Environment, Energy, and Resources Law: The Year in Review

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In 2015, noteworthy decisions at the intersection of constitutional law and environmental, energy, and natural resources law occurred in the areas of standing, the Commerce Clause, preemption, takings, due process, the First Amendment, the Eleventh Amendment, and state constitutional law.

I. STANDING

To invoke the jurisdiction of an Article III court, a plaintiff must establish standing by proving: (1) an injury in fact that is concrete and particularized, not hypothetical or conjectural; (2) causation that is fairly traceable to the defendant’s actions; and (3) redressability showing that a judicial remedy is likely to fix the injury caused by the defendant. A plaintiff also has to meet the requirements of prudential standing, including the requirement that the plaintiff’s alleged injury falls within the zone of interest of the relevant statute.

During 2015, the U.S. Supreme Court issued two standing decisions that, although not specifically in environmental cases, speak to important issues of legislative standing and association standing. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court heard the state legislature’s challenge to a citizen ballot initiative that gave redistricting power to an independent commission, Arizona Independent Redistricting Commission (AIRC), in an effort to end gerrymandering in the state. After AIRC created the 2012 redistricting map, the legislature sought a declaratory judgment and an injunction, claiming the power given to the commission ran afoul of the Elections Clause of the U.S. Constitution, which arguably gives sole authority to the state legislature. A three-judge panel of the U.S. District Court for the District of Arizona ruled the legislature had standing to sue but rejected the suit on its merits. The U.S. Supreme Court upheld the district court ruling, finding that the legislature had standing but rejecting on the merits, noting that “one must not ‘confus[e] weakness on the merits with the absence of Article III standing.” Justice Ginsburg, writing for the majority, said that the constitutional amendment giving sole authority to the AIRC completely nullifies any vote the legislature might take to affect redistricting plans. The nullification of votes the legislature could previously take was sufficient to establish an injury in fact.

In *Alabama Legislative Black Caucus v. Alabama*, voters in Alabama challenged the redistricting plans for the state’s house and senate, claiming at least four counties

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were gerrymandered along racial boundaries, violating the Equal Protection Clause. The district court ruled, among other issues, that one of the plaintiffs, the Alabama Democratic Conference (Conference), lacked associational standing because the record did “not clearly identify the districts in which the individual members of the [Conference] reside.”3 For an association to have standing, the association must show that one of its members has the standing to sue in his or her own right, which means in this case the member would have to live in the district where the alleged gerrymandering took place. The district court raised the standing issue sua sponte and found it insufficient that the Conference merely stated in testimony that it has members in almost every county in the state. The Supreme Court reversed, finding that the record was sufficient to support at least a request that the Conference submit further evidence showing it has members in the counties at issue rather than dismissing the claim entirely.

The Courts of Appeals also gave us notable standing decisions. In Organized Village of Kake v. U.S. Department of Agriculture, the Ninth Circuit en banc addressed intervenor standing.4 The Village of Kake brought suit against the U.S. Department of Agriculture (USDA) over whether the federal agency properly exempted the Tongass National Forest from the Roadless Rule, which requires certain areas of land to limit construction and tree harvesting. The U.S. District Court for the District of Alaska granted summary judgment for the Village, holding the exemption violated the Administrative Procedure Act (APA) because the USDA failed to provide adequate reasoning for the exemption. The State of Alaska appealed as an intervenor. While intervenors are able to seek review, their test for injury in fact is whether their interests “have been adversely affected by the judgment.”5 The Ninth Circuit held that Alaska would be adversely affected by the judgment because under the National Forest Receipts program, Alaska is entitled to 25% of gross timber sales from the state’s national forests, which will be affected by the Roadless Rule and the Tongass Exemption. A petition for certiorari is pending at the Supreme Court as of December 2015, but it does not raise the standing issue; rather, it asks the Court to consider the circumstances under which a federal agency may alter its policy position—here, in the never-ending battle about the Roadless Rule.

In Gunpowder Riverkeeper v. FERC, the D.C. Circuit addressed the zone of interests test.6 An environmental organization (Gunpowder) challenged a certificate issued to Columbia Gas Transmission by the Federal Energy Regulatory Commission (FERC) for the extension of a natural gas pipeline in Maryland. The appeals court found that Gunpowder had organizational standing but concluded the threat of eminent domain, embodied in the proposed pipeline extension, did not fall within the zone of interest protected by the statutes under which they sued.

