The Litigation Labyrinth: Climate Torts and the Clew of Failure-To-Warn

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INTRODUCTION

On April 1, 2021, the Second Circuit Court of Appeals told taxpayers to "shoulder[] the burden" of New York City's climate mitigation expenses without any help from major fossil-fuel producers, marketers, or distributors.[1] The court made this unfortunate assessment while affirming the dismissal of the City's claims against oil and gas companies responsible for over eleven percent of all industrial methane and carbon pollution since the industrial revolution.[2] The City had sued for financial assistance with the costs of protecting its residents from the impacts of the climate crisis—a crisis these companies played a major role in creating and aggravating.[3] In its complaint, the City emphasized how these particular defendants deliberately obfuscated climate science to promote their products, despite their advanced understanding of the global harms resulting from burning fossil fuels.[4] Even so, the court held that these oil and gas companies could face no liability under New York State law for the damages caused by their products.[5]

The City of New York is not the first party denied judicial relief for the mounting costs of global warming.[6] Far from it. In response to legislative

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1. *See* City of New York v. Chevron Corp., 993 F.3d 81, 85–87 (2d Cir. 2021).
2. City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 468 (S.D.N.Y. 2018), *aff'd sub nom.* City of New York. v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).
3. *Id.* at 469–70. In response to unprecedented hurricanes and flooding in the twenty-first century, the City of New York began to invest heavily in climate resiliency. *Id.*
4. Amended Complaint at 43–61, *BP P.L.C.*, 325 F. Supp. 3d 466 (No. 18-cv-182-JFK).
5. *Chevron Corp.*, 993 F.3d at 85.
6. *See, e.g.*, Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 425 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).

inaction,[7] almost 1,400 climate-related cases have been filed as of February 2022.[8] Although claims have proliferated, courts have failed to address the merits of the most significant of these cases: cases attempting to enforce government climate obligations and cases attempting to hold private parties liable for exacerbating climate change.[9] Instead, courts have refused to hear these cries for help by dismissing climate cases as preempted, displaced, or otherwise nonjusticiable.[10]

Still, as urgency—and sea level—continues to rise, plaintiffs have endeavored to craft successful legal arguments. Academics and activists have proposed several creative approaches, ranging from civil conspiracy to violations of the public trust.[11] But these creative approaches have had limited success.[12] Many climate litigants have sought succor in public nuisance law, believing its goals of deterrence and compensation for harm show significant promise for climate claims.[13] Despite this, courts have neglected to extend relief under this theory.[14] Instead, plaintiffs—like the City of New York—

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7. U.N. Env't Programme, The Status of Climate Change Litigation: A Global Review 4 (2017), http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf [https://perma.cc/C8GB-6TU2] [hereinafter 2017 U.N. Status Report] ("[L]itigation seeking to fill the gaps left by legislative and regulatory inaction has also continued. As a result, courts are adjudicating a growing number of disputes over actions—or inaction—related to climate change mitigation and adaptation efforts."); *see also infra* Section II.A (discussing the challenges facing legislators when trying to address climate change).

8. Sabin Ctr. for Climate Change L., *About*, CLIMATE CHANGE LITIG. DATABASES, http://climatecasechart.com/climate-change-litigation/about/ [https://perma.cc/JPL9-5P9A0]. The Sabin Center's definition of "cases" has two criteria: (1) cases must generally be brought before a judicial body; and (2) climate law, policy, or science must be a material issue of law or fact. *Id.*

9. U.N. Env't Programme, Global Climate Litigation Report: 2020 Status Review 31 (2020), https://wedocs.unep.org/20.500.11822/34818 [https://perma.cc/U5VJ-BW89].

10. *See, e.g.*, *Am. Elec. Power Co.*, 564 U.S. at 425–26 (finding plaintiff's claims displaced); Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1199 (Alaska 2014) (finding plaintiff's claims presented a nonjusticiable political question); *Chevron Corp.*, 993 F.3d at 95 (finding plaintiff's claims preempted and displaced); Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020) (finding plaintiffs lacked Article III standing).

11. *See* Joseph Manning, *Climate Torts: It's a Conspiracy!*, 62 B.C. L. REV. 941, 944 (2021); *Juliana*, 947 F.3d at 1165.

12. Manning, *supra* note 11, at 966–68 (laying out challenges to demonstrating an underlying tort for the purposes of a civil conspiracy claim); *see also Juliana*, 947 F.3d at 1173. Although ultimately dismissed for lack of standing, the court in *Juliana* noted that the questions posed by atmospheric trust litigation, despite being "existential in nature—are the province of the political branches." *Id.* Thus, even if plaintiffs using this approach can resolve their standing issues, it is likely that they will still struggle to surmount the political question doctrine. *Id.*

13. *See* Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENV'T L. 1, 24–26 (2011).

14. *See, e.g.*, *Am. Elec. Power Co., Inc.*, 564 U.S. at 425–26; *Chevron Corp.,* 993 F.3d at 95; Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).

have found the courthouse doors closed.[15] In response to this lack of success, a small number of plaintiffs are bringing climate crisis claims under a strict product liability theory of failure-to-warn.[16] If pleaded artfully, this particular cause of action likely presents several advantages for cities and states seeking relief from oil and gas supermajors.

Failure-to-warn claims brought by a city or state seeking compensation for climate adaptation programs are justiciable, and allowing them to proceed constitutes sound public policy. This Comment will demonstrate this proposition in four parts. Part I describes challenges to legislative climate solutions and outlines an abridged history of the tort-based climate litigation parties have turned to in the absence of climate legislation. Part II contends that strict liability failure-to-warn claims brought by cities or states against oil supermajors avoid the legal obstacles that have defeated earlier climate tort claims. It also advances a normative argument that courts should hear climate claims because they frame the climate crisis such that it avoids pitfalls that plague legislative attempts to act, and that viable failure-to-warn claims may drive legislative climate action. Part III concludes by summarizing the most salient points in favor of the legality and desirability of allowing strict liability failure-to-warn climate claims.

I. BACKGROUND

Climate change may be the defining crisis of the twenty-first century. It has been called "existential" and compared to the threat of nuclear warfare.[17] It is indisputably an environmental crisis, but it is also a crisis of national security, human rights, international trade, public health, and equitable development.[18] It touches nearly every aspect of the global economy.[19] Despite this importance, legislative climate action has been hindered by

15. *See supra* notes 1–6 and accompanying text.

16. *See* Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 548 (D. Md. 2019); Complaint, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021) (alleging the defendants intentionally concealed risks of their products and instead "promoted pseudo-scientific theories," and are thus liable for damages stemming from the consumption of their products); Complaint, City of Charleston v. Brabham Oil Co., No. 2020CP1003975 (S.C. Ct. Com. Sept. 9, 2020); *see also* Complaint, City of New York v. ExxonMobil Corp., No. 451071/2021 (N.Y. Sup. Ct. Apr. 22, 2021) (alleging defendants' intentional obfuscation of climate science is an actionable failure to warn consumers of the harms inherent in their products under state consumer protection statutes).

17. Cinnamon Carlarne, *Delinking International Environmental Law & Climate Change*, 4 MICH. J. ENV'T & ADMIN. L. 1, 59 (2014).

18. *Id.* at 47.

19. *Id.*

numerous political factors.[20] Because of the resulting legislative gridlock, many parties have attempted to address climate change in court.[21] Some plaintiffs have sought judgments ordering the government to take action.[22] Other plaintiffs have focused on private actors, seeking to enjoin major carbon emitters or hold them liable for damages caused by climate change.[23] Courts have consistently shirked their responsibility to engage with the merits of these claims.[24]

This Part provides a brief overview of the political challenges inhibiting legislative climate action, resulting in a response that has been charitably characterized as "underwhelming."[25] It then summarizes the labyrinthine history of important climate cases within the United States, focusing on the first generation of tort-based claims and the justiciability obstacles that hindered their progress. The context given by this history is further fleshed out by following three second-generation cases: *City of Oakland v. BP P.L.C.*,[26] *City of New York v. BP P.L.C.*,[27] and *Mayor of Baltimore v. BP P.L.C.*[28] Finally, this Part concludes by placing failure-to-warn climate claims brought by states and municipalities in the context of previous tort-based climate claims.

A. The Political Economy of Climate Change from 30,000 Feet

A problem as large as climate change deserves an urgent response, but the United States' legislative process is inherently inefficient even under "ideal" conditions.[29] Rising levels of partisanship have further aggravated these inefficiencies over the last half century, causing increasing congressional deadlock.[30] Rendering matters even worse, legislative attempts to address the

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20. *See infra* Section II.A.

21. 2017 U.N. Status Report, *supra* note 7, at 4.

22. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020); Massachusetts v. EPA, 549 U.S. 497, 505 (2007).

23. *See infra* Sections II.B.1, II.B.2.

24. *See* Albert C. Lin, *Dodging Public Nuisance*, 11 UC IRVINE L. REV. 489, 537 (2020).

25. Somini Sengupta, *Global Action Is 'Very Far' from What's Needed To Avert Climate Chaos*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/2021/02/26/climate/paris-agreement-emissions-targets.html [https://perma.cc/575Q-S52K].

26. City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *vacated and remanded sub nom.* City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), *amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020).

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

28. Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), *amended* (June 20, 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021).

29. *See generally* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 388 (1997).

30. *See* Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 97 (2015).

climate crisis are susceptible to additional political challenges, especially at the federal level.[31] Although a full exploration of the political economy of the climate crisis is beyond the scope of this Comment, a cursory exploration of some of these barriers can illuminate why many parties have pursued judicial relief.

1. Tragedies, Collective Action, and the Free Rider

One of the major obstacles to comprehensive legislative climate action is that addressing the climate crisis requires concerted, cooperative action.[32] When a common-pool resource requires cooperative action to maintain, it is susceptible to a type of collective-action problem known as the tragedy of the commons.[33] This problem occurs when a set of individual actors have a collective decision to make regarding a shared resource.[34] This decision-making process can result in sub-optimal action when two conditions occur: (1) each actor benefits more when everyone cooperates than when no one cooperates; and (2) each individual actor stands to benefit the *most* when they do not cooperate—regardless of what the other actors do.[35] When this occurs, a rational self-interested actor will attempt to "free ride" by seeking to reap the benefits of other's active cooperation while evading the costs of their own cooperation.[36] Consequently, everyone suffers because too little action is taken.[37]

Climate change mitigation is the "mother of all collective action problems."[38] Indeed, the welfare of the common-pool resource that requires cooperative stewardship—the atmosphere—necessarily benefits every single living thing on the planet. However, the benefits of protecting this shared resource are not fully realized by any single individual actor choosing to reduce greenhouse gas ("GHG") emissions.[39] The benefits of creating GHG

31. *See infra* Sections II.A.1, II.A.2, II.A.3.

32. Nichola Raihani & David Aitken, *Uncertainty, Rationality and Cooperation in the Context of Climate Change*, 108 CLIMATIC CHANGE 47, 53 (2011).

33. *Id.*

34. Jon Elster, *Rationality, Morality, and Collective Action*, 96 ETHICS 136, 138–39 (1985), https://www.jstor.org/stable/2381329.

35. *See id.* at 139.

36. Douglas D. Heckathorn, *The Dynamics and Dilemmas of Collective Action*, 61 AM. SOCIO. REV. 250, 250–51 (1996).

37. *See id.*

38. Sarah Krakoff, *Fragmentation, Morality, and the Law of Global Warming* 28 (Univ. of Colo. L. Sch., Legal Stud. Rsch. Paper Series, Working Paper No. 07-10, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976049 [https://perma.cc/3UK9-9QZN].

39. *See* Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1132–33 (2010).

emissions, though, accrue entirely to the emitter, creating a classic negative externality.[40] In turn, this leads to the classic free-rider problem, wherein a rational party will seek to benefit from other's cooperation—here, a reduction in emissions—while not cooperating themselves and instead continuing to reap the benefits of their own carbon pollution.[41] Because these incentives do not encourage cooperation at any level of governance, it is unlikely that comprehensive climate action will be achieved via legislative channels under current political conditions.[42]

2. Incumbent Stakeholders and Their Very Special Interests

Special-interest politics also hinder legislative climate action in the United States. Building on some of the collective action problems previously described, public choice theorists have identified a set of circumstances under which the political process can be unduly influenced by a small subset of the population: a special-interest group.[43] The influence exerted by special-interest groups can be especially pernicious when the economic benefits of a course of action are concentrated in relatively few parties, but the costs are dispersed across a great number of people.[44] When a special-interest group stands to realize concentrated benefits at the expense of broadly dispersed costs, democratic processes are especially vulnerable and often produce inefficient outcomes.[45]

When it comes to the climate crisis, legislative inaction benefits what is arguably the most well-entrenched special-interest group in the United States:

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40. *Id.* at 1132 ("Climate change threatens to be the externality that ate the world.").

41. *See* Paul G. Harris*, Collective Action on Climate Change: The Logic of Regime Failure*, 47 NAT. RES. J. 195, 196 (2007).

42. *Id.* at 221–24.

43. Subsets of the population that have high stakes invested in a particular political outcome can often overcome collective action problems when: (1) the stakes are high enough, and (2) the sub-group is small enough to overcome the tendency to free ride. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53, 141–49 (1965). It is commonly—but not universally—accepted that small, powerful, special-interest groups form under these conditions and exert significant control over the political process in the United States. *See id.* at 141–47; STEPHEN MILLER, SPECIAL INTEREST GROUPS IN AMERICAN POLITICS 1–8 (1983). *But see* Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1233–35 (2006) (concluding that politicians occasionally facilitate group formation intentionally by legislatively resolving coordination and free-riding problems to solicit campaign donations from the resulting special-interest group).

