FIGHTING OVER FORUM: HOW STATE COMMON LAW PUBLIC NUISANCE CLAIMS WILL SHAPE THE FUTURE OF CLIMATE CHANGE LITIGATION

DREW THARP*

INTRODUCTION

In 2021 alone, the United States experienced twenty weather and climate disaster events, with losses totaling approximately $155 billion.[1] Before that, in 2020, the United States suffered twenty-two weather and climate disasters with losses totaling $114.3 billion.[2] According to a press release regarding a 2021 report from the U.N. Intergovernmental Panel on Climate Change ("IPCC"), the impacts of climate change will only increase with time as heatwaves, droughts, flooding from heavy precipitation events, and rising sea levels will become commonplace without "immediate, rapid, and large-scale reductions in greenhouse gas emissions."[3] The IPCC report states that, averaged over the next twenty years, the global temperature is already expected to reach or exceed 1.5°C of warming; if global warming rises to 2°C, heat extremes would likely reach critical tolerance thresholds for health and agriculture.[4]

There are currently no federal statutes specifically aimed at combating climate change.[5] Without federal legislative action intended to slow climate change or mitigate its effects, the courts have become an increasingly appealing avenue for those parties desperate to find relief. Accordingly, many local governments looking to rebuild in the aftermath of the destruction caused by weather and climate disaster events—or to better prepare for such events in the future—have turned to the judicial system in an attempt to hold fossil fuel companies responsible for the damages.[6] However, many of these public nuisance lawsuits have been slowed by procedural fights over forum, as the parties wrestle over issues such as jurisdiction, preemption, and displacement to determine

---

* J.D. Candidate, 2023, Indiana University Robert H. McKinney School of Law; B.A. 2012, Indiana University – Bloomington, Indiana.

1. *U.S. Billion-Dollar Weather and Climate Disasters: Summary Stats*, NOAA NAT'L CTRS. FOR ENV'T INFO, https://www.ncdc.noaa.gov/billions [https://perma.cc/JUS4-JKBQ] (last visited Feb. 20, 2023) (Select 2021 as Begin Year and 2021 as End Year).

2. *Id.* (Select 2020 as Begin Year and 2020 as End Year).

3. Press Release, Intergovernmental Panel on Climate Change, Climate Change Widespread, Rapid, and Intensifying (Aug. 9, 2021), https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/ [https://perma.cc/S9WE-HB5G].

4. *Id.*

5. *See Climate Change Laws of the World: Laws and Policies*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE & ENV'T, https://climate-laws.org/legislation_and_policies?geography%5B%5D=192&type%5B%5D=legislative [https://perma.cc/3ZK6-Z627] (last visited Oct. 20, 2021).

6. LINDA TSANG, CONG. RSCH. SERV., LSB10605, SUPREME COURT RULING MAY AFFECT THE FATE OF CLIMATE CHANGE LIABILITY SUITS 5 (2021).

whether these cases belong in state or federal courts.[7] For reasons this Note will explore, the plaintiffs in these cases are pursuing state law claims, but the existence of the Clean Air Act ("CAA")[8] and the Supreme Court's decision in *American Electric Power v. Connecticut* ("*AEP*")[9] have sowed doubt as to whether state law has any role left to play in climate change litigation. As a result, none of the plaintiffs have yet had the chance to litigate their claims on the merits.

Consider, for example, *City of Oakland v. BP PLC* ("*BP"*).[10] On September 19, 2017, the cities of San Francisco and Oakland filed separate complaints against five oil and gas companies in California state court, alleging that the global-warming induced sea level rise from their production of fossil fuels had created an "unlawful public nuisance."[11] The complaints alleged that the defendants had produced and promoted the use of "massive amounts" of fossil fuels despite having been informed by the American Petroleum Institute as far back as the 1950s that emissions from fossil fuels would cause severe and even catastrophic climate change impacts.[12] The complaints also alleged that climate change had already exposed each city to impacts from accelerated sea level rise, "including 'more extensive coastal flooding during storms, periodic tidal flooding, and increased coastal erosion.'"[13] The cities asked the courts to order the defendant companies to "abate the global-warming induced sea level rise nuisance to which they have contributed by funding an abatement program to build sea walls and other infrastructure that is urgently needed to protect human safety and public and private property."[14] The cases were consolidated, and almost immediately, the defendants—including Chevron, BP, ExxonMobil, and others—removed the cases to federal court.[15] The United States District Court for the Northern District of California denied the plaintiffs' motions to remand[16] and

---

7. Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1409, 1417-18 (2020).

8. 42 U.S.C. §§ 7401-7671.

9. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).

10. City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020), *cert. denied sub nom.* Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (mem.).

11. Complaint for Public Nuisance at 2, People v. BP PLC, No. CGC-17-561370 (Cal. Super. Ct. San Francisco Cnty. Sept. 19, 2017) [hereinafter S.F. Complaint]; Complaint for Public Nuisance at 2, People v. BP PLC, No. RG17875889 (Cal. Super. Ct. Alameda Cnty. Sept. 19, 2017) [hereinafter Oakland Complaint].

12. S.F. Complaint, *supra* note 11, at 2, 18; Oakland Complaint, *supra* note 11, at 2, 16.

13. S.F. Complaint, *supra* note 11, at 32; Oakland Complaint *supra* note 11, at 28-29 (requesting nearly identical order from the court).

14. S.F. Complaint, *supra* note 11, at 5; *see also* Oakland Complaint, *supra* note 11, at 5.

15. *See* City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1021 (N.D. Cal. 2018), *vacated,* 960 F.3d 570 (9th Cir. 2020), *amended by* 969 F.3d 895 (9th Cir. 2020), *cert. denied sub nom. Chevron*, 141 S. Ct. 2776; BP PLC, 969 F.3d 895.

16. People v. BP PLC, No. C 17-06011, No. C 17-06012, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018).

dismissed the case.[17] In May of 2020, the Ninth Circuit Court of Appeals reversed.[18] The Supreme Court then denied the defendants' petition for certiorari on June 14, 2021, leaving the case to the lower courts.[19] Now, five years removed from the initial filing of the complaints, the parties' arguments are still no closer to being litigated on the merits.

San Francisco and Oakland are not the only two cities in America to turn to the courts seeking relief from climate change; their case is but one case in the rising trend of climate-change-related litigation.[20] In recent years, "[m]ore than 20 states and localities have brought lawsuits against companies like BP and Chevron, seeking to hold them accountable for deceiving the public about the science of climate change and failing to warn consumers about the harm they knew would arise from continued use of their products."[21] Climate change litigation in the United States will likely continue to accelerate as the increasingly harmful effects of climate change wreak havoc unless the courts prove to be a fruitless avenue for relief.

This Note argues that these claims belong in state courts, that public nuisance is an appropriate vehicle to address the alleged harms, and that these conclusions provide a just outcome that meets the urgency of the moment. Imposing state tort law "falls well within a state's historic powers to protect the public health, safety, and property rights of its citizens,"[22] and states have a legitimate interest in combating the adverse effects of climate change.[23] State courts are thus well-equipped to handle these common law claims and deliver justice as each case requires. Further, establishing that these claims belong in state courts serves to eliminate the procedural fights over forum that have delayed litigation on the merits for years. This lost time has been particularly costly in the face of global warming's accelerating harms. As John Kerry, the United States special presidential envoy for climate, said in early 2022, "[w]e have seen the increase in climate-fuelled [sic] extreme events, and the damage that is left behind—lives lost and livelihoods ruined. The question at this point is not whether we can altogether avoid the crisis—it is whether we can avoid the worst consequences."[24] Each time these lawsuits are stalled over a procedural question of forum,

---

17. *BP PLC*, 325 F. Supp. 3d 1017.

18. *BP PLC*, 969 F.3d at 901.

19. *Chevron*, 141 S. Ct. 2776.

20. Emma F. Blake, *Kicking the Climate Can Down the Road: BP v. Baltimore and Chevron v. Oakland*, HAUSFELD (July 20, 2021), https://www.hausfeld.com/en-us/what-we-think/perspectives-blogs/kicking-the-climate-can-down-the-road-bp-v-baltimore-and-chevron-v-oakland/ [https://perma.cc/L983-QVUH].

21. *Id*.

22. *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 96 (2d Cir. 2013).

23. *See* Massachusetts v. EPA, 549 U.S. 497, 522-23 (2007).

24. Fiona Harvey, *IPCC Issues "Bleakest Warning Yet" on Impacts of Climate Breakdown*, THE GUARDIAN (Feb. 28, 2022, 6:00 AM), https://www.theguardian.com/environment/2022/feb/28/ipcc-issues-bleakest-warning-yet-impacts-climate-breakdown [https://perma.cc/58EU-BSGH].

localities lose precious time to prepare for the dangers to come. Pushing these cases to state courts around the country enables the judiciary to meet the moment with the urgency it demands.

