

Levee Board Seeks Review of Application of *Grable/Gunn* jurisdiction with the United States Supreme Court

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On July 11, 2017, the Board of Commissioners of the Southeast Flood Protection Authority-East (the “Board”) filed a petition for a writ of certiorari with the United States Supreme Court to seek review of the Fifth Circuit’s decision in *Board of Comm. of the Southeast Louisiana Flood Protection Authority-East v. Tennessee Gas Pipeline Company, LLC*.¹ As has been widely reported, the Fifth Circuit had affirmed a decision from the Eastern District of Louisiana which found that federal question jurisdiction existed under a narrow exception to the well-pleaded complaint rule set forth by the United States Supreme Court in *Grable & Sons Metal Products, Inc. vs. Darue Engineering and Manufacturing*² and *Gunn v. Minton*.³ In addition, the Fifth Circuit’s holding affirmed the dismissal of the case finding that the defendants (100 oil, gas and pipeline companies) owed no duty under either federal or state law to protect the Board from increased flood protection costs which arise out of coastal erosion allegedly caused by defendants’ dredging activities.

The Board’s petition does not attack the correctness of the Fifth Circuit’s decision to dismiss the case. Rather, the Board seeks review of the holding that federal question jurisdiction existed under the “arising under exception” defined in *Grable* and *Gunn*. Specifically, the Board’s petition presents two questions for the Court’s review:

(1) Whether the “substantial[ity]” and “federal-state balance” requirements of *Grable* are satisfied whenever a federal law standard is referenced to inform the standard of care in a state-law cause of action, so long as the parties dispute whether federal law embodies the asserted standard.

(2) Whether a federal court applying *Grable* to a case removed from state court must accept a colorable, purely state-law claim as sufficient to establish that the case does not “necessarily raise” a federal issue, even if the court believes the state court would ultimately reject the purely state-law basis for the claim on its merits.

The Board’s petition identifies two reasons for granting the petition. First, the Board asserts that the Fifth Circuit’s decision is inconsistent with Supreme Court jurisprudence examining “arising under” decisions because the Fifth Circuit’s decision “would radically expand the class of removable cases,” and it fails to give “due regard to the rightful independence of state governments – and more particularly, to the power of the States ‘to provide for the determination of controversies in the courts.’” Second, the Board argues that the Fifth Circuit’s decision is inconsistent with decisions from the First (*Municipality of Mayaguez v.*

¹ 850 F.3d 714 (5th Cir. 2017).

² 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005).

³ 568 U.S. 251, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013).

*Corporacion Para el Desarrollo del Oeste, Inc.*⁴), Third (*Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*⁵), Eighth (*Great Lakes Gas Transmission L.P. v. Essar Steel Minnesota LLC*⁶) and Federal Circuits (*NeuroRepair, Inc. v. The Nath Law Group*⁷).

The Supreme Court has not yet determined whether it will accept this case for review.

⁴ 726 F.3d 8 (1st Cir. 2013).

⁵ 772 F.3d 158 (3d Cir. 2014), aff'd on other grounds, 136 S. Ct. 1562 (2016).

⁶ 843 F.3d 325 (8th Cir. 2016).

⁷ 843 F.3d 325 (Fed. Cir. 2015).