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Seeking (Some) Climate Justice in State Tort Law

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SEEKING (SOME) CLIMATE JUSTICE IN STATE TORT LAW

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Abstract: Over the last decade, an increasing number of path-breaking cases have been filed throughout the world, seeking to hold fossil fuel industry companies and governments accountable for their actions and inactions that have contributed to the climate crisis. This Article focuses on an important subset of those cases—namely, the recent surge of cases brought by states, cities, and counties all over the United States alleging that the largest fossil fuel industry actors, including ExxonMobil, Shell, BP, and Chevron, are liable in state tort law for harms caused by climate change.

The Article begins with a synthesis of the history of U.S. climate tort litigation, grouping the cases into two "waves." The current state tort cases are in the second wave and represent an attempt to avoid the legal pitfalls that plagued the first. The Article then undertakes the first close examination of the defendants' response to the second-wave climate tort cases; namely, that the federal common law of nuisance preempts all the plaintiffs' state tort claims. Unsurprisingly, the issue has divided the courts that have decided it, as the Supreme Court case law is sparse and unclear. The Article identifies the doctrinal problem in the case law, and then argues that the only way to bring coherence to the law while adhering to federalism principles is to disallow preemption of state tort law by federal common law in these cases. Finally, the Article offers a new perspective on why that is also the right result as a policy matter.

The second-wave climate tort suits are part of a larger global movement of resorting to the courts to demand climate justice after decades of inaction by policymakers. The current era of climate disruption and its catastrophic threats demand not only new and improved legal and policy mechanisms, but also the use of current ones—including state tort law—to the fullest extent possible.

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INTRODUCTION

The 450 Inupiat residents of the Native Village of Kivalina, which lies on the frozen tundra of Alaska along the edge of the Arctic Ocean, are among the increasing number of communities in the world who are losing their ability to survive because of climate disruption.[1] With temperature increases that double the global average, Alaska is one of the canaries in the coal mine of the climate crisis.[2] The Arctic's ice has diminished by half over the last three decades, triggering a series of reactions that are transforming the environment.[3] The Inupiat risk plunging into frigid waters whenever they use their snowmobiles—the only viable motorized

1. See, for example, the U.N. High Commissioner for Refugee's increasingly strong recognition of the role of climate disruption in refugee movements. *Climate Change and Disaster Displacement*, U.N. High Comm'r, https://www.unhcr.org/en-us/climate-change-and-disasters.html [https://perma.cc/JCS2-LAY3] ("People are trying to adapt to the changing environment, but many are being forcibly displaced from their homes by the effects of climate change and disasters, or are relocating in order to survive. New displacement patterns, and competition over depleted natural resources can spark conflict between communities or compound pre-existing vulnerabilities. People displaced across borders in the context of climate change and disasters may in some circumstances be in need of international protection. Refugee law therefore has an important role to play in this area.").

2. Joe McCarthy, *How a Tiny Alaska Town Is Leading the Way on Climate Change*, HUFFPOST (Apr. 18, 2017), https://www.huffingtonpost.com/entry/how-a-tiny-alaska-town-is-leading-the-way-on-climate_us_58f681d7e4b0c892a4fb7350 [https://perma.cc/RBW6-G8D9].

3. *Id.*

means of transportation in the region.[4] That, along with the fact that their principal source of food is the wildlife whose habitats are being destroyed by rising sea levels, means that the Inupiat communities are losing their ability to feed themselves.[5]

The Inupiat people's home will eventually suffer the same fate as the wildlife they depend on: according to the U.S. Army Corps of Engineers, the island on which Kivalina sits will be under water within ten years.[6] Life has always been challenging on the frozen tundra, but in the face of the climate crisis, it is no longer possible. And the federal government has still not done anything about it.[7] Left unprotected by their government, the Inupiat sued ExxonMobil, BP, Chevron, Shell, and other major fossil fuel companies for their contribution to the climate crisis.[8] The Inupiat claimed the right to monetary compensation to relocate based on the federal common law claim of public nuisance.[9]

Over a decade ago, in 2007, the Intergovernmental Panel on Climate Change (IPCC) noted the likelihood of an increase in cases, such as the one brought by Kivalina, that are now often referred to as "climate" or "climate justice" litigation.[10] The reason for the increase, according to the IPCC, is that "countries and citizens [will] become dissatisfied with the pace of international and national decision-making on climate change."[11] The IPCC was right: A 2019 analysis of climate cases by the Grantham Research Institute of Climate Change and Environment determined that

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4. *Id.*

5. Melia Robinson, *This Remote Alaskan Village Could Disappear Under Water Within 10 Years - Here's What Life Is Like There*, BUS. INSIDER INDIA (Sept. 27, 2017), https://www.businessinsider.in/This-remote-Alaskan-village-could-disappear-under-water-within-10-years-heres-what-life-is-like-there/articleshow/60858974.cms [https://perma.cc/2ZQ6-2265].

6. *Id.*

7. Although in 2015 President Obama did submit a proposal to Congress that would have allocated $400 million for the residents of Kivalina and other Alaskan communities to relocate, Congress never approved it. Robinson, *supra* note 5.

8. 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). The village sued a total of twenty-four oil, energy, and utility companies. *Id.*

9. *Id.*

10. *See generally, e.g.*, Chilenye Nwapi, *From Responsibility to Cost-Effectiveness to Litigation: The Evolution of Climate Change Regulation and the Emergence of Climate Justice Litigation*, *in* CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 517, 531–41 (Randall S. Abate ed., 2016) (describing the litigation as a mechanism for seeking "climate justice" and referring to it as "climate justice litigation").

11. Sangata Gupta et al., *2007: Policies, Instruments and Co-operative Arrangement*, *in* CLIMATE CHANGE 2007: MITIGATION, CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 745, 793 (Bert Metz et al. eds., 2007).

"[c]limate change litigation continues to expand across jurisdictions as a tool to strengthen climate action . . . ."[12] As one of the report authors stated, "[h]olding government and businesses to account for failing to combat climate change has become a global phenomenon."[13]

In addition to suits against national governments based on international law, constitutions, and environmental laws, the IPCC pointed to one of the first climate tort cases brought in the United States: *Connecticut v. American Electric Power Co.* (*AEP*).[14] *AEP* launched what this Article calls the "first wave" of climate tort cases.[15] After *AEP* was filed, an increasing number of other climate tort cases were filed throughout the country. This wave of litigation did not end until 2011, when the U.S. Supreme Court struck down the plaintiffs' claims in *American Electric Power Co. v. Connecticut* (*AEP*).[16] In its wake, the pace of climate tort filings slowed down to a trickle. Since 2017, however, the pace of filings has increased dramatically, beginning a second wave. As of this writing, that wave continues to surge, far surpassing its predecessor in strength and size.

The climate tort cases in this "second wave" are even stronger than the first wave for two related reasons. First, these recent claims stand on robust factual foundations. They are supported by: (1) mounting scientific evidence for both of the harms caused by climate disruption, and of specific fossil fuel companies' contributions to climate change, and (2) continuing revelations of the details of the companies' decades-long knowledge of that evidence and attempts to suppress it with a massive disinformation campaign. Federal district court Judge William Smith powerfully summarized the supporting evidence in these cases in his opinion remanding Rhode Island's second-wave climate tort case back to

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12. JOANA SETZER & REBECCA BYRNES, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2019 SNAPSHOT 1, 1 (2019).

13. Press Release, Grantham Rsch. Inst. on Climate Change and the Env't, Climate Change Lawsuits Expand to at Least 28 Countries Around the World, The London Sch. of Econ. & Pol. Sci. (July 4, 2019) (internal quotation marks omitted), http://www.lse.ac.uk/GranthamInstitute/news/climate-change-lawsuits-expand-to-at-least-28-countries-around-the-world/ [https://perma.cc/E9QS-259X].

14. 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).

15. The application of this term to the climate tort suits is inspired by Professor Robert Rabin's effective use of it in his insightful examination and analysis of the long history of litigation against the tobacco industry. *See generally* Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, *in* REGULATING TOBACCO 176 (Robert L. Rabin & Stephen D. Sugarman eds., 2001) (explicating the tobacco tort cases in terms of three "waves," characterized by the parties' strategies and courts' responses to them).

16. 564 U.S. 410 (2011). This decision is explained *infra* section I.C.

state court:

> Climate change is expensive, and the State wants help paying for it. Specifically from Defendants in this case, who together have extracted, advertised, and sold a substantial percentage of the fossil fuels burned globally since the 1960s. This activity has released an immense amount of greenhouse gas into the Earth's atmosphere, changing its climate and leading to all kinds of displacement, death (extinctions, even), and destruction. What is more, Defendants understood the consequences of their activity decades ago, when transitioning from fossil fuels to renewable sources of energy would have saved a world of trouble. But instead of sounding the alarm, Defendants went out of their way to becloud the emerging scientific consensus and further delay changes—however existentially necessary—that would in any way interfere with their multibillion-dollar profits. All while quietly readying their capital for the coming fallout.[17]

Second, all the second-wave plaintiffs have brought only state tort claims, and all but one have brought their claims in state courts.[18] In the first wave, most plaintiffs brought federal common law claims in addition to state claims, and all filed in federal courts. As this Article explains, state tort law is in many ways much better suited than federal common law for claims based on documentation of companies' disinformation campaigns designed to suppress and obfuscate scientific evidence of harm caused by their products. And state courts, which have the authority to create and develop state tort law and regularly decide tort claims, are usually more adept than federal courts at adjudicating those claims. Thus, the use of state tort law, together with strong factual foundations, make the second-wave climate tort cases quite powerful.

It is not surprising, then, that the fossil fuel industry defendants are fighting harder than ever against the cases, attacking them both in court and in public relations messaging. One of their legal arguments presents a significant risk that these important and potent state claims will not be heard: namely, that federal common law of nuisance[19] preempts all the second-wave state tort claims. Defendants then seek to remove the claims, now transformed into federal common law claims, to federal court, where they expect to be able to successfully argue for dismissal on the same

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17. Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146 (D.R.I. 2019).

18. As of this writing, fourteen cases have been brought. *See infra* notes 129–138 and accompanying text.

19. The focus of this Article is the federal common law nuisance claims that are the basis of the defendants' arguments for dismissal of the climate tort claims. It does not address the very different body of judge-made federal maritime law.

grounds that brought an end to the first-wave cases: displacement by the Clean Air Act or justiciability. This Article argues that, as a matter of both law and policy, this defense should be rejected, and these path-breaking state climate tort claims allowed to proceed.

This Article adds a few important things to discussions about the climate tort cases. First, it provides a unique narrative of their history that culminates in a close examination of the fossil fuel defendants' defense strategy that has divided district courts. Second, it identifies the doctrinal problem in the Supreme Court's case law that the second-wave defendants are exploiting with their most recent argument and proposes a way to resolve the problem. Finally, this Article offers a new perspective on why allowing the second-wave climate suits to have their day in court is the right result, not only as a legal matter, but also as a policy matter.

Part I begins with a narrative of the fate of the four first-wave climate tort cases. None survived motions to dismiss, and this Part organizes the first-wave cases by the defendants' three successful arguments: (1) the political question doctrine; (2) lack of Article III standing; and (3) displacement of federal common law. Part II describes the second-wave climate tort cases and the defendants' latest argument. Part III explains the Supreme Court law relevant to that argument. It then argues that although that law is admittedly sparse and thus unclear, the only way to bring coherence to the law while adhering to federalism principles is to reject the possibility that state tort law can ever be preempted by federal common law alone. Part IV argues that this is also the right result as a matter of policy. The Article briefly concludes with an explanation of the significance of the fate of the state climate claims for both tort law and climate policy in this country.

I. THE FIRST WAVE OF CLIMATE TORT CASES (2004 TO 2016)

In *AEP*, a group of states, New York City, and three private land trusts sued major electric power companies for climate harms, including significant risks to public lands, infrastructure, and the health of their residents.[20] Because the five defendants were the largest emitters of carbon dioxide in the United States and together emitted 2.5% of all anthropogenic emissions on the planet, the plaintiffs argued that the companies were liable for creating a "substantial and unreasonable interference with public rights" under both federal common law and state

20. *AEP*, 564 U.S. at 418.

tort law.[21] The plaintiffs filed their claims in federal court.[22]

Although the *AEP* litigation consequently lasted seven years, the case never went to trial. Nor did any of the other first-wave cases. The fossil fuel industry defendants succeeded in getting all these cases dismissed on the pleadings on one or more of three grounds: (1) the political question doctrine; (2) lack of standing; or (3) displacement of the federal common law claim. The following three sections explain each, describing each first-wave case in the process.

A. The Political Question Doctrine

In three of the first-wave climate cases, the district courts determined that the cases presented a non-justiciable political question. The Constitution does not mention "political question"; the Supreme Court developed the doctrine based on separation of powers principles.[23] In the 1962 case *Baker v. Carr*,[24] the Supreme Court set out a factor-based test for determining whether a case raises a political question and is thus non-justiciable.[25] In *AEP* the district court concluded that one of those factors was so dominant in the case that it required dismissal on political question grounds: "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[26] No previous federal common law nuisance case involving pollution, the court reasoned, "touched on so many areas of national and international policy" presented by the climate case.[27] In contrast to previous cases, the court reasoned, deciding the climate nuisance claim would mean making decisions about carbon-dioxide levels of the companies' emissions that

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21. *Id.* (citing Brief of the Petitioner at 103–05, 145–47, *AEP*, 564 U.S. 410 (2011) (No. 10-174)).

22. Connecticut v. Am. Elec. Power Co. (*AEP*), 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

23. Baker v. Carr, 369 U.S. 186, 210–11 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

24. *Id.*

25. *See id.* at 217 ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

26. *AEP*, 406 F. Supp. 2d at 272 (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)). All the factors are listed *supra* note 25.

27. *Id.* at 272.

would "require[] identification and balancing of economic, environmental, foreign policy, and national security interests."[28] Thus, the court held that such decisions were for the political branches and granted the defendants' motion to dismiss.[29]

Before the Supreme Court issued its decision in *AEP*, two more first-wave cases were filed—*California v. General Motors Corp.*[30] and *Native Village of Kivalina v. ExxonMobil Corp.*[31] In both, the district courts reached the same conclusion as the *AEP* district court.[32] Each of the other five *Baker* factors was implicated in the two decisions.

In *General Motors*, California's Attorney General sued the six largest motor vehicle manufacturers—responsible for 20% of all anthropogenic U.S. emissions and over 30% of all anthropogenic emissions in California—alleging liability for their contributions to the "public nuisance" of global warming.[33] The state brought nuisance claims under both federal common law and California tort law, and sought damages for various climate harms, including a decrease in the state's water supply caused by a reduction in snow pack, increased flooding, coastline erosion caused by sea level rise, and increases in risk and intensity of wildfires.[34]

The district court in *General Motors* dismissed the case, agreeing with the defendants that the federal common law nuisance claim presented the court with a nonjusticiable political question.[35] The court relied heavily on the district court's decision in *AEP*, and its reasoning essentially tracked that in the first court's opinion.[36] Because a federal common law nuisance claim requires the plaintiff to demonstrate that the defendants' activities created an "*unreasonable* interference with a right common to the general public," the court would have to "balance the competing interests of reducing global warming emissions and the interests of

28. *Id.*

29. *Id.*

30. No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

31. 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

32. *General Motors*, 2007 WL 2726871, at *16.

33. *Id.* at *1. California brought the case against the "Big Six" motor vehicle manufacturers—General Motors, Toyota, Ford, Honda, Daimler Chrysler, and Nissan. *Id.*

34. *Id.* at *1–2. California gets 35% of its water supply from snow pack in the Sierra Nevada region. *Id.* at *1.

