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environmental lawflash alert

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Supreme Court Changes the Climate on Greenhouse Gas Suits

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Yesterday, the U.S. Supreme Court issued its much-anticipated decision in *American Electric Power Co. v. Connecticut*, reviewing whether federal common law would support a claim that greenhouse gas emissions could give rise to a public nuisance claim that would warrant injunctive relief against future emissions. The Court concluded that the federal common law cannot support such a claim.

The plaintiffs, including eight states,[1] New York City, and three nonprofit land trusts, brought suit in the Southern District of New York against five electric power companies alleged to be the largest emitters of carbon dioxide in the United States. The complaint alleged that carbon dioxide emissions contributed to global warming and thereby constituted a nuisance under federal common law. The plaintiffs requested an injunction limiting emissions in the future. No monetary damages were sought. The district court dismissed the case, finding that the complaint presented a nonjusticiable political question. The Second Circuit reinstated the case, holding that the plaintiffs were not barred by the political-question doctrine and had stated a federal common law nuisance claim.

The Supreme Court, although equally divided,[2] first dealt with a preliminary issue, affirming that the plaintiffs had standing. In doing so, it relied without further discussion on its earlier decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). It then moved to the merits. The Court acknowledged that a federal common law for "subjects of national concern" exists and that this common law extends to environmental protection of air and water. But it bypassed answering whether that common law approach could extend to claims that carbon dioxide emissions are a nuisance, stating it was unnecessary to decide the issue because even if such a common law claim could theoretically exist, the Clean Air Act (CAA) has effectively "displaced" such federal common law claims.

In reaching its conclusion, the Court discussed several specific CAA features. First, it noted that in *Massachusetts* the Court had already concluded that carbon dioxide emissions are air pollutants subject to regulation under the CAA. Second, it concluded that the CAA "speaks directly" to carbon dioxide emissions from the defendants' plants. In supporting this "speaks directly" conclusion, the Court focused on the Environmental Protection Agency's (EPA's) ability to regulate under CAA Section 111 stationary sources that "cause or contribute significantly to air pollution." In addition, the Court noted

1. The original eight states were California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, although New Jersey and Wisconsin are no longer participating.

2. Justice Sotomayor did not participate, leaving an eight-member court.

that the CAA provides multiple avenues for EPA to enforce noncompliance with its regulations and that the CAA allows private parties to request EPA to set such industry rules, and that EPA's response to such requests is subject to review in federal court.

Notably, the Court was clear that its displacement analysis did not depend on EPA exercising its regulatory authority and setting the emissions standards for carbon dioxide. The Court indicated that it is enough that EPA has been given the power to do so in the CAA. Thus, the Court expressly noted that if EPA declines to regulate carbon dioxide emissions under Section 111, the federal courts would still have no role in entertaining such nuisance suits, although the federal courts would have a role in reviewing EPA's decision not to regulate.

In dealing a substantial, and perhaps lethal, blow to such nuisance suits relying on federal common law, the Court nevertheless left unanswered whether such suits may remain viable under state law. The Court stated that it was a separate question whether the CAA preempts such state law claims.

The decision is a major win for those actually or potentially facing such federal common law nuisance suits. But in emphasizing the authority that the CAA apparently gives EPA to regulate greenhouse gas emissions, the decision will also affect the ability to challenge any EPA regulations issued in the future. In addition, by leaving open the possibility that state law claims may remain viable, yesterday's decision will likely simply push such suits to be pled under state law. This will generate yet further litigation about whether the CAA is clear in preempting such state law claims, an analysis similar to, but with significant differences from, whether federal law claims are displaced.

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