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Supreme Court Issues Unanimous Decision in *AEP v. Connecticut*

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The Supreme Court today released its opinion in *American Electric Power Co. v. Connecticut* ("AEP"), a closely watched case in which plaintiffs seek to assign liability for and secure carbon caps to abate greenhouse gas emissions. The Supreme Court in a unanimous opinion held that the federal claims could not proceed because Congress, in the Clean Air Act, displaced federal common law regulation of greenhouse gas emissions. Litigation over climate change will not soon end, but the Court sent a strong message that federal courts are not the proper forum to decide whether and how to address global warming.

AEP is one of several cases recently litigated in the federal courts, in which various plaintiffs argue that large electric power and other utility companies have created a nuisance under the federal common law through their emissions of carbon dioxide gasses. [View "The Fate Of Global Warming Nuisance Suits."]

In *AEP*, two groups of plaintiffs, one including eight states and New York City and the other including three nonprofit land trusts, sued four private companies and the Tennessee Valley Authority, arguing that the entities "are the five largest emitters of carbon dioxide in the United States," jointly producing ten percent of the emissions from all domestic human activities. These activities, the plaintiffs argued, jeopardized public lands, infrastructure, and health as well as habitats for animals and rare species. They sought an injunction from a federal court capping emissions and order specific reductions over a period of at least a decade.

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The trial court-like all trial judges to confront these nuisance suits to date-dismissed the case, finding that it demanded resolution of policy questions properly only determined only by Congress and the Executive. The Second Circuit reversed on the political question doctrine and further found that the case could proceed without running afoul of constitutional or prudential standing doctrines. It also found that federal common law provided a cause of action and that such a claim had not been displaced by the Clean Air Act or any EPA action.

The energy companies petitioned to the Supreme Court and presented several doctrinal issues as bases for decision. The Obama Administration participated in the case on behalf of a named defendant, the Tennessee Valley Authority. It supported the States' standing to bring suit, but urged the Court to remand for the Second Circuit to conduct a displacement analysis based on EPA action undertaken since the appellate panel's opinion.

The Court did not do that, instead deciding the displacement question in favor of the energy companies. It failed to resolve all the questions presented. It divided evenly on the critical question of constitutional standing. A recusal by Justice Sotomayor, who was on the Second Circuit panel that heard the case but did not participate in that decision, led to a 4-4 split on whether plaintiffs have standing to bring suit to address harms allegedly caused by the emission of gases into the atmosphere by the defendants, among others. Four of the remaining justices agreed that none of the plaintiffs had standing, but the other four justices found that at least some of the plaintiffs had standing. Accordingly, the Court affirmed jurisdiction under Article III by split decision and decided the case on the merits.

The Court determined that the plaintiff's claims could not stand because Congress displaced federal common law regarding carbon dioxide emissions from fossil-fuel fired plants when it adopted the Clean Air Act. The court noted that displacement of federal common law requires only that the statute "speaks directly to the question at issue." Here, the Court found that the Clean Air Act directs the EPA administrator to list categories of stationary sources that cause or contribute significantly to air pollution and to subsequently establish performance standards for new or modified sources and to regulate existing sources within that category. The Court recognized that once the EPA issues standards, enforcement can come from the states, the agency itself, or even individuals. Moreover, regardless of the EPA's ultimate action or inaction, states and private parties are entitled to petition for rulemaking and can challenge in federal appeals court any regulations that ultimately emerge. Given this process for seeking limits on the emissions of domestic power plants, the Court found "no room for a parallel track" under federal common law.

In rejecting the argument that federal common law is not displaced until the EPA actually exercises its regulatory authority, Justice Ginsburg emphasized that "[t]he critical point is that Congress delegated to the EPA the decision whether and how to regulate carbon-dioxide emissions from power plans; the delegation is what displaces federal common law." Displacement here is triggered by Congressional action. As Justice Ginsburg writes, "[i]ndeed, were EPA to decline to regulate carbon-dioxide emissions altogether . . . the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination." The Court took pains to remind litigants, including the government, that EPA action is still subject to judicial review for whether it is "arbitrary, capricious, and abuse of discretion, or otherwise not

in accordance with law." But Justice Ginsburg and the Court emphasized that determining how to regulate particular emissions requires "complex balancing" that the Clean Air Act assigns "to EPA in the first instance."

Underlying the Court's displacement analysis was a clear discomfort with the enterprise proposed by the plaintiffs, which would have placed federal district courts on the frontlines of emissions regulations. In finding that the EPA is "best suited to serve as primary regulator of greenhouse gas emissions," the Court recognized that it would be problematic to rely upon "district judges issuing ad hoc, case-by-case injunctions." The Court noted that district courts lack scientific, economic, and technical resources of an agency and that judges "lack authority to render precedential decisions binding other judges, even members of the same court."

The opinion leaves many important legal issues unresolved. By determining that this specific federal common law nuisance claim was displaced by the Clean Air Act, the Court failed to address the scope of the federal common law generally. The Court also declined to address whether the Clean Air Act displaces state law, leaving that matter for consideration in the future, perhaps in federal and state courts around the country.

Despite the Court's clear internal division over certain issues, the opinion did not draw lengthy or numerous concurring opinions. A very short separate opinion by Justice Alito, joined by Justice Thomas, agreed with the Court's disposition and its displacement analysis, but only "on the assumption (which I make for the sake of argument because no party contends otherwise) that the interpretation of the Clean Air Act . . . adopted by the majority in *Massachusetts v. EPA*, 549 U.S. 497 (2007), is correct." This confirms that at least some members of the Court remain unconvinced by that earlier decision and skeptical of federal courts' jurisdiction to hear such cases at all, regardless of displacement.

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Wiley Rein appellate and litigation partner Megan L. Brown, assisted by associates Brendan T. Carr, Michael Connolly and Ari Meltzer filed an amicus brief on behalf of the Cato Institute supporting the petitioner/defendants in *AEP*. Wiley Rein has actively participated in global warming nuisance litigation in the Court of Appeals and Supreme Court.