35. *Id.* at *16.

36. *See id.* at *8 (citing the *AEP* court's reasoning, concluding that although the *AEP* plaintiffs sought equitable relief while California sought damages, "the same justiciability concerns predominate and significantly constrain this Court's ability to properly adjudicate the [federal common law] claim").

advancing and preserving economic and industrial development."[37] Such balancing, according to the court, "is the type of initial policy determination to be made by the political branches" rather than the courts.[38] The court went on to point to various congressional and executive actions and refusals to act on various climate issues at the national and international levels to support its conclusion that the third *Baker* factor made what the court called California's "federal common law global warming nuisance tort claim" non-justiciable.[39]

The district court found further support for that determination in its assessment of the first *Baker* factor: whether there is "a textually demonstrable constitutional commitment of the issue to" the political branches.[40] The *General Motors* Court agreed with the defendants that the federal nuisance claim would sufficiently burden automobile national and international markets to impinge both on Congress's power to regulate interstate commerce and both political branches' foreign policy powers.[41] A nuisance claim based on climate disruption, the court reasoned, was no ordinary tort claim. According to the court, "recognizing such a new and unprecedented federal common law nuisance claim for damages would likely have commerce implications in other States."[42] Further, the court concluded that recognizing the nuisance claim would interfere with the foreign policy decision of the political branches to refuse to commit to reduction of U.S. greenhouse gas emissions in international climate negotiations.[43]

The court also found that its determination that the nuisance claim was "unprecedented" implicated the second *Baker* factor—a lack of "judicially discoverable or manageable standards."[44] Rejecting California's argument that the court had sufficient federal common law precedent addressing nuisance claims involving interstate pollution to equip it to resolve the state's nuisance claim, the court concluded that these previous cases were unhelpful because they involved injunctive

37. *Id.* at *8 (emphasis added) (quoting *In re* Oswego Barge Corp., 664 F.2d 327, 332 n.5 (2d Cir. 1981)).

38. *Id.*

39. *Id.* at *8–13. The court went on to find that the first and second *Baker* factors also "weigh in favor of the Court's finding that Plaintiff's claim presents a non-justiciable political question." *Id.* at *13–15. All the factors are listed in *supra* note 25.

40. Baker v. Carr, 369 U.S. 186, 217 (1962).

41. *General Motors*, 2007 WL 2726871, at *14.

42. *Id.*

43. *Id.*

44. *Id.*

relief, rather than damages, and because they did not involve the sort of complex issues that were presented by a nuisance claim based on anthropogenic climate disruption.[45] According to the court, there was no way a judicial standard could be formulated to decide "what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or . . . who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe."[46]

Like the *General Motors* Court, the *Kivalina* district court concluded that the second and third *Baker* factors required dismissal on political question grounds.[47] The court's reasoning for each was similar, and echoed that of both the *AEP* and *General Motors* district courts for all the *Baker* factors that they assessed: that the federal nuisance claims based on climate were "unprecedented" in that they raised myriad issues of the sort that federal courts were institutionally incapable of addressing.[48]

Importantly, all three district courts dismissed the cases because their determination that the federal common law nuisance claim presented a political question rendered *only* federal courts without jurisdiction.[49] Thus, the courts did not address the defendants' arguments against the state tort claims, and dismissed the cases without prejudice to refile in state court.[50]

California dropped its case,[51] but both the *AEP* and *Kivalina* plaintiffs

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45. *Id.*

46. *Id.* at *15.

47. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 873–77 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Unlike the *General Motors* Court, the *Kivalina* district court concluded that the first *Baker* factor was not implicated by the federal nuisance claim. *Id.* at 872–73.

48. *See id.* at 876 ("Plaintiffs' global warming nuisance claim seeks to impose liability and damages on a scale unlike any prior environmental pollution case . . . . Consequently . . . application of the second *Baker* factor precludes judicial consideration of Plaintiff's federal nuisance claim."); *id.* at 877 ("[T]he allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance.").

49. *General Motors*, 2007 WL 2726871, at *16.

50. *Kivalina*, 663 F. Supp. 2d at 883; *General Motors*, 2007 WL 2726871, at *16; *see* Connecticut v. Am. Elec. Power Co. (*AEP*), 406 F. Supp. 2d 265, 272–74 (S.D.N.Y. 2005) (addressing only the federal nuisance claim), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

51. California initially appealed to the Ninth Circuit, but withdrew its case in June of 2009, citing recent indications of progress on climate mitigation and adaptation, including the new Obama administration's policy changes and the EPA's finding that greenhouse gases were "pollutants" subject to regulation under the Clean Air Act. *See* Colum. L. Sch. Sabin Ctr. for Climate Change L. & Arnold & Porter Kaye Scholer LLP, *Case Documents for* California v. General Motors Corp., CLIMATE CHANGE LITIG. DATABASE [hereinafter Climate Change Common Law Database], http://climatecasechart.com/case/california-v-gm-corp/ [https://perma.cc/EXU4-YZQP].

appealed the district court's decisions in their cases. And they were successful in *AEP*: the U.S. Court of Appeals for the Second Circuit reversed.[52] Emphasizing the limited nature of the political question doctrine and the highly case-specific nature of the factor-based inquiry,[53] the appellate court closely evaluated each of the six *Baker* factors and concluded that none of them were sufficiently implicated by the case to render it non-justiciable.[54] According to the court of appeals, the district court's analysis of the third factor—the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"—failed to account for the nature of the plaintiffs' claim and, thus, for what it would require a court to decide.[55] Because the plaintiffs alleged specific harms by specific emitters,[56] the Second Circuit reasoned, resolving the case would not require a court to answer questions of national and international climate policies that must be decided by the political branches. Even though the claims alleged that the defendants' emissions contributed to climate disruption and sought redress for harms caused thereby, the case was still "an ordinary tort suit" of the sort that courts address all the time.[57]

The defendants made several other arguments for dismissal that the district court declined to address, all of which the Second Circuit rejected. The Supreme Court did not, however. As discussed below,[58] the Court reversed the Second Circuit on the ground that the federal common law nuisance claim was displaced by federal statutory law.

It was based on this decision by the Supreme Court in *AEP*, rather than on the political question doctrine, that the Ninth Circuit ultimately affirmed the district court's dismissal of Kivalina's case.[59] In the meantime, lower courts continued to dismiss most of the other first-wave

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52. Connecticut v. Am. Elec. Power Co. (*AEP*), 582 F.3d 309, 315 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

53. *See id.* at 323 (noting that "the political question doctrine must be cautiously invoked," and that "*Baker* demands a 'discriminating inquiry into the precise facts and posture of the particular case' before a court may withhold its own constitutional power to resolve cases and controversies" (first quoting Can v. United States, 14 F.3d 160, 163 (2d Cir. 1994); and then quoting Lane v. Halliburton, 529 F.3d 548, 558 (5th Cir. 2008)).

54. *See id.* at 324–32.

55. *See id.* at 331 (quoting McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1365 (11th Cir. 2007)).

56. *See id.* at 330–31.

57. *Id.* at 331 (quoting Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 49 (2d Cir. 1991)).

58. *See infra* section I.C.

59. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).

cases on the grounds that they presented a non-justiciable political question or that the plaintiffs lacked standing.

B. Standing

Because the district courts in *AEP* and *General Motors* concluded that the political question doctrine rendered them without jurisdiction, they declined to address the defendants' other arguments, including that the plaintiffs lacked standing.[60] The district courts in the two other first-wave cases—*Kivalina* and *Comer v. Murphy Oil USA*[61]—did, however.[62] Both concluded that the plaintiffs did not have standing to bring their claims in federal court.

The *Kivalina* district court concluded that federal courts were without jurisdiction over the villagers' case based on the federal Article III standing doctrine as well as on the political question doctrine.[63] Like the political question doctrine, federal standing is a constitutional doctrine based on the separation of powers.[64] Also like the political question doctrine, the standing doctrine is a product of the Supreme Court's

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60. Connecticut v. Am. Elec. Power Co. (*AEP*), 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011); *General Motors*, 2007 WL 2726871, at *16.

61. 585 F.3d 855, 859 (5th Cir. 2009). For the rather remarkable subsequent history of this case, see *infra* notes 103–105 and accompanying text.

62. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 877–82 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). There were two other cases in the first-wave period that brought tort claims for alleged climate harms, but this Article does not include them among the first-wave cases because it focuses only on tort claims that, like those in the second-wave, (1) are brought against corporate actors whose business activities contribute to climate disruption, and (2) allege only climate harms. Most cases filed in this time period fit that description (*AEP*, *Comer*, *General Motors*, and *Kivalina*), but there are two that do not.

First, *Korsinsky v. EPA*, No. 05 Civ. 859, 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005) was brought against the EPA rather than a private actor. *Id.*

Second, in *PAWS Holdings, LLC v. Daikin Indus., Ltd.*, No. CV 116-058, 2017 WL 706624 (S.D. Ga. Feb. 22, 2017), the plaintiff brought negligence and products liability claims against manufacturers of heating, ventilation, and air conditioning units, alleging that their products were defective because they were made of material that permitted leaking of corrosive refrigerant, which destroyed the units well before the end of their useful life. *Id.* at *2. The principal injuries that the plaintiff alleged were monetary losses because of premature product malfunction, and the health and safety risks posed by exposure to leaked refrigerant. *Id.* The plaintiff "further allege[d]" that the units harmed the environment because the leaking refrigerant is a greenhouse gas "that is thousands of times more potent than CO_2." *Id.* This is a very different sort of claim than those brought by all the other climate tort cases, which alleged only climate harms, and with great detail and specificity as to how the particular plaintiffs were impacted. *See infra* Part II (describing the allegations of harm in the first-wave and second-wave cases).

63. *Kivalina*, 663 F. Supp. 2d at 877–82.

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

interpretation of Article III's limitation of the federal judiciary's authority to deciding cases or controversies.[65] The two doctrines are, however, distinct.[66] To establish standing to bring a case, plaintiffs must allege that: (1) they have suffered an "injury in fact"; (2) the injury is "fairly . . . trace[able]" to the defendant's actions; and (3) the injury will "'likely' . . . be 'redressed by a favorable decision.'"[67]

Plaintiffs, such as the Inupiat, who seek redress for harms to their land and other property easily establish the Supreme Court's "injury in fact" requirement of standing. As noted in the introduction, the barrier island is disappearing, as the sea ice that had protected it from powerful waves diminishes. That is unquestionably an "actual," "concrete" injury that is

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65. U.S. CONST. art. III, § 2, cl. 1.

66. As noted *supra* text accompanying notes 10–13, the global surge in climate litigation includes cases against governments as well as cases against fossil fuel companies, such as the climate tort suits in the United States. One of the most important climate cases against governments is *Juliana v. United States*. 217 F. Supp. 3d 1224 (D. Or. 2016). In that case, the plaintiffs—twenty-one young people and a climate scientist acting as guardian for future generations—asserted that the U.S. Constitution protects a right to a "climate system capable of sustaining human life." *Id.* at 1250. The U.S. government violated that right, they claimed, because, for at least the past half century, in full knowledge of the grave danger that fossil fuel use and production present to the climate system, it nevertheless systematically promoted the development of a fossil fuel economy by myriad actions, including approving, promoting, and subsidizing fossil fuel "exploration, extraction, production, transportation, importation, exportation, and combustion." *Id.* at 1248. The plaintiffs sought declaratory and injunctive relief, requesting that the court "[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." *Id.* at 1247 (quoting First Amended Complaint at ¶94, *Juliana*, 217 F. Supp. 3d 1224 (No. 6:15–cv–01517–TC)).

District court Judge Ann Aiken agreed that the Constitution protects such a right and denied all of the government's motions to dismiss. *Id.* at 1250, 1276. The case never went to trial, however, because the Ninth Circuit Court of Appeals agreed to hear the Trump Administration's "extraordinary" writ seeking interlocutory appeal, and a divided panel dismissed the *Juliana* case in January of 2020. Juliana v. United States, 947 F.3d 1159, 1165–66, 1175 (9th Cir. 2020). The panel majority's ostensible ground for dismissal was that the plaintiffs had failed to establish the "redressability" element of standing. *Id.* at 1171–72. As Judge Josephine Stanton persuasively argues in a scathing dissent, however, the majority in effect concluded that the case presented a political question, *id.* at 1185–86, without undertaking the difficult but necessary task of "marching purposefully through the Baker factors," *id.* at 1189.

Notwithstanding that *Juliana* is a constitutional case filed against the federal government in federal court, Chevron's attorney filed a letter with the Ninth Circuit Court of Appeals arguing that *Juliana* required dismissal of the climate tort cases currently pending in that court. See Letter from Theodore J. Boutrous, Jr., Gibson, Dunn & Crutcher LLP, to Molly C. Dwyer, Clerk of Ct., U.S. Ct. of Appeals for the Ninth Cir. (Jan. 29, 2020). Regardless whether the *Juliana* panel majority's problematic opinion remains good law, it is irrelevant to the climate tort cases, which, unlike *Juliana*, assert only state claims and seek only damages, and not injunctive relief.

67. *Lujan*, 504 U.S. at 560–61 (alteration in original) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42, 38 (1976)). As the Supreme Court has explained, the doctrine of standing is "[o]ne of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III." *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

"particular" to the Kivalina villagers, rather than one that is "hypothetical" or suffered by the public generally.[68] Similarly, there is no question that the relief that Kivalina sought—monetary compensation to relocate—would serve to redress that harm.[69] However, the *Kivalina* district court concluded that the villagers failed to establish the "fairly traceable"—or "causation"— requirement.[70]

According to the Supreme Court, the causation prong of Article III standing limits federal jurisdiction to those cases in which the alleged injury "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."[71] Although, as the *Kivalina* court noted, plaintiffs need not allege facts sufficient to establish proximate causation to establish causation for purposes of Article III standing, they must instead show "a substantial likelihood that the defendant's conduct caused [the] injury."[72] The district court concluded that the *Kivalina* plaintiff failed to do so. According to the court, the defendants' conduct that the plaintiffs complained of—greenhouse gas emissions—was not "fairly traceable" to the climate harm of impending displacement faced by the villagers because those emissions became part of an "undifferentiated" mass of greenhouse gases that have been accumulating for "centuries" and to which "a multitude of sources *other than* the Defendants" all over the planet contributed.[73] Thus, the court understood "the Plaintiffs' claim for damages [a]s dependent on a series of events far removed both in space and time from the Defendants' alleged discharge of greenhouse gases."[74] Such an "extremely attenuated causation scenario," reasoned the court, is not sufficient to support standing to bring a federal common law nuisance claim.[75] Such a climate claim is different, the court concluded, from the federal statutory claims at issue in the federal common law cases on which the plaintiffs relied, including some that involved challenges to discharges

68. *Id.* at 560 (explaining that an "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990))).

69. *Id.* at 561 ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." (quoting *Simon*, 426 U.S. at 39)).

70. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 881 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

71. *Simon*, 426 U.S. at 41–42.

72. *Kivalina*, 663 F. Supp. 2d at 878 (quoting Habecker v. Estes Park, 518 F.3d 1217, 1225 (10th Cir. 2008)).

73. *Id.* at 880–81 (emphasis in original).

74. *Id.* at 881.

75. *Id.* at 880.

of pollutants by companies under the Clean Water Act (CWA),[76] and one that involved a challenge to the Environmental Protection Agency's (EPA) failure to regulate greenhouse gas emissions under the Clean Air Act (CAA).[77] Although it acknowledged that there were factual similarities between the causal chain alleged by the village of Kivalina and those alleged by the plaintiffs in these cases—particularly that alleged in the CAA case—the court concluded that the fact that the CWA and CAA plaintiffs brought claims under federal statutes rather than federal common law made all the difference for purposes of standing.

