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AEP v. Conn.: Supreme Court Tackles Global Warming

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On December 6, 2010, the Supreme Court granted certiorari in a nationally important global warming case that, like others pending in the federal courts, tests the limits of federal courts' authority to evaluate and enact sweeping changes to the nation's environmental, industrial and economic policy. In deciding to hear *American Electric Power Co, et al v. Connecticut, et al.*, [1] (*AEP*) the Court has signaled its intent to clarify the proper role of courts in addressing global climate change.

The courts are being called upon to play an influential role in setting national climate change policy. In three different cases, various private and state plaintiffs seek to impose direct emissions limits and enormous damages on particular alleged contributors to global warming. In *AEP*, a collection of states and private land trusts sued six energy companies seeking judicial abatement of the companies' alleged contributions to global warming through the creation and imposition of specific emissions caps and mandatory reductions. In *Comer v. Murphy Oil, USA et al.*, [2] Mississippi residents sued dozens of oil and gas companies for damages from Hurricane Katrina, which allegedly was intensified by global warming. And in *Native Vill. of Kivalina v. ExxonMobil Corp. et al.*, [3] an Alaskan village sued two dozen oil, energy and utility companies for $400 million for Alaskan coastal erosion allegedly caused by global warming.

In all three cases, the trial courts dismissed on the basis of a lack of standing and/or the political question doctrine. [4] In *AEP* and *Comer*, panels of the Courts of Appeals for the Second and Fifth Circuits, respectively, disagreed with the trial courts and allowed the cases to proceed. Certiorari has been granted in *AEP*, and Comer is presently

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pending. The Ninth Circuit has yet to hear argument in *Kivalina*, and it likely will have the benefit of the Supreme Court's guidance in *AEP* on the question whether cases seeking to affix responsibility for and limit or recover damages from global warming are properly pressed in federal court.

The Cases are Part of a Broader Movement to Achieve Policies Not Yet Obtained through the Political branches. These cases-filed in three different courts, presenting different legal claims, and seeking different remedies-share the same core goal: to address through judicial action what advocates, academics and commentators suspect may be unattainable though the democratic process. They seek fundamental changes to the nation's economic, environmental and industrial policy to limit greenhouse gas emissions in an effort to slow or stop global warming. "Desperate times call for desperate measures. In light of the climate change crisis . . . there is a need for heroic litigation to go beyond the bounds of traditional doctrine and try to promote public good through creative use of common law theories," Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 Conn. L. Rev. 591, 626-27 (2008). Indeed, the litigants themselves have been remarkably candid in their motives. The *Comer* plaintiffs clearly state in their Complaint that they have been forced to come to federal court because "the political process has failed" to adequately respond to climate change. "[S]tate and Federal Governments . . . [have] refused to regulate greenhouse gas emissions" or have "tak[en] the wrong actions in those instances where they have acted." If these cases are allowed to continue, advocates will be encouraged to use the burdens and risks of the judicial process to demand, cajole, and extort political concessions not otherwise attainable. [5]

AEP v. Connecticut. In *AEP*, several states and land trusts allege that the six named companies' greenhouse gas emissions constitute a public nuisance under federal common law. Of the three major cases presently in federal court, this case is perhaps the most notable because of the remarkable remedy sought. Rather than damages, the plaintiffs ask a single federal judge to order six national energy companies with operations in 20 states to "abate" their alleged "contribution[s]" to global warming "by requiring [them] to cap [their] carbon dioxide emissions and then reduce them by a specific percentage each year for at least a decade." [6]

The district court held that the plaintiffs' claims presented a non-justiciable political question under *Baker v. Carr*, 369 U.S. 186 (1962), because their resolution would "require[] identification and balancing of economic, environmental, foreign policy, and national security interests." The court accordingly dismissed the complaint. A two-judge panel [7] of the Second Circuit reversed. The panel found that plaintiffs' case, which it characterized as an "ordinary tort suit," was well within the competence of federal courts and was not barred by the political question doctrine. The panel went on to consider alternative grounds for affirmance urged by the defendants-appellees and concluded that plaintiffs had standing, that federal common law of nuisance governed the claims, that plaintiffs stated a claim under the federal common law, and that the claims were not displaced by federal statute or on foreign policy grounds. The court denied a petition for *en banc* rehearing, and the defendants sought a writ of certiorari from the Supreme Court.

The *AEP* petition presented three questions: (1) whether states and private parties "have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources;" (2)

whether a cause of action to cap carbon dioxide emissions can be implied under federal common law; and (3) whether "claims seeking to cap defendants' carbon dioxide emissions at 'reasonable' levels" are proscribed by the political question doctrine because they would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion."

