely to redress the alleged injuries, and within the court's power to award.

With respect to the plaintiffs' request for declaratory relief, the majority found that "[a] declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injury absent further court action." Summarizing the plaintiffs' other requested remedy, the majority found that "[t]he crux of the plaintiffs' requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions."

The majority questioned whether such an injunction would actually redress the plaintiffs' alleged injuries, since many of the emissions causing climate change happened decades ago or come from foreign and nongovernmental sources, and the plaintiffs' own experts assert that merely ceasing government promotion of fossil fuels will not stop climate change.

Nevertheless, the majority did not stop its analysis there. Instead, it found that the plaintiffs' injuries were not redressable because the requested remedy was beyond a federal court's power, stating:
There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or for worse, to the wisdom and discretion of the executive and legislative branches.

In light of this finding, the majority remanded the action to the district court with instructions to dismiss the action for lack of standing. The case is remarkable, in part, because of the breadth of the injury alleged and the relief sought. For this reason, its repercussions may be limited.

That said, as the majority points out, a different panel of the Ninth Circuit previously held that plaintiffs lacked standing to pursue a challenge to local agencies for failure to regulate five oil refineries because the refineries had an indiscernible impact on climate change. The two panel decisions place would-be plaintiffs in a difficult position.

This is the case because plaintiffs that pursue claims against discrete sources of emissions may be dismissed because the remedy sought is too narrow to justify the action, and plaintiffs that pursue claims against a wide array of sources of emissions may be dismissed because the remedy sought is too broad to be granted by the courts.

In a fiery dissent, Judge Staton described the majority as simply throwing up their hands, and ignoring established precedent. The dissent concludes with a warning:
If plaintiffs' fears, backed by the government's own studies, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?

Given the high-profile nature of the litigation, it is expected that plaintiffs will seek en banc review of the panel decision. If that is not successful, then the decision could be headed to the Supreme Court.

Under the Supreme Court's rules, a petition for review will be granted so long as four of the nine justices vote to accept a case. And, given the current makeup of the Supreme Court, that seems like a distinct possibility, though there is no question that the coordinate branches of government are, in theory, far better equipped to address this complex issue.

Paul Weiland and Benjamin Rubin are partners at Nossaman LLP.

[1] Juliana v. United States, No. 18-36082 (9th Cir. Jan. 17, 2019).

[2] Spokeo Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).