

## Supreme Court Allows Major State, Local Government Climate Change Litigation to Proceed on Merits | 1

This week the U.S. Supreme Court gave state and local governments a big-if preliminary-legal win against the fossil fuel industry. The justices declined to take up numerous cases in which government entities have sued oil, gas and coal companies, seeking compensation for the climate change-related damage the jurisdictions they claim to have suffered, and which they attribute to the greenhouse gas emissions the companies' products have released into the atmosphere.

After years of procedural wrangling, these lawsuits now-and finally-head back to state courts for resolution on their merits.

What has become a national wave of closely-related climate change litigation began in California in 2017, when San Mateo and Marin Counties, along with the City of Imperial Beach, filed suit in state court against many of the world's largest fossil fuel companies. The lawsuits claim that those jurisdictions and their residents have suffered considerable social and economic harm as a result of climate change-related events such as sea level rise and intensive, damaging coastal storms. The government seeks money damages from the defendant companies, alleging that the combustion of their carbon-based products has produced greenhouse gas emissions which in turn have contributed to the climate change impacts these local governments have suffered.

Notably, the government plaintiffs claim that while the defendant companies for years publicly denied that their fossil fuel products were contributing to climate change, their internal communications reveal that the companies knew full well that the marketing of their products was causing profound environmental damage. And plaintiffs' counsel claim to possess the incriminating industry documents that prove the companies' deception.

Critically, the California local jurisdictions filed their cases in *state* courts, relying on longstanding state common law principles such as public nuisance and trespass as the legal basis for their claims.

This climate change litigation template was quickly embraced and replicated by state and local governments across the United States, who followed suit by filing their own, similar cases against the fossil fuel industry. While some of the claims of climate change-related harm vary among the government plaintiffs and the specific state common law theories relied upon vary as well, the thrust of this national wave of lawsuits is the same: the companies' products have caused the harm these jurisdictions have suffered, and now those companies must pay to compensate the plaintiffs for those harms.

There are now more than two dozen such lawsuits pending in states from New England to

Hawaii.

The industry defendants' immediate, coordinated response to this wave of litigation has been to try to transfer (or, in legal parlance, "remove") those cases from state court to federal court. They've done so based on the belief—probably well-founded—that defendants are likely to receive a more sympathetic reception from federal judges than their state court counterparts.

However, the legal grounds on which a case filed in state court can be removed to federal court are quite narrow under longstanding federal law. But that hasn't stopped the defendants from spending years and millions of dollars trying to convince federal judges across the nation that these cases should be litigated in federal court.

Unfortunately for defendants, federal district courts and U.S. Circuit Courts of Appeals have uniformly rejected the industry's procedural arguments. No fewer than six different Federal Circuits have ruled that these cases don't belong in federal court, finding instead that they should be litigated and resolved in state courts.

The industry defendants' final attempt to keep the cases in federal court was a blizzard of petitions for certiorari, beseeching the U.S. Supreme Court to take up these cases and overrule the six Federal Courts of Appeals that had ruled against them. But the justices declined to do so in a brief order. So after six long years of procedural skirmishing and delays, all of these climate change lawsuits are back in state court—where they belong.

(One interesting sidebar in this litigation saga is that the Trump Administration's Justice Department had originally urged the Supreme Court to rule that these cases could and should be litigated on their merits in federal court. But the Biden Administration reversed that position, arguing that the cases properly belong in state courts, and that the justices should therefore deny review—as they did this week.)

So what happens next?

The state and local government plaintiffs' procedural victory ensures that these far-flung climate change cases will be heard before and decided by state court judges. Now the focus of the parties and their lawyers turns to the merits of these lawsuits.

The industry defendants have at least one more legal card to play before these cases have a chance to go to trial. In 2011, a unanimous Supreme Court held in [\*American Electric Power Co. v. Connecticut\*](#) that *federal* common law-based climate change cases are displaced by

Congressional passage of the federal Clean Air Act. Critically, however, the justices declined in the *American Electric Power* case to decide the related question of whether *state* common law claims are similarly preempted by the Clean Air Act. The fossil fuel defendants in the present cases will doubtless argue that the state and local government state common law claims are indeed preempted by the federal statute.

It seems to this observer that state court judges will be reluctant to agree, and will instead let these cases proceed on their factual merits.

To be sure, the government plaintiffs face some formidable evidentiary challenges in pursuing these cases—in particular, causation (attributing the harm these governments and their residents claim to have suffered to the specific acts and products of these defendants) and quantification of the money damages to which the plaintiffs are entitled.

But the plaintiffs' attorneys who've carefully researched and developed these cases like their chances. They claim to have possession of damning evidence that the fossil fuel industry produced and marketed carbon-based products that they've known for decades would profoundly damage the global environment.

Without question, the state common law-based lawsuits that state and local governments across the country have brought against the fossil fuel industry represent some of the most consequential climate change litigation currently pending in the United States. Seeing how these cases play out should be fascinating for lawyers and laypersons alike.