

In blockbuster climate change case, no legal stones left unturned

By Marcia Coyle and Tony Mauro

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Former Solicitor General Paul Clement
Photo: Diego M. Radzinski / Legal Times



Latham & Watkins' Gregory Garre
Credit: Diego M. Radzinski/NLJ



Harvard Law Prof. Charles Fried

A climate change challenge confronts the U.S. Supreme Court this month. And given the high stakes for business and the environment, the justices' typically "hot" bench may get even warmer when arguments in the complex case unfold.

Lawyers sometimes exaggerate the importance of their cases, said environmental scholar James May of Widener University School of Law, but *American Electric Power v. Connecticut* is a potential "blockbuster," he said.

The case, which will be argued on April 19, stems from a 2004 suit filed by eight states and New York City, and a parallel suit by three private land trusts, against the five largest emitters of carbon dioxide in the United States. The suits, which were heard together, charged that the power plants' emissions contribute to global warming — a public nuisance that is endangering the public's health and welfare. They sought injunctive relief-- not damages--to reduce the carbon dioxide emissions.

A three-judge panel of the U.S. Court of Appeals for the 2nd Circuit, which initially included then-Judge Sonia Sotomayor, heard the case. The panel — this time without Sotomayor — ruled that the public nuisance claims could go forward. (Sotomayor will not participate in the Supreme Court case.)

The public nuisance approach to combating climate change is highly controversial as evident from the outpouring of amicus briefs on both sides of the Supreme Court case.

Another key public nuisance challenge is pending in the 9th Circuit — *Native Village of Kivalina v. Exxon Mobil Corp.* Alaskan villagers, whose island faces imminent destruction from melting sea ice, have sued 18 energy companies for contributing to the global warming that has endangered their home and way of life.

The high court case offers a feast of tort, constitutional and procedural issues, ranging from questions about the very existence of a federal common-law public nuisance claim to different types of standing, separation of powers and preemption.

"Outside of criminal law, there's barely a legal stone left unturned by this case," said May, who has filed an amicus brief supporting the states. "Even from a distance, this is a once in a lifetime case involving foundational issues."

ON THE ATTACK

In the Supreme Court, the power companies, represented by [Peter Keisler of Sidley Austin](#), attack the states' lawsuit on several fronts. They assert that the complex issue of greenhouse gas regulation is "wholly inappropriate for resolution" by the judiciary. The states lack any kind of standing to file a nuisance suit, the companies argue, and the issue at stake is a "political question" that can't be solved by the courts.

The Tennessee Valley Authority, an electric utility owned by the federal government, takes a somewhat narrower approach. Its counsel, Acting Solicitor General Neal Katyal, argues the states and land trusts have no prudential standing — they are making generalized grievances shared by all citizens. Katyal, who will share argument time with Keisler, also urges, along with the utilities, that the Court find that recent steps by the Environmental Protection Agency to regulate greenhouse gases displace the states' claims.

Using the common law is not a way to redress "generalized grievances," Keisler adds. Greenhouse gases are emitted by "virtually every enterprise on the planet," he argues, and the impact, according to his brief, "will allegedly be felt by virtually every person around the world." Ever since the 1938 case *Erie v. Tompkins*, common law has been recognized only in limited areas, and in this one, Keisler's brief asserts, its force is "displaced" or pre-empted by federal statutes including the Clean Water Act and the Clean Air Act.

In his reply brief filed Monday, Keisler summed up: "There is no judicial analog for the enterprise the plaintiffs seek to launch. It is, instead, a legislative and regulatory function properly reserved under our constitutional system for the legislative and executive branches."

The states (Connecticut, New York, California, Iowa, Rhode Island, Vermont) and New York City, represented by [New York Solicitor General Barbara Underwood](#), and the land trusts' counsel, [Matthew Pawa of the Law Offices of Matthew F. Pawa](#) in Newton Centre, Mass., counter each attack by first asserting that these nuisance claims fall "within the well-settled confines of a common law tort that courts have long adjudicated."

The facts alleged, writes Underwood, are of the same nature and types as those that established the states' standing in the Court's first global warming case — *Massachusetts v. EPA* (2007).

There are no generalized grievances, add the states. The injuries from the utilities' contributions to climate change are "concrete and particularized." The claims do not raise political questions and the Court will not have to decide broad policy issues to adjudicate those claims.

"The court will need to determine not how to resolve the worldwide problem of global warming, but rather the feasibility of abating defendants' contribution to the nuisance, here by reducing the carbon-dioxide emissions from their power plants," argues Underwood.

And on their opponents' contention that EPA's recent actions displace the public nuisance claims, Pawa, in an interview, said, "Absent regulations on existing coal-fire power plants, there's no displacement. Right now there are no such rules. Certainly actions taking place Capitol Hill (to block EPA regulation in this area) call attention to the fact that this is an area that's in flux."

DUELING SUPPORTERS

The power companies are backed by 23 amicus briefs, including briefs filed by no fewer than three former solicitors general in Republican administrations: Gregory Garre, Paul Clement and Charles Fried. Some of the briefs predict ruinous results for the national economy if the suit is allowed to proceed, with others stating that under the theory of the case, almost any business or individual could be sued as a contributor to global warming.

The briefs offer slightly different views about the proper role of courts in the climate change debate. In an interview, Keisler said the courts "have an important role to play," pointing to the Massachusetts decision of 2007. That ruling gave states standing to challenge in court Environmental Protection Agency climate change policies under the Clean Air Act. But in the case now before the Court, Keisler said, "there is no statute" involved.