44. Robert Mendelsohn, *Efficient Adaptation to Climate Change*, 45 CLIMATIC CHANGE 583, 594 (2000).

45. *See* KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY, 74–111, 387–89 (1986).

the fossil-fuel lobby.[46] These incumbent stakeholders have much to gain from adherence to the status quo, while the costs of climate change—costs like sea-level rise or increased extreme weather frequency—will be borne globally.[47] Because of this, it is likely the political process will continue to inadequately address the climate crisis because the costs are dispersed across a global population who cannot exert the same political pressures as entrenched special-interest groups.[48]

3. Climate Crisis or Communist Conspiracy?

Collective action issues are not the only challenges hindering legislative climate action. The American body politic is possessed of a deep-rooted fear of socialism, communism, and other redistributive public policies.[49] Furthermore, despite growing levels of inequality, everyday Americans still appear to have very little desire for policies addressing inequality by reallocating wealth or resources.[50] In addition to the general cultural unease with "socialism," redistributive policies are notoriously difficult to enact because they are perceived as benefiting some parts of society at the expense of others.[51] Unsurprisingly, this results in debates over redistributive policy being expressed in terms of ideological groups: conservative versus liberal; poor versus wealthy; in-group versus out-group.[52] Because of this partisan debate and America's general unease with wealth redistribution, political

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46. *See* Editorial, *America's Green Energy Industry Takes on the Fossil-Fuel Lobby*, ECONOMIST (Oct. 2, 2021), https://www.economist.com/united-states/2021/10/02/americas-green-energy-industry-takes-on-the-fossil-fuel-lobby [perma.cc/4H36-KFCB].

47. IPCC, *Summary for Policymakers*, *in* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 89 (Valérie Masson-Delmotte et al. eds., 2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf [https://perma.cc/7F2L-BWFG].

48. *See generally* OLSON, *supra* note 43, at 167.

49. *See* William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375, 379–81 (2001) (describing the prevalence of anti-socialist, anti-redistributive, and anti-communist opinions in the United States starting in the early nineteenth century).

50. Vivekinan Ashok et al., *Support for Redistribution in an Age of Rising Inequality: New Stylized Facts and Some Tentative Explanations* 1, 2, 21 (NBER Working Paper No. 21529, Sept. 2015), https://www.nber.org/system/files/working_papers/w21529/w21529.pdf [https://perma.cc/XD6G-VX2B].

51. Charles E. Jacob, *Reaganomics: The Revolution in American Political Economy*, 48 L. & CONTEMP. PROBS. 7, 26 (1985), https://scholarship.law.duke.edu/lcp/vol48/iss4/2 [https://perma.cc/ZYL9-CF72].

52. *Id.*

discourse is often focused more on what the "other side deserves" as opposed to the overall social benefits of redistributive policies.[53]

Unfortunately, comprehensive climate action is inherently redistributive in many ways. First, many climate change policies (like a carbon fee and dividend or the Green New Deal) either involve direct transfer payments or federally-subsidized mitigation programs.[54] These plans are highly susceptible to the American electorate's fear of "socialism" and the toxic political discourse surrounding redistributive policies.[55] Second, even when plans do not involve more direct wealth redistribution, GHG emissions are highly correlated with wealth while the most pressing climate harms are correlated with poverty—requiring wealthy parties to shoulder the burden of emissions reductions and assist poorer parties with adaptation.[56] Third, emission abatement requires temporal redistribution.[57] That is, the benefits of reducing carbon pollution may not be realized for decades, whereas costs are paid upfront.[58] Because of this, it should come as no surprise that America's aversion to redistribution is linked to a resistance to climate-change policies.[59] This poses yet another challenge for political climate actions.

4. Deliberate Obfuscation and Politicization of Climate Science

In addition to the political hurdles to climate policy, rampant misinformation also thwarts climate adaptation and mitigation. Some of this

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53. *See* Kristina Cooke, David Rohde & Ryan McNeill, *The Unequal State of America: The Undeserving Poor*, REUTERS (Dec. 20, 2012), https://www.reuters.com/subjects/income-inequality/indiana [https://perma.cc/W3QY-4NNW].

54. *See* SEAN KRIEG, A CONSUMPTION BASED APPROACH TO ASSESSING THE IMPACT OF CARBON FEE AND DIVIDEND 7 (2019), https://perma.cc/3SWL-36XR; Zachary B. Wolf, *Here's What the Green New Deal Actually Says*, CNN (Mar. 2, 2020), https://www.cnn.com/2019/02/14/politics/green-new-deal-proposal-breakdown/index.html [https://perma.cc/RY84-TRTD].

55. *See* Dan Zak, *A Green New Deal Ignites an Old Red Scare*, WASH. POST (May 8, 2019), https://www.washingtonpost.com/lifestyle/style/a-green-new-deal-ignites-an-old-red-scare/2019/05/07/6f65be80-62df-11e9-9412-daf3d2e67c6d_story.html [https://perma.cc/MR66-UVDL].

56. Amy Sinden, *Allocating the Costs of the Climate Crisis: Efficiency Versus Justice*, 85 WASH. L. REV. 293, 348–49, 349 n.204 (2010).

57. The resistance to temporal distribution, sometimes called "myopia," is also analyzed as a stand-alone behavioral bias. Wouter Botzen et al., *Lessons for Climate Policy from Behavioral Biases Towards COVID-19 and Climate Change Risks*, 137 WORLD DEV. § 105214, at 2 (2021), https://doi.org/10.1016/j.worlddev.2020.105214 [https://perma.cc/QKT4-ZLLF].

58. *Id.*

59. Angelo Panno et al., *Attitudes Towards Trump Policies and Climate Change: The Key Roles of Aversion to Wealth Redistribution and Political Interest*, 75 J. SOC. ISSUES 153, 161 (2019), https://doi.org/10.1111/josi.12318 [https://perma.cc/K4PB-LHKX].

misinformation is the product of legitimate uncertainty.[60] However, this uncertainty is exacerbated by deliberate attempts to discredit or obfuscate climate science. Some of the most persistent attempts to obfuscate climate science have been promoted by powerful incumbent stakeholders who stand to benefit from inaction—including oil supermajors.[61] This intentional attempt to preserve the status quo, coupled with the previously discussed political and economic difficulties, has resulted in inadequate climate action.[62]

B. Tort-Based Climate Litigation in the United States

Politics and disinformation have thwarted comprehensive legislative and regulatory action. Insufficient national action has forced local and state entities to shoulder the costs of the climate crisis.[63] Seeking to defray these looming costs, some of these entities have sought climate justice through tort litigation.[64] Ostensibly, tort law is a promising body of law to vindicate these claims because forcing emitters to internalize the risks they create and aiding cities in adapting to climate change accomplishes tort law's goals of deterrence and compensation.[65]

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60. See Robert Gifford, *The Dragons of Inaction: Psychological Barriers that Limit Climate Change Mitigation and Adaptation*, 66 AM. PSYCH. 290, 292 (2011), for a thorough analysis of the psychological barriers hindering individual actions on climate change, including legitimate uncertainty.

61. Phoebe Keane, *How the Oil Industry Made Us Doubt Climate Change*, BBC NEWS (Sept. 20, 2020), https://www.bbc.com/news/stories-53640382 [https://perma.cc/XLW5-YQKR].

62. *See* Ivana Kottasová, *Not a Single G20 Country Is in Line with the Paris Agreement on Climate, Analysis Shows*, CNN (Sept. 16, 2021), https://www.cnn.com/2021/09/15/world/climate-pledges-insufficient-cat-intl/index.html [https://perma.cc/7VA9-LGWR]; Michael Greshko, *Current Climate Pledges Aren't Enough To Stop Severe Warming*, NAT'L GEOGRAPHIC (Oct. 31, 2017), https://www.nationalgeographic.com/science/article/paris-agreement-climate-change-usa-nicaragua-policy-environment [https://perma.cc/JKN7-ASG4].

63. JOHN R. NOLAN, CHOOSING TO SUCCEED: LAND USE LAW & CLIMATE CONTROL 6–17 (2021).

64. *See infra* Sections I.B.1, I.B.2.

65. *See* Brief of Professor Catherine M. Sharkey as Amicus Curiae in Support of Plaintiff-Appellant at 2–5, 16–20, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (No. 18-2188-cv). Tort also offers a rich and well-developed body of law on which courts can base their analysis, an important factor when trying to persuade courts to hear an otherwise novel claim. *See generally* Sokol, *infra* note 152 at 1433–34 (arguing that state common law claims offer advantages over federal common law claims in the context of climate litigation because state common law is a more matured body of jurisprudence).

A common tort theory for climate plaintiffs is public nuisance.[66] Public nuisance occurs when an activity causes injury or a significant threat of injury results in an "unreasonable interference with a right common to the general public."[67] Because climate harms are dispersed broadly across society, this focus on the general public (as opposed to individual victims) suggests that public nuisance claims are well-suited for climate crisis claims.[68] Despite this apparent fit, climate-nuisance claims have proven unsuccessful in recovering damages or enjoining GHG emissions.[69]

This Section examines tort-based climate jurisprudence to illustrate the legal obstacles to these claims.[70] The most significant of these dead ends are rooted in foundational doctrines of justiciability: the political question doctrine, standing, preemption, and displacement. Climate plaintiffs have tried to navigate this maze of hazy doctrine, uncovering another dead end at nearly every turn.

1. The First Generation: Interstate Public Nuisance in *AEP*, *Comer*, and *Village of Kivalina*

The only first-generation public nuisance climate case to make it to the Supreme Court was *Connecticut v. American Electric Power Company*, commonly referred to as *AEP*.[71] In *AEP*, Connecticut, and a collation of other states,[72] sued a group of defendants collectively emitting roughly 650 million tons of carbon dioxide annually.[73] The plaintiffs sought abatement of GHG emissions under the federal common law of public nuisance or, in the alternative, the state law equivalent.[74] Before the case progressed beyond the

66. *See* Ben Clapp & Casey J. Snyder, *Climate Change Litigation Trends 2015–2020*, 36 NAT. RES. & ENV'T 45, 46–47 (2021).

67. Milwaukee v. Illinois, 451 U.S. 304, 348 (1981).

68. *See* Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49, 58 (2018).

69. *See* Clapp & Snyder, *supra* note 66.

70. As with the political economy of the climate crisis, an in-depth exploration of the evolution of climate litigation in the United States is far beyond the scope of this article. The cases examined in Section I.B.1 and I.B.2 have been selected because they are either significant, representative, or both.

71. 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated and remanded*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

72. The first complaint included the City of New York in addition to Connecticut, the State of New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin. Complaint, *Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (No. 04 Civ. 5669(LAP)). The court addressed this complaint at the same time it addressed an identical complaint filed on the same day against the same defendants by a coalition of private environmental land trusts. *Id.*

73. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 267–68.

74. *Id.* at 267.

pleading stage, the district court dismissed the claim.[75] The court found the the claim was a non-justiciable political question, reasoning a decision on the merits would require "an initial policy determination of a kind clearly for non-judicial discretion."[76]

The Second Circuit vacated the district court's judgment on review.[77] In a comprehensive decision, the court addressed the threshold questions of standing, displacement, and the political question doctrine.[78] Noting the "high bar" for non-justiciability set by the Supreme Court in *Baker v. Carr*, the court examined each *Baker* factor before holding the lower court erred when dismissing the claims.[79] The Second Circuit also found the governmental plaintiffs had *parens patriae* standing to assert "quasi-sovereign" interests, in addition to traditional Article III standing as property owners.[80]

The Second Circuit continued, holding no statute or regulation displaced a federal public nuisance claim for GHG emissions abatement.[81] And, though there is no "federal general common law" in most circumstances,[82] the Second Circuit relied on *Illinois v. Milwaukee*[83] to determine that this rule is not absolute.[84] States may rely on federal nuisance law to abate transboundary pollution.[85] The court further reasoned that even though the Clean Air Act ("CAA") authorized federal regulation of GHG emissions,[86] the Environmental Protection Agency ("EPA") had declined to do so.[87] Thus, no federal statute or regulation addressed GHG emissions thoroughly enough to displace the common law claim.[88] Because it found the federal common-law claim of interstate nuisance was not displaced, the court did not address the justiciability of a public nuisance action brought under state law.[89]

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75. *Id.* at 274.

76. *Id.* at 274 (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)).

77. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 393 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

78. *Id.* at 321–49, 375–88.

79. *Id.* at 321–32.

80. *Id.* at 332–50.

81. *Id.* at 375–88.

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

83. Illinois v. Milwaukee, 406 U.S. 91, 103 (1981) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . . .").

84. *Am. Elec. Power Co.*, 582 F.3d at 350–51.

85. *Id.*

86. *See* Massachusetts v. E.P.A., 549 U.S. 497, 532–33 (2007) (holding that the CAA granted the EPA statutory authority to regulate GHG emissions and the EPA would be *required* to regulate emissions if it found emissions might endanger public health).

87. *Am. Elec. Power Co.*, 582 F.3d at 381.

88. *Id.* at 387.

89. *Id.* at 392.

