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Supreme Court Holds EPA's Authority to Regulate Greenhouse Gases Displaces Federal Nuisance Suit

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On June 20, 2011, the Supreme Court issued its opinion in *American Electric Power Co., Inc. v. Connecticut*, No. 10-174, a case in which the U.S. Court of Appeals for the Second Circuit had held that eight states, New York City, and three land trusts could bring a claim under the federal common law of nuisance against owners of some of the largest U.S. electric power plants, for allegedly emitting greenhouse gases ("GHGs") that contribute to global warning. The eight Justices who participated in the decision unanimously agreed to reverse and remand the Second Circuit's decision, with six Justices joining the lead opinion, and Justices Thomas and Alito separately concurring. Justice Sotomayor, who sat on the Second Circuit at the time the case was decided, took no part in the Supreme Court's decision.

The Case Below

The case began in 2004, when plaintiffs filed suit against six corporate entities who own fossil fuel-fired electric power plants operating in twenty states, alleging that they release 10% of all U.S. man-made carbon dioxide ("CO_2") emissions and that those emissions adversely impact the public, the environment, and other natural resources, including plaintiffs' properties. Plaintiffs sought to hold defendants jointly and severally liable under both state and federal common law for creating a public nuisance and demanded that the nuisance be abated through the imposition of emissions limits on the defendants. The U.S. District Court for the Southern District of New York (Preska, J.) dismissed plaintiffs' claims in 2005 on the ground that they presented a "political question" not justiciable by a federal court. On appeal, the Second Circuit held that: (a) the political question doctrine does not bar plaintiffs' claims, because plaintiffs did not seek to combat global warming generally, but rather brought claims against specific parties for particular emissions; (b) plaintiffs have standing to bring those claims, because they allege concrete, particularized, and current or imminent injuries, and those alleged injuries are "fairly traceable," at least in part, to defendants' emissions; (c) federal law governed, and the plaintiffs stated claims under the federal common law of nuisance; and (d) nuisance claims that derive from federal common law and concern CO_2 are not displaced by the Clean Air Act, at least not until U.S. EPA promulgates regulations controlling GHG emissions from stationary sources. 582 F. 3d 309 (2009). The Second Circuit reached its decision despite the fact that in 2007 the Supreme Court ruled that the Clean Air Act authorizes regulation of GHG emissions. *Massachusetts v. EPA*, 549 U.S. 497 (2007). The defendant electric utilities sought and were granted review by the Supreme Court.

Oral Argument

At oral argument in April 2011, the utilities argued that: (1) the plaintiffs lacked standing because a favorable court ruling would only incrementally decrease global GHG emissions and so would not redress the injury they claimed, *i.e.*, global warming; (2) EPA's authority to regulate GHG emissions displaces federal common law remedies (which might be inconsistent with regulatory standards); (3) allowing a nuisance suit to proceed would require a district judge, who lacks

the expertise and accountability of an agency, to determine a reasonable level of GHG emissions; and (4) because climate change is a global concern related to multifarious activities around the world, the Court should end the suit in the name of prudential standing. Plaintiffs countered that federal common law remedies should be displaced only when EPA begins regulating GHGs from existing stationary sources, and that courts traditionally have been trusted to balance competing interests in deciding nuisance cases based on pollution and emissions. Because the Court of Appeals had addressed only whether the case could proceed under federal nuisance law, neither party offered a position on what should be done about plaintiffs' state law nuisance claims. Most of the questions asked by the Justices at argument concerned displacement and whether a climate change tort suit inappropriately asks a federal judge to craft emissions policy.

The Supreme Court's Ruling

The focus of the Court's opinion was on the Clean Air Act's displacement of federal common law nuisance claims, echoing the concerns raised in oral argument. In her opinion for the Court, Justice Ginsburg explained that the Court was evenly divided on whether federal courts had authority to adjudicate the case, and an even split among the Justices meant that the lower court holding stood. In particular, Justice Ginsburg stated that four justices would hold that "at least some plaintiffs have Article III standing" under *Massachusetts v. EPA*, and that no other obstacle bars jurisdiction. (Slip op. 6.) With standing, prudential standing, and the political question issues put aside, the Court turned to the merits and concluded that, with respect to claims concerning GHG emissions, the federal common law of nuisance was displaced by the Clean Air Act and its delegation to EPA of authority to regulate such emissions, as established by *Massachusetts v. EPA*. After reviewing the jurisprudential history of federal common law, the Court refused to address the "academic question" of whether GHG emissions were an appropriate subject for federal common law, given the displacement by federal legislation and regulation. (Slip op. 9.)

To determine displacement, the Court examined whether the Clean Air Act "speaks directly to the question at issue," namely, limits on GHG emissions. It held that the Clean Air Act speaks directly to that issue by requiring EPA to list categories of stationary sources that "that may reasonably be anticipated to endanger public health or welfare" and then establish performance standards for their emissions. (Slip op. 10-11.) If EPA declines to list a pollutant, parties may seek judicial review of that decision, but the mere fact that the Clean Air Act has entrusted to EPA the determination of what air pollutants to regulate, and how, "speaks directly to the question" of whether there should be limits on GHG emissions and displaces the federal common law of nuisance from that question. (Slip op. 11.) Thus, even if EPA ultimately were to decline to regulate GHG emissions at the conclusion of its ongoing GHG rulemaking, there still would be no place for federal common law. (Slip op. 12.)

In a separate concurrence, Justice Alito and Justice Thomas explained that they concurred in the judgment but agreed with the displacement analysis "on the assumption" that the interpretation of the Clean Air Act in *Massachusetts v. EPA* is correct. These Justices noted, however, that no party in the case had challenged the Court's previous interpretation.

In ordering a remand to the Second Circuit, the Court was careful to note that the parties had not addressed the status of a nuisance claim under *state* common law; consequently, the Court's opinion should not be interpreted to express any opinion on the viability of that claim, which should be considered by the Court of Appeals on remand. (Slip op. 15-16.) This important point means that common law challenges involving GHG emissions have not been completely ruled out, so long as they are brought under state law, although such claims will presumably face many other hurdles, including another issue expressly reserved by the Court – whether "a State may sue to abate any and all manner of pollution originating outside its borders." (Slip op. 8.)

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