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Cover Page Footnote

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CLIMATE CHANGE LITIGATION IN THE WAKE OF *AEP V. CONNECTICUT* AND *AES V. STEADFAST*: OUT TO PASTURE, BUT NOT OUT OF STEAM

CECILIA O'CONNELL MILLER*

I. INTRODUCTION

On April 19, 2011, two courts heard oral arguments in cases that will define the future of climate change litigation for decades to come. In *American Electric Power Co. v. Connecticut* (hereinafter *AEP*), the United States Supreme Court considered whether environmental advocates can use a federal common-law nuisance claim as a vehicle for seeking redress for climate change accruing from greenhouse gas (hereinafter GHG) emissions. Just a hundred miles south that same day, the Virginia Supreme Court heard oral arguments in *AES Corporation v. Steadfast* (hereinafter *Steadfast*), in which Virginia's highest court considered whether a commercial general liability insurer must provide a defense in climate change litigation.

Both courts issued holdings that appear, at first blush, to significantly undercut the viability of climate change litigation. In *AEP*, the United States Supreme Court concluded the Clean Air Act and the Environmental Protection Agency's ongoing steps to implement the Clean Air Act displace a federal common-law public nuisance claim to limit carbon dioxide emissions. In *Steadfast*, the Virginia Supreme Court held an insurer was not obligated, as a matter of law, to defend a policyholder under a commercial general liability policy in climate change litigation because the alleged conduct of contributing to global warming was intentional and thus did not constitute an occurrence as required by the policy language. However, in both cases it is precisely

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what these courts left unsaid that leaves open the floodgates to future climate risk claims.

Specifically, in narrowing its holding to displacement, the Supreme Court in *AEP* declined to rule on preemption and the viability of state-law tort claims, which the plaintiffs also pled. Rather than forestall the filing of future climate change litigations, the *AEP* holding simply crystallizes the forum and the likely claim, namely, state-law nuisance. In several respects, state courts present a more hospitable forum for such litigation. Thus, by relegating these claims to state courts, hence implicitly authorizing such claims to continue in those forums, the Court's decision in *AEP* may effectively increase the number of climate change litigations filed in state courts in the coming years.

Similarly, the Virginia Supreme Court's holding in *Steadfast*, declining insurance coverage in an unrelated climate change litigation, does not end the prospect that insurers may be called upon to defend these litigations and pay for any resulting damages. The precedential impact of *Steadfast* may be limited because state law governs the construction of insurance policies and the precise terms of the policy at issue control that interpretation. More critically, an insurer's ultimate liability for climate change damages will rest on whether a particular court classifies carbon dioxide as a pollutant within the scope of a policy's pollution exclusion. The *Steadfast* court declined to rule on this issue. With the lynchpin to insurance coverage still unsettled, insurers remain at risk.

Part II of this Article analyzes the holding and ramifications of the United States Supreme Court's decision in *AEP*. Part III analyzes the holding and ramifications of the Virginia Supreme Court's decision in *Steadfast*. Part IV synthesizes the ramifications of these two decisions and predicts that climate change litigation remains viable, both on the underlying claim and related coverage issues. Thus, rather than take the steam out of climate change litigation, the *AEP* and *Steadfast* decisions simply send this litigation back to the states.

II. *AEP* v. *CONNECTICUT*: THE UNITED STATES SUPREME COURT IMPLICITLY AFFIRMS THE VIABILITY OF STATE PUBLIC NUISANCE LAW FOR ASSERTING CLIMATE CHANGE CLAIMS

On Monday, June 20, 2011, the United States Supreme Court released its decision in *AEP*.¹ In an 8-0 ruling, the Court held that the Clean Air Act (hereinafter CAA) and Congress's delegation of authority

¹ Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

to the Environmental Protection Agency (hereinafter EPA) to regulate carbon dioxide emissions from power plants displaces any federal common-law nuisance claim seeking a judicially mandated cap on GHG emissions.² On the issue of Article III standing, an equally divided Court affirmed the Second Circuit's exercise of jurisdiction.³ Most notably, the Court did not reach the issue of pre-emption, and sent the issue of whether the state law of nuisance provides a cognizable theory back to the Second Circuit.⁴

A. PROCEDURAL HISTORY

The *AEP* litigation originated in 2004 when a group of eight States,⁵ along with New York City, and a group of three non-profit land trusts,⁶ (collectively, the Plaintiffs, who were the Respondents before the Supreme Court) filed two separate complaints against five power companies⁷ (collectively, the Defendants, who were the Petitioners before the Supreme Court) in the United States District Court for the Southern District of New York.

The Plaintiffs alleged that GHG emissions from the Defendants' power plants have significantly contributed to global warming.⁸ According to the Plaintiffs, the Defendants "are the five largest emitters of carbon dioxide in the United States."⁹ The Plaintiffs contended that, by contributing to global warming, the Defendants' emissions created a "substantial and unreasonable interference with public rights" in contravention of the federal common law of interstate nuisance.¹⁰ In the alternative, the Plaintiffs sought redress under state tort law.¹¹

According to the states and New York City, climate change puts at

² *Id.* at 2532.

³ *Id.* at 2535.

⁴ *Id.* at 2540.

⁵ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005), vacated, 582 F.3d 309 (2d Cir. 2009) (listing State Plaintiffs California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin).

⁶ *Id.* (listing non-profit Plaintiffs Open Space Institute, Inc., Open Space Conservatory, Inc., and the Audubon Society of New Hampshire).

⁷ *Id.* (listing Defendants American Electric Power Co., and American Electric Power Service Corp. (together AEP), Southern Company, Xcel Entergy Inc., the Tennessee Valley Authority (TVA), and Cinergy Corporation.).

⁸ *See Am. Elec. Power Co.*, 131 S.Ct. at 2534.

⁹ *Id.* (reciting Plaintiffs' Petition for Certiorari, which noted the collective annual emissions of the Defendants represent twenty-five percent of emissions from the domestic electric power sector and ten percent of emissions from all domestic human activities).

¹⁰ *Id.*

¹¹ *Id.*

risk public lands, infrastructure, and human health.¹² According to the private land trusts, climate change poses a risk of the destruction of the habitats of animals and rare species of trees and plants inhabiting land owned by the trusts.¹³ Thus, the Plaintiffs collectively sought an injunction requiring each Defendant to cap its carbon dioxide emissions and then reduce the emissions each year by a specific percentage for, at a minimum, the next ten years.¹⁴

In the district court, the Defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. The Defendants argued that a federal common-law cause of action to abate GHG emissions does not exist, that the claims raised political questions unfit for adjudication by the courts, that Congress has displaced any possible federal common-law cause of action seeking regulations of GHG emissions, and that Plaintiffs did not have standing to sue on account of global warming.¹⁵

Relying on *Baker v. Carr*, the district court dismissed the Plaintiffs' suits as presenting non-justiciable political questions.¹⁶ In *Baker*, the United States Supreme Court described the test of whether a case is justiciable, in light of the separation of powers doctrine, as "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."¹⁷ Courts recognized six factors as indicative of a non-justiciable political question, including, of most relevance here, "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."¹⁸ Applying these factors, the district court in *AEP* concluded:

The explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions . . . confirm that making the "initial policy determination[s]" addressing global climate change is an undertaking for the political branches.

Because resolution of the issues presented here requires

¹² *Id.*

¹³ *Id.*; see also *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268 (S.D. N.Y. 2005) (describing the causes and evolution of global warming).

¹⁴ *Am. Elec. Power Co.*, 131 S.Ct. at 2534; *Connecticut*, 406 F. Supp. 2d at 270.

¹⁵ *Connecticut*, 406 F. Supp. 2d at 270.

¹⁶ *Id.* at 271-74.

¹⁷ *Baker v. Carr*, 369 U.S. 186, 198 (1962).

¹⁸ *Baker*, 369 U.S. at 217; see also *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (listing the six *Baker* tests).

identification and balancing of economic, environmental, foreign policy, and national security interests, “an initial policy determination of a kind clearly for non-judicial discretion” is required. Indeed, the questions presented here “uniquely demand single-voiced statement of the Government’s views.”¹⁹

On the Plaintiffs’ appeal, the Second Circuit reversed the judgment of the district court and held that the political question doctrine did not bar the Plaintiffs’ case from adjudication.²⁰ Although the district court had not ruled on the issue of standing, the Second Circuit did not limit its analysis and considered other grounds raised in the Defendants’ original motion to dismiss. The Second Circuit held “that all of [the] Plaintiffs have standing; that the federal common law of nuisance governs their claims; that Plaintiffs have stated claims under the federal common law of nuisance; that their claims are not displaced; and that TVA’s [Tennessee Valley Authority’s] alternate grounds for dismissal are without merit.”²¹ In concluding all Plaintiffs (including private parties) had stated a federal common-law claim of nuisance, the Second Circuit relied on the Restatement’s public nuisance standard and Supreme Court jurisprudence holding that states may maintain suits against other states or out-of-state industries for air- and water-pollution abatement.²²

In determining that the CAA did not displace the federal common law of nuisance, the Second Circuit relied on Supreme Court jurisprudence finding displacement when legislation enacts a *comprehensive* regulatory program with supervision by an expert administrative agency.²³ Ruling in September of 2009, the Second Circuit determined the EPA had failed to promulgate any rule addressing regulation of GHG emissions, stating, “Until EPA *completes* the

¹⁹ *Connecticut*, 406 F. Supp. 2d at 274 (citation omitted).

²⁰ *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332 (2d Cir. 2009), *rev’d*, 131 S. Ct. 2527 (2011).

²¹ *Id.* at 315.

²² *Id.* at 350-52, 364-66 (relying on *Illinois v. Milwaukee (Milwaukee I)*, 406 U.S. 91 (1972) (“The Court set out no requirement that only states could bring claims under the federal common law of nuisance.”)).

