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CASENOTE UPDATE: THE SUPREME COURT RESTRICTS
PLAINTIFF OPTIONS FOR CLIMATE CHANGE
LITIGATION IN *AMERICAN ELECTRIC
POWER CO. V. CONNECTICUT*

I. INTRODUCTION

Since the rise of environmentally conscious activists more than thirty years ago, Americans have been concerned over the growing threat of climate change.¹ Once their concerns were planted in the American consciousness, these activists began seeking justice through the court system, initially by relying on the Equal Protection Clause (EPC).² After realizing that relying on the EPC would not be possible, plaintiffs in environmental justice cases turned to Title VI of the Civil Rights Act of 1964, which prohibited any entity acting with federal power from discriminating on the basis of race; that option, however, would also prove unfruitful.³ Until recently, plaintiffs in these cases had attempted to advance theories of public nuisance, claiming that greenhouse gas emissions contribute heavily to climate change.⁴ A recent climate change case based on a public nuisance claim, *Am. Elec. Power Co., Inc. v. Connecticut* (AEP),⁵

1. See Hadyn Davies, *From Equal Protection to Private Law: What Future for Environmental Justice in U.S. Courts?*, 2 BRIT. J. AM. LEGAL STUD. 163, 164-65 (2013) (noting origin of Environmental Justice Movement). The first environmentally conscious activists are generally thought to have arisen in 1982. *See id.* Residents of Warren County in North Carolina complained to the state government when they learned that hazardous soil would be disposed of in a landfill nearby. *See id.* Further investigation revealed that similar landfills were all located near communities populated primarily by minorities. *See id.* at 165.

2. *See id.* at 170 (explaining methods by which activists sought remedies). The EPC quickly proved to be an unsuccessful basis for claims, as due to the Supreme Court's holding in *Washington v. Davis*, plaintiffs "[i]n effect . . . had to adduce evidence of intentional racial discrimination in order to obtain redress." *Id.*

3. *See id.* at 171 (detailing environmental plaintiffs' interest in basing claims on Title VI). In *Cannon v. Univ. of Chicago*, 494 U.S. 677 (1979), the Supreme Court implied that a "private right of action existed under Title VI whether for claims based on intentional discrimination *or* disparate impact," which empowered plaintiffs to seek remedies under disparate impact claims. *Id.* (citing *Cannon*, 494 U.S. at 694 (emphasis in original)). In 2001, however, the Court denied the implied right to private disparate impact claims under Title VI with its holding in *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See id.* (citing *Sandoval*, 532 U.S. at 285).

4. *See id.* at 178 (opining that climate change cases are most often based upon public nuisance claims).

5. 131 S. Ct. 2527 (2011).

altered the landscape of these cases, if only due to the fact that it was the first of its kind to reach the U.S. Supreme Court.⁶

In *AEP*, eight states, New York City, and three land trusts sued five corporations that owned fossil-fuel-emitting power plants, claiming the defendants' carbon dioxide emissions to be effecting climate change.⁷ The District Court dismissed these claims "as presenting non-justiciable political questions," but the Second Circuit disagreed and therefore examined the merits.⁸ It held that the plaintiffs had successfully stated a public nuisance claim, noting that because the Environmental Protection Agency (EPA) had not yet promulgated a rule with respect to regulating the emission of greenhouse gases from power plants, its authority to do so under the Clean Air Act (CAA) could not override the plaintiffs' ability to make a nuisance claim.⁹ A Note published in Vol. XXII, Issue 2 of this *Journal* analyzed the Second Circuit's decision in the context of climate change litigation and the impact the decision could have on future cases in this area of law.¹⁰ After the Note was published, however, the Supreme Court reversed the Second Circuit's decision.¹¹ The Court held "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."¹²

This Note updates the law examined in the original Note. Section II studies developments in climate change litigation since the Supreme Court's decision in *AEP*.¹³ Section III looks at the impact

6. See Davies, *supra* note 1, at 178-79 (explaining significance of *American Electric* to climate change litigation).

7. See 131 S. Ct. at 2534 (revealing parties and plaintiffs' claim). To support the public nuisance claim, the plaintiffs argued that "public lands, infrastructure, and health were at risk" from the defendants' actions. *Id.* (citation omitted).

