

Supreme Court Ruling May Affect the Fate of Climate Change Liability Suits

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On May 17, 2021, the Supreme Court issued a ruling that could delay climate liability suits—that is, lawsuits seeking damages for alleged climate change-related injuries that result from selling and producing fossil fuel products. In *BP p.l.c. v. Mayor and City Council of Baltimore*, the Court considered the scope of judicial review of orders that transfer a lawsuit from federal to state court. The Court expanded the scope of appellate review of orders remanding climate liability cases to state court, a holding that will likely postpone judicial review of the merits of these suits.

Legal challenges over the appropriate court venue may affect the law and precedent that is applied in more than 20 climate liability suits filed by state and local governments against fossil fuel producers in state courts. This Legal Sidebar reviews the background of the *Baltimore* case, the Supreme Court’s ruling, its potential effect on climate liability suits, and considerations for Congress.

Removal from State to Federal Court

The *Baltimore* case arose from lower court decisions related to whether climate liability suits belong in state or federal court. [Article III, Section 2 of the Constitution](#) limits federal courts’ jurisdiction to cases involving federal statutes, the Constitution, or treaties.

A defendant may [remove](#) (transfer) a suit brought in state court to a federal district court if it falls with the federal court’s jurisdiction. If the plaintiff appeals the defendant’s removal action, a federal court can remand the case to state court if it concludes that the suit was improperly removed. Under [28 U.S.C. § 1447\(d\)](#), such remand orders are not subject to appellate review.

Congress established two exceptions to the Section 1447(d) bar on appellate review of remand orders. In 1964, Congress permitted appellate review of remand orders if the state case was removed to federal court under the civil rights removal statute, [28 U.S.C. § 1443](#), which permits removal to federal court of suits in which “equal civil rights of citizens” cannot be enforced in state court. In 2011, Congress extended the exception to allow appellate review of removal orders under the federal officer removal statute, [28 U.S.C. § 1442](#), which authorizes the removal of state cases to federal court against any officer or agency of the United States for any act related to federal authority. It is this removal statute that provided a mechanism for the Supreme Court to review the *Baltimore* case.

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BP p.l.c. v. Mayor and City Council of Baltimore

In July of 2018, the Mayor and City of Baltimore (Baltimore) [filed suit](#) in Maryland state court against 26 fossil fuel producers, alleging that they violated state nuisance, negligence, strict liability, and consumer fraud laws by producing, promoting, and marketing fossil fuel products that contribute to climate change. Baltimore claims that it suffered various “[climate change-related injuries](#)” as a result of these companies’ actions. The alleged injuries include infrastructure repair and planning and response costs associated with increases in sea levels, storms, floods, heatwaves, droughts, and extreme precipitation. Baltimore seeks compensatory damages, civil penalties, punitive damages, and other relief.

Two of the defendants removed the case to the U.S. District Court for the District of Maryland, asserting [eight separate grounds](#) to support removal. One of those eight grounds was that removal is authorized under the federal officer removal statute, [28 U.S.C. § 1442](#), because certain defendants entered into agreements and leases with the federal government to undertake some fuel production activities. The defendants also argued that the case should be removed because Baltimore’s claims are governed by federal common law and preempted by the Clean Air Act (CAA), other federal statutes, and the Constitution. Baltimore then [moved](#) to return the case to state court, asserting that the federal court lacked subject matter jurisdiction over the state-law claims. The Maryland federal district court granted the remand to state court, rejecting all eight removal grounds asserted by the defendants. The defendants appealed the federal district court’s remand order to the U.S. Court of Appeals for the Fourth Circuit. The defendants cited the federal-officer exception to appellate review in [28 U.S.C. § 1447\(d\)](#) as the basis for appellate jurisdiction, but they asked the Fourth Circuit to review the entire remand order.

On appeal, the Fourth Circuit [concluded](#) that under [28 U.S.C. § 1447\(d\)](#), it could review only the lower court’s ruling pursuant to the federal-officer removal statute and none of the other grounds for removal. Section 1447(d) states that:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal

The Fourth Circuit interpreted Section 1447(d) as limiting its appellate jurisdiction to grounds for removal under (1) the federal-officer removal statute, [28 U.S.C. § 1442](#), or (2) the civil-rights removal statute, [28 U.S.C. § 1443](#). (In other climate liability suits, the U.S. Courts of Appeals for the [First](#), [Ninth](#), and [Tenth](#) Circuits interpreted Section 1447(d) similarly in their review of remand orders.) The Fourth Circuit therefore [affirmed](#) the district court’s removal order, agreeing that contractual relationships between the defendants and federal agencies did not support removal based on the federal-officer removal statute. The Supreme Court granted the fossil fuel producers’ petition for a writ of certiorari on whether [28 U.S.C. § 1447\(d\)](#) permits appellate review of any removal grounds addressed in a district court’s remand order where removal to federal court was based in part on the federal-officer or civil-rights removal statutes.