Despite the Second Circuit's thorough analysis, Connecticut never got to argue the merits of its claim. The Supreme Court granted certiorari in late 2010.[90] The following June, the Court issued a unanimous decision dismissing the federal claim as displaced by the CAA.[91] When Congress authorized the EPA to regulate GHG emissions under the CAA, the Court reasoned it displaced federal nuisance claims for emission abatement—even though the EPA had not actually set any standards to regulate emissions.[92]

The Court was not as unified on the issue of standing, but it nevertheless affirmed the Second Circuit's exercise of jurisdiction.[93] This implies that similarly-situated, future climate litigants may have standing and that their claims may not implicate the political question doctrine.[94] The Court was clear, however, in rejecting federal nuisance claims seeking emission abatement, though the possibility of bringing a state law claim was left open.[95] The Supreme Court, like the Second Circuit, explicitly declined to address whether the CAA displaced state law claims and said nothing about federal claims seeking non-abatement relief.[96] Though those paths still seemed open, federal nuisance claims for injunctive relief were a dead end.

While the dispute in *AEP* was percolating through the courts, residents of the Mississippi Gulf Coast sought judicial relief for flooding caused by Hurricane Katrina.[97] In *Comer v. Murphy Oil USA*, fourteen private citizens filed a putative class action against oil, gas, and power companies for their GHG emissions' contribution to the climate crisis and the resulting ferocity of Katrina.[98] The plaintiffs sought compensatory and punitive damages under Mississippi state common law theories of public and private nuisance,

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90. Am. Elec. Power Co. v. Connecticut, 562 U.S. 1091 (2010).

91. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011). Justice Sotomayor recused herself because she sat on the Second Circuit panel for *AEP*, resulting in an 8-0 decision at the Supreme Court. *See id.* at 420–29.

92. *Id.* at 423–26.

93. *Id.* at 420.

94. Four of the eight Justices held that "at least some plaintiffs have Article III standing under *Massachusetts [v. EPA]*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions; and further, that no other threshold obstacle bars review." *Id.* (citation omitted). It is not entirely clear what, if any, precedential value this has. It is likely that Justice Sotomayor, like the Second Circuit, would have found the claims justiciable, leading to a 5-4 court in favor of justiciability. However, the constitution of the court has changed significantly since 2011. Additionally, the emphasis on *Massachusetts v. EPA* suggests that a sovereign entity may be needed.

95. *Id.* at 429.

96. *Id.* at 424, 429.

97. Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *and on reh'g en banc*, 607 F.3d 1049 (5th Cir. 2010).

98. *Comer*, 585 F.3d at 859.

trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.[99]

The district court dismissed the claims before trial, framing them as a mere "debate" about global warming.[100] The court did not even deem this case significant enough to warrant a written opinion.[101] However, the order granting the defendant's motion to dismiss stated the plaintiffs lacked standing and the claims were non-justiciable political questions.[102]

On review, the Fifth Circuit reversed in part, holding that the residents seeking damages for Hurricane Katrina's "extensive death and destruction"[103] had standing to assert public nuisance, private nuisance, trespass, and negligence claims—and that none of these claims presented nonjusticiable political questions.[104] The court found these plaintiffs had clearly satisfied two of the three standing requirements[105] articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*,[106] because they suffered concrete injuries that could be redressed by awarding damages.[107] With respect to the remaining *Lujan* prong—that the injury is traceable to the defendant's actions—the court held that the defendant's actions need not be the sole cause of injury.[108] Instead, the actions must simply contribute to the plaintiff's injury.[109] The court relied on over a dozen environmental cases to make this determination,[110] and also cited the closely analogous reasoning in *Massachusetts v. EPA*.[111] When addressing whether the plaintiff's claims were political questions, the court recognized that common law tort claims rarely implicate the political question doctrine, and that "[c]laims for damages are also considerably less likely to present nonjusticiable political questions, compared with claims for injunctive relief."[112] The court remanded

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99. *Id.* at 859–60.

100. *Id.* at 860 n.2.

101. *Id.*

102. Comer v. Murphy Oil USA, No. 1:05-cv-00436-LG-RHW, 2007 WL 6942285, at *1 (S.D. Miss. Aug. 30, 2007) ("For the reasons stated into the record at hearing, the Court finds that Plaintiffs do not have standing to assert claims against Defendants and that Plaintiffs' claims are non-justiciable pursuant to the political question doctrine.").

103. First Amended Complaint at 12–13, Comer v. Murphy Oil USA, No. 1:05-cv-00436-LG-RHW (S.D. Miss. Sept. 30, 2005).

104. *Comer*, 585 F.3d at 860.

105. *Id.* at 863.

106. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

107. *Comer*, 585 F.3d at 863.

108. *Id.* at 866.

109. *Id.*

110. *Id.* at 866–67.

111. Massachusetts v. EPA, 549 U.S. 497, 523 (2007); *see also infra* Section I.B.3.

112. *Comer*, 585 F.3d at 873–74.

the case for further proceedings on the nuisance, trespass, and negligence claims.[113]

Unfortunately for the plaintiffs in *Comer*, they, like the plaintiffs in *AEP*, were ultimately denied a trial on the merits. But unlike *AEP*, *Comer* was not dismissed as displaced. Rather, it was vacated because of an "injudiciously mechanistic and arbitrary"[114] application of procedural rules and "a *decision* to reject several legally valid courses of action."[115] In 2010, the Fifth Circuit voted en banc to rehear the panel decision in *Comer*.[116] This action automatically vacated the panel's opinion.[117] However, after the en banc court voted to rehear the decision, but before the decision was reheard, one of the judges recused herself from the hearing, resulting in a loss of quorum.[118] Absent a quorum, the Fifth Circuit held that no rehearing could occur nor could the panel's opinion be reinstated.[119] Accordingly, the en banc court dismissed the appeal and suggested the parties seek relief at the Supreme Court.[120] Three judges vigorously dissented, criticizing the failure to engage with the dispute's merits.[121]

Although the way *Comer* was dismissed en banc provided little guidance on how to plead a successful climate claim, the Court's holding in *AEP* and the panel's reasoning in *Comer* indicated that a public nuisance claim for damages (as opposed to abatement) might not be displaced. Perhaps because of this, when the plaintiffs in *Native Village of Kivalina v. ExxonMobil Corporation* filed a complaint against oil, energy, and utility companies for contributing to the climate crisis by emitting GHGs, they tried a new tactic: requesting only monetary damages.[122] They sought these damages under a federal common law claim of public nuisance.[123]

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113. *Id.* at 880.

114. Comer v. Murphy Oil USA, 607 F.3d 1049, 1057 (5th Cir. 2010) (Dennis, J., dissenting).

115. *Id.* at 1066.

116. *Id.* at 1053.

117. *Id.*

118 *Id.* at 1053–54.

119. *Id.* at 1053–55.

120. *Id.* at 1055. Following this dismissal, the plaintiffs petitioned the Supreme Court for a writ of mandamus directing the Fifth Circuit to grant them their statutory right of appeal. Petition for Writ of Mandamus, *In re* Comer, 562 U.S. 1133 (2011) (No. 10-294). It was denied without comment. *In re* Comer, 562 U.S. 1133 (2011). After the Court denied the petitioners' writ, they re-filed the action in district court. Comer v. Murphy Oil USA, Inc. 718 F.3d 460, 466 (5th Cir. 2013). The district court dismissed on grounds of res judicata; upon appeal the Fifth Circuit affirmed the dismissal. *Id.* at 466, 469.

121. *See Comer*, 607 F.3d at 1055–66.

122. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

123 *Id.*

In *Kivalina*, residents of a small Alaskan Native village struggled to preserve their way of life while bearing the brunt of the climate crisis.[124] The village of Kivalina was established on a small barrier reef island in the early twentieth century, after the Bureau of Indian Affairs required the native Inupiaq people to enroll their children in the school established there in 1905.[125] One hundred years later, Kivalina is being engulfed by the sea as increasing temperatures melt the permafrost that protects the island.[126] Prompted by government inaction and corporate indifference, Kivalina filed suit in early 2008, seeking monetary damages for the costs of relocating their community to a safer location.[127]

Before trial, the district court dismissed the village's claims without a hearing.[128] As in *AEP* and *Comer*, the court held the plaintiffs lacked Article III standing and that their nuisance claim was a non-justiciable political question.[129] The court focused on the second and third *Baker* factors—whether the issue could be resolved using judicially discoverable and manageable standards and whether doing so required an initial policy determination unsuitable for judicial discretion.[130] The court contended it lacked the ability to discover or manage the requisite standards and claimed a climate nuisance claim required courts to make inappropriate policy determinations about what would constitute a reasonable level of GHG emissions.[131] Both factors weighed in favor of dismissal.[132]

Regarding standing, the court held the plaintiffs' injury was not fairly traceable to the defendants' GHG emissions.[133] The court analyzed whether Kivalina's injury was traceable to defendants' emissions using a "zone of discharge" test.[134] Using this test, the court found the emissions occurred too far away from the village to satisfy standing, even though the geographic location of GHG emissions and climate harms are unrelated.[135] Unlike the Fifth Circuit in *Comer*, the district court in *Kivalina* demanded that plaintiffs show the defendants did more than simply contribute to the alleged injury.[136] Instead, the court suggested a "contribution theory" was only applicable to

124. CHRISTINE SHEARER, KIVALINA: A CLIMATE CHANGE STORY 102–04 (2011).
125. *Id.* at 34.
126. *Id.* at 15.
127. *Id.* at 115–17.
128. *Kivalina*, 663 F. Supp. 2d at 868, 883.
129. *Id.* at 883.
130. *Id.* at 873–77.
131. *Id.*
132. *Id.* at 877.
133. *Id.* at 878–82.
134. *Id.* at 881–82.
135. *See id.*
136. *Id.* at 878–80.

statutory water pollution claims where a defendant violated a prescribed discharge limit.[137] After dismissing the "contribution theory" the court also reasoned that, because GHG emissions are fungible and have been accumulating over a long period of time, no climate-related injury could be fairly traced to a particular emitter.[138] The court seemed hesitant to apportion any blame to the defendants—even at a preliminary stage—when there were "a multitude of 'alternative culprit[s]' allegedly responsible" for climate change.[139]

Kivalina appealed.[140] Instead of engaging in the same jurisdictional analysis as the district court, the Ninth Circuit began by seeking to establish: (1) whether public nuisance was a viable federal common law claim, and (2) if viable, whether it had been legislatively displaced.[141] The Ninth Circuit acknowledged that federal common law can apply to transboundary pollution, and that a federal public nuisance theory is appropriate for suits of this nature.[142] Despite this, the court held that the CAA displaced Kivalina's claim.[143] Although *AEP* held only that federal nuisance claims seeking abatement were displaced, the Ninth Circuit held a displaced cause of action is displaced for all remedies sought under that cause.[144] The court declined to reach any other issue and affirmed the district court's judgment.[145] Climate plaintiffs hit yet another dead end.

Early climate claims were trapped in a maze of avoidance doctrines inconsistently applied by courts unwilling to engage with the claims on their merits. District courts in *AEP*, *Comer*, and *Kivalina* all dismissed these early tort-based climate cases for lack of standing or for implicating the political question doctrine.[146] However, the Second and Fifth Circuits held otherwise on appeal, and the Ninth Circuit declined to address those issues.[147] The treatment on appeal implies climate claims may be justiciable in Article III courts. But their justiciability is not certain. This uncertainty is magnified by the "affirm[ation of jurisdiction], by an equally divided Court" in *AEP*.[148] Though it is not clear, it is likely that federal courts might rely on the logic in

137. *Id.*
138. *Id.* at 880–81.
139. *Id.* at 881 (quoting Tex. Indep. Producers & Royalty Owners Ass'n v. E.P.A., 410 F.3d 964, 974 (7th Cir. 2005)).
140. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012).
141. *Id.* at 855.
142. *Id.*
143. *Id.* at 857.
144. *Id.* at 857.
145. *Id.* at 858.
146. *See supra* Section I.B.1.
147. *See supra* Section I.B.1.
148. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 420 (2011).

AEP or *Comer* to find a claim justiciable with respect to standing and the political question, especially when a state is the plaintiff.[149] What is clear, however, is that the federal common law claim of public nuisance has been displaced by the CAA for transboundary GHG pollution—for both injunctive and monetary relief.[150]

2. The Second Generation: *Oakland*, *New York*, and *Baltimore*

With *AEP* and *Kivalina* precluding the viability of federal nuisance climate claims, climate plaintiffs began to seek relief under state common law.[151] Perhaps wary of continued abnegation by the federal judiciary, many of these plaintiffs strategically pleaded claims in state courts.[152] In many of these cases, the defendants followed a familiar pattern: claiming the state common law claims are preempted or necessarily governed by federal law and removing the cases to federal courts where they will be dismissed as displaced or otherwise non-justiciable.[153] When attempting this defense, the doctrine of complete preemption represents a particularly potent procedural weapon for defendants because it provides both a defense and a basis for federal jurisdiction.[154] The following three cases shed light on the current status of tort climate litigation, and suggest state nuisance claims may also ultimately prove unsuccessful.

