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The Fate Of Global Warming Nuisance Suits

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The United States Supreme Court is poised this month to decide the fate of a novel lawsuit that raises important questions about the role of federal courts in addressing global climate change.

American Electric Power Co.v. Connecticut ("AEP"),[1] argued in April, is one of several lawsuits in the federal court system that attempt to use public nuisance doctrine in creative ways to remediate or slow global warming in the absence of regulatory action by Congress or the U.S. Environmental Protection Agency.

Indeed, activists' frustration with global warming policy has resulted in the very recent filing of a series of lawsuits against various states and the federal government, presenting a novel theory that the "atmosphere" is a public trust that defendant governments have breached their duty to preserve and protect. In the nuisance and public trust cases, environmental activists are using novel theories to press their global warming agenda in federal courts. A clear rebuke from the Supreme Court in *AEP* could help tamp down enthusiasm for using the federal courts as platforms for policy advocacy.

In *AEP*, several states and private land trusts have sued a handful of energy companies under a theory of "public nuisance." The plaintiffs seek to assign these companies their alleged share of responsibility for global warming and obtain an injunction capping their carbon dioxide emissions, having the court order specific reductions over a period of at least 10 years.

These global warming nuisance cases have faced skepticism from federal trial judges, all of whom dismissed them as raising complex and unresolved policy issues beyond the judiciary's constitutional

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authority and institutional competency. In *AEP*, after the Southern District of New York dismissed the claims, a two-judge panel of the United States Court of Appeals for the Second Circuit disagreed and allowed the case to go forward.

The energy companies then sought Supreme Court review. In granting *certiorari*, the court signaled that it will weigh in on whether these cases can be properly decided by federal courts.

At oral argument, just about every justice seemed unsettled by the implications of using public nuisance doctrine in the manner proposed by the states and other plaintiffs. Although no obvious consensus emerged about what particular grounds, if any, a majority of the court could coalesce, it seems likely that they will act to limit *AEP* and other federal global warming nuisance suits. A decision is expected by the end of the court's term in June.

AEP is One of Several Novel Climate Change Lawsuits that Seek to Pressure Industry and Government on Climate Change

Various plaintiffs have sought over the past decade to deploy creative public nuisance theories to impose emissions caps or enormous damages on alleged contributors to global climate change. In addition to the case presently before the Supreme Court, two other major federal suits have been brought in federal courts around the country.

In *Comer v. Murphy Oil, USA*,[2] Mississippi residents filed a lawsuit in the Southern District of Mississippi against more than 30 energy companies seeking damages from Hurricane Katrina, which plaintiffs theorize was intensified by global warming. In *Native Village of Kivalina v. ExxonMobil Corp.*,[3] a village filed suit in the Northern District of California seeking hundreds of millions of dollars in damages from dozens of oil, energy and utility companies due to coastal erosion in Alaska, an event allegedly precipitated by global warming.[4]

In all three cases, the district courts, which would be charged with fact-finding and determining the "reasonableness" of the challenged emissions, readily concluded that the cases were unsuitable for judicial resolution. On appeals from those dismissals in *AEP* and *Comer*, panels of the Courts of Appeals for the Second and Fifth Circuits issued opinions allowing global warming nuisance cases to proceed.

In *Comer*, the Fifth Circuit agreed to a rehearing *en banc* and vacated the panel opinion, but subsequently dismissed the appeal for lack of quorum. That dismissal was left in place when the Supreme Court recently denied the plaintiffs' petition for mandamus. In *AEP*, after rehearing was denied by the Second Circuit, certiorari was granted. In *Kivalina*, the Ninth Circuit has not yet heard argument. When it decides the case, it likely will have the benefit of the Supreme Court's guidance.

Complementing these cases and illustrating the need for clear Supreme Court guidance on the justiciability of

global warming suits, a new wave of creative cases have recently been filed. Perhaps inspired by calls for "heroic litigation to go beyond the bounds of traditional doctrine,"[5], this new series of lawsuits has been filed to secure judicial remediation of global warming. In early May 2011, a group of children and teenagers, along with their parents and various organizations they founded, sued multiple states and the U.S. government over global warming.

