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April 10, 2007

Thomas Asreen, Acting Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
Foley Square
40 Centre Street
New York, NY 10007

Re: State of Connecticut, et al. v. American Electric Power Company, Inc., et al.
(05-5104-cv)
Submission of additional authority pursuant to FRAP 28(j)

Dear Mr. Asreen:

The Plaintiffs in the above-captioned case submit this letter, pursuant to Fed. R. App. P. 28(j), to advise the Court of supplemental authority relevant to the case.

The decision of the Supreme Court in Massachusetts v. EPA, No. 05-1120 (April 2, 2007), governs the standing issue in State of Connecticut v. American Electric Power. It also is relevant, though to a lesser extent, to the defendants' preemption argument and their argument in this appeal that domestic regulation of greenhouse gases is inextricably intertwined with international negotiations and thus cannot occur without the consent or direction of the Executive.

In Massachusetts, twelve States, four cities and various environmental groups challenged EPA's conclusion that carbon dioxide emissions from motor vehicles cannot be regulated under section 202 of the Clean Air Act.

The Massachusetts decision addressed a challenge to the States' standing that was similar to the defendants' standing challenge in American Electric Power. In rejecting EPA's arguments that the State Petitioners lacked standing in Massachusetts, the Supreme Court made two sets of holdings directly relevant to the appeal in American Electric Power. First, relying on Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), and other decisions of the Court in which States have sought judicial relief for injuries caused by out-of-state actors, the Court recognized that States are "entitled to special solicitude in our standing analysis." Slip Op. at 17. The Supreme Court's analysis provides further support for the position of the Plaintiffs-Appellants in this case and for our reading of such cases as Tennessee Copper. See Brief of Plaintiffs-

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Appellants ("Pl. Br.") at 3-7, 38-41; Reply Brief for Plaintiffs-Appellants ("Pl. Reply Br.") at 36-40.

Second, in Massachusetts the Court held that the injuries that climate change is inflicting and will inflict on the State Petitioners are sufficient to confer standing under Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992): the injuries are "actual and imminent," Slip Op. at 18; failure to regulate greenhouse gas emissions contributes and will contribute to those injuries, Slip Op. at 20; and regulation of major domestic contributors to climate change, even if it would only "slow the pace of global emissions increases," satisfies Lujan's redressability requirement, Slip Op. at 23. These holdings support the American Electric Power Plaintiffs' analysis of their standing to seek regulation of domestic greenhouse gas emitters. See Pl. Br. at 41-46; Pl. Reply Br. at 40-47.

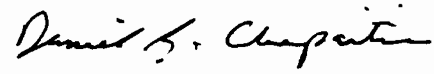
The Supreme Court's resolution of the merits of the issues in Massachusetts also is relevant to, though not dispositive of, the defendants' preemption argument in American Electric Power. The Supreme Court's decision in Massachusetts eliminated certain obstacles to regulation of greenhouse gases under the Clean Air Act, but it did not hold that such regulation is mandated. The decision recognizes that the Clean Air Act imposes an obligation on EPA to take a serious look at every "air pollutant," that is every "physical, chemical substance or matter which is emitted into or otherwise enters the ambient air," Slip Op. at 26 (quoting 42 U.S.C. § 7602(g)), to determine whether the air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," Slip Op. at 30 (citing 42 U.S.C. § 7251(a)(1). And it specifically holds that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant' . . ." Slip Op. at 29-30. Notwithstanding the resulting agency obligation to determine whether greenhouse gases can be anticipated to endanger public health and welfare, the Court acknowledged the possibility that EPA still might conclude that it is not required to regulate greenhouse gas emissions from motor vehicles under Clean Air Act section 202. Slip Op. at 30.

Given the Court's precise holding, any argument that the Clean Air Act preempts federal common law actions to address climate change is at best premature. As Plaintiffs have explained in their briefs to this Court, the federal common law is not preempted until federal statutory law provides a remedy. Pl. Br. at 57. Thus, plaintiffs' federal law claim regarding power plant emissions is not preempted until federal statutory or regulatory limits on carbon dioxide emissions from power plants are in place. As we explained in our brief, "the day may come that implementation of carbon dioxide limitations for the utility sector will preempt the federal common law. But that day has not yet arrived. . . ." Id. at 64.

Finally, the Court rejected defendants' contention that domestic regulation of greenhouse gases is inextricably linked to international negotiations, and thus cannot occur without the Executive's direction. Slip Op. at 31. The decision is thus inconsistent with defendants' argument that foreign affairs considerations prevent the federal courts from adjudicating Plaintiffs' federal common law claim. Indeed, the Court specifically determined that the case before it did not constitute a political question. Id. at 13.

Thank you very much for your consideration.

Sincerely,



Daniel J. Chepaitis
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cc: Shawn Patrick Regan (by email)
Matt Pawa (by email)