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RISA GOLUBOFF: Hello and welcome back to Common Law, a podcast from the University of Virginia School of Law. I'm Risa Golubuff, the dean.

LESLIE KENDRICK: And I'm Leslie Kendrick, the vice dean.

RISA GOLUBOFF: It's hard to believe this is the last episode of the season, Leslie. It feels like no time has passed since we kicked off this season on "When law changed world," talking about the rise of the anti-smoking movement with Sarah Milov. But it also feels like years have happened outside of the show in our real world, from a presidential impeachment, to a worldwide pandemic.

LESLIE KENDRICK: It's so true. It really highlights how your life can change just in an instant and that we're making history and shaping law everyday. Even though much of our attention is now on the pandemic, there's another looming problem facing the world that could similarly alter our lives-- climate change.

RISA GOLUBOFF: And our guest today will help us understand a pivotal moment in the fight to mitigate climate change. Harvard law professor Richard Lazarus has written a book about the Supreme Court case, Massachusetts versus the Environmental Protection Agency. The book is called, The Rule of Five, Making Climate History at the Supreme Court. Welcome to the show, Richard.

RICHARD LAZARUS: Delighted to be here.

LESLIE KENDRICK: Richard, you've argued 14 cases before the United States Supreme Court yourself. Why did you choose this case to focus on for your book?

RICHARD LAZARUS: This was the most significant environmental decision ever handed down by the United States Supreme Court. It was immediately hailed as environmental law as Brown V Board of Education. And no case is as significant as Brown v Board of Education, but it led to the first international Climate Accord the Paris Agreement in 2015, a historic moment for the world. And the Paris Agreement would not have happened without Massachusetts versus the EPA. So I had a sense at the beginning I knew the arc of my story. And then I learned a lot more as I did the research. And then, of course, some things changed after 2015 as well.

LESLIE KENDRICK: So take us back to the very beginning. How did the case get started?

RICHARD LAZARUS: Well, the case started really with a guy named Joe, and that's Joe Mendelson. Joe Mendelson worked for a group that no one has ever heard of, called the Center for Technology Assessment, a public interest organization Washington DC. It's the late 1990s. It's 1998. So a good decade before the Supreme Court to decide the case.

And Joe worked for this group, and Joe was just fed up. He'd gone to GW Law School-- George Washington Law School. He was a second generation environmental lawyer, interested in issues like climate change. And he got fed up as he watched the Clinton administration year after year after year not do anything on climate change. They had a lot of really important stuff during the Clinton administration on environmental issues, but not on climate, which is particularly frustrating for environmentalists like Joe, because Al Gore was vice president of the United States.

He had written the book in 1992 called *Earth in the Balance* on how climate change was the biggest threat facing humankind, an existential threat, threatening sort of enormous, potentially catastrophic consequences on the planet. Yet the Clinton administration just wouldn't actually regulate greenhouse gas emissions during eight years. So by the end of the 1990s, Joe's fed up. He works on a petition to challenge the Clinton EPA.

He works on it late at night by his baby daughter's crib, and he's under enormous pressure not to do it. All the big environmental groups in the country were saying, don't do it. Don't challenge the Clinton administration. This is a big mistake.

LESLIE KENDRICK: What was it that he was going to ask them to do?

RICHARD LAZARUS: He decided that he was going to file a petition with the EPA to require them to regulate greenhouse gas emissions from new motor vehicles in the United States. And he looked at the Clean Air Act, the statute which had been in existence in 1970. And he said, it's quite clear to me, you have a mandatory obligation here, EPA. What the statute provides in Section 202-- the Clean Air Act provides if the administrative EPA-- that's the person who runs the Environmental Protection Agency-- determines that emissions of any air pollutant from motor vehicles may reasonably endanger public health and welfare, the administrator has to regulate those emissions from motor vehicles.

And Joe looked at that statute and said, well, this is easy. Greenhouse gases, they're clearly air pollutants. So the question is whether they reasonably determined to endanger public health and welfare. Well, that too was easy.