²³ *Id.* at 378-79 (noting EPA’s proposed findings and preliminary action to regulate emissions; quoting *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 319-24 (1981), in concluding, “We cannot say, therefore, that EPA’s issuance of proposed findings suffices to regulate greenhouse gases in a way that ‘speaks directly’ to Plaintiff’s problems and thereby displaces Plaintiff’s existing remedies under federal common law.”); *see id.* at 381 (“With respect to the greenhouse gas emissions causing the alleged nuisance at issue in the instant cases, however, EPA has yet to make any determination that such emissions are subject to regulation under the Act, must less endeavor *actually* to regulate the emissions. . . . Accordingly, the problem of which Plaintiffs complain certainly has not ‘been thoroughly addressed’ by the CAA..” (citing *Milwaukee II*, 451 U.S. at 320)).

rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the [CAA] would in fact ‘speak[] directly’ to the ‘particular issue’ raised here by Plaintiffs.”²⁴

The Second Circuit denied Defendants’ request for a rehearing en banc, after which the Defendants sought review by the Supreme Court.²⁵ The Supreme Court granted certiorari on December 6, 2010.²⁶ The Supreme Court heard oral argument on April 19, 2011.²⁷

B. ARGUMENTS ON APPEAL

i. Defendants’ Argument

The Defendants based their appeal of the Second Circuit’s decision finding a cognizable claim primarily on the absence of standing, including a lack of prudential standing—although the Defendants had not raised that theory in the district court.²⁸

As to Article III standing to bring a climate change nuisance suit, Defendants focused on how the Plaintiffs failed to demonstrate an “injury-in-fact” that could be traceable to the challenged conduct of these Defendants.²⁹ Instead, the pleadings asserted the Defendants contributed to climate change *generally* through their emissions, and this resulting climate change contributed *generally* to an increased risk of injuries.³⁰ By this logic, the Defendants argued, “any entity” could sue another entity because all entities contribute in some manner to global climate change.³¹

Defendants also contended the chain of causation necessary to sufficiently establish Article III standing omitted many other potential sources of the alleged harms, unfairly targeting these five defendants.³²

²⁴ *Id.* at 380 (emphasis added).

²⁵ See Docket in Case No. 05-5104, *Connecticut v. American Electric Power Co., Inc.*, U.S. Court of Appeals for the Second Circuit, Order dated March 5, 2010 (denying petition for rehearing and rehearing en banc).

²⁶ See 131 S. Ct. 813 (2010).

²⁷ *Am. Elec. Power Co.*, 131 S. Ct. at 2527.

²⁸ See Brief for the Petitioners at 12-16, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174), 2011 WL 334707 [hereinafter Brief for the Petitioners]. Compare *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332-47 (2d Cir. 2009) (addressing extensively the issue of standing) with *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D. N.Y. 2005) (dismissing case exclusively on the basis of a non-justiciable political question).

²⁹ Brief for the Petitioners, *supra* note 28, at 17 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

³⁰ See *id.* at 18.

³¹ *Id.* at 19.

³² See *id.* at 21 (arguing the Defendants are but five of “billions of independent sources

Absent joinder of all potential sources of emissions, the claims as pled could not achieve the desired reduction in emissions.³³ The Defendants thus argued the Plaintiffs failed to satisfy the redressability prong of Article III standing because the relief requested would fall short of redressing the alleged injury.³⁴

The Defendants further argued that the Plaintiffs' claims were barred by prudential standing limitations. By this theory, the Defendants contended the Plaintiffs' claims constituted simply a "generalized grievance."³⁵ Given the commonality of potential liability for nearly every organization in the world allegedly accruing from GHG emissions, the Plaintiffs' allegations were unfit for a judicial solution absent an existing legislative statement or systematic regulatory response.³⁶

Even if the Court found standing, the Defendants contended that multiple other grounds existed warranting dismissal. In particular, the Defendants argued that, even if the Plaintiffs had properly stated a nuisance cause of action, any such claims had been displaced, at a minimum, by Congress's enactment of the CAA.³⁷ According to the Defendants, the CAA "establishes a 'comprehensive' regulatory process" authorizing the EPA to weigh the costs and benefits to society in determining the appropriate levels of GHG emissions.³⁸ Thus, the Defendants proffered that the correct cause of action for the Plaintiffs was embedded in the CAA.³⁹ In other words, congressional intent

around the world over the course of centuries" contributing to alleged climate change).

³³ See *id.* at 21 (arguing the Plaintiffs' alleged injury can be redressed only if "sources other than the defendants simultaneously reduce their emissions"); *id.* at 24 ("[T]he vast bulk of GHG emissions are from sources that are not parties to this case [T]here is no basis to believe that reductions ordered here . . . would lead to any overall reduction.").

³⁴ See *Lujan*, 504 U.S. at 561 ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").

³⁵ See Brief for the Petitioners, *supra* note 28, at 30 (characterizing the emission of GHG as "common to (and necessary for) virtually every enterprise on the planet;" thus the alleged injury "will allegedly be felt by virtually every person around the world."); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (explaining the doctrine of prudential standing); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982).

³⁶ See Brief for the Petitioners, *supra* note 28, at 30.

³⁷ See *id.* at 31; see also *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 314-15 (1981) (stating the federal common law is relied upon in the "absence of an applicable act of Congress," thus, when Congress "addresses a question . . . the need for such an unusual exercise of lawmaking by federal courts disappears").

³⁸ Brief for the Petitioners, *supra* note 28, at 31.

³⁹ *Id.* at 44 ("Congress's decision to provide these express avenues for States and others to seek emissions limitations means that federal courts may not allow plaintiffs to bypass those paths and seek similar relief in diverse district courts under federal common law standards fashioned by judges."); see also *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

demonstrated that the EPA had sole discretion in regulating GHG emissions, thus displacing any federal common-law nuisance claim by the Plaintiffs.

The Defendants further argued that the case presented a non-justiciable political question.⁴⁰ Hewing close to the reasoning of the District Court, the Defendants argued that the question presented required “an initial policy determination of a kind clearly for nonjudicial discretion,” that is beyond “judicially discoverable and manageable standards.”⁴¹

ii. Plaintiffs’ Argument

In response the Plaintiffs sought to demonstrate Article III standing by establishing causation, redressability and injury in fact.⁴² The Plaintiffs further sought to challenge the characterization of the issue as exclusively a political question and dispute displacement.⁴³

As to causation, the Plaintiffs claimed that global warming already caused demonstrable harm and will cause future injuries.⁴⁴ Using the traceability standard enunciated in *Massachusetts*, the Plaintiffs argued the particular emissions of the Defendants constituted a “meaningful contribution” to these injuries.⁴⁵ Discounting the Defendants’ argument that they were but five of billions of carbon dioxide emitters on the planet, the Plaintiffs relied upon the principle that even one who pollutes to a slight extent may be held liable and thus satisfy the “meaningful contribution” standard of *Massachusetts*.⁴⁶

Turning to the redressability prong, the Plaintiffs countered that the relief sought need not “reverse” global warming; instead, the proper

⁴⁰ Brief for the Petitioners, *supra* note 28, at 46.

⁴¹ *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁴² Brief for Respondents Connecticut, New York, California, Iowa, Rhode Island, Vermont, and the City of New York at 8-9, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174), 2011 WL 915093 [hereinafter Brief for Respondent States].

⁴³ *Id.* at 9.

⁴⁴ *See id.* at 12-13 (noting earlier seasonal melting of the Sierra Nevada snowpack, which in turn reduces the amount of drinking water available in California; eminent beach erosion in coastal states; and future increases in heat related deaths in New York City).

⁴⁵ *See id.* at 14. (“The percentage of global emissions at issue in [*Massachusetts*](well under six percent) is comparable to the percentage attributed by the complaint to defendants here: about 2.5 percent of all carbon dioxide emissions worldwide.”)

⁴⁶ *Id.* at 15 (“As the Restatement explains, ‘[i]t may, for example, be unreasonable to pollute a stream to only a slight extent, harmless in itself, when the defendant knows that pollution by others is approaching or has reached the point where it causes or threatens serious interference with the rights of those who use the water.’” (quoting RESTATEMENT (SECOND) OF TORTS § 840E cmt. b (1979))).

inquiry was whether the relief sought would “*slow or reduce it*.”⁴⁷ In other words, the fact that the risk would be lessened, regardless of how minimally, *proves* that the Plaintiffs’ allegations satisfy the redressability prong of standing.⁴⁸

Asserting they had demonstrated a concrete injury, the Plaintiffs disputed any distinct prudential standing limitations that preclude so-called “generalized grievances.”⁴⁹ Instead, Article III’s requirement for “injury-in-fact” necessarily subsumed a prohibition on such generalized grievances.⁵⁰ According to Plaintiffs, the Court had found widespread and widely shared injuries to be “sufficiently concrete and specific.”⁵¹

In denying the case presented a political question, the Plaintiffs similarly relied on *Baker v. Carr* and its six-factor test.⁵² Because a ruling would provide a remedy as to these particular parties, and did not contemplate a nationwide policy that might be at odds with other branches of government, the case did not present a political question.⁵³

The Plaintiffs disputed displacement on multiple levels. The Plaintiffs contended their claims encompassed federal common law.⁵⁴ Plaintiffs further claimed there was no displacement and no risk of a parallel system because Congress remains free to act and thus displace any common-law action taken by the courts in this case.⁵⁵ The Plaintiffs also challenged the Defendants’ argument that displacement occurs whenever the field has been occupied; instead, Plaintiffs contended, the field must be occupied in a particular manner for displacement.⁵⁶

⁴⁷ *Id.* at 16-17 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007)).

⁴⁸ Brief for Respondent States, *supra* note 42, at 17-18 (relying on *Massachusetts*, 549 U.S. at 526).

⁴⁹ *See id.* at 23.

⁵⁰ *See id.* at 23; *see e.g.*, *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (stating the general grievance principle); *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23-25 (1998) (holding that the right to vote is “sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (stating that a claim for only general grievances will not satisfy Article III standing).

⁵¹ Brief for Respondent States, *supra* note 42, at 25; *see also Akins*, 524 U.S. at 20-25.

⁵² Brief for Respondent States, *supra* note 42, at 31-32.

⁵³ *See id.* at 30-31 (“EPA may limit carbon dioxide emission from existing power plants, and thereby displace plaintiffs’ federal common-law claims. Congress similarly may pass legislation modifying or displacing federal common law in this area. As a result, this case presents no risk that the judiciary will develop a “parallel” regulatory system that would “frustrate and complicate” EPA’s regulatory undertakings . . . or that common-law decisions will “conflict [] with current and future legislation and regulation addressing greenhouse gas emissions.”) (internal citations omitted); *id.* at 35-36 (discussing the specific contours of the injunctive relief the Plaintiffs could obtain).

⁵⁴ *See id.* at 37-38.

⁵⁵ Brief for Respondent States, *supra* note 42, at 30.

⁵⁶ *Id.* at 47-48 (quoting *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 324 (1981)).