Parts I through III of this Note examines the history of climate change litigation in the United States, highlighting the years of failure plaintiffs have suffered in their search for relief from the harms of global warming. Part I provides a review of the so-called "first wave"[25] of climate change litigation that ended with the Supreme Court's holding in *AEP* that while federal common law claims related to carbon dioxide emissions are displaced by the CAA, state common law claims may remain viable.[26] Part II explores the "second wave"[27] of climate change litigation, as plaintiffs around the country have filed dozens of state common law nuisance complaints in response to the *AEP* decision. Part III details *BP*, an exemplary second-wave lawsuit, dissecting the plaintiffs' initial complaints, the case's procedural history, and the defendants' petition for certiorari. Part IV analyzes the arguments of both parties in *BP* to explain why state courts are the appropriate forum for climate change litigation. Finally, Part V examines how state jurisdiction would impact the future of climate change litigation and argues that because "second-wave" plaintiffs can satisfy the elements of state common law public nuisance, justice calls for expanding the cause of action beyond its traditional bounds.

I. *AEP* AND THE FIRST WAVE OF CLIMATE CHANGE LITIGATION

The "first wave" of climate change litigation effectively began and ended with *AEP*.[28] The plaintiffs in that case (a group that included several states, New York City, and three public land trusts) brought suit against four private power companies and the Tennessee Valley Authority—the five largest emitters of carbon dioxide in the United States at the time.[29] The plaintiffs' complaint, filed in federal court, alleged the defendants' carbon dioxide emissions had created a "substantial and unreasonable interference with public rights" under federal common law, or, in the alternative, under state tort law.[30] The plaintiffs sought injunctive relief requiring each defendant to cap its carbon dioxide emissions and gradually reduce them over time.[31]

AEP never went to trial.[32] The Supreme Court held that the CAA displaced the plaintiffs' federal common law claim.[33] The plaintiffs sought abatement of the

25. Sokol, *supra* note 7, at 1386.
26. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011).
27. Sokol, *supra* note 7, at 1386.
28. *Am. Elec. Power Co*., 564 U.S. 410.
29. *Id*. at 418.
30. *Id.*
31. *Id*. at 419.
32. *Id*. at 429.
33. *Id*. at 423.

defendants' carbon dioxide emissions,[34] but the CAA authorized the Environmental Protection Agency ("EPA") to regulate carbon dioxide emissions.[35] Therefore, the Court determined the CAA "speaks directly" to the issue.[36] Because the CAA "provides a means to seek limits on emissions of carbon dioxide from domestic powerplants—the same relief the plaintiffs seek by invoking federal common law,"[37] it displaced any federal common law right of action.[38] However, the Court stated that although "the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act."[39] Since the parties had not addressed the availability of a claim under state nuisance law before the Court, the matter was left "open for consideration."[40] Tellingly, though, the Court drew a parallel to its decision in *International Paper Co. v. Ouellette*,[41] noting that the Clean Water Act "does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State.'"[42]

After *AEP* was filed, three similar lawsuits followed.[43] All of these cases were also dismissed before they ever went to trial, on one or more of three grounds: the political question doctrine,[44] lack of Article III standing,[45] or displacement of a federal common law claim.[46]

Despite the first wave's failure to deliver any kind of relief for its plaintiffs, the *AEP* decision did provide a potential roadmap for future climate change litigation. Though the Court held that federal common law nuisance claims related to carbon dioxide emissions are displaced because the CAA "speaks directly" to the issue,[47] it also stated that similar state common law nuisance claims are not necessarily preempted.[48] Indeed, the Court remanded the plaintiffs' state law claims.[49] Although the plaintiffs declined to litigate those claims further, the Court's decision to remand "suggests the justices believed state-law-based

---

34. *Id*. at 419.
35. 42 U.S.C. § 7409.
36. *Am. Elec. Power Co*., 564 U.S. at 424.
37. *Id*. at 425.
38. *Id*. at 424.
39. *Id*. at 429.
40. *Id*.
41. Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987).
42. *Am. Elec. Power Co.*, 564 U.S. at 429 (quoting *Int'l Paper Co.*, 479 U.S. at 497).
43. *See* People v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009).
44. *See* Gen. Motors Corp. at *16; *Kivalina*, 663 F. Supp. 2d at 873-77.
45. *See Kivalina*, 663 F. Supp. 2d at 877-82; Comer, 585 F.3d at 861-62.
46. *Kivalina*, 696 F.3d at 857.
47. *Am. Elec. Power Co.*, 564 U.S. at 424.
48. *Id*. at 423, 429.
49. *Id*. at 429.

claims may not be preempted by the [CAA]."[50]

The Supreme Court's invitation to pursue state law tort claims would become the guiding principle for the second wave of climate change litigation. Moving their claims to state court would help plaintiffs steer clear of the federal court-based problems of displacement, Article III standing, and the political question doctrine—all the issues that had proven deadly to the first-wave suits.[51] State courts "have their own standing and political question doctrines that differ from their federal counterparts in ways that could make them less likely to pose an obstacle to climate tort claims."[52] As an added benefit, state courts "have a much greater familiarity with common law claims," and therefore "are in a much better position to evaluate grounds for dismissal in light of the specific nature of the tort claims alleged, rather than focusing on climate disruption generally, as the first-wave federal district courts did."[53] Because of state courts' more lenient approach to standing and the political question doctrine, and the fact that the doctrine of displacement is applicable only to federal common law, state courts are less likely to dismiss second-wave claims.[54] As a result, the plaintiffs have a greater opportunity to litigate their claims on the merits and make the case that justice demands the relief they seek.

II. CLIMATE CHANGE LITIGATION'S SECOND WAVE

Since 2017, more than twenty state and local governments have filed lawsuits against fossil fuel producers, seeking damages for alleged climate-related injuries resulting from selling and producing fossil fuel products.[55] The plaintiffs have exclusively brought state tort claims, and nearly all of these lawsuits were filed in state courts.[56]

The second-wave plaintiffs have made two strategic changes in response to the failures of the first wave. First, by bringing only state law claims, they have

---

50. Harrison Beck, *Locating Liability for Climate Change: A Comparative Analysis of Recent Trends in Climate Jurisprudence*, 50 ENV'T L. 885, 891 (2020).

51. Sokol, *supra* note 7, at 1405.

52. *Id.* at 1414.

53. *Id.* at 1405.

54. *Id.* at 1414.

55. TSANG, *supra* note 6, at 3.

56. *See, e.g.*, Mayor of Baltimore v. BP PLC, 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021); People v. BP PLC, No. C 17-06011 & No. C 17-06012, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) *and* City of Oakland v. BP PLC, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *vacated,* 960 F.3d 570 (9th Cir. 2020), *amended by* 969 F.3d 895 (9th Cir. 2020), *cert. denied sub nom.* Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (mem.); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019), *aff'd in part and appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667 (2021), 25 F.4th 1238 (2022); City of New York v. BP PLC, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81 (2d Cir. 2021).

attempted to sidestep the issues that led to the dismissal of the first-wave suits.[57] These state claims cannot be displaced by the CAA—the doctrine of displacement applies only to federal common law—thereby avoiding the downfall of *AEP*.[58] Second, the plaintiffs have based their claims on the defendants' marketing of fossil fuels, rather than on their greenhouse gas emissions.[59] Their complaints typically allege that the defendants "embarked on a decades-long campaign to hide the connection between fossil fuels and the climate crisis, attack science (and scientists), and influence the public and decisionmakers to avoid limits on their products' sales," despite the fact they have known for decades that "profligate use of their products would cause catastrophic injuries to communities, including the plaintiffs."[60] Focusing their approach on the defendants' deceptive business practices makes it less likely that a court will find the plaintiffs' claims preempted by the CAA, as the CAA does not speak to the marketing of fossil fuel products.[61]

In response, second-wave defendants have tried to capitalize on the successful defenses from the first wave. The defendants argue that the plaintiffs' state law claims are preempted by federal common law; they then seek to remove those federal claims to federal court, where they "expect to be able to successfully argue for dismissal on the same grounds that brought an end to the first-wave cases: displacement by the Clean Air Act."[62]

To date, the defendants' preemption argument has found minimal success, as only two courts have sided with the defendants. In *People v. BP PLC*, the Northern District of California found that the plaintiffs' claims were "necessarily governed by federal common law" and denied their motion to remand to state court.[63] Interestingly, the court held that the claims were not displaced by the CAA.[64] Because the claims centered on the defendants' "having put fossil fuels into the flow of international commerce," they attacked behavior worldwide—including foreign emissions beyond the reach of the EPA and CAA.[65] Despite the lack of displacement, the court held that the claims were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems" and thus dismissed the complaints.[66]

---

57. *See supra* notes 30-38, 44-47 and accompanying text.