8. *Id.* (explaining procedural history).

9. See *id.* at 2534-35 (detailing Second Circuit's reasoning) (citations omitted). The defendants appealed, and the Supreme Court granted *certiorari*. *Id.*

10. See Michael Schiraldi, *Ring Temperatures, Political Questions, and Public Nuisances: The Second Circuit Weighs in on the Climate Change Debate in Connecticut v. American Electric Power Co.*, 22 VILL. ENVTL. L.J. 321 (2011) (examining Second Circuit's holding).

11. See *American Electric*, 131 S. Ct. at 2537 (offering holding).

12. *Id.* (explaining holding). The Court specifically disagreed with the plaintiffs' claim (and the Second Circuit's holding) that, because the EPA had not yet promulgated a rule on the subject, public nuisance actions were available to seek regulation of greenhouse gases. See *id.*

13. For a further discussion of these developments, see *infra* notes 15-52 and accompanying text.



of these new developments and how they may affect future climate change litigation.¹⁴

II. BACKGROUND

The Supreme Court, in its consideration of *AEP*, almost completely repudiated the Second Circuit's holding and, therefore, the plaintiffs' arguments.¹⁵ The Court noted that a subject's governance by federal law does not imply that federal courts have the ability to create such federal law; instead, the Court should leave that power to Congress.¹⁶ It further explained that precedent could not support a public nuisance claim:

We have not yet decided whether private citizens (here, the land trusts) or political subdivisions (New York City) of a State may invoke the federal common law of nuisance to abate out-of-state pollution. Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders.¹⁷

In the Court's opinion, it noted a disagreement between the parties over whether climate change issues operate on too large a scale to allow for public nuisance review was irrelevant because Congress vested the power to regulate carbon dioxide emissions in the EPA.¹⁸

14. For a further discussion of the impact, see *infra* notes 53-65 and accompanying text.

15. See *American Electric*, 131 S. Ct. at 2540 (detailing holding). There were two issues before the court: Article III standing and the public nuisance question. See *id.* at 2535. The Court was split 4-4 on the standing issue as Justice Sotomayor abstained from the decision, so the Second Circuit's ruling that the plaintiffs indeed had standing was upheld. See *id.* The Court overturned the Second Circuit's decision on the public nuisance issue, as aforementioned. See *id.* at 2537.

16. See *id.* at 2536 (noting Court's lack of creative power). The Court explained that if Congress has not spoken on a federal law subject, the Court should "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Id.* (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979)). In this case, however, because multiple states were involved in the litigation, there was no specific state law for the Court to rely on; regardless, the Court maintained that it could not override Congress's constitutional right to create federal laws. See *id.*

17. *Id.* (reviewing lack of precedent for public nuisance claims against climate change).

18. See *id.* (explaining reasoning behind refusal to consider scope of public nuisance review); see generally *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that greenhouse gases should be considered air pollutants under CAA and, therefore, regulatory power lies with EPA). The defendants alleged that global warming issues are too complex to be supported by a public nuisance claim in the same way that smaller pollution concerns can be. See *id.* They noted that "[g]reenhouse gases once emitted 'become well mixed in the atmosphere[:]' emissions in New Jersey may contribute no more to flooding in New York than emissions in China."

According to the Court, with the EPA having regulatory power over carbon dioxide emissions, the CAA “displace[s] any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”¹⁹ The CAA even provides specific recourse in situations where the EPA has not prescribed limits on a given pollutant: aggrieved parties, whether they be states or private citizens, can petition the EPA for regulation; that regulation would, of course, be reviewable by the judiciary.²⁰ Further injuring the plaintiffs’ case was ongoing EPA rulemaking regarding the regulation of greenhouse gas emissions from fossil fuel power plants, which resulted from the settlement of a case in which the *AEP* plaintiffs were also involved.²¹

The Court disregarded the plaintiffs’ allegation that the EPA could not displace public nuisance law until it set official regulations for greenhouse gas emissions as well.²² Again, the Court emphasized the correct avenue for judicial review: “[i]f 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 certiorari in this Court.”²³ As such, it ultimately held that the Second Circuit had erred in its consideration of the issues.²⁴

Id. (citations omitted). The plaintiffs, conversely, claimed that because they had only sought relief from the largest corporations, the complexity of the issue was attenuated by its fairly small focus. *See id.*

19. *Id.* at 2537 (detailing reasoning behind Court’s refusal to allow public nuisance claim to proceed).