In the CWA cases, Congress had set a standard for the amount of allowable pollutant discharge into waterways, and thus the plaintiffs could allege that the named defendants exceeded that limit.[78] Under those cases, reasoned the *Kivalina* district court, such an allegation entitles plaintiffs to a presumption that the defendant sufficiently "'contributed' to [their] injury" even though "it may not be possible to trace the injury to a particular entity" because Congress had determined that excessive discharges were harmful.[79] "In contrast, there are no federal standards limiting the discharge of greenhouse gases," and thus the *Kivalina* plaintiffs were unable to sufficiently connect the particular defendant companies' emissions with their injuries.[80]

Because the CAA case did involve discharge of greenhouse gases, the court could not distinguish it, as it did for the CWA cases, by pointing to the existence of a congressional standard serving to link prohibited conduct with the capacity to harm. In that case, *Massachusetts v. Environmental Protection Agency*,[81] the Supreme Court held that several states had standing to sue the EPA for refusing to regulate greenhouse gas emissions under the CAA.[82] Like Kivalina, Massachusetts's alleged injury was disappearance of its land due to anthropogenic climate disruption.[83]

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76. *See id.* at 878–82 (first citing Pub. Int. Rsch. Grp. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990); and then citing Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161–62 (4th Cir. 2000)). In these statutory cases, the plaintiffs brought suit pursuant to the citizen suit provisions of the CWA, 33 U.S.C. § 1365, and the CAA, 42 U.S.C. § 7604.

77. *See Kivalina*, 663 F. Supp. 2d at 882 (citing Massachusetts v. EPA, 549 U.S. 497 (2007)).

78. The Clean Water Act (CWA) establishes the "National Pollutant Discharge System" to limit the amount of pollutants that facilities can discharge into waters of the United States. *See* 33 U.S.C. § 1342. Any unauthorized pollutant discharge is unlawful under the CWA. *See* 33 U.S.C. § 1311(a).

79. *Kivalina*, 663 F. Supp. 2d at 879–80 (quoting Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 558 (5th Cir. 1996)).

80. *Id.* at 880.

81. 549 U.S. 497 (2007).

82. *Id.* at 526.

83. *Id.* at 522.

Massachusetts made similar factual allegations to those made by Kivalina regarding the causal link between that injury and the challenged conduct—i.e., the EPA's refusal to regulate greenhouse gas emissions.[84] Nevertheless, the court distinguished Kivalina's case based on the fact that the claim in *Massachusetts* was statutory, rather than common law. Specifically, the court stated that the *Kivalina* plaintiffs were not "seeking to enforce any procedural rights concerning an agency's rulemaking authority," but instead asserted a claim "for damages directed against a variety of private entities."[85] Thus, like the CWA cases, the *Kivalina* district court concluded that a statutory provision served to somehow sufficiently link the conduct with the injury for the *Massachusetts* plaintiffs to establish the causation requirement of Article III standing. Curiously, however, the court did not look to the nature of the federal common law claim, as it did with the statutory claims, to determine whether the *Kivalina* plaintiffs had alleged sufficient facts to establish causation for purposes of standing to bring *the sort of claim that they had brought*.[86] In contrast, the Fifth Circuit Court of Appeals did focus on the nature of the plaintiffs' tort claims in *Comer v. Murphy Oil USA*,[87] and determined that they had established Article III standing.

In *Comer*, Mississippi land and property owners sued several oil, energy, and chemical companies for damage to the Mississippi Gulf Coast caused by Hurricane Katrina and sea level rise.[88] The district court in

84. *See id.* at 523–26 ("While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. . . . The risk of catastrophic harm, though remote, is nevertheless real." (emphasis in original)).

85. *Kivalina*, 663 F. Supp. 2d at 882.

86. Neither did Judge Pro, the district judge sitting on the Ninth Circuit panel that heard Kivalina's appeal. As noted, because the Ninth Circuit upheld the district court's dismissal of the villagers' case based on the Supreme Court's intervening decision in *AEP*, holding that the CAA displaced the federal common law claim in that case, the court declined to address the district court's political question and standing analyses. *See supra* text accompanying notes 58–59. Judge Pro, however, did address standing in a concurring opinion. Because he understood the nature of the federal common law nuisance claim in the same way as the district court, he agreed with that court that Kivalina did not meet the causation requirement of the standing doctrine. He concluded that Kivalina had failed to establish the requisite causal nexus because they neither alleged a specific point in time at which "their injury occurred nor tie[d] it to [the defendants'] activities within this vast time frame" in which global warming has been occurring. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 868 (9th Cir. 2012). Thus, he reasoned, the villagers could not rely on *Massachusetts*. *See id.* at 869 ("It is one thing to hold that a State has standing to pursue a statutory procedural right granted to it by Congress in the CAA to challenge the EPA's failure to regulate . . . . It is quite another to hold that a private party has standing to pick and choose amongst all the greenhouse gas emitters throughout history to hold liable for millions of dollars in damages.").

87. 585 F.3d 855 (5th Cir. 2009).

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

Comer concluded that the plaintiffs in that climate tort case lacked federal standing,[89] but did not provide the reasons for its decision in a written opinion.[90] The *Comer* plaintiffs appealed, and the Fifth Circuit panel reached the opposite conclusion, reversing the district court and remanding so the plaintiffs could pursue their claims.[91] Contrasting the Fifth Circuit's analysis of the standing "causation" requirement with the *Kivalina* district court's analysis of that requirement for the federal common law nuisance claim, illustrates the great significance of the court's understanding of the nature of a given claim—whatever its legal source—to standing analysis.

Like in all the first-wave cases, the plaintiffs in *Comer* filed their claims in federal court. Unlike all the other plaintiffs in the first-wave cases, however, the Mississippi plaintiffs brought only state common law claims: public and private nuisance, trespass, negligence, fraudulent misrepresentation, civil conspiracy, and unjust enrichment.[92] They alleged that the defendants were responsible for the damage because their business operations contributed to climate disruption, which caused increases in sea level and the severity of the storm.[93]

On appeal, the Fifth Circuit held that the district court erroneously dismissed their "public and private nuisance, trespass, and negligence claims," but upheld its dismissal of their "unjust enrichment, civil conspiracy, and fraudulent misrepresentation claims."[94] Like the *Kivalina* plaintiffs, the *Comer* plaintiffs easily satisfied the "injury in fact" requirement by alleging public and private property damage as well as the "redressability" requirement by seeking monetary compensation. Thus, like the *Kivalina* defendants, the *Comer* defendants based their standing challenge on an argument that the plaintiffs had failed to allege that their injuries were "fairly traceable" to the defendants' alleged tortious conduct.[95]

As noted, comparing the Fifth Circuit's analysis of the standing "causation" requirement for the common law claims brought by the *Comer* plaintiffs, with the *Kivalina* district court's analysis of that same requirement for the common law claim, reveals that it is crucial to closely

89. Comer v. Murphy Oil USA, Inc., No. 1:05–CV–436–LG–RHW, 2007 WL 6942285, at *1 (S.D. Miss. Aug. 30, 2007).

90. In its summary order, the district court noted that it stated its reasoning into the record. *Id.*

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

92. *Id.*

93. *Id.* at 859.

94. *Id.* at 879–80.

95. *See id.* at 863–64.

inquire into the nature of the claim at issue to properly assess standing. In contrast to the *Kivalina* district court—which did not even look to the elements of a federal common law nuisance claim in concluding the plaintiffs lacked standing—the Fifth Circuit panel noted the elements of each of the *Comer* plaintiffs' state tort law claims in determining whether they had alleged sufficient facts to establish standing causation.[96] That makes sense, as the causal link for any claim—regardless of its legal source—is between the alleged unlawful conduct of the defendant and the alleged harm suffered by the plaintiff. Thus, in the CWA cases, the link had to be between discharge of a pollutant and harm to the plaintiffs' property, and in *Massachusetts*, between the EPA's failure to regulate greenhouse gas emissions and loss of land.

The *Comer* panel noted that in their first set of claims—nuisance, trespass, and negligence—the conduct that the plaintiffs alleged was tortious was the companies' greenhouse gas emissions.[97] The emissions were a public and private nuisance because they constituted an unreasonable interference with the plaintiffs' use of nearby public property and of their own property; a trespass because they caused destructive and hazardous substances to enter the plaintiffs' property; and negligent because they unreasonably endangered the plaintiffs, the general public, and the environment in violation of the companies' duty to avoid unreasonably causing harm by conducting their business.[98] Because it carefully looked at the nature of the plaintiffs' tort claims in this way, the Fifth Circuit, in contrast to the *Kivalina* district court, agreed with the plaintiffs that, under *Massachusetts*, they had standing to bring each of these claims. Indeed, according to the Fifth Circuit, in *Massachusetts* "the Court accepted a causal chain *virtually identical* in part to that alleged by plaintiffs, *viz.*, that defendants' greenhouse gas emissions contributed to the warming of the environment, including the ocean's temperature, which damaged plaintiffs' coastal Mississippi property via sea level rise and the increased intensity of Hurricane Katrina."[99] "In fact," continued the court, "the *Massachusetts* Court recognized a causal chain extending one step further—*i.e.*, that because

96. *See id.* at 860–61.

97. *See id.* at 863 ("[T]he . . . public and private nuisance, trespass, and negligence claims[] all . . . rely on allegations of a causal link between greenhouse gas emissions, global warming, and the destruction of the plaintiffs' property by rising sea levels and the added ferocity of Hurricane Katrina."); *see also id.* (grouping the unjust enrichment, civil conspiracy, and fraudulent misrepresentation claims together because they were all "based on plaintiffs' alleged injuries caused by defendants' public relations campaigns and pricing of petrochemicals").

98. *Id.* at 860–61.

99. *Id.* at 865 (emphasis added).

the EPA did not regulate greenhouse gas emissions, motor vehicles emitted more greenhouse gasses than they otherwise would have, thus contributing to global warming, which injured Massachusetts lands through sea level rise and increased storm ferocity."[100]

Unlike the *Kivalina* district court, the Fifth Circuit panel did not even mention the existence of a right to bring an action against the EPA in the CAA, or any other statutory provision. Rather, its analysis focused on whether the alleged illegal conduct—greenhouse gas emissions—was "fairly traceable" to the alleged harms to property, human health, and the environment. By these lights, as the court noted, the causal link in *Comer* was even closer than that accepted by the Court in *Massachusetts*. The Fifth Circuit thus held that the companies' argument that standing was lacking for these claims was "without merit."[101]

The Fifth Circuit panel also found that the district court erred in finding that the plaintiffs' nuisance, negligence, and trespass claims presented a political question, and remanded to the district court.[102] The Fifth Circuit initially granted rehearing en banc,[103] but then dismissed the appeal for lack of a quorum.[104] Rather oddly, however, the majority reinstated the district court's dismissal and vacated the panel's decision.[105] The Second Circuit's decision in *AEP* holding that the plaintiffs had standing and that their claim did not present a political question was reversed on other grounds by the Supreme Court, as discussed in the following section.[106] As noted, in light of the Court's *AEP* decision, the Ninth Circuit in *Kivalina* also upheld the district court's dismissal on displacement grounds and declined to address the issues of standing and political question.

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100. *Id.*

101. *Id.*

102. *Id.* at 879–80. The court upheld the dismissal of the unjust enrichment, civil conspiracy, and fraudulent misrepresentation claims on the ground that they lacked "prudential" standing, a doctrine related to, but distinct from, Article III standing. *See id.* at 867–69.

103. *See* Comer v. Murphy Oil USA, 598 F.3d 208, 210 (5th Cir. 2010).

104. *See* Comer v. Murphy Oil USA, 607 F.3d 1049, 1054–55 (5th Cir. 2010).

105. *Id.* at 1055. Judges Davis, Stewart, and Dennis dissented from the dismissal of the appeal. *Id.* at 1055–56. Judge Dennis wrote a lengthy opinion dissenting from what he called "the shockingly unwarranted actions of ruling that the panel decision has been irrevocably vacated and dismissing the appeal without adjudicating its merits." *Id.* at 1056.

106. *See* discussion *infra* section I.C. After concluding that the district court erred in finding that the case presented a political question, *see supra* section I.A, the Second Circuit rejected the defendants' other arguments for dismissal, including lack of standing and displacement. *See* Connecticut v. Am. Elec. Power Co. (*AEP*), 582 F.3d 309, 332, 349, 387–88 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

C. Displacement of Federal Common Law

Many people have some idea what state tort law is, and, in fact, think of the common law as state law. That makes sense. After all, federal common law such as the public nuisance claim in *AEP* is much more limited than state common law, both in types of claims and the frequency with which they are brought. As the Supreme Court has repeatedly emphasized in the handful of public nuisance cases that it has decided, federal common law is "an unusual exercise of lawmaking by federal courts."[107] Federal common law is relatively rare for two reasons. First, state common law is usually more appropriate; only in exceptional cases involving a handful of interstate issues has the Court required a federal law of decision to ensure uniformity.[108] Second, because this need for a federal law of decision is the only reason justifying federal common law, it is appropriate only when Congress has not addressed the issue presented by the case.[109] As the Court has noted, "[f]ederal common law is a 'necessary expedient'" that is no longer necessary once Congress has addressed the issue.[110] Thus, Congress need not "affirmatively proscribe[] the use of federal common law"; rather, the question is whether Congress has enacted legislation that "addresse[s]" or "sp[eaks] directly" to the issue.[111] When Congress has done so, the federal statute "displaces" federal common law.[112]

In *AEP*, the Supreme Court held that that the plaintiffs' federal common law claim was displaced by the CAA.[113] The Court reasoned that, because the plaintiffs sought abatement of the defendants' emissions, and the CAA authorizes the EPA to regulate those emissions, Congress had "sp[oken] directly" to the issue.[114] Thus, courts had nothing to say about

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107. Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 314 (1981).

108. *Id.* at 335–36.

109. *Id.* at 313–14.

110. *Id.* at 314 (quoting Comm. for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976)).

111. *Id.* at 315.

112. *See* Am. Elec. Power Co. v. Connecticut (*AEP*), 564 U.S. 410, 423–24 (2011). The doctrine of displacement applies to federal common law only. The doctrine of preemption, by contrast, applies to state law only (whether state statutory or common law). For a full explanation of federal preemption of state law, see *infra* Part III.

113. *Id.* at 423 ("[I]t is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.").

114. *Id.* at 424. More specifically, the plaintiffs "sought injunctive relief requiring each defendant to 'cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at

the matter through federal common law, and the Second Circuit erroneously concluded otherwise.

In reaching its conclusion that the federal nuisance claim in *AEP* was not displaced, the Second Circuit acknowledged that the CAA authorized the EPA to regulate emissions of greenhouse gases.[115] However, according to the court, that authorization alone did not displace a nuisance claim seeking abatement of those emissions by the defendants, because the EPA had yet to exercise that authority by issuing regulations.[116] Until and unless the Agency did so, the court held "the CAA does not . . . regulate" emissions of the sort that the plaintiffs sought to abate through the federal common law.[117]

When *AEP* reached the Supreme Court, the EPA had still not regulated greenhouse gas emissions. That did not matter, however: in a unanimous opinion, the Court agreed with the defendants that the legislative authorization alone meant that Congress had addressed the issue and thus displaced federal common law.[118] Similar to the *Kivalina* district court in its standing analysis, the Court did not give more than a cursory reference to the nature of a federal common law public nuisance claim in reaching its conclusion that the claim was displaced. Rather, in so holding, the Court highlighted the different institutional capacities of "expert" administrative agencies such as the EPA and courts.[119] The Court

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least a decade.'" *Id.* at 419 (quoting Complaint at 110, *AEP*, 564 U.S. 410 (No. 10-174)).