By 1998, the science was-- there was consensus across the United States, across the globe. So Joe just couldn't wait any longer. In 1998, he drafted a petition, under enormous pressure not to do it. And in 1999, he's finally decided he's going to rock the boat. He walked the petition down to the EPA. He filed it by hand with the Environmental Protection Agency, and he sent a copy of it to Vice President Gore at the White House for good measure.

LESLIE KENDRICK: So what did the Clinton administration do with it when they got it?

RICHARD LAZARUS: They did nothing with it. They sat on it, because it wasn't actually clear that there was any particular right to file the petition or any obligation on the part of EPA at all to actually respond to it. So the Clinton administration did nothing with it, except one thing. To their great shock and the shock of many, they lost the presidential election in 2000. George Bush was the new president.

So at the very end of the Clinton administration, they decide to file a notice about the receipt of that petition to trigger within the agency some obligation to sort of think about it and consider it. What one departing Clinton administration official described as, "leaving a turd on the doorstep of the next administration."

That's how they viewed Joe's petition.

LESLIE KENDRICK: So this was just-- they were making some work for the incoming administration.

RICHARD LAZARUS: Right.

RISA GOLUBOFF: That's great. So they leave the turd, and does the Bush administration do with it once they get in office?

RICHARD LAZARUS: Well, it's interesting, and this is part of the story we think most people would not have had any idea about. And that is the Bush administration comes in, there is every reason to believe they were going to aggressively regulate greenhouse gas emissions. During the 2000 election between Al Gore and George Bush, only one candidate made a pledge to regulate greenhouse gas emissions, and that wasn't Al Gore, it was George Bush.

On September 29, 2000, he made a pledge to regulate greenhouse gas emissions. About 2 and 1/2 weeks later-- actually, four or five weeks later, everything changed because all of them were outmaneuvered by one person and that was Vice President Dick Cheney. He had flipped the administration. Bush reneged on his campaign pledge with a letter to Congress, and that letter included an important statement.

He said, not only am I not going to regulate greenhouse gas emissions, I also don't have authority to do it. The Clean Air Act does not authorize the regulation of greenhouse gas emissions. They are not air pollutants under the Clean Air Act. So he not only answered a policy question, he answered a question of law.

LESLIE KENDRICK: And that was the shift on that legal question.

RICHARD LAZARUS: Absolutely. It was a shift because EPA had taken the position that greenhouse gases were air pollutants. They had done that during the Clinton administration. They had never actually regulated them, but they did taken the position saying that greenhouse gases were air pollutants.

RISA GOLUBOFF: All right. So eventually, EPA denies Joe Mandelson's petition? Is that what happens next?

RICHARD LAZARUS: Yeah. Basically, once the president of the United States has said that greenhouse gases are not air pollutants, the decision has been made. It's been made for EPA. So at that point, the EPA had no choice. The only choice was to deny the petition.

So once a petition is denied, then they can challenge that decision in court. They now have a final decision by the agency, and they can bring a challenge to the administrative procedure act. It's not all clear EPA ever had to have acted on the petition at all. But once they acted on the petition, then they could bring a lawsuit in court.

By the time the lawsuit is brought, which is now in the fall of 2003-- so we're now five years from when he drafted the petition, four years from when he walked it down at the EPA, at that point, Joe Mendelson is no longer alone. He's got a dozen states on his side, about two or three dozen national environmental groups on his side. They call themselves "The Carbon Dioxide Warriors," as they're challenging EPA. So he's part of a huge team that is bringing this case.

And the case is brought in the first instance in the United States Court of Appeals to the District of Columbia circuit. Now, as most people realize, usually you start cases in trial court-- here being in federal trial court. But under the Clean Air Act, this decision was made by EPA under the Clean Air Act. This kind of decision goes to the US court of Appeals for the DC circuit in a first sentence. So it goes straight to the Court of

Appeals. Doesn't have to do trial first.