58. Sokol, *supra* note 7, at 1414.

59. *Id.* at 1415.

60. Vic Sher, *Forum Versus Substance: Should Climate Damages Cases Be Heard in State or Federal Court?*, 72 STAN. L. REV. ONLINE 134, 134 (2020).

61. Sokol, *supra* note 7, at 1415.

62. *Id.* at 1387-88.

63. People v. BP PLC, No. C 17-06011 & No. C 17-06012, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *amended by* 969 F.3d 895 (9th Cir. 2020), *cert. denied sub nom.* Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (mem.).

64. *Id.* at *4.

65. *Id.*

66. City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018), *vacated,* 960 F.3d 570 (9th Cir. 2020), *amended by* 969 F.3d 895 (9th Cir. 2020), *cert. denied sub nom. Chevron*,

Shortly thereafter, the Southern District of New York cited the Northern District of California's decision in its order granting the defendants' motion to dismiss another second-wave suit, *City of New York v. BP PLC*.[67] The court agreed that the plaintiff's claims were governed by federal common law,[68] but determined that the federal common law claims were indeed displaced by the CAA, as the plaintiff ultimately sought to hold the defendants liable for greenhouse gas emissions—"the same conduct at issue in *AEP*."[69]

The Second Circuit affirmed the Southern District of New York's decision.[70] However, the Ninth Circuit vacated the Northern District of California's holding, finding that the plaintiffs' state-law public nuisance claim "fail[ed] to raise a substantial federal question."[71] The case was remanded to the Northern District of California to determine whether there was an alternative basis for subject-matter jurisdiction that would require the case to proceed in federal court.[72]

Despite the defendants' limited progress in dismissing the plaintiffs' claims, the removal strategy has undoubtedly succeeded in grinding these suits to a halt—to date, not one of the second-wave climate change cases has been litigated on the merits.

As if the debates over federal question jurisdiction, displacement, preemption, standing, and the political question doctrine are not enough, defendants continue to find other creative ways to argue for federal jurisdiction. *BP PLC v. Mayor of Baltimore* is representative of the long and winding road facing each of the second-wave suits.[73]

The plaintiffs sued several fossil fuel companies in Maryland state court for promoting fossil fuels while allegedly concealing their environmental impacts.[74] The defendant companies removed the case to federal court, citing a number of grounds for federal jurisdiction.[75] One such ground was the federal officer removal statute, 28 U.S.C. § 1442.[76] Under 28 U.S.C. § 1442, any civil action filed in a state court against an officer or agency of the United States may be removed to federal court by that officer or agency.[77] In order to remove a case under the federal officer removal statute, a defendant must show: (1) that it acted under the direction of a federal officer, (2) that it raises a "colorable federal

---

141 S. Ct. 2776.

67. City of New York v. BP PLC, 325 F. Supp. 3d 466, 471, 476 (S.D.N.Y. 2018), *aff'd sub nom.* City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).

68. *Id.* at 471.

69. *Id.* at 474.

70. *Chevron Corp.*, 993 F.3d at 103.

71. City of Oakland v. BP PLC, 969 F.3d 895, 906 (9th Cir. 2020), *cert. denied sub nom.* Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (mem.).

72. *Id.* at 901.

73. 141 S. Ct. 1532 (2021).

74. Id. at 1535-36.

75. Id. at 1536.

76. Id.

77. 28 U.S.C. § 1442.

defense," and (3) "that the charged conduct was carried out 'for or relating to' the asserted official authority."[78] The defendants argued that by contracting with the federal government, they were "acting under" federal officers.[79] The district court disagreed, holding that removal under the federal officer statute was not proper because the defendants "failed to plausibly assert that the acts for which they ha[d] been sued were carried out 'for or relating to' the alleged federal authority" as required by the statute.[80] The case was remanded back to Maryland state court.[81]

The defendants appealed the order to remand.[82] In its review of the issue, the Fourth Circuit Court of Appeals was forced to interpret 28 U.S.C. § 1447(d) to determine the scope of its appellate jurisdiction.[83] According to 28 U.S.C. § 1447(d), "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise."[84] The court interpreted this language to mean that its jurisdiction was limited to review of federal officer removal under § 1442; the rest of the remand order could not be reviewed, as it was outside the court's jurisdiction.[85] Accordingly, the court dismissed the appeal for lack of jurisdiction as it applied to all grounds other than federal officer removal.[86]

The appellate court then went on to evaluate the district court's conclusion about the impropriety of the removal under 28 U.S.C. § 1442.[87] After a thorough analysis, the appellate court found that "the relationship between Baltimore's claims and any federal authority over a portion of certain Defendants' production and sale of fossil fuel products is too tenuous to support removal under § 1442."[88] The court affirmed the district court's order for state court remand.[89]

Shortly thereafter, the defendants filed a certiorari petition in the Supreme Court, seeking review of the question of:

> [w]hether 28 U.S.C. § 1447(d) permits a court of appeals to review any

---

78. Mayor of Baltimore v. BP PLC, 388 F. Supp. 3d 538, 567 (D. Md. 2019) (quoting Sawyer v. Foster Wheeler LLC, 860 F.3d 249, 254 (4th Cir. 2017) (citing 28 U.S.C. § 1442(a)(1))), *aff'd* 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021).

79. *Id.* at 568.

80. *Id.* at 569.

81. *Id.* at 574.

82. Mayor of Baltimore v. BP PLC, 952 F.3d 452 (4th Cir. 2020), *vacated*, 141 S. Ct. 1532 (2021).

83. *Id.* at 457.

84. *Id.* at 459 (quoting 28 U.S.C. § 1447(d)).

85. *Id.*

86. *Id.* at 461.

87. *Id.*

88. *Id.* at 468.

89. *Id.* at 471.

> issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443.[90]

On October 2, 2020, the Supreme Court granted certiorari on the question of whether the Fourth Circuit was right to limit its review to § 1442 or whether it could consider the defendants' other grounds.[91] In another brief, the defendants pushed the Court to go further: "Given the number of climate-change cases pending across the Nation, the Court should confirm that this case and others like it were properly removed to federal court on the ground that federal common law necessarily governs claims alleging injury based on the contribution of interstate and international emissions to global climate change."[92]

If there was any question as to whether the Supreme Court would look beyond the defendants' narrow procedural question and review the case on its merits, Justice Gorsuch, the author of the majority opinion, wasted no time providing the Court's answer: "This case began when Baltimore's mayor and city council sued various energy companies for promoting fossil fuels while allegedly concealing their environmental impacts. But the merits of that claim have nothing to do with this appeal."[93] The Supreme Court limited its review to the interpretation of 28 U.S.C. § 1447(d), thereby punting on the opportunity to rule on the appropriate forum for climate change litigation.[94] Upon review, the Court determined that the whole of the district court's order to remand became reviewable on appeal and that the Fourth Circuit "erred in holding that it was powerless to consider all of the defendants' grounds for removal under § 1447(d)."[95] The case was remanded back to the Fourth Circuit.[96]

Notably, Justice Sotomayor dissented, writing that the majority decision will not only allow defendants to sidestep the restrictions of § 1447(d) "by making near-frivolous arguments for removal under § 1442 or § 1443," but that it also adds another roadblock that second-wave plaintiffs must clear before litigating a case on the merits.[97] The Court's decision leaves "Baltimore, which has already waited nearly three years to begin litigation on the merits, . . . consigned to waiting once more."[98] In April of 2022, the Fourth Circuit remanded the case to back to Maryland state court, concluding that "none of [the] Defendants' bases

---

90. Petition for Writ of Certiorari at 1, BP PLC v. Mayor of Baltimore, 141 S. Ct. 222 (2020) (No. 19-1189).

91. BP PLC v. Mayor of Baltimore, 141 S. Ct. 222 (2020).

92. Brief for Petitioners at 45, BP PLC v. Mayor of Baltimore, 141 S. Ct. 1532 (2021) (No. 19-1189).

93. BP PLC v. Mayor of Baltimore, 141 S. Ct. 1532, 1535-36 (2021).

94. *Id.* at 1536.

95. *Id.* at 1543.

96. *Id.*

97. *Id.* at 1547 (Sotomayor, J., dissenting).

98. *Id.*

for removal permit the exercise of federal jurisdiction."[99] Still, the defendants are expected to appeal to the Supreme Court once again.[100] Four years have passed since Baltimore filed its complaint. Just as Justice Sotomayor predicted, Baltimore continues to wait fruitlessly for a trial on the merits.

With the harmful effects of climate change growing worse by the day, second-wave plaintiffs cannot afford to wait for the resolution of each new procedural barrier. With public health, safety, and property at stake, the city and state governments involved in these lawsuits urgently need to know if the courts will be a source of relief. The incessant fighting over forum has delayed litigation of the issues at the heart of these cases and raised uncertainty around the plaintiffs' attempts to prepare for the harms yet to come.