20. *See American Electric*, 131 S. Ct. at 2538 (citing CAA, 42 U.S.C. § 7607(b)(1) (2012)) (explaining CAA procedures for setting limits on pollutants).

21. *See id.* (noting existence of EPA rulemaking on subject of carbon dioxide emissions). According to the Court, the rulemaking was scheduled to be completed by May 2012. *See id.* Due to continuing challenges of the proposed rulemaking, however, no final rule has been published as of February 2016. *See* Coral Davenport and Adam Liptak, *Supreme Court Deals Blow to Obama’s Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), <http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html>. For a further discussion of the EPA’s rulemaking on this subject, see *infra* notes 56-65 and accompanying text.

22. *See American Electric*, 131 S. Ct. at 2538 (refusing to follow plaintiffs’ suggestion that common law could hold precedent until EPA promulgated official regulations). “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.” *Id.* (citing *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 22 (1981)) (emphasis in original).

23. *Id.* at 2539 (noting availability of challenge to promulgated rule). The Court further noted that the EPA is much better equipped to set emissions standards than the Court is as the EPA is solely focused on, and has vast knowledge of, environmental issues. *See id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984)).

24. *See id.* at 2540 (detailing holding).



While the Supreme Court seemingly advanced the idea that only a challenge to specific EPA regulations on greenhouse gas emission levels is judicially reviewable in its *AEP* decision, plaintiffs continued to seek relief for the EPA's lack of official action.²⁵ As one commentator noted, one way in which plaintiffs have attempted to circumvent *AEP* is by making tort claims for the effects of climate change against corporations that own fossil-fuel power plants.²⁶ The Ninth Circuit case *Native Village of Kivalina v. ExxonMobil Corp.*²⁷ is an example of such an approach.²⁸ In *Kivalina*, the citizens of the nominal Alaskan village were required to relocate due to the melting of an ice barrier which protected the town from rising levels of the Pacific Ocean; the villagers blamed greenhouse gas emissions for the melting.²⁹ After the District Court dismissed their claims, the plaintiffs appealed to the Ninth Circuit.³⁰ The Ninth Circuit upheld the lower court's decision, explaining that the *AEP* holding applied not only to the public nuisance claims at the center of that case, but also to claims regarding tortious damage caused by greenhouse gas emissions.³¹ The court therefore determined the EPA's regulatory power displaced federal common law and thus, the plaintiffs could not pursue their claim.³² Taking the holdings of *AEP* and *Kivalina* together makes clear that neither injunctive relief nor damages are available to plaintiffs unless they are challenging regulatory action (as opposed to lack thereof) by the EPA.³³

25. See Davies, *supra* note 1, at 180 (explaining that plaintiffs were not deterred from challenging greenhouse gas emissions by *American Electric* holding); see also Hari M. Osofsky, *AEP v. Connecticut's Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101, 104 (2011).

26. See Davies, *supra* note 1, at 180 (examining plaintiff strategies post-*American Electric*).

27. 696 F.3d 849 (9th Cir. 2012).

28. See Davies, *supra* note 1, at 180; see also *Kivalina*, 696 F.3d 849 (discussing plaintiff's tort claim).

29. See Davies, *supra* note 1, at 180; see also *Kivalina* at 863 (detailing facts of case). The U.S. Army Corps of Engineers determined that it would cost upwards of \$400 million to relocate the entire village, but that there was no other legitimate option. See Davies, *supra* note 1, at 180; see also *Kivalina* at 863.

30. See Davies, *supra* note 1, at 180; see also *Kivalina* at 855 (explaining procedural history).

31. See Davies, *supra* note 1, at 180; see also *Kivalina* at 857 (providing reasoning behind refusal to allow claim for tortious damage). The court further noted that "under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies." *Kivalina* at 857.

32. See Davies, *supra* note 1, at 180; see also *Kivalina* at 858 (holding that Congress gave power to EPA which overrides common law claims).

33. See Davies, *supra* note 1, at 180 (opining that neither injunctive relief nor damages are viable opportunities for judicial review under tort law).