"Global warming is here and it is harming Oakland now."[155] This forceful opening by the City of Oakland launched the second generation of tort climate litigation.[156] The cities of Oakland and San Francisco jointly fired this opening salvo when they commenced identical actions in Alameda and San Francisco County Superior Courts.[157] Brought against the five largest

149. The "quasi-sovereign" nature of these entities likely entitles them to "special solicitude" in standing. *See* Massachusetts v. E.P.A., 549 U.S. 497, 520 (2007). Additionally, states and other similarly situated entities may have standing under the doctrine of *parens patriae*, as suggested by the Second Circuit in *AEP*. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 338–39 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011); *see also* Snapp & Son, Inc. v. Puerto Rico, *ex rel.* Barez, 458 U.S. 592, 607–08, 608 n.15 (1982).

150. *See Am. Elec. Power Co.*, 564 U.S. at 424; *Kivalina*, 696 F.3d at 857.

151. *See* Harrison Beck, *Locating Liability for Climate Change: A Comparative Analysis of Recent Trends in Climate Jurisprudence*, 50 ENV'T L. 885, 891–95 (2020).

152. *See* Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1415–17 (2020).

153. *See id.* at 1417–18; *see also* Beck, *supra* note 151, at 892–93.

154. Sokol, *supra* note 152, at 1421.

155. Complaint for Public Nuisance at 1, California v. BP P.L.C., No. RG17875889 (Cal. Super. Ct. Sept. 19, 2017) [hereinafter Oakland Complaint].

156. *Id.*

157. *Id.*; Complaint for Public Nuisance at 1, California v. BP P.L.C., No. CGC-17-561370 (Cal. Super. Ct. Sept. 19, 2017) [hereinafter San Francisco Complaint].

investor-owned fossil fuel producers,[158] these cities each alleged only one cause of action: state law public nuisance.[159] The cities asserted the defendants' products were causing an accumulation of GHGs in the atmosphere, resulting in sea level rise.[160] Despite knowing this, the cities alleged, the defendants had "stole[n] a page from the Big Tobacco playbook" and paid millions of dollars to disseminate disinformation and promote their products.[161] Because of this "egregious state of affairs," Oakland and San Francisco asked the court to require each corporation to contribute to an infrastructure fund to protect the cities and their residents from the impacts of the climate crisis.[162]

Immediately, the oil and gas producers removed the cities' climate cases to federal court; the court consolidated the cases in *City of Oakland v. BP P.L.C.*[163] The cities moved to remand, arguing their claims did not arise under federal law nor raise a substantial or disputed federal issue, and that the CAA only contemplated *emissions* and could not completely preempt a state claim for *production and promotion* of fossil fuels.[164] The federal district court denied the cities' motion.[165] Citing the claims' scope and the federal ownership of coastal waters—the alleged instrumentality of harm—the court held the nuisance claims necessarily arose under federal common law because they must be governed by "as universal a rule of apportioning" as possible.[166] Although the court did not say it was applying the doctrine of complete preemption, it appeared to apply it—imprecisely—by transforming

158. B.P., Chevron, ConocoPhillips, ExxonMobil, and Royal Dutch Shell. *See* San Francisco Complaint, *supra* note 157, at 2; Oakland Complaint, *supra* note 155, at 2.

159. Oakland Complaint, *supra* note 155, at 37; San Francisco Complaint, *supra* note 157, at 32.

160. Oakland Complaint, *supra* note 155, at 12–16; San Francisco Complaint, *supra* note 157, at 12–16.

161. Oakland Complaint, *supra* note 155, at i, 24, 26; San Francisco Complaint, *supra* note 157, at i, 24, 26.

162. Oakland Complaint, *supra* note 155, at 2, 39; San Francisco Complaint, *supra* note 157, at 2, 34.

163. City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1021 (N.D. Cal. 2018), *vacated and remanded sub nom.* City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), *amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020).

164. Plaintiff's Notice of Motion and Motion to Remand to State Court; Memorandum of Points and Authorities at 2–3, City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-cv-06011-WHA). The plaintiffs also addressed the defendant's more tenuous bases for removal: federal officer and enclave jurisdiction. *Id.* at 27–30.

165. *Oakland*, 325 F. Supp. 3d at 1021.

166. *Id.*

a claim intentionally pleaded under state law into a federal cause of action.[167] Interestingly, the court held that this federal cause of action was not automatically displaced by the CAA (and could therefore preempt the state claim) because the defendants' products were consumed globally.[168] Regardless, the court held that the well-pleaded complaint rule did not apply.[169] Federal jurisdiction was proper.[170]

Attempting to comply with this holding, the cities amended their complaints to include a federal common law claim for public nuisance.[171] In response, the defendants filed a motion to dismiss, insisting the cities had mischaracterized the source of the harm and failed to adequately plead causation.[172] Further, the corporations alleged any federal claims concerned with domestic emissions were displaced under *AEP* and *Kivalina* and allowing a claim for foreign emissions would invade the province of the legislative and executive branches.[173] Despite having found that the claims necessarily arose under federal common law for the purposes of removal, the court (in seeming contradiction) now found them displaced and dismissed the amended complaint.[174] The district court appeared determined to avoid engaging with Oakland's complaint.

When dismissing the complaint, the court began by recognizing two important questions: (1) whether the sale of fossil fuels was unreasonable, in light of the gravity of the climate crisis; and (2) whether cities could request damages for anticipated harms.[175] Before answering either of these questions, however, the discussion quickly pivoted to displacement.[176] Even though the

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167. *Compare* City of Oakland v. BP P.L.C., No. 3:17-cv-06011-WHA, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018) ("[T]he well-pleaded complaint rule does not bar removal of these actions. Federal jurisdiction exists in this case if the claims necessarily arise under federal common law.") *with* Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 24 (1983) ("[I]f a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."); *see also* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from* California v. BP, 117 MICH. L. REV. ONLINE 25, 32–38 (2018) (arguing that the court in *Oakland* employed the doctrine of complete preemption without properly articulating or applying it).

168. That is, the federal nuisance claim that preempted the state claim was not displaced because the cities brought claims against the producers of fossil fuels consumed worldwide, and not just against domestic GHG emitters. *BP P.L.C.*, 2018 WL 1064293, at *4.

169. *Id.* at *5.

170. *Oakland*, 325 F. Supp. 3d at 1021.

171. *Id.* at 1021–22.

172. Defendants' Motion to Dismiss First Amended Complaints; Memorandum of Points and Authorities at 18–21, City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-cv-06011-WHA).

173. *Id.* at 8–11.

174. *Oakland*, 325 F. Supp. 3d at 1028–29.

175. *See id.* at 1022–24, 1024 n.8.

176. *Id.* at 1024.

court had previously ruled that the cities could only bring a public nuisance claim under federal law—suggesting that a viable federal nuisance claim existed for the production and promotion of fossil fuels—the court rejected the cities' attempt to differentiate their claims from *AEP* and *Kivalina*.[177] Instead, the court agreed with the defendants: any federal public nuisance claims concerning domestic emissions were displaced by the CAA, and claims concerning foreign emissions interfered with the constitutional separation of powers.[178] Though the cities had attempted to be responsive to the court, they were nevertheless stonewalled.

Oakland and San Francisco appealed.[179] Unlike the lower court, the Ninth Circuit did not find that the cities' claims necessarily arose under federal law; the cities' claims merely implicated federal interests.[180] Additionally, the claims were not completely preempted by the CAA because Congress did not indicate it intended to preempt all other causes of action, and the cause of action provided by the CAA is not exclusive.[181] Accordingly, the district court had no federal jurisdiction over the original state law claims; removal was improper.[182]

Nevertheless, even though the federal district court lacked subject-matter jurisdiction over the original state law claims, Oakland and San Francisco cured any jurisdictional deficiency by amending their complaints to add a claim rooted in federal interstate nuisance.[183] Seizing on this jurisdictional hook, the oil and gas corporations pressed the Ninth Circuit to affirm the lower court's dismissal.[184] The court declined, and instead vacated the order of dismissal and remanded the case to determine if another basis for jurisdiction existed.[185] As of mid-April 2022, *Oakland* was stayed pending the Ninth Circuit's reconsideration of an appeal in a similar climate case

177. *Id.*

178. *Id.* at 1024–28. The same day the district court dismissed the cities' claims, the defendants requested a ruling on personal jurisdiction. City of Oakland v. BP PLC, 969 F.3d 895, 903 (9th Cir. 2020). The district court held that personal jurisdiction was lacking over four of the five oil and gas corporations. *Id.*

179. *Oakland*, 969 F.3d at 903.

180. *Id.* at 906–07.

181. *Id.* at 907–08.

182. *Id.* at 908.

183. *Id.*

184. *Id.*

185. *Id.* at 911.

dealing with removal jurisdiction,[186] *County of San Mateo v. Chevron Corp*.[187]

In 2018, while the district court in *Oakland* was deciding whether to remand, the City of New York filed suit against the same five massive fossil fuel producers.[188] Unlike *Oakland*, or any other significant second-generation climate tort case, *City of New York v. BP P.L.C.*[189] was filed in federal court.[190] In *City of New York*, the City sought relief for the expense of protecting itself and its citizens from climate change.[191] It alleged three state common law causes of action: public nuisance, private nuisance, and trespass.[192] In support of these claims, the City alleged the defendants knew that the use of their products posed a "catastrophic" threat as early as the 1970s, yet deliberately misled the public to foster continued dependence on fossil fuels.[193] In part due to this deception, the City argued courts should shift the costs of the climate crisis "back onto the companies that have done nearly all they could to create this existential threat."[194]

The federal district court decided otherwise.[195] When dismissing New York City's suit, the court echoed the *Oakland* court, holding the claims necessarily "arise under federal common law" despite being pleaded as state law claims.[196] The district court referred to this as federal common law "displacing" the state law claims,[197] but it is probably more accurately described as preempting.[198] Regardless, federal law governed, the court reasoned, because the claims were based on transboundary GHG emissions

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186. Order Staying Case, California v. BP P.L.C., No. 3:17-cv-06011-WHA (N.D. Cal. Aug. 4, 2021).

187. County of San. Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020), *vacated,* Chevron Corp. v. San Mateo County, 141 S. Ct. 2666 (2021).

188. Complaint, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18 cv 182).

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

190. *See* Sokol, *supra* note 152, at 1407.

191. *City of New York*, 325 F. Supp. 3d at 468–69.

192. *Id.* at 470.

193. Amended Complaint at 45–51, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18-cv-182).

194. *Id.* at 1–2.

195. *See City of New York*, 325 F. Supp. 3d at 476.

196. *Id.* at 472; *Oakland*, 325 F. Supp. 3d at 1021–22.

197. *Id.* at 471.

198. *See* P. Leigh Bausinger, *Welcome to the (Impenetrable) Jungle:* Massachusetts v. EPA*, the Clean Air Act and the Common Law of Public Nuisance*, 53 VILL. L. REV. 527, 533 n.36 (2008) ("The Supreme Court has generally used the word 'displacement' to refer to the situation in which a federal statute supplants federal common law; conversely, the Court has used the word 'preemption' to refer to the more well-known situation in which federal law supplants state law.").

and required a uniform standard of decision.[199] The court further held that, once preempted, the (now federal) nuisance and trespass claims were displaced by the CAA under the precedent set by *AEP* and *Kivalina*.[200]

The City argued the Supreme Court explicitly left open the possibility of state law claims in *AEP*; thus state law claims should remain available.[201] The district court rejected this argument because the City did not sue "under New York law for claims related to the production of fossil fuels in New York" but rather for the production and combustion of fossil fuels used globally.[202] The claims interfered with the separation of powers and foreign policy, the court reasoned, and thus fell within the purview of the political branches.[203]

On appeal, the Second Circuit affirmed.[204] Even though the City did not seek abatement, the Second Circuit held that the City's claims necessarily arose under federal common law for two reasons. First, an award of damages could indirectly regulate global GHG emissions. Second, the court found that state law claims are incompatible with "the careful balance" between addressing the climate crisis and "energy production, economic growth, foreign policy, and national security."[205] When making this holding, the court first clarified the nature of the suit by determining whether the lawsuit represented an attempt to stop the climate crisis by regulating worldwide GHG emissions or if it was instead "a more modest litigation akin to a product liability suit."[206] New York City contended it was the latter and that the claims avoided preemption because the claims focused on harms caused by fossil-fuel production, promotion, and sale—not transboundary emissions.[207] The court was not convinced.[208]

Tracking the district court's decision, the Second Circuit held the CAA displaced any federal common law claims related to domestic GHG emissions.[209] The court also expressly held that the displacement of federal common law claims did not revive preempted state law claims.[210] Still, the circuit court acknowledged the existence of a "slim reservoir" of state nuisance law that could apply to transboundary pollution.[211] However, under

199. *City of New York*, 325 F. Supp. 3d at 472.
200. *Id.*
201. *Id.* at 474 (quoting Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 429 (2011)).
202. *Id.*
203. *Id.* 475–76.
204. City of New York v. Chevron Corp., 993 F.3d 81, 103 (2d Cir. 2021).
205. *Id.* at 90–93.
206. *Id.* at 91.
207. *Id.* at 88, 91.
208. *Id.* at 91.
209. *Id.* at 95.
210. *Id.* at 98.
211. *Id.* at 100.

International Paper Co. v. Ouellette,[212] the only nuisance law that would be appropriate would be the nuisance law of the state where the emissions occurred.[213] New York's claim was thus preempted because it sought to "impose New York nuisance standards on emissions emanating simultaneously from all 50 states and the nations of the world."[214] In closing, the Second Circuit held that even though the CAA did not displace federal common law claims concerned with foreign emissions, foreign policy concerns nevertheless foreclosed such claims.[215] Unlike the district court, however, the Second Circuit reached this conclusion by extending the presumption against extraterritoriality—a canon of interpretation presuming a statute only applies domestically—to common law.[216] Climate plaintiffs were again lost in a maze of inconsistently applied avoidance doctrines.