Other appellate court standing cases from this year include:

- WildEarth Guardians v. U.S. Dept. of Agriculture, in which the Ninth Circuit ruled an environmental organization had standing to sue USDA for using archaic and unnecessarily destructive predator control methods, rather than using updated methods and systems.7 Mere speculation that the state could implement its own

4 795 F.3d 956 (9th Cir. 2015) (en banc), petition for cert. filed (pending on the merits, not the standing issue).
5 Id. at 963 (quoting Didrickson v. U.S. Dep’t of Interior, 982 F.2d 1332 (9th Cir. 1992)).
6 807 F.3d 267 (D.C. Cir. 2015)
7 795 F.3d 1148 (9th Cir. 2015).
equally destructive methods in the absence of the federal government doing so did not defeat redressability.

- *Cottonwood Environmental Law Center v. U.S. Forest Service*, in which the Ninth Circuit ruled an environmental organization had standing to sue the Forest Service when it declined to reinitiate consultation with the U.S. Fish and Wildlife Service after a critical habitat designation was revised for the Canadian Lynx. Because the organization alleged a “procedural injury,” it did not have to demonstrate that additional consultation would change the ultimate outcome of the government’s deliberations.

II. COMMERCE CLAUSE

The Commerce Clause of the United States Constitution provides that “Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States.” In its positive form, the Commerce Clause is the source of constitutional authority underlying most federal environmental laws. In its negative or “dormant” form, it prevents states from adopting protectionist laws that erect barriers to interstate commerce or attempt to control commerce beyond the state’s borders.

Over the last few years, states have adopted various measures trying to address greenhouse gases, including renewable energy mandates or low carbon fuel standards, and those state efforts have been challenged under the dormant Commerce Clause. In 2015 that trend continued in *Energy and Environment Legal Institute v. Epel*, a Tenth Circuit decision that considered the validity of a Colorado law requiring a certain percentage of consumer electricity to come from renewable sources. The petitioner asked the Court of Appeals to apply one particular variant of dormant Commerce Clause jurisprudence, namely the so-called Baldwin “extraterritoriality” doctrine. The Tenth Circuit referred to this as “the most dormant doctrine in dormant [C]ommerce [C]lause jurisprudence” and “the least understood.” After giving a helpful explanation of the few cases in the Baldwin line, the court concluded that Colorado’s mandate did not “share any of the three essential characteristics that mark those cases”, in that the statute was not “a price control statute”; it did not “link prices paid in Colorado with those paid out of state”; and it did not “discriminate against out-of-staters.”

As to the positive (not dormant) form of the Commerce Clause, we noted in the 2014 Constitutional Law chapter that the U.S. District Court for the District of Utah struck down protections for the prairie dog under the Endangered Species Act because the creature does not have sufficient connections to interstate commerce. The Tenth Circuit heard oral argument in that case in September 2015, so look for a decision in the near future.

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8 789 F.3d 1075 (9th Cir. 2015).
9 U.S. CONST. art. I, § 8, cl. 3.
10 793 F.3d 1169 (10th Cir. 2015).
11 *Id.* at 1172.
12 *Id.* at 1170, 1172.
13 *Id.* at 1173.
III. PREEMPTION

In September, the U.S. Supreme Court granted certiorari on two petitions (now consolidated) challenging a Fourth Circuit opinion holding that certain state subsidies to instate power generators were preempted both on the grounds of “field preemption” and “conflict” (sometimes termed “obstacle”) preemption. The two cases are Hughes v. PPL EnergyPlus, LLC, No. 14-614, and CPV Maryland, LLC v. PPL EnergyPlus, LLC, No. 14-623. With a decision expected no later than June 2016, these two cases promise to shed further light on the doctrines of field and conflict preemption in the context of the world of utility power and on the FERC’s decision to delegate rate-making functions to various regional transmission entities covering interstate markets. The cases also mark the Court’s apparent disregard of the recommendation of the Solicitor General not to take either case on the grounds that both cases were correctly decided by the Fourth Circuit.