In the federal case, *Alec L. et al. v. Lisa Jackson, Administrator of EPA, et al.*,[6] the plaintiffs ask for, among other things, an injunction ordering a series of federal agencies to "take action consistent with the United States Government's equitable share" of global warming and commensurate with its "financial and technological capability" to ensure that global carbon dioxide emissions peak in 2012. They want a federal court to require the federal government to "take all necessary actions" to reduce U.S. carbon dioxide emissions by 6 percent annually starting in 2013 and continuing into the future.

The plaintiffs also ask the court to decree that the United States must "provide financial and technological assistance to developing countries" to support their reduction efforts. While this frivolous lawsuit and others like it are likely to fail, they illustrate environmental activists' willingness to misuse legal proceedings to pursue ideological policies.

The Supreme Court in *AEP* has an opportunity to send a strong message about the justiciability of suits to abate climate change and chill the propensity of environmental activists and their attorneys to burden the U.S. legal system with "promising, if untested, legal constructs to address carbon loading of the atmosphere."[7]

Global Warming Litigation Raises Important Doctrinal Questions

In *AEP*, several states and land trusts allege that the named energy companies' greenhouse gas emissions constitute a public nuisance under federal common law. Beyond the novel public nuisance theory, this case is remarkable because of the remedy sought, an issue several Justices commented on at argument.

Rather than damages, the plaintiffs are asking a federal judge to order a handful of energy companies operating in 20 states to "abate" their alleged "contribution[s]" to global warming "by requiring [them] to cap [their] carbon dioxide emissions and then reduce them by a specific percentage each year for at least a decade." Complaint ¶ 186,*Connecticut v. Am. Elec. Power Co.*, No. 04-05669 (S.D.N.Y. July 21, 2004).

The Southern District of New York concluded that the case presented a non-justiciable political question under *Baker v. Carr*, 369 U.S. 186 (1962), because, among other things, its resolution would "require[] identification and balancing of economic, environmental, foreign policy, and national security interests."

In the Court of Appeals, a two-judge panel reversed, characterizing the case as an "ordinary tort suit" well within the traditional competence of federal courts. As such, the panel determined that it was not barred by the political question doctrine. The court then considered and rejected alternative arguments presented by the

energy companies in support of affirmance. The court concluded that plaintiffs had constitutional standing, that the federal common law of nuisance provided a cause of action, and that the claims were not displaced by congressional or EPA action.

Using a more forgiving analysis at the pleading stage, the panel found that the state plaintiffs had standing under *Lujan v. Defenders of the Wildlife*, 504 U.S. 555 (1992), reasoning that (1) in *Massachusetts v. EPA*, the Supreme Court recognized that alleged future injuries, including damage from rising sea levels, were actionable; (2) causation can be established where defendants release a pollutant that "contributes to the kind of injuries alleged by plaintiffs," and (3) redressability requires only that the requested relief lead to some slowing of global warming, not complete cessation.

The panel disagreed with the energy companies and the district court about the difficulty of the issues presented, concluding that courts regularly interpret tort law doctrines like nuisance and frequently engage in complex fact-finding. The Second Circuit denied the energy companies' petition for rehearing *en banc*, after which the defendants sought a writ of certiorari.

The petition to the Supreme Court raised three questions: (1) whether states and private parties "have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources;" (2) whether a cause of action to cap carbon dioxide emissions is properly implied under federal common law; and (3) whether "claims seeking to cap defendants' carbon dioxide emissions at 'reasonable' levels" are barred by the political question doctrine.

AEP and the other petitioners received substantial amicus support from, among others, the National Association of Home Builders, the Association of Global Automakers, the American Farm Bureau Federation, the U.S. Chamber of Commerce, the Chairman of the House Energy and Commerce Committee and two other Congressional leaders on environmental issues, and twenty-three states who disagree with those that filed suit.

At the merits stage, the energy companies renew their many arguments that the case is nonjusticiable. As Peter Keisler explained at oral argument on behalf of the energy companies, the many doctrinal issues raised by the case all "flow from the same basic separation of powers principles that establish, we believe, that the case ought to be dismissed."