III. *CITY OF OAKLAND V. BP PLC*

BP[101] has faced a similarly long road to litigation on the merits, with miles (and likely years) yet to go. In their complaints, San Francisco and Oakland alleged that the defendants—BP PLC, Chevron Corporation, ConocoPhillips Company, Exxon Mobil Corporation, and Royal Dutch Shell PLC—had "contributed to the creation of a public nuisance . . . causing severe harms and threatening catastrophic harms" in their cities.[102] The defendants, plaintiffs claimed,

> engaged in large-scale, sophisticated advertising and public relations campaigns to promote pervasive fossil fuel usage and to portray fossil fuels as environmentally responsible and essential to human well-being—even as they knew that their fossil fuels would contribute, and subsequently were contributing, to dangerous global warming and associated accelerated sea level rise.[103]

The plaintiffs further alleged that these defendants—the five largest investor-owned fossil fuel corporations in the world—are qualitatively different than other contributors to climate change because of their "in-house scientific resources, early knowledge of global warming, commercial promotions of fossil fuels as beneficent even in light of their knowledge to the contrary, and efforts to protect their fossil fuel market by downplaying the risks of global warming."[104] Accordingly, the plaintiffs sought an order requiring the defendants to "abate the global warming-induced sea level rise nuisance to which they have contributed

---

99. Mayor of Baltimore v. BP PLC, 31 F.4th 178, 195 (4th Cir. 2022).

100. Lesley Clark, *Climate Lawsuits Poised for New Supreme Court Fight*, E&E NEWS (May 18, 2022, 7:18 AM), https://www.eenews.net/articles/climate-lawsuits-poised-for-new-supreme-court-fight/ [https://perma.cc/6MXN-M5ZP].

101. City of Oakland v. BP PLC, *969 F.3d 895 (9th Cir. 2020), cert. denied sub nom. Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (mem.).*

102. S.F. Complaint, *supra* note 11, at 10; Oakland Complaint, *supra* note 11, at 9.

103. S.F. Complaint, *supra* note 11, at 3; Oakland Complaint, *supra* note 11, at 2.

104. S.F. Complaint, *supra* note 11, at 2, 5; Oakland Complaint, *supra* note 11, at 2, 5.

by funding an abatement program to build sea walls and other infrastructure" considered necessary to "protect human safety and public and private property" in their cities.[105] Finally, the plaintiffs alleged that the defendants' conduct "constitutes a substantial and unreasonable interference with and obstruction of public rights and property, including, *inter alia*, the public rights to health, safety, and welfare."[106]

The plaintiffs brought these claims pursuant to California public nuisance law.[107] Under California law, a "nuisance" is:

> [a]nything which is injurious to health, including . . . indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully restricts the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . . .[108]

A nuisance becomes "public" when it "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[109]

The cases were consolidated, and the defendants removed the case to federal court, arguing, among other things, that the cities' public nuisance claims were governed by federal common law because of the claims' "uniquely federal interests."[110] The cities moved to remand on the ground that the Northern District of California lacked subject-matter jurisdiction.[111] The district court denied the motion after concluding that it had federal question jurisdiction, as the claim was "necessarily governed by federal common law" due to its implication of interstate and international disputes.[112] The cities then amended their complaints to include a federal nuisance claim, alleging that "the conduct and emissions contributing to the nuisance arise outside the United States, although their ill effects reach within the United States."[113] Because foreign emissions are beyond the EPA's reach, the plaintiffs argued, the federal claim could not be displaced by the CAA.[114] The district court dismissed the amended complaints for failure to state a claim, ruling that the state law claims were preempted by federal common law

---

105. S.F. Complaint, *supra* note 11, at 5; Oakland Complaint, *supra* note 11, at 5.

106. S.F. Complaint, *supra* note 11, at 38; Oakland Complaint, *supra* note 11, at 32-33.

107. S.F. Complaint, *supra* note 11, at 37; Oakland Complaint, *supra* note 11, at 32.

108. CAL. CIV. CODE § 3479 (West 2022).

109. *Id.* § 3480.

110. City of Oakland v. BP PLC, 969 F.3d 895, 902 (9th Cir. 2020), *cert. denied sub nom.* Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (mem.).

111. *Id.*

112. *Id.*

113. City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020), *amended by* 969 F.3d 895, *cert. denied sub nom. Chevron*, 141 S. Ct. 2776.

114. *Id.*

while the federal claim was a non-justiciable political question.[115] The district court, about a month later, then concluded that it lacked personal jurisdiction over the defendants, as the plaintiffs had "failed to adequately link each defendants' [sic] alleged California activities to plaintiffs' harm."[116] The cities appealed the denial of their motions to remand, the dismissal of their complaints, and the district court's personal jurisdiction ruling.[117]

On appeal, the Ninth Circuit determined the district court erred in holding that it had federal question jurisdiction, as the cities' claim did not raise a substantial federal issue, nor was it completely preempted by the CAA.[118] In its jurisdiction analysis, the court noted that the plaintiffs' complaints "may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption."[119] The Ninth Circuit found that the plaintiffs' state law claim failed to raise a substantial federal question as "the claim neither requires an interpretation of a federal statute, nor challenges a federal statute's constitutionality."[120] The court held that the artful pleading doctrine, which applies "where federal law completely preempts a plaintiff's state law claim,"[121] had no effect as the language of the CAA does not indicate that Congress intended to preempt every state law cause of action within its scope, nor does it provide the plaintiffs with a federal claim or a cause of action for nuisance caused by global warming.[122] The case was remanded back to the Northern District of California to determine whether there was any alternative basis for federal jurisdiction; if not, the case should be remanded to state court.[123]

In response, the defendants filed a petition for a writ of certiorari, arguing this case to be an "excellent vehicle" for determining whether public nuisance claims based on climate change "belong in federal or state court."[124] The Supreme Court denied the defendants' petition, leaving the issue to the Northern District of California.[125]

Given the sheer volume of second-wave climate change litigation suits and the ongoing uncertainty over where the litigants' claims belong, it seems to be only a matter of time before the Supreme Court is asked—yet again—to address state-law climate tort litigation. In the interest of addressing Justice Sotomayor's concerns about leaving the plaintiffs in these cases "consigned to waiting once

---

115. *Id.* at 1024, 1029.

116. City of Oakland v. BP PLC, No. C 17-06011, No. C 17-06012, 2018 WL 3609055, at *3 (N.D. Cal. July 27, 2018).

117. *See* City of Oakland v. BP PLC, 969 F.3d 895, 903 (9th Cir. 2020).

118. *Id.* at 907-08.

119. *Id.* at 904 (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987)).

120. *Id.* at 906 (citations omitted).

121. *Id.* at 905 (quoting Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998)).

122. *Id.* at 908.

123. *Id.* at 911.

124. Petition for Writ of Certiorari at 32, Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (No. 20-1089).

125. *Chevron*, 141 S. Ct. 2776, *denying cert. to* 969 F.3d 895 (9th Cir. 2020).

more,"[126] the next section of this Note analyzes the arguments of *BP* to determine how a Supreme Court ruling might "decide the future of climate tort litigation."[127]

IV. WHERE DOES *BP* BELONG?

If the Supreme Court were interested in ending the fight over forum for these kinds of cases, how should it decide? The debate hinges on two versions of a single issue, as identified by the parties in *BP*. As the defendants put it: "[w]hether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law."[128] Or, from the plaintiffs' perspective: whether a "state law public nuisance claim alleging wrongful and deceptive promotion of hazardous consumer goods 'arises under' a congressionally displaced body of federal common law regarding interstate air pollution for purposes of removal jurisdiction."[129] Although the parties frame the issue differently, the underlying question is the same: does a state law nuisance claim related to climate change necessarily arise under federal law? If so, the plaintiffs' claims in *BP* and similar suits will be preempted by federal common law and then displaced by the CAA—the very outcome plaintiffs around the country have sought to avoid since the Supreme Court's ruling in *AEP*.[130] Fortunately for the *BP* plaintiffs, they have successfully tailored their complaints to steer clear of the preemption and displacement issues that dogged first-wave plaintiffs. Accordingly, they should be allowed to proceed in state court, where they will have a chance to litigate their claims on the merits and attempt to prove the elements of public nuisance.

A. The Parties' Arguments

In their petition for certiorari, the defendants fought for federal question jurisdiction as a means for removal.[131] Federal question jurisdiction is governed by the well-pleaded complaint rule, which provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."[132] As "master of the claim," plaintiffs can generally "avoid federal jurisdiction by exclusive reliance on state law."[133]

In *BP*, the plaintiffs have done just that. In their complaints, they were careful to limit their claims to local harms arising under state law; they "do not seek to impose liability on Defendants for their direct emissions of greenhouses gases and

126. BP PLC v. Mayor of Baltimore, 141 S. Ct. 1532, 1547 (2021) (Sotomayor, J., dissenting).

127. Sokol, *supra* note 7, at 1422.

128. Petition for Writ of Certiorari at (i), *Chevron*, 141 S. Ct. 2776 (No. 20-1089).

129. Brief of Respondents in Opposition to Petition for a Writ of Certiorari at i, *Chevron*, 141 S. Ct. 2776 (No. 20-1089).

130. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).

131. *See* Petition for Writ of Certiorari at 14-27, *Chevron*, 141 S. Ct. 2776 (No. 20-1089).

132. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

133. *Id.*

do not seek to restrain Defendants from engaging in their business operations."[134] Instead, the plaintiffs' complaints alleged that the defendants have knowingly done "all they can to help create and maintain a profound public nuisance" in their cities by causing harm via "their in-house scientific resources, early knowledge of global warming, commercial promotions of fossil fuels as beneficent even in light of their knowledge to the contrary, and efforts to protect their fossil fuel market by downplaying the risks of global warming."[135]

In response, the defendants made three arguments for removal. First, they argued that the plaintiffs' claims fell within two exceptions to the well-pleaded complaint rule: *Grable* jurisdiction and the artful-pleading doctrine, or complete preemption.[136] Alternatively, the defendants asked the Supreme Court to recognize a third exception: implied preemption.[137] The defendants frequently mixed these issues together, seemingly in an attempt to overwhelm the Court with a dense, tangled web of reasons why the plaintiffs' claims must be removed to federal court. Each issue will now be isolated, to the extent possible, and addressed in turn.

1. Grable *Jurisdiction*.—In their effort to remove the plaintiffs' claims, the defendants argued that the claims fell within a "'special and small category' of state-law claims that arise under federal law."[138] The Ninth Circuit evaluated the argument via the *Grable* exception to the well-pleaded complaint rule.[139] Under *Grable*, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."[140] As the Ninth Circuit correctly noted, adjudicating the plaintiffs' state law public nuisance claim "does not require resolution of a substantial question of federal law: the claim neither requires an interpretation of a federal statute, nor challenges a federal statute's constitutionality."[141] Therefore, the public nuisance claims do not arise under federal law.

The defendants pressed on by arguing that the plaintiffs' claims implicated a variety of "federal interests," such as foreign policy, energy policy, and national security.[142] Allowing these claims to proceed in California state courts, the defendants argued, would "use California law to make energy policy for, and impose liability for conduct occurring in, the other 49 States and many foreign

---

134. S.F. Complaint, *supra* note 11, at 5; Oakland Complaint, *supra* note 11, at 5.

135. Oakland Complaint, *supra* note 11, at 5; S.F. Complaint, *supra* note 11, at 5.

136. City of Oakland v. BP PLC, 969 F.3d 895, 904-06 (9th Cir. 2020), *cert. denied sub nom.* Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (mem.).

137. Petition for Writ of Certiorari at 4-5, 14-15, *Chevron*, 141 S. Ct. 2776 (No. 20-1089).

138. *BP PLC*, 969 F.3d at 906-07 (quoting Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006)).

139. *Id.* at 906.

140. Gunn v. Minton, 568 U.S. 251, 258 (2013) (citing Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005)).

141. *BP PLC*, 969 F.3d at 906 (citations omitted).

142. *Id.* at 906-07.

nations."[143] Because these claims "attempt to impose California's law beyond its borders," federal law must apply, as federal law "exclusively governs claims that implicate the federal division of sovereignty between the States and the United States."[144]

Further, the defendants argued, allowing the plaintiffs' claims to move forward will "disrupt and impede the political branches' international climate-change initiatives and negotiations."[145] Worse, any finding of liability on behalf of the defendants would "allow plaintiffs to govern conduct and control energy policy on foreign soil."[146] The defendants noted that "'federal law and policy' have long treated fossil fuels as 'strategically important domestic resources'" and that the United States' military and national security would be severely impacted "if domestic production were massively curtailed, as the cities seek."[147] For these reasons, there is "an overriding federal interest in the need for a uniform rule of decision."[148] Because the cities' theory of harm stems from greenhouse gas emissions made on an interstate and international scale, federal law must govern.[149]

Additionally, the defendants argued that because the plaintiffs' claims involve interstate and international disputes, only federal law can apply: "whether the CAA would preempt state law is irrelevant—no state law exists here."[150] However, state law *does* exist here: namely, California's public nuisance statute.[151] Throughout their petition for certiorari, the defendants repeatedly mischaracterized the plaintiffs' claims. As noted, the cities "do not seek to impose liability on Defendants for their direct emissions of greenhouses gases and do not seek to restrain Defendants from engaging in their business operations."[152] Because the plaintiffs "do not seek to stop global warming by regulating or enjoining emissions, but to mitigate the local nuisance impacts through discrete abatement measures," they have not implicated any of the federal interests that so worried the defendants.[153] While these federal interests are all significant concerns for the political branches of government, the fact remains that none are grounds for federal jurisdiction under *Grable*. *Grable* recognized that "a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law;"[154] that is simply not the case here.

---

143. Petition for Writ of Certiorari at 3, Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (No. 20-1089).

144. *Id.* at 17.

145. *Id.* at 6.

146. *Id.* at 18.

147. *Id.*

148. *Id.* at 19.

149. *Id.* at 19-20.

150. *Id.*

151. Cal. Civ. Code § 3479 (West 2022).

152. S.F. Complaint, *supra* note 11, at 5; Oakland Complaint, *supra* note 11, at 5.

153. S.F. Complaint, *supra* note 11, at 5; Oakland Complaint, *supra* note 11, at 5.

154. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

2. Complete Preemption.—Complete preemption is the weakest of the defendants' arguments for removal. In earlier filings, the defendants argued that the cities' public nuisance claims arose under federal law because they were completely preempted by the CAA.[155] Complete preemption for purposes of federal jurisdiction exists "when Congress: (1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action."[156]

> When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. [That] claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court.[157]

The CAA fails to satisfy either requirement for complete preemption.[158] The statute has a savings clause which "'makes clear that states retain the right to "adopt or enforce" common law standards that apply to emissions' and preserves '[s]tate common law standards] against preemption.'"[159] The CAA also does not provide a substitute cause of action for nuisance that allows for compensatory damages.[160] The Supreme Court has determined three federal statutes have extraordinary preemptive force; the CAA is not one of them.[161] Complete preemption, therefore, fails as a viable justification for removal. Interestingly, the defendants seem to have abandoned this argument in their petition for certiorari,[162] perhaps as a result of the Ninth Circuit's thorough dismantling of the claim.[163]

Likewise, the cities' claim is not preempted under ordinary preemption principles.[164] Ordinary preemption is a defense that claims, "that because federal

---

155. City of Oakland v. BP PLC, 969 F.3d 895, 907 (9th Cir. 2020), *cert. denied sub nom.* Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (mem.).

156. *Id.* at 906 (citing Hansen v. Grp. Health Coop., 902 F.3d 1051, 1057 (9th Cir. 2018)).

157. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003) (quoting U.S.C. § 1441(b)).

158. *BP PLC,* 969 F.3d at 908.

159. *Id.* at 907-08 (quoting Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685, 690-91 (6th Cir. 2015)).

160. *See* Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 150 n.3 (4th Cir. 1994).

161. *See* Ainsley v. Ameriquest Mortg. Co., 340 F.3d 858, 862 (9th Cir. 2003) (noting that "[t]he test is whether Congress clearly manifested an intent to convert state law claims into federal-question claims"). Only § 301 of the Labor-Relations Management Act, 29 U.S.C. § 185; § 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132; and the usury provisions of the National Bank Act, 12 U.S.C. §§ 85, 86, have been found to pass this test. *Id.*; *see also* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6-11 (2003).

162. Petition for Writ of Certiorari at 24, Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (No. 20-1089) (arguing that state-law claims that arise under federal common law were removable even if jurisdiction was not supported by complete preemption).

163. *See BP PLC*, 969 F.3d at 907-08.

164. *Id.* at 907.

law preempts state law, the defendant cannot be held liable under state law."[165] The Supreme Court in *AEP* explicitly chose not to answer the question of whether state law nuisance claims are preempted by the CAA,[166] thereby eliminating any support for an ordinary preemption defense.

