

NINA MOINI: We'll now go from weather to climate, as Paul Huttner would say. Now, according to the State Department of Natural Resources, Minnesota has gotten warmer and wetter over the last century. It's one sign of a changing climate being seen right here in the state.

And as we continue to learn about the impacts of climate change, state leaders are taking steps to hold big companies accountable for their role in contributing to climate change. One route has been through the courts. Another has been through legislation that would make fossil fuel companies pay for their emissions.

Our next two guests have been keeping an eye on these efforts in Minnesota and across the US. They're here to give us an explainer and look at where things stand. First, we're happy to be joined by James Coleman, a professor of law at the University of Minnesota. Thanks for your time, Professor. It's wonderful to be here. We're also very happy to have Margaret Barry, a climate litigation fellow at Sabin Center for Climate Change Law at Columbia University. Thank you for your time as well, Margaret.

MARGARET Glad to be joining you all today.

BARRY:

NINA MOINI: James, I'd love to start with you. Would you start by describing the lawsuit that Attorney General Keith Ellison filed against ExxonMobil, Koch Industries, and the Americas Petroleum Institute in 2020, the legal route that had been taken before?

JAMES COLEMAN: Right, it's a lawsuit that's about consumer deception. And that is a little bit different than the tact some other states are taking, where they are suing more directly for the harm that's been caused by carbon emissions from companies operating around the world. But the argument here is that instead, there was some kind of deception that led people not to understand the risks that this product had. That's a kind of claim that's often brought when there is something wrong with the product that might harm a consumer. But here, the alleged deception is about the impact of climate change.

NINA MOINI: And Margaret, I understand the Sabin Center has a database that tracks these so-called climate litigation cases across the world. How does Ellison's case compare to what other states-- and maybe other countries, even-- are doing?

MARGARET BARRY: So, as James mentioned, Minnesota's case is based on allegations that the company's conduct was deceptive and that that deception led to a buildup of greenhouse gas emissions that's leading to these climate change harms. There are a number of other-- about three dozen or more-- cases brought by state and local and tribal governments across the United States that make similar claims of deception.

And as James mentioned, some of those states and local governments are also focused on the actual emissions caused by production, or their claims are also based on the company's historical emissions and ongoing emissions of greenhouse gases.

NINA MOINI: And I know it's hard-- oh, I'm sorry. Go ahead.

MARGARET BARRY: And around the world and in the United States, the state and local governments are certainly at the forefront, but there are also cases that you can find in the Sabin Center's Climate Change Database from around the world.

NINA MOINI: I wonder, Margaret-- I'm reading here the US has more than 3,000 of these cases, the most of any country. And why do you think litigation is a common route here in the US?

MARGARET BARRY: The cases in the United States are-- there are a lot of different types of cases, and a lot of them relate to state and federal and local governments' obligations to do something about climate change. And I think that because of the nature of some of our federal laws that have been used to take action under climate change, we have a lot of cases where plaintiffs are asking the federal government to take climate change into account when it takes actions or issues regulations.

This subset of cases that we're talking about that Minnesota's case is part of is a much smaller subset of cases, only a few dozen cases. And I think that the hope is that since we do not have an overarching regulatory mechanism addressing climate change, that litigants hope to use these lawsuits to be able to recover from-- to recover and begin implementing and use the proceeds, eventually, from these lawsuits to implement adaptation measures and other ways to protect their communities from the harmful impacts of climate change.

NINA MOINI: Yeah, it sounds like some of these litigation routes are more reactive after the fact but maybe don't do as much to deter any sort of actions. I wonder, Margaret, what are some of the main challenges that you hear from the corporations in these cases? What are their defenses.

MARGARET BARRY: So a primary defense in these cases, which are bringing state law claims, is that federal law preempts the claims. And this is a defense that the Supreme Court has recently taken a case that it will consider over the next year about whether federal law does preempt these state law claims. And that's in a case-- they'll be considering that issue in a case brought by Boulder, Colorado and Boulder County, Colorado.

NINA MOINI: OK. James, let's turn now to what's called Climate Superfund legislation. Can you explain what's been proposed in the state legislature and how it's supposed to help with some of these challenges we've been discussing?

JAMES COLEMAN: Yeah, so it's called Superfund legislation because it's making an analogy with earlier regulation that we had from the US Congress, so national regulation for the chemicals industry. And so one aspect of the Superfund Statute, which is a really quite comprehensive approach to trying to clean up hazardous waste sites, is that it imposes a tax on the chemicals industry that's used to help clean up sites that are-- otherwise, we can't find somebody to clean it up. So we can't find anybody that was responsible for it to clean those up.

And so I think the analogy that states are drawing, and that you see from Minnesota here, is, well, maybe we need some kind of tax on fossil fuel companies that's going to help pay for these climate harms that we otherwise don't get paid for. I think the big challenge and distinction from that earlier-- from those under CERCLA, the statute that does Superfund for hazardous waste, is that here, it's not a national statute. This is just for the state. And those fossil fuel emissions that are causing harm in Minnesota, of course, are not just in Minnesota, not just in the United States, but around the world. So there's not quite the close connection as there is between the US chemicals industry and US hazardous waste sites.

NINA MOINI: James, do you think it's likely that this will pass, or what are some of the obstacles?

JAMES COLEMAN: Well, there's, of course, a political question. And I think that you will see very different opinions in the legislature about whether this is a good idea. And so I'm not going to handicap what we see out of any given legislative session, but I think one of the big questions is, if it were to pass, would you see challenges that suggest it also is preempted or violates other provisions of the federal Constitution, whether it's what we call the Dormant Commerce Clause for interference with other states or whether we see any kind of national backlash from states that might feel like their companies are being unfairly treated.

And so I think they would undoubtedly be controversial. The two states that have passed these kind of laws in New York and Vermont have both attracted challenges from about half of US states as well as the federal government. And so I think there would be a lot of litigation about it, even if it gets through the Minnesota legislature.

NINA MOINI: OK. That's good perspective. Margaret, just before we go-- and you might have alluded to this case out of Boulder that's made its way to the Supreme Court, but what kinds of implications might that have on some of the pending lawsuits and proposals in Minnesota? It sounds like this idea of federal law preempting state law tends to be a roadblock in a lot of situations.

MARGARET BARRY: Yeah, the preemption issue is something that the court may ultimately address. And it's-- in part, it depends on whether the court views these cases and the state climate Superfund laws being an addressing emissions issue and international emissions and interstate emissions, which the defendants are arguing can only be addressed by federal law, or whether the court agrees with the plaintiffs in these cases that the conduct that they're addressing is within the authority of the states to address.

NINA MOINI: All right, Margret and James. I appreciate both of you for sharing your expertise with us. Appreciate your time. Thank you.

JAMES Thank you.

COLEMAN:

MARGARET Thank you.

BARRY:

NINA MOINI: That's James Coleman with the University of Minnesota Law School and Margret Barry with the Sabin Center at Columbia University.