The energy companies argue that, as a threshold matter, the states and private land trusts lack standing to maintain their suit under Article III of the Constitution. The energy companies highlight the traceability and redressability prongs and argue that they are not met here because the "complaints assert that these defendants have contributed to climate change *generally* through their emissions, and that climate change contributes *generally* to increased risks of injuries." Pet. Br. 18.

On this point, the Obama administration's position on Article III standing notably departs from that of the energy companies. The administration writes that "although the question is not free from doubt, the allegations advanced by the coastal States in their capacity as sovereign landowners are sufficient to survive a motion to dismiss under this Court's recent decision in *Massachusetts v. EPA*." Br. of United States 25.

At least two justices seemed inclined to agree with that application of Massachusetts. Justice Ruth Bader Ginsburg indicated that "it seems to me the States would have standing on the same basis that Massachusetts had standing."

Justice Elena Kagan pushed back on the energy companies' distinction of that case as resting on the existence of a statute and a cause of action therein, and went on to state that "I would think under traditional standing principles the standing there [in Massachusetts] was actually harder to find because one had to go through the EPA first. ... here the EPA is out of the picture. The action is much more direct."

Other Justices, like Justices Anthony Kennedy and Antonin Scalia, seemed eager to go beyond the standing doctrine and reach the merits of the political question doctrine and the federal common law and displacement analyses, perhaps to ensure that the courts would not have to wrestle with the inevitable subsequent suits alleging similar claims.

Beyond Article III standing, which is a threshold jurisdictional question, the energy companies argue that this case cannot proceed because nuisance suits for contributions to climate change are not cognizable under federal common law, and in any event have been displaced by EPA action.

AEP and the other petitioners point out how rare it is for courts to create federal common law and emphasize its particularly infrequent use to create causes of action. The United States takes a more cautious approach, writing that "the Court need not determine whether federal common law should, absent displacement, provide a cause of action for public nuisance against persons and entities that contributed to climate change." Br. of United States 43. Instead, the United States argues that any common-law claims have been displaced by EPA actions being considered under the Clean Air Act. Id. at 44-53.

At argument, several justices pressed the government in particular to say when precisely displacement of state or federal common law occurs. The acting Solicitor General, Neal Katyal, listed several anticipated EPA actions that he argued operate to displace any federal common law cause of action. Several justices pushed back, wanting to know what the effect would be on displacement if those actions did not happen or were not anticipated.

Mr. Katyal explained that displacement occurs "so long as the nuisance is being addressed - and here the nuisance is undoubtedly being addressed with a panoply of different federal actions ... and concrete steps taken," thereby rejecting the states' position that federal action is not imminent or concrete enough to justify displacement. Mr. Katyal explained that "most fundamentally, there is no precedent, ... that says that the

government must regulate the specific industry, the specific thing that the plaintiff isolates, in order for displacement to occur."

Finally, the energy companies argue that the case presents nonjusticiable political questions. The United States does not urge its use, but states that the court "could properly rely on the political-question doctrine to direct dismissal of this case," id. at 39. Elaborating, the United States notes that "the myriad questions associated with developing a judgment about reasonable levels of greenhouse-gas emissions from defendants and the broader industry of which they are a part are more properly answered by EPA." Id. at 19.

Across the bench, justices seemed to agree, at least to the extent that they were troubled by the task plaintiffs would impose upon a district court judge. Justice Ginsburg challenged the states' attorney, asserting that "the relief you're seeking seems to me to set up a district judge, who does not have the resources, the expertise, as a kind of super-EPA."

Chief Justice John Roberts echoed that concern, observing that "across the economy, the whole problem of dealing with global warming is that there are costs and benefits on both sides, and you have to determine how much you want to readjust the world economy to address global warming, and I think that's a pretty big burden" for "a district court judge."

And Justice Kagan followed up, commenting that such an inquiry involves "facts that are [usually] determined by an administrative agency. I mean, even just reading that part of your complaint, it sounds like the paradigmatic thing that administrative agencies do rather than courts."

Demonstrating the breadth of the justices' discomfort, Justice Stephen Breyer questioned the authority of a district court to address global warming through what the states characterized as cost-effective measures. He proposed a hypothetical lawsuit seeking to impose a relatively simple carbon tax to remedy global warming. After the states' attorney indicated that a court would not have authority to impose that particular remedy because it would be intrusive, he skeptically inquired why a court would have the power to enter the order sought here in AEP, implying that the requested relief is similarly intrusive.

