

Climate Litigation Has at Least for Now Dodged a Possibly Fatal Blow

This past fall, the “Trial of the Century” was scheduled to commence in a federal court in Oregon. The plaintiffs? Twenty-one children. The defendant? No less than the United States. And the accusation? That the federal government had violated the children’s constitutional rights by “creating, controlling, and perpetuating a national fossil fueled based energy system, despite long-standing knowledge of the resulting destruction.”

The remedy sought by the plaintiffs was no less ambitious than their claim that the Constitution’s Due Process Clause confers on individuals the right to “a stable climate system capable of sustaining human lives and liberties.” Plaintiffs sought a court order directing the government to implement “an enforceable national remedial plan to cease the constitutional violations by phasing out fossil fuel emissions and drawing down excess atmospheric CO₂.”

The 50-day trial seemed unstoppable only days before its start date. The judge had repeatedly denied the government’s motions to dismiss the complaint. No less significantly, by declining to certify the case for interlocutory appeal, the judge had refused to allow the federal government the ability to appeal those rulings before trial.

Nor had either the Ninth Circuit or the Supreme Court been willing to come to the federal government’s rescue. The Ninth Circuit had twice denied the Department of Justice’s mandamus petitions to hear their arguments for dismissal before trial. And the Supreme Court in July had rebuffed the solicitor general’s request to stay the trial court proceedings.

Everything shifted, however, on the eve of trial. The case was postponed and its future remains uncertain. Reversing herself in late November, the trial judge

agreed to certify the case for interlocutory appeal and the Ninth Circuit has scheduled the case for expedited consideration.

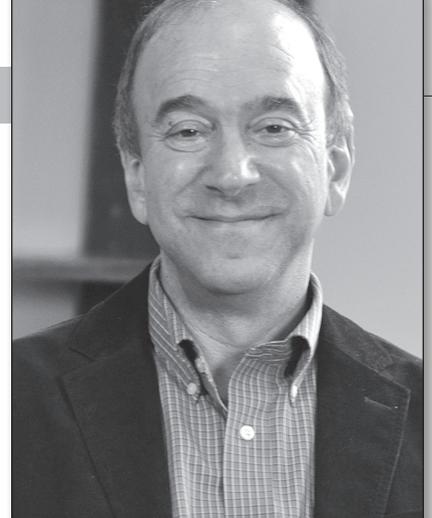
So what happened? What prompted the trial judge to change her mind?

When the justices denied the solicitor general’s request for a stay in July, too little attention was paid to the order’s fine print. While formally denying the government’s requests, the High Court simultaneously left little doubt it believed that the trial judge should have certified the case for interlocutory appeal. The July order set forth the central statutory touchstone for certification — a case raising a “controlling question of law as to which there is a substantial ground for difference in opinion” — and then offered the Court’s clear view that the “striking breadth of the plaintiffs’ claims present substantial grounds for difference in opinion.”

That is why when the trial court failed to take the initial hint and continued to in-

sist on trial, the justices double-downed when the solicitor general a few days before trial filed a mandamus petition with the Court and again asked the justices to stay the trial. This time Chief Justice Roberts immediately stayed the trial to allow the full Court to consider the motion. And, although the Court once again denied the stay request, here again the fine print of the Court’s order left little doubt that it wanted the Ninth Circuit and trial judge to clean up this mess so that the Supreme Court would not have to take the extraordinary step of intervening.

The exclusive reason the High Court gave for denying a stay was not that mandamus was unwarranted but that the Supreme Court need not be the one to grant mandamus because there was good reason to believe the Ninth Circuit would. In Supreme Court-speak,



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that is about as close as one can get, short of a formal reversal, to the Court telling the Ninth Circuit to fix the problem. The wording was no doubt a compromise reached by the chief and some of more liberal justices seeking to avoid a worse outcome.

The Ninth Circuit plainly got the hint. A few days later, the appeals court stayed the district court proceedings and asked the trial judge to “promptly resolve” the government’s motion to reconsider the denial of interlocutory appeal. And, while insisting that it had not changed “its belief that this case would be better served by further factual development at trial,” the district judge subsequently made clear she understood what she was being asked to do, and certified the case for interlocutory appeal.

Indeed, the entire turnabout was so head-spinning that one of the three Ninth Circuit judges dissented from that court’s decision to hear the appeal. Judge Michelle Friedland wrote she did not believe the trial judge was truly “of the opinion” that interlocutory appeal was warranted but had “felt compelled to make that declaration.”

As disappointed as the plaintiffs no doubt are, I suspect climate litigation has at least for now dodged a fatal blow. Had the lower courts not retreated and the justices been forced to act, it is not hard to imagine the harsh ruling that would have likely resulted in such an extravagant case — with negative repercussions affecting all climate jurisprudence.

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