NOTES

Sierra Club v. City of San Antonio: Stretching the Bounds of the Burford Abstention Doctrine

I. OVERVIEW

The Edwards Aquifer is the sole source of water for the City of San Antonio, and the primary source for many other towns in Central Texas.[1] The aquifer flows into the Guadalupe River Basin at the Comal and San Marcos Springs, where it is the sole source of water for five plant and animal species that have been designated as threatened or endangered under the Endangered Species Act (ESA).[2] Of these, an endangered fish, the fountain darter, is found at Comal Springs.[3] In 1996, after a severe drought, which significantly reduced the flows at Comal Springs, a zoologist and expert for the Sierra Club, observed five or six "very thin" fountain darters in the upper reaches of the springs.[4] The Sierra Club brought suit in federal district court against the City of San Antonio, and other governmental and private entities, alleging that due to the continued pumping of aquifer water, a "taking" of the endangered species had occurred, in violation of the ESA.[5] The Sierra Club sought an injunction to force a reduction in withdrawals from the aquifer to maintain the minimum natural flows from the San Marcos and Comal Springs necessary for the continued survival of the threatened and endangered species living in or downstream from the springs.[6] The United States District Court for the Western District of Texas entered a preliminary injunction to limit the withdrawal of water from the Edwards Aquifer.[7] On appeal, the Fifth Circuit applied the abstention doctrine announced in *Burford v. Sun Oil Co.* and reversed the district court, holding that the Sierra Club had failed to establish a substantial likelihood of success on the merits. *Sierra Club v. City of San Antonio*, 112 F.3d 789, 791, 793 (1997).

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1. *See* Sierra Club v. City of San Antonio, 112 F.3d 789, 791 (5th Cir. 1997).
2. 16 U.S.C. §§ 1531-1544 (1994); *see Sierra Club*, 112 F.3d at 791.
3. *See Sierra Club*, 112 F.3d at 791.
4. *See id.*
5. *See id.* at 791-92; *see also* 16 U.S.C. §§ 1532, 1538 (1994).
6. *See Sierra Club*, 112 F.3d at 792.
7. *See id.* at 791.

II. BACKGROUND

The *Burford* abstention doctrine directs that a federal court abstain from exercising federal jurisdiction in two categories of cases: "[w]here timely and adequate state-court review is available," and either:

> (1) there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[8]

Several factors relevant to determining whether the abstention doctrine applies have emerged from the *Burford* line of cases: (1) whether there is a state or federal cause of action, (2) whether inquiry into unsettled areas of state law or local facts is necessary, (3) the significance of the state interest involved, (4) the state's need to have uniform policy in the area, and (5) the availability of a special state forum for judicial review.[9]

At issue in *Burford* was an order given by the Texas Railroad Commission granting a permit to Burford to drill four wells on a small piece of land in an east Texas oil field.[10] Several oil companies brought suit in federal court to enjoin the enforcement of the Railroad Commission's order, claiming that the order violated their right to due process under the law.[11] The Supreme Court found the constitutional challenge of minimal importance for the uniformity of federal law because a federal court's review would not determine whether the Commission's order was valid under the Constitution.[12] Rather, a federal court's review would determine whether compliance with a standard of "reasonableness," under state law, was different from the constitutional standard of due process.[13] The order was part of Texas's complex general regulatory scheme for oil and gas conservation, "an aspect of 'as thorny a problem as has challenged the ingenuity and wisdom of legislatures.'"[14]

The Texas Legislature had created a centralized system of direct judicial review of the Commission's orders in the state district courts of Travis County in order to avoid the conflicting interpretations that would

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8. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).

9. *See* Wilson v. Valley Elec. Membership Corp., 8 F.3d 311, 314 (5th Cir. 1993) (citations omitted).

10. Burford v. Sun Oil Co., 319 U.S. 315, 315-17 (1943).

11. *See id.* at 317.

12. *Id.* at 332.