On July 20, 2018, six months after the original complaint was filed in *City of New York*, the Mayor and City Council of Baltimore filed a climate complaint in Maryland state court.[217] Similar to the complaints in *Oakland* and *City of New York*, Baltimore's complaint alleged that it already suffered, and will continue to suffer, climate-related harms because oil and gas companies wrongfully produced, marketed, and distributed fossil fuel products while "simultaneously deceiving consumers and the public about the dangers associated with those products."[218] However, the scope of Baltimore's complaint was broader. Instead of focusing only on five oil supermajors, Baltimore named twenty-six fossil fuel companies.[219] Baltimore also asserted more causes of action than Oakland or New York.[220] It sought monetary damages, civil penalties, and equitable relief under eight causes of action: private nuisance, strict liability failure-to-warn, strict liability design defect, negligent design defect, negligent failure-to-warn, trespass, and

212. 479 U.S. 481, 497 (1987) (holding that the Clean Water Act—which contains similar provisions to the CAA—did not preempt state claims against out-of-state polluters if brought under the law of the polluter's state).

213. *City of New York*, 993 F.3d at 100.

214. *Id.*

215. *Id.* at 101.

216. *Id.* at 101–02; *see also* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021) ("First, we presume that a statute applies only domestically, and we ask 'whether the statute gives a clear, affirmative indication' that rebuts this presumption.") (quoting RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 337 (2016)).

217. Complaint, Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 24-C-18-004219).

218. Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 548 (D. Md. 2019), *as amended* (June 20, 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021).

219. *Id.*

220. *Id.*

violations of the Maryland Consumer Protection Act.[221] All claims were brought under state law.[222]

Following the playbook established by the defendants in *Oakland*, the defendants in *Baltimore* immediately removed the case to federal court.[223] Asserting a "host of grounds" for removal, the defendants contended that the court had federal-question jurisdiction over the claims because they necessarily arose under federal law, they raised a disputed and substantial federal issue, they were completely preempted by the CAA, or the conduct in question occurred on a federal enclave.[224] Alternatively, the defendants insisted, the federal court had original jurisdiction under the Outer Continental Shelf Lands Act, or that federal officer, bankruptcy, or admiralty jurisdiction otherwise provided proper grounds for removal.[225] Baltimore contested all eight grounds for removal and moved to remand.[226]

The court agreed with Baltimore.[227] In June 2019, the court issued a comprehensive decision where it assessed—and rejected—each of the defendant's proffered grounds for removal.[228] Before addressing the grounds individually, the court observed that the "[d]efendants seem to conflate complete preemption," which provides a basis for removal, "with the defense of ordinary preemption."[229] Similarly, the court criticized the district court in *Oakland*, calling its ruling that Oakland's claim was necessarily governed by federal law "at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction."[230] The court also distinguished *City of New York*'s findings from the jurisdictional question at hand.[231] Because *City of New York* was originally filed in federal court, the Southern District of New York's finding that the claims were necessarily governed by federal common law answered the question of *ordinary* preemption, not *complete* preemption, and could not provide grounds for federal jurisdiction.[232] Even though the City's claims were not completely preempted, the defense of ordinary preemption was still available

221. *Id.*
222. *Id.*
223. *Id.* at 548–49.
224. *Id.* at 551.
225. *Id.*
226. *Id.* at 549.
227. *Id.* at 574.
228. *Id.* at 554–74.
229. *Id.* at 553.
230. *Id.* at 556–57.
231. *Id.* at 557.
232. *Id.*

to the defendants in state court.[233] Still, without a valid basis for jurisdiction the case had to be remanded.[234]

The fossil fuel firms appealed.[235] Although they requested review of the entire remand order, the Fourth Circuit held it only had jurisdiction to review the district court's ruling on whether the federal-officer removal statute provided federal subject-matter jurisdiction.[236] On this relatively narrow issue, the Fourth Circuit agreed with the district court and affirmed its remand order.[237]

Local media proclaimed the Fourth Circuit's decision to send Baltimore's claims back to state court "a major victory for the city."[238] This victory proved ephemeral, however, as the Supreme Court quickly granted certiorari.[239] The Court found the Fourth Circuit erred in determining it could only review the district court's ruling on federal officer jurisdiction.[240] Accordingly, the Court vacated the Fourth Circuit's judgment, and remanded the case with instructions for the circuit court to review all of the fossil fuel companies' grounds for removal.[241]

In April 2022, the Fourth Circuit affirmed the district court's order to remand on all seven remaining grounds for removal.[242] The Fourth Circuit agreed with *City of New York* on whether procedural posture matters, concluding a "heightened standard" for federal-question jurisdiction applies when a defendant seeks to remove a state law claim plead in a state court.[243] The court disagreed, however, on whether federal common law should apply.[244] The Fourth Circuit explained that federal common law may only be created to resolve a "significant conflict" between a federal interest and application of state law, and no such conflict existed here.[245] Further, Baltimore's complaint did not necessarily raise any question of federal law—

233. *Id.* at 563.

234. *Id.* at 574.

235. Mayor of Balt. v. BP P.L.C., 952 F.3d 452, 458 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021).

236. *Id.* at 458–61.

237. *Id.* at 471.

238. Heather Coburn, *4th Circuit Affirms Remand of Baltimore Climate Change Lawsuit*, DAILY RECORD (Mar. 6, 2020), https://thedailyrecord.com/2020/03/06/4th-circuit-climate-remand/ [https://perma.cc/9NZL-MJXP].

239. BP P.L.C. v. Mayor of Balt., 141 S. Ct. 222 (2020).

240. BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1543 (2021).

241. *Id.*

242. Mayor of Balt., v. BP P.L.C., 31 F.4th 178, 238 (4th Cir. 2022).

243. *Id.* at 203.

244. *Id.* (referring to *City of New York*'s legal reasoning as flawed and confusing).

245. *Id.* at 203–04.

at least not to the extent removal was appropriate.[246] Nor were any of the City's claims completely preempted because Congress did not intend for the CAA to provide an exclusive cause of action against GHG emitters.[247] The court was especially scathing when addressing the defendants' argument that removal was proper because the federal common law of interstate nuisance governed.[248] It held this position "defies logic" because federal public nuisance law was displaced by the CAA, and therefore could not possibly provide a jurisdictional basis—contrary to what *Oakland* indicated.[249] This decision is undoubtedly a victory for climate plaintiffs, but it addresses jurisdiction only. Indeed, the court expressly noted it was not engaging with the merits of Baltimore's claims.[250] Consequently, upon remand, the claims are still vulnerable to many of the defenses that trapped first-generation climate claims.[251]

3. Hurdles to Justiciability: Lessons from the First- and Second-Generation Cases

It is clear climate plaintiffs face many challenges, including confronting some of the largest and most powerful businesses in the world.[252] In addition to plaintiffs being outmatched by oil supermajors' overwhelming resources, judges in first- and second-generation tort cases appear reluctant to engage with a claim's substance, instead dismissing them as: (1) lacking standing; (2) non-justiciable political questions; or (3) preempted and displaced.[253] Even if litigants can overcome these hurdles, they likely face another common challenge in environmental tort cases: showing causation and apportioning liability.[254] This Section fleshes out some of the lessons learned while wandering the labyrinth of climate litigation before introducing failure-to-warn claims as a potential thread leading out of the maze.

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246. *Id.* at 212.

247. *Id.* at 215–17. In testament to how convoluted preemption doctrine is, the Fourth Circuit's treatment of complete preemption—although the most precise and articulate encountered by this author—inaccurately refers to preemption as displacement at least once. *Id.* at 217.

248. *Id.* at 206–07.

249. *Id.*; *supra* notes 168, 174 and accompanying text.

250. *BP P.L.C.*, 31 F.4th at 238.

251. *See id.* at 198–99, 198 n.2; *infra* Section I.C; *see also* Schiff & Beard II, *infra* note 290.

252. *See Global 500*, FORTUNE, https://fortune.com/global500/2019/search/ [https://perma.cc/N388-NQGL] (ranking energy and oil firms as seven of the top ten companies in the pre-pandemic world (based on sales and revenue)).

253. *See supra* Sections I.B.1, I.B.2.

254. Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2265–68 (2015).

Before an Article III court can rule on a claim's merits, a climate plaintiff (indeed, any plaintiff) must demonstrate standing.[255] Most famously expressed in *Lujan v. Defenders of Wildlife*,[256] standing requires showing: (1) the plaintiff suffered an "injury in fact" that is "concrete" and "actual or imminent"; (2) this injury can fairly be traced to the defendant's actions; and (3) a favorable judgment will "likely" redress the injury.[257] Climate plaintiffs struggled to satisfy this doctrine.[258] There are two potential exceptions for certain climate plaintiffs: the "special solicitude" accorded states as sovereign entities—a relaxed standing requirement articulated in *Massachusetts v. E.P.A.*[259]—and the *parens patriae* doctrine, a doctrine wherein a state is granted standing to assert its own interest in the well-being of its citizens.[260] These narrow exceptions to the general doctrine of standing are rarely extended to non-state plaintiffs,[261] despite legal scholars suggesting that courts should more readily grant standing—especially to local governments.[262] Strict standing requirements challenged plaintiffs in *AEP*, *Comer*, and *Kivalina*.[263] The only climate claimant to "successfully" demonstrate standing was a sovereign state, and even that demonstration was inconclusive.[264]

The political question doctrine is another obstacle early tort-based climate litigation struggled to overcome.[265] This discretionary doctrine is primarily a function of the separation of powers, and generally excludes legislative and executive policy disputes from judicial review.[266] When analyzing this

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255. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

256. 504 U.S. 555 (1992).

257. *Id.* at 560–61.

258. *See supra* Section I.B.1. Climate claims not brought under tort theories also struggle with standing. Recent claims brought under constitutional theories have also been dismissed for lacking standing. *See* Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).

259. 549 U.S. 497, 520 (2007). Ironically, while the Court's articulation of this relaxed standing requirement allowed Massachusetts its day in court, the resulting decision—that the Clean Air Act authorizes the regulation of greenhouse gas emissions—has become a lynchpin in fossil fuel producers' displacement defenses to common-law climate claims. *Id.* at 520, 528–29; *see, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011).

260. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

261. *See generally* Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 69, 69 n.55 (2014) (examining federal courts' treatment of cities asserting standing under *parens patriae*).

262. *Id.* at 85–89; Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J.L. REFORM 581, 608 (2019); *see also* Ian R. Curry, *Establishing Climate Change Standing: A New Approach*, 36 PACE ENV'T L. REV. 297, 326–27 (2019).

263. *See* discussion *supra* Section I.B.1.

264. *See supra* notes 93–96 and accompanying text.

265. *See* Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. LAND USE & ENV'T L. 79, 81 (2008); *see also* discussion *supra* Section I.B.1.

266. 16 C.J.S. *Constitutional Law* § 392 (2021).

doctrine, the six-factor test laid out in the 1962 Supreme Court case *Baker v. Carr* is controlling,[267] but the doctrine has been infrequently applied.[268] In the context of climate litigation, the second, third, and sixth *Baker* factors have proven the most troublesome.[269] Respectively, they are: (1) "a lack of judicially discoverable and manageable standards"; (2) an inability to adjudicate the dispute "without an initial [nonjudicial] policy determination"; and (3) the potential for governmental "embarrassment from multifarious [and conflicting] pronouncements . . . on one question."[270] The third factor (here, number two) has been especially problematic, and was decisive for the district courts in *AEP* and *Comer*.[271]

Second-generation claims fared better than first-generation claims against the doctrines of standing and political question, though the language used by the courts suggests that these doctrines are still being implicated.[272] Despite this measure of success, courts still consistently dismiss climate tort claims as being preempted and displaced.[273] These two doctrines are related and often misinterpreted.[274] A basic understanding of these two doctrines is essential to understanding the difficulties facing climate claimants.

State law is preempted when it is supplanted by federal law.[275] Although categories of preemption are not "rigidly distinct,"[276] three types of ordinary preemption are generally recognized: conflict, express, and field.[277] All three can provide a defense to a state law claim, but none can provide a basis for removal jurisdiction.[278] Complete preemption, however, confers federal

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267. 369 U.S. 186, 217 (1962).

268. Thorpe, *supra* note 265, at 80–81.

269. *See* discussion *supra* Sections I.B.1, I.B.2.

270. *Baker*, 369 U.S. at 217.

271. *See* discussion *supra* Section I.B.1; *see also* Thorpe, *supra* note 265, at 86.

272. *See, e.g.*, City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018) ("The City argues that its claims do not present political questions because the Second Circuit in *AEP* 'reviewed this issue in detail and rejected it, and the Supreme Court affirmed.' However, the plaintiffs in *AEP* sought only to 'limit emissions from six domestic coal-fired electricity plants.'") (citations omitted); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018) ("[C]ourts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches.").

273. *See* discussion *infra* Section II.B.2.

274. *Cf.* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENV'T L. 293, 311–16 (2005) (discussing "ambiguous" displacement standards); Steven Kahn, *Displacing an Incomplete Complete Preemption and Displacement Analysis: Doctrinal Errors and Misconceptions in the Second Wave of State Climate Tort Litigation*, 35 J. LAND USE & ENV'T L. 169, 183 (2020) (discussing the "confusion" in determining what form of preemption is appropriate).