The petitioners received substantial amicus support, including that of twelve states, [8] who note, among other things, that they own power plants and could be sued in future similar actions.

Of note, the Obama Administration took a position in this case because the Tennessee Valley Authority is a named defendant. Though the United States notes in passing the interlocutory posture of the case and the absence of a current circuit split, the United States identified several factors that make what it deemed "limited intervention by the Court . . . appropriate at this juncture." Notably, those factors include the effect of the Second Circuit decision on additional and future litigation, which the United States indicates will be encouraged by the panel's analysis of the threshold justiciability questions. The "limited intervention" urged by the United States was vacatur of the panel opinion and remand for the Second Circuit to consider two issues: whether the doctrine of "prudential standing" bars the claims, and whether the common law claims have been displaced by EPA's actions since the Second Circuit opinion issued. By urging such a limited approach, the government encouraged the Supreme Court to stay its hand on the merits. And by recasting the petitioners' Article III standing and political question arguments as prudential standing problems, the United Stated avoided taking a position on the more politically sensitive doctrinal aspects of the case. Nonetheless, despite its careful parsing and the narrow disposition recommended, the brief clearly endorsed the petitioners' core argument about how poorly suited this sort of case is for resolution by the federal judiciary. The United States plainly stated that " Plaintiffs' common-law nuisance claims are quintessentially fit for political or regulatory-not judicial-resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both plaintiffs and defendants." It is perhaps not surprising that this brief drew criticism from those who favor urgent and dramatic action, including by courts, to address global warming.

The Supreme Court granted certiorari on December 6, with Justice Sotomayor not participating. There is no indication that Justice Kagan is or will be recused. The acting Solicitor General, in his brief for the United States, indicated that "TVA appeared through its own counsel in the district court and court of appeals, and its briefs and oral arguments did not reflect consultation with other Executive branch agencies, including EPA and the Department of Justice." This somewhat cryptic footnote appears to clarify that then-Solicitor General Kagan played no role in the case while she was at the Department of Justice.

Barring some unusual development, briefing will take place in the winter and spring, and a decision is expected by the end of the Court's term in June.

Comer v. Murphy Oil USA. *Comer* is the next case to arrive at the Supreme Court. This case seeks money damages under various state common law theories of liability. It has a more complicated procedural history than *AEP*, and is before the Court on an extraordinary petition for writ of mandamus rather than the more

conventional petition for certiorari. Indeed, the petition for writ of mandamus does not even raise the underlying merits as questions presented for the Court's consideration. As such, it is unclear whether the Supreme Court could reach the underlying merits of the case, as opposed to the narrow procedural questions presented by the petition for writ of mandamus.

In *Comer*, a purported class of Mississippi residents sued dozens of oil and gas companies for their alleged contributions to climate change which, they asserted, has had various effects on the global environment, including a rise in sea levels and an increase in the intensity of Hurricane Katrina. The plaintiffs sought compensatory and punitive damages for property damage resulting from the hurricane based on Mississippi common-law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation and civil conspiracy.

The defendants in *Comer* argued that the case could not proceed because the plaintiffs lack standing and the case presents nonjusticiable political questions. After defendants secured a dismissal from the district court, plaintiffs prevailed before a panel of the Fifth Circuit, which rejected the district court's conclusions that standing and the political question doctrine served as bars to proceeding. In analyzing the case under Article III's familiar standing requirements-that a plaintiff have suffered an "injury-in-fact" that is "fairly traceable" to the defendant's actions and which is likely to be "redressed by a favorable decision"-the panel focused on causation. The panel concluded that "that alleged contribution to the harm is sufficient for traceability purposes." Relying in part on its view of the Supreme Court's standing analysis in the Supreme Court's 2007 case, *Massachusetts v. EPA*, the panel concluded that "injuries may be fairly traceable to actions that contribute to, rather than solely or materially cause, greenhouse gas emissions and global warming." The panel rejected the argument that *Massachusetts* did not so dramatically redefine Article III standing, but rather dealt with a circumstance in which Congress had defined an injury and articulated a chain of causation giving rise to a particular and defined legal claim. As the petitioners state in their reply in *AEP*, *Massachusetts* involved "the particular context of a challenge to EPA's decision not to regulate greenhouse gas emissions, and when the CAA granted an express right of judicial review, the plaintiff had standing to bring that challenge in federal court." The import and consequence of *Massachusetts* will be at issue whenever and however the Court hears these cases.