115. *See* Connecticut v. Am. Elec. Power Co. (*AEP*), 582 F.3d 309, 378 (2d Cir. 2009) ("After *Massachusetts*, it is clear that EPA has statutory authority to regulate greenhouse gases as a 'pollutant' under the Clean Air Act."), *rev'd*, 564 U.S. 410 (2011).

116. *Id.* at 379–80.

117. *Id.* at 381. The court left open the question whether such a nuisance claim would be displaced in the event that the EPA did exercise that regulatory authority. *Id.*

118. *See AEP*, 564 U.S. at 425–26 ("The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants; *the delegation is what displaces federal common law*." (emphasis added)); *see also id.* at 429 ("The Second Circuit erred . . . in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits . . . .").

119. *See, e.g.*, *id.* at 419 ("The [CWA] installed an all-encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively with interstate water pollution."); *id.* at 426 ("[W]ere EPA to decline to regulate carbon-dioxide emissions altogether . . . the federal courts would have no warrant to employ the federal common law of nuisance to upset the Agency's expert determination."); *id.* at 427 ("[T]his prescribed order of decisionmaking—the first decider under the [CAA] is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law."); *id.* at 428 ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.").

explained that "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector" requires "complex balancing" between "the environmental benefit potentially achievable" with "our Nation's energy needs and the possibility of economic disruption."[120] This is not a job that courts are equipped to do, as they "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."[121] But that is what, according to the Court, the federal nuisance claim would ask of courts, since they would have to "determine, in the first instance, what amount of carbon-dioxide emissions is 'unreasonable.'"[122] Although a public nuisance under federal common law is an "unreasonable interference with a right common to the general public,"[123] the Court did not elaborate on the nature of the judicial inquiry specific to that common law claim by, for example, drawing on precedent elaborating on that standard. Instead, the Court just assumed that applying that standard would parallel that required of the EPA in the exercise of its CAA authority.

Thus, even if the EPA never regulates carbon dioxide emissions, federal common law is not available for actions seeking abatement of greenhouse gas emissions under *AEP*. However, that leaves open the question of whether plaintiffs can still bring federal nuisance claims for *damages* to compensate for climate harms caused by greenhouse gas emissions. After all, the CAA does not contain any provisions regarding damages to remedy harms caused by greenhouse gases or any other air pollutant. In the *Kivalina* plaintiffs' appeal of the district court's dismissal of their case, they argued that their nuisance claim was not displaced under *AEP* for this reason, as they were seeking compensation, not abatement of emissions.[124] The Ninth Circuit disagreed, concluding that Supreme Court case law indicated that "displacement of a federal common law right of action means displacement of [all] remedies," and thus that "*AEP* extinguished Kivalina's federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions."[125]

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120. *Id.* at 427.

121. *Id.* at 428.

122. *Id.*

123. RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).

124. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012).

125. *Id.* In a concurring opinion, Judge Pro, the district judge sitting on the Ninth Circuit panel in *Kivalina*, carefully analyzed the relevant Supreme Court case law to highlight the "tension . . . on whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim." *Id.* at 858. He ultimately agreed that under the best reading of the cases, the majority correctly

Importantly, the *AEP* Court made clear that its displacement decision impacted only the *federal* common law claim. The Court thus "le[ft] the matter [of the state tort claims] open for consideration on remand."[126] The shift to state law and state courts is one of the key distinguishing features of the second wave of climate tort suits. This makes sense given the fate of the first-wave suits. In addition to displacement, the other doctrines that have proven fatal to climate tort suits thus far—the political question and Article III standing doctrines—apply only in federal courts. Although state courts do apply these doctrines, they are based on state constitutions rather than on the Federal Constitution. Furthermore, state courts have a much greater familiarity with common law claims because, unlike federal courts, they adjudicate them regularly. As a result, they are in a much better position to evaluate grounds for dismissal in light of the specific nature of the tort claims alleged, rather than focusing on climate disruption generally, as the first-wave federal district courts did. As explained in greater detail below,[127] for both these reasons, it is less likely that all state courts will dismiss the second wave of climate suits based on the state

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decided that a damages claim was also displaced under *AEP*. *Id.* at 866.

126. *AEP*, 564 U.S. at 429. The plaintiffs did not pursue their state law claims after the Court's decision, however. Because they did not allege state law claims, the Ninth Circuit's decision that *AEP* required displacement of their federal common law claim brought their case to an end. *See Kivalina*, 696 F.3d at 858. The court recognized that its decision "obviously does not aid Kivalina, which itself is being displaced by the rising sea." *Id.* "But the solution to Kivalina's dire circumstance," the court continued, "must rest in the hands of the legislative and executive branches of our government, not the federal common law." *Id.* In January of 2020, the Native Village of Kivalina joined four Louisiana tribes in submitting a complaint to multiple U.N. special rapporteurs, claiming that the U.S. government is violating its international human rights obligations by failing to address climate impacts that result in forced displacement. *See* THE ALASKA INST. FOR JUST., RIGHTS OF INDIGENOUS PEOPLE IN ADDRESSING CLIMATE-FORCED DISPLACEMENT 3 (2020). The tribes allege:

> The United States government has known for decades that changes to the environment caused by the effects of climate change, as well as human-made disasters, threaten these coastal Tribal Nations in Alaska and Louisiana. Among these threats include rising sea levels, catastrophic storms, and unchecked extraction of oil and gas. When these threats impact citizens of these Tribal Nations, the government has failed to allocate funds, technical assistance and other resources to support the Tribes' right to self-determination to implement community-led adaptation efforts that effectively protect the lives and livelihoods of Tribal citizens [sic] The government's inaction has gone beyond basic negligence where the government has failed to engage, consult, acknowledge and promote the self-determination of these Tribes as they identify and develop adaptation strategies, including resettlement [sic]. By failing to act, the U.S. government has placed these Tribes at existential risk.

Id. at 9. They ask the Special Rapporteurs to "find that climate-forced displacement is a human rights crisis" and to make a number of recommendations to the U.S. government, including "[r]ecogniz[ing] the self-determination and inherent sovereignty of all of the Tribes," establishing a "relocation institutional framework that is based in human rights protections to adequately respond to the threats facing Tribal Nations, including the rapid provision of resources for adaptation efforts that protect the right to culture, health, safe-drinking water, food, and adequate housing," and funding "the tribal-led relocation process for the Alaska Native Village of Kivalina." *Id.* at 10–11.

127. *See infra* Part II.

versions of either doctrine.

It thus makes sense that, rather than making these arguments in state courts, the defendants in the second-wave climate tort suits are arguing that all of the state claims are preempted by federal common law, and then attempting to remove them to federal court. If they are successful in this defense strategy, there is a significant chance that the second wave will suffer the same fate as its predecessor.[128] The next Part describes this second wave of climate tort suits and the principal defense strategy to defeat them: namely, to "federalize" the state claims.

II. THE SECOND WAVE OF CLIMATE TORT CASES (2017 TO PRESENT)

The first wave of climate tort cases ended with the Supreme Court's displacement decision in *AEP* and the Ninth Circuit's extension of it to damages claims in *Kivalina* in 2012. The waters remained still for the next five years.[129] But beginning in the summer of 2017, the pace of climate tort filings increased dramatically. In contrast to most of the first-wave cases, these recent plaintiffs are bringing *only* state claims. And, unlike all of the first-wave cases, all except one in the second wave have filed in state court, rather than federal.

Beginning in July of 2017, several cities and counties, one state, and, most recently, a commercial fishing industry trade group, have filed state tort claims seeking compensation from fossil fuel industry defendants for current and future damages to infrastructure, land and other natural resources, residents' health and property, and livelihoods.[130] Within just three years, the number of second-wave climate tort cases filed is now four times the total number of first-wave cases filed in the previous

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128. Indeed, all the district courts that heard the first-wave cases held that one or both doctrines barred the suits. *See supra* sections I.A, I.B. Further, it bears mention that in *AEP*, four Justices "would [have] h[e]ld that none of the plaintiffs ha[d] Article III standing." 564 U.S. at 420. Because Justice Sotomayor did not participate in the decision, the Court affirmed the Second Circuit's decision finding Article III standing and reversed its decision finding that the claim was not displaced by the CAA. *Id.* at 420, 429.

129. A chronological listing of filings with links to court documents of all U.S. common law climate actions is available at Climate Change Common Law Database, *supra* note 51, at http://climatecasechart.com/case-category/common-law-claims/ [https://perma.cc/292K-AAA9]. The site is also an excellent resource on all types of climate litigation in the United States and in rest of the world. *See id. PAWS Holdings* was filed in 2016, but I do not include it among climate tort cases for purposes of this Article because the principal harms alleged were not related to climate disruption. *See supra* note 62.

130. *See* Climate Change Common Law Database, *supra* note 51.

twelve years.[131]

From July of 2017 through the end of the year, several California counties and cities sued Chevron, ExxonMobil, Shell, and other major fossil fuel producers in state courts for current and future damage to homes and infrastructure caused by climate change induced sea level rise.[132] New York City then brought the first second-wave suit of 2018, and the only one filed in federal court, suing the five largest fossil fuel producers for damages for various climate injuries, including more intense heat waves, extreme precipitation, and sea level rise.[133] Next, the city of Boulder and two counties sued Suncor Energy and ExxonMobil in Colorado state courts, the first climate tort case brought by communities living in an interior, non-coastal region of the United States.[134] A month later, in May of 2018, King County filed suit in Washington state court against BP and five other companies, alleging similar climate harms to those alleged by California coastal communities, as well as the threat presented by ocean acidification to the region's significant shellfish industry.[135] In July, Rhode Island became the first state plaintiff of these second-wave cases, filing suit against several companies.[136] Later in the month, Baltimore filed suit in Maryland state court against twenty-six fossil fuel companies.[137] A few months later, the Pacific Coast Federation of Fishermen's Associations—the largest commercial fishing industry trade group on the west coast—filed suit "seek[ing] to hold" several companies "accountable for acute changes to the ocean off of California and Oregon that resulted, over the last three years, in prolonged regulatory closures of the Dungeness crab fisheries—the most lucrative and reliable fisheries on the west coast."[138]

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131. Four cases were filed in the first wave, *see supra* Part I, and, thus far, sixteen cases have been filed since July of 2017. *See* Climate Change Common Law Database, *supra* note 51.

132. *See* Climate Change Common Law Database, *supra* note 51. Summaries of each case are provided in the California entries in Climate Change Common Law Database. *Id.*

133. *See* Complaint, City of N.Y. v. BP P.L.C., No. 18-CV-182 (S.D.N.Y. Jan. 9, 2018). The city alleged that the defendants were together responsible "for over 11% of all the carbon and methane pollution from industrial sources that has accumulated in the atmosphere since the dawn of the Industrial Revolution." *Id.* at 2.

134. *See* Amended Complaint and Jury Demand, Cnty. Comm'rs v. Suncor Energy, Inc., No. 2018CV30349 (Colo. Dist. Ct. June 11, 2018) [hereinafter Boulder Complaint].

135. *See* Complaint, King Cnty. v. BP P.L.C., No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018). King County includes Seattle and Bellevue.

136. *See* Complaint, Rhode Island v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018) [hereinafter Rhode Island Complaint].

137. *See* Plaintiff's Complaint, Mayor of Balt. v. BP P.L.C., No. 24-C-18-004219 (Md. Cir. Ct. July 20, 2018).

138. *See* Complaint ¶ 1, Pac. Coast Fed'n. of Fishermen's Ass'ns v. Chevron Corp., No. CGC-18-

The first case of 2020 was filed by the city and county of Honolulu against Sunoco, ExxonMobil, Chevron, BP, Shell, ConocoPhillips, and other major oil and gas companies. Honolulu is seeking damages for myriad climate harms, including bleaching of coral reefs, loss of marine life and several bird species unique to the region, flooding from sea level rise and more intense weather events, heatwaves, drought, and corrosion of the water mains of its drinking supply system from seawater intrusion.[139] Honolulu's climate case is particularly important since, as the only island state, Hawai'i is particularly vulnerable to the climate crisis.[140] Finally, the most recent filing as of this writing was by Minnesota, the second state to file a climate tort suit.[141] Minnesota's case is the first to name the American Petroleum Institute, the major industry trade association of which the defendants in all the cases are members and the actions of which are extensively documented in all the complaints.[142] Minnesota's complaint is also notable because it highlights the disproportionate impact of the climate crisis on the state's most vulnerable

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571285 (Cal. Super. Ct. Nov. 14, 2018) [hereinafter Fishermen's Complaint].

139. *See* Complaint ¶¶ 149–52, City of Honolulu v. Sunoco LP, No. 1CCV-20-0000380 (Haw. Cir. Ct. Mar. 9, 2020) [hereinafter Honolulu Complaint]. The Mayor of Maui County has also announced his intention to bring suit against fossil fuel companies. *See* Press Release, Cnty. of Maui Pub. Info. Off., Maui County to Hold Fossil Fuel Companies Accountable for Costs & Consequences of Climate Change (Oct. 29, 2019), https://www.documentcloud.org/documents/6785849-Maui-Press-Release-Climate-Change-Lawsuit-10-29-19.html [https://perma.cc/W7U6-57MF].

140. The most recent National Climate Assessment report details how Hawai'i and "U.S. affiliated Pacific Islands" (i.e., the Northern Mariana Islands, Micronesia, the Marshall Islands, Palau, American Samoa, and Guam) "are at risk from climate changes that will affect nearly every aspect of life." Jo-Ann Leong et al., *Hawai'i and U.S. Affiliated Pacific Islands*, *in* CLIMATE CHANGE IMPACTS IN THE UNITED STATES 537, 538 (Jerry M. Melillo et al. eds., 2014), https://nca2014.globalchange.gov/downloads [https://perma.cc/7LZR-N63G]. As a later report also details, the U.S. island territories of Puerto Rico and the U.S Virgin Islands face similar climate risks "to food security, the economy, culture, and ecosystems services." William A. Gould et al., *U.S. Caribbean*, *in* 2 IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT 809, 816 (David R. Reidmiller et al. eds., 2018), https://nca2018.globalchange.gov/downloads/NCA4_Ch20_US-Caribbean_Full.pdf [https://perma.cc/Y9QH-GDND]. Indeed, a recent report assessing levels of exposure and vulnerability to extreme weather events all over the world concluded that Puerto Rico was one of the three countries and territories "most affected by extreme weather events" in the period from 1999 to 2018, along with Myanmar and Haiti. DAVID ECKSTEIN ET AL., GLOBAL CLIMATE RISK INDEX 2020, at 4, 9 (Joanne Chapman-Rose & Janina Longwitz eds., 2019), https://germanwatch.org/sites/germanwatch.org/files/20-2-01e%20Global%20Climate%20Risk%20Index%202020_10.pdf [https://perma.cc/4XDP-UGUF].

141. *See* Complaint, Minnesota v. Am. Petroleum Inst., No. 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020) [hereinafter Minnesota Complaint], https://www.ag.state.mn.us/Office/Communications/2020/docs/ExxonKochAPI_Complaint.pdf [https://perma.cc/BQZ8-5LLM].

