



By Richard Lazarus

## The Justices Take On Climate, Again

The end of April in Washington, D.C., is its most beautiful season. There are flowering trees, abundant tulips, and magnificent azalea bushes. And, if you have a case in the Supreme Court that you are going to lose, it is also the best possible time to have your case scheduled for oral argument.

No, not because the justices are a kinder and gentler bunch in the spring. The reasons are more mundane and practical. When a case is argued in April, the Court has only about 60 days to issue its opinion. And that means that the justice charged with writing the Court's opinion must circulate a draft several weeks before that in order to provide other justices with meaningful opportunity to comment and, if necessary, circulate their own concurring or dissenting opinions. That is a tall order because the Court, then, is also invariably deciding the toughest cases of the term, over which the jurists have likely been debating for months.

The resulting shortness of time for deciding an April-argued case places a heavy premium on a draft that a majority of justices will join quickly and easily. The less ambitious and far-reaching the draft, the more likely that can be accomplished. The Sirens of Summer can be very persuasive

That is why respondents in the *American Electric Power v. Connecti-*

*cut* case, concerning the viability of a federal common law of nuisance action to redress global climate change, were fortunate that the Court granted review in early December, when cases were still being scheduled for the few remaining April argument slots. When the Court granted industry's petition, it was clear that the justices were going to reverse the Second Circuit's ruling that a federal common law of nuisance cause of action survived congressional enactment of the Clean Air Act.

The vote on the viability of the federal common law was unlikely to be close; at a minimum, Anthony Kennedy and Stephen Breyer would join the four justices who dissented in *Massachusetts v. EPA* (John Roberts, Antonin Scalia, Clarence Thomas, and Samuel Alito); Justice Elena Kagan likely would as well; and only Justice Ruth Bader Ginsburg might be willing to vote to affirm the Second Circuit. (Justice Sonia Sotomayor was recused because she had participated in the case in the lower court).

The only open question was how sweeping the High Court would rule and whether, in particular, the four *Massachusetts* dissenters would secure Justice Kennedy's vote for an opinion that limited the Court's ruling in that earlier case. *AEP* presented several opportunities to do so. For instance, petitioners (and the solicitor general, representing the Tennessee Valley Authority) challenged respondents' standing, with industry doing so more broadly. They also questioned the existence of a federal common law of nuisance action to address climate change, regardless of the existence of the Clean Air Act. Many of petitioners' more sweeping proffers were in obvious tension with the *Massachusetts* ruling.

At oral argument, however, the bad and good news for respondents were that it quickly became clear that Ginsburg favored reversal, so long as the

Court's opinion was more narrowly tailored. Ginsburg signaled her position to her colleagues on the bench by her questioning. Indeed, she posed the first question of respondents' oral advocate by expressing the view that "the relief you are seeking, asking a court to set standards for emissions, sounds like the kind of thing EPA does." This was bad news for respondents because it made obvious they would lose their favorable lower court judgment by a unanimous vote. But, ironically, it was simultaneously good news, because it was now possible for Ginsburg to secure the opinion assignment and draft a narrower opinion for the Court than others likely would have written.

Both happened. The Court reversed the Second Circuit two months later, in time for the summer recess, and the Chief Justice did indeed assign Justice Ginsburg the job of writing the Court's opinion. Although respondents no doubt would have preferred an even narrower ruling, the opinion was as narrow as

they could have possibly obtained from the current Court. In reversing the Second Circuit's judgment, the Court declined to limit *Massachusetts* in any significant

respect. And, parts of the opinion seemed instead to reinforce the scope of EPA's authority to address climate change under the Clean Air Act. The Court's earlier standing ruling remained intact, it did not rule that federal common law of nuisance actions could never exist to address climate change, and the justices left for another day the viability of state common law of nuisance actions.

Spring time is a great time to visit D.C., especially if you have a case before the Supreme Court that you are about to lose.

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*Respondents in American Electric Power were lucky it was argued in April*