A petition for rehearing was filed and the *en banc* court, diminished in size by the remarkable recusal of seven of sixteen judges, granted the petition, vacated the panel opinion and set the case for argument. In the midst of briefing, however, an eighth judge recused herself, thereby depriving the *en banc* court of a quorum. After entertaining additional briefing on its ability to proceed, the diminished *en banc* court dismissed the appeal. Because the *en banc* court had been properly constituted when the panel opinion was vacated, the court indicated that the panel opinion remained vacated and the district court's decision stood.

The plaintiffs in *Comer* have sought an extraordinary writ of mandamus from the Supreme Court compelling the Fifth Circuit to reinstate the appeal and, if it still lacks a quorum, return the case to the panel and reinstate the panel's opinion. Petitioners argue that the Fifth Circuit had jurisdiction to hear the appeal, that the panel properly did so and that the *en banc* court's disposition of the case, particularly its vacatur of the panel opinion, was patently unfair and contrary to law.

A response to the petition was filed November 29, 2010. Three briefs in opposition were filed, two by the private defendants and one by the Solicitor General on behalf of Tennessee Valley Authority. Collectively, these respondents oppose the writ of mandamus, arguing among other things that the petitioners have-through their own strategic choices-boxed themselves into the very situation they now allege is unfair. Specifically, the respondent energy companies point out that the petitioners opposed many of the procedural solutions they now fault the Court of Appeals for eschewing, and failed to avail themselves of at least two alternative avenues for obtaining a merits disposition of their appeal. Because the petitioners have not sought certiorari, the respondents argue that the petitions should not now be heard to complain of any deprivation.

A major theme of the private companies' opposition is that the petitioners, by focusing in the Court of Appeals only on their one desired outcome-the reinstatement of the panel opinion-undermine their present cries of injustice at what they characterize as the deprivation of an appellate adjudication of the merits of their appeal. Respondents point out that the petitioners opposed several options that could have enabled the Court of Appeals to adjudicate the case, including deferral of the case until a quorum was achieved, and the respondents' suggestion that judges sell disqualifying stock. In a similar vein, the United States' brief points out that the petitioners before the Fifth Circuit argued against several of the options they now urge the Supreme Court to exercise. "Petitioners cannot plausibly claim that they now have a 'clear and indisputable' right to an order compelling the court of appeals to do something they previously argued it should not do." Respondents characterize the petitioner's strategy before the Court of Appeals as "all-or-nothing" and argue that mandamus would improperly relieve them of the consequences of their gamble.

One issue clearly underlying the briefing is whether the Court can or should convert the petition for mandamus into a petition for certiorari, which the petitioners note the Supreme Court has authority to do. The United States' brief discourages such a maneuver, distinguishing the few cases in which the Court has granted certiorari in response to a mandamus petition, and pointing out that the petitioners themselves made clear their view that "a Writ of Mandamus is the proper remedy in this case."

It is hard to predict what the Court will do with *Comer*. The petition for mandamus itself not present to the Court the underlying merits of the case. The procedural questions at issue in the petition, while interesting, do not bear many of the traditional indicia for certiorari; there is no circuit split and the issues are unlikely to recur often. As such, it would be surprising if the Court granted the petition. The case is likely to be distributed for the conference scheduled for January 7, and could be granted, denied or held pending disposition of *AEP*.

Kivalina v. ExxonMobil. Kivalina is an Alaskan coastal town populated by indigenous Alaskans. The town sued dozens of oil, energy and utility companies on the grounds that their greenhouse gas emissions contributed to the public nuisance of global warming, which was causing sea levels to rise and threatening the existence of the town. A federal judge in the Northern District of California dismissed the case, reasoning that the political question doctrine barred the case and further that the plaintiffs lacked standing. In deciding that the case presented a nonjusticiable political question, the court determined that the global warming public nuisance theory provides no judicially manageable standards. The town has appealed to the Ninth Circuit, where briefing has concluded, but no argument date has yet been set. The Ninth Circuit often takes many months after the end of briefing to set an argument date, so a decision in this case may be a long ways

off.

What Comes Next? The Supreme Court has indicated a willingness to wade into these issues by granting certiorari in *AEP*. While it could link or relate the disposition of *AEP* to the mandamus petition filed in *Comer*, that case presents some difficult and arguably extraneous procedural issues that the Court might not want to address. *Comer* has other vehicular problems as well, given the number of recusals below.