And the DC circuit has exclusive jurisdiction over these issues. No other federal court of appeals can hear it. So this case is brought in from the DC circuit, which is often referred to as the second most important court in the United States after the Supreme Court. Well, the Court nominally decided the EPA wins. The vote is 2 to 1 to dismiss the Mendelson petition.

LESLIE KENDRICK: So the carbon dioxide lawyers lose at the DC circuit. And in the normal course of things, for this case to get to the Supreme Court, they would have to petition the Supreme Court to grant review and hear the case. But as you talk about in your book, there was some question among the environmentalists about whether rolling the dice with the Supreme Court was such a good idea.

RICHARD LAZARUS: So the biggest fight first happened on whether go for rehearing on bond, let alone any further review. And everyone, including Joe Mendelson, who was a fighter, everyone said, fold our tents. One person thought that they should keep going, a guy named Jim Milkey.

Jim Milkey was a career attorney with the Massachusetts attorney general's office. He headed their environmental Division of that office. And Milkey felt strong about the case. He didn't think they should acquiesce in this loss. But it took a lot of courage by Milkey to convince the Court to take this case was Herculean an effort in any context, since that there was no lower court decision, let alone a circuit conflict of any kind.

And you add to that the historic fact that the environmental groups never succeed in getting cert granted. So there was not a snowball's chance in hell that this case ever would ever get granted. Even then they fought over it. And the amazing thing is it was granted.

RISA GOLUBOFF: So how did the snowball have a chance in hell? What made the Court take it? How did they persuade them?

RICHARD LAZARUS: I think there are a few things. One is David Tatel's dissent. I think David Tatel's dissent played a significant role. Tatel is highly regarded by the justices. So I think to some extent, his dissent was a cert petition. So that's one thing that played a role.

The other thing that played a role is the cert position filed by the carbon dioxide warriors. Jim Milkey did the first draft, and he managed to for the first time achieve consensus among the Carbon Dioxide Warriors. Everyone agreed that his petition was terrible. It was awful. And even he realized when he read all their criticism how bad it was.

So Jim Milkey was about 3 and 1/2 weeks left before the petition was due did a terrific thing. He brought in a ringer. He brought in a law professor from Georgetown University, Lisa Heinzerling, and asked Lisa Heinzerling if she would draft a cert petition.

Lisa Heinzerling had formerly worked for the Massachusetts attorney general's office, so she was known to them. She was a brilliant young scholar, terrific teacher. She had clerked for Justice Brennan on the United States Supreme Court. She's a great writer, engaging, fun.

In very short order, Lisa wrote a very engaging cert petition. She understood how to try to get their attention to the case. She made the case about ad law. She didn't make the case about climate.

I mean, those of us who are in peak environmental law, our hearts may go pitter patter when we think about climate change. The justices' hearts don't go pitter patter for climate change. They go pitter patter for administrative law. These are the kinds of issues they care and they think about it.

So she pitched a case, an administrative law case. She made the first issue of the case, which is not at all logical, about whether or not EPA had abused its discretion in deciding not to decide the issue. She made the second question whether or not greenhouse gas air pollutes. That's the issue they cared about, but she had a hard time making it the first issue since no judge in the majority would even address the issue.

So it made it into this big deal. Who knows what actually made the difference, but it was a shocking moment. And when the Court-- I think was June 26, if I remember correctly, 2006, they granted cert in that case. The petitioners, Carbon Dioxide Warriors, they were stunned. None of them thought this case would be granted. Everyone was basically saying the same thing-- holy shit or the like.

They couldn't believe they had a case. And so Milkey recalled to me later how when he saw the cert granted, he actually thought, what have I done? Because he knows it takes four votes to grant cert. It takes five votes to win. And he realized at that point, if they took this case up and now it was up, they had the biggest environmental case ever and they lost, it would be a disaster, particularly if they lost in Article 3 standing. Because that it could shut down climate litigation in all the federal courts forever.

