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Supreme Court To Decide Fate Of Global Warming Litigation In American Electric Power Co. v. Connecticut

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On December 6, 2010, the Supreme Court granted certiorari in American Electric Power Co. v. Connecticut, a federal nuisance case on appeal from the Second Circuit. Plaintiffs -- eight states, the City of New York and three non-profit land trusts -- seek abatement and reduction of greenhouse gas emissions from defendants, who include some of the United States' largest electric utility companies. The Second Circuit ruled that: (1) the case did not present a non-justiciable political question, (2) the plaintiffs have standing, (3) the plaintiffs stated claims under the federal common law of nuisance, (4) the plaintiffs' claims are not displaced by the Clean Air Act ("CAA"), and, finally, (5) the Tennessee Valley Authority ("TVA"), a quasi-governmental defendant, is not immune from the suit. See Connecticut v. American Electric Power Co., 582 F.3d 309 (2nd Cir. 2009). This article summarizes the Second Circuit's lengthy decision, the implications of such, and the impending Supreme Court review.

A. Background

The Plaintiffs in the case consist of eight States, the City of New York, and three non-profit land trusts that "acquire and maintain ecologically significant and sensitive properties for scientific and educational purpose, and for human use and enjoyment" (the "Trusts"). Plaintiffs sued multiple electric power corporations that own and operate fossil-fuel-fired power plants in twenty states (the "Defendants"), under the federal common law of nuisance, and under state nuisance law in the alternative. Specifically, the complaints allege that Defendants are contributing significantly to the global warming crisis which, in turn, is causing Plaintiffs extensive current and future injuries. Plaintiffs seek to force Defendants to cap and then reduce their carbon dioxide emissions.

B. Political Question Doctrine

The District Court held that the case presented a non-justiciable political question, based on the third factor enumerated by the Supreme Court in Baker v. Carr, 369 U.S. 186 (1962). Specifically, the District Court determined that Plaintiffs' causes of action were impossible to decide without an initial policy determination regarding global warming, which should be made by the elected branches of the government.

The Second Circuit reversed. First, the Court reviewed the Baker factors, which set "a high bar for nonjusticiability." Then, the Court went through each of the six factors and discussed how they are inapplicable to the case at hand. The Court repeatedly asserted that "simply because an issue may have political implications does not make it non-justiciable." Also, the Court rejected Defendants' arguments that the case would interfere with the President's authority to manage foreign relations by undermining the President's bargaining leverage with other nations when negotiating to reduce their greenhouse gas emissions. Instead, the Court held that this was a domestic case, with domestic parties regarding domestic conduct, the resolution of which would not establish a national or international emission policy. Hence, the Court held that the case does not present a

political question.

C. Standing

The Court then discussed the issue of whether the Plaintiffs have standing to bring the suit. First, the Court determined that the States are suing in both their *parens patriae* capacity, protecting "quasi sovereign" rights such as the health and well-being of its residents, and their proprietary capacity. The Second Circuit held that the City and the Trusts are suing solely in their proprietary capacity. The Court analyzed each capacity separately. First, it set forth the "Snapp test" for *parens patriae* standing: A state (1) must articulate an interest apart from the interests of particular private parties, (2) must express a quasi-sovereign interest and (3) must have alleged injury to a sufficiently substantial segment of its population. Additionally, the Court added a fourth prong to the test, that the individuals upon whose behalf the State is suing could not obtain complete relief through a private suit. The Court then held that the States met the Snapp test because they have an interest in safeguarding the public health and resources (a quasi-sovereign interest) apart from any interest held by individual parties, the injuries will affect virtually their entire populations, and it is doubtful that private plaintiffs could achieve complete relief. Thus, the Court held that the States have *parens patriae* standing.

Second, the Court held that all of the Plaintiffs meet the familiar Lujan test for proprietary standing, which requires a showing of injury, causation, and redressability. The Court found that Plaintiffs alleged both current and future injury, which was certainly impending and not in any way contingent on their actions. Plaintiffs also sufficiently alleged that these injuries are fairly traceable to Defendant's conduct, a showing which does not require proof that particular Defendants caused particular harms or that it was solely Defendants' emissions that caused the injuries. Finally, the redressability analysis was analogous to that in Massachusetts v. EPA, 549 U.S. 497 (2007), in which the Supreme Court found that "the proposed remedy need not address or prevent all harm from a variety of other sources." Thus, the Court held that all Plaintiffs have Article III standing.

D. Federal Common Law of Nuisance Claims

Next, the Court addressed whether Plaintiffs stated a claim under the federal common law of nuisance. First, the Court adopted the Restatement (Second) of Torts' definition of public nuisance, which is "an unreasonable interference with a right common to the general public." The Restatement § 821(b)(2) explains that there are 3 circumstances that tend to show that an interference with a public right is unreasonable: (a) when the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; (b) when the conduct is proscribed by a statute, ordinance, or administrative regulation; or (c) when the conduct is of a continuing nature of has produced a permanent and long lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. The Court then determined that grievances in the complaints suffice to allege an unreasonable interference with public rights under circumstances (a) and (c).

The Court also rejected Defendants' arguments that principles of constitutional necessity limit the scope of federal nuisance claims and that federal nuisance claims are only available to abate nuisances of a "simple type" that are immediately and severely harmful and readily traced to an out of state source. Last, the Court rejected Defendants' argument that "the federal common law of nuisance cause of action is reserved only for states" and held that both the City of New York and the Trusts had stated claims for federal nuisance. In addition to caselaw, the Court again looked to the Restatement for guidance on who may bring a claim for public nuisance. § 821 C provides, in relevant part, that a plaintiff may seek to enjoin a public nuisance where it (a) has the right to recover damages or (b) has the authority as a public official or agency representing the state or a political subdivision in the matter. The Court stated that the City of New York, a political subdivision of the State of New York, clearly meets the criteria under (b), while the Trusts met the criteria under (a) as they would have been able to sue for damages as private parties because they suffered a harm different in kind than the harm suffered by the general public.