The states and private land trusts argue that this case is suitable for judicial resolution, framing the case as a routine common law tort suit, albeit on a larger and admittedly more complex scale. On the standing question, the states and other petitioners support their standing by reference to *Massachusetts v. EPA* and urge the court to permit this case to proceed, allowing difficult causation questions to be addressed at the merits stage.

With respect to federal common law and the political question doctrine, they argue that the litigation is well within the experience and ability of federal judges and assert that it is amply supported by earlier interstate pollution cases brought under the public nuisance doctrine and heard by the Supreme Court.

At argument, Justice Kagan pushed back on the support for that proposition. She queried the states' attorney by noting that "much of your argument depends on this notion that this suit is really like any other pollution suit, but all those other pollution suits that you've been talking about are much more localized affairs."

Justice Kagan identified what she called "a huge gap, a chasm between the precedents" cited by the states and the allegations here. Finally, while the states admit that no standard or rule presently governs carbon dioxide emissions from the energy companies in this case, the states and their supporters argue that the court can remand the case to the trial court to see whether and how the EPA's climate change regulations might displace or alter their asserted cause of action.

Indeed, at several points during the argument, the states welcomed remand to the lower court, perhaps realizing that affirmance is unlikely. In so arguing, the states and other plaintiffs may be content to survive simply by living to fight another day and perhaps, with an eye on reaping political advantages from the maintenance of this case and the threat of additional litigation, the plaintiffs can exact concessions on legislation and regulation presently under consideration.

Because the Tennessee Valley Authority ("TVA") is a named defendant, the Obama administration has taken a position on the litigation. That position, while broadly consistent with the energy companies' view that this case is not suitable for federal court adjudication, departs in some respects and appears to reflect a degree of compromise and caution on the part of the acting solicitor general.

At the *certiorari* stage, the United States supported what it characterized as "limited intervention by the Court" in part because the decision's effect on future litigation. The United States urged remand for the lower court to consider the case under the prudential standing doctrine and to evaluate whether EPA action after the panel opinion had displaced the claims.

At the merits stage, the United States argues strenuously that the case is not properly resolved by federal courts at all, but offers arguably narrower grounds for disposition, namely the prudential standing doctrine or a finding of displacement of federal common law.

At oral argument, acting Solicitor General Katyal framed the case as unprecedented, explaining that "in the 222 years that this Court has been sitting, it has never heard a case with so many potential perpetrators and so many potential victims ... [t]he very name of the alleged nuisance, 'global warming,' itself tells you much of what you need to know."

Though they seemed to agree that this case is unprecedented, several justices pushed back on the government's prudential standing argument, finding it dissatisfying and perhaps misplaced.

Chief Justice Roberts explained, "[w]e don't usually base a decision on our general intuition, and the idea of prudential standing that we have jurisdiction of the case but we're not going to decide it is contrary to Chief

Justice John Marshall's famous line that if we don't have jurisdiction, we can't decide it, but if we do, we have to decide it."

Likewise, Justice Kagan expressed skepticism, noting that "you say we shouldn't go there [and address the political question doctrine], that we should instead address this matter on prudential standing grounds. But the political question doctrine actually seems more natural, given the kinds of arguments you're making."

These Suits Are a Threat to U.S. Businesses

These global warming nuisance cases seek to change the way energy is produced, regulated, and sold in this country by requiring energy companies and perhaps others to internalize what some argue are the externalities of activities that produce greenhouse gases. Indeed, the states' complaint in *AEP* notes the desirability of having companies implement "practical" options such as "changing fuels" and "increasing generation from ... wind, solar" and other sources that they predict will "reduc[e] carbon dioxide emissions without *significantly* increasing the cost of electricity."

If creative global warming suits like *AEP* are permitted to proceed, it seems certain that there will be additional litigation and it will not necessarily be limited to energy companies.