LESLIE KENDRICK: So the case ends up being decided, I believe, in the spring of 2007. And this is the Roberts Court, and they've got questions both about standing for the states and for the various other petitioners and then the substantive questions about EPA's authority under the Clean Air Act. And the outcome is fairly surprising. What's the decision?

RICHARD LAZARUS: Well, the outcome is surprising. The opinion is written by John Paul Stevens, who I refer to as the Jedi master of the Supreme Court. He writes the opinion for the Court. It comes out April 2, 2007.

An important thing to remember, though, is that there is nothing preordained, as you suggest, about this happening. As you may know, the arguments of November 29, the justices are being conferenced in private on December 1. So two days later, Friday morning, that's when they vote. And the tentative vote was 5 to 4, and Justice John Paul Stevens was the senior justice in the majority.

That doesn't mean he's going to write the opinion for the Court. That means he gets to decide who's going to write the opinion for the Court. And as Justice Stevens has explained, that is a big decision. Because if it's 5 to 4, he has to make sure the person who writes the opinion for the Court can keep those five.

Because the votes at conference are just tentative. They're not at all permanent, and people change their mind all the time. So Stevens is sitting there on December 1 trying to think, who do I want to write this opinion? And he knows Justice Kennedy-- he can't afford to lose a vote. He knows Justice Kennedy changes his mind on votes, so Stevens sits there and goes, do I assign it to myself, or do I assign to Justice Kennedy?

If I assign it to Justice Kennedy, the odds are we'll keep the five. He'll institutionally feel committed to write an opinion in a way he can sign it. And this is an ownership you have of things once you start them. It's hard to leave. You can, but it's harder.

Or do I assign it to myself and take the risk? Stevens decided to assign it to himself. So it took him eight drafts. It took him eight drafts to get his five votes.

Draft number one, he had four. Draft number two, he had four. On the eighth draft, he finally made enough compromise and qualifications to get Kennedy to join him. He still kept his very sweeping beginning, very strong opening statement. He made it about climate change.

But on April 2, 2007, the opinion comes out. No one was expecting the opinion then. The case was argued in November. You know when cases are generally going to come out. This was clearly going to be a 5-4 close one.

Everyone assumed this is a May or late June decision, so no one was paying attention when the Court walked out on April 2, 2007 and announced its opinions that day. None of the Carbon Dioxide Warriors were paying any attention to the Court. They didn't even know the Court was coming out at that point. So everyone was stunned when it came out it and stunned with the result.

RISA GOLUBOFF: So you've already said how huge a case this was for environmental law and for climate change and making it akin to *Brown Versus Board of Education*. Are there lessons that you think this case offers outside of that, of it being a capstone case? What other kinds of lessons do you take?

RICHARD LAZARUS: Well, one is, what a difference good lawyering can make. There was really good lawyering done in the Supreme Court in this case. And this case could not have been done without really good lawyering.

Knowing how to frame a case, knowing how to pitch it, knowing how to acknowledge your weaknesses in a case, which they did very well, particularly the oral argument. Not to sort of argue something as strong when it's not strong when you lose credibility. Had to narrow their ask and make it a small ask to possibly try to win the case and then celebrate big later.

The difference that good lawyering could make. And this case, by winning it, by establishing greenhouse gases were air pollutants, every single thing the Obama administration did was based on *Massachusetts versus the EPA*. All of the greenhouse gas emissions and all that was necessary for Paris.

So the first lesson I would say is the difference good lawyering could make. And this case, among others, I think underscores something I've always told my students interested in environmental law, which is, the best environmental lawyers are the best lawyers. You can be environmentalist, that's great. But, you have to be an excellent lawyer first and not just an excellent environmental lawyer.

The second lesson I would say is what a difference one person can make. In this case, along the line, there is at different times, there were individuals who were extremely courageous and it made a difference.

A third lesson I would take away from the case is, don't assume history. There's a reason why my book is called *Making Climate History in the Supreme Court*. One of my unfavorite arguments of all time, which I hear people say, those of my generation, younger generation, is if they don't like the position of someone else, they say, you're on the wrong side of history. I hate that argument because it assumes history. It assumes history will be what you think it should be.

