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Sustainability & Climate Change Reporter

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U.S. Supreme Court Takes Another Run At Climate Change

Tuesday, April 19, will be a watershed day for climate change litigation as the U.S. Supreme Court hears oral argument in *American Electric Power v. Connecticut*. At stake is whether states and private parties should be allowed to bring common law nuisance claims against utilities for their greenhouse gas ("GHG") emissions. While the authority of the federal Environmental Protection Agency to regulate GHG emissions is not directly at issue, the case will implicate the Court's 2007 decision in *Massachusetts v. EPA*, which held that GHG emissions are a pollutant under the Clean Air Act and that states have standing to challenge inaction by the federal government. Meanwhile, the elephant in the courtroom, so to speak, are the continuing efforts in Congress to curb the EPA's adoption of regulations addressing climate change issues.

Underlying Lawsuit & Appeal

In 2004, eight states (Connecticut, California, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin), three private land trusts and New York City sued five utilities asserting a claim for federal common law public nuisance. The lawsuit alleged that GHG emissions from the utilities' power plants contributed to global warming and, thereby, threaten injury to the states and their citizens. The district court dismissed the case as raising complex policy questions that should be decided by the legislative and executive branches, not by the courts.

The Second Circuit Court of Appeals reversed in a decision issued by two judges (the third, now-Supreme Court Justice Sonia Sotomayor heard oral argument but recused herself from the decision because of her subsequent nomination to the Court). The Second Circuit held that the nuisance claims do not involve nonjusticiable political questions and, at least for purposes of determining the plaintiffs' standing, the case could move forward through discovery and summary judgment, which would require plaintiffs to provide more evidence to support their claim.

Issues

The three primary issues before the U.S. Supreme Court are:

- Whether the states and private parties have standing to bring a common law claim;
- Whether there is even a common law nuisance action that would apply to climate change; and
- Whether the federal common law claims are displaced by either the Clean Air Act or the EPA's GHG regulations.

The briefing in the case has been extensive. The Climate Law Blog at Columbia Law School's Center for Climate Change Law has posted excellent summaries of the issues in the [utilities'](#) and [states'](#) opening briefs and the utilities' [reply](#). In addition, the case has drawn 31 separate amicus briefs from a wide range of interests such as the U.S. Chamber of Commerce, National Association of Home Builders, Business Roundtable, Edison Electric Institute, major oil companies, National Automobile Dealers Association, American Trucking Association, Petroleum Marketers Association, CATO Institute and 23 states (all against allowing nuisance claims) to Defenders of Wildlife, Westinghouse Solar, a coalition of religious organizations and four states (in support of permitting nuisance claims).

A New Dynamic

When the utilities, six states (New Jersey and Wisconsin dropped out), land trusts and city argue before the Supreme Court on Tuesday, they will face a different Court than the one that decided *Massachusetts*. Justice Stevens, the author of the 5-4 majority decision, and Justice Souter, a member of the majority, have been replaced by Justices Sotomayor and Kagan. Only eight of the justices, however, will consider the *AEP* case because Justice Sotomayor has recused herself due to her participation in the Second Circuit case. That leaves a potential for either a 4-4 tie, which would mean the Second Circuit decision stands, or one of the *Massachusetts* majority switches sides. Because of this shift, the merits briefing in *AEP* no doubt has paid careful attention to the dissents in *Massachusetts*, which focused on the nonjusticiability of the states' claims regarding standing and injury.

Another critical issue not raised by *Massachusetts*, but which may come up if a majority can get past the standing issue, is whether EPA's GHG regulations have displaced, or will at some point in the future will displace, any common law claims. [Seth Jaffe](#) of Foley Hoag points out the nuances in the parties' briefs on this issue. The irony is that the displacement argument may be good only so long as the EPA actually is allowed to regulate. In the last budget vote, EPA's climate change programs took substantial hits and some in Congress are aiming to go even further and enact either a complete ban on EPA regulating GHG or defund the agency's programs to prevent implementation. If, however, only one of the Justices switches to the *Massachusetts* dissenters' position on standing, the Court would not even have to address displacement.

The oral argument on Tuesday should be fascinating and the comments of the Justices will be closely watched for clues as to the outcome, which is expected in June.

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Lane Powell PC | Your Pacific Northwest Law Firm®

Seattle

1420 Fifth Avenue
Suite 4100
Seattle, WA 98101-2339
Phone:
206.223.7000

Fax:
206.223.7107

Portland

601 SW Second Avenue
Suite 2100
Portland, OR 97204-3158
Phone:
503.778.2100

Fax:
503.778.2200

Olympia

111 Market Street NE
Suite 360
Olympia, WA 98501
Phone:
360.754.6001

Fax:
360.754.1605

Anchorage

301 West Northern Lights Blvd.
Suite 301
Anchorage, AK 99503
Phone:
907.277.9511

Fax:
907.276.2631

London

Office 2.24
148 Leadenhall Street

London, EC3V 4QT, England

Phone:

020.7645.8240

Fax:

020.7645.8241