142. *Id.* ¶¶ 13–16.

residents, including communities of color, those living in poverty, the elderly, and children.[143] It alleges health effects from increasing heatwaves, wildfires, air pollution, and flooding.[144] Indeed, the complaint's opening paragraph states: "Warming will continue with devastating economic and public-health consequences across the state and, in particular, disproportionately impact people living in poverty and people of color."[145]

As noted, all of these second-wave plaintiffs have brought only state tort claims. In response, all of the defendants are seeking to "federalize" the state claims of the second-wave climate suits by arguing that federal common law preempts them. Also as noted, for the first time, the plaintiffs in most of the second-wave cases filed in state courts (all but one).[146] In all of those cases, the defendants have also filed notices of removal to federal court on the ground that federal common law preemption of the state claims provides federal courts with subject matter jurisdiction under the federal-question statute.[147]

These second-wave cases have understandably garnered significant attention because they rely on even more robust evidence than those of the first wave and are using potentially powerful litigation strategies. Sections A and B address each in turn. The final section of this Part explains the defendants' attempt to federalize the state claims so they can resort to the same or similar arguments that were successful in getting federal courts to dismiss the first-wave suits.

A. Strong Evidence of Defendants' Responsibility for Climate Harms, Knowledge Thereof, and Disinformation Campaign to Suppress It

Since the Supreme Court's *AEP* decision put an end to the first-wave cases, the evidence that anthropogenic greenhouse gas emissions have disrupted the planet's climate system, and thereby wreaked myriad catastrophic harms at an ever-increasing pace, has steadily

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143. *See id.* at 67.

144. *Id.* ¶¶ 159, 161.

145. *Id.* ¶ 1. In his press release announcing the state's suit, Minnesota Attorney General Keith Ellison stated: "Impacts from climate change hurt our low-income residents and communities of color first and worst." Press Release, Off. of Minn. Att'y Gen. Keith Ellison, AG Ellison Sues ExxonMobil, Koch Industries & American Petroleum Institute for Deceiving, Defrauding Minnesotans About Climate Change (June 24, 2020), https://www.ag.state.mn.us/Office/Communications/2020/06/24_ExxonKochAPI.asp [https://perma.cc/4JJC-SCQD].

146. *See supra* text accompanying note 131.

147. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

strengthened.[148] The complaints filed by the second-wave climate tort plaintiffs lay out this scientific evidence in great, sobering detail. In addition to strong evidence of the causal links between anthropogenic greenhouse gas emissions and climate impacts such as sea level rise, wildfires, and more intense storms, the plaintiffs present two timelines alongside each other to striking effect. First, "[t]he substantial majority of all greenhouse gas emissions in history has occurred since the 1950s, a period known as the 'Great Acceleration.'"[149] Second, the complaints set forth extensive documentary evidence that another "acceleration" took place over the same period of time: namely, the fossil fuel industry became increasingly aware that their products were contributing to the dangerous transformation of the planet's climate. In the 1950s, the companies and the American Petroleum Institute (API), the trade association of which all the major fossil fuel companies are members, began putting significant funding into research on the changes in the climate systems that would be caused by continued anthropogenic emissions of greenhouse gases and the consequences for people and the

148. *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 40 (Rajendra K. Pachauri & Leo A. Meyer eds., 2015), https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf [https://perma.cc/VD33-3VBG] ("Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems.").

> The evidence for human influence on the climate system has grown since [the 2007 Synthesis Report]. Human influence has been detected in warming of the atmosphere and the ocean, in changes in the global water cycle, in reductions in snow and ice, and in global mean sea level rise; and it is *extremely likely* to have been the dominant cause of the observed warming since the mid-20th century. In recent decades, changes in climate have caused impacts on natural and human systems on all continents and across the oceans. Impacts are due to observed climate change, irrespective of its cause, indicating the sensitivity of natural and human systems to changing climate.

Id. at 47 (emphasis in original).

149. *See* Complaint ¶ 4, City of Imperial Beach v. Chevron Corp., No. C17-01227 (Cal. Super. Ct. July 17, 2017) [hereinafter San Mateo Complaint] (quoting Will Steffen et al., *The Trajectory of the Anthropocene: The Great Acceleration*, 2 ANTHROPOCENE REV. 81 (2015)) (Imperial Beach's and Marin County's cases were consolidated with San Mateo's when removed to federal court). The "Great Acceleration" was coined by a group of scientists working with the International Geosphere-Biosphere Programme. *See Great Acceleration*, INT'L GEOSPHERE-BIOSPHERE PROGRAMME, http://www.igbp.net/globalchange/greatacceleration.4.1b8ae20512db692f2a680001630.html [https://perma.cc/H4TC-5CCV]. In 2015, they published graphs showing "socio-economic and Earth System trends from 1750 to 2000." *See* Steffen et al., *supra*. To "evaluate the rate and magnitude of human-driven change compared to natural variability," they assess the increase in atmospheric carbon dioxide levels over time. *Great Acceleration*, *supra*. Based on these findings, they concluded: "Only beyond the mid-20th century is there clear evidence for fundamental shifts in the state and functioning of the Earth System that are beyond [previous] range of variability . . . and driven by human activities." Steffen et al., *supra*.

planet.[150] The level of accuracy in the predictions of the various research reports over the years is striking. For example, the complaints quote from a series of reports by Stanford Research Institute scientists that the API received and distributed to its members in the late 1960s.[151] The scientists stated that by the year 2000, "[s]ignificant temperature changes are almost certain to occur," and that "the potential damage to our environment could be severe," including the "melting of the Antarctic ice cap."[152] The report further stated that by the same year "atmospheric CO_2 concentrations would reach 370 ppm."[153] As Honolulu's complaint notes, that is "almost exactly what it turned out to be (369 ppm)."[154] "What was missing, the scientists said, was work on 'air pollution technology and . . . systems in which CO_2 emissions would be brought under control.'"[155] Similarly, a 1979 Exxon internal memorandum stated that limiting the CO_2 concentration in the atmosphere to what was "assumed to be a relatively safe level for the environment" would require "[e]ighty percent of fossil fuel resources . . . to be left in the ground," minimal use of fossil fuels such as shale oil, and rapid deployment of carbon-free energy systems.[156]

In response, instead of taking measures to change their business activities to mitigate their consequences, the companies accelerated those activities, protected their infrastructure from the climate impacts they knew were coming, and mounted a concerted disinformation campaign to create doubt about the impact of fossil fuel products on the planet. For example, as late as the 1990s, the API created a public-relations front group (the "Global Climate Science Communications Team") whose *stated* mission was convincing "[a] majority of the American public" to "recognize[ ] that significant uncertainties exist in climate science."[157] The goal of this disinformation campaign was to ensure that the climate crisis would be "a non-issue, meaning that the Kyoto Protocol is defeated and

150. *See, e.g.*, Honolulu Complaint, *supra* note 139, ¶ 48 ("In 1954, geochemist Harrison Brown and his colleagues at the California Institute of Technology wrote to the American Petroleum Institute, informing the trade association that preliminary measurements of natural archives of carbon in tree rings indicated that fossil fuels had caused atmospheric carbon dioxide levels to increase by about 5% since 1840. The American Petroleum Institute funded the scientists for various research projects, and measurements of carbon dioxide continued for at least one year and possibly longer, although the results were never published or otherwise made available to the public.").

151. *Id.* ¶ 55.

152. *Id.*

153. *Id.* ¶ 56.

154. *Id.*

155. *Id.* ¶ 55.

156. *Id.* ¶ 61.

157. *See* Boulder Complaint, *supra* note 134, ¶¶ 426–27.

there are no further initiatives to thwart the threat of climate change."[158]

The San Mateo complaint powerfully summarizes the damning evidence:

> Defendants' awareness of the negative implications of their own behavior corresponds almost exactly with the Great Acceleration, and with skyrocketing greenhouse gas emissions. With that knowledge, Defendants took steps to protect their own assets from these threats through immense internal investment in research, infrastructure improvements, and plans to exploit new opportunities in a warming world. . . . Defendants concealed the dangers, sought to undermine public support for greenhouse gas regulation, and engaged in massive campaigns to promote the ever-increasing use of their products at ever greater volumes.[159]

The degree of the companies' acceleration of their fossil fuel exploitation is astounding: They have "extracted from the earth enough fossil fuel materials (i.e., crude oil, coal, and natural gas) to account for more than one in every five tons of CO_2 and methane emitted worldwide."[160] At the same time, they ensured that there would be a demand for their products notwithstanding the dangerous consequences with "wrongful promotion and marketing activities."[161] As a result, the complaint alleges, the defendants "bear a dominant responsibility for global warming generally and for Plaintiffs' injuries in particular."[162]

This dual-pronged strategy of aggressively marketing products to create fossil-fuel dependent societies, coupled with massive and systematic disinformation campaigns to counter and obfuscate the catastrophic dangers of use of those products, has been so effective that we are now at the point where the problem can no longer be addressed merely by mitigation of emissions. Instead, we are experiencing and will continue to experience climate harms that must be adapted to and redressed.[163] In a previous article I discussed a similar strategy, which I

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158. *Id.* ¶ 427. The Kyoto Protocol is one of the key international climate agreements.

159. San Mateo Complaint, *supra* note 149, ¶¶ 6–7.

160. *Id.* ¶ 14.

161. *Id.*

162. *Id.*

163. The United Nations Special Rapporteur on Extreme Poverty & Human Rights concluded in a recent report:

> [T]he scale of change required to limit warming to 1.5°C is historically unprecedented and c[an] only be achieved through 'societal transformation' and ambitious emissions reduction measures. Even 1.5°C of warming—an unrealistic, best-case scenario—will lead to extreme temperatures in many regions and leave disadvantaged populations with food insecurity, lost incomes and livelihoods, and worse health. As many as 500 million people will be exposed and vulnerable to water stress, 36 million people could see lower crop yields and up to 4.5 billion people could be

called a strategy of "disinformation plus path-dependence," used by the tobacco industry to continue selling its products in the face of mounting evidence of their deadly nature.[164] The second-wave complaints make clear that there is now sufficient evidence to show that the fossil fuel industry was engaging in this strategy at around the same time that the tobacco industry was. That is perhaps not surprising considering that, as the complaints also lay out, many of the same people worked on effectuating the strategy for both industries.[165] For example, the API and Exxon funded and promoted the work of two physicists—Fred Seitz and Fred Singer—who had previously worked for the tobacco industry to cast doubt on the scientific evidence establishing the dangers of tobacco product use.[166] In their book detailing both industries' disinformation campaigns designed to suppress and distort science, historians Naomi Oreskes and Erik Conway explain how, in the 1980s and early 1990s, Singer attempted to counter the work of climate scientists on human-induced global warming by associating calls for environmental protections to fears of the Soviet Union and communism then fueled by the Cold War. Oreskes and Conway quote from an essay that Singer wrote in 1991 stating that "[t]he 'real' agenda of environmentalists—and the scientists who provided data on which they relied—was to destroy capitalism and replace it with some sort of worldwide utopian Socialism—or perhaps Communism."[167]

It bears emphasis that the second-wave plaintiffs' allegations of these dual "acceleration" timelines are supported by extensive documentary evidence *in their complaints*; none of the cases have even reached discovery yet. And, given their promising new litigation strategies, some

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exposed to heat waves. In all of these scenarios, the worst affected are the least well-off members of society.

Philip Alston (Special Rapporteur), *Climate Change and Poverty*, ¶ 7, U.N. Doc. A/HRC/41/39 (July 17, 2019).

164. *See* Karen C. Sokol, *Smoking Abroad and Smokeless at Home: Holding the Tobacco Industry Accountable in a New Era*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 81, 94–102 (2010) (describing the "disinformation plus path-dependence" strategy as consisting of "(1) the pervasive dissemination of disinformation to encourage nonrational decisionmaking about tobacco product use, and (2) the subsequent deprivation of free choice on the part of those who become addicted to the products, even if the disinformation problem is corrected").

165. *See* Boulder Complaint, *supra* note 134, ¶ 430.

166. *See id.*; *see also* NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT 5, 35 (2010) (detailing Seitz's and Singer's work for the tobacco industry "helping to cast doubt on the scientific evidence linking smoking to death" and their subsequent work for fossil-fuel industry actors to undermine the scientific evidence linking anthropogenic greenhouse gas emissions to global warming).

167. ORESKES & CONWAY, *supra* note 166, at 134.

may very well proceed to discovery, which will undoubtedly lead to even more evidence.

B. Avoiding the Pitfalls of the First Wave: New Litigation Strategies

The second-wave cases have made two primary changes in litigation strategy: (1) bringing only state tort claims, mostly in state court, and (2) basing the claims on the marketing of fossil fuel products, rather than on emission of greenhouse gases.

Bringing only state claims makes dismissal on all three of the federal separation of powers grounds detailed in Part I much less likely. First, state claims cannot be displaced by the Clean Air Act, as displacement is a doctrine applicable only to *federal* common law. Indeed, as noted, in *AEP* the Supreme Court dismissed the federal nuisance claims on displacement grounds and indicated that the plaintiffs could refile their state claims in state court.[168] State common law can be preempted by federal law, but, as discussed below, that is a different doctrine that has yet to be addressed in the context of climate tort claims.

Further, although the standing and political question doctrines may still pose obstacles, state courts have their own standing and political question doctrines that differ from their federal counterparts in ways that could make them less likely to pose an obstacle to climate tort claims.[169] Importantly, many state courts have more relaxed standing requirements than those imposed at the federal level.[170] And, even in cases in which

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168. *See supra* note 126 and accompanying text.

169. *See* Tracy Hester, *Climate Tort Federalism*, 13 FLA. INT'L L. REV. 79, 85–86 (2018) ("[T]he switch to state law claims within a state court system (or a federal court's diversity jurisdiction) potentially sidesteps the most troublesome barriers that bedeviled federal common law tort climate claims. . . . Because state courts generally operate as courts of general jurisdiction, they avoid the deeply rooted limits woven into federal judicial powers as courts of limited jurisdiction subject to separation of powers constraints and Article III textual limitations."); *see also* Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 406–07 (1984) ("Despite th[e] absence of serious evolution in Supreme Court opinions [on the political question doctrine since *Baker v. Carr*], the idea of political questions has not escaped judicial attention entirely. The supreme courts of the states . . . have continued to address the notion of inherently nonjusticiable issues and have formulated their own political question doctrines.").

170. *See* Hester, *supra* note 169. As the Fifth Circuit panel noted in *Comer v. Murphy Oil USA*, for example: "Because Mississippi's Constitution does not limit the judicial power to cases or controversies, its courts have been more permissive than federal courts in granting standing to parties," finding "standing to sue 'when [parties] assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law.'" 585 F.3d 855, 862 (5th Cir. 2009) (quoting State v. Quitman Cnty., 807 So. 2d 401, 405 (Miss. 2001)). Under that standard, the panel concluded, the "Plaintiffs' claims easily satisfy Mississippi's 'liberal standing requirements.'" *Id.* (quoting Van Slyke v. Bd. of Tr. of State Insts. of Higher Learning (*Van Slyke II*), 613 So. 2d 872, 875 (Miss. 1993)).

state standing and political question analyses are similar to their federal counterparts, it is possible that state courts would assess their respective states' tort law differently than a federal court would under these doctrines. After all, as discussed further below,[171] state courts regularly adjudicate tort claims and contribute to tort law's evolution, and thus in all likelihood will know the state's tort law and its distinctive jurisprudential nature much better than a federal court sitting in diversity jurisdiction would.

The distinctive nature of state tort claims is particularly important where, as here, the law governing the claims is much richer than that governing the federal common law nuisance claims brought by the first-wave plaintiffs. This relates to the second change in litigation strategy that makes the second-wave claims so potentially powerful—i.e., basing them on the companies' marketing of fossil fuel products, rather than on their emission of greenhouse gases.