C. THE AEP DECISION

The Court unanimously ruled on June 20, 2011, that the CAA and the EPA's actions authorized by the CAA displaced the federal common law of public nuisance as a means for limiting carbon dioxide emissions.⁵⁷ Justice Ginsburg authored the opinion, in which Chief Justice Roberts and Justices Scalia, Kennedy, Breyer and Kagan joined.⁵⁸ Justice Alito filed an opinion, in which Justice Thomas joined, concurring in part and concurring in the judgment.⁵⁹ Justice Sotomayor took no part in the decision.⁶⁰ Due to her recusal, the Court was equally divided on the issue of standing and thus affirmed the exercise of jurisdiction by the Second Circuit.⁶¹ The Court's ruling was based on the following principles.

i. The Court's Prior Decision in Massachusetts v. EPA and the EPA's Response

The Court's 2007 opinion in *Massachusetts v. EPA* figured heavily in the Court's consideration.⁶² There, the Court held the EPA had misread the CAA in denying a rulemaking petition that sought GHG emission controls on new motor vehicles.⁶³ The Court concluded GHG emissions qualify as air pollutants within the CAA.⁶⁴ As a consequence, GHG emissions are within the regulatory ambit of the EPA. Because the EPA has regulatory authority to set GHG emission standards, but had offered no "reasoned explanation" for its failure to so act, the Court determined the Agency had not acted "in accordance with the law" in denying the rulemaking petition.⁶⁵

Having concluded the CAA authorized regulation of carbon dioxide emissions by the EPA, the Court in *AEP* briefly surveyed the EPA's

⁵⁷ *Am. Elec. Power Co.*, 131 S. Ct. at 2531-32.

⁵⁸ *Id.*

⁵⁹ *See id.* at 2540-41 (Alito, J., concurring in part and concurring in the judgment). Justices Alito and Thomas sought to clarify their ongoing disagreement with the Court's majority opinion in *Massachusetts v. EPA*, 549 U.S. 497 (2007); *see id.* (concurring with the Court's displacement analysis on the assumption, "for the sake of argument," that the majority's interpretation of the CAA in *Massachusetts v. EPA* is correct).

⁶⁰ *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

⁶¹ *See id.* at 2535 (Justice Sotomayor recused herself because she had served, before her elevation to the United States Supreme Court, on the Second Circuit panel that considered *Connecticut v. AEP*. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 313 (2d Cir. 2009).

⁶² *See Am. Elec. Power Co.*, 131 S. Ct. at 2532-33.

⁶³ *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); *see also id.* at 530 n.29.

⁶⁴ *Id.* at 532.

⁶⁵ *Id.* at 534.

course of action to date.⁶⁶ Following the Court's decision in *Massachusetts*, the EPA initiated the process of regulating carbon dioxide emissions through rulemaking, ultimately concluding that "compelling" evidence demonstrated that "anthropogenic"⁶⁷ emissions of GHG contributed to climate change and global warming.⁶⁸

The Court in *AEP* recited from the EPA rulemaking the following "consequent dangers" of GHG emissions:

[I]ncreases in heat-related deaths; coastal inundation and erosion caused by melting icecaps and rising sea levels; more frequent and intense hurricanes, floods and other "extreme weather events" that cause death and destroy infrastructure; drought due to reductions in mountain snowpack and shifting precipitation patterns; destruction of ecosystems supporting animals and plants; and potentially "significant disruptions" in food production.⁶⁹

In 2010, the EPA and the Department of Transportation issued rules addressing vehicle emissions.⁷⁰ Most significantly, the EPA also commenced, under section 111 of the CAA, rulemaking to impose limits on GHG emissions from new, modified, and existing fossil-fuel-fired power plants.⁷¹ The EPA also agreed, by virtue of a March 2011 settlement that included "the majority of the plaintiffs in this very case," to issue a proposed rule by July of 2011 and a final rule by May of 2012.⁷² Accordingly, unlike the Second Circuit, the *AEP* Court in

⁶⁶ See *Am. Elec. Power Co.*, 131 S. Ct. at 2533.

⁶⁷ *Anthropogenic Definition*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/dictionary/anthropogenic (last visited Dec. 12, 2011) (defining "anthropogenic" as "of, relating to, or resulting from the influence of human beings on nature").

⁶⁸ See *Am. Elec. Power Co.*, 131 S. Ct. at 2533; see also *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,517-24 (Dec. 15, 2009).

⁶⁹ *Id.*; see also *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. at 66,524-35; *Am. Elec. Power Co.*, 131 S. Ct. at 2533, n.2 (listing this panoply of potential harms, the Court, in a footnote, cited a source for a view contrary to that of the EPA, and emphasized that, "The Court, we caution, endorses no particular view of the complicated issues related to carbon dioxide emissions and climate change.").

⁷⁰ *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) (codified 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536-538); *Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles*, 75 Fed. Reg. 74,152 (proposed Nov. 30, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 1036, 1037, 1065, 1066, 1068; 49 C.F.R. pts. 523, 534, 535).

⁷¹ *Am. Elec. Power Co.*, 131 S. Ct. at 2533 (citing 42 U.S.C. §7475(a)(4)(1977); *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,520-21 (June 3, 2010) (codified at 40 C.F.R. pts. 51,52, 70, 71)).

⁷² *Am. Elec. Power Co.*, 131 S. Ct. at 2533; see also *Proposed Settlement Agreement*, 75

assessing displacement had the benefit of nearly two years of rulemaking by the EPA in response to the Court's directive in *Massachusetts v. EPA*.⁷³

ii. *Displacement*

Having surveyed the EPA's steps toward regulation,⁷⁴ and the comprehensive regulatory scheme contemplated by the CAA, the Court applied a straightforward test: "whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue."⁷⁵

In holding the CAA and the EPA actions authorized by the Act displace a federal common-law right to seek abatement of GHG emissions, the Court concluded that Congress had spoken directly to regulation of those emissions.⁷⁶ The Court first noted that *Massachusetts v. EPA* answered in the affirmative the inquiry of whether carbon dioxide emissions qualified as a pollutant subject to the CAA's regulatory framework.⁷⁷

Next, the Court described the legislative delegation of the regulation of this pollutant. Initially, section 111 of the CAA obligates the EPA Administrator to list categories of stationary sources that cause or contribute to air pollution.⁷⁸ Thereafter the agency is required to establish "standards of performance" for emissions from new or modified sources within each category.⁷⁹ The Court further noted that the CAA provides "multiple avenues for enforcement," including delegation of implementation and enforcement to the states, criminal penalties for individuals who violate the standards, and private enforcement actions.⁸⁰ Most critically, the Court recognized that "[i]f EPA does not set emissions limits for a particular pollutant or source of pollution, States

Fed. Reg. 82,390, 82,392 (Dec. 30, 2010).

⁷³ See *Am. Elec. Power Co.*, 131 S. Ct. at 2535 ("At the time of the Second Circuit's decision, by contrast, EPA had not yet promulgated any rule regulating greenhouse gases, a fact the court thought dispositive.").

⁷⁴ See *supra* Part II.C.i.

⁷⁵ *Am. Elec. Power Co.*, 131 S. Ct. at 2537 (recognizing the standard for legislative displacement was less rigorous than the test for preemption of state law, and quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)); see also *infra* Part II.D.

⁷⁶ *Am. Elec. Power Co.*, 131 S. Ct. at 2537.

⁷⁷ *Id.*

⁷⁸ See *id.*; see also Clean Air Act, 42 U.S.C.A. § 7411(b)(1)(A) (Westlaw 2011).

⁷⁹ *Am. Elec. Power*, 131 S. Ct. at 2537; see also 42 U.S.C.A. § 7411(a)(2), (b)(1)(B), (d) (Westlaw 2011).

⁸⁰ *Am. Elec. Power*, 131 S. Ct. at 2538.

and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court."⁸¹

Because the CAA "speaks directly" to GHG emissions and the EPA has commenced rulemaking, "Congress delegated to the EPA the decision whether and how to regulate carbon dioxide emissions from power plants," rendering the Plaintiffs' federal common-law claims displaced.⁸² The Court thus concluded there was "no room for a parallel track."⁸³

In response to Plaintiffs' argument that the EPA's rulemaking was still in its nascent stages and the EPA had not "actually exercise[d] its regulatory authority," the Court emphasized that the key inquiry was whether there had been a delegation of the authority, not an assessment of the extent of that delegation or the resulting regulatory framework.⁸⁴ Indeed, the Court pragmatically recognized that each resulting regulatory regime must be tailored to the subject of such regulation.⁸⁵ Particularly, in considering the practical limitations upon the regulation of carbon dioxide, which is omni-present, the Court reasoned that the absence of an extensive regulatory framework was hardly indicative of Congress's intention to occupy the field.⁸⁶

Thus, whether the EPA "actually" had regulated carbon dioxide emissions was not relevant to the calculus. Indeed, EPA could respond to the delegation by declining to regulate, and the federal courts would not be authorized to use the federal law of nuisance to reverse that agency decision.⁸⁷

The Court also recognized that the fact that the EPA may not have "actually" enacted the regulation simply provided yet another bite at the apple for Plaintiffs: "If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for

⁸¹ *Id.* (emphasis in original); see also 42 U.S.C.A. § 7607(b)(1) (Westlaw 2011).

⁸² *Am. Elec. Power*, 131 S. Ct. at 2538.

⁸³ *Id.*

⁸⁴ *Id.* at 2538 ("[T]he relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" (quoting *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 324 (1981)).

⁸⁵ *Id.* at 2539 ("The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national and international policy, informed assessment of competing interests is required").

⁸⁶ *Id.* at 2538 ("Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely breathing."). As noted *infra* at Part IV, this commentary suggests how the Court might be guided if ever presented with the issue of the scope of a pollution exclusion in a commercial general liability policy.