3. Implied Preemption and Displacement via Federal Common Law.— Finally, the defendants argued that the plaintiffs' claims were impliedly preempted by federal common law.[167] "[F]ederal law can *impliedly* preempt state law when its structure and purpose implicitly reflect Congress's preemptive intent."[168] The Supreme Court has recognized two kinds of implied preemption: "field preemption," which "occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or when states attempt to regulate a field where there is clearly a dominant federal interest," and "conflict preemption," which "occurs when compliance with both federal and state regulations is a physical impossibility ('impossibility preemption'), or when state law poses an 'obstacle' to the accomplishment of the 'full purposes and objectives' of Congress ('obstacle preemption')."[169]

By framing the plaintiffs' claims as an attempt to use state law to regulate interstate and international greenhouse gas emissions, the defendants relied on various aspects of field and obstacle preemption to support the application of federal common law.[170] The defendants stated that the Supreme Court "has made *very* clear that interstate pollution is one of the few areas that, given the constitutional structure, must be governed by federal law to the exclusion of state law."[171] There is "a longstanding line of Supreme Court cases holding that claims involving interstate air and water pollution arise directly under federal common law";[172] thus, the defendants argued, the plaintiffs' claims "do not just implicate federal-law issues—they *are* federal claims."[173]

It is important to note that the Supreme Court essentially declared federal common law dead in *Erie Railroad Co. v. Tompkins*.[174] However, "*Erie* also sparked 'the emergence of a federal decisional law in areas of national concern.'"[175] Those areas include "'subjects within national legislative power

---

165. Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 272-73 (2d Cir. 2005).

166. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 429 (2011).

167. Petition for Writ of Certiorari at 4-5, 14-15, *Chevron*, 141 S. Ct. 2776 (No. 20-1089).

168. JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 2 (2019).

169. *Id.* (internal citations omitted).

170. Petition for Writ of Certiorari at 20, *Chevron*, 141 S. Ct. 2776 (No. 20-1089).

171. *Id.* at 15.

172. *Id.* (quoting United States Rehearing Brief at 2, *Chevron,* 141 S. Ct. 2776 (2021)) (internal quotations omitted).

173. *Id*.

174. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

175. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 421 (2011) (quoting Henry J. Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 405 (1964)).

where Congress has so directed' or where the basic scheme of the Constitution so demands."[176] In *AEP*, the Supreme Court noted that "[e]nvironmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'"[177] In particular, the Court stated that "'[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.'"[178] Further, the defendants argued, federal common law is "necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State . . . by sources outside its domain."[179] The resolution of "an interstate environmental dispute necessarily presents 'a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive.'"[180]

Additionally, the defendants argued that the constitutional structure demands the application of federal law.[181] According to the defendants, "[t]he Constitution's allocation of sovereignty between the States and the federal government, and among the States themselves, precludes applying state law in certain narrow areas whose inherently interstate nature requires uniform *national* rules of decision."[182] As this case falls precisely within one of those areas, "the 'federal judicial power' must supply any rules necessary 'to deal with common-law problems.'"[183] The use of state law in this case would create a one-size-fits-all policy for the whole country—a solution that cannot stand as "each State is afforded regulatory autonomy because *other* States' policy prerogatives stop at the state line."[184]

By painting the plaintiffs' claims as an attempt to regulate interstate and international greenhouse gas emissions that must be preempted by federal common law, the defendants' arguments lead directly back to the Supreme Court's holding in *AEP*: that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants."[185] In effect, the defendants sought

---

176. *Id.* (quoting Henry J. Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 408 n.119, 421-22 (1964)).

177. *Id.* (quoting Henry J. Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 421-22 (1964)).

178. *Id.* (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972), *disapproved in later proceedings*, 451 U.S. 304 (1981)).

179. Petition for Writ of Certiorari at 16, Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (No. 20-1089) (quoting *Illinois*, 406 U.S. at 107 n.9).

180. *Id.* (quoting Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938)).

181. *Id.* at 4.

182. *Id.*

183. *Id.* (quoting United States v. Standard Oil Co. of Cal., 332 U.S. 301, 307 (1947)).

184. *Id.* at 16 (quoting Brief of Indiana et al. as Amici Curiae in Support of Defendants-Appellees, Chevron, 141 S. Ct. 2776 (No. 20-1089) (internal quotations omitted).

185. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011).

to funnel the plaintiffs' claims into the same path that led to the first wave's demise.

In their brief in opposition to the defendants' petition for certiorari, the plaintiffs forcefully pushed back against the idea of federal common law preempting their claims:

> No federal common law has ever encompassed claims of wrongful promotion and deceptive business practices, which are within the states' traditional authority to regulate—especially where, as here, the defendants' conduct poses severe harms to public health and safety. Whatever application federal common law might have when a plaintiff seeks to impose liability for "interstate pollution," neither petitioners' emissions nor anyone else's are the claimed basis for liability here.[186]

Instead, the defendants' liability "rests upon proof that they conducted advertising and communications campaigns to promote the use of their products at levels they falsely claimed were safe and environmentally responsible, while deliberately concealing their risks."[187] For an allegation to give rise to federal common law, the plaintiffs argued, there must be a "specific, concrete, and significant conflict between a uniquely federal interest and the use of state law."[188] The plaintiffs' allegations do not fit that mold, as the elements of California's public nuisance action and the relief sought all sound in consumer and public deception—areas within state authority.[189] Because holding the defendants liable for "knowing and deceitful corporate conduct does not implicate—much less conflict with—any uniquely federal interest," the plaintiffs' claims cannot be governed by federal common law.[190] As the plaintiffs noted, the Supreme Court itself recently stated that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law."[191] Accordingly, the claims belonged in state court, as "[r]emedying public nuisances and protecting consumers from deceptive business practices are core state responsibilities within the purview of state court systems."[192]

The defendants' argument in favor of federal common law must fail for much the same reason as the other issues they raised: the defendants have willfully distorted the plaintiffs' claims. Again, the plaintiffs "do not seek to impose liability on Defendants for their direct emissions of greenhouses gases and do not seek to restrain Defendants from engaging in their business operations."[193]

---

186. Brief of Respondents in Opposition to Petition for Writ of Certiorari at 7-8, Chevron, 141 S. Ct. 2776 (No. 20-1089).

187. *Id.* at 8.

188. *Id.* at 10 (internal quotations omitted).

189. *Id.*

190. *Id.* at 11.

191. *Id.* (quoting Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019)).

192. *Id.* at 9.

193. S.F. Complaint, *supra* note 11, at 5; Oakland Complaint, *supra* note 11, at 5.

Instead, they aimed to hold the defendants liable for "conducting deceptive marketing tactics while knowingly misrepresenting the dangers of their products"—areas "squarely within the states' traditional authority to protect residents from the impacts of misleading marketing and related practices."[194] Additionally, despite invoking a variety of federal interests, the CAA is the only federal statute the defendants identified as conflicting with the plaintiffs' claims. As discussed, the CAA does not preempt the plaintiffs' claims. The defendants' failure to identify any other federal law that impliedly preempts these claims dooms this argument, as well.

The Supreme Court has recognized only two exceptions to the well-pleaded complaint rule: claims that fall under *Grable* and claims that are completely preempted by a federal statute.[195] The plaintiffs' claims do not fit either exception, so federal question jurisdiction is improper. The plaintiffs accused the defendants, correctly, of asking the Supreme Court to create a third exception to the well-pleaded complaint rule "for cases in which federal common law purportedly 'governs' . . . state-law claims but neither *Grable* nor complete preemption support removal."[196] Importantly, the Supreme Court has held that even when federal common law claims are displaced by federal statute, they do not render state-law claims removable.[197] That precedent precludes the need for the Court to recognize this third exception to the well-pleaded complaint rule. Accordingly, the plaintiffs' claims must proceed in state court, under state law.

B. State Courts Are the Appropriate Forum for Second-Wave Litigation

Ultimately, *BP* is distinguishable from *AEP* because of the remedy sought. In *AEP*, the plaintiffs asked "for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually."[198] Such a remedy necessarily implicated the CAA, which authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases.[199] Because the EPA alone holds the power to set restrictions on carbon dioxide emissions, the plaintiffs' claims were displaced by the CAA.[200]

By declining to seek abatement of the defendants' emissions, the *BP* plaintiffs have avoided the defining issue of *AEP*. Focusing their claims on the defendants' wrongful promotion and deceptive business practices and requesting funds for a local abatement program to build sea walls and other infrastructure threatened by those practices steers the plaintiffs clear of any potential displacement concerns.

---

194. Brief of Respondents in Opposition to Petition for Writ of Certiorari at 2, Chevron, 141 S. Ct. 2776 (No. 20-1089).

195. *See id*. at 12-13.

196. *Id.* at 2.

197. *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 488-89 (1987); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011).

198. *Am. Elec. Power Co*., 564 U.S. at 415.

199. 42 U.S.C. § 7409.

200. *Am. Elec. Power Co*., 564 U.S. at 415.

Adjudicating these claims in state court, under state law, would not force the court to weigh the value of fossil-fuel production against its harms, but instead to simply determine whether the defendants' alleged wrongful promotion substantially and unreasonably interfered with a public right.[201]

Because the defendants have no grounds for removal, and because elements of California's public nuisance action and the relief sought by the cities sound in consumer and public deception—areas within state authority[202]—*BP* belongs in state court. Accordingly, other second-wave complaints (including suits already filed and those yet to come) that make similar claims and seek similar remedies should also fall under state jurisdiction, thereby avoiding the pitfalls of *AEP*.

