In Potential Blow to Climate Suits, Supreme Court Broadens Scope Of Appellate Review Of Orders Remanding Cases To State Court

On May 17, 2021, the U.S. Supreme Court in *BP P.L.C. v. Mayor and City Council of Baltimore* granted energy companies an important victory with the potential to stymie the almost two dozen climate change-related cases pending across the country. The *Baltimore* case has been closely watched by governments, environmental groups and the energy sector. While the Court ostensibly resolved only a narrow procedural question—holding that appellate courts may review all bases for removal from state to federal court where the removal was partially premised on federal officer jurisdiction—the decision will have an immediate impact on pending climate change-related suits and broader ramifications for cases filed in state courts across the country.

Baltimore is one of nearly two dozen climate change-related lawsuits filed since 2017 by states, cities, and municipalities in state courts across the country. Broadly speaking, the plaintiffs allege that the defendant energy companies' promotion and sale of fossil fuel products and purported attempts to discount climate science render them liable for the alleged effects of climate change. These cases have strategically been filed in state courts under state law tort theories and consumer protection laws, in part, to avoid a prior Supreme Court decision—*American Electric Power v. Connecticut*, 564 U.S. 410 (2011). There, the Court held that that EPA's regulatory authority over carbon emissions under the Clean Air Act displaces any federal common law cause of action based on carbon emissions. By filing state claims in state court, the plaintiffs hope to avoid displacement, along with other federal doctrines likely to threaten their claims.

Seeking to avail themselves of potential federal preemption, defendants have removed the cases from state to federal court on multiple grounds, including that the claims really arise under federal common law and federal officer jurisdiction (which provides federal jurisdiction over actions taken at the direction of a federal officer). Unsurprisingly, plaintiffs have fought to have the cases sent back to state court and had thus far been successful. Federal district courts had almost universally remanded the cases back to state court, finding no federal jurisdiction, and the appellate courts have held their authority to review such orders to be extremely limited. Specifically, every reviewing circuit court has held that its jurisdiction is statutorily limited to examining only one basis for removal—federal officer jurisdiction. In other words, even if the circuit court believed there was another basis for the case to be maintained in federal court, the court was bound to ignore it. Finding an insufficient basis for federal officer jurisdiction, each circuit court affirmed remand to state court.

In last weeks' 7-1 decision (Justice Alito recused), however, the Supreme Court disagreed with each circuit court and held that a federal appellate court must review *all grounds* in a remand order where removal was predicated, at least in part, on the federal officer or civil rights removal statutes. The Supreme Court therefore vacated the remand of the *Baltimore* case to state court, and directed the Fourth Circuit to consider the other grounds for removal in the district court's remand order.

With the scope of appellate review broadened, the energy companies now hope that the circuit courts will find at least one basis for federal jurisdiction, which could then lead to the dismissal of the cases under more restrictive federal law. Indeed, this is exactly what happened in *Chevron v. City of Oakland*, another climate change case. There, the district court declined to remand the case to state

court on the basis that the claims were necessarily governed by federal law. The court then dismissed the claims because they would interfere with the separation of powers and foreign policy. 325 F. Supp. 3d 1017, 1024 (2018) ("these claims are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems").

The Ninth Circuit Court of Appeals subsequently reversed the denial of remand in *Oakland*. However, the defendants have petitioned the Supreme Court. They request that the Court reach the merits of the removal issue by deciding whether climate change-related claims pleaded under state law are actually governed by federal common law, and thus subject to federal jurisdiction. Should the Supreme Court grant the petition and review that issue, it is likely that the circuit courts will await the Court's guidance. And, in the event the defendants prevail, the next question—whether the Clean Air Act displaces plaintiffs' claims like in *AEP v. Connecticut*—has the potential to be case dispositive. Indeed, just last month in *City of New York v. Chevron*, the Second Circuit Court of Appeals affirmed the dismissal of climate change-related claims brought in federal court by the City of New York. The court held that federal common law applied to the City's claims for alleged climate change-related injuries, and that the Clean Air Act displaced such claims, even though they had been brought under state law.

In short, last week's Supreme Court decision brings the defendants one step closer to having these cases shifted to the federal courts. To the extent successful, the cases then face the potential of dismissal under more restrictive federal law. Thus, although the Supreme Court cautioned that its *Baltimore* decision had "nothing to do with" the merits of the plaintiffs' climate change claims, as the "only question before [it] [was] one of civil procedure," the decision may in fact set the stage for the Supreme Court to reach whether the cases belong in federal court, and whether the cases may survive a motion to dismiss down the road.

But even beyond the climate change-related cases, the Supreme Court's decision will likely lead to more appellate review of remand orders. This is because every state court defendant with a colorable argument for removal under the federal officer or civil rights removal statutes will know that inclusion of such grounds will afford appellate review of all bases for removal.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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