With several moving parts, and other cases in the pipeline, it is hard to predict the ultimate disposition in *Comer* or handicap the Court's eventual evaluation of the merits in *AEP*. The issues raised in *AEP* go to the heart of the federal courts' role and will guide the course of pending and future global warming cases. Indeed, *AEP* might be the Court's attempt to reckon with the effects and limitations of *Massachusetts v. EPA*. It is not surprising that the Court views the issues raised in *AEP* as sufficiently important to grant review. In 2007, the Court remarked that "the unusual importance of the underlying issue persuaded us to grant the writ" in *Massachusetts v. EPA*, despite the presence there of arguable jurisdictional problems and the lack of a circuit split.

All eyes now are on the Supreme Court to see how it will address the threshold justiciability questions raised in *AEP* and what guidance it will provide about whether federal courts are properly suited to the task of fashioning and imposing judicial remedies for harms allegedly caused by global warming . [9]

Implications. These cases raise novel theories of causation and liability, and test the limits of familiar justiciability doctrines long deemed essential to maintaining the proper and properly limited role of courts in our system of government. If allowed to proceed, these cases will open the courts to litigants and policy advocates seeking to have judges, rather than elected or democratically accountable officials, set national emissions standards free from the vagaries and constraints of the political process. Because of the seemingly boundless chains of causation at issue in affixing responsibility for global climate change, the possibilities for future litigation are staggering: any emitter of greenhouse gases can be haled before a court by any party allegedly harmed by the consequences of this decidedly global, natural and imperfectly understood phenomenon.

These cases are intended to remake the way energy is produced, regulated, and sold, which will have dramatic effects on the nation's economic and industrial policy. Indeed, the complaint filed by the states in *AEP* notes the desirability of forcing companies to implement "practical" options such as "changing fuels" and "increasing generation from . . . wind, solar" and other sources that they predict will "reduc[e] carbon dioxide emissions without *significantly* increasing the cost of electricity." (emphasis added). The plaintiffs candidly acknowledge the goal of their enterprise: a costly and consequential set of restraints on and penalties for greenhouse gas emissions and the activities that produce them, crafted and imposed by judges and juries.

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Global businesses and associations, and the companies that insure them, should pay close attention to *AEP*and the other global warming cases. If these cases are allowed to proceed to discovery and /or resolution, private industry increasingly will be the target of global warming related litigation and will bear

the direct and indirect burdens of any remedies imposed or extracted thereby.

Ms. Brown, who practices in the Litigation and Appellate groups, is Counsel of Record to the Cato Institute, which has filed amicus briefs in two of the three cases discussed herein.

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[1] *Connecticut v. American Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, No. 10-174 (S. Ct. Dec. 6, 2010)

[2] *Comer v. Murphy Oil USA*, No. 05-436 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *vacated on grant of reh'g en banc*, 598 F.3d 208 (5thCir. 2010), *appeal dismissed*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010), *petition for writ of mandamus filed*, No. 10-294 (S. Ct. Aug. 26, 2010).

[3] *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. 2010).

[4] A fourth case, in which automakers were sued under nuisance theories, in 2007 met the same fate-dismissal under the political question doctrine. *See California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). The appeal was voluntarily dismissed.

[5] As one observer stated, "climate change litigation fills a niche created by the . . . absence of federal action" and "opens up the possibility of a quid pro quo: industry accepts federal mandatory emissions limits in exchange for immunity from liability." Kristen H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. Penn. L. Rev. 1563, 1564 and 1573 n.29 (2007).

[6] Complaint, ¶ *186, Connecticut v. Am. Elec. Power Co.*, No. 04-05669(S.D.N.Y. July 21, 2004).

[7] Justice Sotomayor was on the panel originally, but was sworn in as an Associate Justice of the Supreme Court before the Second Circuit issued its opinion.

[8] The states are Arkansas, Hawaii, Kansas, Kentucky, Nebraska, North Dakota, Ohio, Pennsylvania, South Carolina, Utah and Wyoming.

[9] While the implications of such judicial action proceeding past the motions stage are staggering, even if the Court permits these cases to continue past the threshold stage, the plaintiffs' success in securing judicial emissions caps or large damage awards is far from assured. The various plaintiffs will confront difficult and likely insurmountable causation issues, as presaged by the Fifth Circuit. The panel in *Comer* noted that "the worldwide effects of greenhouse gas emissions may, for instance, make it difficult for the plaintiffs to show proximate causation." Judge Davis, specially concurring in the result reached by the panel, explained that "the defendants argued to the district court that the plaintiffs failed to allege facts that could establish that the defendant's actions were a proximate cause of the plaintiffs' alleged injuries." Interestingly, he observed that "[i]f it were up to me, I would affirm the district court on this alternative ground."