Climate Liability News

Oil Company Supporters Argue Cities Cannot Sue for Climate Liability

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May 22, 2019

Industry trade groups, several law professors, a free-market legal think tank, the U.S. government and 18 states have rallied behind five major oil companies in fighting a major climate liability lawsuit. They filed a flurry of briefs supporting the companies against claims by the cities of San Francisco and Oakland that seek to hold the oil companies accountable for the costs of adapting to sea level rise and other climate impacts.

The briefs were filed last week in the Ninth Circuit Court of Appeals, which will hear the appeal of a lower court dismissal of the case. In them, the oil companies' supporters argue that courts cannot intervene in climate and energy policy, and that two California cities cannot impose liability on five select companies for a global problem that also implicates domestic and foreign policy. They charge that federal statutes and the Constitution prohibit state law nuisance claims relating to climate change.

San Francisco and Oakland first filed the case in California state court in September 2017 against BP, Chevron, ConocoPhillips, ExxonMobil, and Royal Dutch Shell. Defendants removed it to federal court and U.S. District Judge William Alsup dismissed the case in June 2018. The cities recently appealed Alsup's ruling and submitted their brief in March, which was followed with a wide range of supporting briefs including from six U.S. senators, former federal diplomats and nine states plus the District of Columbia.

The oil companies were supported by briefs from the federal government, 18 states, three law professors, the Washington Legal Foundation, the National Association of Manufacturers, and the U.S. Chamber of Commerce. Most of these interests have previously weighed in supporting fossil fuel defendants in similar climate suits. The WLF and the law professors are the only new supporters.

Big Oil Defenders' Arguments and Financial Ties to Fossil Fuels

The amici or friends supporting the five oil companies in this case argue that the companies cannot be held liable under California public nuisance law for the global issue of climate change. Although San Francisco and Oakland face billions of dollars in costs for dealing with climate-related damage, the interests defending the companies say that the oil majors cannot be forced to pay these costs.

The U.S. government argues that the cities' claims are preempted by federal statute and the Constitution. It also contends that the Clean Air Act displaces the claims and that the claims interfere with the separation of powers. The federal government is itself a defendant in a climate liability lawsuit, *Juliana v. United States*, brought by 21 young people alleging violation of their Constitutional rights to a healthy climate.

The states backing the oil companies, all represented by Republican attorneys general and many of which are home to significant fossil fuel production, say the claims raise "political questions" and that climate policy should not be decided by courts.

The WLF challenges the plaintiffs' claims based on proximate cause, saying there is not a clear enough connection between the five oil companies and the harm. "The path from John D. Rockefeller and his successors, on one side, to the present-day tides of the Bay Area, on the other, is too long, too winding, and too tangled to support liability," the brief argues. WLF has frequently opposed environmental regulations and is reported to have funding ties to fossil fuel groups, the Koch Family Foundations and ExxonMobil.

Richard A. Epstein, a professor at NYU Law School and a senior fellow at the Hoover Institution at Stanford University, filed one brief. Hoover has received funding from ExxonMobil and the Koch network. Epstein is also listed as an adjunct scholar on Cato Institute's website, another Koch-backed think tank. University of Virginia law and economics professor Jason S. Johnston is also a Cato Institute adjunct scholar. And Henry N. Butler at George Mason University's Antonin Scalia Law School has former ties to the American Enterprise Institute and to the Washington Legal Foundation.

Additional briefs were submitted by the National Association of Manufacturers and the U.S. Chamber of Commerce, two large corporate-backed trade associations with a long history of lobbying against environmental regulations and climate policy. NAM maintains that climate change cannot be addressed through the courts and notes that all previous attempts to do so have failed. The Chamber argues that the Constitution bars any potential state law claims in this case.

Chevron Raises First Amendment Defense

The oil companies also filed responses. One brief submitted by BP, ConocoPhillips, ExxonMobil and Shell defended the district court's dismissal for lack of personal jurisdiction, which applied only to the four companies not based in California. Chevron, which is headquartered in California, filed the second reply brief arguing to reject the appeal on other grounds.

Chevron's brief also addresses the allegation that the oil companies knowingly sold and promoted a harmful product and engaged in a sophisticated campaign of deception to downplay the risk and discredit the science. Rather than deny the allegation, Chevron claims that "the 'wrongful' conduct alleged is constitutionally protected speech immunized by the First Amendment."

Exxon has invoked this First Amendment defense in attempting to quash investigations into its alleged deception by the attorneys general of New York and Massachusetts, which was flatly rejected by a federal judge. The companies briefly referenced "lobbying and other First Amendment-protected activities" in arguing against New York City's climate liability case, but Chevron's discussion of the First Amendment marks the first time this defense has been elaborated on in the municipal climate cases.

Chevron attorney Theodore J. Boutrous Jr., who specializes in First Amendment law, argues in the brief that "the so-called 'promotional' activity Defendants allegedly undertook to 'discredit the growing body of scientific evidence' would be nothing more than constitutionally protected lobbying activity." Boutrous cites the Noerr-Pennington doctrine, originally formulated to protect businesses from anti-trust liability but which companies have often tried to use to justify

other lobbying efforts. Boutrous argues that the doctrine protects lobbying against climate action, even if it involves deception.

But several climate law experts say that doctrine does not extend to product liability claims.

“Cities and counties filing lawsuits seeking compensation or abatement under a range of theories ranging from public nuisance to failure to warn simply does not amount to an infringement on First Amendment rights,” said Michael Burger, executive director of the Sabin Center for Climate Change Law at Columbia Law School. “There is no First Amendment protection for failing to warn consumers of known harms from products.”

Oakland City Attorney Barbara J. Parker also referenced this point in a press releaseannouncing the cities’ brief in their appeal filed in March. “Companies cannot lie to their customers for decades about the dangers of their products and walk away with impunity,” she wrote.