Supreme Court Ruling

In a 7-1 decision, the majority of the Supreme Court [ruled](#) that the Fourth Circuit erred, and that the Fourth Circuit had jurisdiction under [28 U.S.C. § 1447\(d\)](#) to consider all of the defendants’ grounds for removal. (Justice Alito took no part in the consideration or decision of this case.) In an opinion authored by Justice Gorsuch, the majority [reasoned](#) that the ordinary meaning of “order remanding a case” in Section 1447(d) permits appellate review of all grounds for removal addressed in the district court’s remand order, even if the federal-officer or civil-rights removal statutes were not the defendants’ only grounds for removal. Justice Gorsuch [highlighted](#) the Court’s decision in [Yamaha Motor Corp. USA v. Calhoun](#) to support the majority’s interpretation of Section 1447(d). In [Yamaha](#), the Court [held](#) that an appellate court has jurisdiction over any issue included in an order certified for interlocutory appeal under

28 U.S.C. § 1292(b), and is not limited to the question of law the district court certified for further review. Because a removal order can be appealed under Section 1447(d), like an order certified for interlocutory appeal under Section 1292(b), the majority **reasoned** that an appeals court can review any ground for removal included within the order.

The majority **rejected** Baltimore's argument that expanding appellate review of removal orders would delay litigation of the merits of a case. The majority noted that Congress accepted the potential delay when it allowed appeal of removal orders in cases removed under the federal-officer and the civil-rights removal statutes. The Court **declined** to consider the merits of the other grounds for removal that the fossil fuel producers had raised, vacating the Fourth Circuit's decision and remanding the case so that the Fourth Circuit could consider them for the first time.

In her dissent, Justice Sotomayor **argued** that Section 1447(d) "does not speak clearly" to how the provision applies to cases removed on multiple grounds that include federal-officer or civil-rights removal. In reviewing possible interpretations of Section 1447(d), she **reasoned** that the majority's interpretation stretches the exceptions to the bar on appellate review of removal orders "too far," allowing defendants to "bootstrap" their removal arguments for appellate review "by tacking on an argument under §1442 or §1443." She **argued** that restricting appellate review to the federal-officer or civil-rights removal statute grounds "best accords" with "'Congress's longstanding policy of not permitting interruption of the litigation of the merits of a removed case' with lengthy jurisdictional disputes." She **asserted** that the majority's interpretation "opens a back door to appellate review that would otherwise be closed to" the defendants, further delaying litigation on the merits.

Effect on Climate Liability Suits

Baltimore's lawsuit is one of **more than 20 similar suits** that state and local governments have filed since 2017, seeking to hold fossil fuel producers liable for climate change-related damages under state nuisance, negligence, or consumer fraud laws. Many of these suits face similar issues related to court venue and challenges to the scope of appellate review of removal orders under Section 1447(d).

As a result of the Supreme Court's *Baltimore* ruling, four appellate courts will review all grounds seeking to remove climate suits to state courts in those pending cases. In addition to the remand to the **Fourth Circuit** in the *Baltimore* suit, the Supreme Court granted petitions that raised the same Section 1447(d) issue in climate liability suits filed by the state of **Rhode Island**, several cities and counties in **California**, and the Board of County Commissioners of Boulder County in **Colorado**. The Court cited its *Baltimore* ruling in vacating decisions from the U.S. Courts of Appeals for the **First**, **Ninth**, and **Tenth** Circuits, respectively, and remanded the cases to expand review to all grounds for removal to federal court, further delaying litigation of the merits of these suits. These federal courts of appeals will address, among other grounds, whether the suits should be removed to federal court because the state claims raise federal questions or are preempted by the CAA. If not for the Supreme Court's decision in *Baltimore*, the state courts would have proceeded to adjudicate the merits of these cases to decide whether federal questions (including preemption) are viable defenses to the liability claims.

Fossil fuel producers have sought to remove the state climate liability cases to federal court, where previous attempts to hold major sources of GHG emissions liable for climate change-related injuries have failed. In 2011, the Supreme Court held in *American Electric Power Co. v. Connecticut* (*AEP*) that the CAA displaced the federal common law interstate nuisance claim seeking an injunction limiting GHG emissions from power plants. The Court explained that a federal statute displaces federal common law if the statute "'speak[s] directly to [the] question' at issue." In 2012, the Ninth Circuit held in *Native Village of Kivalina v. ExxonMobil Corp.* that the Supreme Court's reasoning in *AEP* also precludes federal common law claims seeking monetary damages, rather than injunctive relief. Federal district courts have also dismissed **other federal common law nuisance suits** seeking climate change-related damages because

the courts found that the claims were displaced by the CAA or raised nonjusticiable questions that only the political branches can resolve.