E. Displacement

Next, the Court held that Plaintiffs' federal nuisance claims were not displaced by the Clean Air Act ("CAA") or by any other environmental legislation. First, the Court set out the test for when a common law cause of action is displaced by federal legislation. In Matter of Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir. 1981), the court found a presumption in favor of displacement where Congress has "legislated on the subject." However, the Supreme Court clarified in Illinois v. City of Milwaukee, 406 U.S. 91 (1972), that the relevant inquiry is whether the statute speaks directly to the particular issue at hand. If not, "the federal courts may apply federal common law."

The Court then determined that the particular issue here is whether Congress had regulated emissions of greenhouse gases and whether it had provided a remedy for those injured by greenhouse gas emissions. While the EPA had proposed to render findings pursuant to the CAA, it had not, as of the time of the Second Circuit's opinion, completed the rulemaking process regarding greenhouse gas emissions. Therefore, the Court refused to speculate whether this hypothetical regulation of greenhouse gases under the CAA would actually speak directly to the particular issue raised by the Plaintiffs.

Defendants cited five other federal statutes that touch on global warming, however, all of them require only research, planning and strategizing, technology development, assessments and monitoring, as opposed to "real action to abate emissions." In other words, these laws are meant to assist Congress in the global warming debate by giving it more information to make choices with regard to actually regulating emissions, but they do not actually regulate anything. Indeed, one of the Acts, the Global Climate Change Act of 1990 recognizes this limitation by providing that the act should not be interpreted to preclude other federal action designed to address the threat of global warming.

In sum, the Court stated, "in a federal nuisance cause of action, unless the statute regulates the nuisance itself, the federal common law that would otherwise by invoked to abate the particular nuisance applies. A collection of non-regulatory statutes focused on studying the issue is insufficient to displace the common law."

F. TVA's Separate Arguments

Finally, the Court rejected Defendant TVA's separate arguments that the case against it presents a political question and that the discretionary function exception mandates dismissal of the actions against it. The TVA was created by Congress, but all of its power related activities are self-financed and thus, it operates much like a private corporation. Additionally, the Act establishing the TVA contains a sue-and-be-sued clause, which denies the TVA sovereign immunity.

First, the Court rejected the TVA's argument that the Property Clause of the United States Constitution serves to satisfy the first Baker factor because "TVA is not the United States or Congress" but rather, is a separate corporate entity. Second, the Court explained that "[t]he discretionary function exception 'insulates the Government from liability if the action challenged . . . . involves the permissible exercise of policy judgment." However, the broad sue-and-be-sued clause in the TVA Act indicates that Congress did not wish to preserve the discretionary function exception for the TVA. The Court then discussed whether the TVA had implied immunity by applying the Supreme Court's three pronged test from Loeffler v. Frank, 486 U.S. 549 (1988). The Court found that the test was not met because there were no inconsistencies between a nuisance suit against the TVA and the statutory or constitutional scheme, the TVA had not established that its greenhouse gas emissions were "governmental functions," it did not show any "grave interference" with the performance of a governmental function, and Congress placed no limitations on the sue-and-be-sued clause. Thus, the Court held that neither the political question doctrine nor the discretionary function exception applies to warrant dismissal of Plaintiffs' claims against the TVA.

G. Implications

The Second Circuit's holding with regard to *parens patriae* standing is notable as it extends and reiterates the special treatment of States as litigants discussed by the Supreme Court in Massachusetts v. EPA. There , the decision to recognize Massachusetts' standing was not grounded solely in Massachusetts' sovereignty as a state, but also on the fact that Massachusetts was seeking to protect a procedural right guaranteed by the CAA. Here, no such procedural right exists because the Plaintiffs are suing under the federal common law as opposed to a federal statute.

In Massachusetts v. EPA, the Court explained that the existence of a procedural right lowered the standards of causation and redressability. However, as the Second Circuit pointed out here, it is unclear whether States need to show causation and redressability, which are part of the Lujan test for proprietary standing, or if a showing of *parens patriae* standing under the Snapp test is sufficient on its own. The Second Circuit declined to answer this question because it believed that the State Plaintiffs had met the Lujan test for standing regardless.

Furthermore, the Second Circuit insinuated more than once that the legislative branch could amend the CAA or the EPA and could regulate emissions, both of which would override any decision made by a federal court under the federal common law. Since the Second Circuit's decision, the EPA has promulgated regulations for motor vehicles and stationary sources under the CAA. The Department of Justice, on behalf of TVA, argues, *inter alia*, that this renders the case moot.

There is also an interesting procedural consequence of Supreme Court review, as Justice Sonia Sotomayor will most likely recuse herself from the case because she sat on the original Second Circuit panel. This means that there is a possibility for a tie, in which case the Second Circuit's decision will automatically be affirmed. Most likely, the four conservative justices will vote to reverse, while Kagan (a strong proponent of executive power) and Kennedy (the deciding vote in Massachusetts v. EPA) will cast the deciding votes.

Finally, this decision has the power to make or break climate change litigation. Currently, at least three other climate change public nuisance cases are ongoing around the country. The Supreme Court's ruling in this case will directly affect those lawsuits, as well as any interest in filing new lawsuits. If the Court determines that the CAA displaces federal nuisance law, global warming litigation based on common law claims in this country will cease to exist.

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