⁸⁷ See *id.* ("The Clean Air Act is no less an exercise of the legislature's 'considered judgment' concerning the regulation of air pollution because it permits emissions *until* EPA acts.").

certiorari in this Court.”⁸⁸ Thus, the Court expressly recognized, in several sections of the opinion, that the sufficiency of the regulation on GHG emissions was simply an issue for the Court to address on another day in a different procedural posture.⁸⁹

iii. Standing

The Court’s affirmance of the Second Circuit’s determination that the Plaintiffs satisfied Article III standing by a 4-4 vote does not create any binding precedent, but it is binding on the parties in the case.⁹⁰ Thus, Justice Sotomayor’s recusal eliminated standing as a procedural bar for these litigants, but it also eliminated precedent upon which future litigants might rely.⁹¹

When equally divided, the Court does not traditionally publish the individual Justices’ votes, but Justice Ginsburg gave an indication that the four Justices who voted against Article III standing were the same four Justices who dissented in *Massachusetts*.⁹² Chief Justice Roberts and Justices Alito, Scalia, and Thomas dissented in *Massachusetts*.⁹³

This division may indicate how the Court would decide a similar Article III case in the future if all nine Justices participate.⁹⁴ Indeed, in noting that four Justices would hold that at least some Plaintiffs have Article III standing under *Massachusetts*, Justice Ginsburg elaborated that these same Justices also believe that “no other threshold obstacle bars review,” intimating that the Defendants’ eleventh-hour “prudential” argument barring generalized grievances was unmeritorious.⁹⁵ In a future climate change litigation involving a state plaintiff, Justice Sotomayor may join with those Justices adhering to the holding of *Massachusetts*, which permitted a state to challenge EPA’s action, thereby producing a precedential decision upon which future litigants could rely.⁹⁶

⁸⁸ *Am. Elec. Power*, 131 S. Ct. at 2539.

⁸⁹ *See id.* at 2538 (“EPA’s response will be reviewable in federal court.”); *id.* at 2539.

⁹⁰ *See generally* *Durant v. Essex Co.*, 74 U.S. 107, 113 (1868) (holding that in a divided court the judgment “prevents the decision from becoming an authority for other cases But the judgment is conclusive and binding in every respect upon the parties.”).

⁹¹ *See supra* note 90.

⁹² *See Am. Elec. Power*, 131 S. Ct. at 2535 (“Four members of the Court, adhering to a dissenting opinion in *Massachusetts* or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing.” (citation omitted)).

⁹³ *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007).

⁹⁴ *See Am. Elec. Power*, 131 S. Ct. at 2540. (Justice Sotomayor did not take part in the AEP decision).

⁹⁵ *Id.* at 2535, n.6.

⁹⁶ *See Riverkeeper, Inc. v. EPA*, 475 F.3d 85 (2d Cir. 2007) (remanding to the EPA rulemaking regulating cooling water intake structures at power plants; reasoning that the EPA had

iv. Political Question Doctrine

Although the political question doctrine had formed the fulcrum of the debate in the courts below, and by consequence in the Supreme Court briefing,⁹⁷ the Court did not affirmatively rule on the application of the doctrine.⁹⁸ By declining to affirmatively address the political question issue, the Supreme Court left standing the Second Circuit's ruling that this doctrine does not bar global warming claims.⁹⁹ However, the Court's opinion provides significant guidance as to how the Court may have considered the issue, had the displacement inquiry not been dispositive.

In discussing the "prescribed order of decisionmaking," thereby implicating the expert agency versus federal court conundrum, the Court confirmed the priority position of the agency. The Court thus credited Congress with determining, in the first instance, that a federal agency is best positioned to analyze the issue, compile the expert evidence, receive public comments, appreciate the industry to be regulated, seek guidance in the impacted jurisdiction and consider the global ramifications of any agency action:

[T]he first decider under the Act is the expert administrative agency, the second, federal judges—[this prescribed order] is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy

improperly weighed costs and benefits); David Willet, *Sierra Club Applauds Sotomayor Nomination*, SIERRA CLUB PRESS ROOM (May 26, 2009), action.sierraclub.org/site/MessageViewer?em_id=111221.0 ("As we learn more about her record, the Sierra Club is encouraged by Judge Sotomayor's opinion in *Riverkeeper, Inc. v EPA* in which she ruled in favor of environmental protection and against attempts by the government to ignore true environmental benefits when enforcing clean water laws."); J. Wylie Donald, *American Electric Power v. Connecticut: 8-0 The Supreme Court Rules Federal Common Law Is Displaced*, CLIMATE LAWYERS BLOG (June 20, 2011), climatelawyers.com/post/2011/06/20/American-Electric-Power-v-Connecticut-8-0-the-Supreme-Court-Rules-Federal-Common-Law-is-Displaced.aspx.

⁹⁷ See *supra* notes 16-20, 52-53.

⁹⁸ See *Am. Elec. Power*, 131 S. Ct. at 2537 ("We need not address the parties' dispute in this regard. For it is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs 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 federal legislation authorizing EPA to regulate carbon dioxide emissions.").

⁹⁹ See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332 (2d Cir. 2009) (concluding political question doctrine did not bar Plaintiffs' federal common law cause of action for nuisance arising from green house gas emissions).

needs and the possibility of economic disruption must weigh in the balance. The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators.¹⁰⁰

By contrast, the facts of any particular case constrain Article III judges. Also, the form of evidence Article III judges can receive constricts the judges and thus limits the scientific, economic, and technological resources they can access to make a decision.¹⁰¹

The Court also identified additional factors justifying this prescribed order of decisionmaking. An agency determination is inherently precedential—binding upon all citizens—unlike district court decisions that do not even bind members of the same court.¹⁰² Additionally, the Court apprehended the flood of litigation that might follow “in any federal district” if district court judges were accorded this *ad hoc* decisionmaking authority.¹⁰³ Thus, to overcome the Court’s reticence to rule on such issues, any future litigant must be able to surmount the expertise and resources of the agency, the lack of *stare decisis* in the district courts, and the potential for vexatious litigation.

D. THE RAMIFICATIONS OF THE COURT’S DECISION: LAWSUITS IN STATE COURTS ALLEGING STATE-LAW CLAIMS

The Court’s straightforward application of the doctrine of displacement serves only to complicate the coming landscape of climate change litigation. Indeed, what the Court left unsaid provides the greatest harbinger for the future of climate change litigation.¹⁰⁴

The Court in *AEP* did not rule on whether the CAA preempted a

¹⁰⁰ See *Am. Elec. Power*, 131 S. Ct. at 2539.

¹⁰¹ See *id.* at 2539-40; see also Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioners at 4, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174), 2011 WL 396512 (“[T]he court of appeals erred in failing to appreciate that the global nature of climate change and the necessity in any bid for redress to balance an enormously vast array of interrelated interests [that] are ill-suited to the *ad hoc* and piecemeal nature of litigation.”).

¹⁰² *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (quoting 18 J. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 134.02[1] [d] (3d ed. 2011))).

¹⁰³ Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioners, *supra* note 101, at 15 (citing to Defendants’ oral argument in which counsel estimated that suits could be maintained against “thousands or hundreds or tens” of other defendants who could be characterized as “large contributors” to GHG emissions).

¹⁰⁴ See *Am. Elec. Power*, 131 S. Ct. at 2539 (ensuring that climate change litigation will continue in some variant, by recognizing that the EPA’s eventual regulation of GHG emissions will be reviewable in federal court, and ultimately by the United States Supreme Court).

potential nuisance claim in state court:

In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act. . . . None of the parties briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.¹⁰⁵

Although the Court declined to offer an *opinion* on the ultimate viability of state-law nuisance theories, the Court also declined to forestall the prosecution of this theory on remand. Thus the plaintiffs in *AEP* continue to hold potentially viable state-law nuisance claims seeking redress for climate change injuries.

More critically, in addition to the *AEP* Plaintiffs, potential plaintiffs throughout the country may hold viable state-law claims seeking relief for climate change injuries.¹⁰⁶ Thus, it is simply a matter of time before the preemption question is raised through an action arising under state law.

The Court also predicted further contours of such litigation in noting that “the Clean Water Act does not preclude aggrieved individuals from bringing a ‘nuisance claim pursuant to the law of the *source* state.’”¹⁰⁷ In *International Paper Co. v. Ouellette*, the Court held in a nuisance suit for interstate water pollution that “the court must apply the law of the State in which the point source is located.”¹⁰⁸ The Court in *Ouellette* refused to hold that such a suit must be brought in the “source-state courts,” but only that “source-state” law must apply.¹⁰⁹ In so ruling, the Court implicitly confirmed the legitimacy of initiating suits applying the law of the state from where the emissions occur, which could leave the door open to future federal court litigation applying state law.

Future plaintiffs could theoretically file litigation under the law of the source state seeking immediate relief, rather than awaiting the federal

¹⁰⁵ *Id.* at 2540 (citation omitted).

¹⁰⁶ See Lawrence Hurley, *Va. Supreme Court to Rule on Insurance Coverage of Warming Claims*, N.Y. TIMES, May 19, 2011, available at www.nytimes.com/cwire/2011/05/19/19climatewire-va-supreme-court-to-rule-on-insurance-covera-90214.html (predicting that plaintiffs will continue to pursue state common-law claims for redress of global warming even if the Supreme Court denies a viable federal common-law cause of action).

¹⁰⁷ *Am. Elec. Power*, 131 S. Ct. at 2540. Relying upon *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, at 489, 491, 497 (1987), a water pollution case, the Court analyzed the case under the Clean Water Act, and not the CAA, but lower courts may readily rely upon similar reasoning—especially with the Supreme Court crediting the analogy. *Id.*

¹⁰⁸ *Ouellette*, 479 U.S. at 487.

¹⁰⁹ *Id.* at 499-500.

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agency action upon which the Court relied. *Milwaukee v. Illinois* proclaimed that “state and federal common laws cannot coexist,” but because the Court in *AEP* ruled the CAA *displaced* any potential federal common-law claim, *Milwaukee II* does not present a hurdle to *state* common-law claims.¹¹⁰

Furthermore, the bar for preemption of state law is higher than that of displacement. Specifically, preemption requires “a clear and manifest [congressional] purpose.”¹¹¹ The test for preemption hinges on whether “state law . . . interferes with the methods by which the federal statute was designed to reach its goal.”¹¹² Yet, the test for displacement is merely whether the “statute ‘speak[s] directly to [the] question’ at issue.”¹¹³

Although the Court did not rule out a federal forum for future climate change claims grounded in source-state law, state courts may prove more attractive. First, state-court judges likely possess more experience with the nuances of state law.¹¹⁴ Second, plaintiffs in state court have the advantage of liberalized standing requirements. For instance, state courts are not limited by the federal courts’ requirement of a case or controversy, or the doctrine of justiciability, even when the state courts address issues of federal law.¹¹⁵ California law relaxes standing requirements even more, “stating that the *Lujan* requirements of concrete injury and redressability are not essential parts of the California standing test.”¹¹⁶ Additionally, some states lower the standing bar for plaintiffs litigating environmental issues.¹¹⁷ Fifteen states have promulgated environmental rights acts or environmental provisions in their constitutions expanding standing for plaintiffs alleging

¹¹⁰ Robert A. Wyman, Jr. & Michael G. Romey, Pamphlet, GREENHOUSE GAS TORT LITIGATION § 1.07(1)(d)(i) (Bradley M. Marten ed., 2010).

