

Justices Reject States' Climate Change Nuisance Lawsuit

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Ginsburg's opinion for the Court ruled against the environmental coalition on the narrowest possible ground; in so doing, it declined to rely on legal theories that, if adopted, would have been far more damaging to those seeking to pursue climate change litigation in federal courts.

In 2004, California and its co-plaintiffs sued four private power companies and the federal Tennessee Valley Authority in federal district court in New York. Plaintiffs alleged that defendants' huge mid-western power plants represent the largest sources of carbon dioxide in the nation, with collective annual emissions of 650 million metric tons. (That represents 10 percent of human-caused carbon dioxide emissions in the United States and 2.5 percent of such emissions worldwide.) Plaintiffs argued that these power plant emissions constituted a public nuisance under federal common law, and sought an injunction capping and eventually reducing defendants' carbon dioxide emissions.

The district court dismissed the lawsuit, finding it raised a non-justiciable, "political question" best left to Congress and the executive branch. Plaintiffs then appealed to the 2nd U.S. Circuit Court of Appeals.

Critically, while the *American Electric Power* appeal was pending, the Supreme Court in 2007 ruled in *Massachusetts* that, contrary to the Bush administration's position, the federal government possessed the authority to regulate climate change under the Clean Air Act. President Barack Obama directed EPA to do just that upon taking office in 2009.

The 2nd Circuit reversed the district court dismissal in *American Electric Power*, finding that plaintiffs' federal nuisance claim was indeed subject to federal court resolution. The appellate court went on to find defendants' other defenses similarly without merit: it ruled plaintiffs had demonstrated adequate standing to sue, and that the Clean Air Act did not displace their common law nuisance claim.

The Supreme Court granted the power companies' petition for certiorari in late 2010 — notwithstanding the recommendation of the federal government that it decline to hear the case. (The solicitor general nevertheless aligned itself with the private power companies on the merits — much to the dismay of California and the other plaintiffs, who had hoped for support from the Obama administration.)

California and its litigation allies suffered another early setback when it was announced that Justice Sonia Sotomayor — a member of the Court's "liberal" wing — had recused herself from the case, presumably due to her having heard the matter while a judge on the 2nd Circuit.

On June 20, the Supreme Court issued its decision in *American Electric Power*. Some aspects of the unusual opinion were unanimous, while others reflected deep and continuing divisions among the justices.

Justice Ginsburg first addressed the threshold procedural questions of standing and "political question." She observed that only four of the eight remaining justices would rule that plaintiffs have constitutional standing to bring their nuisance action, with the other four adhering to their view (first advanced in dissent in *Massachusetts*) that even sovereign states lack standing to litigate climate change issues in federal court. Under longstanding Supreme Court rules, however, such an impasse results in an "equally divided Court" affirming the lower court decision on the issue — i.e., in the states' favor — without serving as precedent for future cases. Justice Ginsburg's opinion reached the same result regarding the power company's related claims that plaintiffs lacked "prudential" standing (due to the allegedly generalized nature of their grievances), and

regarding the political question issue.

By contrast, the Court spoke with one voice when it turned to the merits. All eight justices agreed that plaintiffs' common law nuisance claim was displaced by the Clean Air Act, and by EPA's now-settled authority to regulate greenhouse gas emissions under the Act. The Court grounded its holding in separation-of-powers concerns: "[I]t is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." Inasmuch as Congressional enactment of the Clean Air Act "speaks directly" to greenhouse gas emissions from defendants' power plants, the Court opined, "we see no room for a parallel track" of litigation to accomplish the same objective through invocation of federal common law nuisance principles.

The justices handed the state of California and its environmental allies a landmark litigation victory, ruling that federal officials had both the authority and responsibility to consider regulating greenhouse gases under the Clean Air Act.

Further parting company with the 2nd Circuit, the Supreme Court deemed irrelevant the fact that EPA has not yet concluded its rulemaking process or actually begun regulating greenhouse gas emissions from defendants' power plants: "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law."

The justices expressly declined to address one final issue: whether the Clean Air Act similarly supersedes public nuisance lawsuits based on state common law. The Court remanded that particular question to the lower courts. (It seems unlikely that state nuisance law will find a more hospitable judicial reception than federal common law-based claims, however. Defendants in such cases can be expected to argue that state nuisance claims in climate change litigation are either preempted by the federal Clean Air Act or displaced by comparable state statutory schemes such as California's Global Warming Solutions Act (AB 32).)

The Supreme Court's decision in *American Electric Power* unquestionably ends the ability of California and other environmental plaintiffs to rely on the federal law of nuisance to address climate change concerns. And the decision likely sounds the death knell for other public nuisance actions pending around the country, including one such case pursued by Native Alaskans that's currently before the 9th U.S. Circuit Court of Appeals. But the environmentalists' loss could have been a lot worse. The Supreme Court confirmed — by the slimmest of margins — its earlier holding in *Massachusetts* that at least states have constitutional standing to pursue other forms of climate change litigation in the federal courts. And the fact that the Court declined to find such suits barred by the "political question" doctrine is a huge relief to environmental interests. (That issued will undoubtedly continue to be litigated in the lower federal courts, and likely find its way back to the Supreme Court in the future.)

Finally, this decision reflects a major irony: As the Court noted in its opinion, the law of climate change is far different than it was when Califor-

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Richard M. Frank is professor of environmental practice and director of the California Environmental Law & Policy Center at the UC Davis School of Law.

Impact of US Supreme Court Climate Change Decision Could Have Been Worse

For the second time in four years, the U.S. Supreme Court has weighed in on the most contentious and important environmental issue of our era: climate change. In *Massachusetts v. Environmental Protection Agency (EPA)*, 549 U.S. 497 (2007), the justices handed the state of California and its environmental allies a landmark litigation victory, ruling that federal officials had both the authority and responsibility to consider regulating greenhouse gases under the Clean Air Act. But now the Court — relying in significant part on its earlier decision in *Massachusetts* — has rejected efforts by California and another group of environmental allies to use the federal common law of nuisance to reduce major sources of greenhouse gas emissions.

In *American Electric Power Inc. v. Connecticut*,

2011 D.DAR 8968 (June 20, 2011), the justices ruled that the Clean Air Act, and EPA's ongoing regulatory efforts, "displace" the federal common law of nuisance. A coalition of states, the city of New York and private land trusts had relied on federal nuisance law in litigation to abate greenhouse gas emissions from large, coal-fired power plants.

To be sure, *American Electric Power* represents a major win for the mid-western power companies and the federal government, which sided with them. And the case unquestionably represents a setback for California, other states and environmental organizations that had won a series of important climate change lawsuits in federal courts until this decision. But Justice Ruth Bader

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