Richard O. Faulk and John S. Gray report on the Supreme Court's recent decision refusing to precluding regulation of climate change emissions by federal public nuisance litigation.

DEFENDANTS WIN "ROUND ONE" OF CLIMATE CHANGE FIGHT IN UNITED STATES SUPREME COURT

By

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In *American Electric Power Co. v. Connecticut ("AEP")*, the United States Supreme Court held that federal common law public nuisance claims seeking injunctive relief against emitters of greenhouse gases ("GHG") were displaced by the Clean Air Act ("CAA") and EPA's regulatory implementation of the Act's provisions.[3] In hindsight, this holding seems an inevitable outgrowth of *Massachusetts v. EPA,* 549 U.S. 497 (2007), which held that GHGs are pollutants subject to CAA regulation. Building on that precedent in a unanimous 8-0 opinion,[4] the *AEP* Court gave the defendant utility companies a clear-cut victory by precluding judicial direct regulation of GHG through tort litigation.

Despite the Supreme Court's mandate, it is premature to declare victory over all climate change litigation based on common law public nuisance. The high court's ruling was conspicuously narrow – and it left many important issues unresolved. These include:

- What is the import of the Court's unusual 4-4 deadlock regarding whether the claim was justiciable in the first place – whether those questions arise from lack of standing or the presence of a "political question" constitutionally reserved to the Executive or Legislative branches of government?

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[3] *American Electric Power Co. v. Connecticut* ("AEP"), __ U.S __ (2011) (Docket No. 10-174)(slip opinion). Messrs. Faulk and Gray authored amicus curiae briefs at supporting certiorari and on the merits of the case on behalf of the American Chemistry Council, The National Association of Manufacturers, The American Coatings Association, The Property Casualty Insurance Association of America, and the Coalition for Public Nuisance Fairness. A copy of the merits brief is posted at http://www.linkedin.com/profile/view?id=51690213&trk=tab_pro

[4] Justice Sotomayor recused herself because she had participated as part of the Second Circuit panel who heard argument on the case. *See id.* (slip opinion at 17).

- Does the Court's "displacement" ruling also dispose of suits seeking damages under the federal common law, or only those invoking equitable abatement?

- Are public nuisance claims based upon state common law, as opposed to the displaced federal common law, preempted by the CAA and its regulatory framework?

- What is the precedential value of *AEP*, if any, in other pending climate change tort cases that seek damages, as opposed to injunctive relief directly regulating GHG emissions, such as *Native Vill. of Kivalina v. ExxonMobil Corp.*, currently awaiting oral argument in the 9th Circuit?

Given these troubling issues, AEP may ultimately be remembered more for the vagaries it left unresolved that for the victory it gave to a few electric utility companies.

BACKGROUND

Eight states, three nonprofit land trusts and the City of New York filed the *AEP* public nuisance case in 2004. They sued four private utilities[5] and the Tennessee Valley Authority and claimed that their GHG emissions tortuously contributed to the effects of global warming. Allegedly, the defendants were the five largest emitters of carbon dioxide in the United States and their GHG emissions substantially and unreasonably interfered with public rights "in violation of the federal common law of interstate nuisance, or alternatively, under state tort law."[6] The plaintiffs did not seek to recover damages. Instead, they sought injunctive relief to cap and reduce the defendants' GHG emissions.[7]

The district court dismissed the case in 2005. It held that the controversy raised non-justiciable "political questions" because the claims could not be adjudicated without first making impermissible policy determinations about the level at which to cap the defendants' GHG emissions and the appropriate amount of yearly emission reductions. The court also found that to adjudicate the plaintiffs' claims it would have to "determine and balance the implications of [the requested] relief on the United States' ongoing negotiations with other nations concerning global climate change;" "assess and measure available alternative energy resources;" and "determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security."[8]

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[5] The utility defendants are American Electric Power Company, Inc., Southern Company, Xcel Energy, Inc. and Cinergy Corporation. *Id.* at 4 n.5.

[6] *Id.* at 4.

[7] *Id.* at 4-5. Significantly, *AEP* was filed before the Supreme Court's decision in *Massachusetts v. EPA* – at a time when the Bush administration was arguing against the use of the CAA to regulate GHG emissions. Perhaps at that time the *AEP* plaintiffs saw no alternative to using the common law and the power of equity to reduce carbon pollution.

[8] *See Connecticut v. Am. Elec. Power Co*., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

The plaintiffs appealed to the Second Circuit, which heard oral arguments in this case in 2006 but refrained from issuing an opinion until after the U.S. Supreme Court issued it decision in *Massachusetts v. EPA*, a case in which the high court would decide whether Congress authorized EPA to address climate change under the CAA.