V. WHAT STATE JURISDICTION MEANS FOR SECOND-WAVE LITIGATION

The fact that these kinds of cases belong in state courts does not guarantee a positive outcome for the plaintiffs. The Restatement (Second) of Torts defines public nuisance as "an unreasonable interference with a right common to the general public."[203] Circumstances that may indicate an unreasonable interference include:

> Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or . . . whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[204]

Because of this seemingly broad scope of liability, public nuisance claims have long been a favored litigation strategy for state and local governments in efforts to address broad public problems, albeit with limited success. Indeed, the public nuisance doctrine has been applied, with mixed results, in litigation over everything from environmental contamination and asbestos to tobacco products, handguns, and lead paint.[205]

In fact, the cities' claims in *BP* closely mirror the plaintiff's claims in *State ex rel. Hunter v. Johnson & Johnson*,[206] the State of Oklahoma's recent attempt to use public nuisance as a tool for recovery in the wake of the opioid crisis. Oklahoma sued three opioid manufacturers (Johnson & Johnson, Purdue Pharma L.P., Teva Pharmaceuticals USA, Inc., and their related entities), alleging the

---

201. Brief of Respondents in Opposition to Petition for Writ of Certiorari at 9, Chevron Corp. v. Oakland, 141 S. Ct. 2776 (2021) (No. 20-1089).

202. *Id.* at 10.

203. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

204. *Id.*

205. James K. Holder, *Opening the Door Wider? Opioid Litigation and the Scope of Public Nuisance Law*, IN-HOUSE DEF. Q., Spring 2018, at 34-35.

206. State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021).

companies deceptively marketed opioids in the state.[207] The State reached settlements with Purdue Pharma L.P. and Teva Pharmaceuticals USA, Inc. prior to trial.[208] In 2019, the trial court held Johnson & Johnson liable for conducting "false, misleading, and dangerous marketing campaigns" about prescription opioids and ordered Johnson & Johnson to pay $465 million to the State's Abatement Plan, which would fund government programs to combat opioid abuse.[209] However, in November 2021, the Oklahoma State Supreme Court reversed the judgment, holding that the district court's judgment expanded public nuisance to allow courts to "manage public policy matters that should be dealt with by the legislative and executive branches."[210] The court identified three justifications for refusing to extend public nuisance law to cover the defendant's conduct: "(1) the manufacture and distribution of products rarely cause a violation of a public right, (2) a manufacturer does not generally have control of its product once it is sold, and (3) a manufacturer could be held perpetually liable for its products under a nuisance theory."[211]

Oklahoma brought the action under its nuisance statute,[212] which generally codifies the common law.[213] Under the common law, public nuisance has "historically been linked to the use of land by the one creating the nuisance"; courts have typically "limited public nuisance claims to these traditional bounds."[214] For that reason, the Oklahoma State Supreme Court shied away from holding Johnson & Johnson liable for the alleged harms, as "[a]pplying the nuisance statutes to lawful products . . . would create unlimited and unprincipled liability for product manufacturers."[215]

A. The Potential of Public Nuisance

The plaintiffs in second-wave climate change litigation suits may yet encounter the same results; they may face state courts unwilling to make a decision with potentially seismic consequences beyond the courtroom. However, once the distractions of displacement and preemption are stripped away, the state courts will be left with nothing to do but analyze the public nuisance claims in front of them. As Judge Jeffrey P. Crabtree of the First Circuit Court of the State of Hawai'i recently wrote in consideration of another second-wave lawsuit, "[h]ere, the causes of action may seem new, but in fact are common. They just seem new—due to the unprecedented allegations involving causes and effects of fossil fuels and climate change. Common law historically tries to adapt to such

---

207. *Id.* at 722.
208. *Id.*
209. *Id.*
210. *Id.* at 731.
211. *Id.* at 726.
212. OKLA. STAT. tit. 50, §§ 1, 2 (2022).
213. *Hunter*, 499 P.3d at 724.
214. *Id.*
215. *Id.* at 725.

new circumstances."[216] Though climate change-related claims may fall outside the traditional scope of public nuisance, they are in fact a fit for the cause of action. Public nuisance is an apt vehicle for the harms alleged.

1. Second-Wave Plaintiffs Can Satisfy the Elements of Public Nuisance.—In actions for public nuisance, plaintiffs must prove four commonly recognized elements: "the existence of a public right, a substantial and unreasonable interference with that right by the defendant, proximate cause, and injury."[217] Looking solely at those elements, justice appears to favor the plaintiffs in climate change tort litigation.

Second-wave plaintiffs have clearly identified a public right at stake in these lawsuits: "public access to roads, beaches, buildings, and infrastructure."[218] While these kinds of environmental rights may be easier to vindicate due to readily identifiable harms, successfully vindicating these rights is no small feat. It has become commonplace for a public nuisance claim to fail because the plaintiff was unable to establish the existence of a public right.[219]

Crucially, the plaintiffs have also articulated an unreasonable interference with that right. An unreasonable interference may be established when the actor knows, or has reason to know, its conduct has produced "a permanent or long-lasting effect . . . on the public right."[220] The plaintiffs in *BP* alleged, and likely possess evidence to prove, that each defendant "has at all relevant times been aware, and continues to be aware," that the inevitable effects of its products would result in "dangerous levels of global warming with grave harms for coastal cities" such as San Francisco and Oakland.[221] Further, the plaintiffs alleged the defendants have continued to produce massive amounts of fossil fuels despite knowing for decades that fossil fuel usage would cause dangerous global warming and associated sea level rise that is "an irreversible condition on any relevant time scale: it will last hundreds or even thousands of years."[222] Such a claim, if proven, undoubtedly qualifies as an unreasonable interference with a public right. As rising sea levels have the potential to prevent the use of public property such as coastlines, roads, and city or state infrastructure, the interference

---

216. Ruling on Defendants' Motion to Dismiss for Failure to State a Claim at 7, City of Honolulu v. Sunoco, LP, Civ. No. 1CCV-20-0000380 (Haw. 1st Cir. Ct. Feb. 22, 2022).

217. City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1113 (Ill. 2004).

218. David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 60 (2003).

219. *See, e.g.*, *Beretta U.S.A. Corp.*, 821 N.E.2d at 1116 (seeing plaintiffs bring a public nuisance claim against manufacturers, dealers, and distributors of handguns in which court held that there was no public right to be free from the threat that others may defy criminal laws); *Hunter*, 499 P.3d at 727 (holding that there was no "public right to be free from the threat that others may misuse or abuse prescription opioids"); State v. Lead Indus. Ass'n, 951 A.2d 428, 448, 454 (R.I. 2008) (holding that a child's right to not be poisoned by lead is a nonpublic right).

220. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

221. S.F. Complaint, *supra* note 11, at 38; Oakland Complaint, *supra* note 11, at 32.

222. S.F. Complaint, *supra* note 11, at 2; Oakland Complaint, *supra* note 11, at 2.

"impinges on a public right and can be characterized as a public nuisance."[223]

Causation will likely prove to be the most difficult element for second-wave plaintiffs to satisfy. When evaluating the issue of proximate cause in public nuisance claims, courts often become preoccupied with the issue of control—namely, whether the manufacturer "control[led] the instrumentality alleged to constitute the nuisance at the time it occurred."[224] For example, public nuisance cases involving handguns were allowed to proceed only with a showing of a defendant's "intentional creation or propagation of an illegal handgun market"—thereby demonstrating a level of control—"rather than just the manufacture and distribution" of handguns.[225] Control can be difficult to establish in public nuisance cases related to products as courts tend to find that manufacturers release control of their products at the point of sale.[226] Without control, courts reason, manufacturers can neither prevent the nuisance nor abate it.[227] It is important to note, however, that the ability to remedy the nuisance is not an element of the cause of action.[228]

However, second-wave plaintiffs could still establish a chain of causation that demonstrates defendants retained control all along the way. Take, for example, this line of thinking from the dissenting opinion in *Hunter*:

> In application, J & J's directed use of their personal property or goods in Oklahoma commerce, when combined with J & J's false and misleading safety representations of those goods, constitutes a public nuisance when those misrepresentations are causally linked to harm suffered by the public in Oklahoma and resulting in expenditures from the Public Purse.[229]

Following that logic, the chain of causation in climate change litigation looks something like this: the defendants produce fossil fuels; spurred on by defendants' false advertising and deceptive public relations campaigns, consumers use the fuels, thereby generating greenhouse gas emissions; the emissions cause global warming, which in turn causes rising sea levels, floods, and climate disaster events; such effects cause damage to public property, requiring public funds for repair.[230] Consumers are intervening parties, but their use of the fuels matches the manufacturers' intentions.[231] Further, fossil fuel

---

223. Grossman, *supra* note 218, at 53 (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1979)).

224. *Hunter*, 499 P.3d at 728.