A private plaintiff in a separate case alleging federal preemption of Connecticut’s awards of electric power contracts for alternative sources of energy was not successful, with the Second Circuit holding that the private party either failed to exhaust administrative remedies under the statutory scheme or lacked standing to bring such a claim as to prior contractual awards. In Alco Finance Limited v. Klee, the Court of Appeals held that a losing bidder (plaintiff) failed to establish that setting aside the state’s awards to the two lowest bidders would result in a remedy that would redress plaintiff’s alleged harm (not receiving an award). The court did not explain how plaintiff, which had one project listed fourth in the original bids, might not benefit if the two lowest bidders were deemed legally disqualified from the bid process.

A state common law suit founded on negligence, nuisance, and trespass based upon emissions from a whiskey distiller regulated under the federal Clean Air Act was held not preempted by the Sixth Circuit. In Merrick v. Diageo Americas Supply, Inc., the Sixth Circuit focused on the Clean Air Act’s “citizen suit savings clause,” which provided that nothing in the Act restricted the right of a person to sue under common law to seek enforcement of an emissions standard. This clause, the appellate court reasoned, expressly provided for such common law remedies. The Court of Appeals rejected defendant’s effort to argue that preemption of state common law was merited under the Supreme Court’s decision in American Electric Power Co. v. Connecticut, finding that displacement of federal common law in AEP was quite different from federal preemption of state common law. The Sixth Circuit concluded that the savings clause in the Clean Air Act was intended to cover state common law suits and effectively exclude them from the scope of what might otherwise constitute a preempted state action.

18805 F.3d 89 (2d Cir. 2015).
19805 F.3d 685 (6th Cir. 2015).
22The U.S. District Court for the Northern District of Ohio came to a similar conclusion in an unpublished decision holding that local residents’ state common law claims against emissions from two former factories were not preempted under the Clean Air Act. Elmer v. S.H. Bell Co., No. 4:13-CV-02735, 2015 WL 5102707 (N.D. Ohio Aug. 31, 2015).
A suit by truckers asserting that regulation by the California State Air Resources’ Board was preempted under federal transportation laws encountered a fatal obstacle—the lack of jurisdiction. In California Dump Truck Owners v. Nichols, the Ninth Circuit held that the trucker’s challenge was essentially a challenge to an EPA decision approving the regulation as part of California’s State Implementation Plan (SIP) under the Clean Air Act. Pursuant to the Act, SIP challenges must be brought in the Court of Appeals, not the district court. Although the Truck Association argued it was only testing state enforcement and not the SIP itself, the appellate court did not agree. Without jurisdiction, there was no judicial authority to examine the truckers’ preemption claim on its merits.

In evaluating a personal injury claim alleging harmful exposure in connection with manufacturing parts for a nuclear power plant, the U.S. District Court for the Northern District of California concluded that state law claims were only preempted to the degree they actually conflicted with federal radiation standards under the federal Price-Anderson Act. In Lawson v. General Electric Co., the district court concluded that the Price-Anderson Act had a “hybrid” preemption provision that allowed consideration of state law as long as there was not a direct conflict with federal law. The court concluded that most of plaintiff’s common law claims alleging strict liability conflicted with federal law and were preempted, although it allowed part of plaintiff’s negligence claim to proceed.

The U.S. District Court for the District of Oregon rejected a claim of express and conflict preemption based on the federal Clean Air Act brought by truckers and the America Fuel & Petrochemical Manufacturers who sought to overturn Oregon state regulation of transportation fuels including methane content. In American Fuel & Petrochemical Manufacturers v. O’Keefe, the district court concluded that EPA’s determination not to regulate the methane content of fuels as part of its Reformulated Gasoline Rule simply did not have preemptive effect precluding state law regulation. The district court also concluded that plaintiff’s claims of conflict preemption were also not well taken.

The U.S. District Court for the District of Hawaii concluded that a county’s ordinance precluding Genetically Modified Organisms (GMO) or “genetic engineering” of foodstuffs was expressly preempted by the federal Plant Protection Act. In Robert Ito Farm, Inc. v. County of Maui, the district court also concluded that Maui’s county ordinance conflicted with federal law and therefore also fell pursuant to the doctrine of conflict preemption.