With tort claims completely unavailable, those claiming harm from greenhouse gas emissions were forced to look to a different area of law; the plaintiffs in *Alec L. v. Jackson*³⁴ made a breach of fiduciary duty claim.³⁵ The plaintiffs in *Jackson* were five minors and two environmentally conscious organizations who brought their claim against the Administrator of the EPA.³⁶ The District Court of D.C. ruled a fiduciary duty claim was not viable, explaining that courts have never extended the public trust doctrine “to protect the atmosphere or impose duties on the federal government,” which would therefore require it to depart from precedent.³⁷ A fiduciary duty claim was particularly unfeasible, according to the court, because if it were to extend public trust doctrine to the emission of greenhouse gases, *AEP* would prohibit the plaintiffs from seeking relief outside of the EPA’s regulatory power; and, conversely, if it were to refuse to extend public trust doctrine, the federal court would not have federal question jurisdiction over the claim.³⁸

In *Utility Air Regulatory Group v. EPA*,³⁹ the issue of greenhouse gas emission regulation under the CAA returned to the Supreme Court.⁴⁰ The EPA regulatory scheme for pollution requires that states, for each of the six types of pollutants named by the EPA, designate areas within their borders “attainment,” “nonattainment,”

34. 863 F. Supp. 2d 11 (D.D.C. 2012); see generally Patrick C. McGinley, *Climate Change and the Public Trust Doctrine*, 65 PLAN. & ENVTL. L. No. 8 (2013) (examining history of public trust doctrine and related litigation).

35. See *Jackson*, 863 F. Supp. 2d at 12 (noting plaintiffs’ fiduciary duty claim). More specifically, the plaintiffs alleged violations of public trust doctrine through the defendants’ failure to “protect the atmosphere.” *Id.*

36. See *id.* (naming parties to lawsuit).

37. See *id.* at 13 (noting lack of historical precedent for claim). The court further explained that past applications of public trust doctrine to “groundwater, wetlands, dry sand beaches, non-navigable tributaries, and wildlife” did not affect the lack of precedent for the facts of *Jackson*. *Id.* (citation omitted).

38. See *id.* at 15-16 (explaining court’s lack of ability to adjudicate based on fiduciary duty claim). Though the plaintiffs argued that *American Electric* applied only to public nuisance claims, the court explained that the court’s analysis in *American Electric* did not limit itself to public nuisance claims and, rather, was meant to cover all federal common law claims. See *id.*

39. 134 S. Ct. 2427 (2014).

40. See *id.* at 2434 (determining permissibility of EPA’s decision that greenhouse gas regulations with respect to motor vehicles “automatically triggered permitting requirements under [CAA] for stationary sources”). See also Robert Barnes, *Supreme Court: EPA can Regulate Greenhouse Gas Emissions, with Some Limits*, THE WASHINGTON POST (June 23, 2014), https://www.washingtonpost.com/politics/supreme-court-limits-epas-ability-to-regulate-greenhouse-gas-emissions/2014/06/23/c56fc194-f1b1-11e3-914c-1fbd0614e2d4_story.html (noting Court held that EPA had exceeded limits of its power).



or “unclassifiable.”⁴¹ Any power plants located in “attainment” or “unclassifiable” areas are subject to special CAA provisions called Prevention of Significant Deterioration (PSD).⁴² The EPA, however, interpreted PSD provisions to apply based on whether the area in which a power plant is housed meets the relevant designations for *any* pollutant rather than the pollutants emitted by the power plant in question.⁴³ According to the Court, the EPA came to this decision as a result of rulemaking on motor vehicle emissions stemming from the Court’s decision in *Massachusetts v. EPA*,⁴⁴ in which the CAA recognized the EPA’s power to regulate carbon dioxide emissions.⁴⁵ Once the EPA had determined that it needed to regulate motor vehicle emissions due to their effect on the environment, it decided that such regulations should automatically subject power plants located in “attainment” or “unclassifiable” areas to permitting.⁴⁶

The Supreme Court determined that the EPA unreasonably interpreted the CAA, and therefore, reversed the D.C. Circuit, which had held the EPA’s interpretation permissible.⁴⁷ The Court first explained that nothing in the CAA positively compelled the EPA to expand its permitting requirements based on the motor vehicle emission regulations.⁴⁸ The Court followed up by examining the

41. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2435 (citing CAA § 7407(d)) (detailing requirements for state designation of areas prone to pollution).