225. Grossman, *supra* note 218, at 56-57.

226. *See, e.g.*, *Hunter*, 499 P.3d at 728; Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993); State v. Lead Indus. Ass'n, 951 A.2d 428, 455 (R.I. 2008).

227. *See Hunter*, 499 P.3d at 728; *Tioga*, 984 F.2d at 920; *Lead Indus. Ass'n*, 951 A.2d at 435.

228. *Hunter*, 499 P.3d at 742 (Edmondson, J., dissenting).

229. *Id.* at 734.

230. Grossman, *supra* note 218, at 27; *Hunter*, 499 P.3d at 742.

231. Grossman, *supra* note 218, at 27.

producers' misrepresentations about the science of climate change[232] mirrors the model established by the *Hunter* dissent, which made a direct connection between Johnson & Johnson's misrepresentations about the safety of its products and the public funding required to combat opioid abuse.[233] By filing suit against defendants who have substantially contributed to climate change, plaintiffs can thus establish an uninterrupted causal chain.[234] While this chain may be lengthy, it is tethered at every step by the defendants' directed use of their products and their false and misleading representations of the safety of those goods. Each step is entirely foreseeable and therefore a tenable representation of the defendants' control.

In contrast, injury is likely the easiest element for plaintiffs to prove. Not only has the defendants' conduct unreasonably interfered with a public right, but that interference has caused, and will continue to cause, immense harm. San Francisco and Oakland noted that the State of California has already projected a sea level rise of 0.3 to 0.8 feet in the San Francisco Bay by 2030; there is a risk of as much as ten feet of additional sea level rise by 2100.[235] These projections suggest the results will not only be dangerous, but expensive; both cities calculate the properties put at risk by the rising seas to be valued at tens of billions of dollars of public and private property.[236]

Because second-wave plaintiffs can satisfy the elements of state common law public nuisance, the expansion of public nuisance law to cover second-wave claims would result in a just outcome. The validation of these claims would not abate the nuisance of climate change but would be an invaluable first step in holding fossil fuel producers accountable for the harms they have caused through their deceptive business practices. Further, favorable decisions for plaintiffs would provide local governments with a much-needed source of funds to prepare for the coming global warming-induced challenges—directly from those most responsible for the damages.

If even one of the second-wave lawsuits results in a sizable award of damages to the plaintiffs—such as San Francisco and Oakland's request for an abatement program to fund "the building of sea walls, raising the elevation of low-lying property and buildings and building such other infrastructure as is necessary . . . to adapt to climate change"[237]—it will likely be enough to encourage other states and local governments to file similar complaints of their own. This outcome would accelerate the trend of climate change litigation, with governments around the country attempting to capitalize on the opportunity to hold fossil fuel producers responsible for their deceptive marketing practices and the ensuing harm. That, in turn, would likely push the energy companies toward acceptance

---

232. Sher, *supra* note 60, at 134.

233. *Hunter*, 499 P.3d at 742.

234. *Id.*

235. S.F. Complaint, *supra* note 11, at 4; Oakland Complaint, *supra* note 11, at 4.

236. S.F. Complaint, *supra* note 11, at 4; Oakland Complaint, *supra* note 11, at 4.

237. City of Oakland v. BP PLC, 969 F.3d 895, 902 (9th Cir. 2020), *cert. denied sub nom.* Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (mem.).

of a massive, nation-wide settlement agreement and tighter federal regulations, similar to the result of the litigation involving the tobacco industry in the 1990s.[238] Such an outcome is only fitting considering fossil fuel producers borrowed liberally from the Big Tobacco playbook to promote their products and sow doubt in the minds of consumers about the dangers of climate change.[239]

2. Second-Wave Public Nuisance Claims Meet the Urgency of the Moment.— Though it may be more likely that state courts follow Oklahoma's lead and conservatively decline to expand the traditional bounds of public nuisance law,[240] second-wave plaintiffs clearly have a strong case to support their claims. As San Francisco and Oakland have noted, the harmful effects of climate change are already felt and will only escalate in the years to come.[241] The time for courts to provide relief is now.

Under this scenario, all parties have the potential to benefit. Local governments gain funds necessary to remedy the defendants' unreasonable interference with a public right and thereby prepare their infrastructure for the coming challenges. Fossil fuel producers, while not required to end production, are incentivized to pursue cleaner alternative sources of energy in order to comply with federal regulations, avoid further litigation costs, and reclaim a perception of good standing with the general public. The public receives improved, modern infrastructure more capable of withstanding the harms of climate change and an energy industry with a more substantial interest in sustainability. While the dangers of global warming still loom, public nuisance law could ensure that all sides are better prepared to mitigate its effects.

On the other hand, as state law public nuisance suits become more commonplace, some pro-business states may respond by passing legislation that blocks the possibility of bringing public nuisance tort lawsuits for climate change damages.[242] For example, Texas has already adopted a statute that expressly forbids nuisance or trespass lawsuits seeking damages allegedly due to greenhouse gas emissions from facilities that have permits under authorized federal programs for the activities that released the gases.[243] Other states generally opposed to climate change litigation finding a home in state courts—including Indiana[244]—will likely follow suit to appear more attractive to industry. Either way, a favorable decision for the plaintiffs in any of the second-wave climate change litigation suits would have a massive impact on public policy in this country.

---

238. Holder, *supra* note 205, at 35.

239. *See, e.g.*, S.F. Complaint, *supra* note 11, at 24-28; Oakland Complaint, *supra* note 11, at 22-25.

240. *See* State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 723 (Okla. 2021).

241. *See* S.F. Complaint, *supra* note 11, at 4; Oakland Complaint, *supra* note 11, at 4.

242. Tracy D. Hester, *A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENVTL. L.J. 49, 67 (2012).

243. TEX. WATER CODE ANN. § 7.257 (West 2021).

244. *See generally* Brief of Indiana et al. as Amici Curiae in Support of Defendants-Appellees, Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021) (No. 20-1089).

As global temperatures and sea levels continue to rise and climate disaster events occur with increasing frequency and force, the time has come for courts to move beyond vague considerations of past traditions. To reckon with our climate-change-addled future, courts must expand public nuisance law to address its dangers. Even the Supreme Court in *AEP* recognized that "public nuisance law, like common law generally, adapts to changing scientific and factual circumstances."[245] Earth's scientific and factual circumstances are changing, rapidly and, without action, irreversibly.[246] In the opinion that pioneered the doctrine of market share liability, another judicial innovation, Justice Mosk of the Supreme Court of California wrote, "[t]he response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured . . . or to fashion remedies to meet these changing needs."[247]

Legislative responses are also needed in order to establish a more cohesive approach, but such proposals will undoubtedly take time to draft, ratify, and implement. Unfortunately, the dangers of climate change intensify every day. With dozens of second-wave cases currently on dockets around the country, courts have the opportunity to act now. While the expansion of public nuisance to encompass second-wave plaintiffs' claims will not prevent or even slow the harms of climate change, it will help cities and states prepare for what is to come—an essential remedy in the face of a potentially cataclysmic global transformation.

CONCLUSION

The United States is feeling the harmful effects of climate change like never before. In response, city and state governments have turned to the courts for relief, seeking to hold fossil fuel companies accountable for economic and ecological disasters. However, procedural battles over forum have delayed litigation on the merits and thus far prevented local governments from obtaining a decision one way or the other.

By tailoring their complaints to state law, the plaintiffs in these cases have avoided the issues of federal question jurisdiction, preemption, and displacement. Accordingly, their claims belong in state court, where they will at least have a chance to recover damages tied to the costly effects of climate change. The First, Fourth, Ninth, and Tenth Circuits agree; each has recently remanded a second-wave case back to state courts.[248] At a minimum, this conclusion provides an expeditious path to litigation on the merits and gives all potential parties to climate change-related lawsuits a clear understanding of the judicial landscape.

---

245. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011).

246. Press Release, Intergovernmental Panel on Climate Change, *supra* note 3.

247. Sindell v. Abbott Lab'ys, 607 P.2d 924, 936 (Cal. 1980).

248. *See* Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44 (1st Cir. 2022); Mayor of Baltimore v. BP PLC, 31 F.4th 178 (4th Cir. 2022); Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

More importantly, it provides the judicial branch with a vital opportunity to redress the harms caused by fossil fuel producers' wrongful and deceptive promotion of their products at a local level. Expanding the law of public nuisance to cover climate change-related harms is not only legally sound, but would also provide a just and timely outcome with the potential to deliver major benefits to all involved parties, thereby leaving cities and states across the country better equipped to deal with the enormous challenges of climate change.