IV. FIFTH AMENDMENT TAKINGS

The widely anticipated takings case of 2015 was Horne v. Department of Agriculture, which concerned whether USDA’s mandate to relinquish a specific amount of raisin growers’ crop as a condition to engaging in commerce was a per se taking. The Secretary promulgates “marketing orders” to help maintain stable markets for particular

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23 784 F.3d 500 (9th Cir. 2015), cert. denied, 136 S.Ct. 403 (2015).
25 Cal. Dump Truck Owners Ass’n, 784 F.3d at 508.
agricultural products. The marketing order for raisins requires growers in certain years to give a percentage of their crop to the federal government, free of charge. Growers generally ship their raisins to a raisin “handler,” who physically separates the raisins owed to the government (“reserve raisins”), pays the growers for the remainder (“free-tonnage raisins”), and packs and sells the free-tonnage raisins. The Raisin Committee, a government entity of growers and others in the raisin business appointed by the Secretary, acquires title to the reserve raisins and decides how to dispose of them in its discretion, which can include selling them in non-competitive (e.g., foreign) markets. Raisin growers retain an interest in any net proceeds from sales that the Committee acquires. The Hornes, both growers and handlers, refused to comply with the marketing order, and they were charged for the market value of the missing raisins and a $200,000 penalty. The Ninth Circuit concluded that the reserve requirement was not a per se taking, reasoning that “the Takings Clause affords less protection to personal than to real property” and the Hornes “are not completely divested of their property rights” because growers retain an interest in the proceeds from any sale of reserve raisins. Rather, the reserve requirement was a use restriction, similar to a government condition on a land use permit.

The Supreme Court reversed. As a threshold matter, the Court disagreed that the Takings Clause applies only to real property and not to personal property. The Court also rejected the notion that the government may avoid paying just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property. In other words, once there has been a physical taking, “we do not ask . . . whether it deprives the owner of all economically valuable use’ of the item taken.” Finally, the Court held that, at least “in this case,” a governmental mandate to relinquish specific, identifiable property as a “condition” to engage in commerce effects a per se taking.

Other takings cases of note this year included:

- **Rancho de Calistoga v. City of Calistoga**, in which the Ninth Circuit declined to entertain the creation of an “as-applied private takings claim,” dryly observing that “[e]ach time a court closes one legal avenue to mobile home park owners seeking to escape rent control regimes, the owners, undaunted, attempt to forge a new path via another novel legal theory.” (Quoting Yogi Berra, the Ninth Circuit called it “déjà vu all over again.”)

- **Dimare Fresh, Inc. v. United States**, in which the Federal Circuit affirmed the dismissal of tomato producers’ regulatory taking claim based on Food and Drug Administration press releases warning consumers of a possible link between the producers’ tomatoes and a salmonella outbreak, which caused the market for those tomatoes to crash.

- **Boston Taxi Owners Association, Inc. v. City of Boston**, in which the U.S. District Court for the District of Massachusetts dismissed a takings claim against the City of Boston and Massachusetts, among others, for recent amendments to regulations

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30 Id. at 2425 (citing Horne v. U.S. Dep’t of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014)).
31 Id. at 2429 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 323 (2002)).
32 Id. at 2430–32.
33 800 F.3d 1083, 1086-87 (9th Cir. 2015).
34 Id. at 1086.
that would allow “Transportation Network Companies” such as Uber and Lyft to operate in most respects as taxicabs without first obtaining a taxi medallion.36

V. DUE PROCESS

In Grocery Manufacturers Association v. Sorrell, a state motion to dismiss was denied in an industry’s due process challenge to a Vermont statute prohibiting labeling, advertising, or signage for genetically engineered foods as natural or “any words of similar import.” 37 The court held that the statute’s restriction was void for vagueness because the phrase “any words of similar import” fails to provide fair notice of prohibited conduct and would thus permit arbitrary enforcement subject to civil penalties.38 The appeal is pending in the Second Circuit.

In a closely-watched challenge to a county ban on fossil-fuel extraction by corporations, Swepi, LP v. Mora County, the court rejected a substantive due process challenge (although the ban was invalidated on preemption and Supremacy Clause grounds).39 In ruling on a motion for judgment on the pleadings, the court determined that the county could not be said to lack a rational basis for targeting corporations which, for example, could evade responsibility by undercapitalizing themselves. The court also rejected the argument that property interests and rights are so fundamental as to require strict scrutiny. Courts similarly declined to find due process violations because of a lack of a legitimate property interest, including in loan programs for green car manufacturing.40

