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Supreme Court Holds Federal Courts Do Not Have Jurisdiction to Hear Federal Common Law Nuisance Claims Relating to Greenhouse Gas Emissions

By Jeanne Schubert Barnum and Levi Jones

The United States Supreme Court, in an 8–0 decision (Justice Sotomayor did not participate) written by Justice Ginsburg, ruled on June 20, 2011 that federal common law nuisance claims are not available as a means to impose greenhouse gas limits on fossil-fueled power plants. *American Electric Power Co. v. Connecticut et al.* This is a logical result flowing from the Court's 2007 decision in *Massachusetts v. EPA*, where it held that the Environmental Protection Agency ("EPA") had the authority to regulate greenhouse gases under the Clean Air Act. The *American Electric Power* decision holds that the regulatory avenue established by the *Massachusetts* decision is the only avenue available under federal law to pursue limits on greenhouse gas emissions — even though the EPA has not yet used its regulatory power to impose any emissions caps.

By invoking the doctrine of displacement, the Court decided the case on the narrowest possible grounds. The Court divided 4–4 on the important issue of whether the plaintiffs had standing to sue under Article III of the Constitution, i.e., whether they could demonstrate the existence or possibility of a judicially redressable harm. This meant that the Second Circuit finding of standing, and its jurisdiction, were upheld. Because it was not considered by the appeals court, the Court did not decide whether the plaintiffs could continue to pursue climate change claims based on state common law.

Defeat for Plaintiffs in the District Court

In 2004, eight states and three nonprofit land trusts filed two separate suits in the Southern District of New York against four private power companies and the Tennessee Valley Authority. The plaintiffs' complaints claimed that the five defendants were responsible for 25 percent of the carbon dioxide emissions resulting from all United States electric power generation and 2.5 percent of anthropogenic emissions of greenhouse gas worldwide. The plaintiffs sought injunctions to cap the defendants' carbon dioxide emissions and reduce them by a set amount each year for a decade. The district court dismissed both suits as being barred by the political question doctrine.

Plaintiffs Win on Appeal

On appeal the Second Circuit disagreed, holding that the political question doctrine did not bar this case from being heard and that both the plaintiff states and the land trusts had established standing to sue. The Second Circuit also held that the plaintiffs' nuisance claims had not been displaced by the Clean Air Act because the EPA has not yet done anything to regulate greenhouse gas emissions.

In support of this decision, the Second Circuit distinguished an earlier case, *Illinois v. Milwaukee*, where the Supreme Court held that Congress had displaced the federal common law claims at issue by amending the Clean Water Act to create a comprehensive regulatory program. Because there is no such regulatory program in place for greenhouse gases, the Second Circuit reasoned, the federal common law claims had not yet been displaced. The court, therefore, said the case should proceed in the trial court.

The Second Circuit's decision was appealed to the Supreme Court, with numerous industry and environmental groups filing amicus briefs on both sides of the issue.

The Clean Air Act Displaces Greenhouse Gas Nuisance Claims

The Clean Air Act authorizes the EPA to regulate greenhouse gas emissions. According to the Supreme Court in *American Electric Power*, it is not necessary for the EPA actually to have promulgated greenhouse gas regulations under the Clean Air Act for that law to displace common law claims based on greenhouse gas emissions. It is enough that Congress has expressed its intention that the Clean Air Act be the means by which this issue will be regulated. As the Court explains, "The test for whether congressio-

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nal legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue."

The Court's *Massachusetts* decision determined that the EPA can regulate greenhouse gas emissions under the Clean Air Act. In *American Electric Power*, the Court noted that federal common law claims seeking to do the same thing would create a "parallel track" for which there is no room under federal law. That does not mean that there is no recourse in the federal court. The Court went on to point out that the EPA must either adopt or refuse to make rules regarding greenhouse gas emissions, and parties who are not satisfied with the EPA's decisions may seek judicial federal review.

Standing Issues Still Somewhat Unclear

As noted above, the Court was split 4–4 on the issue of plaintiffs' standing (Justice Sotomayor recused herself from the case because of her involvement with it while on the Second Circuit bench). Because of this even split, the lower court's decision granting the plaintiffs' standing was affirmed by default, although this default affirmance has no precedential value. Still unanswered is whether the Supreme Court will ultimately allow plaintiffs such as environmental groups and industry groups Article III standing when there is an argument for which no specific injuries have been identified or pled. Of more immediacy is whether the Court would, in the next round, find Article III standing for the States to pursue claims under state nuisance law in federal court. This decision provides no insight, but suggests a serious dispute remains.

The Effect of This Decision on Environmentalists and Targeted Industries

As the Court noted, "the [EPA] is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic and technological resources an agency can utilize in coping with issues of this order." However, there is no doubt that, as the issue of how to address global warming continues, both Congress and the courts will continue to play significant roles in the debate.

Electric utilities and other targeted industries no longer face a risk of climate change-related lawsuits under federal nuisance law. A contrary ruling would have exposed American industry to potentially devastating litigation. However, environmentalists still have hope because the decision did not resolve the issue of climate change litigation as long as it is based on state common law rather than federal common law — an issue that the Court left to the Second Circuit to decide on remand.

The Second Circuit's decision that the plaintiffs had standing to sue in the first place — the most important issue to the defendants — was left in place by the Court. The standing issue, as well as the political question defense that targeted industries have invoked in the past in climate change litigation may be weakened by this decision. And, there may yet be challenges in the Federal courts after the EPA issues greenhouse gas emissions regulations. Those regulations may not be coming as soon as previously thought, however, as it has been reported that the EPA has pushed back a deadline for a proposed rule on greenhouse gas emissions from power plants in order to get more input from the public. ◆

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.

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