Because of the seemingly boundless chains of causation at issue in affixing responsibility for global climate change, the possibilities for future litigation seems almost endless: any company or entity that "contributes to" global warming through the emission of greenhouse gases can be called into court by any party allegedly harmed by the consequences of this decidedly global, complex, and imperfectly understood phenomenon.

As the Obama administration succinctly stated at the cert stage, "action by this Court would meaningfully affect an emerging category of litigation over greenhouse-gas emissions that implicates myriad plaintiffs and defendants." Br. in Support of Cert. at 10.

Reinforcing the potential reach of this case, the justices at argument questioned the states' attorney about whether any limiting principle applies to those who could be liable for global warming under their theory. Justice Scalia in particular pressed the point: "You're lumping them all [the energy company defendants] together. Suppose you lump together all the cows in the country. Would - would that allow you to sue all those farmers?"

Given that these companies' alleged contributions to the U.S. share of emissions range from 1-3.5% and an even smaller fraction of global emissions, many of the Justices seemed unconvinced by her assurance that only "significant" contributors could be held responsible.

The Court Will Offer Guidance on Global Warming Litigation

In *AEP*, the Supreme Court is positioned and likely to provide guidance to lower courts confronted with pending and future global warming nuisance cases. In so doing, the court has an opportunity to clarify the effects and limitations of *Massachusetts v. EPA*, as well as several core justiciability doctrines that limit the role of courts in this country.

At oral argument, justices across the bench voiced skepticism about the wisdom and propriety of this case proceeding. Though they clearly were engaged in the substantive and varied doctrinal issues presented by the states' theory, no clear consensus emerged for a decision.

In light of the many doctrinal issues presented in this case, it is difficult to predict which justices might agree to dismissal on any of the particular grounds raised. Almost all of the justices appeared deeply troubled by this case. Some seemed comfortable that the states had established Article III standing, and instead appeared focused on the political question doctrine as a basis for analysis.

Others focused on whether this case fits within its precedent, recognizing a cause of action under the common law of nuisance for interstate pollution. And many were wrestling with how a displacement analysis would impact this and future litigation. All told, none of the justices appeared comfortable allowing this novel public nuisance suit to proceed.

As for predictions, many aspects of *AEP* distinguish it from the 5-4 *Massachusetts v. EPA* decision, making the 2007 case an imperfect model for calculating the outcome here. But with the recusal of Justice Sonia Sotomayor, if the *Massachusetts v. EPA* alignment repeats - with Justice Kagan taking the place of Justice John Paul Stevens and Justice Kennedy voting to permit the states to maintain such actions - the court would produce a 4-4 split, which would leave the Second Circuit's decision intact.

No matter the outcome, the court or some portion thereof is likely to clarify the meaning and limits of *Massachusetts v. EPA*. In doing so, and in addressing the many other grounds raised to challenge the maintenance of global warming nuisance suits in federal court, the Supreme Court will offer guidance on the limits of the judiciary's institutional and constitutional competence to craft and order remedies for harms allegedly caused by global warming.

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[1] *Connecticut v. Am. Elec. Power Co. Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), rev'd, 582 F.3d 309 (2d Cir. 2009), cert. granted, No. 10-174 (U.S. Dec. 6, 2010).

[2] *Comer v. Murphy Oil USA*, No. 05-436 (S.D. Miss. Aug. 30, 2007), rev'd, 585 F.3d 855 (5th Cir. 2009), vacated on grant of reh'g en banc, 598 F.3d 208 (5th Cir. 2010), appeal dismissed, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010), *mandamus* denied, No. 10-294 (U.S. Jan. 10, 2011)

[3] *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir. 2010).

[4] In a fourth case, automakers were sued under nuisance theories. In 2007 that case was dismissed under the political question doctrine. See *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). An appeal was voluntarily dismissed.

[5] Randall S. Abate, "Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California, *40 Conn. L. Rev. 591, 626-27* (2008).

[6] Case No. 11-2203 (N.D. Cal. filed May 4, 2011).

[7] Mary Christina Wood, Atmospheric Trust Litigation, 129, chapter in *Adjudicating Climate Change: Sub-National, National, And Supra-National Approaches* (William C.G. Burns & Hari M. Osofsky, eds. 2009), available at http://law.uoregon.edu/faculty/mwood/docs/atmospheric.pdf