Interestingly, litigants brought challenges in environmental enforcement actions alleging that opposing counsel or an agency official should have been disqualified on due process grounds, although these challenges were unsuccessful in the end.41 Litigants attempting to challenge the robustness of due process were similarly unsuccessful.42

3981 F. Supp. 3d 1075, 1173-78 (D.N.M. 2015).
41See, e.g., Mississippi Comm’n on Envtl. Quality v. EPA, 790 F.3d 138, 183-84 (D.C. Cir. 2015) (no due process violation where EPA administrator who designated non-attainment area under the Clean Air Act declined to disqualify himself where clear and convincing showing was lacking that, despite his history of working with environmental advocates, he had not unalterably closed his mind in decision-making process); United States v. Farrell, No. 2:14-cr-00264, 2015 WL 3891640, at *7 (S.D. W. Va. June 24,
This review focuses on First Amendment cases that directly affect environmental, energy, or natural resources concerns. “Free speech” cases in this area are rare. Most such cases actually arise under federal statutes protecting religious freedom—the Religious Freedom Restoration Act (RFRA)\(^43\) or the Religious Land Use and Institutionalized Persons Act (RLUIPA)\(^44\)—rather than the Constitution itself. However, this year we address a landmark Supreme Court case that has the potential to dramatically affect a host of issues pertaining to the environment, energy, and natural resources, as well as many other aspects of First Amendment jurisprudence. Because of the importance of this singular case, discussion of other reported cases will necessarily be shorter in this review.

*Reed v. Town of Gilbert, Arizona*\(^45\) merits a great deal of attention. The case flew into Washington under everyone’s radar, characterized as a minor dispute involving a church’s challenge to a local sign code. The itinerant church used temporary signs to advise parishioners about the location of services. Those signs were deemed illegal under the sign code, although messages of similar size were allowed if they fell under the category of “political signs” or “temporary directional signs.” Following oral argument, commentators believed that the case would be decided on the basis of the general meanness and stupidity of the ordinance with no major change in doctrine. Instead, the Supreme Court used the opportunity to redefine what it means by a “content-based” law. This has major implications because content-based laws are automatically subject to strict scrutiny, and such strict review generally spells doom for a law.

The Supreme Court soundly rejected what it perceived as a tendency of the lower courts to uphold laws that were justified by a content-neutral purpose or that regulated speech at the level of broad categories as opposed to particular messages or speakers. Thus, laws that had the actual effect of regulating based on the message or speaker were upheld as long as the law did not suggest an actual intent to censor that speech. As the Supreme Court made clear, such justifications are no longer sufficient: “[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.”\(^46\)

A plurality of the Court instead adopted a rather strict and bright-line test for determining whether a law is content based; if the law defines the subject of its regulation in terms of the message, it is content based. Given the importance of this concept, a lengthy quote from the decision is warranted:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial

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\(^{2015}\) (no due process violation where government counsel could be putative plaintiffs in a class action case involving the same chemical spill at issue in the prosecution).

\(^42\) *Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1327 (D.C. Cir. 2015) (no due process violation where no prejudice resulted from belated disclosure of information for commenting on environmental review).


\(^{46}\) *Id.* at 2228.
distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be “justified without reference to the content of the regulated speech,” or that were adopted by the government “because of disagreement with the message [the speech] conveys.” Those laws, like those that are content based on their face, must also satisfy strict scrutiny.47

Reed likely renders most sign ordinances in the country unconstitutional. It has already had a profound impact on decisions involving solicitation or panhandling laws. It is also likely to overhaul the law relative to “free speech zones,” parades, demonstrations and many other real-world applications of First Amendment law. Citation to Reed will be de rigueur in any case where the content of speech is at issue or a facial attack is brought under the First Amendment.

Other First Amendment cases this year include:

- **Animal Legal Defense Fund v. Otter**, a significant case involving an “Ag-Gag law” which drew a fair amount of media attention.48 Animal rights activists distributed video of dairymen doing unpleasant things to our bovine friends, which prompted the state legislature to criminalize interference with agricultural production facilities. The activists brought First Amendment and Equal Protection claims against the law, which went down in flames as both a content-based and viewpoint-based restriction on speech.

