I'm traveling but wanted to get in a few quick words about Judge Alsup's decision today in the California climate change litigation. This is a really complex issue, and I wanted to try to unpack it a bit.

In general, except where a federal statute or constitutional provision is the basis for an action, legal disputes are governed by state law, whether cases are filed in state court or federal court. There is an exception, however, for matters of special federal concerns. A line of cases going back about a century says that interstate pollution is one of those areas.

In a number of cases, plaintiffs brought suits against emitters for remedies based on climate change, invoking this "federal common law nuisance" theory. The Supreme Court cut off those claims in the *AEP*, holding that the federal common law was displaced by the Clean Air Act's regulation of greenhouse gases. But the Court left open the question whether similar claims could be brought under state common law, rather than federal common law. With me so far?

Here's where things get sticky. The plaintiffs in this case brought suit under California nuisance law against producers of fossil fuels, claiming that they had contributed to climate change through marketing the fuels and deceiving the public about the risk posed by their products. They filed that case in state court. The defendants then asked a federal court to take over the case, a procedure called removal. That brings us to Judge Alsup's decision.

Judge Alsup ruled that these cases are covered by the federal common law of nuisance, not state law. He saw a need for a uniform federal rule covering remedies against fossil fuel producers given the global nature of the problem and the fact that the defendants' conduct was also global. He also distinguished the *AEP* case, on the ground that the Clean Air Act regulates emissions rather than production and marketing of fossil fuels. If he's right that the case arises under federal law, the defendants clearly have a right to move it to federal court.

The first issue is whether the case really is covered by federal common law. In general, the Supreme Court has increasingly stressed the exceptional nature of federal common law and the need to be sparing in its application. Generally, c0urts haven't held that marketing or producing a product is subject to federal common law – otherwise, lawsuits for harm caused by a lot of defective products would have to be brought in federal court rather than state court.

Maybe Judge Alsup is right that the climate issue is especially suited to federal common law. That makes a certain amount of sense in policy terms, but I have some doubts about

whether the Supreme Court would agree. His effort to distinguish *AEP* has some logic on its side, since the Clean Air Act doesn't regulate production and marketing (as opposed to emissions). But the damages also relate to the effects of the emissions, so this distinction also seems open to debate.

The plaintiffs probably brought suit in state court because they expected a better reception from California judges. But Judge Alsup has a good track record in environmental cases, and the litigation will have a higher profile in federal court. So this may not be much of a loss for them.

Judge Alsup certified the case for immediate appeal, which seems very sensible. We'll see what the Ninth Circuit, and maybe ultimately the U.S. Supreme Court, has to say about all this. In my own view, *AEP* was wrong in the first place and the Court should have stuck with federal common law all along. But given *AEP*, it's not clear to me that these cases belong in federal court.