

*American Electric Power Company v. Connecticut*, 131 S. Ct. 2527 (2011).

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**ABSTRACT**

*American Electric Power Company v. Connecticut* reaffirms the Supreme Court’s decision in *Massachusetts v. Environmental Protection Agency* in which the Court ruled that the EPA had authority to regulate greenhouse gas (GHG) emissions. *American Electric Power Company* also extends the *Massachusetts* decision by eliminating the possibility of public nuisance tort suits brought under the federal common law as redress for GHG emissions.

**I. INTRODUCTION**

*American Electric Power Company v. Connecticut*<sup>1</sup> reaffirms the United States Supreme Court’s holding in its 2007 decision, *Massachusetts v. Environmental Protection Agency*.<sup>2</sup> In *Massachusetts*, the Court held that the Environmental Protection Agency (EPA) had authority to regulate GHG emissions under the Clean Air Act<sup>3</sup> (CAA).<sup>4</sup> In response, the EPA began regulatory processes aimed at Light-Duty vehicle emissions<sup>5</sup> (light-duty vehicles weigh less than 10,000 pounds) and at emissions from “major sources” (major sources are stationary sources that emit more than 100 or 250 tons per year of a regulated air pollutant<sup>6</sup>).<sup>7</sup> In *American Electric Power Company*, the Court held that EPA regulation of GHGs under the CAA displaced the plaintiffs’ federal

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<sup>1</sup> *Am. Elec. Power Co. v. Conn.*, 131 S. Ct. 2527 (2011).

<sup>2</sup> *Mass. v. Env’tl. Protec. Agency*, 549 U.S. 497 (2007).

<sup>3</sup> 42 U.S.C. § 7602(g) (2006) (defining “air pollutant”).

<sup>4</sup> *Mass.s.*, 549 U.S. at 529–30.

<sup>5</sup> 75 Fed. Reg. 25324 (May 7, 2010).

<sup>6</sup> 42 U.S.C. § 7412(a)(1).

<sup>7</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2532–2533.

common law right to a remedy.<sup>8</sup> The Court, equally divided, also affirmed the Second Circuit’s exercise of jurisdiction on the basis that at least some of the plaintiffs had standing under Article III of the U.S. Constitution.<sup>9</sup>

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. *Massachusetts v. EPA***

In 1999, a group of 19 organizations filed a petition for rule-making with the EPA, asking the Agency to regulate GHG emissions from new motor vehicles.<sup>10</sup> The EPA refused the petition in 2003<sup>11</sup> and the plaintiffs filed suit seeking review.<sup>12</sup> In 2007, the United States Supreme Court held that States had *parens patriae* standing to challenge the EPA’s failure to regulate GHG emissions because climate change resulting from those emissions presented an “actual” and “imminent” threat of harm to the States’ interests.<sup>13</sup> The Court also held that GHGs are “air pollutants” within the language of the CAA.<sup>14</sup> Therefore, the Court held, the CAA required the EPA to present a reasoned basis for its decision whether or not to regulate them.<sup>15</sup>

### **B. The “Cause and Contribute” and “Endangerment” Findings**

In 2009, the EPA found that GHGs cause or contribute to air pollution.<sup>16</sup> The EPA also found that the air pollution to which GHGs cause or contribute may endanger the public health or welfare.<sup>17</sup> Based on these findings, the EPA began processes to

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<sup>8</sup> *Id.* at 2537.

<sup>9</sup> *Id.* at 2535.

<sup>10</sup> *Mass.*, 549 U.S. at 510.

<sup>11</sup> *Id.* at 511 (citing 68 Fed. Reg. 52922 (2006)).

<sup>12</sup> *Id.* at 514.

<sup>13</sup> *Id.* at 521.

<sup>14</sup> *Id.* at 528–29.

<sup>15</sup> *Id.* at 530.

<sup>16</sup> 74 Fed. Reg. 66536–66546 (Dec. 15, 2009).

<sup>17</sup> *Id.*

regulate GHG emissions from new motor vehicles and from “major stationary sources,”<sup>18</sup> such as power plants, under the CAA.