The focus on the marketing of fossil fuel products is important for two reasons. First, it makes it less likely that a court will determine that the claims are preempted by the Clean Air Act, which regulates emissions of greenhouse gases and other pollutants but does not address the marketing of fossil fuel products.[172] Because those claims were never refiled, however, the question of whether those claims were preempted by the CAA was never raised. The defendants in the second wave will unquestionably raise the issue however, and the plaintiffs will be able to respond by emphasizing that the focus on marketing distinguishes their claims from the federal common law claims that the Court dismissed in *AEP*. Further, the CAA has a "savings clause" that explicitly preserves common law claims.[173] The Supreme Court has relied on a similar provision in the Clean Water Act to hold that the CWA does not preempt certain state tort actions.[174]

Second, there is a strong argument that focusing on the companies' marketing practices better captures the wrongful nature of the conduct that caused the climate harms. Importantly, state tort law is much better equipped to handle claims regarding wrongful marketing of products than federal common law. Indeed, there is no federal common law precedent addressing product marketing. Rather, the relatively small number of Supreme Court cases applying the federal common law of nuisance

171. *See infra* Part IV.

172. Preemption doctrine and its relevance to the climate tort litigation is discussed further *infra* Part III.

173. *See* 42 U.S.C. § 7604(e).

174. *See infra* text accompanying notes 235–240.

involve interstate pollution.[175] In contrast, the state tort law of nuisance is much broader. In some states, courts have recognized its applicability in cases seeking to hold manufacturers accountable for their wrongful marketing of products, including manufacturers of lead paint,[176] guns,[177] and opioids.[178]

All of the second-wave plaintiffs except Minnesota have brought state nuisance claims. Minnesota[179] and the plaintiffs in four of the other

175. *See infra* Part III.

176. *See* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (2017) (upholding a judgment that lead paint manufacturers were liable under the doctrine of public nuisance for knowingly manufacturing and marketing lead paint for indoor use notwithstanding their knowledge of its dangers to human health before the federal government banned its use in homes in the 1950s). Other jurisdictions have, however, held that lead paint manufacturers could not be held liable under their public nuisance doctrines. *See, e.g.*, State v. Lead Indus. Ass'n., 951 A.2d 428, 453–54 (R.I. 2008) (holding that, because "[t]he right of an individual child not to be poisoned by lead paint is . . . similar to other examples of nonpublic rights," the state had failed to allege the requisite interference with a public right, which "is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way," and does not extend to "a widespread interference with the private rights of numerous individuals"); *In re* Lead Paint Litig., 924 A.2d 484, 501–02 (N.J. 2007) (holding that lead paint manufacturers could not be liable for public nuisance because the property owners, rather than the manufacturers, were in "control" of the alleged nuisance, as "lead paint in buildings is only a hazard if it is deteriorating, flaking, or otherwise disturbed").

177. *See* TIMOTHY D. LYTTON, SUING THE GUN INDUSTRY 12–14 (Timothy D. Lytton ed., 2005) (summarizing the history of the litigation and various courts' reception to public nuisance claims).

178. Recently, hundreds of cities, counties, states, and tribes have filed public nuisance suits against opioid manufacturers. *See* Jackie Fortier, *'This Case Will Set a Precedent': 1st Major Opioid Trial Opens in Oklahoma*, NAT'L PUB. RADIO (May 27, 2019, 4:21 PM), https://www.npr.org/2019/05/27/724093091/this-case-will-set-a-precedent-first-major-opioid-trial-to-begin-in-oklahoma [https://perma.cc/CK7Z-NCUM] (reporting on the start of the trial in the case brought by Oklahoma against Johnson & Johnson alleging that the company is liable under public nuisance doctrine for its marketing practices that contributed to the state's opioid addiction crisis, and noting that the case will set precedent for the hundreds of other pending cases). In late summer of 2019, an Oklahoma trial judge found that Johnson & Johnson was liable to the state for creating a public nuisance by fueling an opioid epidemic with its marketing practices, and ordered the company to pay the state $572 million for treatment programs and other expenses incurred as a result of the crisis. *See* State v. Purdue Pharma L.P., No. CJ-2017-816, slip op. at 22–25, 29–41 (Okla. Dist. Ct. Aug. 26, 2019); *see also* Karen Savage, *After Opioids, Will Climate Change Be the Next Successful Liability Battle?*, CLIMATE DOCKET (Sept. 12, 2019), https://www.climatedocket.com/2019/09/12/opioids-liability-climate-change/ [https://perma.cc/AE6U-K36J] ("In both sets of cases, the plaintiffs point to a long history of corporate knowledge about the harms their products cause, and concerted efforts to hide that knowledge and profit from business as usual." (quoting Michael Burger, Exec. Dir., Sabin Ctr. for Climate Change L., Columbia Univ.)).

179. Minnesota brings a number of claims under Minnesota's consumer protection statutes. *See* Minnesota Complaint, *supra* note 141, at 73–82. The District of Columbia filed a climate case the day after Minnesota did, and is the first to rely solely on consumer protection statutes. *See* Complaint at 67–77, District of Columbia v. Exxon Mobil Corp., No. 2020-CA-002892-B (D.C. Sup. Ct. June 25, 2020). The nature of the wrongful conduct alleged and of the harms for which the government is seeking redress, however, are similar to all the second-wave climate tort cases.

second-wave cases[180] assert products liability claims. All states have developed this now quite rich body of tort law specifically for the purpose of addressing harms caused by wrongful manufacture and marketing of products.[181] These sorts of claims are well-suited to cases, such as the second-wave climate cases, that allege a product manufacturer's systematic use of a "disinformation plus path-dependence" strategy[182] to continue profiting from the sale of their products notwithstanding clear evidence of their catastrophic nature.

Given the potential power of the second-wave strategy of relying solely on state tort law, and, for the most part, filing in state court, it is not surprising that the fossil fuel industry defendants have responded with arguments that seek both to "federalize" the plaintiffs' state claims and to get them before federal courts.

C. The Defendants' Response to the Second Wave: "Federalization" of State Tort Law Claims

All the defendants have responded to these new second-wave state-focused strategies by seeking to "federalize" the state law claims, and to then reassert the largely successful arguments that resulted in dismissals of the first-wave cases. They primarily rely on the one that succeeded before the U.S. Supreme Court—i.e., displacement. Because only *federal* common law, and not state common law, can be *displaced* by the Clean Air Act or any other federal statute, however, this defense requires a two-step process. The first step of this new argument is that the state tort claims are "preempted" by federal common law.[183] Specifically, the defendants claim that the plaintiffs' state tort claims are based on "global-warming related injuries" that "implicate[] uniquely federal interests" and thus must be addressed, if at all, under federal common law.[184] In all the

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180. *See* Fishermen's Complaint, *supra* note 138, at 80–85; Rhode Island Complaint, *supra* note 136, at 120–33; San Mateo Complaint, *supra* note 149, at 81–87; Honolulu Complaint, *supra* note 139, at 106–08.

181. Indeed, state products liability law became so well-developed in the second half of the twentieth century that the reporters for the *Restatement (Third) of Torts* devoted an entire volume to it. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (AM. LAW INST. 1998). The *Restatement (Second) of Torts*, which was published around three decades before, contained only one section addressing it. *See* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

182. *See supra* note 164 and accompanying text.

183. The notices of removal do not use the term "preemption," but this is the proper way to characterize the trumping of state law by federal common law. *See* 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4515 (rev. 4th ed. April 2020 update).

184. *See* Notice of Removal ¶ 5, California v. BP P.L.C., No. 3:17-cv-6011-WHA (N.D. Cal. Oct.

second-wave cases filed in state court, the defendants have filed a notice of removal on this ground.[185] With only federal law at stake, the defendants argue, they are entitled to remove the cases from the state courts in which they were filed. Next, the defendants argue that the federal courts should dismiss the cases because the only proper claim—the federal common law claim—is displaced by the Clean Air Act under *AEP*, or, in the alternative, presents a nonjusticiable political question.[186]

The argument that state tort climate claims are preempted by federal common law has succeeded in two courts so far. In one of the cases brought in California state court—by Oakland and San Francisco—the five fossil-fuel industry defendants removed the case, and Northern District of California Judge William Alsup denied the cities' motion to remand.[187] A little less than a month later, on the other side of the country, Southern District of New York Judge John Keenan relied on Judge Alsup's opinion in agreeing with the defendants that New York City's state claims were preempted by federal common law.[188] In so holding, neither judge applied a particular standard, but rather relied on Supreme Court cases recognizing that it was appropriate for federal courts to develop federal common law to deal with interstate pollution.[189]

The plaintiffs' state claims in these two cases were preempted by a federal common law claim whose existence was apparently fleeting,

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20, 2017). This notice of removal in the case brought by Oakland and San Francisco was the first one filed by the second-wave defendants, and the notices filed in all the other suits make the same arguments and track the language quoted here.

185. The city and county of Honolulu filed its complaint shortly before this Article went to press, and the defendants have not yet filed a notice of removal in that case.

186. *See, e.g.*, Defendants' Motion to Dismiss First Amended Complaints; Memorandum of Points and Authorities at 8, City of Oakland v. BP P.L.C., No. 3:17-cv-6011-WHA (N.D. Cal. Apr. 19, 2018) ("Federal common law does not provide relief here because, in addition to other defects, Plaintiffs' global warming-based tort claims—whether framed as targeting greenhouse gas emissions, oil and gas extraction and production, or fossil-fuel product promotion—have been displaced by federal statute."). As explained *infra* note 187 and accompanying text, the defendants in *California v. BP P.L.C.* also successfully argued that application of federal common law would be improper based on what appears to be a combination of the "extraterritoriality" principle developed by the Supreme Court in the context of the Alien Tort Statute and the political question doctrine. No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. 2018). The defendants assert a number of other arguments, but these are the ones on which they primarily rely and which, as discussed *infra* in the rest of this section, have been the only ones to which the courts have given serious consideration.

187. *See* Order Denying Motions to Remand at 8, California v. BP P.L.C., No. C 17-06011 WHA, 2018 WL 1064293, at *15 (N.D. Cal. 2018).

188. *See* City of N.Y. v. BP P.L.C., 325 F. Supp. 3d 466, 471, 474 (S.D.N.Y. 2018).

189. *See id.* at 471 (first citing Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); and then citing Illinois v. City of Milwaukee (*Milwaukee I*), 406 U.S. 91 (1972)); *California v. BP P.L.C.*, 2018 WL 1064293 at *2–3 (citing and quoting *Milwaukee I*, 406 U.S. 91).

however. Both judges agreed with the second step of the defendants' argument as well, and thus dismissed the federal common law claims that they had just concluded preempted the cities' state claims. That is, paradoxically, the federal common law claims existed only long enough to preempt the state claims, at which point they were immediately displaced by the Clean Air Act. More specifically, both courts held that, to the extent that the claims were based on climate harms caused by domestic emissions from the defendants' fossil fuel products, they were displaced by the Clean Air Act.[190] And to the extent that the harms were caused by emissions from products outside the United States, the courts held that the claims were barred by what appears to be essentially a "foreign policy" focused application of the political question doctrine.[191] Importantly, unlike the Supreme Court in *AEP*, Judges Alsup and Keenan both concluded that, because the plaintiffs' state claims had already been preempted, they did not reemerge in the wake of the dismissals of the federal common law claims.[192]

The other four federal district judges who have thus far addressed the second-wave defendants' "federalization" argument—Judges Vince

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190. *See New York*, 325 F. Supp. 3d at 474 ("[T]he City alleges that its climate-change related injuries are the direct result of the *emission* of greenhouse gases from the combustion of Defendants' fossil fuels, and not the production and sale of those fossil fuels. Thus, the City ultimately seeks to hold Defendants liable for the same conduct at issue in *AEP* and *Kivalina*: greenhouse gas emissions. . . . Thus, . . . the City's claims are displaced.") (emphasis in original); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018) ("The harm alleged by our plaintiffs remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels. . . . If an oil producer cannot be sued under the federal common law for their own emissions, *a fortiori* they cannot be sued for someone else's.") (emphasis in original).

191. *See New York*, 325 F. Supp. 3d at 475–76; *Oakland*, 325 F. Supp. 3d at 1024–28. In opposing the defendants' motions to dismiss in these cases, the plaintiffs argued that the federal common law claims were not displaced both because (1) they were based on defendants' production and sale of fossil fuels, and not, like the first-wave cases, on their emissions of greenhouse gases, and (2) their damages were caused by the combustion of fossil fuel products all over the world, and the Clean Air Act regulates only domestic activities. *See supra* note 190 and accompanying text. Both courts rejected the first distinction, and, although they acknowledged that the Clean Air Act did not displace the claims to the extent that they were seeking redress for harms caused by emissions outside the United States, both held that the global nature of the claims raised significant foreign policy issues appropriately addressed only by the political branches. *New York*, 325 F. Supp. 3d at 475–76 ("Here, the City seeks to hold Defendants liable for the emissions that result from their worldwide production, marketing, and sale of fossil fuels. . . . Such claims implicate countless foreign governments and their laws and policies. . . . [T]he immense and complicated problem of global warming requires a comprehensive solution that weighs the global benefits of fossil fuel use with the gravity of the impending harms. To litigate such an action . . . in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government. Accordingly, the Court will exercise appropriate caution and decline to recognize such a cause of action.").

192. *See New York*, 325 F. Supp. 3d at 474; *Oakland*, 325 F. Supp. 3d at 1028–29.

Chhabria, also of the Northern District of California, Ellen Hollander of the District of Maryland, William Smith of the District of Rhode Island, and William Martinez of the District of Colorado—have concluded that it does not provide a basis for federal removal jurisdiction, and accordingly remanded to the state courts.[193] In doing so, these courts made an important distinction that the defendants' argument evades and that Judge Alsup apparently overlooked, namely, that between "complete" and "ordinary" preemption.[194]

Although the defendants in all of the second-wave cases sought removal on the basis of federal preemption of state law, in most cases that doctrine does not provide a basis for federal jurisdiction. In almost all cases, federal jurisdiction exists, and thus removal is proper, only if a federal issue appears on "the face of a well-pleaded complaint."[195] This rule, known as the "well-pleaded complaint rule," is long-standing.[196] Thus, in the vast majority of cases, federal preemption of state law is an affirmative defense that the state court in which the complaint is filed is perfectly capable of addressing.[197] The cases in which the Supreme Court has departed from this rule and found federal court jurisdiction on preemption grounds are few and far between.[198] Indeed, there are only

193. *See* Cnty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018); Mayor of Balt. v. BP, 338 F. Supp. 3d 538, 574 (D. Md. 2019); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 152 (D.R.I. 2019); Boulder Cnty. v. Suncor Energy, Inc., 405 F. Supp. 3d 937, 981 (D. Colo. 2019).

194. *See San Mateo*, 294 F. Supp. 3d at 938; *Mayor of Balt.*, 338 F. Supp. 3d at 554–58; *Rhode Island*, 393 F. Supp. 3d at 149–50; *Boulder Cnty.*, 405 F. Supp. 3d at 972.

195. Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987) ("The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.").

196. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.").

197. *See* Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 14 (1983) ("[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, *including the defense of preemption*, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." (emphasis added)).

