Yesterday I previewed Tuesday's oral arguments in the U.S. Supreme Court's *American Electric Power v. Connecticut* case, and two of my Legal Planet colleagues have already posted comments on certain aspects of those arguments. But let me cast discretion to the wind and predict the outcome of the case.

Actually, it's not that difficult a prognostication: the plaintiff states, City of New York and private land trusts are going to lose. From their questions and comments during oral arguments, seven of the nine justices displayed, to one degree or another, hostility towards the plaintiffs' legal position. (Justice Sotomayor has recused herself from the case, having participated in an earlier phase while on the Second Circuit and before her elevation to the Supreme Court; Justice Thomas continued his practice of asking no questions of counsel during Tuesday's arguments.)

The tougher prediction is the ground on which the Supreme Court will jettison plaintiffs' federal common law nuisance lawsuit. On that point, the states and their allies in the environmental community can take some comfort: it appears possible and even likely that the plaintiffs–to use Harvard Law Professor and colleague Jody Freeman's phrase–will "lose well." Specifically, the justices did not seem particularly interested in the defendant power companies' threshold argument that the plaintiffs lack Article III standing to bring their lawsuit. Nor did they seem terribly receptive to the companies' backstop claim that the litigation is barred by the political question doctrine. A more likely result–especially if the justices seek a consensus decision–will be to find that the states' common law nuisance claims are "displaced" by the federal Clean Air Act and the Obama Administration's actions to date to regulate greenhouse gas emissions under the Act. Indeed, toward the end of yesterday's arguments, Justices Ginsburg and Kagan seemed by their questions and commentary to be rather overtly nudging their colleagues in that direction.

Another possibility is that the Court will rule that the plaintiffs lack "jurisprudential standing," on the theory that climate change is a "generalized grievance" shared by society as a whole. This is the narrower standing defense that the U.S. Solicitor General is advancing–for the first time before the Court, and arguably out of whole cloth. Several justices expressed discomfort with the government's jurisprudential standing theory but–like displacement–it could provide a relatively convenient and narrower theory on which to rely in jettisoning the litigation. And while the plaintiff states and land trusts will take no comfort from their near-certain defeat, a Court reversal on either jurisprudential standing or (especially) displacement grounds will be relatively less damaging to future climate change litigation efforts than would be a decision predicated on the Article III standing or political question theories advanced by the defendant private power companies.

(Full disclosure notice: the author participated in this litigation in its early stages while previously a member of the California Attorney General's Office–one of the lead plaintiffs in the case.)