275. Bausinger, *supra* note 198, at 533 n.36.

276. English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990).

277. Murphy v. NCAA, 138 S. Ct. 1461, 1480 (2018).

278. Kahn, *supra* note 274, at 182–84.

question jurisdiction.[279] Representing an exception to the "well-pleaded complaint" rule, complete preemption acts both as a jurisdictional hook and a defense.[280] Even so, complete preemption is only appropriate when a federal statute provides the "exclusive cause of action" for a claim "and also set[s] forth procedures and remedies governing that cause of action."[281] Though powerful, this doctrine is also narrow; the Supreme Court has only found complete preemption under three statutes.[282]

By contrast, displacement occurs when federal statutes supplant federal common law.[283] Similar to preemption, when a federal statute displaces federal common law, a plaintiff's rights (if any remain) may only be asserted under the federal statute.[284] GHG-emitting defendants in *AEP*, *Kivalina*, *Oakland*, and *City of New York* successfully argued that federal common law claims of public nuisance are displaced by the CAA and should thus be dismissed.[285]

This displacement argument effectively put an end to the first generation of tort climate litigation.[286] It is also integral to the most significant defense to second-generation climate claims brought under state law. First, defendants seek to federalize state claims.[287] Once federalized, defendants seek to have the claims dismissed as displaced by the CAA.[288] Although many of these second-generation cases are still pending at the time of this writing, there are indications that this federalization two-step may prove successful for fossil fuel companies.[289] Even if climate claims are not federalized, state courts may nevertheless dismiss second-generation state

279. *Id.*

280. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 5–6 (2003). The "well-pleaded complaint" rule prohibits removal unless the complaint expressly alleges a federal cause of action. *Id.* at 5.

281. *Id.* at 8.

282. *Id.* at 2, 10–11 (finding the Labor Management Relations Act, the Employee Retirement Income Security Act of 1974, and the National Bank Act completely preempt state law causes of action).

283. Bausinger, *supra* note 198, at 533 n.36.

284. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011).

285. *See supra* Sections I.B.1, I.B.2.

286. *See, e.g.*, Am. Elec. Power Co., 564 U.S. at 424; Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012).

287. *See, e.g.*, Mayor of Balt. v. BP P.L.C., 952 F.3d 452, 458 (4th Cir. 2020).

288. *See, e.g.*, City of New York v. Chevron Corp., 993 F.3d 81, 95 (2d Cir. 2021).

289. *See id.* ("Having concluded that the City's claims must be brought under federal common law, we see that those federal claims immediately run headlong into a problem of their own. For many of the same reasons that federal common law preempts state law, the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions.").

law nuisance claims as preempted.[290] And even if these claims are not dismissed as preempted, nuisance claimants must still convince courts the doctrines district courts relied on to avoid hearing first-generation cases—standing and the political question doctrine—are not implicated.

C. The Demise of Second-Generation State Nuisance Claims and a Shift to Failure-To-Warn

Second-generation nuisance claims—although not yet dead—have been left lingering in the doctrinal labyrinth. Courts are largely unpersuaded by the distinction between fossil fuel producers and GHG emitters in second-generation nuisance cases.[291] Because of this, courts are analyzing these cases as transboundary pollution cases, which are vulnerable to preemption.[292]

It is unlikely that complete preemption applies to state law nuisance claims because the CAA expressly preserves plaintiffs' right to seek relief under other statutes and common law,[293] and the Supreme Court has only found complete preemption when a federal statute provides an exclusive cause of action as well as its procedures and remedies.[294] Furthermore, the Supreme Court has interpreted the doctrine narrowly, and the CAA is not one of the three statutes deemed to have the congressional intent necessary for complete preemption.[295] However, the Supreme Court's reversal and remand in *Baltimore* effectively gives fossil fuel producers another bite at the preemption apple by requiring courts to consider additional grounds for removal on appeal.[296] Although the forum may not be dispositive, climate claims will do better in state courts because state judges may be more

290. *See* Damien M. Schiff & Paul Beard II, *Preemption at Midfield: Why the Current Generation of State-Law-Based Climate Change Litigation Violates the Supremacy Clause*, 49 ENV'T L. 853, 875 (2019) (arguing that state law climate claims should be preempted).

291. *See supra* text accompanying notes 165–166; *cf. City of New York*, 993 F.3d at 95.

292. *See* Schiff & Beard, *supra* note 290, at 874–80.

293. 42 U.S.C. § 7604(e).

294. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 2 (2003). *But see* Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 539 (2007) (arguing that complete preemption should be interpreted as a jurisdictional doctrine formulated to promote uniformity in the interpretation of federal law).

295. *See* Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L.J. 412, 429 (2019).

296. *See* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1543 (2021).

receptive to state claims,[297] and justiciability doctrines may be relaxed in state courts.[298]

Climate nuisance plaintiffs must be especially cautious. Even though complete preemption does not apply, it is likely "ordinary" preemption will pose an insurmountable challenge to nuisance claims because of *Ouellette*'s source-state requirement.[299] For climate nuisance cases, where emissions are perfectly fungible and attributable to millions of point sources, finding the appropriate "source state" is practically impossible. The court in *City of New York* was clear that a state nuisance claim concerning transboundary emissions was preempted to the extent it relied on the law of the impacted state,[300] and other courts have agreed with this assessment.[301] Consequently, even though state nuisance claims are resilient to complete preemption, obstacle preemption can still provide a complete defense to state tort claims.[302]

Because courts have indicated a willingness to dismiss these second-generation state public nuisance claims, an alternative movement in climate litigation has begun: seeking climate damages under a strict product liability theory for a "failure to warn."[303] Although different jurisdictions have slightly different approaches to this cause of action, the elements are generally: (1) the defendant had a duty to warn; (2) the defendant breached

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297. "The venue is critical because judges in federal courts are generally less receptive to 'expansive' legal theories like Baltimore's climate liability claims . . . ." Ellen M. Gilmer, *Booming Climate Litigation Movement Faces Supreme Court Test*, BLOOMBERG L. (Jan. 14, 2021, 4:00 AM), https://news.bloomberglaw.com/environment-and-energy/booming-climate-litigation-movement-faces-supreme-court-test [https://perma.cc/T34B-X8KQ] (quoting George Mason Law Professor Donald Kochan).

298. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836–37 (2001) (stating how state courts aren't bound by Article III, and that "[s]ome state courts issue advisory opinions, grant standing to taxpayers challenging misuse of public funds, and decide important public questions even when federal courts would consider the disputes moot").

299. *Cf. supra* text accompanying notes 212–213 (discussing *Ouellette* and GHG emissions).

300. *See supra* note 213 and accompanying text.

301. *See* Rothschild, *supra* note 295, at 447–48.

302. *See generally* Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000) (holding a state tort law standing as an obstacle to a federal statute's objective is preempted).

303. *See, e.g.*, Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 548 (D. Md. 2019); Complaint at 159, Anne Arundel Cnty. v. BP P.L.C., No. C-02-CV-21-000565 (Md. Cir. Ct. April 26, 2021) (alleging the defendants intentionally concealed risks of their products and instead "advanced pseudo-scientific theories," and are thus liable for damages stemming from the consumption of their products); Complaint at 129, City of Charleston v. Brabham Oil Co., No. 2020CP1003975 (S.C. C.P. Sept. 9, 2020); *see also* Complaint at 50–52, City of New York v. ExxonMobil Corp., No. 451071/2021 (N.Y. Sup. Ct. April 22, 2021) (alleging defendants' intentional obfuscation of climate science represents an actionable failure to warn consumers of the harms inherent in their products under city consumer protection ordinances).

that duty; and (3) the plaintiff was harmed because of the breach.[304] This duty has been defined rather broadly as a duty to warn of any "latent dangers resulting from foreseeable uses of its product of which it knew or should have known."[305] It does not matter why the defendant did not warn of reasonably known risks; in strict product liability, "the reasonableness of the defendant's failure to warn is immaterial."[306] This approach avoids many of the dead ends nuisance claims have encountered, but has not been thoroughly tested in court. If successful, these claims may help plaintiffs out of the maze.

II. FAILURE-TO-WARN CLAIMS' SUFFICIENCY AND DESIRABILITY

Strict liability failure-to-warn claims brought by states or cities against oil supermajors avoid the legal obstacles that have left first- and second-generation climate actions lost in the labyrinth of litigation. Additionally, the political pressures and economic distortions thwarting legislative action do not apply to product liability litigation.[307] Climate litigation, including cases brought under a theory of failure-to-warn, may even provide the impetus needed to enact meaningful climate legislation.[308]

A. Failure-To-Warn Claims Are Not Susceptible to Many of the Legal Vulnerabilities that Plagued Previous Climate Cases.

Although there are some similarities to other climate claims, failure-to-warn claims are significantly more resilient to many of the legal barriers that beset earlier claims. This Section will explain how parties—especially states—seeking compensation for climate adaptation measures under a failure-to-warn theory are much more likely to be heard on their merits. This is because these cases likely satisfy the doctrines of standing and the political question and because federal law is less likely to preempt or displace a

304. *See, e.g.*, Hunter v. Shanghai Huangzhou Elec. Appliance Mfg. Co., 505 F. Supp. 3d 137, 155 (N.D.N.Y. 2020); Christian v. 3M, 126 F. Supp. 2d 951, 958 (D. Md. 2001).

305. Liriano v. Hobart Corp., 92 N.Y.2d 232, 237 (N.Y. 1998). The California Supreme Court has defined this duty even more broadly, holding that "strict liability require[s] a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 558 (Cal. 1991).

306. Carlin v. Superior Ct., 920 P.2d 1347, 1351 (Cal. 1996).

307. *See infra* Section II.B.

308. *See* Maria Stamas, Comer v. Murphy*: The Fifth Circuit Grapples with Its Role in Hearing Climate Change Tort Claims*, 37 ECOLOGY L.Q. 711, 719 (2010).

product liability claim than a nuisance claim.[309] Additionally, showing causation and apportioning liability in the context of failure-to-warn claims allows climate litigants to rely on theories used in other complex product liability cases.[310] As a threshold matter, it is important to note that state courts are not necessarily bound by constitutional justiciability doctrines.[311] However, because many state courts observe similar doctrines,[312] and state claims may be removed to federal court, the advantages presented by failure-to-warn claims are still significant.

1. Standing

A municipal party can likely establish the necessary elements of standing in a failure-to-warn claim, and it may be even easier for states. With respect to standing, climate plaintiffs are well-advised to commence their case in state courts, because standing requirements in many state courts are more accommodating than standing in Article III courts.[313] Even so, failure-to-warn claims brought by states should satisfy strict Article III standards.

Sovereign entities can more easily satisfy the doctrine of standing. In *AEP*, a plurality of the Court held that, under *Massachusetts v. EPA*, "at least some plaintiffs" had Article III standing.[314] This suggests courts are at least likely to afford states special solicitude when bringing climate claims. In addition to states, courts have also afforded tribes special solicitude.[315] Although this shows a willingness to extend this doctrine beyond states, it

309. *See infra* Sections II.A.1, II.A.2, II.A.3.

310. *See generally In re* Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig., 725 F.3d 65, 113–17 (2d Cir. 2013).

311. Hershkoff, *supra* note 298, at 1836.

312. *See id.* at 1838.

313. *See* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RES. L. 349, 353 (2016) (claiming an "overwhelming majority of states" provide exceptions to standing requirements not allowed under *Lujan*).

Because the "defense du jour" of climate defendants involves removing a case to federal court and seeking to dismiss it as displaced, astute readers may wonder if a similar defense may be available for standing. That is, a fossil fuel producer could remove a failure-to-warn claim and then seek its dismissal for failing to meet less liberal federal standing requirements. This defense is unlikely to prevail. Defendants have attempted this tactic against state consumer protection laws with little success; the end result is generally a remand order, but in at least one instance the plaintiff was also awarded attorney fees. *See, e.g.*, Polo v. Innoventions Int'l, LLC, 833 F.3d 1193, 1196 (9th Cir. 2016); Wallace v. Conagra Foods Inc., 747 F.3d 1025, 1033 (8th Cir. 2014); Mocek v. Allsaints USA Ltd., 220 F. Supp. 3d 910, 914 (N.D. Ill. 2016) ("[D]efendant tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction . . . .").

314. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 420 (2011).

315. Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 463 (2d Cir. 2013).

also likely evinces courts' unwillingness to extend special solicitude to an entity without inherent sovereign powers.

Similarly, states can rely on the doctrine of *parens patriae* for standing when a third party threatens the physical or economic well-being of its citizens.[316] In the leading modern case on the doctrine, the Supreme Court extended this doctrine beyond states.[317] Like the doctrine of special solicitude, however, this extension was to an entity that held inherent sovereign powers: the Commonwealth of Puerto Rico.[318] Even though academics are calling for an extension of these two doctrines to municipal entities,[319] it is likely that these "exceptions" to strict Article III standing are only available to sovereign entities.