198. WRIGHT & MILLER, *supra* note 183, § 4515 ("Although defendants' attempts to remove a case to federal court based on federal preemption generally have been unsuccessful because it is a matter of affirmative defense, some courts have concluded that a federal statute can preempt what appears to be a state cause of action so completely that removal is available even when the plaintiff never invoked federal common law or any other basis for federal subject matter jurisdiction in the original complaint. By virtue of the force of the federal statute, the state claim is treated as if it has been replaced by and in reality stated a federal law claim.").

three categories of cases in which courts have concluded that so-called "complete preemption" exists, which does provide a basis for federal question jurisdiction. All three involve areas of law in which federal courts have developed common law as necessary to adjudicate claims requiring application of comprehensive congressional statutes.[199] Thus, all four district courts held that any preemption of state law by federal common law alone is "ordinary" rather than "complete," and accordingly can never provide a basis for removal.[200] They accordingly remanded the cases to state court, where the defendants can—and undoubtedly will—assert "ordinary" preemption as an affirmative defense.[201]

The plaintiffs in *Oakland* and the defendants in *San Mateo* appealed to the Ninth Circuit Court of Appeals, and the plaintiffs in *New York* to the Second Circuit. The defendants in the Colorado, Rhode Island, and Baltimore cases all appealed the remand orders, bringing the issue before the First, Fourth, and Tenth Circuits as well. As of this writing, the Fourth,[202] Ninth,[203] and Tenth[204] Circuits have decided the cases. The Fourth and Tenth Circuit panels, as well as the Ninth Circuit panel in its decision in the *San Mateo* case, did not address the question of preemption—complete or ordinary. Rather, they all held that the only basis on which defendants may appeal a district court's remand order under 28 U.S.C § 1447 is "federal officer" removal jurisdiction, and that the fossil fuel companies had failed to establish that basis.[205] Although the

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199. *See id.* § 3722.2 (explaining that "[b]ecause of the obvious federalism implications of the complete-preemption doctrine, the courts have limited its application" to actions under the Labor Relations Management Act and the Employee Retirement and Income Security Act, and to claims against banks chartered under the National Bank Act).

200. *See* Cnty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018); Mayor of Balt. v. BP, 338 F. Supp. 3d 538, 554–58 (D. Md. 2019); Boulder Cnty. v. Suncor Energy, Inc., 405 F. Supp. 3d 937, 981 (D. Colo. 2019); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 149–50 (D.R.I. 2019) ("Without a federal statute wielding—or authorizing the federal courts to wield—'extraordinary pre-emptive power,' there can be no complete preemption." (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987)); *Mayor of Balt.*, 338 F. Supp. 3d at 557 (citing Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from* California v. BP, 117 MICH. L. REV. ONLINE 25, 32–35 (2018)) (relying on Seinfeld's trenchant critique of Judge Alsup's opinion).

201. *See supra* text accompanying notes 172–174.

202. Mayor of Balt. v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020).

203. City of Oakland v. BP P.L.C., 960 F.3d 570 (9th Cir. 2020); Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020).

204. Boulder Cnty. v. Suncor Energy, No. 19-1330, 2020 WL 3777996 (10th Cir. July 7, 2020).

205. *See id.* at *17, *23; *San Mateo*, 960 F.3d at 598, 603; *Mayor of Balt.*, 952 F.3d at 457 ("[T]his decision is only about whether one path to federal court lies open. Because 28 U.S.C. § 1447(d) confines our appellate jurisdiction, the narrow question before us is whether removal of this lawsuit is proper under 28 U.S.C. § 1442, commonly referred to as the federal officer removal statute.

defendants have asserted "federal officer" as a basis of federal court jurisdiction in all of the second-wave cases, none of the district court judges—including Judge Alsup—have agreed with that argument. The defendants in Baltimore's case immediately filed a petition for writ of certiorari to the Supreme Court, arguing that the Fourth Circuit's precedent interpreting § 1447 as permitting review of only federal officer removal jurisdiction, and not of any other jurisdictional bases asserted by a defendant, falls on the wrong side of a circuit split on the issue.[206]

The same Ninth Circuit panel heard the plaintiffs' appeal of Judge Alsup's decision finding federal jurisdiction, and held that he erred in finding federal-question jurisdiction because the defendants had failed to establish either of the two exceptions to the "well-pleaded complaint" rule—that the plaintiff's state tort claim of nuisance raised a "substantial federal question"[207] or was completely preempted by a federal law.[208] Judge Alsup did not decide on any of the other bases for removal that the defendants had asserted; however, the Ninth Circuit remanded the case to the district court to decide whether any of the other bases were proper.[209]

Regardless how the Supreme Court rules on the industry's petition in Baltimore's case, the issue of preemption of the state climate claims by federal common law is likely to eventually come before the Court. The question of complete preemption was irrelevant to Judge Keenan's analysis in New York City's case since the city originally filed its state claims as a diversity action in federal court. Thus, the Second Circuit will have to address the question of whether Judge Keenan correctly concluded that the state climate claims are preempted by federal common law under "ordinary" preemption analysis.[210] The defendants will almost certainly assert the defense in the state courts in California, Rhode Island, Baltimore, Colorado, Hawai'i, Minnesota, and, ultimately, in all the other second-wave cases that may still be filed. That is, all the courts will probably face the question of whether federal common law preempts the state climate claims—their answers, and, ultimately that of the Supreme Court—may decide the future of climate tort litigation.

And . . . . because we conclude that § 1442 does not provide a proper basis for removal, we affirm the district court's remand order.").

206. Petition for Writ of Certiorari at 2–3, BP v. Mayor of Balt., No. 19-1189 (Mar. 31, 2020).

207. *Oakland*, 960 F.3d at 580–81.

208. *Id.* at 581–82.

209. *Id.* at 585.

210. As Judge Hollander pointed out in her thoughtful and exhaustive opinion, the New York district court's analysis was inapposite, since that the "court did not consider whether [its finding that federal common law preempted New York City's state claims] conferred federal question jurisdiction because the plaintiffs originally filed their complaint in federal court based on diversity jurisdiction." Mayor of Balt. v. BP, 338 F. Supp. 3d 538, 557 (D. Md. 2019).

As the initial judicial responses to the defendants' preemption argument indicate, the proper analysis of the issue whether state tort law is preempted by the federal common law of nuisance is far from clear. This is perhaps not surprising given that there are only a handful of key Supreme Court federal common law nuisance cases. In most of them, the Court is just as—if not more—concerned with the question whether it should exercise its original jurisdiction. In light of the second-wave defendants' "federalization" defense strategy, however, the question of preemption of state tort law by federal common law sorely needs clarification.

III. THE FEDERAL COMMON LAW CLAIM OF PUBLIC NUISANCE AND STATE TORT LAW

There is a significant amount of case law on the preemption of state law by federal *statutory* law, and the analytical framework for analyzing the issue is well-established.[211] In contrast, the Supreme Court has never directly addressed the issue of how to properly determine whether federal common law preempts state law.[212] When the Court has stated that there are issues of special federal interest that should be governed by federal common law—rather than state common law—it has done so mainly with the goal of justifying the rare exercise of federal judicial power to make and apply federal common law, rather than leaving the matter to resolution by state tort law. Indeed, such justification is called for—given that the Court held over eighty years ago that state tort law is appropriate in the vast majority of cases.

In *Erie Railroad Co. v. Tompkins*,[213] the Supreme Court put federal courts out of the business of fashioning "federal general common law," reasoning that such lawmaking is not within the federal judicial power: "Congress has no power to declare substantive rules of common law applicable in a state . . . [a]nd no clause in the Constitution purports to confer such a power upon federal courts."[214] In the wake of *Erie*, however, the Court has recognized limited situations in which federal common law

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211. *See, e.g.*, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203–04 (1983) (setting out the well-established three ways in which Congress can preempt state law: express, field, and obstacle preemption); Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 2 (2001) ("As federal law making and federal regulation have increased in size and importance, so too has the doctrine of federal preemption.").

212. As noted *supra*, note 19, the focus of this Article is on federal common law outside of the maritime area.

213. 304 U.S. 64 (1938).

214. *Id.* at 78.

should govern. When it has done so, however, it has taken care to justify departure from *Erie* based on the federal judicial role in U.S. constitutional structure in light of the specific nature of the case at hand.[215]

In recognizing its authority to establish a federal common law doctrine of nuisance, the Supreme Court has primarily relied on the interstate nature of the disputes in which it has applied the doctrine, rather than on the idea that environmental harms presented issues that were necessarily "federal" in nature.[216] In one of its earliest federal nuisance cases, which involved a claim brought by Missouri against Illinois seeking to abate sewage discharges from Chicago into a river that fed into the Mississippi River, the Court stated:

> It may be imagined that a nuisance might be created by a state upon a navigable river like the Danube, which would amount to a casus belli for a state lower down, unless removed. If such a nuisance were created by a state upon the Mississippi, the controversy would be resolved by the more peaceful means of a suit in this court.[217]

Similarly but somewhat less dramatically, around seven decades later in another case in which a state brought suit to abate sewage discharges from another state, the Court noted: "When we deal with air and water in their ambient or interstate aspects, there is federal common law . . . ."[218]

That some federal common law has survived *Erie*, however, does not mean that every claim by a jurisdiction alleging that it suffered harm caused by activities that took place outside of it must be a federal common law claim. Indeed, in some of the same cases in which the Court has recognized the propriety of federal common law, it has also recognized the possibility that state common law may be applicable. In its pre-*Erie*

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215. *See, e.g.*, WRIGHT & MILLER, *supra* note 183, § 4514 ("To some extent, each exercise of federal common lawmaking is *sui generis* in that it is the product of the unique interplay of specific statutory or constitutional language, case-sensitive federal policy concerns, and other case-specific factors." (emphasis added)).

216. *See generally id.* § 4517 (in explaining the development of federal common law nuisance doctrine, noting that the Court had concluded that "cases involving disputes over interstate boundaries, streams, air, or water pollution present federal questions" appropriately resolved by federal common law "govern[ing] interstate proprietary and ecological controversies").

217. Missouri v. Illinois, 200 U.S. 496, 520–21 (1906); *see also* Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) ("When the states by their union made the forcible abatement of outside nuisances, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court."). "Casus belli" is a Latin phrase meaning "an event or action that justifies . . . a war." *Casus belli,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/casus%20belli [https://perma.cc/NB9L-AYQU].

218. Illinois v. Milwaukee (*Milwaukee I*), 406 U.S. 91, 103 (1972).

nuisance cases, the Court adjudicated the claims, which were brought by a state against another state or the citizens thereof, in the exercise of its original jurisdiction.[219] As a result, the question of the role of state law in such cases did not arise until after both *Erie* and the enactment of federal environmental legislation. Section A lays out how the Court has dealt with that issue so far and the significant questions that remain about the appropriate way to deal with it. Section B provides a recommendation for a clear rule based on the relevant case law so far and principles of federalism.

A. What Little We Know about Preemption of State Nuisance Law by Federal Nuisance Law

In the 1972 case *Illinois v. Milwaukee* (*Milwaukee I*),[220] Illinois invoked the Supreme Court's original jurisdiction to enjoin cities and municipal agencies in Wisconsin from discharging untreated and improperly treated sewage into Lake Michigan.[221] The Court declined to exercise its original jurisdiction, in part because federal common law is federal law for purposes of federal subject matter jurisdiction, so the federal district court provided a venue for Illinois's claim.[222] That was not the end of the matter for the Court, however—there is a "*Milwaukee II*," *Milwaukee v. Illinois*.[223] Shortly after Illinois refiled in district court, Congress enacted the Clean Water Act (CWA).[224] The district court concluded that the CWA did not displace the state's federal common law claim, the Seventh Circuit affirmed, and the Supreme Court granted certiorari and held that the lower courts were wrong.[225] Congress, the Court concluded, had displaced federal common law nuisance claims involving water pollution by "speaking directly" to the issue in the CWA.[226] In so holding, the Court emphasized the highly limited nature of federal common law in the U.S. constitutional structure. The Court noted that it is state, and not federal, courts that "possess a general power to

219. *See Tenn. Copper Co.*, 206 U.S. at 236, 240; *Missouri*, 200 U.S. at 517.

220. 406 U.S. 91 (1972).

221. *Id.* at 93.

222. *See id*. at 98, 100, 108 ("While this original suit normally might be the appropriate vehicle for resolving this controversy, we exercise our discretion to remit the parties to an appropriate district court . . . .").

223. 451 U.S. 304 (1981).

224. *Id.* at 310.

225. *Id.* at 310–12.

226. *Id.* at 315, 332.

develop and apply their own rules of decision."[227] Accordingly, "[t]he enactment of a federal rule in an area of national concern, *and the decision whether to displace state law in doing so*, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress."[228] As a result, while state common law is "routine,"[229] federal common law "is a necessary expedient" and "unusual exercise of lawmaking by federal courts."[230]

Because states' lawmaking power is so much greater than that of the federal courts, the Court rejected Illinois's argument that the question whether Congress had displaced federal common law was governed by the same analysis as the question whether Congress had preempted state law.[231] The Court will assume that state law is not preempted unless that is "the clear and manifest purpose of Congress."[232] In contrast, it is not necessary that Congress "affirmatively proscribe[] the use of federal common law" for it to be displaced, but rather only that Congress "sp[eak] directly to a question" previously governed by federal common law.[233] Given the difference in the stringency of these standards, it necessarily follows that legislation may displace federal common law but leave state law— including state common law—intact. The Supreme Court reached this conclusion in its next federal common law nuisance case, also involving interstate water pollution: *International Paper Co. v. Ouellette*.[234]

In *International Paper*, landowners in Vermont on the shore of Lake Champlain sued a pulp and paper mill (IPC) located on the New York side of the lake, alleging that IPC was liable for nuisance under Vermont common law for the discharge of pollutants into the lake.[235] IPC responded that the CWA preempted the state nuisance claim; the district court and Second Circuit disagreed.[236] The Supreme Court held that the

227. *Id.* at 312.

228. *Id.* at 312–13 (emphasis added).

229. *Id.* at 329.

230. *Id.* at 314.

231. *See id*. at 316 ("Contrary to the suggestion of respondents, the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same at that employed in deciding if federal law pre-empts state law.").

232. *Id.* (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

233. *Id.* at 315.

234. 479 U.S. 481 (1987).

235. *Id.* at 483–84. The landowners filed their claim in Vermont state court, and IPC removed it.

236. *See id.* at 484–87.

CWA preempted a Vermont nuisance claim, but not a New York nuisance claim.[237] Because the CWA "specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the [statute]."[238] Importantly, that necessarily means that state common law is not preempted by the CWA even though, as the Court held in *Milwaukee II*, that statute displaces all *federal* common law claims involving interstate water pollution. In making this conclusion, the Court relied on the CWA's savings clause,[239] which, as discussed above, is substantively similar to that in the Clean Air Act.[240]

The logic of the Court's decision in *International Paper* makes sense given that, as the *Milwaukee II* Court emphasized, federal common law is much more readily displaced by federal legislation than state law is preempted thereby. This is not the part of the decision that the defendants rely on to support their argument for preemption of the state climate claims by federal common law, however. They rely on the *International Paper* Court's rather puzzling characterization of the import of *Milwaukee I*. In holding that the federal common law of nuisance applied, the *Milwaukee I* Court was primarily focused on justifying its decision to deny Illinois's request that the Court exercise its original jurisdiction, and thus on the nature of federal common law as "federal law" for purposes of federal question jurisdiction.[241] The Court did not directly address the issue of the possible availability of state court claims. Rather, in a footnote accompanying its conclusion that "federal law governs,"[242] the Court stated:

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237. *See id.* at 498–99 (in justifying its conclusion that "An action brought against IPC under New York nuisance law would not frustrate the goals of the CWA as would a suit governed by Vermont law," the Court explained the regulatory framework established the CWA based on the National Permit Discharge Elimination System: "First, application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements").