¹¹¹ *Am. Elec. Power*, 131 S. Ct. at 2537 (quoting *Milwaukee II*, 451 U.S. at 317).

¹¹² *Ouellette*, 479 U.S. at 494. See *Mich. Canners & Freezers Ass’n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 477 (1984) (finding the Michigan Act directly interfered with the federal statute purpose of prohibiting “producers’ associations from coercing a producer to agree to membership . . . that would impinge on the producer’s independence”).

¹¹³ *Am. Elec. Power*, 131 S. Ct. at 2537 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

¹¹⁴ See H. WILLIAM RYLAARSDAM ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 3:654 (2011) (opining that federal judges are more receptive and familiar with federal claims and defenses).

¹¹⁵ *Wyman & Romey*, *supra* note 110, § 1.07(1)(b); see also *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article II do not apply to state courts . . .”).

¹¹⁶ *Wyman & Romey*, *supra* note 110, § 1.07(1)(b)(i); see also *National Paint & Coatings Ass’n v. California*, 68 Cal. Rptr. 2d 360, 365 (Ct. App. 1997).

¹¹⁷ *Wyman & Romey*, *supra* note 110, § 1.07(1)(b)(i).

environmental harms.¹¹⁸ Some states, including Utah, New Mexico, and New York (a plaintiff in *AEP*), have a variant of standing for matters of “great public import.”¹¹⁹

Commentators have also recognized that plaintiffs in future suits will simply devise new and alternate theories of liability for climate change harm in the wake of *AEP*.¹²⁰ Accordingly, the Court’s declination to speak to the issue of preemption in *AEP* did not take the steam out of climate change litigation, although the decision may well have redirected those suits back to state courts.

III. *AES CORP. V. STEADFAST INSURANCE CO.*: THE VIRGINIA SUPREME COURT DENIES INSURANCE COVERAGE FOR CLIMATE CHANGE LITIGATION

On September 16, 2011, the Virginia Supreme Court became the highest court in the country to address the availability of insurance coverage for climate change lawsuits, such as *AEP*.¹²¹ The court in *Steadfast* considered whether GHG emissions constitute an “occurrence” under standard language found in most comprehensive general liability (CGL) policies.¹²² The Virginia Supreme Court held that because the alleged damages “were the natur[al] and probable consequence of AES’s intentional actions,” there was no occurrence.¹²³ Accordingly, the CGL policies did not cover the policyholder for the alleged damage accruing from climate change.¹²⁴

A. PROCEDURAL HISTORY OF *AES CORP. V. STEADFAST*

The defendant policyholder, AES Corporation (hereinafter AES), is a Virginia-based power company that allegedly emitted GHG emissions

¹¹⁸ *Id.* at § 1.07(1)(b)(ii).

¹¹⁹ *Id.* at § 1.07(1)(b)(iii).

¹²⁰ See J. Wylie Donald, *American Electric Power v. Connecticut: 8-0 The Supreme Court Rules Federal Common Law Is Displaced*, CLIMATE LAWYERS BLOG (June 20, 2011), climatelawyers.com/post/2011/06/20/American-Electric-Power-v-Connecticut-8-0-the-Supreme-Court-Rules-Federal-Common-Law-is-Displaced.aspx; see also J. Randolph Evans, Joanne L. Zimolzak & Christina M. Carroll, *Is Past Prologue to Climate Change Liability?*, LAW360 (May 31, 2011), www.law360.com/articles/247592 (noting that in the weeks following oral argument in *AEP*, plaintiffs filed a “new breed of climate change lawsuit” in all fifty states grounded on a public trust theory).

¹²¹ See *AES Corp. v. Steadfast Ins. Co.*, 715 S.E.2d 28, 29 (Va. 2011).

¹²² *Id.* at 29.

¹²³ *Id.* at 33-34.

¹²⁴ *Id.* at 34.

during the course of its operations in California.¹²⁵ In February of 2008, the City of Kivalina, Alaska, and the Native Village of Kivalina, Alaska (*Kivalina* plaintiffs), sued AES and twenty-three other energy companies,¹²⁶ alleging the following claims for relief: (1) federal common-law public nuisance, (2) state-law private and public nuisance, (3) civil conspiracy, and (4) concert of action.¹²⁷

According to the *Kivalina* plaintiffs, the companies' GHG emissions caused global warming, which in turn melted Arctic sea ice protecting plaintiffs' coast from storms and ultimately caused massive land erosion.¹²⁸ The plaintiffs sought damages accruing from the forced relocation of their village as a result of this erosion, including \$400 million in relocation costs.¹²⁹ The district court dismissed the federal claim for lack of subject-matter jurisdiction, concluding the plaintiffs lacked standing and the issue was a non-justiciable political question.¹³⁰ The *Kivalina* plaintiffs filed an appeal and a Ninth Circuit panel heard oral argument on November 28, 2011.¹³¹

AES tendered its defense of the *Kivalina* lawsuit to its insurer, Steadfast Insurance Company (Steadfast). Steadfast insured AES through its CGL policies, which obligated Steadfast to pay "those sums that [AES] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which th[e] insurance applies."¹³² Such "bodily injury" and "property damage" must be "caused by an occurrence."¹³³ The policy defined an occurrence as an "accident,

¹²⁵ *Id.* at 29.

¹²⁶ *Native Village of Kivalina v. ExxonMobil Corp. (Kivalina)*, 663 F. Supp. 2d 863, 868 n.1 (N.D. Cal. 2009) (naming defendants (1) ExxonMobil Corporation; (2) BP P.L.C.; (3) BP America, Inc.; (4) BP Products North America, Inc.; (5) Chevron Corporation; (6) Chevron U.S.A., Inc.; (7) ConocoPhillips Company; (8) Royal Dutch Shell P.L.C.; (9) Shell Oil Company; (10) Peabody Energy Corporation; (11) The AES Corporation; (12) American Electric Power Corporation; (13) American Electric Power Services Corporation; (14) DTE Energy Company; (15) Duke Energy Corporation; (16) Dynegy Holdings, Inc.; (17) Edison International; (18) MidAmerican Energy Holdings Company; (19) Mirant Corporation; (20) NRG Energy; (21) Pinnacle West Capital Corporation; (22) Reliant Energy, Inc.; (23) The Southern Company; and (24) Xcel Energy, Inc.).

¹²⁷ *Id.* at 869.

¹²⁸ *Id.*

¹²⁹ *Id.* ("The resulting erosion has now reached the point where Kivalina is becoming uninhabitable. Plaintiffs allege that as a result, the Village will have to be relocated, at a cost estimated to range from \$95 to \$400 million." (citation omitted)).

¹³⁰ *Id.* at 882–83 (declining to assert supplemental jurisdiction over the remaining state-law claims).

¹³¹ See *Kivalina*, United States Court of Appeals for the Ninth Circuit, Case No. 09-17490 (notice dated October 11, 2011).

¹³² Complaint at 6, *AES Corp. v. Steadfast Ins. Co.*, 715 S.E.2d 28 (Va. 2011) (No. 2008-858), 2008 WL 3693418.

¹³³ *Steadfast*, 715 S.E.2d at 30.

including continuous or repeated exposure to substantially the same general harmful condition.”¹³⁴

Steadfast agreed to provide a defense under a reservation of rights.¹³⁵ In July 2008, however, Steadfast filed suit against AES in Virginia state court, seeking a declaratory judgment that it had no duty to defend or indemnify AES under the Steadfast policies.¹³⁶ Steadfast alleged that the *Kivalina* plaintiffs’ damages arose from intentional conduct, which does not constitute an occurrence. Steadfast also contended that “loss in progress” endorsements barred coverage because the alleged injury arose prior to the inception of AES’s policies. Finally, Steadfast argued that the policies’ pollution exclusion precluded coverage because carbon dioxide is a pollutant.¹³⁷ AES counterclaimed, seeking a declaratory judgment that the Steadfast policies entitled it to coverage.¹³⁸

Two rounds of summary judgment proceeded in the trial court. The trial court denied Steadfast’s motion for summary judgment, succinctly reasoning that the “allegations of negligence, nuisances, intentional conduct under the exclusion clause, definitions of pollutants and/or the existence of them, as well as what the parties intended at contract formation rise and fall on established questions of fact.”¹³⁹ Thus, because the parties each relied on extrinsic evidence, the court declined to rule as a matter of law that there was no duty to defend.¹⁴⁰

AES and Steadfast subsequently filed cross-motions for summary judgment. The trial court granted Steadfast’s motion, holding that the

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See Steadfast Ins. Co. v. AES Corp., No. 2008-858, at 1-2 (Va. Cir. Ct. Oct. 30, 2009) (docket).

¹³⁷ *Id.* at 9-10. See Steadfast, 715 S.E.2d at 30.

¹³⁸ Steadfast, 715 S.E.2d at 30.

¹³⁹ Amended Order, Steadfast Ins. Co. v. AES Corp., No. 2008-858 (Va. Cir. Ct. Dec. 3, 2009), 2009 WL 5242863 (denying Steadfast’s motion for summary judgment).

¹⁴⁰ Virginia follows the “eight corners” rule in addressing an insurer’s duty to defend. See *Copp v. Nationwide Mut. Ins. Co.*, 692 S.E.2d 220, 224 (Va. 2010); *Brenner v. Lawyers Title Ins. Corp.*, 397 S.E.2d 100, 102, 104 (Va. 1990); *Am. Online, Inc. v. St. Paul Mercury Ins. Co.*, 207 F. Supp.2d 459, 465-66 (E.D. Va. 2002) (applying Virginia law). Under this rule, a court examining the existence of an insurer’s duty to defend need examine only the “four corners” of the underlying complaint and the “four corners” of the insurance policy. Steadfast, 715 S.E.2d at 32. The majority of states across the country employ a variant of this “eight corners” rule, although the rule is denominated differently. See, e.g., *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 176 (Cal. 1966). *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153, 1157-61 (Cal. 1993); *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 378 (N.C. 1986) (“This is widely known as the ‘comparison test’: the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded. Any doubt as to coverage is to be resolved in favor of the insured.”).

Kivalina plaintiffs' allegations of "negligence" were insufficient to allege an "occurrence" under the Steadfast policies.¹⁴¹ In the final round of summary judgment, the trial court omitted any discussion of whether the Steadfast policies' pollution exclusion precluded coverage.¹⁴² On February 22, 2010, AES appealed to the Virginia Supreme Court.¹⁴³ On appeal, the parties addressed both issues.