Two federal appellate decisions have exercised jurisdiction to consider the kinds of removal arguments that, after *Baltimore*, are now more broadly subject to appellate review. In May 2020, the Ninth Circuit addressed these removal grounds in an appeal by the cities of Oakland and San Francisco. The federal district court in that case had denied a remand to state court, an order that is not subject Section 1447(d), and had dismissed the cities' climate liability suit. In *City of Oakland v. BP*, the Ninth Circuit reversed the dismissal and ordered the district court to reconsider whether a remand to state court was warranted. The Ninth Circuit [held](#) that the federal district court did not have jurisdiction over the state-law public nuisance claim because it did not require resolution of a substantial question of federal law. The court also [rejected](#) the fossil fuel producers' argument that the state-law nuisance claim raised federal questions because the claim is completely preempted by the CAA. The court explained that "the statutory language does not indicate that Congress intended to preempt 'every state law cause of action within the scope' of the Clean Air Act" and that the CAA does not include a "substitute" federal claim for "nuisance caused by global warming." The Ninth Circuit [ordered](#) the state-law nuisance claims to proceed in state court unless the lower court found an alternative basis for federal jurisdiction over the climate liability claims. Although federal preemption was an insufficient basis for federal court jurisdiction, the court [noted](#) that federal preemption can still be raised as a defense against the claims in state court. Even if the Ninth Circuit's decision results in a remand of the cities' claims to state court, the appeal of the district court's remand order took approximately 21 months from filing to decision—highlighting the concern that the Supreme Court's *Baltimore* decision will cause delays in adjudicating state-law climate liability claims.

An April 2021 decision in the U.S. Court of Appeals for the Second Circuit illustrates how the merits of climate liability suits might fare in federal courts. In *City of New York v. Chevron Corp.*, the Second Circuit affirmed the dismissal of New York City's lawsuit seeking climate change damages from fossil fuel producers under state nuisance laws. Unlike the *Oakland* case in the Ninth Circuit, the City filed its suit in federal district court and did not involve court venue issues present in the *Oakland* and *Baltimore* cases. The Second Circuit [held](#) that federal common law displaced the City's state-law claims against fossil fuel producers because applying New York law would conflict with federal interests in creating a uniform federal policy on regulating GHG emissions nationally. The court [reasoned](#) that a substantial damage award under state law would regulate cross-border GHG emissions indirectly by compelling fossil fuel producers to change or cease their production of fossil fuels. The Second Circuit then [concluded](#) that the CAA displaced the City's federal common law claims for injunctions and damages, citing the rulings in *AEP* and *Native Village of Kivalina*. [Rejecting](#) the City's argument that those rulings should not apply, the court [determined](#) that the substance of the City's claim regarding the production and sale of fossil fuels was essentially the same as claims against GHG emitters because the injuries allegedly resulted from GHG emissions.

Considerations for Congress

[Stakeholders across the globe](#) are turning increasingly to the judicial system to force governments, GHG emitters, and fossil fuel producers to take action on climate change or to take responsibility for actions contributing to climate change. For example, on May 26, 2021, a Dutch district court [held](#) that Royal Dutch Shell PLC violated the standard of care under Dutch law and ordered the company to reduce its GHG emissions by 45 percent by 2030, relative to 2019, including emissions from its own operations and from end-users of its products. This decision follows judicial rulings this year in [Germany](#) and [France](#) that held that their national governments failed to take sufficient action to address climate change.

In the United States, *Baltimore* and other climate liability suits represent part of domestic efforts to address climate changes and its effects. In the United States, the Biden Administration, among other initiatives, [set new goals](#) to reduce GHG emissions by 50-52 percent from 2005 levels by 2030 as part of

rejoining the Paris Agreement. Meanwhile, Congress continues to debate [varying legislative proposals](#) to balance economic and environmental interests across industrial sectors and geographic regions.

Without legislative clarification or direction on climate change concerns, state and local governments will continue to seek relief for climate-change related injuries through the courts. As a result, the courts will play a large role in defining the scope of appellate review, the appropriate venue for climate liability suits, and the applicability of federal versus state law. The Supreme Court is considering [petitions](#) to review the Ninth Circuit's decision in *City of Oakland v. BP* to remand to state court. Congress could consider legislation that specifies which state law claims are removable to federal court or clarify when federal law would preempt the kinds of state law claims at issue in the climate liability suits. As an alternative to litigation, Congress could devise a legislative scheme to provide financial assistance to state and local governments to prevent or address injuries related to climate change impacts.

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