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Town of Barnstable v. O'Connor

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***Town of Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015)**

Taylor R. Thompson

The United States Circuit Court of the First Circuit’s decision in *Town of Barnstable v. O’Connor* reignites a hotly debated offshore wind plant proposal. The First Circuit held that the *Ex parte Young* exception to the Eleventh Amendment applied because the complaint alleged an ongoing violation of federal law and the relief sought was prospective. The court did not discuss the merits of the claim, so the fight against the proposed wind plant powers on.

I. INTRODUCTION

In *Town of Barnstable v. O’Connor*, the Alliance to Protect Nantucket Sound, a citizen advocacy group, the Town of Barnstable, and businesses and individuals residing near a proposed offshore wind farm (together “Barnstable”) challenged the United States District Court of the District of Massachusetts’s determination that sovereign immunity barred their claim against the developers of the proposed offshore wind farm, and two Massachusetts state agencies (together “Defendants”).¹ The district court’s determined that sovereign immunity barred Barnstable’s claim against the two agencies, and two private actors, Cape Wind and NSTAR, for entering into a Power Purchase Agreement (“PPA”), as approved by the Massachusetts Department of Public Utility (“DPU”). Barnstable joined two state agency officials in the suit, alleging a violation of both the Supremacy Clause and Commerce Clause, which created an Eleventh Amendment issue.² The Defendants argued that the district court properly dismissed the claim based on sovereign immunity.³ The Defendants also argued that the basis of the complaint was both moot and unripe, as NSTAR had terminated the PPA a week before oral arguments, in the middle of the appeals process.⁴

The First Circuit held that the *Ex parte Young* exception to the Eleventh Amendment applied to the claim because the proscribed relief was properly characterized as prospective, and the complaint properly alleged an ongoing violation of federal law.⁵ The court also held that the issue was not moot and was ripe, as the termination of the PPA between NSTAR and Cape Wind remained unresolved.⁶ The court did not decide the merits of the claim, leaving the future of the proposed offshore wind facility uncertain.⁷

¹ *Town of Barnstable v. O’Connor*, 786 F.3d 130, 133 (1st Cir. 2015).

² *Id.* at 137.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 141 (discussing *Ex Parte Young*, 209 U.S. 123 (1908)).

⁶ *Id.* at 144.

⁷ *Id.*

II. FACTUAL AND PROCEDURAL BACKGROUND

Cape Wind has tried to develop off shore wind for years and finally made headway in 2008 when the Massachusetts legislature enacted the Green Communities Act (“GCA”).⁸ The GCA requires energy utilities to solicit renewable energy proposals and enter into “cost-effective long-term contracts” with renewable energy developers for roughly three percent of their energy demand.⁹ When enacted, the GCA limited the renewable energy companies available to fulfill the requirement in effect solely to in-state companies.¹⁰ However, in 2010 a Canadian utility company challenged this part of the law, which caused an amendment to remove the geographical limitations.¹¹ After the geographic ban was lifted, the DPU reopened bidding for out-of-state energy generators, and required NSTAR to accept proposals from renewable energy companies.¹² NSTAR received bids from forty-four energy developers and entered into contracts with three wind developers in 2010, two of which were out-of-state.¹³

In November 2010, NSTAR sought to merge with Northeast Utilities, a Connecticut-based utility company, but needed approval from DPU.¹⁴ After negotiations, the parties settled and a subsequent Memorandum of Understanding (“MOU”) between NSTAR, DOER, and Cape Wind was approved by DPU, requiring NSTAR to purchase 27.5-percent of Cape Wind’s energy output for fifteen years. The next day, Cape Wind and NSTAR executed a PPA required by the MOU. Once the merger was approved by DPU, the PPA between Cape Wind and NSTAR was approved.¹⁵

Barnstable sued, seeking injunctive and declaratory relief, and sought to terminate the PPA between Cape Wind and NSTAR.¹⁶ Barnstable included the agency officials in their official capacity at DPU and the Massachusetts Department of Energy Resources (“DOER”) as defendants in the suit. Barnstable argued that both agencies violated the Commerce Clause and the Supremacy Clause by forcing NSTAR to enter into a PPA with Cape Wind as a condition to approve the merger agreement.¹⁷ Additionally, Barnstable argued that the PPA would create high-energy rates, and that they would suffer “negative impacts to the environment, regional economy, historic and cultural resources, public safety, and recreational opportunities.”¹⁸

⁸ An Act Relative to Green Communities, 2008 Mass. Act ch. 169.

⁹ *Id.* at § 83.

¹⁰ *Id.*

¹¹ *O’Connor*, 786 F.3d at 135 n. 5 (citing An Act Relative to Competitively Priced Electricity in the Commonwealth, 2012 Mass. Acts ch. 209, § 35, *amending* 2008 Mass. Acts ch. 169, § 83).

¹² *Id.* at 135.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 137.