Clement, writing for Chevron USA and other oil companies, also said, "The point is ... not that global climate change issues can never be suitable for judicial resolution." Clement, head of King & Spalding's national appellate practice, said courts can act within a statutory framework that gives parties a right to judicial review.

But Garre's brief for the Chamber of Commerce takes a somewhat harder line, criticizing the 2007 decision and urging the Court not to expand its scope to allow common law actions against power companies. "This complex dialogue belongs in the political arena, not the courthouse," wrote Garre, head of Latham & Watkins' Supreme Court and appellate practice. "Only the elected branches are authorized and equipped to develop our nation's response to climate change and undertake any necessary reforms."

In an interview, Garre said he is not asking the Court to reconsider or reverse *Massachusetts v. EPA*, a ruling he said is "taken as a given." Garre added, "The court is generally reluctant to say that courts have no role, but it has been sensitive to the problem of courts cutting off or getting ahead of the political processes."

Fried's brief for the American Petroleum Institute and others, also takes a dim view of any court involvement in the climate change debate. "Judicial intervention, under the rubric of the tort of public nuisance," Harvard Law's Fried wrote, would overrun tort law, swamp the courts, and undercut the proper organs of public policy in the United States and abroad."

Not all states have joined Connecticut and the other state plaintiffs in the suit against the utilities. Twenty-three states joined in a brief by Indiana Solicitor General Thomas Fisher in arguing that the issues involved in the lawsuit are "not fit for the wrangling of lawyers," a quotation by the late legal scholar Alexander Bickel. Allowing the courts to cap carbon dioxide emissions that federal and state law would otherwise permit would "undermine the entire federal-state regulatory scheme," the states agreed.

The nine briefs supporting the respondent-states and the land trusts tackle each of the standing questions, the displacement argument and even doubts about the science of climate change.

Widener's May, writing on behalf of environmental, constitutional and tort law professors, argues that under the political question doctrine, constitutional issues are reserved to the political branches. The doctrine, he says, has no application to common-law claims like the public nuisance claim in this case.

The utilities and the government are trying "to expand the political question doctrine far beyond its traditional boundaries," he writes.

"I never believed the public nuisance doctrine was the only way nor the best way nor the optimal way," said May. "In my opinion, it is certainly a way to do this under our constitutional. There's nothing that prevents the federal courts from considering this claim. There's nothing that bars private land trusts, states, individuals and others from getting into the courthouse."

In a brief on behalf of more than a dozen scientists, **Richard Webster of Public Justice** informs the justices that it is a "scientific certainty" that carbon dioxide is increasing in the atmosphere. That increase is caused by activities to which the power plants contribute, and the increase is causing the climate to warm.

"All of the nation's leading scientists agree when you look at the objective evidence, climate change is happening and will become more severe over time," said Webster in an interview. "We want to be sure the Court understands that. Some of the amici on the other side did dispute it."

Defenders of Wildlife and other environmental organizations, represented by Eric Glitzenstein of Meyer, Glitzenstein & Crystal, take on their opponents' arguments on Article III and prudential standing.

Glitzenstein tells the justices that the government's "novel rationale for why prudential standing is lacking – i.e., that many people and entities will suffer concrete injuries from global climate change – could, if endorsed by the Court, have adverse and unanticipated consequences for other types of litigation concerning serious but widely-felt injuries."

A 4-4 SPLIT?

Sotomayor's recusal in the case may be an important factor in the outcome. By the time *American Electric Power* was decided in September 2009, Sotomayor, who was on the original panel hearing it, had joined the Supreme Court. Justices customarily recuse in cases in which they participated as judges below.

Latham's Garre said, "The greatest potential impact, of course, is that the Court could split 4 to 4," which would mean the 2nd Circuit ruling, allowing the lawsuit to proceed, would stand. "It would be unfortunate, because the lower courts need guidance on this," said Garre. "But the Court has done quite a good job avoiding 4-4 splits this term."

Justice Elena Kagan has not recused from the case, though she was still officially solicitor general when her office was discussing and preparing the Tennessee Valley Authority's brief, filed with the Court last Aug. 24. At earlier stages of the dispute, in which TVA is one of the named defendants, the TVA's own lawyers handled the case. Earlier this year, when discussions on appealing the 2nd Circuit decision reached the SG's office, Kagan did not join in, according to other participants

Sotomayor's recusal is "certainly bad news from my view," said Amanda Leiter of Catholic University Columbus School of Law who filed an amicus brief for environmental law professors supporting the states. "There is more to lose here than there is to win."

Leiter and others fear that the Court might reconsider its 2007 decision in *Massachusetts v. EPA*, a 5-4 standing ruling authored by Justice John Paul Stevens.

Glitzenstein agreed that a decision could have implications beyond the climate change context. "It could be very significant if it's decided on some of the grounds raised by the utilities and the government, particularly the standing issue. It could be very detrimental to even garden-variety, statutorily based, environmental litigation."

Megan Brown, a Wiley Rein partner who wrote a Cato Institute brief on the side of the power companies, said this case is different from the Massachusetts case. Justice Anthony Kennedy, she added, "may be intensely uncomfortable with how far the Massachusetts case has been pushed."

And she added, "If this suit is allowed to go forward, you encourage the legislature and the EPA to stand down and avoid making the tough choices."

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