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Supreme Court hears oral argument in greenhouse gas nuisance case

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Author page »

Author page »

Although there have been numerous lawsuits filed challenging U.S. EPA's authority to promulgate and implement regulations governing greenhouse gas emissions, perhaps the most significant, and most watched, pending climate change case is *American Electric Power Co. v. Connecticut*, No. 10-174, argued April 19, 2011 before the U.S. Supreme Court. The Court's decision is expected to address the question of whether states and private land trusts can bring federal common law nuisance actions against utility companies for their alleged contribution to climate change through greenhouse gas emissions.

In *American Electric Power Co.*, eight states, New York City, and three private land trusts filed a suit against a group of electric utilities in the U.S. District Court for the Southern District of New York. The District Court dismissed the lawsuit in 2005, holding that the claims were non-justiciable "political questions" that could not properly be adjudicated by the courts. *See Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). In 2009, the U.S. Court of Appeals for the Second Circuit reversed. 582 F.3d 309 (2d Cir. 2009). The U.S. Supreme Court granted a writ of certiorari on December 6, 2010.

On January 31, 2011, Petitioners (i.e., the utility company defendants) filed their opening brief. In their brief, the utilities (American Electric Power Co., Duke Energy Corp., Southern Co., and Xcel Energy Inc.) first argue that Respondents (i.e., the states, city, and private land trusts) lack standing to sue under Article III of the U.S. Constitution. Specifically, Petitioners argue that the particular harms allegedly incurred by Respondents, and the effects of climate change more generally, are not traceable to

Petitioners' conduct, because climate change is gradually induced by an undifferentiated mixture of emissions released by billions of independent actors.

Petitioners also assert that the redress sought by Respondents—judicial imposition of emission caps on five utilities—would have no effect on climate change or Respondents' alleged injuries. Petitioners further argue that there is no reason for the Supreme Court to relax standing requirements in this case, because such relaxed standards are available only where Congress has statutorily created an enforceable legal right, a circumstance not presented in Respondents' federal common law suit.

In addition to arguing that Respondents lack standing on Article III grounds, Petitioners claim that Respondents also lack standing based on prudential considerations. According to Petitioners, finding standing under the facts alleged in this case would allow future suits by, and against, virtually any enterprise on the planet for any injury arising from climatological or meteorological events. Rather than unleashing a deluge of nuisance-based climate change suits, it should be left to Congress to create statutory standards. Until then, courts are ill-equipped to adjudicate such "generalized grievances."

Petitioners offer several alternative bases for dismissing Respondents' claims. Petitioners assert that federal courts lack the power to create a federal common law cause of action in the absence of either statutory authorization or constitutional exigency, neither of which exists with respect to global climate change. Petitioners also argue that the provisions of the Clean Air Act displace any federal common law cause of action. By enacting the Clean Air Act and delegating authority to U.S. EPA, Congress directly addressed the issue of greenhouse gas emissions, regardless of any regulatory action to target the types of emissions released by Petitioners.

Finally, Petitioners argue that Respondents' claims are non-justiciable political questions. In awarding the type of remedy desired by Respondents, a court would be required to make predictions about, and inquire into, the behavior of every sector of the national and international economies, while simultaneously balancing interests outside the court's expertise.

Also on January 31, 2011, the Department of Justice filed a brief on behalf of Tennessee Valley Authority, a utility corporation owned by the U.S. government. The federal government's brief supports Petitioners' position that the Second Circuit's decision should be reversed and the complaint dismissed on the narrow ground of a lack of prudential standing. The TVA brief states that Respondents' allegations would otherwise be sufficient to survive dismissal for lack of standing under Article III but argues that the lack of prudential standing means the court need not reach that issue to decide the case.

The TVA brief also takes the position that Respondents' claims do not fall within the ambit of non-justiciable political questions because the case does not implicate separation of powers concerns but asserts that the Clean Air Act and U.S. EPA's recently promulgated greenhouse gas regulations (e.g., endangerment finding and PSD tailoring rule) displace any federal common law cause of action.

The Supreme Court's announcement setting oral arguments for April 19, 2011 coincided with a flood of amicus briefs, predominantly opposing the Second Circuit's decision, onto the case's docket. Among the parties that filed briefs in support of Petitioners were 23 state attorney generals, the United States Chamber of Commerce, the Cato Institute, and Rep. Fred Upton (R-MI), the current Chair of the House Energy Committee.

On March 11, 2011, the state Respondents (joined by New York City) filed their response brief. In their brief, the states maintain that the allegations in their complaint are sufficient to establish Article III standing. According to the state Respondents, the complaint alleges particularized injuries caused by climate change, including injury to natural resources and public health; alleges a "substantial contribution" by Petitioners to climate change; and seeks relief (i.e., emission caps) that would reduce the degree and likelihood of harm. State Respondents also contend that because the case is at the motion to dismiss stage, generalized allegations of harm should suffice. As for prudential standing, state Respondents assert that there is no separate test for prudential standing apart from that needed to satisfy Article III requirements.

State Respondents further dispute that their claims raise non-justiciable political questions, asserting that the political question doctrine is limited to situations in which the judiciary would interfere with matters committed to Congress and the Executive Branch, a circumstance not present in the context of common law causes of action. Finally, state Respondents argue that federal common law governs the public nuisance claims and such claims are well-settled in federal common law as part of the federalist system, in which states relinquished their right to use force to abate nuisances emanating across borders. Further, according to state Respondents, the Clean Air Act does not displace federal common law because the statute fails to impose any limits on carbon dioxide emissions from stationary sources like those operated by Petitioners.

In their response brief, the land trust Respondents proffer nearly identical arguments to those raised by the state Respondents. However, the land trust Respondents highlight the historical underpinnings of public nuisance claims, including the role of public nuisance actions as a means of addressing then-novel public health and public safety concerns in the era preceding the enactment of the major environmental statutes.