### **C. Procedural History of *American Electric Power Company***

In 2004, two separate groups of plaintiffs sued four private power companies as well as the federal Tennessee Valley Authority on the theory of public nuisance under the federal common law.<sup>19</sup> The plaintiffs sought injunctive relief and requested the district court to establish a cap to defendants’ GHG emissions with annual reductions.<sup>20</sup> The district court dismissed both suits as presenting non-justiciable political questions.<sup>21</sup>

The Second Circuit reversed in 2009.<sup>22</sup> It held that the political question doctrine did not bar the suits and that the plaintiffs had Article III standing.<sup>23</sup> The court also held that the CAA did not displace federal common law.<sup>24</sup> The Second Circuit partially based its decision on the fact that the EPA had not begun any rule-making processes aimed at GHGs at the time of its decision.<sup>25</sup> The defendants petitioned for certiorari and the Supreme Court granted it.<sup>26</sup>

### **ANALYSIS**

The Court first addressed whether the plaintiffs’ had Article III standing. In a four-four split decision, the Court determined that at least some of the plaintiffs had

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<sup>18</sup> 42 U.S.C. § 7602(j).

<sup>19</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2534.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2534–2535.

<sup>26</sup> *Id.* at 2535.

Article III standing, and thus, the suit was permissible under the *Massachusetts* rationale.<sup>27</sup> Therefore, it affirmed the Second Circuit’s exercise of jurisdiction.<sup>28</sup>

The Court then turned to the plaintiffs’ federal common law right to bring a nuisance suit based on pollution originating in other states. Despite the holding in *Erie Railroad Company v. Tompkins*,<sup>29</sup> a federal common law has evolved around environmental issues.<sup>30</sup> The Court emphasized that the body of law authorizing states to sue out-of-state sources whose emissions threaten public health or welfare has not yet been applied to questions involving climate change or extended to non-state entities.<sup>31</sup> Regardless, the Court determined that since legislation authorized EPA to regulate carbon dioxide emissions, the right to bring federal common law nuisance claims had been displaced.<sup>32</sup>

Citing its decision in *Milwaukee II*,<sup>33</sup> the Court explained that once Congress has addressed a common law question, its action “displaces” the federal common law.<sup>34</sup> The Court reasoned, “it is the office of Congress . . . to prescribe national policy.”<sup>35</sup> The Court found the CAA “speaks directly” to the issue of GHGs as air pollutants.<sup>36</sup> Thus, the CAA displaced the federal common law system as a mechanism for GHG regulation and left no room for common law remedies.<sup>37</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>30</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2535.

<sup>31</sup> *Id.* at 2536.

<sup>32</sup> *Id.* at 2537.

<sup>33</sup> *Milwaukee v. Ill.*, 451 U.S. 304 (1981)(holding that amendments to the Clean Water Act displaced the nuisance claim it recognized in *Milwaukee I*).

<sup>34</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2537.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2537–2538.

The Court then addressed accountability, summarizing the method by which EPA and state regulations interact to implement the CAA.<sup>38</sup> The CAA provides enforcement mechanisms, including criminal penalties, for emitters who knowingly violate its standards.<sup>39</sup> The CAA demands accountability from the EPA, and if the EPA refuses to set emissions standards, the appeals procedure used in *Massachusetts* is available.<sup>40</sup> Courts might then evaluate the refusal under the Administrative Procedures Act’s “arbitrary and capricious” standard.<sup>41</sup> Furthermore, if the emissions standards are inadequate, they are subject to judicial review.<sup>42</sup> There is no need for additional redress in nuisance law.<sup>43</sup>

Indeed, the EPA need not have to actually set regulatory standards for “displacement” of the common law to occur.<sup>44</sup> The Court stated that Congress delegated the authority to regulate GHG emissions from power plants to the EPA through the CAA.<sup>45</sup> The avenues for judicial review existing within the CAA and administrative law are more appropriate than the federal common law for resolving disputes.<sup>46</sup> The Court explained the agency is better equipped than individual federal courts to set emission standards for GHGs.<sup>47</sup> The Court left the availability of state law nuisance claims open for consideration on remand.<sup>48</sup>

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<sup>38</sup> *Id.* at 2538.

<sup>39</sup> *Id.*

<sup>40</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2538.

<sup>41</sup> *Id.* at 2539.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2537–2538.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2538.

<sup>46</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2539–2540.

<sup>47</sup> *Id.* at 2540.

<sup>48</sup> *Id.* at 2540–2541.

#### **IV. CONCLUSION**

*American Electric Power Company* is significant because it eliminates potential for public nuisance claims founded in the federal common law against GHG emitters. The divided opinion on the Article III standing issue is also notable because it illustrates that standing in climate change suits may be tenuous.

While the *American Electric Power Company* and *Massachusetts* decisions provide grounds for regulating GHG emissions, they do not replace the need for climate legislation. The CAA is an unwieldy tool for addressing GHG emissions and climate change because it was designed to address air pollutants whose effects are primarily localized. Precisely-tailored legislation would be better suited to regulating GHGs and their global effects.