Supreme Court to Hear Appeal of *Connecticut v. American Electric Power*

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The Supreme Court of the United States has granted certiorari in the Second Circuit's *Connecticut v. American Electric Power* decision, which allowed federal common law nuisance claims to proceed against several utilities because of their greenhouse gas emissions. Among the issues raised are whether federal environmental programs now preempt the field and whether the case should be dismissed under the political question doctrine or on standing grounds.

In Spring 2011 the Supreme Court of the United States will hear an appeal of *State of Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), which determined that eight states, as well as New York City and three environmental land trusts, could bring federal common law nuisance claims against six electric power corporations. The claims were intended to cap and then reduce carbon dioxide emissions from what were alleged to be the five largest emitters of carbon dioxide in the United States, with fossil fuel-fired power plants in 20 states. The Second Circuit reversed a lower court decision dismissing the lawsuit under the political question doctrine, *i.e.*, that claims which present non-justiciable political questions cannot be decided by the judiciary.

Unlike most decisions reached in other federal jurisdictions, the Second Circuit determined the political question doctrine did not preclude the plaintiffs' nuisance claims. It also concluded the plaintiffs had standing under Article III of the U.S. Constitution to bring claims against all the utilities named, including the Tennessee Valley Authority (TVA). In addition, it held that because the plaintiffs had stated a claim under the federal common law of nuisance, it was not adjudicating state law nuisance claims. Finally, it determined the claims were not preempted by federal legislation or regulations, although it noted this could change if comprehensive legislation or regulations governing federal greenhouse gas (GHG) emissions were adopted.

While no such legislation has been enacted since the Second Circuit decision, the U.S. Environmental Protection Agency (EPA) has issued regulations that are intended to eventually reduce GHG emissions from both mobile sources and stationary sources, the latter through issuance of permits under the Prevention of Significant Deterioration and Title V permitting programs. The EPA's GHG regulations are slated to go into effect next year, but they have been appealed to the U.S. Court of Appeals for the D.C. Circuit, which has also been asked to stay their application to stationary sources pending a decision on the appeal.

On August 2, 2010, four of the utility defendants in the *American Electric Power* case filed a petition for certiorari. The solicitor general then filed a brief on behalf of the TVA in support of the petitioners, arguing that the Second

Circuit decision should be vacated and remanded because the issues are best addressed by Congress and the executive branch, and because the EPA's regulatory actions have now displaced any federal common law claims. Consequently, the brief asks the court to vacate the appellate court decision and remand the case back to the Second Circuit for further briefing on whether the plaintiffs' suit should be barred on prudential standing grounds (*i.e.*, on grounds of judicial self-restraint), and whether EPA's actions have now displaced any cognizable common law claims.

Justice Sotomayor has recused herself from the Supreme Court's review due to her earlier involvement with the case while sitting on the Second Circuit bench. Consequently, only eight Justices will consider it, four of whom dissented from the court's earlier decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that 5-4 decision written by Justice Stevens, the majority held that GHGs were covered by the Clean Air Act and that the EPA must determine whether GHG emissions from new motor vehicles caused or contributed to air pollution which might reasonably be anticipated to endanger public health or welfare, or if the science was too uncertain to make a reasoned decision. The EPA has now made such an endangerment finding.

Should the Supreme Court overturn the Second Circuit decision on the political question or standing grounds, it is likely that other climate change cases based on federal common law tort claims would be dismissed, and that the court's decision would have a chilling effect on similar litigation in the future. However, unless the Supreme Court can muster four votes in support of the Second Circuit's decision or the D.C. Circuit Court stays application of the GHG permit provisions to stationary sources so as to undercut the federal preemption argument, the Supreme Court may well vacate the decision and remand the case to the Second Circuit for consideration of the federal preemption and prudential standing arguments raised in the solicitor general's brief. Indeed, the Supreme Court could decide to follow that course of action even if such a stay is imposed by the D.C. Circuit.

With the exception of the *American Electric Power* decision, litigants seeking to use federal common law nuisance claims to achieve stationary source reductions in GHG emissions have had little success to date. Moreover, it is very unlikely that climate change legislation will be enacted by the new Congress, and the prospects for EPA regulation of stationary source GHG emissions in the near term hang in the balance as the D.C. Circuit considers both the appeal of EPA regulations on GHG emissions and a stay of their application to stationary sources. Should the D.C. Circuit impose such a stay, the Supreme Court's consideration of the Second Circuit decision will take on added importance to those seeking reductions in GHG emissions from power plants and other stationary sources.