The Virginia Supreme Court heard oral argument on April 19, 2011.

B. THE OPINION OF THE VIRGINIA SUPREME COURT IN *STEADFAST V. AES*

On September 16, 2011, the Virginia Supreme Court affirmed the trial court's decision. Justice Bernard Goodwyn authored the majority opinion.¹⁴⁴ Senior Justice Koontz authored a concurring opinion, in which Senior Justice Carrico joined.¹⁴⁵

The majority concluded that Steadfast owed no duty to defend AES against the climate change litigation because intentional GHG emissions, even those with unintended results, did not constitute an "accident" (i.e., an "occurrence") under the policy.¹⁴⁶ Notably, Justice Koontz concurred in the result but emphasized that the holding should be limited to the particular facts of this case.¹⁴⁷ The Virginia Supreme Court based its decision on the following reasoning.

i. Focus on the Four Corners of the Complaint

Consistent with Virginia's "eight corners" rule, by which a court considering coverage reviews the four corners of the complaint and the four corners of the insurance policy, the court first considered in detail the complaint in the underlying *Kivalina* case.¹⁴⁸ The *Kivalina* complaint alleged that AES "*intentionally* emits millions of tons of carbon dioxide

¹⁴¹ AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28, 30 (Va. 2011).

¹⁴² Brief of Appellant at 4, 18, AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28 (Va. 2011) (No. 100764), 2010 WL 6893538.

¹⁴³ The Virginia Supreme Court has exclusive jurisdiction over an appeal of a general civil judgment from a Virginia circuit (or district) court. In contrast, Virginia Courts of Appeals have limited appellate jurisdiction, generally hearing matters involving domestic relations or certain administrative issues. See www.courts.state.va.us/courts/cav/about.html (discussing limited jurisdiction of the Virginia Court of Appeals).

¹⁴⁴ *Steadfast*, 715 S.E.2d at 29, 34.

¹⁴⁵ *Id.* at 34.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 32.

and other greenhouse gases into the atmosphere annually.”¹⁴⁹ The *Kivalina* complaint also alleged that AES “knew or should have known of the impacts of [its] emissions” of carbon dioxide, yet “despite this knowledge” AES continued to contribute to global warming.”¹⁵⁰

ii. *No Occurrence*

Both AES and Steadfast agreed that the “eight corners” rule applied; thus, the court could consider only the “four corners” of the *Kivalina* complaint and the “four corners” of the Steadfast policies when determining the existence of a duty to defend.¹⁵¹ The court also acknowledged the well-settled principle that an insurer’s duty to defend is broader than its duty to pay; the duty to defend will arise “whenever the complaint alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy.”¹⁵²

Looking to the “four corners” of the policy, and in particular the definition of occurrence, the court concluded that occurrence was synonymous with an “accident” that was unexpected “from the viewpoint of the insured.”¹⁵³ The court explained further that an “accident” is “an event which creates an effect which is not the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated.”¹⁵⁴ Consequently, an “intentional” act cannot be an “occurrence” or an “accident.”¹⁵⁵ In other words, “[i]f a result is the natural and probable consequence of an insured’s intentional act, it is not an accident.”¹⁵⁶

The court recognized, however, a caveat to the seemingly straightforward “occurrence” test. In these circumstances, the dispositive issue is not whether the conduct was intended, but rather, whether the

¹⁴⁹ *Steadfast*, 715 S.E.2d at 30(emphasis added); see also *id.* at 31 (citing to paragraph 252 of the *Kivalina* complaint, which alleges: “Defendants know or should know that their emissions of greenhouse gases contribute to global warming, to the general public injuries such heating will cause, and to Plaintiff’s special injuries. Intentionally or negligently, defendants have created, contributed to, and/or maintained the public nuisance.”).

¹⁵⁰ *Id.* at 30 (emphasis added).

¹⁵¹ *Id.* at 32.

¹⁵² *Id.* (quoting *Va. Elec. Power Co. v. Northbrook Prop. & Cas. Ins. Co.*, 475 S.E.2d 264, 265-66 (Va. 1996)).

¹⁵³ *Id.* (citing *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 286 S.E.2d 225, 226 (Va. 1982)).

¹⁵⁴ *Id.* (citing *Lynchburg Foundry Co. v. Irvin*, 16 S.E.2d 646, 648 (Va. 1941)); see also *Fid. & Guar. Ins. Underwriters, Inc. v. Allied Realty Co.*, 384 S.E.2d 613, 615 (Va. 1989) (accidental injury “happen[s] by chance, or unexpectedly; taking place not according to the usual course of things; casual, fortuitous”).

¹⁵⁵ See *Steadfast*, 715 S.E.2d at 32.

¹⁵⁶ *Id.*

resulting harm was a “reasonably anticipated consequence” of the insured’s intentional act. Specifically, if the insured’s action initiated a chain of events intentionally performed, but the alleged injury results from an unforeseen cause that is “out of the ordinary expectations of a reasonable person,” then the injury may still be caused by an occurrence (and thus within coverage).¹⁵⁷ Thus, the perspective of a hypothetical “reasonable person,” and not the subjective intent of the particular insured, is considered in the equation.¹⁵⁸

AES had argued that the *Kivalina* complaint alleged in the alternative that AES acted either “[i]ntentionally or negligently,” and that AES “knew or should know.”¹⁵⁹ AES thus argued that Steadfast must defend AES in an underlying litigation when allegations of negligence arise from the underlying complaint, such as in *Kivalina*.¹⁶⁰ AES further argued that allegations it “should know” the consequences demonstrated that the resulting injury was “accidental *from the viewpoint of AES* and within the definition of an ‘occurrence.’”¹⁶¹

The Virginia Supreme Court declined to view the existence of an “occurrence” from the viewpoint of the policyholder. The court reasoned that the policies at issue in *Steadfast* did not contemplate coverage for “all suits against the insured alleging damages not caused intentionally,” nor did the policy contemplate coverage for “all damage resulting from AES’s negligent acts.”¹⁶² Instead, the Virginia Supreme Court reasoned that the “occurrence” requirement trumped any such expansions to the grant of coverage, stating:

In the Complaint, *Kivalina* plainly alleges that AES intentionally released carbon dioxide into the atmosphere as a regular part of its energy-producing activities. *Kivalina* also alleges that there is clear scientific consensus that the natural and probable consequence of such emissions is global warming and damages such as *Kivalina* suffered. Whether or not AES’s intentional act constitutes negligence, the nature

¹⁵⁷ *Id.* (citing ERIC M. HOLMES, APPLEMAN ON INSURANCE 2D § 129.2(I)(5) (2002 & Supp. 2009)).

¹⁵⁸ *See id.* at 32-33 (“Thus, resolution of the issue of whether *Kivalina*’s Complaint alleges an occurrence covered by the policies turns on whether the Complaint can be construed as alleging that *Kivalina*’s injuries, at least in the alternative, resulted from unforeseen consequences that a reasonable person would not have expected to result from AES’s deliberate act of emitting carbon dioxide and greenhouse gases.”).

¹⁵⁹ *Id.* at 33.

¹⁶⁰ *Id.* (citing *Parker v. Hartford Fire Ins. Co.*, 278 S.E.2d 803 (Va. 1981)).

¹⁶¹ *Steadfast*, 715 S.E.2d at 33 (emphasis added). “In essence, AES argues that the damage to the village resulting from global warming caused by AES’s electricity-generating activities was accidental because such damage may have been unintentional.” *Id.*

¹⁶² *Id.*

and probable consequence of that intentional act is not an accident under Virginia law.¹⁶³

In other words, from the viewpoint of the hypothetical reasonable person, the resulting damage from GHG emissions was plainly foreseeable. The fact that AES may have subjectively been unaware or ignorant of the likelihood of such damage, and thus negligent, was irrelevant to the calculus.¹⁶⁴

The Virginia Supreme Court thus adheres to, and indeed recited twice, that “when the insured knows or *should have known* the consequences of his actions, there is no occurrence and therefore no coverage.”¹⁶⁵ By injecting the notion that the insured “should have known” the consequence of his or her actions, the analysis no longer is subjective and individualized. Instead, the court’s analysis is predicated upon an objective consideration of what a “reasonable” person would have perceived.¹⁶⁶ The *Steadfast* decision thus perpetuates Virginia’s alignment with those courts across the country that decline to consider the insured’s subjective intent in assessing whether damages were the result of an “occurrence.”¹⁶⁷

iii. Pollution Exclusion

The court’s decision, declining to find an occurrence, mooted consideration of whether the *Steadfast* policies’ pollution exclusions would apply to defeat coverage. The issue of whether carbon dioxide might be excluded as a pollutant under a CGL policy’s pollution exclusion is hotly contested by policyholders and insurers.¹⁶⁸

¹⁶³ *Id.*

¹⁶⁴ *See id.* (“Inherent in [the allegation that AES knew or should have known] is the assertion that the results were a consequence of AES’s intentional acts that a reasonable person would anticipate.”).

¹⁶⁵ *Id.* at 33-34 (citing 1 BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.03[c] (15th ed. 2011) (emphasis added)).

¹⁶⁶ *See id.* at 34 (“Even if AES were actually ignorant of the effect of its actions and/or did not intend for such damages to occur, Kivalina alleges its damages were the natural and probable consequence of AES’s intentional actions. Therefore, Kivalina does not allege that its property damage was the result of a fortuitous event or accident, and such loss is not covered under the relevant CGL policies.”).

¹⁶⁷ *See* LEE R. RUSS, COUCH ON INSURANCE §103:27 (3d ed. 2011) (noting dispute as to whether “expected or intended” element of the term “occurrence” is interpreted objectively or subjectively; listing cases on both sides of the dispute).

