



Credit: Baltimore Sun

On Tuesday, the U.S. Supreme Court will hear oral arguments in its first environmental case of the 2020-21 Term. That case, [*BP PLC v. Mayor and City Council of Baltimore*](#), involves an important, nationwide climate change litigation trend, and will provide the first indication of the post-Ginsburg Court's attitude towards environmental law and litigation generally.

The *Baltimore* case is part of a nationwide initiative of 19 separate lawsuits brought by numerous local governments-and a few states-against major international coal, oil and gas companies. The government plaintiffs seek compensation from the multinational energy companies for the financial harm and burdens the local and state governments have suffered from the impacts of climate change-impacts they attribute to greenhouse gas emissions from fossil fuels the companies have marketed and from which they have profited greatly. Critically, the government plaintiffs rely on a variety of state common law (i.e., court-developed) legal theories in pursuing their claims for monetary compensation. (Previous posts on this nationwide litigation initiative can be found [here](#) and [here](#).)

As in virtually all of these cases, the City of Baltimore filed its lawsuit in state court. As part of their nationwide defense strategy, the energy defendants immediately removed (i.e., transferred) the case to federal district court, believing that Baltimore's climate change lawsuit would receive a chillier reception there than it would in state court.

But under federal law, it is the federal court, not the defendants, that has the ultimate say in determine whether a case has been properly removed there or, alternatively, if it should be remanded back to state court for resolution. In *Baltimore*, the energy defendants argued that they were entitled to transfer the case to federal court under the so-called "federal officer" doctrine. Specifically, they claimed that they were quasi-federal officials by virtue of the fact that they regularly do business with the federal government-such as by bidding

for and purchasing oil, gas and coal leases from the government. The federal district court judge unsurprisingly found that argument attenuated and without merit, and ordered the case remanded back to state court. (Both rulings are consistent with those of other federal courts around the nation in the other, related government v. Big Energy lawsuits.) The energy defendants appealed that decision to [the U.S. Court of Appeals, which agreed with the district court that removal was improper](#). The energy defendants then successfully sought Supreme Court review.

At first blush, then, the *Baltimore* case would appear to be a narrow, rather arcane case about federal court procedural rules. But it's not. Instead, how the Supreme Court decides may well influence—or even dictate—how state and local governments' legal efforts to hold Big Energy accountable fare on their legal merits.

That's because the Big Energy defendants have not-so-subtly shifted their legal arguments in the *Baltimore* case once the justices granted review last fall. Instead of simply contending that their attempted remove the case to federal court is permissible under the “federal officer” rule, they're now asking the Court to go much further, and hold that the City's substantive, state law-based legal claims are meritless.

To understand why and how, a bit of background is required: in its 2011 decision in [American Electric Power v. Connecticut](#), the Supreme Court unanimously ruled that states could not rely on *federal* common law principles such as public nuisance law to hold the owners and operators of coal-fired power plants liable for the adverse effects of their plants' GHG emissions. Those federal common law claims are “displaced” by the federal Clean Air Act, the justices concluded.

But, critically, the *American Electric Power* decision left unresolved the companies' related argument that *state law*-based common law claims are similarly superseded by the Clean Air Act. (It is those very state common law principles on which the City of Baltimore and 18 other state and local governments around the country rely in the current set of climate change lawsuits.). And just [last year the justices held](#) in a hazardous waste dispute involving the federal Superfund law that state common law theories of liability remain valid notwithstanding the existence of a comprehensive federal statutory scheme; that decision suggests the City of Baltimore's state common law claims may well be similarly viable.

So it's perhaps unsurprising that the Big Energy defendants in *Baltimore* are trying to strangle the municipal plaintiffs' legal claims before lower courts even have a chance to consider them. Understandably, the City of Baltimore argues that the Court should not allow the energy defendants to “smuggle” these new legal claims into the case after they'd

initially sought Supreme Court review on a far narrower procedural point.

It will be most interesting to see how the justices react to Big Energy's attempted bait-and-switch tactics. On the one hand, the Court has traditionally frowned on advocates' efforts to shift their legal arguments after they've obtained Court review. However, the newly-expanded conservative wing of the Court may view the *Baltimore* case as an opportunity to double-down on Chief Justice Roberts' previously-stated view that climate change disputes are inappropriate for resolution by the courts. (As a middle ground, the justices could send the case back to the lower federal courts to sort out both the energy companies' removal and state common law arguments initially.)

If the justices decide to address only the narrow procedural issue of whether the Big Energy defendants are "federal officers" for purposes of federal court removal rules, it would appear the City of Baltimore has the far stronger argument. And should the Court so rule, that means the *Baltimore* case-and the others currently pending around the country-will likely head back to state court for resolution on their merits. There, in turn, the City of Baltimore and the other government plaintiffs are likely to find a more friendly forum than they would before the federal courts.

If, on the other hand, the Court decides to accept Big Energy's invitation in *Baltimore* to hold that there is no appropriate role for state common law-based theories in addressing state and local government climate change concerns, this important, nationwide climate change litigation trend could suffer a fatal blow.

More broadly, the *Baltimore* case provides a newly-constituted and more conservative Supreme Court its first opportunity to declare its views on environmental law generally and climate change litigation in particular.

In sum, the *Baltimore* case is one very much worth watching.