13. *See id.*

14. *Id.* at 318 (quoting Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573, 579 (1940)).

result from collateral attacks in the state district courts.[15] The centralization of judicial actions to supervise the Railroad Commission's orders allowed the state courts and the Railroad Commission to gain specialized knowledge of the regulations shaping the field.[16] Due to Texas's important public interest in the comprehensive regulation of the oil and gas industry, the Court endorsed an abstention doctrine "whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."[17] In these circumstances, "a sound respect for the independence of state action requires the federal equity court to stay its hand."[18]

However, a federal court's decision to abstain from deciding a case properly before it is "the exception, not the rule."[19] "'The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a [d]istrict [c]ourt to adjudicate a controversy properly before it,'" and can be justified in only exceptional circumstances where removing to state court would serve "an important countervailing interest."[20] In *Colorado River Water Conservation District*, the Supreme Court held that dismissal of the United States case on behalf of two Indian tribes could not be supported under the *Burford* abstention doctrine because the case did not fall into either of the two general categories of cases warranting abstention under *Burford*.[21] No federal constitutional issue would be made moot or placed in a different posture by a state court's determination of state law because no constitutional issue was presented.[22] Further, no difficult questions of state law affecting policy of substantial public significance were presented.[23] Moreover, a federal court decision would not impair efforts by a state to implement its policies.[24]

The Supreme Court further refined the *Burford* abstention doctrine in *New Orleans Public Service, Inc. v. Council of New Orleans* (*NOPSI*).[25] New Orleans Public Service, Inc. sought a rate increase from

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15. *See id.* at 326; *see also* Texas Steel Co. v. Fort Worth and D.C. Ry. Co., 40 S.W.2d 78 (Tex. 1931).
16. *See Burford*, 319 U.S. at 327.
17. *Id.* at 332 (quoting Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941)).
18. *Id.* at 334.
19. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976).
20. *Id.* (quoting County of Allegheny v. Frank Mashuda, 360 U.S. 185, 188-89 (1959)).
21. *Id.* at 814-16. The Tribes sought a determination of their federal water rights in certain rivers and their tributaries in Colorado Water Division Number 7. *See id.* at 805.
22. *See id.* at 814-16.
23. *See id.*
24. *See id.*
25. 491 U.S. 350 (1989).

the New Orleans City Council to cover the increase in costs resulting from the Federal Energy Regulatory Commission's (FERC) allocation of the cost of the Grand Gulf 1 nuclear reactor.[26] The Council refused, and New Orleans Public Service, Inc. filed suit in federal court seeking declaratory and injunctive relief under federal law.[27] The district court held that it had no jurisdiction under the Johnson Act[28] to hear the case, and that alternatively, it must abstain under *Burford*.[29] The court of appeals affirmed, holding that abstention was proper.[30]

The Supreme Court reversed, holding that the *Burford* abstention doctrine did not apply, as neither of the two circumstances in which *Burford* applies were present in *NOPSI*.[31] First, there was no state law claim, nor allegation that federal claims were "'in any way entangled in a skein of state law that must be untangled before the federal case can proceed.'"[32] Second, a federal court determination of whether the Council's order was preempted by FERC's allocation decree and the Federal Power Act[33] would not disrupt state processes nor undermine the state's ability to establish uniform policy in the area.[34] The *NOPSI* Court found authority for its holding in a pre-*Burford* case.[35] In *Public Utility Commission of Ohio v. United Fuel Gas Co.*, the court held the Commission's orders to be invalid on their face and determined that the federal court's inquiry into whether the orders were in conflict with the federal act was limited to an examination of the orders themselves and the undisputed facts underlying them.[36] The Court in *NOPSI* reasoned that, like the Commission's orders in *Public Utility Commission*, no inquiry beyond the Council's rate order was necessary to determine whether it preempted federal law and the inquiry would not unreasonably intrude into the state's governmental processes nor its ability to set coherent policy.[37] Even though one of the claims asserted would require inquiry into power availability during the period relevant to the action, industry

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26. *See id.* at 355.
27. *See id.*
28. 28 U.S.C. § 1342 (1994).
29. *See NOPSI*, 491 U.S. at 355.
30. The court of appeals held that abstention was proper under *Burford* and *Younger v. Harris*, 401 U.S. 37 (1971). *See NOPSI*, 491 U.S. at 355. However, I will address only those portions of the opinion dealing with the *Burford* abstention doctrine.
31. *NOPSI*, 491 U.S. at 362-64.
32. *Id.* at 361 (quoting McNeese v. Board of Educ., 373 U.S. 668, 674 (1963)).
33. 16 U.S.C. § 825 (1994).
34. *See NOPSI*, 491 U.S. at 363.
35. *Id.* at 362.
36. *See id.* at 362-63 (citing Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 465 (1943)).
37. *Id.* at 363-64.

practice, and wholesale rates, there was no need for great familiarity with local facts or policies, nor would state resolution of the issues be disrupted.[38] Therefore, *Burford* abstention was not appropriate.[39]