- **Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona**, an exceptionally lengthy opinion which can be recommended only because it includes an uncommon sanction for failure to preserve posts on social media and because of its “kitchen sink” approach to litigation.49 This is a conventional RLUIPA case complaining about local zoning and environmental regulations that effectively prevented the construction of a religious school. The statutory case was dressed up with First Amendment claims based on free exercise, free speech, and free association. The laws were found to be content-neutral for purposes of all of the First Amendment claims. The Court found that construction of a college would promote free speech but was not itself a form of communication. Other claims survived for trial.

- **Bensalem Masjid, Inc. v. Bensalem Township, Pennsylvania**, addressing the same sort of combined RLUIPA/Free Exercise claims.50 These religion cases are relatively common and no new ground was plowed here. One thing that does separate these cases from other First Amendment cases is the frequency with which summary judgment motions are denied. The expense of a trial places a burden on government not often encountered in other First Amendment cases.

47 Id. at 2227 (internal citations omitted).
CTIA-The Wireless Association v. City of Berkeley, California, a fun case involving energy—the electromagnetic kind that cellphones emit. Berkeley required cell phone manufacturers and retailers to include a statement to the effect that cell phones emit radiation, which might be of concern. The First Amendment claim based on undue burden and compelled speech failed, although a minor preemption argument was partly sustained.

VII. ELEVENTH AMENDMENT

The Eleventh Amendment provides immunity from suit in federal courts, stating that “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." In Hays v. LaForge, the federal district court discussed three possible exceptions to the suit immunity of the Eleventh Amendment: (1) valid abrogation by Congress pursuant to section 5 of the Fourteenth Amendment; (2) waiver or consent to suit by the state; and (3) applicability of the Ex parte Young doctrine. In Hays, the plaintiff, a professor at a state university, filed a section 1983 action against the university president in both his official capacity and individual capacity, alleging a free speech retaliation claim. The Hays court held that the Ex parte Young doctrine applied but granted the defendant’s Rule 12(b)(6) motion because the plaintiff’s actions and speech were part of his official duties and so were not protected by the First Amendment.

In Beaulieu v. State of Vermont, the Second Circuit considered how a state defendant’s removal of a case to federal court affected Eleventh Amendment immunity and general state sovereign immunity. More than 700 current and former employees of the State of Vermont alleged violations of the Fair Labor Standards Act (FLSA) in regard to overtime pay by the State. The plaintiffs sued the State, its Agency of Administration, and its Secretary of Administration in his official capacity in state court, and the defendants removed the case to federal court. The Second Circuit affirmed the lower court’s dismissal of the suit. In so ruling, the appellate court decided to join the majority of circuit courts by holding “that, while [d]efendants may, by removing the action, have waived their Eleventh Amendment immunity from suit in a federal forum, Defendants have not expressly waived Vermont’s general sovereign immunity from private FLSA suit, and their litigation conduct does not constitute such a waiver.”

In Haven v. The Board of Trustees of Three Rivers Regional Library System, the Eleventh Circuit dealt with an age employment-discrimination lawsuit under the Age Discrimination in Employment Act (ADEA) against the Three Rivers Regional Library System (Library) and its Director. The U.S. District Court for the Southern District of Georgia granted the Library’s motion for summary judgment and dismissed the plaintiffs ADEA suit for lack of subject-matter jurisdiction, ruling that the Library was entitled to immunity under the Eleventh Amendment and that it was “uncontestedly an arm of the

52 U.S. CONST., amend. XI.
54 807 F.3d 478 (2d Cir. 2015).
55 Id. at 481.
state” even though the Library had not raised the immunity issue.\(^57\) The lower court also ruled that the *Ex parte Young* exception did not apply.

The Court of Appeals reviewed the issue of Eleventh Amendment immunity *de novo* as well as the issue of whether the Library was an “arm of the state” entitled to immunity under the Eleventh Amendment. In its review, the court stated that “[a]lthough Congress has the power, within limitations, to abrogate the states’ Eleventh Amendment immunity, the Supreme Court has held that Congress, in enacting the ADEA, did not validly abrogate the states’ immunity.”\(^58\) The appellate court ultimately vacated the dismissal of the ADEA claim and remanded the issue of whether the Library was entitled to Eleventh Amendment immunity as an arm of the state under the four-prong test established in *Manders v. Lee*.\(^59\)

