

The Local Case Against Climate Deception

Korey Silverman-Roati

2023-05-13T17:02:01

Over the last five years, cities, counties, and states across the U.S. have sued fossil fuel companies alleging that the companies violated state law in marketing their products as safe. Collectively, these cases are known as climate liability cases or climate deception cases. On April 24, the U.S. Supreme Court [declined to hear a petition](#) on whether the climate liability cases should be heard in state or federal court. As a result, 11 cases will be remanded to state court to move towards motions to dismiss, discovery, and trial. The Supreme Court's decision also helps plaintiffs in more than a dozen other cases argue that their cases against fossil fuel companies should be heard in state court, rather than federal court, and it may help spur more state court filings. This is a big win for the city, county, and state plaintiffs, after they engaged in a five-year fight to keep the cases in state court.

Several factors led to the Supreme Court's decision. They include (1) consensus in federal appellate courts that the cases belong in state courts; (2) strategic, state-law focused claims by the plaintiffs; and (3) the Department of Justice's (DOJ) brief supporting the plaintiffs' arguments. From here, the cases will move ahead in state court, with key developments to watch in Hawai'i and around the country.

Background on the cases

Starting in 2017 with three cases filed in California, cities, counties, and states across the country filed suits against fossil fuel companies. In total, at least 25 cases have been filed in California, Colorado, Connecticut, Delaware, Hawai'i, Maryland, Minnesota, New Jersey, New York, Rhode Island, South Carolina, and Vermont. While there are some differences between the cases, broadly speaking, all of the government plaintiffs allege that the fossil fuel companies knew that their products would cause climate disasters, deceptively marketed them as safe, and as a result, taxpayers have been on the hook for billions to trillions of dollars in infrastructure repairs and adaptation expenses. The specific claims raised in the cases can be grouped into two broad categories. First are cases that allege that the fossil fuel companies' deceptive practices amount to [violations of common law](#), like public nuisance, private nuisance, negligence, and failure to warn. Second are cases that allege the fossil fuel company activities [violate state consumer protection laws](#).

Nearly all of the state and local government plaintiffs filed their cases in state court. Fossil fuel company defendants responded by removing the cases to federal court. The fossil fuel company defendants vigorously fought to keep the cases in federal court because they viewed them as easier to dismiss in federal court. This is because they argue that the claims are actually federal common law claims and federal common law climate claims are displaced by the Clean Air Act. Local and

state government plaintiffs want the cases to remain in state court, where they argue that climate nuisance claims are similar to past state law-based efforts to hold companies accountable for misleading the public about their products' harms, like those against tobacco companies.

The jurisdictional fight dragged out over five years. In May 2021, the Supreme Court [issued a decision](#) on one aspect of this fight – whether appellate courts could review all aspects of a federal district court's remand order, or whether appellate courts were limited in their ability to review. The Supreme Court sided with the fossil fuel company defendants, ruling that appellate courts could review all grounds of the remand order.

But the fossil fuel companies' procedural win proved fleeting. Five circuit courts of appeal, after considering all aspects of the remand orders, affirmed lower court decisions that the cases should be sent down to state court. In response, the fossil fuel companies filed petitions for a writ of certiorari to the Supreme Court in an attempt to have the high court overturn those rulings. The Supreme Court refused the petition. Just before this, a sixth circuit court, the Eighth Circuit, also affirmed a remand order sending another case back to state court.

The Supreme Court's decision to reject the petition

Like many decisions on petitions for writs of certiorari, the Supreme Court did not include any reasoning in its decision. The order stated only that Justice Alito did not participate in the decision, and that Justice Kavanaugh would have granted the petition. When the Supreme Court rejects such petitions, the rulings of the lower appellate courts stand. As a result, the [ruling in the Tenth Circuit Court of Appeal](#) to send the case back to state court will go into effect.

Key factors in the Supreme Court's decision

While the Supreme Court did not issue an opinion or explain its reasons, the following factors were likely significant in its decision to reject the petition.

Appellate courts across the country sent the cases back to state court

The [First](#), [Third](#), [Fourth](#), [Eighth](#), [Ninth](#), and [Tenth](#) Circuits issued rulings that these climate liability suits should be remanded to state court. Supreme Court decisions on whether to grant petitions of writs of certiorari often turn on whether appellate courts are split on a question of law, and the Supreme Court's intervention is therefore needed to resolve that split. That wasn't the case here. While one appellate court, [the Second Circuit](#), did affirm a district court's granting of the defendant fossil fuel companies' motions to dismiss, that case was initially filed in federal court, meaning that the appellate court did not consider whether federal or state courts were the appropriate jurisdiction. Thus, no circuit split existed on the question of which courts should hear the cases. And the Supreme Court was likely strongly

influenced by this backdrop of lower court legal consensus that the cases should be sent back to state court.

Strategic pleading by government plaintiffs

The appellate court decisions to remand the cases to state court turned on decisions over whether the plaintiff's claims', although frame as state law claims, actually arise under federal law. A key point of this analysis, known as [the Grable test](#), is whether the plaintiffs' claims necessarily raise a disputed and substantial question of federal law. This requires an analysis of the claims themselves. The plaintiffs strategically pled state law claims and refrained from adding federal causes of action to their cases. They aimed to focus their claims on issues that state courts are used to hearing – whether the fossil fuel companies violated state common law and state consumer protection laws. The focus of plaintiffs' claims, and their arguments about them in court, ultimately persuaded district and appellate courts around the country that they did not raise federal interests that required federal court jurisdiction.

Key filing by the Department of Justice

Before rejecting the petition for writ of certiorari, the Supreme Court [asked the DOJ to weigh in](#) on whether the Supreme Court should take the case. On March 16, the DOJ [filed a brief](#) arguing that state courts are the proper jurisdiction to hear the governments' claims. As part of their reasoning, the DOJ argued that “no federal issue is ‘embedded’ within respondents’ own articulation of their claims.” In other words, the claims, as pleaded, do not rise or fall on their ability to prove violations of federal law. The DOJ also supported the argument that no circuit split existed between appellate courts. Given that the Supreme Court explicitly asked the DOJ to weigh in, it is likely that their analysis played a large role in the Court’s denial of the petition.

The DOJ had taken a different position in [its brief](#) in the May 2021 Supreme Court case, writing that the claims “may well be” thought to arise under federal law for jurisdictional purposes. But, in this case, the DOJ wrote that, “[a]fter the change in Administration and in light of those intervening developments, the United States has reexamined its position and has concluded that state-law claims like those pleaded here should not be recharacterized as claims arising under federal common law.”

Future developments in the climate liability cases

With the petition denial, observers of the cases will look to key developments in state court. The case that is widely viewed as the furthest along is [Honolulu v. Sunoco](#). In that case, the Hawai'i Circuit Court became the first state court in the nation to rule on a motion to dismiss in these climate liability lawsuits. The court rejected the fossil fuel companies' arguments, allowing the case to move forward (for more on the decision, see a previous blog [here](#)). The fossil fuel company defendants appealed the ruling to the Hawai'i Supreme Court, and on March 31, the Court agreed to hear the appeal.

More state courts around the country will begin to hear arguments on motions to dismiss. If the plaintiff governments are successful, the cases will move towards discovery and trial. The plaintiffs will aim to use discovery to gather more evidence that the fossil fuel company defendants had knowledge of the climate harms arising from use of their products. They will also aim to bolster evidence of fossil fuel company actions taken to conceal that knowledge from the public and deceptively market their products as safe.

This article has been cross-posted with the [Climate Law Blog](#) of the Sabin Center for Climate Change Law at Columbia Law School.

