The 2010-2011 U.S. Supreme Court case promises to be a blockbuster one for environmental law. The Court today announced that it had granted a petition for certiorari filed in *AEP v. Connecticut* (the lower court decision in the case is here). The case, brought by a number of states against the country's five larges utilities , argues that the greenhouse gases they emit are creating a public nuisance. Jonathan has blogged about the case several times, including here, here, and here.

The case promises to be a blockbuster on several grounds. Of course the merits of the case are important: the Court will decide the important question of whether the nuisance case can go forward on substantive grounds. One big issue is whether current efforts by the Environmental Protection Agency (EPA) to regulate greenhouse gases under the Clean Air Act "displace" the nuisance suit by crowding out a nuisance case under federal common law. Here's Jonathan's explanation of the issue. But the merits of the case are not the only reason to pay special attention to AEP v. Conn. The Court will also need to decide whether the plaintiffs have standing to sue — in other words whether they are proper plaintiffs who have the right to bring the case. One reason standing is so important is because what the Court has to say about standing in AEP v. Conn. will matter a lot to any future case involving climate change. So the case promises to have repercussions far beyond the substantive issue in this case.

The Court's landmark climate change case *Massachusetts v. EPA* also addressed the standing question by holding on a 5-4 vote that Massachusetts could bring the case against the Environmental Protection Agency for failing to regulate greenhouse gases under the Clean Air Act. The Court said that Massachusetts was a proper plaintiff in part because states are special under our system of constitutional governance: "the Commonwealth [of Massachusetts]," said the Court, "is entitled to special solicitude in our standing analysis." The Court gave the state special solicitude in deciding the three questions standing raises: has the plaintiff alleged "an injury in fact" that is sufficiently "concrete and particularized" that is either actual or imminent? is the injury "fairly traceable" to the defendant? and is it likely that a favorable decision will "redress" the plaintiff's injury? Though Massachusetts v. EPA decided all three of these questions in favor of the state, the *AEP v. Conn* case gives the Court the opportunity to address the questions anew. One substantive difference between the two cases: Mass v. EPA involved a federal statute . For cases involving federal statutes, Congress has afforded plaintiffs the statutory right to challenge "agency action unlawfully withheld," — in Mass v. EPA the failure by the EPA to regulate greenhouse gases under the Clean Air Act. The Connecticut case involves no such statute — instead the states are arguing that utilities are creating a common law nuisance. Common law is judicially, not Congressionally, created. So standing could be a real problem for the state plaintiffs

here. Also a real problem? The Obama Administration is siding with the utilities on the question, arguing that states do not have standing to bring the suit. As usual, the target Justice will be Anthony Kennedy, who provided the crucial fifth vote in Mass v. EPA.

Another looming question is much less legal than political. The states that brought AEP v. Conn. did so when George W. Bush was President, in large measure because the federal government was failing to do anything about climate change. The idea was that putting pressure on the federal government through litigation and through state legislation would help build momentum to get Congress to pass climate change legislation and preempt lawsuits and some state legislation. Of course that strategy has to date had no success. A U.S. Supreme Court decision in favor of the states in AEP v. Conn would at least move climate change back into the Congressional limelight, though it's hard to imagine the new Congress enacting legislation to regulate greenhouse gases even in the face of such a decision. But if the Supreme Court holds in favor of the utilities — and my best guess is the Court will find a way to do so, either by dismissing the case on standing grounds or finding that the Clean Air Act displaces the nuisance case — then one source of pressure on Congress will be gone.

Finally, the decision in AEP v. Conn will be compounded by the fact that Justice Sonia Sotomayor was on the 2nd circuit Court of Appeals panel of judges that heard the case prior to her nomination to the high Court. As a result, Sotomayor may recuse herself from hearing the case. If she does, and the Court splits 4-4, the lower court decision — which held in favor of the plaintiffs — will stand.