¹⁶⁸ Compare J. Robert Renner, *Coverage for Climate Change Claims, an Uphill Fight*, L.A. DAILY J., Apr. 4, 2011, available at www.duanemorris.com/articles/static/renner_dailyjournal_041111.pdf (concluding standard pollution exclusions are broadly drafted, not ambiguous and plainly exclude liabilities arising from anthropogenic climate change), with John E. Heintz, Marla H. Kanemitsu & Elizabeth Scanlan, *Insurance Coverage for Climate Change Suits*:

Steadfast had argued on appeal that “[e]very substance is proper and benign in its proper place and proper quantity” but can become a pollutant when these boundaries are breached.¹⁶⁹ AES countered that the insurance policy did not expressly identify carbon dioxide, whereas the policy delineated other substances.¹⁷⁰ AES also argued that carbon dioxide is “omni-present,” a naturally occurring “odorless and colorless gas,” and thus hardly in the category of materials deemed “pollutants.”¹⁷¹ The *Steadfast* court’s failure to reach these issues means that policyholders and insurers alike must await a future decision to learn if carbon dioxide will be included within the category of “pollutants” and thus potentially removed from the coverage scope of many standard insurance policies.

iv. The Concurring Opinion

Critically for policyholders who may face future climate change liabilities, Senior Justice Koontz authored a concurring opinion in *Steadfast*.¹⁷² Judge Koontz wrote separately to “make clear and emphasize” that the majority’s holding should be limited to the particular allegations of the *Kivalina* lawsuit and the definition of occurrence contained in the *Steadfast* policies.¹⁷³ Justice Koontz shared the concern of AES that *Steadfast*’s argument “paints with too broad a stroke,” and thus threatened truncating the broad duty to defend in cases that did not share the unique circumstances therein.¹⁷⁴

Although the majority sought to distinguish its analysis through a discussion of the *Parker v. Hartford Fire Insurance Co.* decision,¹⁷⁵ in Judge Koontz’s opinion the majority’s holding could still be “misconstrued as departing from the rule that the insurer’s duty to defend should be abrogated only where it is certain that no liability could arise from the contract of insurance.”¹⁷⁶ Thus, although Judge Koontz concurred in the result, and agreed that the *Kivalina* complaint did allege intentional and foreseeable, indeed “inevitable,” damage, Judge Koontz

The Battle Has Begun, ENVTL. CLAIMS J., Mar. 2009, at 46-51 (concluding that insurers face an “uphill battle” applying standard pollution exclusions to avoid liability for climate change).

¹⁶⁹ Brief of Appellee at 40, *AES Corp. v. Steadfast Ins. Co.*, 715 S.E.2d 28 (Va. 2011) (No. 100764), 2010 WL 6893536.

¹⁷⁰ *Id.* at 19.

¹⁷¹ *Id.* at 19-20.

¹⁷² *Steadfast*, 715 S.E.2d at 34 (Koontz, J., concurring).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Parker v. Hartford Fire Ins. Co.*, 278 S.E.2d 803 (Va. 1981).

¹⁷⁶ *Steadfast*, 715 S.E.2d at 34-35 (Koontz, J., concurring).

separately wrote to ensure that the holding of *Steadfast* remained limited to that particular policy language and the allegations of the underlying complaint.¹⁷⁷

v. *Rehearing Granted*

On October 17, 2011, AES petitioned the Virginia Supreme Court for a rehearing.¹⁷⁸ On January 17, 2012, the court set aside its prior decision and granted AES's petition.¹⁷⁹ On February 27, 2012, the Virginia Supreme Court heard oral argument on AES's petition for rehearing.¹⁸⁰ The court's decision to rehear the case is unusual and underscores both the intensity of the debate and the ongoing uncertainty over insurance coverage for climate change liabilities.¹⁸¹

C. RAMIFICATIONS OF *AES v. STEADFAST*

Commentators predicted that the *Steadfast* decision, as the first case analyzing insurance coverage in connection with climate change litigation, would be a bellwether decision of national importance.¹⁸² The court's decision, however, may be confined to the particular facts and circumstances of the *Steadfast* litigation. Additionally, the procedural posture of the litigation, which removed from consideration the scope of the pollution exclusion, may further minimize the precedential value of the *Steadfast* opinion.

i. *The Steadfast Decision Is Limited to One State Court*

The interpretation of insurance policies is a creature of state, not

¹⁷⁷ *Id.* at 35.

¹⁷⁸ Petition for Rehearing, filed by Appellant AES Corporation, in *AES Corp. v. Steadfast Ins. Co.*, Case No. 100764.

¹⁷⁹ Order dated January 17, 2012 in *AES Corp. v. Steadfast Ins. Co.*, Case No. 100764.

¹⁸⁰ Latham & Watkins, *Insurance Coverage for Climate Change Suits: Virginia Supreme Court Reconsidering 2011 Steadfast v. AES Decision*, CLIENT ALERT (Feb. 16, 2012), www.lw.com/upload/pubContent/_pdf/pub4600_1.pdf.

¹⁸¹ See John G. Nevius, *Quite an 'Occurrence,' Rehearing in Steadfast v. AES*, LAW360 (February 9, 2012) (noting that the Virginia Supreme Court historically grants approximately three percent of rehearing petitions; declining to predict how the court's rehearing will impact the scope of the prior decision).

¹⁸² See Steve Jones, *Virginia Supreme Court to Decide Insurance Coverage for Climate Change Suits*, MARTEN LAW (June 2, 2011), www.martenlaw.com/newsletter/20110602-insurance-coverage-climate-change ("The case, [*Steadfast*], is one of first impression and is being closely followed by both insurers and insureds.").

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federal, law.¹⁸³ Thus, each state has developed a distinct body of jurisprudence addressing insurance policy interpretation.¹⁸⁴ As a result, policyholders and insurers regularly search for the more favorable jurisdiction and enter a race to the courthouse.¹⁸⁵ Indeed, many commentators have opined that Steadfast deliberately filed its declaratory relief action first and in Virginia, to take advantage of that state's reputation for being less than favorable for policyholders.¹⁸⁶

The Virginia Supreme Court decision binds only the courts of that jurisdiction. Thus, other states may well decide the occurrence issue differently. Indeed, in analyzing whether an "occurrence" had taken place, other states have focused on the ability of the policyholder, subjectively, to foresee the resulting damage, not whether such damage was objectively foreseeable.¹⁸⁷ In light of the jurisprudence in these states

¹⁸³ See H. WALTER CROKEY ET AL., CALIFORNIA PRACTICE GUIDE: INSURANCE LITIGATION ¶ 15:592 (2011) ("Rights and obligations under an insurance policy are governed primarily by state law."); Steve Jones, *Virginia Supreme Court Holds that Climate Change Allegations Do Not Trigger Insurer's Duty to Defend*, MARTEN LAW (Sept. 21, 2011), www.martenlaw.com/newsletter/20110921-virginia-insurers-duty-to-defend ("However, the fact that insurance is almost exclusively governed by state law means that a different result could arise in a different state.").

¹⁸⁴ Courts across the country are split on whether an insurer can recoup defense costs paid toward claims that ultimately are found to be uncovered. *Compare* *Buss v. Superior Court*, 939 P.2d 766, 776-777 (Cal. 1997) (insurer has right to reimbursement of fees exclusively allocable to the defense of uncovered claims), *with* *Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092, 1103 (Ill. 2005) (insurer cannot recover defense costs even if it is later determined there is no coverage). Courts across the country are also split on the impact of a policyholder's late notice of a claim. *Compare* *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 845 (Ct. App. 1993) ("California law is settled that a defense based on an insured failure to give timely notice requires the insurer to prove that it suffered substantial prejudice. Prejudice is not presumed from delayed notice alone. The insurer must show actual prejudice, not the mere possibility of prejudice." (citations omitted)), *with* *Country Mut. Ins. Co. v. Livorsi Marine, Inc.*, 856 N.E. 2d 338, 346 (Ill. 2006) ("We also hold that once it is determined that the insurer did not receive reasonable notice of an occurrence or a lawsuit, the policyholder may not recover under the policy, regardless of whether the lack of reasonable notice prejudiced the insurer.").

¹⁸⁵ *E.g.*, *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) ("[T]he court in which an action is first filed is the appropriate court to determine whether subsequently filed cases involving substantially similar issues should proceed."). Thus the second-filed court's role is often limited to determining whether to stay, transfer, or dismiss its proceeding. *Twin City Ins. Co. v. Key Energy Servs., Inc.*, No. H-09-0352, 2009 U.S. Dist. LEXIS 46267, at *16-17 (S.D. Tex. June 2, 2009).

¹⁸⁶ *E.g.*, Mike Tsikoudakis, *Steadfast Insurance Has No Duty to Defend in Climate Suit*, BUSINESS INSURANCE (Sept. 25, 2011), www.businessinsurance.com/article/20110925/NEWS06/309259993?tags=%7C61%7C75%7C302# (citing a source characterizing Virginia as "insurer-friendly").

¹⁸⁷ *E.g.*, *Siagha v. Nat'l Fire Ins. Co. of Pittsburgh*, 762 N.Y.S.2d 46, 47-48 (App. Div. 2003) (CGL policy; "a court, when deciding whether a loss is the result of an accident . . . must determine from the point of view of the insured, whether the loss was unexpected, unusual and unforeseen") (internal quotation marks omitted); *Nat'l Union Fire Ins. Co. v. Terra Indus., Inc.*, 216 F. Supp. 2d 899, 919 (N.D. Iowa 2002) (applying Iowa law to general liability and umbrella policies, and

confirming the application of a *subjective* viewpoint, these same states may decide the issue differently, which suggests that coverage for climate change liabilities nonetheless may be available to policyholders in other states. Thus, as plaintiffs bring new climate change claims under state tort law, other state courts addressing the related coverage disputes may reach different conclusions about whether the unintended effects of intentional emissions constitute an occurrence. In these states, defendants may obtain an insurer-funded defense of these litigations, which could greatly alter the complexion, and any ultimate resolution, of climate change litigation.