Still, demonstrating standing for municipal bodies will be easier for failure-to-warn claims than for the public nuisance claims brought in earlier climate litigation. Some courts have found climate injuries are fairly traceable to a defendant's actions where a defendant's emissions comprise a "meaningful contribution" to global climate change; however, courts are unclear on what exactly is "meaningful."[320] Luckily, in a failure-to-warn claim, tracing a particular defendant's GHG emissions is unnecessary. In a failure-to-warn claim, *Lujan*'s "fairly traceable" prong instead asks: "Did the defendant's deliberate and successful attempt to portray their fossil fuel product as safe result in more sales of fossil fuels?" If so, attribution science can be used to establish a causal connection between the resultant fossil fuel consumption, GHG emissions, and the harms of the climate crisis.[321] Additionally, plaintiffs may attempt to rely on the commingled product theory described in Section III.A.4 *supra*, to persuade a court their harms are fairly traceable to the fossil fuel producers' actions.

For the purpose of standing, it is also important to note that demonstrating fairly traceable harm does not rise to the level of pleading proximate cause.[322] Indeed, scholars have argued—consistent with the Second Circuit in

316. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602, 607 (1982).

317. *Id.* at 609.

318. *Id.*

319. *See supra* note 262.

320. *See* Massachusetts v. EPA, 549 U.S. 497, 524 (2007); *see also* Juliana v. U.S., 217 F. Supp. 3d 1224, 1244 (D. Or. 2016). *But see* Washington Env't Council v. Bellon, 732 F.3d 1131, 1135 (9th Cir. 2013) (finding emissions amounting to 6% of Washington's total GHG emissions not a "meaningful contribution" to climate change), *reh'g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

321. Michael Burger et al., *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV'T L. 57, 235 (2020).

322. Bennett v. Spear, 520 U.S. 154, 168–69 (1997) (reasoning proximate cause cannot be "equate[d to] injury 'fairly traceable' to the defendant").

Comer—the "fairly traceable" standard for climate plaintiffs should "require only plausible evidence of a link between the defendants' conduct and the alleged harm to the plaintiff."[323]

As recognized in most first-generation climate cases like *Comer*, the redressability prong is easily satisfied by seeking a contribution to climate adaptation measures.[324] Though the district court in *Oakland* was skeptical of requiring defendants to pay into a hypothetical abatement fund,[325] a city or town that has already incurred adaptation costs or has actual plans for specific measures should be found to meet the requisite redressability standard. Importantly, redressability need not be certain;[326] the likelihood of only limited redress is adequate for climate harms.[327] The Supreme Court was clear in *Massachusetts*: even if a remedy "will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether [the defendant] has a duty to take steps to *slow* or *reduce* it."[328] Faced with the magnitude of climate risk, the Court determined that partial redress—even for remote harms—could satisfy standing's redressability prong.[329]

2. Political Question

Failure-to-warn claims are also less likely to raise nonjusticiable political questions because they focus on relatively narrow issues: whether oil supermajors knew the harms inherent in their product and whether these companies provided an adequate warning. Further, as the Fifth Circuit noted in *Comer*, a claim for damages is less likely to present a nonjusticiable political question than a claim seeking to enjoin emissions.[330] A product liability claim seeking compensatory damages best avoids the three most disputed of the *Baker* factors: (1) a lack of judicially discoverable standards; (2) the need for an initial policy determination reserved for other branches; and (3) the potential of embarrassment from multifarious pronouncements.[331]

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323. Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 925–26 (2012).

324. *See* discussion *supra* Section I.B.1.

325. City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1024 n.8 (N.D. Cal. 2018).

326. Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d 1177, 1189 (W.D. Wash. 2015).

327. *See* Massachusetts v. EPA, 549 U.S. 497, 525–26 (2007).

328. *Id.* at 525.

329. *See id.* at 525–26.

330. Comer v. Murphy Oil USA, 585 F.3d 855, 874 (5th Cir. 2009).

331. *See generally supra* text accompanying notes 266–271 (discussing the *Baker* factors and first-generation climate tort claims).

First, and most importantly, courts will no longer be asked to decide whether the harms of the climate crisis constitute an "unreasonable interference" when weighed against the benefits of the defendant's activities that result in GHG emissions. This balancing test is patently unworkable: the harms are existential but modern life is impossible without the benefits.[332] Strict product liability claims require no such balancing. Courts must simply decide if the defendant sold a product that could cause harm, if the defendant failed to warn of that harm, and if that harm occurred because of the defendant's failure to warn.[333]

Second, courts do not have to make an initial policy determination in a failure-to-warn case—at least not to the extent the policy determination implicates the political question doctrine. The Second Circuit acknowledged this in *City of New York* when it juxtaposed its expansive characterization of New York's claim against "a more modest litigation akin to a product liability suit such as . . . *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*."[334] The Second Circuit was indirectly recognizing that products liability claims—like failure-to-warn—may avoid the political question doctrine by allowing courts to focus more on legal issues and not policy. By pleading strict liability failure-to-warn, cities and states do not have to show unreasonableness and courts do not have to engage in the requisite policy determination to decide what is reasonable.

Third, failure-to-warn claims have a low potential for multifarious pronouncements. Because of the relatively localized nature of the dispute (sales of products without a suitable warning *in this state or city*) and the fact that a state is bringing a claim under its own laws, each case will be sufficiently unique to avoid conflicting pronouncements. Further, unlike a nuisance claim, a product liability claim does not attempt to "impose [a jurisdiction's] . . . standards on emissions emanating simultaneously from all 50 states and the nations of the world."[335] Narrowing the scope to domestic actions and local abatement costs avoids this concern. Most importantly for this factor, however, the potential for multifarious pronouncements does not

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332. *See generally* California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (finding that climate claims would require courts "to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development").

333. *See generally supra* text accompanying note 304 (listing the elements of a failure-to-warn claim).

334. City of New York v. Chevron Corp., 993 F.3d 81, 91 (2d Cir. 2021).

335. *Id.* at 100.

exist when other branches are not directly addressing the same issue.[336] Because current legislation and regulation on fossil fuels do not address a producer's duty to warn of climate harms, no court pronouncement can contradict it.[337]

3. Preemption and Displacement

Even without complete preemption, climate claims are likely to find their way into federal courts.[338] Once there, the Second Circuit's analysis in *City of New York*—the only second-generation claim pleaded in federal court—may control. The Second Circuit was clear that federal nuisance claims preempted state public nuisance actions in the context of climate litigation, in part relying on *Ouellette*'s source-state requirement.[339] Even the Fourth Circuit's remand—a favorable outcome for Baltimore—leaves nuisance plaintiffs trapped. The Fourth Circuit is right: The CAA entirely displaces federal nuisance claims for air pollution.[340] However, the Second Circuit was also correct: The CAA preserves only state-law nuisance claims brought under the law of the state where the pollution occurred.[341]

However, a claim of products liability does not implicate *Ouellette*, nor any other federal common law applicable to air or water pollution. Thus, no displacement can occur. Even if a court attempts to characterize the pursuit of damages as indirect regulation, as they did in *City of New York*, there is no analogous federal statute that regulates the sale of fuel in a preemptive

336. *See generally* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 874 (1994) (arguing the "multifarious" prong of *Baker* should not apply to the Guarantee Clause "because the other branches of government do not act pursuant to the provision").

337. *Cf.* EVAN JASICA, THE THREAT OF GREENWASHING AND THE NEED FOR SUBSTANTIVE REGULATION, https://static1.squarespace.com/static/57d835d93e00be04a77c6716/t/618f364679f9ff1b07cdf602/1636775494455/The+Threat+of+Greenwashing.pdf [https://perma.cc/K9WJ-369N]. (decrying the lack of legislation and regulation to prevent firms from deceptively marketing products as climate-friendly).

338. In addition to diversity jurisdiction, the Supreme Court's remand in *Baltimore* provides defendants with a multitude of jurisdictional hooks to re-assert. *See* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1543 (2021).

339. *City of New York*, 993 F.3d at 89–95.

340. Mayor of Balt. v. BP P.L.C., No. 19-1644, WL 1039685, at *9 (4th Cir. Apr. 7, 2022).

341. *City of New York*, 993 F.3d at 100.

manner.[342] Because of this, a failure-to-warn claim is much less vulnerable to preemption.[343]

4. Causation and Apportioning Liability

Finally, strict liability failure-to-warn claims also offer several advantages when attempting to tackle problems of causation and apportioning liability. For example, plaintiffs may be able to rely on causation theories used in earlier environmental contamination cases brought in product liability.

One such case is *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*,[344] or *MTBE*. In *MTBE*, manufacturers of fuel containing methyl *tertiary*-butyl ether—which, like GHG emissions, is perfectly fungible—were held liable for groundwater contamination using a commingled product theory.[345] The Second Circuit allowed the City of New York to rely on expert testimony to show the defendant's product was commingled with the products of other producers before leaking and causing contamination.[346] In conjunction with market-share data, this was sufficient for a jury to find the defendant substantially contributed to the contamination caused by the fuel additive.[347] In an interesting parallel, the defendant in *MTBE*, an oil supermajor, attempted to argue—without success—that the CAA preempted the state law product liability claims.[348]

Like methyl *tertiary*-butyl ether, GHG emissions are also perfectly fungible, making liability allocation difficult. The cumulative nature of climate harms and the broad temporal range over which emissions have occurred makes this problem even trickier.[349] Showing causation and

342. *But see* Kurns v. R.R. Friction Prod. Corp., 565 U.S. 625, 637 (2012) (holding the Locomotive Inspection Act preempted a state tort failure-to-warn claim about locomotive brake shoes because the Act exclusively occupied the field of regulating locomotive equipment).

343. *Cf.* Jean Macchiaroli Eggen, *The Normalization of Product Preemption Doctrine*, 57 ALA. L. REV. 725, 777–78 (2006) (concluding the Supreme Court emphasized "that state tort law may play a valuable role in supplementing federal statutory schemes" in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), and that the presumption against preemption is "alive and thriving" in a product liability context).

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

345. *Id.* at 130.

346. *Id.* at 116.

347. *Id.* at 115–17.

348. *Id.* at 96, 104.

349. *See generally* Daniel J. Grimm, *Global Warming and Market Share Liability: A Proposed Model for Allocating Tort Damages Among Co2 Producers*, 32 COLUM. J. ENV'T L. 209 (2007) (describing some of the difficulties in damage allocation and suggesting a modified market share liability scheme). *But see* Justine S. Hastings & Michael A. Williams, *Market Share*

calculating cumulative harm presents a major hurdle to plaintiffs seeking damages based on GHG emissions.[350] By focusing on the products, rather than the emissions, allocation is somewhat simplified.

If a plaintiff were to rely on the commingled-products theory presented in *MTBE*, they would first show defendants knew (or should have known) of the dangers inherent in their product and did not warn consumers—elements one and two of a failure-to-warn claim. When showing element three, that the plaintiff was harmed because of the failure to warn, they could proceed as follows: (1) use expert testimony and attribution science to establish a causal link between burning fossil fuels and the climate crisis; (2) show continued dependence on fossil fuels was exacerbated by the defendant's obfuscation of science and failure to warn of the risks of GHG emissions; and (3) use market-share data to show that more likely than not defendants' failure to warn played a substantial role in causing the plaintiff's injury. In *MTBE*, the Second Circuit found a market share of about twenty-five percent of the gas sold in an area over seventeen years was sufficient.[351]

A commingled product theory could render fossil fuel producers jointly and severally liable for climate adaptation measures, but courts have been hesitant to expose defendants to crushing liability.[352] This is especially true in climate cases, where the number of potential "culprits" is exceptionally large.[353]

Courts might find a more traditional theory of market share liability more palatable. Instead of relying on the substantial factor test of *MTBE*, courts could apportion several liability to defendants in proportion to their market share proportion of the transportation sector's GHG emissions in a given year, for the time period they were liable for failing to warn consumers. This proportion can be roughly approximated as follows: $\rho = \alpha_k \epsilon_k$ where α represents the defendant's local market share over time period "k", and ϵ represents the proportion of the defendant's market sector's contribution to GHG emissions over the same time period. Compensatory damages would be calculated as follows: $d = \rho\sigma$ where σ represents the cost of the plaintiff's climate adaptation damages. Although this theory would not expose the

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Liability: Lessons from New Hampshire v. Exxon Mobil, 34 J. ENV'T L. & LITIG. 219, 248–49 (2019) ("A damages system based on market share liability is not particularly suitable for tort claims related to global warming . . . .").

350. *Cf.* Amy Sinden, *Allocating the Costs of the Climate Crisis: Efficiency Versus Justice*, 85 WASH. L. REV. 293, 336–39 (2010).

351. *MTBE*, 725 F.3d at 116.

352. *See, e.g.*, Strauss v. Belle Realty Co., 65 N.Y.2d 399, 402 (N.Y. 1985).

353. *See supra* note 139 and accompanying text.

defendant to joint liability, plaintiffs may still be eligible to receive considerable punitive damages.[354]

The cumulative effect of carbon emissions on the climate crisis also presents a potential obstacle. Scholars have attempted to devise liability calculations that approximate the non-linear damage function of GHG emissions over time,[355] but this may prove unnecessary. Even if climate science cannot tell us precisely how severe future damages will be, courts allow a defendant to face liability for unforeseeably severe injuries in tort law.[356] Proximate cause can be satisfied if fossil fuel producers knew the *nature* of the harm they might cause—even if they did not understand the severity. It seems likely they did.[357]

5. Potential Remedies

Climate claims for damages are less likely to implicate the political question doctrine than those seeking to enjoin emissions.[358] Even so, given the irreparable harm being caused by the climate crisis, courts should carefully consider the consequences of refusing to entertain claims for injunctive relief. Failure-to-warn plaintiffs may request a unique injunctive remedy: warning labels. Although warnings do not address existing climate harms, they may reduce future fossil fuel consumption.[359] More importantly, they represent a good first step to addressing the harm caused by climate disinformation.