¹⁷ *Id.*

¹⁸ *Id.*

The Defendants moved to dismiss the complaint based on sovereign immunity, preclusion, lack of ripeness, and failure to state a claim.¹⁹ The district court sided with the Defendants, determining that the Eleventh Amendment barred the court's jurisdiction to hear the claim, and that the *Ex parte Young* exception did not apply.²⁰ The suit was dismissed with prejudice, and Barnstable appealed fourteen months later.²¹ The First Circuit reviewed de novo.²²

III. ANALYSIS

A. Sovereign Immunity; Ex Parte Young Exception

The Eleventh Amendment codifies the idea of state sovereign immunity by barring a state citizen from bringing a federal claim against his or her own state in federal court.²³ However, the *Ex parte Young* exception allows federal courts to hear claims against a state official in order to ensure that their conduct conforms to federal law.²⁴ A critical question in determining whether an *Ex parte Young* exception exists is whether the relief serves to “bring an end to a present violation of federal law.”²⁵

Relying on the Supreme Court of the United States's decision in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, the First Circuit recognized that the inquiry of whether the *Ex parte Young* exception applies does not rely on the merits of the claim.²⁶ Rather, the inquiry is “straightforward,” and seeks to determine whether the complaint alleges an ongoing violation of federal law and seeks prospective relief.²⁷

The district court determined that the claim would “invariably lead to restitution claims against the Commonwealth by NSTAR and Cape Wind.”²⁸ The First Circuit saw this argument as simply conjecture, and an issue which could be determined later in a separate action, should it arise.²⁹ The district court also held that the relief sought by Barnstable would impact the State's ability to implement policies “enunciated in the GCA.”³⁰ The circuit court determined that this alone did not resolve the sovereign immunity issue, because the entire point of the *Ex parte Young* doctrine is to allow a plaintiff to “frustrate the efforts

¹⁹ *Id.*

²⁰ *Id.* 138 (discussing U.S. Const. amend. XI).

²¹ *Id.*

²² *Id.*

²³ *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 48 (1st Cir. 2003).

²⁴ *O'Connor*, 786 F.3d at 138; *see Ex Parte Young*, 209 U.S. 123.

²⁵ *O'Connor*, 786 F.3d at 138 (quoting *Whalen v. Mass. Trial Court*, 397 F.3d 19, 29 (1st Cir. 2005)).

²⁶ *Id.* at 139 (discussing *Verizon Md. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635 (2002)).

²⁷ *Id.* (quoting *Verizon Md.*, 535 U.S. at 667).

²⁸ *Id.* at 140 (quoting *Town of Barnstable v. Berwick*, 17 F. Supp. 3d 113, 122 (D. Mass 2014), *rev'd sub nom. O'Connor*, 786 F.3d 130).

²⁹ *Id.*

³⁰ *Id.* (quoting *Berwick*, 17 F. Supp. 3d at 123).

of a state policy” when the policy threatens or violates the plaintiff’s constitutional rights, *and* the plaintiff requests the proper prospective relief.³¹

The Defendants argued that because the DPU had no ongoing role within the PPA, there was no longer an “ongoing violation of federal law.”³² The circuit court found this argument unpersuasive, as the DPU would annually review NSTAR’s recovery of above-market costs to ensure that NSTAR recovers the costs “in a manner approved by DPU.”³³ The circuit court also used logic to extend the *Ex parte Young* exception to past regulatory orders, holding that most state orders occur in the past by the time a lawsuit arises.³⁴ Therefore, the relief sought by Barnstable was not retroactive, and the *Ex parte Young* exception applies.³⁵

B. Anticipatory Arguments; Validity of the PPA

Anticipating a possible remand, the Defendants advanced alternative arguments supporting dismissal.³⁶ The district court relied solely on the Eleventh Amendment barring the claim, and therefore did not address the alternative arguments.³⁷ The circuit court decided to look specifically to the alternative arguments advanced by NSTAR on issues of both mootness and ripeness.³⁸ None of the parties to the suit agreed on the issues of mootness and ripeness.

According to NSTAR, the appeal was moot after it terminated the PPA, once Cape Wind missed certain financial deadlines.³⁹ However, this argument was advanced a week before oral arguments, after the district court had issued its order.⁴⁰ Of course, Cape Wind disagreed with NSTAR’s “termination” of the PPA, causing the need for prolonged litigation and confusion.⁴¹

There is a “heavy burden of persuasion” placed upon the party advocating mootness to find an issue moot.⁴² The circuit court’s inquiry into the mootness of an issue demands that the intervening events have “completely and irrevocably eradicated the effects of the parties’ conduct.”⁴³ Due to the disagreement between Cape Wind and NSTAR over the termination of the PPA, the appellate court had no choice but to find that the issue was not moot.⁴⁴

³¹ *Id.*

³² *Id.*

³³ *Id.* at 141.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 142.

³⁹ *Id.* at 141.

⁴⁰ *Id.*

⁴¹ *Id.* at 142.

⁴² *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968).

⁴³ *O’Connor*, 786 F.3d at 142.

⁴⁴ *Id.* (citing *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013)).

As for the ripeness of the appeal, the circuit court found that the ripeness doctrine conferred jurisdiction over the claim to the district court upon remand.⁴⁵ The court considered both the claim's fitness for review and the parties' hardships in order to determine whether the claim was ripe.⁴⁶ While the circuit court concluded that there was "serious potential" for the claim to become unripe, the district court had the right to decide questions of law that had not yet been decided.⁴⁷

IV. CONCLUSION

In determining that the *Ex parte Young* exception applied to the case, the First Circuit emphasized the importance of allowing a plaintiff an opportunity to sue their state under limited circumstances. While sovereign immunity remains intact, the very limited exception articulated by the court remains a logical way for parties to seek relief, despite facing the hurdles of immunity. The future of the Defendant's wind farm remains up in the air, as it faces substantial legal hurdles, including a contract dispute with NSTAR. Similarly, Barnstable will also face a tough legal battle, as the court gave no indication as to the validity of the claim, and signaled that the claim could become moot.⁴⁸

⁴⁵ *Id.* at 143.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 144.