Concerning the sovereign immunity of a state, on June 30, 2015, the Supreme Court agreed to hear two of the three questions presented in *Franchise Tax Board of California (CFTB) v. Hyatt*.\(^60\) Both questions involved a state’s sovereign immunity in another state’s courts: (1) “[w]hether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts”; and (2) “[w]hether *Nevada v. Hall* . . . which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.”\(^61\) Forty-five states supported California’s position of overruling *Nevada v. Hall*.\(^62\)

In the *CFTB* case, respondent Gilbert Hyatt won a multi-million dollar judgment against the California Franchise Tax Board in a Nevada state court.\(^63\) Hyatt alleged that CFTB auditors committed several intentional torts against him in Nevada as part of CFTB’s decades-old battle over his non-payment of California income taxes. During oral argument held on December 7, 2015, Justices Kagan, Ginsburg, and Sotomayor seemed sympathetic to upholding *Nevada v. Hall*.\(^64\) Justice Breyer also seemed sympathetic to that position, but he expressed concern that Nevada had not extended its own $50,000 sovereign immunity limitation on damages to California.\(^65\) Justices Alito and Scalia


\(^58\) *Id.* at *3.

\(^59\) *Id.* at *4-5. In determining whether an entity is an “arm of the State”, the Eleventh Circuit implements a four-part test: “(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.” *Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003).


\(^63\) *Franchise Tax Bd. of Cal.*, 335 P.3d at 125.


\(^65\) Transcript, supra note 62, at 17-19, 28-29, 40-44; *Argument Analysis, supra* note 64.
seemed sympathetic to California’s position, although Justice Scalia did seem concerned that under California’s position, a foreign country, but not a sister state, could be sued in a state court. Justice Kennedy asked whether there was anything in “our constitutional tradition that say[s] States can protect each other by retaliating against each other?” Chief Justice Roberts and Justice Thomas did not ask any questions. A decision could be issued as early as March 2016.

VIII. STATE CONSTITUTIONAL LAW

The New Mexico Court of Appeals, in Sanders-Reed v. Martinez held that the common law public trust doctrine did not authorize the judicial branch to unilaterally impose greenhouse gas emissions. The court held that the New Mexico Constitution delegated environmental authority, including air regulation, to the New Mexico Legislature. The court concluded that the constitutional provision superseded common law. Second, the Legislature implemented the constitutional provision by creating an Environmental Improvement Board (EIB), which provided an adequate remedy. Finally, the relief requested violated separation of powers.

The Georgia Supreme Court in Elbert County v. Sweet City Land applied a balancing test on a dormant commerce clause challenge to a local solid waste ordinance. The ordinance was facially neutral. The court refused to apply the less deferential standard applicable to local law that facially discriminates against interstate commerce.

The Mississippi Supreme Court in Hosemann v. Harris ruled on an issue that is common to all states. Where is the location of the boundary between private uplands and submerged sovereign lands held in public trust by the state? The Hosemann case followed up on a 1988 decision of a sharply divided U.S. Supreme Court in Phillips Petroleum Co. v. Mississippi, which held that each state with tidelands took public trust title at statehood to all lands underlying tidally influenced waters. The Hosemann court noted that sandy beaches on the Gulf of Mexico ordinarily are bounded at the mean high water line. Nevertheless, the State alleged the beach at issue was filled in tidelands. The court reversed partial summary judgment for the private littoral owner and remanded for factual determination of the sovereign boundary.

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67 Transcript, supra note 62, at 5; Argument Analysis, supra note 64.


69 Id. at 1225-27; see also N.M. Const., art. 20, § 21.

70 297 Ga. 429, 774 S.E.2d 658 (Ga. 2015).

71 Id. at 434-35 (citing United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338, 346 (2007)).

72 163 So.3d 263 (Miss. 2015).


75 Hosemann, 163 So.3d at 270, 274.
The Kentucky Court of Appeals in *Louisville Gas and Electric Company v. Kentucky Waterways Alliance*, 76 distinguished between state constitutional venue and jurisdiction. The Kentucky Constitution creates one unitary circuit court, 77 and a statute establishes venue for administrative appeals in one circuit court. 78 On an issue that addressed the separation of powers (even though it was not labeled as such) the majority held the State Energy and Environment Cabinet failed to conduct a statutorily required “case by case best professional judgment” of the subject effluent treatment technology. The dissent contended it is not the job of the judiciary to set technology-based effluent limitations. 79