

# *Oil Companies Fight Climate Lawsuits by Citing Free Speech*

The firms say their First Amendment rights are being violated when cities and states sue and accuse them of spreading misinformation about climate change.



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Oil companies are employing an unusual tactic in some of their biggest court battles. They're alleging that their critics are infringing on their free-speech rights, invoking laws designed to protect people who challenge the powerful.

The laws, known as “anti-SLAPP” provisions, were created to stop companies or people from silencing their critics with the threat of costly lawsuits. Oil companies have turned this around, arguing that climate lawsuits against them should be thrown out because they infringe on the companies’ protections under the First Amendment.

“What we’re seeing now is a complete inversion” of the original intent of these laws, said Nicole Ligon, an assistant professor of law at Campbell University in North Carolina and expert on freedom of speech and SLAPP, which is shorthand for strategic lawsuit against public participation. The laws offer judges a way to dismiss cases that they determine lack merit.

This strategy is playing out in courtrooms nationwide, particularly where oil companies are fighting lawsuits filed by state and local governments that claim the industry has misled Americans about global warming and should help pay the cost of adapting to climate change.

The industry considers these climate lawsuits a major threat. Nearly 40 have been filed since 2017. They are seeking potentially billions of dollars in damages.

Recently, the cases have come under increased scrutiny as the Trump administration has sought to stop them, even pre-emptively suing Hawaii and Michigan to try to block them from filing their own climate-change lawsuits. (Hawaii sued anyway, and Michigan has said it will.)

While each case differs, the lawsuits generally allege that various oil companies and trade associations have for decades covered up what they knew about climate change in a quest for profit. The lawsuits cite laws against consumer deception, creating a public nuisance and others. None has yet made it to trial.

The companies, in turn, have accused the plaintiffs of filing copycat lawsuits that are aimed at bankrupting the fossil fuel industry. They also say the lawsuits, filed in state courts, are improperly trying to dictate national energy policy when that should be left to the federal government, not state proceedings. Jury trials could create a patchwork of policies around the country, the companies argue, which wouldn't be the right way to address climate change. A few cases have been partly or fully dismissed.

Now come the oil industry's anti-SLAPP motions.

Filed in about a third of the cases, they are the latest tool the companies are using to try to persuade judges to dismiss or narrow individual cases before they get to a jury. The motions also serve a strategic purpose: They put the onus on plaintiffs to prove their cases aren't frivolous and deserve to proceed to trial.



Theodore J. Boutrous Jr., who represents Chevron. Madeline Gray for The New York Times

Theodore J. Boutrous Jr., a veteran First Amendment lawyer who represents Chevron in the climate litigation, said the lawsuits against the oil companies are centered on political speech by the companies that is protected by the Constitution. “The First Amendment applies to everyone,” he said. “It applies to companies.” He pointed to the 2010 Supreme Court decision in *Citizens United*, in which the justices, citing free speech, ruled that the government could not ban political spending by corporations.

With the climate-change lawsuits, he said, “The government is trying to squelch speech it doesn’t like and punish it and deter it in the future.”

The companies haven’t yet prevailed using these arguments. Judges in Massachusetts, Hawaii and Minnesota, among other places, have denied the oil companies’ SLAPP motions, though appeals of some of those decisions are pending.

The term SLAPP was coined in the 1980s by two professors at the University of Denver, the sociologist Penelope Canan and the law professor George W. Pring, who went on to write the 1996 book “SLAPPs: Getting Sued for Speaking Out.” In the years since, anti-SLAPP laws have been adopted by most states. To deter frivolous lawsuits, these laws typically require a losing plaintiff to pay the defendants’ legal bills.

Professor Canan said the energy companies were essentially interfering with the right of local officials to raise their concerns before a judge and jury. “The logic of what the energy companies are doing is the logic of a SLAPP, not the logic of an anti-SLAPP,” she said.

Observers are particularly watching cases in California, where the attorney general, Rob Bonta, and eight local governments, including San Mateo County and the city of Imperial Beach, have filed suits against Exxon Mobil, Chevron and other companies.

The suits argue that oil companies used deceptive public statements and marketing to deter government action to curb greenhouse gas emissions. They are being handled jointly by the Superior Court for the County of San Francisco.

California has a strong anti-SLAPP law that was enacted in 1992.

This coming August, Mr. Boutrous is expected to argue on behalf of the companies that the judge should strike parts of the lawsuits that concern the companies’ participation in the public debate around climate change. In a joint motion earlier this year, the companies argued that the First Amendment prohibits liability based on advocacy, lobbying or scientific debate.

Judge Ethan P. Schulman dismissed a similar motion in December that had been filed solely by Chevron, saying the state’s anti-SLAPP law carves out an exception for “commercial” speech related to the selling of goods and services.

Mr. Boutrous said that decision was wrong because the speech described in the lawsuit against the oil companies was not part of a commercial transaction. In the climate change cases, where governments are seeking damages based on speech

concerning public issues, anti-SLAPP laws are applicable tools, he said.

“The double standard drives me crazy, the notion that the First Amendment and the anti-SLAPP laws are only meant to protect one side of a debate,” Mr. Boutrous said. Restrictions on particular viewpoints, he said, are “an insult to the First Amendment.”



Matt Edling, who represents California and other plaintiffs, in a South Carolina courtroom last month. Madeline Gray for The New York Times

Matt Edling, a lawyer whose firm, Sher Edling, represents California and other plaintiffs in similar suits around the country, argued that the oil industry’s argument is flawed. “Neither the First Amendment nor anti-SLAPP laws condone the use of deceptive commercial speech,” he said.

Mr. Edling said the fossil fuel companies “want to have it both ways.” They want First Amendment protections for their own statements, he said, but also to “use First Amendment and anti-SLAPP arguments proactively to silence public entities” from challenging those statements.

Christine Lee, a spokeswoman for Mr. Bonta, noted that two higher courts in California had declined to hear appeals of the decision on Chevron's motion. She said that under California law, lawsuits filed by the state attorney general "are, by definition, not SLAPP suits," she said.

(Judge Schulman did not address the question of whether prosecutors like Mr. Bonta are automatically exempt from anti-SLAPP laws.)

Professor Ligon, the Campbell University legal expert, said that anti-SLAPP laws had traditionally been invoked almost exclusively in defamation suits and that fossil fuel companies had started using them as a legal tactic only in recent years. So far the companies have largely been unsuccessful, she said, but courts haven't closed the door entirely on the idea.

Still, Professor Ligon said, political speech and commercial speech have different protections under the First Amendment, complicating the energy industry's argument. "These laws were meant to protect vulnerable speakers," she said.

**Karen Zraick** covers legal affairs for the Climate desk and the courtroom clashes playing out over climate and environmental policy.

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