III. THE COURT'S DECISION

In the noted case, the Fifth Circuit first addressed the Edwards Aquifer Act,[40] the state's "comprehensive" regulatory scheme for managing and directing use of the aquifer.[41] The Act created the Edwards Aquifer Authority to supervise the regulatory scheme.[42] The district court, however, found that, in spite of the existence of the Act and the Authority, there was a state of emergency in the aquifer, and the "taking" of endangered species was occurring.[43] The district court, therefore, granted a preliminary injunction to limit the defendants' withdrawals from the aquifer to 1.2 times their winter use.[44] The district court concluded that the Edwards Aquifer Authority was not yet ready to manage the aquifer.[45]

In its review of the district court's decision, the Fifth Circuit first addressed the necessary elements that a party seeking a preliminary injunction must establish:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat that failure to grant the injunction will result in irreparable injury, (3) that the threatened injury outweighs any damage that the injunction will cause the opposing party, and (4) that the injunction will not disserve the public interest.[46]

The appellate court's review of a lower court's decision to grant or deny a preliminary injunction and of abstention decisions is under an abuse of discretion standard.[47] In the noted case, the Fifth Circuit narrowed its review to a determination of whether a preliminary injunction was properly granted in this case in light of the *Burford* abstention doctrine.[48] The court concluded that the Sierra Club had

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38. *See id.* at 364.
39. *See id.* at 365.
40. 1993 Tex. Gen. Laws 2355.
41. Sierra Club v. City of San Antonio, 112 F.3d 789, 792 (5th Cir. 1997). A state district court had declared the Act unconstitutional but in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618, 626-27, 638 (Tex. 1996), the Texas Supreme Court upheld the Act's facial constitutionality. *See Sierra Club*, 112 F.3d at 792.
42. *See Sierra Club*, 112 F.3d at 792.
43. *See id.*
44. *See id.*
45. *See id.* at 792-93.
46. *Id.* at 793.
47. *See id.*
48. *Id.*

"failed to meet the first requirement of a preliminary injunction—a substantial likelihood of success on the merits."[49]

The court then analogized the noted case to *Burford* finding the facts of the two cases to be very similar.[50] The opinion stressed that, like the Railroad Commission's regulatory scheme for conserving the oil and gas resources of Texas, the Edwards Aquifer Act was a "comprehensive regulatory scheme," representing a "sweeping effort by the Texas Legislature to regulate the aquifer, with due regard for all competing demands for the aquifer's water."[51] Additionally, the Edwards Aquifer Authority was vested with "'all the powers and privileges necessary to manage, conserve, preserve, and protect the aquifer.'"[52] The Act also addressed the protection of endangered species in Section 1.14 of the Act.[53] Under the Act, the Authority may file suit in state district court for an injunction and the Texas Natural Resource and Conservation Commission is authorized to file a suit for an order of mandamus to compel the Authority to comply with its duties under the Act.[54] The court asserted that the water resources at issue in the noted case were a matter of paramount importance to the state, akin to the oil and gas resources at issue in *Burford*.[55] The Fifth Circuit also recognized Texas's enormous interest in the Edwards Aquifer and in water conservation, especially in times of drought.[56] The court observed that both the endangered species at issue and the Edwards Aquifer are entirely intrastate.[57] Considering the state's interest, the court declared a need for harmonious management and decision-making regarding the aquifer and the state's entire water conservation scheme.[58]

The court then defeated a series of arguments that abstention is not appropriate. The Sierra Club had reasoned that the court should not abstain because the suit sought relief solely under a federal law, the ESA.[59] The Fifth Circuit responded that, under *Burford*, abstention might be appropriate where jurisdiction is not solely based on the diversity of

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49. *Id.* at 793.
50. *Id.*
51. *Id.* at 794.
52. *Id.* (quoting Edwards Aquifer Act, 1993 Tex. Gen. Laws 2355).
53. "The Authority must 'protect aquatic and wildlife habitat' and 'protect species that are designated as threatened or endangered under applicable federal or state law.'" *Id.* at 794 (quoting Edwards Aquifer Act, 1993 Tex. Gen. Laws 2355).
54. *See id.* (citing Edwards Aquifer Act, 1993 Tex. Gen. Laws 2355).
55. *Id.*
56. *Id.*
57. *Id.* at 794.
58. *Id.* at 794-95.
59. *See id.*

the parties.[60] The issue is whether the cause of action is so "entangled" in state law issues that the state law issues "'must be untangled before the federal case can proceed.'"[61] According to the court, if abstention was authorized in *Burford*, where plaintiffs claimed a "violation of [their] constitutional rights, then surely it is also warranted where the plaintiff claims a federal statutory violation."[62]