42. *See id.* (explaining statutory requirements).

43. *See id.* (reviewing EPA’s interpretation of CAA). According to the Court, every single area in the United States is designated “attainment” or “unclassifiable” for at least one of the six pollutants; therefore, every power plant in the country was subject to PSD provisions in the EPA’s view. *See id.* Power plants subject to PSD provisions must receive a permit from the EPA before they can be “construct[ed] or modif[ied] . . .” *Id.* (citing CAA §§ 7474(a)(1), 7479(2)(C)). These power plants must also receive a separate operating permit. *See id.* (citing CAA § 7661a(a)).

44. 549 U.S. 497 (2007).

45. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2436 (explaining effect of *Massachusetts v. EPA* on EPA’s decision-making).

46. *See id.* (examining reasoning behind automatic triggering of permitting requirements for power plants). The Court noted that the EPA had to revise the PSD provisions because “the PSD program . . . [was] designed to regulate ‘a relatively small number of large industrial sources,’ and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs . . .” *Id.* (citation omitted).

47. *See id.* at 2449 (announcing holding that EPA was not permitted to interpret CAA as it had). Though Justice Scalia, who announced the judgment of the court, wrote a plurality opinion, his holding on this topic had a majority backing, as Justice Alito noted his separate opinion (joined by Justice Thomas) that he agreed with the holding. *See id.* at 2455.

48. *See id.* at 2442 (holding that textual analysis of CAA does not support EPA’s claim of automatic triggering).

EPA's discretionary power to interpret the CAA, and whether the EPA permissibly interpreted the CAA to allow the EPA to expand permitting requirements.⁴⁹ According to the Court, "[a] brief review of the relevant statutory provisions leaves no doubt that the PSD program . . . [is] designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens."⁵⁰ Further, the EPA admitted that attempting to satisfy its interpretation of the CAA would require an overhaul of the PSD program, one which the Court found implausible.⁵¹ Though the Court held that the EPA could not extend its permitting requirements based on its regulation of motor vehicle emissions, it did further confirm that the EPA had regulatory authority over greenhouse gases, supporting the *AEP* determination that plaintiffs who seek relief for the effects of greenhouse gas emissions are required to do so by challenging EPA regulations on those emissions.⁵²

III. IMPACT

Recent developments in climate change litigation do suggest a way forward for activists, organizations, and even states to challenge greenhouse gas emissions: through litigation on the appropriateness of EPA regulations.⁵³ One large problem for plaintiffs interested in regulatory challenges, however, had been the lack of promulgated regulation on greenhouse gas emissions from fossil-fuel power plants.⁵⁴ As far back as the *AEP* decision, the EPA had been planning to finalize rulemaking on greenhouse gas emissions,

49. *See id.* (reviewing EPA's discretionary powers).

50. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2443 (determining that EPA's interpretation was unreasonable). The Court explained that the PSD program is very costly, both monetarily and procedurally, for those subject to its provisions, including a detailed scientific analysis and the allowance of a state-held public hearing on the matter. *See id.*

51. *See id.* at 2444 (explaining issues with EPA's interpretation).

52. *See id.* at 2449 (holding that EPA may regulate greenhouse gas emissions from power plants). Both the EPA/President Obama and opponents of such regulation saw the holding as a win because the Court confirmed the EPA's regulatory authority while placing limits on its power. *See Barnes, supra* note 40.

53. *See Osofsky, supra* note 25, at 105; *see also Davies, supra* note 1, at 188-89 (opining that climate change litigation will be limited to regulatory challenges). It is worth noting, however, that because the challenged regulation will rarely have an impact on race, regulations will most likely be subject to intermediate scrutiny rather than strict scrutiny, which will lessen the likelihood of plaintiff success. *See Davies, supra* note 1, at 189.