In 2007, the Supreme Court changed the climate change legal landscape, ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that EPA had the authority and a duty under § 7401 of the CAA to determine whether GHGs were an "endangerment" and, if so, how they should be regulated. Because EPA had neither exercised that authority nor offered any "reasoned explanation" for failing to do so, the high court concluded that EPA violated the law when it denied the requested GHG rulemaking.[9] Subsequently, the Obama administration determined that climate science was well settled, that mankind's impacts on a dangerously shifting climate could not be denied and that climate change posed an endangerment on both public health and the environment. Accordingly, beginning in 2009, EPA began taking steps toward national comprehensive GHG regulations. To date, EPA has promulgated regulations requiring GHG reporting, regulations on GHGs from light duty vehicles, and is moving toward implementing a scheme for regulating major industrial plants.

In 2009 (three years after oral argument), the Second Circuit reversed the district court's dismissal of the case and concluded that (1) the case was not barred by the political question doctrine and that the plaintiffs had adequately alleged standing; (2) all plaintiffs had stated a claim under the federal common law of nuisance; and (3) the CAA did not displace their claims.[10] The defendants filed a petition for certiorari, arguing that the plaintiffs lacked standing to raise nuisance claims, that the CAA grants EPA the exclusive authority to regulate GHG emissions, and that climate change regulation presents a non-judiciable political question. The Solicitor General of the United States filed a separate brief on behalf of the Tennessee Valley Authority supporting the Utilities' request for certiorari arguing that the case ought to be dismissed pursuant to prudential standing because EPA had issued of a number of new GHG regulations. The Supreme Court granted certiorari in 2010 – and then unanimously reversed the Second Circuit on the narrowest ground possible.

THE SUPREME COURT'S "DISPLACEMENT" RULING

Writing for the Court, Justice Ginsburg stressed that the mere enactment of federal legislation can displace federal common law claims. Although environmental protection is "undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices' and, if necessary, even 'fashion federal law,'"[11] she cautioned that

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[9] *Massachusetts v. EPA*, 549 U.S. at 534–535 (quoting §7607(d)(9)(A)).

[10] *AEP* at 5 (noting that at the time of the decision EPA had yet to promulgate any GHG regulations). Although Justice Sotomayor heard arguments and presumably participated in deliberations to some degree, she was confirmed to the Supreme Court before the Second Circuit's decision was announced. It was released as a 2-0 ruling – in which she did not participate.

[11] *Id.* at 7 (quoting *In Praise of Erie—And of the New Federal Common Law*, 39 N. Y. U. L. Rev. 383, 421-22 (1964) and discussing various federal common law lawsuits brought by one State to abate pollution emanating from another).

"[r]ecognition that a subject is meet for federal law governance, however, does not necessarily mean that the federal courts should create the controlling law."[12]

She explained that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears. Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law."[13] The test for whether legislation excludes federal common law is simply "whether the statute 'speak[s] directly to [the] question' at issue."[14]

Based on these precedents, the Court concluded that *Massachusetts v. EPA* "made plain that emissions of carbon dioxide qualify as air pollution subject to regulation" under the CAA and that it is "equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants."[15] Therefore, the CAA and the EPA actions it authorizes displaced "any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."[16]

STANDING AND "POLITICAL QUESTION" ISSUES

The Court affirmed the Second Circuit's decision to exercise Article III standing, but did so only by a 4-4 deadlocked vote. The holding is not precedent, but merely binds the parties to the individual case. Nevertheless, it raises intriguing questions regarding how the complete compliment of justices might rule when the issues are once again presented.

In *AEP*, four justices held that at least "some" plaintiffs had Article III standing under *Massachusetts* and, further, that "no other threshold obstacle" (*i.e.*, political question) barred review. Four other justices held that *none* of the plaintiffs have Article III standing by adhering to a dissenting opinion in *Massachusetts* or distinguishing that decision. Consequently, the equally divided Court declined to disturb the appellate court decision finding that the case should not be dismissed on that basis and affirmed the Second Circuit's exercise of jurisdiction.[17] The split arguably resembles the 5-4 vote in *Massachusetts v. EPA,* in which the majority afforded *states* "special solicitude" standing in cases involving the federal government or, as in *AEP*, where the adverse impacts being complained about originate from other states.

Given *AEP's* cryptic affirmance of standing for "some" plaintiffs, defendants in cases involving non-state plaintiffs may argue that *standing to pursue climate change litigation is*

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[12] Id. at 7-8.

[13] *Id*. at 9 (internal citations omitted).

[14] *Id*. at 10 (citations omitted).

[15] *Id*.

[16] *Id*.

[17] *AEP* at 6.

limited to states. Although the Second Circuit ignored *Massachusetts'* "special solicitude" reasoning, and specifically permitted suits by non-state parties, the Supreme Court's language suggests some degree of disagreement.[18] Thus, *even in the Second Circuit on remand*, it is unclear whether non-state parties, as opposed to states, have standing to pursue climate change litigation. Even more clearly, defendants in other jurisdictions (*e.g.*, *Kivalina* in the Ninth Circuit) remain free to challenge the standing of non-state plaintiffs.