The Fifth Circuit also disagreed with the district court's reasoning that abstention was not warranted because the Edwards Aquifer Authority had not yet developed a plan to manage the aquifer and deal with the emergency situation.[63] The court noted that the record revealed that the Authority had issued rules for processing permit applications and for management in the emergency period.[64] The Fifth Circuit concluded that a state regulatory scheme need not be fully in place for *Burford* abstention to apply.[65] The court emphasized that the concern expressed in *Burford* for the Railroad Commission's regulatory scheme was based, not on the length of existence of the scheme, but on its comprehensive regulation of a matter of great state concern and the need for uniform application of its rules.[66]

The court contended that its abstention was especially appropriate because the Sierra Club's request for an injunction followed a vote by the Authority not to declare an emergency.[67] The Fifth Circuit held that "[t]he purpose of *Burford* abstention is to discourage such federal court second-guessing of state regulatory matters."[68]

The Fifth Circuit also agreed with the Sierra Club's assertion that the Edwards Aquifer Act does not provide an express vehicle for citizens to assert private causes of action.[69] The court declined to decide whether the applicability of the Texas Administrative Procedure Act would "confer [] standing on an environmental group like the Sierra Club."[70] The court was persuaded that, in spite of the Supreme Court's description of *Burford* abstention as proper "'[w]here timely and adequate state-court review is available,'" a plaintiff need not have an individual "cause of action under

60. *Id.*
61. *Id.* at 795 (quoting Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712, 1726 (1996)).
62. *Id.* at 796.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 796-97.
70. *Id.* (citing Texas Administrative Procedure Act, TEX. GOV'T CODE ANN. § 2001.001-2001.901 (West Supp. 1997)).

the state regulatory scheme."[71] Moreover, the Edwards Aquifer Authority has a statutory duty to protect endangered species and may file civil suits in state district court for a preliminary injunction.[72] Additionally, the Texas Natural Resource Conservation Commission is authorized to file suit for mandamus to force the Authority to carry out that duty.[73]

The Sierra Club also argued that federal courts should not abstain where a state sets up a regulatory scheme and then contends that a preexisting federal regulatory scheme should not be controlling, establishing a "negative preemption."[74] The court responded that such a situation was normal with abstention under the *Younger* doctrine[75] as well and that the ESA did not attempt to preempt state law.[76]

Finally, the Sierra Club argued that abstention was inapplicable because there was no state administrative proceeding with which the federal proceeding was in conflict.[77] The court, however, signaled the Authority's rulemaking as underway and its vote against declaring an emergency as in conflict with the federal court's injunction.[78] Further, according to the court, "*Burford* abstention does not require the existence of an ongoing state proceeding with which the federal court action directly interferes."[79]

Judge Benavides dissented from the majority opinion, finding that, in the absence of "timely and adequate state-court review," *Burford* abstention is inappropriate.[80] Judge Benavides asserted that where state courts do not, for some reason, have jurisdiction over the federal question presented, abstention is unwarranted.[81] The dissent emphasized that the Supreme Court has only required Burford abstention in two cases, and in both cases the Court found that plaintiffs could obtain adequate review in state court.[82] Judge Benavides' contention is that even if, as the majority claimed, adequate judicial review of the Authority's activity is available under Texas's administrative scheme, "there is still no judicial review of the Sierra Club's federal claim" under the ESA.[83] Judge Benavides

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71. *Id.* at 797 (quoting *NOPSI*, 491 U.S. 350, 361 (1989)).
72. *See id.*
73. *See id.*
74. *Id.*
75. *See* Younger v. Harris, 401 U.S. 37 (1971).
76. *Sierra Club*, 112 F.3d at 797.
77. *See id.* at 798.
78. *Id.*
79. *Id.*
80. *Id.* at 798-99 (Benavides, J., dissenting) (quoting *NOPSI*, 491 U.S. 350, 361 (1989)).
81. *Id.*
82. The two cases were *Burford* and *Alabama Public Service Commission v. Southern Ry.*, 341 U.S. 341, 343 (1951). *See Sierra Club*, 112 F.3d at 799 (Benavides, J., dissenting).
83. *Sierra Club*, 112 F.3d at 800 (Benavides, J., dissenting).

concluded that the argument for abstention in this case was "nothing more than a plea for this court to abrogate its duty to enforce a federal right granted to private citizens by Congress" due to possible conflicts with local interests.[84]