54. *See Clean Power Plan for Existing Power Plants*, EPA, <http://www.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants> (last updated Feb. 11, 2016) (noting pending judicial review of proposed rule).

but was unable to do so for an extended period of time.⁵⁵ Late in 2015, the EPA submitted a final rule, noting that it had held multiple public forums and power plant stockholder meetings, leading it to continually amend its rule.⁵⁶ Given the existence of concrete rulemaking, plaintiffs finally were able to take advantage of the regulatory challenge option; the Supreme Court granted a stay on application on the final rule pending review in cases filed by five separate groups of plaintiffs.⁵⁷ Oddly enough, the plaintiffs who challenged the new regulation were all industrial organizations or states looking to continue to make greenhouse gas emissions.⁵⁸ The lack of challenges from activists interested in curbing such emissions could be seen as evidence suggesting that the EPA's final rule favors those activists.⁵⁹

This is not to say, of course, that the plaintiffs are correct to seek defeat of the EPA's final rule.⁶⁰ The EPA, naturally, feels as though it will prevail on the merits of these cases.⁶¹ One commen-

55. See *American Electric*, 131 S. Ct. at 2535 (noting EPA's planned rule promulgation by May 2012). For a further discussion of *American Electric*, see *supra* notes 15-26 and accompanying text.

56. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662-01 at 64704 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). The EPA noted that more than 2,800 people attended public forums, and almost half spoke at those forums. See *id.*

57. See *Chamber of Commerce v. EPA*, No. 15A787, 2016 WL 502658 (U.S. Feb. 9, 2016); see also *Basin Elec. Power Coop. v. EPA*, No. 15A776, 2016 WL 502654 (U.S. Feb. 9, 2016), *Murray Energy Corp. v. EPA*, No. 15A778, 2016 WL 502656 (U.S. Feb. 9, 2016), *North Dakota v. EPA*, No. 15A793, 2016 WL 502659 (U.S. Feb. 9, 2016), *West Virginia v. EPA*, No. 15A773, 2016 WL 502947 (Feb. 9, 2016) (staying application of EPA's final rule on greenhouse gas emission regulation).

58. See *Davenport and Liptak*, *supra* note 21 (examining plaintiffs in challenges to EPA regulation).

59. See *id.* (explaining that liberal Supreme Court justices were unopposed to regulation and that plaintiff's arguments against regulation focused on economic benefits of greenhouse gas emissions).

60. See *id.* (noting President Obama's commitment to current version of rule). The rule is based heavily in an international climate change pact signed in December 2015, and President Obama "pointed to the power plant rule as evidence that the United States would take ambitious action, and that other countries should follow." *Id.*

61. See *Clean Power Plan for Existing Power Plants*, *supra* note 54 (noting EPA's confidence in rule). A statement on the EPA's website reads:

On February 9, 2016, the Supreme Court stayed implementation of the Clean Power Plan pending judicial review. The Court's decision was not on the merits of the rule. EPA firmly believes the Clean Power Plan will be upheld when the merits are considered because the rule rests on strong scientific and legal foundations. For the states that choose to continue to work to cut carbon pollution from power plants and seek the agency's guidance and assistance, EPA will continue to provide tools and support. We will make any additional information available as necessary.

tator, conversely, is of the opinion that the EPA may have overstepped its bounds by suggesting it has the authority to propose regulations that replace fossil fuels with renewable energy options.⁶² That commentator further notes that, as a result of the many changes made to the rule by the EPA between its initial proposal and the final version, a court could find that the final rule was not a “logical outgrowth” of the initial proposal.⁶³ Similarly, opponents of the rule explained that the departure from the initial proposal has cost states “countless dollars” in attempts at implementation.⁶⁴ Regardless of the ultimate victor, though, the regulatory challenge approach is cemented as the best, and likely only, way for plaintiffs to enter into future climate change litigation.⁶⁵

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Id.

62. See Jonathan H. Adler, *Placing the Clean Power Plan in Context*, THE WASHINGTON POST (Feb. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/10/placing-the-clean-power-plan-in-context/> (examining EPA’s renewable energy considerations).

63. See *id.* (detailing number of changes between proposed rule and final rule).

64. See Davenport and Liptak, *supra* note 21 (explaining plaintiffs’ arguments against rule). The attorney general of West Virginia said that the stay “protect[ed] workers and sav[ed] countless dollars as our fight against its legality continues.” *Id.*

65. See Osofsky, *supra* note 25, at 105 (noting that courts have left regulatory challenges as the only option for climate change litigation).

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