recognizing that “where the insured neither intended nor expected” the “damage” there was an “occurrence”), *aff’d*, 346 F.3d 1160 (8th Cir. 2003); *Potomac Ins. of Ill. v. Huang*, No. 00-4013-JPO, 2002 U.S. Dist. LEXIS 4710, at *20 (D. Kan. Mar. 1, 2002) (unpublished) (applying Kansas law to CGL policy, and recognizing “the Kansas Supreme Court would find that the damage that occurs as a result of faulty or negligent workmanship constitutes an ‘occurrence’ as long as the insured did not intend for the damage to occur” (internal quotation marks omitted)); *Gibson v. Farm Family Mut. Ins. Co.*, 673 A.2d 1350, 1353 (Me. 1996) (general liability policy; finding an “occurrence” because a “consequence that follow[ed] from” insureds’ intentional act could be “unintentional despite the fact that [the act was] intentional”); *Hudson Ins. Co. v. City of Chi. Heights*, 48 F.3d 234, 237 (7th Cir. 1995) (applying Illinois law to excess and umbrella policies, and recognizing that “claims for intentional [acts] can fall under the definition of occurrence as long as the *injuries* incurred were not specifically intended or expected” (internal quotation marks omitted)); *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153, 1164 (Cal. 1993) (“expected” damage is governed by a subjective test and examines “whether the insured knew or believed its conduct was substantially certain or highly likely to result in that kind of damage”); *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 845 P.2d 746, 749 (Mont. 1993) (excess policies; recognizing that “the word ‘occurrence’ ha[s] a broader definition than the word ‘accident’ and that the intent of the policy is to insure the acts or omissions of the insured, including his intentional acts, excluding only those in which the resulting injury is either expected or intended from the insured’s standpoint”); *Lane v. Worcester Mut. Ins. Co.*, 430 N.E.2d 874–876 (Mass. App. Ct. 1982) (CGL and general liability policies; “[A]n act committed intentionally but without malice or desire to injure can lead to accidental results.”); *Otterman v. Union Mut. Fire Ins. Co.*, 298 A.2d 547, 551 (Vt. 1972) (liability policy; finding an “occurrence” where insured did not “expect[.]” the “result” of his act); *see also Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007) (CGL policy; recognizing that “a deliberate act, performed *negligently*, is an accident if the *effect* is not the intended or expected result” (emphasis added)); *MAMSI Life & Health Ins. Co. v. Callaway*, 825 A.2d 995, 1000 (Md. 2003) (life insurance policy; recognizing that the appropriate test of whether an “accident” occurred is “whether the *damage* caused by the actor’s intentional conduct was unforeseen, unusual and unexpected” (emphasis added and internal quotation marks omitted)); *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998) (CGL policy; holding that “where the term ‘accident’ in a liability policy is not defined, the term, being susceptible to varying interpretations, encompasses not only ‘accidental events,’ but also injuries or damage neither expected nor intended from the standpoint of the insured”); *Town of Huntington v. Hartford Ins. Group*, 415 N.Y.S.2d 904, 907 (App. Div. 1979) (CGL policy; “[I]t is not legally impossible to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damages were intentional.” (internal quotation marks omitted)).

ii. *The Steadfast Decision Is Limited to One Particular Policy*

As the concurring opinion dramatically underscored, the specific policy terms at issue here limit the court's interpretation. Judge Koontz separately wrote to make certain that the holding of *Steadfast* was not "misconstrued" as a general limitation on the insurer's broad duty to defend a potentially covered claim.¹⁸⁸ In so writing, Judge Koontz provided direct support for future litigants who seek to distinguish their coverage circumstances from *Steadfast*. Although the majority opinion may provide significant support for insurers in forthcoming insurance coverage disputes—especially in Virginia—Judge Koontz's opinion is powerful ammunition for policyholders to counter these arguments.

iii. *The Unresolved Application of the Pollution Exclusion to Climate Change Liabilities Remains Pivotal*

A coverage court in the future may well conclude, contrary to the *Steadfast* court, that the allegations of an underlying climate change complaint describe an occurrence sufficient to trigger an insurer's duty to defend, because the occurrence determination is bound by each state's insurance coverage jurisprudence. Thus, the ultimate issue of an insurer's liability for climate change will likely rest at the application of a policy's pollution exclusion—an issue upon which the Virginia Supreme Court remained silent.

The procedural posture of *Steadfast* prevented the Virginia Supreme Court from opining on the application of a standard pollution exclusion¹⁸⁹ to the circumstances of global warming. Nevertheless, other judges

¹⁸⁸ AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28, 34 (Va. 2011) (Koontz, J., concurring).

¹⁸⁹ Since the mid-1970's most CGL policies have included a pollution exclusion of some vintage. See H. WALTER CROKEY ET AL., CALIFORNIA PRACTICE GUIDE: INSURANCE ¶ 7:2060 (2011) (citing ISO form; "This insurance does not apply: . . . to . . . property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere . . . but this exclusion does not apply . . . if such discharge, dispersal, release or escape is sudden and accidental." (first emphasis added)). The first pollution exclusions utilized in the mid-1970's were less restrictive than those currently in use, which are termed "absolute" pollution exclusions. See *id.* ¶ 7:2085 (citing ISO form; "This insurance does not apply to . . . property damage arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants: at or from any premises, site or location which is or was at any time owned or occupied by . . . any insured . . ." (emphasis added)). Because allegations of GHG emissions (and the alleged damage) may span decades, a policyholder may seek to trigger an entire portfolio of insurance policies reaching back into the 1960s. Thus, a single policyholder may seek coverage under policies issued before the 1970s, which include no limitation on pollution-related liabilities, as well as policies issued since the 1970s that include variations of a pollution exclusion.

reviewing the circumstances of *AEP* and *Steadfast* have noted in dicta that carbon dioxide may not qualify as a pollutant because it is omnipresent and harmless in its natural state.¹⁹⁰

Thus, although commentators have suggested that the *Steadfast* decision could “chill” future coverage litigation and/or dissuade policyholders from aggressively seeking coverage, the limitations on the *Steadfast* decision significantly undermine these predictions.¹⁹¹ Additionally, the damages implicated by global warming, both in terms of defense costs and settlements/judgments, are substantial. Faced with significant liability and unsettled case law, policyholders will remain, even in the wake of the *Steadfast* decision, motivated to obtain insurance coverage for these liabilities.¹⁹² Both plaintiffs and defendants in future global warming cases must be attuned, in light of *Steadfast* and state-specific insurance coverage jurisprudence, as to how the allegations of “damage” may, or may not, fit within the coverage provisions of policies that could respond to these liabilities.

IV. THE INTERSECTION OF AEP & STEADFAST

Commentators watching and waiting for the decisions of the United States Supreme Court in *AEP* and the Virginia Supreme Court in *Steadfast* prognosticated that these decisions would prove to be bellwether opinions that could significantly transform the future of climate change litigation, and indeed, the progression of global warming. Both courts took measured approaches to the epic issues before them, reserving for a later day key issues.

In so doing, these courts guaranteed future climate change litigation

¹⁹⁰ See *Am. Elec. Power*, 131 S. Ct. at 2538. (addressing pre-emption, the Supreme Court reasoned, “Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely breathing.”). Similarly, during oral argument on cross-motions for summary judgment, the trial judge in *Steadfast* made statements indicating that he may *not* view carbon dioxide as a pollutant. When asked to clarify whether his January 7, 2010, statement that “carbon dioxide is not a pollutant” was a ruling, the judge stated, “Well, it’s not a ruling. We were just talking. Otherwise we would all have to stop breathing. We’re polluting right now. I believe that then, I believe it now. But that’s not a ruling as it relates to the issues in that case.” Transcript of Hearing on Motions for Summary Judgment at 4, *Steadfast Ins. Co. v. AES Corp.* (Va. Cir. Ct. Mar. 19, 2010) (No. 2008-858).

¹⁹¹ E.g., Tsikoudakis, *supra* note 186.

¹⁹² See Lawrence Hurley, *Va. Supreme Court to Rule on Insurance Coverage of Warming Claims*, N.Y. TIMES, May 19, 2011 (noting that even after courts rule on these cases, plaintiffs will still be harmed by climate change and look for “deep pockets” to pay for these liabilities meaning more insurance coverage disputes); Tsikoudakis, *supra* note 186 (“Coverage for environmental liabilities has always been a controversial area rife with litigation. This decision is only the first round in what likely will be a long fight over policyholder rights.”).

and related coverage disputes.¹⁹³ *AEP* at most represents a bump in the road for plaintiffs seeking redress for climate change liabilities. As noted *supra* in Part II.D, climate change litigation is destined to continue in at least three variants: (1) the anticipated and expressly sanctioned federal court review of the EPA's eventual occupation of the field; (2) the state-law claims of the *AEP* plaintiffs which were subject to remand; and (3) claims in state courts by future litigants, including claims based on new, as yet undeveloped or unarticulated, theories.

By the same token, litigation concerning the scope of insurance coverage for climate change liabilities remains in its preliminary stages.¹⁹⁴ *Steadfast* was the first, but certainly not the last, decision interpreting who will ultimately foot the bill for climate change liabilities.¹⁹⁵ Because insurance coverage jurisprudence is state-specific, the *Steadfast* decision may well be confined to Virginia.¹⁹⁶ With the scope of the pollution exclusion still unsettled, and Judge Koontz's concurrence emboldening policyholders, insurers potentially remain at risk for these liabilities.¹⁹⁷

Lynchpin issues remain unaddressed in both opinions. Thus, the progeny of *AEP* and *Steadfast* will prove to be the more transformative, bellwether decisions.

V. CONCLUSION

With the holdings of both *AEP* and *Steadfast* silent on predicate

¹⁹³ See Lawrence Hurley, *Va. Court Rules That Insurance Doesn't Cover Global Warming Claims*, N.Y. TIMES, Sept. 16, 2011, available at www.nytimes.com/gwire/2011/09/16/16greenwire-va-court-rules-that-insurance-doesnt-cover-glo-97999.html ("Despite . . . [the *AEP*] outcome, lawyers expect cases against utilities over climate change featuring different legal theories to continue."); see also J. Randolph Evans, Joanne L. Zimolzak & Christina M. Carroll, *Is Past Prologue to Climate Change Liability?*, LAW360 (May 31, 2011), www.law360.com/articles/247592 ("Emitters (and their insurers) can expect a steady stream of probative complaints based on steadily evolving legal theories until one reached the magic combination or the Congress simply preempts the area.").

¹⁹⁴ See Lawrence Hurley, *Va. Court Rules That Insurance Doesn't Cover Global Warming Claims*, N.Y. TIMES, Sept. 16, 2011 ("Litigation over insurance coverage relating to climate change is likely to grow in coming years. . .").

¹⁹⁵ See, e.g., John G. Nevius, *Arguing the Future of Climate Change Litigation*, LAW360 (May 3, 2011), www.law360.com/articles/242484 ("One thing is certain: Legal disputes related to climate change and the insurance industry's obligations related thereto will be with us for some time to come."); Mike Tsikoudakis, *supra* note 186 (reporting that *Steadfast* is not the "last" coverage case in this area).

¹⁹⁶ See Hurley, *supra* note 194 (observing that *Steadfast* decision is limited to Virginia, and "[s]imilar cases will be decided on a state-by-state basis").

¹⁹⁷ See *id.* (*Steadfast* ruling represents "an initial victory for insurers in the field of unfolding climate change liability").

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issues, the long-term viability of judicial action to redress climate change is not out of steam. Instead, plaintiffs and defendants will be looking to state courts across the country for direction on whether these claims are cognizable, and if so, who will ultimately bear the cost of global warming.