Alternatively, a plaintiff can seek damages—either for adaptation costs already incurred or for future costs. Admittedly, as the *Oakland* court recognized, requesting damages for expected harms is unusual.[360] But it is

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354. Failure-to-warn claims can support punitive damages in many jurisdictions when a plaintiff can show maliciousness, callousness, or other aggravating circumstances. *See, e.g.*, *In re* Levaquin Prod. Liab. Litig., 700 F.3d 1161, 1169 (8th Cir. 2012); Jager v. Davol Inc., No. EDCV161424JGBKKX, 2017 WL 696081, at *7 (C.D. Cal. Feb. 9, 2017); Ivins v. Celotex Corp., 115 F.R.D. 159, 165 (E.D. Pa. 1986).

355. Luke J. Harrington & Friederike E. L. Otto, *Attributable Damage Liability in a Non-Linear Climate*, 153 CLIMATIC CHANGE 15, 16 (2019).

356. *See* "THIN SKULL" OR "EGGSHELL SKULL" RULE, GENERALLY, 2 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 11:1 (3d ed.).

357. *See, e.g.*, Oakland Complaint, *supra* note 155, at 2, 24, 26; Amended Complaint, *supra* note 193, at 45–51.

358. *See* discussion *supra* Section II.A.2.

359. *See generally* Jennifer J. Argo & Kelley J. Main, *Meta-Analyses of the Effectiveness of Warning Labels*, 23 J. PUB. POL'Y & MKTG. 193, 198–201, 204 (2004) (finding "warnings moderately influence behavioral compliance" for products ranging from tools and chemicals to cigarettes and alcohol).

360. *See* City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1024 n.8 (N.D. Cal. 2018).

not unprecedented. Courts have awarded "permanent damages" for future harms when addressing the harm's source was prohibitively costly or otherwise impracticable.[361] As climate science progresses, litigants can more precisely calculate these future damages. And given current technology, abatement programs cost significantly less than scrubbing the atmosphere of GHGs. Combined, these two factors suggest permanent damages to address future climate harms may be appropriate.

Even if courts shy away from the task of calculating damages, a viable failure-to-warn claim may pressure oil supermajors to pay into abatement funds as part of a settlement. This is also not unprecedented. States entered into similar agreements with manufacturers to resolve other litigation brought, in-part, under a theory of failure-to-warn:[362] tobacco and opioid settlements.[363] Though tobacco settlements were criticized for failing to appropriately allocate funds towards abatement and harm reduction,[364] some states have learned from these mistakes.[365] Opioid settlements have been intentionally structured to emphasize abatement, including treatment for current harm and education to minimize future harm.[366] States and cities entering into climate abatement settlements can have a similar focus:

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361. *See, e.g.*, Boomer v. Atl. Cement Co., 257 N.E.2d 870, 874 (1970); Rudd v. Electrolux Corp., 982 F. Supp. 355, 371 (M.D.N.C. 1997).

362. *Cf.* Mason A. Leichhardt, *Big Tobacco's Big Settlement: What Pharmaceutical Companies Can Learn To Protect Themselves in Opioid Litigation*, 60 U. LOUISVILLE L. REV. 161, 193 (2021) ("Both opioid and tobacco litigation center on failure-to-warn claims and defective products.").

363. Mem. Ex. A 1–9, Ariz. Att'y Gen., One Arizona Opioid Settlement Memorandum of Understanding, (Oct. 16, 2020), https://www.azag.gov/sites/default/files/docs/press-releases/2021/decrees/One_AZ_MOU_Executed_by_Counties_Towns_With_Exhibits.pdf [https://perma.cc/ZE6J-KAPX] (stating two approved settlement fund uses are abatement and prevention); *see also* Colleen Walsh, *Learning the Hard Way*, THE HARV. GAZETTE (Aug. 4, 2021), https://news.harvard.edu/gazette/story/2021/08/applying-lessons-learned-from-the-tobacco-settlement-to-opioid-negotiations/ [https://perma.cc/4VRX-BY75] (discussing that the intended use for tobacco settlement funds was to "redress the problem of tobacco use" and prevent youth smoking).

364. Spencer Chretien, *Up in Smoke: What Happened to the Tobacco Master Settlement Agreement Money?*, CITIZENS AGAINST GOV'T WASTE (Dec. 12, 2017), https://www.cagw.org/thewastewatcher/smoke-what-happened-tobacco-master-settlement-agreement-money [https://perma.cc/PKE4-TQ7G].

365. *See* Keith M. Pheneuf, *Opioid Settlement Dollars May Be Harder To Divert than CT's Payments from Tobacco Industry*, CT. PUBLIC (July 30, 2021, 12:46 PM), https://www.ctpublic.org/news/2021-07-30/opioid-settlement-dollars-may-be-harder-to-divert-than-cts-payments-from-tobacco-industry [https://perma.cc/AXN4-GNCQ].

366. As a default, seventy percent of funds are earmarked for abatement in Johnson & Johnson's (and other distributor's) twenty-six-billion-dollar settlement offer. DISTRIBUTOR SETTLEMENT AGREEMENT 29 (2021), https://www.attorneygeneral.gov/wp-content/uploads/2021/07/2021-07-21-Final-Distributor-Settlement-Agreement.pdf [https://perma.cc/VXJ4-4B6E].

infrastructure to alleviate current harm and funding policies to minimize future risk. Any settlements must avoid the mistakes of tobacco settlements and adopt the best practices being integrated into opioid settlements. But courts should not allow misappropriation concerns to become another hurdle to recovery.

B. Failure-To-Warn Claims Offer Policy Benefits To Complement and Spur Comprehensive Climate Action.

States seeking climate adaptation compensation from oil supermajors in failure-to-warn actions are more resilient to legal obstacles than nuisance claims. Even so, courts may be tempted to abdicate their responsibilities by asserting a lack of the requisite institutional competency. However, courts—especially state courts—are generally much more familiar with the contours of product liability than interstate nuisance. Further, climate litigation of this nature is not mutually exclusive with a more comprehensive mitigation approach.[367] Indeed, climate litigation may complement climate legislation by allowing parties to challenge incumbent interests in venues less prone to special interest capture.[368] Failure-to-warn claims, with their focus on what oil supermajors knew and whether they adequately warned the public, are especially complementary.[369]

Failure-to-warn claims address many of the public choice distortions impeding legislative climate action—at least in part. Successful claims would force producers and distributors of fossil fuels to partially internalize the costs of their actions.[370] This reduces economic externalities and results in fewer incentives to free-ride at the expense of others.[371] Litigation also places climate change within the context of the adversarial system. Instead of widely dispersed costs held in tension with concentrated benefits, litigation

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367. *See generally* Mark P. Nevitt & Robert V. Percival, *Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?*, 96 WASH. U.L. REV. 441, 446 (2018) ("[C]ommon law litigation has served as an effective prod to help spur the development and implementation of new pollution control technology and to stimulate regulatory action.").

368. *Cf.* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 178–79 (2006) (arguing that allowing "jurisdictional overlap" between state and federal environmental law can combat excessive special interest influences and promote effective regulation).

369. To be clear, failure-to-warn claims are not the *only* common law climate claims that could complement legislative action. But they are well-suited and are more likely to prove justiciable. *See supra* Section II.A.

370. *See* Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 16 (1995) (describing one paradigm of product liability theory).

371. *See* discussion *supra* Section II.A.1.

motivates parties to vigorously protect their interests by concentrating the interests in a single forum.

Climate tort claims also complement the recently passed Inflation Reduction Act ("IRA").[372] Passed in August of 2022, the IRA has been billed as "the largest climate legislation in U.S. history."[373] Though *any* climate legislation is cause for celebration, the IRA contains some glaring deficiencies that undoubtedly resulted from the very same challenges to climate legislation outlined in Section I.A. Specifically, and despite its multi-billion dollar investment in decarbonization, the IRA does nothing force GHG emitters to internalize the costs of their emissions.[374] Failure-to-warn claims can help fill this gap by ensuring that both negative and positive climate externalities are internalized. That is: the IRA can spur new investment in "green" technology by internalizing some of the positive externalities of clean vehicles and energy.[375] Concomitantly, failure-to-warn claims can prompt disinvestment in carbon-intensive activities by internalizing some of the negative externalities of GHG emissions. This is a perfect, current example of how failure-to-warn claims can complement climate legislation.

Failure-to-warn claims can also mitigate the toxic political discourse around redistributive climate policies. Climate legislation often redistributes wealth from individuals who do not view themselves as especially culpable to others who they see as undeserving.[376] On the other hand, climate litigation concentrates on harms stemming from specific actions taken by the defendant. This transforms a resource redistribution problem into a question of individual accountability—something certain facets of the American electorate receive well.[377] Reframing the problem in this manner is important because courts play a "vital role . . . in granting legitimacy to particular

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372. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat 1818.

373. Ron Kinghorn et al., *The Inflation Reduction Act and Your Business: Four Ways It Can Help Drive Sustainability Strategy and Growth*, PWC, https://www.pwc.com/us/en/services/esg/library/inflation-reduction-act-climate-considerations.html [https://perma.cc/SN65-4EAN].

374. S. DEMOCRATIC LEADERSHIP, SUMMARY OF THE ENERGY SECURITY AND CLIMATE CHANGE INVESTMENTS IN THE INFLATION REDUCTION ACT OF 2022 2–3 (2022), https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf [https://perma.cc/K4XB-LVW3].

375. *Id.*

376. *See* Isabelle Gerretsen, *Who Will Pay for the Damage Caused by Climate Change?*, BBC (Dec. 13, 2021), https://www.bbc.com/future/article/20211213-who-will-pay-for-the-damage-caused-by-climate-change [https://perma.cc/YEP7-ZFVQ].

377. *See, e.g.*, DENNIS PRAGER, THE AMERICAN TRADITION OF PERSONAL RESPONSIBILITY 3 (1994), http://s3.amazonaws.com/thf_media/1994/pdf/hl515.pdf [https://perma.cc/4598-DNV6].

arguments, ideologies and identities."[378] Letting cities and states confront fossil fuel producers in a court of law gives these plaintiffs an opportunity to legitimate their narratives in the court of public opinion.

Failure-to-warn claims can also influence public opinion in other ways. As one scholar put it: "Misconduct by large publicly-traded firms is usually tried in the court of public opinion before it is tried in courts."[379] Once a claim reaches discovery, reputation-damaging information often comes to light.[380] Indeed, oil supermajors may be so fearful of the reputational damage suffered by tobacco companies in the course of litigation,[381] they may consent to settlement talks to avoid disclosing what they knew about the climate. Although any pre-trial settlement would likely contain confidentiality agreements intended to diminish any impact on public opinion, the mere existence of a successful settlement agreement would almost certainly affect public perception of fossil fuel companies' culpability.

Finally, claims of insufficient institutional competency fundamentally distort the role of the judiciary. Courts do not merely enforce legal norms; judicial review is an exercise of counter-majoritarian power to protect against political harm.[382] Here, where public choice complications and disinformation have prevented a comprehensive response to the climate crisis from the other branches of government, it is not merely proper for courts to allow climate litigation to proceed—it is imperative. Even more so when some of the hurdles to implementing climate mitigation have been erected by the very same parties trying to keep climate claimants from having their day in court.[383] It is thus incumbent on courts to consider these claims on their merits.

III. CONCLUSION

Failures in the United States' legislative process have resulted in a woefully deficient response to the climate crisis. Seeing this political inaction, communities have grown increasingly worried about the costs of

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378. Lisa Vanhala, *The Comparative Politics of Courts and Climate Change*, 22 ENV'T POL. 447, 449 (2013).

379. Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL'Y REV. 1, 21 (2015).

380. *Id.* at 41.

381. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 304 (2021).

382. *See* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 75–85 (1991).

383. Keane, *supra* note 61.

rebuilding after disasters and adapting to further disruptions to nature's balance. Cities, states, and other plaintiffs brought these concerns to courthouses across the United States, and found the doors closed to them. Instead of engaging with these claims, courts have allowed plaintiffs to become entrapped in a maze of labyrinthine avoidance doctrines.

Failure-to-warn claims present a potential way out. State plaintiffs are likely to satisfy standing because of their special solicitude and it is unlikely that state product liability law is preempted because no federal statute sufficiently addresses fossil fuel labels in the context of climate change. Failure-to-warn claims also allow plaintiffs to request damages under commingled or more traditional market-share theories of product liability because sales of products are far more easily tracked than emissions. Crucially, strict liability failure-to-warn claims do not present political questions because courts need not determine a defendant's reasonableness or weigh costs and benefits when determining liability.

Courts must stop avoiding climate claims and engage with them on the merits. Doing so constitutes good public policy because failure-to-warn claims can help address political distortions by reframing public discourse, exposing intentional misinformation, and forcing fossil fuel producers to internalize external costs of their products.

Courts may open their doors to cities and states because failure-to-warn claims satisfy the avoidance doctrines used to dismiss previous climate claims. Courts should hear these claims because doing so will galvanize and complement legislative climate action. Courts must shoulder their burden, engage with these claims, and let climate litigants out of their doctrinal labyrinth.