You don't assume history. You fight for history. You make history. In this case, they made history, but they made it by fighting for it, by being smart and by being strategic, by being nimble, knowing when to ask small and knowing when to ask big.

And the I think the last lesson I would take away is even a case as monumentally important as *Massachusetts versus the EPA*, it's still just a Supreme Court decision. And Supreme Court decisions themselves, the votes of five justices is never enough for truly long-lasting transformative change.

Brown v Board of Education did not end racism in the United States. It did not end segregation in our schools. It's taken-- it's still fighting for that across this country. It took legislation afterwards. It took changes of attitude. Incredibly important cases, but it takes more than just five votes of justices.

And the same is true for *Massachusetts versus the EPA*. Incredibly important decision, but it's a decision of the Supreme Court. You want transformative change, long-lasting change in the United States, that's done through the ballot box. It's not done through five votes of justices. It's done by individual votes of people across the country. That's how you change history. That's how you have long-lasting change.

And the climate change issue is one which requires long-lasting, enduring laws. You can't just solve it one night. You've got to maintain the laws, maintain the emissions reductions over time.

So really, the longer term lesson of this is incredibly important decision. But if Massachusetts versus the EPA is promised. The promise of that ruling has to be realized, not unlike the promise of Brown v Board of Education is who are the votes of individuals, courageous individuals, people not just willing the lawyer, but people willing to vote. And we have a very important election coming up on many issues, but certainly including on the climate change issue.

LESLIE KENDRICK: This has been such a great conversation, Richard. Thank you so much.

RICHARD LAZARUS: Well, thank you. I enjoyed it a lot.

RISA GOLUBOFF: Thanks, Richard.

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LESLIE KENDRICK: So where Richard ended, Risa, makes me think a lot about your work, that cases don't get decided in a vacuum and that legal history and history is made by lots of different actors.

RISA GOLUBOFF: Yeah. I was thinking the same thing, Leslie. Funny you should mention that. The book is so fabulous in that it's really telling this story of what happens to a case from the very beginning and before it's even a case, all the way through the court and then afterward.

And I think a lot of a time when people think about what is a case or what is law, they start and end with the Supreme Court and its decision. But I write a lot in my legal history about how a court doesn't even take a case until a plaintiff has come forward, until a lawyer has decided there is a legal issue here. And so one of the things he does so beautifully is show both within litigation itself how many different actors play a part in changing the world through the law in identifying that there's a harm, in classifying that harm as a legal categorical way. And even in what facts they think are important so that litigation neither starts nor ends at the core.

And on the backside, which he says so well is, the Court isn't the end of the story. They're a punctuating moment. They intervene into this larger milieu. And they obviously set terms, and they set baselines, and they give power to one side or the other coming out of the case. But then everybody regroups, and they start from the new baseline thinking, what is it that we can do? How do we change the world to look like we want it to look? And that's different for many different actors. And then beyond that is outside of litigation is policy and politics and all of these other organizations that are all operating not only in the litigation context, but in all those other arenas as well.

LESLIE KENDRICK: It made me think about some of the stories we've heard in some other cases. So when he talks about Joe Mendelson deciding to walk this complaint over, it makes me think about some of the individual actors that Sarah Milov talked about who kicked off the anti-smoking movement, some of which were involved with litigation, but others were involved in other types of political action. Or the council in New York Times versus Sullivan. It was the New York Times' local Alabama counsel that thought they should make the constitutional claim, and none of the fancy New York lawyers thought to make that.

It's all of these ways that folks who are not the Supreme Court justices and they're not the Supreme Court litigators, they can have an enormous impact on the way the law ends up getting shaped. And we've heard so many stories about that this season. It's been really interesting.

