

Landmark Climate Change Nuisance Case is Headed to the Supreme Court

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This past fall, a lawsuit brought by eight states, including Connecticut, finds itself in the forefront of U.S. climate change litigation. Through the lawsuit, the plaintiffs (collectively States) want to force several power companies to reduce their greenhouse gas emissions, arguing that the emissions contributed to the public nuisance of global warming. The case, *Connecticut v. American Electric Power*, is one of three common law climate change lawsuits working their way through the U.S. judicial system. And it happens to be the first of the three to make its way to the U.S. Supreme Court. Last year, the U.S. Court of Appeals for the Second Circuit reversed a lower court's dismissal of the case, a decision that would allow the case to move beyond the preliminary stages. This August, defendant power companies appealed the Second Circuit's decision to the Supreme Court. This article provides an overview of the case history and the two primary issues being raised – political question and standing.

Background

Connecticut v. AEP is the consolidation of two similar lawsuits (one brought by a group of eight states and the city of New York, the other by three land trusts) filed against six electric power companies who own and operate coal-fired power plants across the United States. The States argue that climate change is causing detrimental effects to human health and natural resources and that the six companies are the “five largest emitters of carbon dioxide in the United States and ... among the largest in the world.” The States assert that impacts of climate change, exacerbated by the power companies' actions, are harming the environment, residents, and property of the states and will cost them billions of dollars; the harms will accelerate over the upcoming decades if no action is taken. The States seek to force the power companies to cap and reduce their carbon dioxide emissions.

In 2005, the power companies successfully argued that the case was precluded from judicial review because the issue of cap and trade was a political question and the case was dismissed by the district court. The States appealed this decision to the Second Circuit. In 2009, the Second Circuit reversed the lower court decision and ruled the matter was *not*

precluded by the political question doctrine and the parties had standing to bring their action. Now, in 2010, the matter has been appealed further to the U.S. Supreme Court.

While the Supreme Court has yet to grant review of the case, a variety of interests have filed briefs with the Court including the U.S. Solicitor General, on behalf of the Tennessee Valley Authority (a named defendant), a group of law professors, the Association of International Automobile Manufacturers, and the U.S. Chamber of Commerce. The briefing period was scheduled to end November 3 with a decision on whether or not the Supreme Court will hear the appeal sometime thereafter.



American Electric Power

Political Question Doctrine

So what is the political question doctrine and why does it matter? The political question doctrine applies when another branch of the government is better suited to resolve a particular issue. However, just because a case has political implications does not mean that the court cannot hear the matter. According to the district court, balancing those interests would necessitate the type of initial policy determination that should first be conducted by the elected branches (Congress and the President).

Without delving into the detailed analysis of the court, the Second Circuit disagreed with the holding of the district court. Particularly, the Second Circuit focused on the long history of judicial review in common law nuisance actions and noted that “where a case appears to be an ordinary tort suit” a nonjudicial policy determination is not required. As observed by the Second Circuit, “Nowhere in their complaints do plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches. Instead, they seek to limit emissions from six domestic coal-fired electricity plants on the ground that such emissions constitute

a public nuisance that they allege has caused, is causing and will continue to cause them injury.”

Standing

Where the court determines that the PQD does not preclude review of the states’ claims, the court must explore whether the plaintiffs have “standing” to bring their lawsuit. In environmental cases, a plaintiff must demonstrate that she has suffered a particularized injury which is fairly traceable to the defendant’s actions and redressable by the court. Not only can states sue for harms to the state itself, states can also sue in its *parens patriae* capacity. *Parens patriae* literally means “parent of the country” and refers to states’ ability to sue on behalf of harms to its citizenry much like a parent might sue on behalf of a minor child.

Another significant change to the legal landscape of climate change litigation occurred in 2007 with the Supreme Court’s decision in *Massachusetts v. EPA*, which directly addressed Article III standing. The case dealt with challenges by state parties against the Environmental Protection Agency (EPA) decision not to regulate greenhouse gas emissions under the Clean Air Act. Regarding standing, the Court found that Massachusetts’ loss of state-owned coastal property due to sea level rise was indeed a particularized injury. Although EPA’s contribution to climate change (by failing to regulate greenhouse gas emissions from cars) was quite small, EPA’s actions still contributed to Massachusetts’ harm. Because the Court could order EPA to regulate emissions, thereby slowing impacts of climate change, the matter was



U.S. Supreme Court

The U.S. Supreme Court in Washington, DC will soon hear a case involving electric power plants as a public nuisance, because of the greenhouse gases that they emit, particularly in burning coal.

redressable by the Court.

In analyzing standing in *Connecticut v. AEP*, the Second Circuit found the States satisfied standing as to both Article III proprietary standing and *parens patriae* standing. With regard to *parens patriae*, the court noted that the States alleged “that the injuries resulting from carbon dioxide emissions will affect virtually their entire population” and expressed doubt “that individually plaintiffs filing a private suit could achieve complete relief.” As to Article III standing, the Second Circuit found that the States suffered both future and current injuries as a result of the power companies’ actions. In particular, California (one of the states in this case) suffered declining water supplies and flooding resulting from earlier melting of the snowpack which injured property owned by California. Relying on the analysis in *Massachusetts v. EPA*, the harms were fairly traceable to the power companies’ greenhouse gas emissions and redressable by the court.

The Appeal

Five of the six power companies have appealed the Second Circuit’s ruling to the Supreme Court. Their Petition for Writ of Certiorari (a formal request that the Supreme Court hear an appeal) raises three questions for consideration by the Supreme Court: 1) whether the states have standing; 2) whether there is a federal common law cause of action that is not preempted by the Clean Air Act; and 3) whether the matter is a non-justiciable political question. However, the brief that is attracting the most attention in the environmental community is that of the U.S. Solicitor General, filed on behalf of the Tennessee Valley Authority (the sixth named power company in the lawsuit).

Unlike AEP’s petition, TVA’s brief focuses on very narrow grounds. TVA argues that things have changed since this decision was issued – the EPA has begun the process of regulating GHGs under the CAA and some regulations may take effect as early as January 2011. Following TVA’s argument, even if the States have Article III standing, the Court should abstain from hearing the matter on grounds of prudential standing. While framed somewhat differently, the factual basis supporting this argument is similar to that raised regarding political question. Essentially, the TVA is saying that this is best left to the other branches of government. TVA further argues that because EPA has begun regulating greenhouse gas emissions under the Clean Air Act, the States no longer have a common

law claim. Their claims have been “displaced” by EPA’s recent actions.

What Next?

How the Supreme Court will handle this case is relegated to pure speculation. Regardless, any decision – even the decision not to hear the appeal – will be significant. Should the court deny cert, allowing the Second Circuit opinion to stand, the case is headed back to the trial court and may eventually lead to an actual trial on the merits. Either way, the outcome of this case will directly impact the viability of future climate change tort actions including two similar actions (*Comer v. Murphy Oil* and *Native Village of Kivalina v. Exxon-Mobil*) in the Fifth Circuit and Ninth Circuit.

Editor’s Note:

After this article was accepted, the author wrote to say that on December 6, 2010 the Supreme Court made a decision to hear the case in the upcoming term.

The Court will consider issues of standing, political question, and preemption of federal common law by the Clean Air Act.



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