The disposition of *AEP's* "political question" argument is equally problematic. By the same 4-4 vote, the Court also found that "no other threshold obstacle bars review." If one examines the Court's "displacement" reasoning, however, the holding echoes arguments championed by "political question" proponents – namely, that courts are particularly ill-suited to decide climate change disputes:

> The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.[19]
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> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency 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. See generally Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 865–866 (1984). Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.
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> Notwithstanding these disabilities, the plaintiffs propose that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable," and then decide what level of reduction is "practical, feasible and economically viable." These determinations would be made for the defendants named in the two lawsuits launched by the plaintiffs. Similar suits

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[18] *Id*. Though unidentified in the opinion, the four justices favoring justiciability may be Ginsburg, Breyer, Kagan and Kennedy. The four who disagree may be Roberts, Scalia, Thomas and Alito. It should be noted that Thomas and Alito filed a concurrence casting doubt on *Massachusetts* that neither Roberts nor Scalia joined. The resolution of future cases remains uncertain. A majority may favor justiciability when Justice Sotomayor participates. On the other hand, a majority may reject claims by private parties if Justice Kennedy joins to limit standing only to states.

[19] *Id*. at 13.

> could be mounted, counsel for the States and New York City estimated, against "thousands or hundreds or tens" of other defendants fitting the description "large contributors" to carbon-dioxide emissions.[20]

Given this reasoning, it seems clear that the two primary justiciability arguments in *AEP* remain viable – for now – waiting only for the vote of a recused justice.

Moreover, especially in the *Kivalina* case pending in the Ninth Circuit, plaintiffs may argue that *AEP's* "displacement" ruling only applies to suits seeking to abate GHG emissions directly, as opposed to actions seeking damages for harm already sustained. Although both types of cases require courts to determine the "reasonableness" of GHG emission levels, damage suits seek retrospective relief, rather than prospective regulation. Arguably, damage awards serve a "regulatory" purpose because they impact defendants' future behavior, but that impact is less immediate, less coercive and more speculative than direct regulation via equitable relief punishable by contempt. These arguable distinctions probably will be explored if *Kivalina* is found justiciable.

ARE STATE LAW PUBLIC NUISANCE CLAIMS PREEMPTED?

The plaintiffs asserted state law public nuisance claims in *AEP* under the law of each state where the defendants operated their power plants, but the Second Circuit did not address their validity.[21] After the Supreme Court held the plaintiffs' could not pursue their federal common law claims because they had been displaced by EPA's GHG regulations, it remanded the case back to the Second Circuit to address whether the state law claims were preempted by the same federal laws that displaced the federal causes of action.[22]

Pursuant to Article VI of the United States Constitution "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."[23] Courts have found that preemption of state law claims occurs in three situations. *First*, preemption may occur when Congress explicitly provides for that effect. *Second*, preemption may be implied when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Third*, preemption may be found where state law "actually conflicts" with federal law.[24]

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[20] *Id*. at 14-15 (internal citations omitted).

[21] *AEP*, 582 F.3d 309, 392 (2d Cir. 2009).

[22] *AEP*, __ U.S. __ (2011) (Slip opinion at 16). Space limitations preclude a complete analysis of this crucial issue here.

[23] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (state laws that conflict with federal laws have no effect). However, "courts should not lightly infer preemption." *International Paper v. Ouellette*, 479 U.S. 481, 491 (1987).

[24] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

At this stage in the proceedings, it is premature to speculate regarding the outcome of the preemption analysis – but it is obvious that the problem is substantially different than a simple "displacement" test. In *International Paper Co. v. Ouellette*,[25] for example, the Supreme Court held that the Clean Water Act did not preempt all state law nuisance claims, but merely restricted claims to those based upon "the law of the State in which the point source is located."[26] It is unclear whether the same result will obtain under the CAA, which differs from the CWA in many aspects.

If the Second Circuit determines that state law claims remain viable, and if that decision is affirmed by the Supreme Court, industry may face the prospect of litigation based upon the substantive laws of fifty states. Moreover, even if the courts determine that the CAA preempts state law claims for injunctive relief, the Supreme Court may find that the CAA does not preempt damage claims under state law. Such claims have been asserted in both *Kivalina* and in the recently re-filed *Comer v. Murphy Oil* lawsuit in Mississippi. These issues will probably remain unresolved until they are fully developed for Supreme Court review.

CONCLUSION

Although the decision in *AEP* is undeniably a victory for defendants against those seeking to use the tort system to regulate GHG emissions directly, the victory is merely "round one" in an ongoing struggle over the use of public nuisance to prevent and redress global climate change. Difficult and dangerous questions remain unanswered, and they will probably remain so until the Supreme Court once confronts them in different contexts. Cases such as *Kivalina* in the Ninth Circuit and the remanded *AEP* case in the Second Circuit are the best candidates for high court review, but new actions, such as the refilled *Comer* suit, promise continued controversy. *AEP's* failure to deliver a definitive "knockout" probably encourages public nuisance advocates to persist in their quest – not only in climate change litigation, but also in other contexts where the ancient doctrine might apply.

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[25] 479 U.S. 481 (1987),

[26] *Id*. at 493, 487. In *Ouellette*, the Court found that the Clean Water Act preempted common law suits in one state (the affected state) against a polluter in another state (the source state) because such suits would disrupt the Act's envisioned regulatory scheme. The analysis should be the same under the CAA.