RISA GOLUBOFF: Absolutely. And I think it's one of my favorite themes as a scholar, and I know it's one

of our favorite themes as legal educators, which is, the power of lawyers. And I think people think, oh, Thurgood Marshall or Ruth Bader Ginsburg before she's on the Court. There are individual lawyers people can picture and imagine as having a lot of power, but I don't think people always appropriately estimate how much power all lawyers have to bring cases to make law change, and I think that's what we've been seeing.

I think Joe Mendelson is a great example here. And as you mentioned, we've had so many over the course of the season of people who aren't famous and they don't seem like they wield tremendous amounts of power, but that's what having a law license enables you to do. It's set in motion this whole apparatus of legal change and legal process. Obviously, doesn't always lead to the biggest environmental case the Supreme Court's ever seen, but it creates that possibility.

LESLIE KENDRICK: Something that I didn't realize was the bit that he told about the Bush administration coming in, being generally kind of open to and favorable toward climate change regulation. And that's something that I didn't remember from that time period. And it's striking there too just how politics can change over time, the sort of political valence of different ideas can change over time.

And that's something that's happening outside of the courtroom and outside of litigation. And it's something about the interaction between law and politics and culture, and that was just a really kind of striking example of that that I had lost track of.

RISA GOLUBOFF: Me too. And as we come to the end of the season, that makes me think, Leslie, about the pandemic more generally and the themes that we've been talking about on the podcast and when law changed the world. And it really strikes me that we're talking about law in a broad sense, and our different stories have been about different kinds of laws at different levels of government and different kinds of actors.

But one of the themes that you can see all throughout the season is really the power of government, in its regulatory power, in its spending power, starting way back with Sarah Milov and the tobacco questions, where the government really didn't regulate soon enough and took a while before the lawyers were able to force the issue and really step in. And I think we see that all the way throughout. And here we are in this pandemic asking similar questions about the role of government, the power of government, both as a spender and as a regulator and as a purveyor of legal rules that not all law is the same. And even as we talk about the power of different actors, some actors really have a lot more power to shape what societal responses are going to look like to these major disruptions in the world.

LESLIE KENDRICK: That's so true. And being in this moment, you realize, we are in one of these historic moments right now, where different peoples' decisions, individual decisions, big policy decisions, they really do have a huge impact on people's lives. And having talked about so many different pieces like that from the past and that are ongoing-- the anti-smokers movement, pandemics of the past, climate change-- to realize we're in a moment like that right now. I mean, we're always in a moment like that on some level, but it's really, really striking right now.

RISA GOLUBOFF: I agree. Striking and humbling and makes me grateful to be able to be part of these conversations. So, thank you for this wonderful season.

LESLIE KENDRICK: Same here. Thank you so much. It's been a real joy. And although we're all living in uncertain times, having the through line of this podcast throughout all of it, with all of our wonderful producers and our wonderful guests and my wonderful co-host, that has made a huge difference. So I want to say to our listeners too, thank you for listening, and I hope that it's provided you with some amount of through line as well.

RISA GOLUBOFF: Hear, hear. We hope to see you next season.

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LESLIE KENDRICK: That's it for this season of Common Law. We hope you've enjoyed hearing about when law changed the world. And on the flip side, when the world changed the law.

RISA GOLUBOFF: If you're tired of social distancing, you can still get closer to us online by telling us what you think. Rate or review us on Apple podcasts or wherever you hear the show. To learn more about this topic or catch up on other episodes, visit us at CommonLawPodcast.com or follow us on Twitter @CommonLawUVA.

LESLIE KENDRICK: We'll see you again in the fall when our podcast resumes. And Risa, I hope we're back in the studio to see each other too.

RISA GOLUBOFF: I hope so too, Leslie. Common Law comes to you from the University of Virginia School of Law. Today's episode was produced by Sydney Holliman, Robert Armengol, and Mary Wood, with help from Virginia Cane. This show was recorded remotely via our cell phones. I'm Risa Goluboff.

LESLIE KENDRICK: And I'm Leslie Kendrick. Stay safe and healthy, and we'll see you next season.

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