IV. ANALYSIS

The Fifth Circuit's reliance on the *Burford* abstention doctrine to remove the Sierra Club from federal court sets a dangerous precedent. Acknowledging that the court is correct in its assertions that Texas has a comprehensive scheme for the conservation of the Edwards Aquifer and endangered species, that water resources are of paramount importance to the state, and that the state should be allowed to develop coherent policy to manage these critical resources, the court has nonetheless stretched the boundaries of the *Burford* abstention doctrine to the breaking point.[85] As the Supreme Court noted in *Colorado River Water Conservation District*, abstention is "'an extraordinary and narrow exception'" to a district court's duty to adjudicate questions properly before it.[86] Nonetheless, by bending virtually every part of the prior Supreme Court elaboration of the *Burford* doctrine, the Fifth Circuit has rendered it so elastic that it is able to encompass a multitude of situations where states would prefer not to comply with federal laws.

The court's analogy of the Edwards Aquifer Act and Authority to the Railroad Commission's orders in *Burford* is improper because, as Judge Benavides observes, the Railroad Commission's orders in *Burford* were reviewable in state court and abstention by a federal court would lead to adjudication in state court.[87] In contrast, the ESA violations at issue in the noted case cannot be raised within the scheme Texas has established to regulate the Edwards Aquifer.[88] Therefore, deference to the state's regulatory scheme does not serve to avoid the confusion that the *Burford* doctrine is intended to avoid.[89] The court added that it is not necessary for a plaintiff to have a private cause of action under the state statutory scheme to have "'timely and adequate state-court review available.'"[90]

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84. *Id.* at 801.

85. *See id.* at 791, 794.

86. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)).

87. *Sierra Club*, 112 F.3d at 800 (Benavides, J., dissenting).

88. Nor was the Edwards Aquifer Authority planning to act affirmatively to protect the endangered species at issue. *See Sierra Club*, 112 F.3d at 796.

89. *See id.* at 801 (Benavides, J., dissenting).

90. *Id.* at 797 (quoting *NOPSI*, 491 U.S. 350, 361 (1989)) (discussing the Authority's obligation to protect endangered species by filing civil suit for injunctive relief in state district

Thus, the court implied that it is enough that some entity have state-court review available, which goes against the grain of the Supreme Court's abstention doctrine.[91]

The court's assertion that state law issues are so entangled with the ESA claim that the state issues must first be resolved is not supported by the case law. In fact, under the Supreme Court's reasoning in *NOPSI*, *Burford* abstention is inappropriate in this case. The *NOPSI* Court held that where a challenge to the Commission's orders to determine if they conflicted with federal law was limited to an evaluation of the orders themselves and the undisputed facts underlying them, the inquiry would not unreasonably intrude into the state's governmental processes or its ability to establish coherent policy.[92] As in the noted case, a federal court's inquiry is limited to determining whether the undisputed actions of the challenged governmental and private entities conflict with the ESA. This determination is appropriately made by a federal court, charged primarily with the coherent interpretation of federal law. As Judge Benavides asserts in his dissent, the abstention argument "is flatly inconsistent with a governmental system in which federal law is supreme."[93]

The majority's opinion also stretches the limits of the doctrine regarding the level of comprehensiveness of the state's regulatory scheme necessary for *Burford* abstention to apply. The Edwards Aquifer Authority only finalized rules for processing permit applications and for a management plan during the course of the litigation.[94] It is difficult to say that the comprehensive scheme necessary for the uniform application of the state's rules was in existence such that a federal court should rightfully have abstained.

V. CONCLUSION

It is unclear whether future plaintiffs challenging state and local governmental action, as well as private action, as in a violation of a federal law will now face a greater likelihood of having their cases rejected by federal courts under the Fifth Circuit's expanded *Burford*

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court and the Texas Natural Resource Conservation Commission's authority to sue for mandamus in state district court to compel the Authority to carry out its duties).

91. *See* Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943) (holding abstention appropriate where plaintiffs had a private cause of action in state court under Texas's regulatory scheme for oil and gas); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951) (holding that abstention was only appropriate because plaintiffs could be granted adequate review and relief in state court).

92. *NOPSI*, 491 U.S. 350, 361-64 (1989).

93. *Sierra Club*, 112 F.3d at 802 (Benavides, J., dissenting).

94. *See id.* at 796.

abstention doctrine. The court has stretched the limits of the doctrine to allow states to claim that they have preempted the area. It is especially noteworthy that this broadening of states' powers has occurred with respect to an environmental law—an area that has been dominated by federal law under the comprehensive reach of the Commerce Clause. Now, it seems that the expansive reach will be of the states' regulations, which may engulf citizens' abilities to sue for violations of federal environmental laws.

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