238. *Id.* at 499.

239. *Id.* at 497 ("The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State.") (emphasis in orginal).

240. *See* 33 U.S.C. § 1365(e); *supra* text accompanying notes 173–174.

241. *See supra* note 222 and accompanying text.

242. Milwaukee I, 406 U.S. 91, 107 (1972).

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain . . . . And the logic and practicality of regarding such claims as being entitled to be asserted within the federal-question jurisdiction . . . would seem to be self-evident.[243]

Citing this footnote, the *International Paper* Court explained that the "implicit corollary" of the *Milwaukee I* Court's determination that federal law governed "was that state common law was preempted."[244] The Court does not explain, however, how state law that was preempted by federal law before the enactment of the CWA could be resurrected after its enactment displaced federal common law. And in neither *International Paper,* nor any of its other federal common law nuisance cases, has the Court articulated a clear standard for determining whether federal common law preempts state common law. Rather, we are left to flesh out the "implicit corollary" of a 1972 opinion with vague references to the need for a federal "uniform" standard and the general idea of environmental nuisances that cross state lines.

Now, almost five decades later, this absence of a meaningful standard has become a problem. The fossil fuel industry defendants have made what has heretofore been an "implicit corollary," coupled with vague references to the "national" and "federal" nature of the problem of climate disruption," part of their primary defense in the second-wave cases. And two district courts have agreed with them.

In the following section, this Article proposes a rule that is the most logical in light of the Supreme Court's relevant federal common law nuisance cases and the most consistent with general principles of federalism.

B. Bringing Clarity to Preemption of State Nuisance Law by Federal Common Law

AEP is the most recent case in which the Supreme Court has addressed the question whether a federal common law nuisance claim is displaced and the relationship between federal common law and state common law. As noted above, the *AEP* Court confirmed that federal common law is displaced if Congress has "spoken directly" to the issue.[245] The Court also

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243. *Id.* at 107 n.9.

244. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 488 (1987).

245. Am. Elec. Power Co. v. Connecticut (*AEP*), 564 U.S. 410, 424 (2011) ("The test for whether

confirmed that a decision that federal common law is displaced does not mean that state common law is preempted, as that is a different—and much more exacting—inquiry.[246] Thus, after holding that the federal nuisance claim in that case was displaced by the CAA, the *AEP* Court stated that, as "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law . . . [w]e . . . leave the matter open for consideration on remand."[247] The Court also noted that the Second Circuit had not addressed the question whether the CAA preempted the plaintiffs' state claims "because it held that federal common law governed."[248] In making this point, the Court cited *International Paper* and included the following quote in the accompanying parenthetical: "if a case should be resolved by reference to federal common law[,] . . . state common law [is] preempted."[249] The implication is that if a federal claim is displaced, state claims may still exist.

Thus, the *Milwaukee I–Milwaukee II–International Paper* line of reasoning means that Judges Alsup and Keenan were wrong in concluding that the plaintiffs' state claims did not reemerge after those judges concluded that the federal common law claim was displaced. On the one hand, there is arguably some logic to the idea that state claims do not reemerge after being preempted by federal common law. On the other hand, it seems odd that federal common law, which disappears merely if Congress "directly speaks to an issue," can preempt state claims that are presumed not to be preempted by legislation unless there is "evidence of a clear and manifest [congressional] purpose" to do so.[250]

Rather than an "implicit corollary" based on vague ideas about the need for national uniformity, interstate environmental nuisances, and so on, the question of preemption of state common law by federal common law should, if anything, be governed by a *more* exacting standard than preemption of state law by federal statutes. Crafting such a standard is

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congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978))).

246. *See id.* at 423, 429 ("Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." (alteration in original) (quoting Milwaukee II, 451 U.S. 304, 317 (1981))); *id.* ("In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect of the federal Act.").

247. *Id.* at 429.

248. *Id.* at 429.

249. *Id.* at 429 (quoting *Int'l Paper*, 479 U.S. at 488).

250. *Id.* at 423 (quoting *Milwaukee II*, 451 U.S. at 317).

difficult if not impossible, however, because the "touchstone" of the congressional preemption standard is congressional intent.[251] There is no such intent to divine when it comes to federal common law, which is an "unusual exercise of lawmaking power" by federal courts that they resort to only as a "necessary expedient" in limited cases.[252] Indeed, the idea that law of that sort can preempt state tort law is in tension with the constitutional rationale underlying the congressional preemption standard—namely, protecting the U.S. federal system of government. As the Court has repeatedly stated: "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" so "our analysis [will] include[] 'due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy.'"[253] Developing an equally stringent standard—much less a more exacting one—is not possible with federal common law, which federal courts do not make with the sort of intent that Congress does when it legislates and for which it is accountable. Particularly in a post-*Erie* world, then, the only way out of this doctrinal dilemma is to recognize preemption of state tort claims only by federal statutes, and not by the thin body of federal common law that federal judges have essentially been out of the business of making—and applying—for over eight decades. Indeed, to allow preemption of state law by federal common would turn *Erie* on its head.

Importantly, the idea that federal common law might preempt state tort law and the concomitant ideas of the "federal interests" implicated by interstate environmental nuisances did not emerge in the Court's federal common law nuisance cases until after *Erie*, when the Court had to justify its decision to apply federal common law rather than the applicable state tort law. In the Court's pre-*Erie* nuisance cases, all of which were based on its diversity jurisdiction, there was no need for such justifications; the Court proceeded directly to the merits of the nuisance claims.[254] In *Milwaukee I*—the post-*Erie* case that is the source of the "implicit corollary" that state tort law may be preempted by federal common law—

251. Medtronic v. Lohr, 518 U.S. 470, 485 (1996).

252. *Milwaukee II*, 451 U.S. at 314.

253. *Id.* at 316 (first quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); and then quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959)).

254. *See* Georgia v. Tenn. Copper Co., 206 U.S. 230, 236–39 (1907) (enjoining a copper smelting company in Tennessee from "discharging noxious gas" over Georgia's territory); Missouri v. Illinois, 200 U.S. 496, 517, 526 (1906) (declining to issue an injunction after concluding that Missouri was unable to prove that the typhoid bacillus polluting the Mississippi River near St. Louis originated from Chicago sewage).

the Court primarily emphasized the need to ensure that states had the ability to protect the air and water on which their residents depended, even if the state was unable to bring a nuisance suit under its own tort law and in its own courts because of the location of the polluter:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.[255]

It may be that there are similar situations in which courts should recognize federal common law nuisance claims. But where, as in the second-wave climate cases, plaintiffs properly plead and bring state claims in state court, they should never be deemed preempted by federal common law alone. Indeed, the second-wave cases demonstrate that allowing preemption by federal common law alone would be inconsistent with *Erie* rationale. After all, the Court justified its pronouncement in that case that it was a "fallacy" to apply general federal common law in diversity cases rather than the applicable state law for two reasons: first, because doing so permitted noncitizens believing a federal rule of decision would be more favorable to them to simply remove based on diversity jurisdiction,[256] and second, because states and Congress, and not federal courts, have lawmaking authority under the Constitution.[257] The fossil fuel industry defendants' latest strategy of removing cases to federal court based on federal question jurisdiction (and, in New York City's case, turning the state claims alleged in federal court into a federal claims) presents the same threat to states' ability to develop and apply their own common law and to their residents' ability to invoke it.[258]

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255. Milwaukee I, 406 U.S. 91, 104 (1972) (quoting *Tenn. Copper*, 206 U.S. at 237).

256. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 76 (1938) ("[D]iscrimination resulted from the wide range of person held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction.").

257. *See id.* at 78–79 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is that of the state. . . . Congress has no power to declare substantive rules of common law applicable in a state . . . be they commercial law or a part of the law of torts.").

258. In his opinion for the Court in *Erie*, Justice Brandeis strongly condemned the game playing to secure a federal forum that took place in the pre-*Erie* case: *Black & White Taxicab v. Brown & Yellow Taxicab*, 276 U.S. 518 (1928). *See Erie*, 304 U.S. at 73–74 ("Brown & Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville & Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at [a Kentucky] Railroad station; and that the Black & White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a

Additionally, and perhaps even more importantly, this second-wave defense strategy is ultimately simply a generalized argument that any sort of claim relating to anthropogenic climate disruption does not belong in a court, but rather is for the political branches to address, or to not address. As the discussion above in Part II shows, that logic underlies every successful first-wave strategy—standing, political question, and displacement. In accepting this generalized argument that is—at best—loosely moored to the various doctrines on which it has purportedly been based, most of the first-wave courts and two of the second-wave courts have entirely failed to meaningfully engage with the nature of the common law claims before them.

Even though these claims are about climate harms, they are asking courts to do what courts have done in many different situations throughout U.S. history: hold responsible parties accountable for wrongfully causing legally cognizable harms. Yes, the current historical situation happens to be a global, national, and local emergency that leaves no facet of life untouched. And yes, courts are unable to respond to that emergency in the way that policymakers can—and must. But that does not mean the courts have no role to play in the legal response to the climate crisis. To the contrary, it means that facing their obligation to play a role by allowing these claims to be heard is all the more essential. In the wake of the first wave, this obligation now rests with state courts.

IV. THE URGENT NEED FOR CLIMATE STATE TORT CLAIMS

Preventing the "federalization" of the state tort climate claims by disallowing preemption by federal common law is not only, as argued in Part III, the better result as a legal matter. It is also the better result as a policy matter. For at least two reasons, it is important that the plaintiffs be allowed to litigate their climate tort claims now—i.e., when climate tort claims are so powerful, the climate emergency is only becoming more devastating, and the fossil fuel industry is continuing to fuel the crisis by continuing its "disinformation plus path-dependence" strategy. The next two sections address each reason in turn.

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contract would be void under the common law of Kentucky, it was arranged that the Brown & Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for Western Kentucky to enjoin competition by the Black & White; an injunction issued by the District Court was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift & Tyson* had been applied, affirmed the decree."). The fossil fuel industry defendants' attempts to remove the second-wave cases are very much the same sort of game playing.

A. The Much Greater Suitability of State Tort Law to the Second-Wave Claims than Federal Common Law

State tort law is a much richer body of law than the federal common law of nuisance, which has not developed much since the beginning of the twentieth century because of *Erie*. Consequently, federal common law is ill-suited to the second-wave claims. The state nuisance claims are different from the federal common law nuisance claims alleged by the first-wave plaintiffs, and, indeed, from all of federal common law nuisance claims based on pollution that the Supreme Court has addressed. The second-wave climate claims allege that the defendants' marketing of fossil fuel products was tortious—not, like the first-wave climate tort cases or all other federal nuisance claims in Supreme Court cases, the defendants' emissions or other types of pollutant discharge. Further, as noted above, the plaintiffs in some of the second-wave cases allege not only state nuisance claims, but also several products liability claims that are unavailable in federal common law. [259]

The second-wave climate tort suits are based on extensive, robust scientific evidence of the causal link between combustion of fossil fuel products and anthropogenic climate disruption.[260] Additionally, the plaintiffs have evidence supporting the specific, large contributions of each particular defendant's products to the total anthropogenic greenhouse gas produced over time, and thus, to climate disruption.[261] Finally, they have extensive documentation of the defendants' knowledge of their contribution to the climate crisis and its devastating consequences and their response to that knowledge; namely, a concerted disinformation campaign about anthropogenic disruption of the Earth's climate system and its connection to fossil fuel use, coupled with an acceleration of their businesses to further entrench societal dependence on fossil fuels. Although there is a strong argument that such evidence would support a federal nuisance claim, it would be a relatively novel claim. That is not the case with state tort law, which is much better equipped to handle

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259. *See* Minnesota Complaint, *supra* note 141, at 74–76 (failure to warn); Honolulu Complaint, *supra* note 139, at 106–10 (failure to warn); Rhode Island Complaint, *supra* note 136, at 121–33 (design defect and failure to warn); Fishermen's Complaint, *supra* note 138, at 82–85, 88–89 (design defect and failure to warn); San Mateo Complaint, *supra* note 149, at 81–87 (design defect and failure to warn).

The ability to allege multiple claims in this way does not, of course, allow for multiple damage awards; plaintiffs can recover only once for a given injury. But it does in many cases give plaintiffs the opportunity to more fully describe—and thus voice their opposition to—conduct that they claim has unlawfully harmed them.

260. *See supra* section II.A.

261. *See supra* section II.A.

claims that allege liability for wrongful marketing of products.

Extension of theories of tort liability to deceptive marketing practices is among the most important developments in the evolution of state tort law in response to widespread public harms. Unlike federal common law, this development of state tort law has only accelerated since *Erie*. In the 1960s, state courts throughout the nation began drawing on existing tort law principles in response to new types of business activities by large companies—including mass-marketing of their products, engaging in misleading marketing strategies, and selling unsafe products with the potential to cause widespread and devastating harms. In so doing, state courts have recognized that, in an era of corporate national marketing campaigns that make representations of products essential to what consumers perceive the products to be, tort law must be able to address harms that are caused not by isolated instances of individual actions, but rather from systematic activities of corporations. This is the sort of conduct and harms that state courts have been addressing in their tort law for over half a century now; federal courts applying the very limited federal common law of nuisance have not.[262] In this regard, the recent climate tort claims based on the fossil fuel industry's product manufacturing and marketing are not novel for state tort law.

In sum, in contrast to the federal common law of nuisance—which developed to respond to the limited situation of interstate pollution disputes—state common law claims have increasingly been used to mitigate the local consequences of corporate conduct that may have widespread impacts throughout the rest of the nation, or indeed, the world. It is unquestionably not the only, or even the best, way to address these consequences. But it does not have to be in order to be justified or, indeed, to be one essential means of addressing such problems. This is the second reason that disallowing preemption of state tort law by federal common law alone is the right result as a matter of policy, as explained the next section.

B. The Significance of State Tort Climate Litigation as Part of the U.S. Legal Response to the Climate Crisis

State tort law has long provided a critical way in which individuals and entities can hold others accountable for causing injury and secure redress for those injuries. Particularly since the mid-twentieth century, individuals and communities have sought compensation for harms caused by national

262. Relatedly, because state tort law is usually applicable and federal common law exceptional, state judges have significantly more expertise with common law and its development than federal judges do.

and multinational for-profit entities whose widespread commercial activities harm the health and well-being of humans and their environment, usually when the political branches have left such activities virtually unchecked. This makes it a particularly powerful tool for communities who are most vulnerable to the harms caused by corporate misconduct but who lack the sort of political or economic power that might help them secure some measure of protection at the national level. The pathbreaking litigation seeking redress for climate harms may prove to be the most important example to date of this function of the tort system at work.[263]

As noted above, the second-wave plaintiffs have strong evidence of the fossil fuel industry defendants' deceptive marketing *in their complaints*.[264] If the cases get to discovery, there will undoubtedly be further revelations about the extent of defendants' knowledge about the climate harms that the use of their products was causing and their disinformation campaigns in response. Additionally, if allowed to proceed, these cases will provide a much-needed governmental venue for providing information about climate science. Such venues are particularly essential now, when the Trump Administration is systematically suppressing climate science and its implications[265] across agencies, including the EPA,[266] Department of Interior,[267] Department of

263. *Cf.* Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENV'T L. 1, 71 (2011). ("Ideas about . . . tort law must continually interact with the raw realities of human suffering and with . . . institutions that address such suffering . . . . [S]uch a complex and contingent matrix does not lend itself readily to prediction, but if scientists are even remotely correct in their assessment of harms to be expected from greenhouse gas emissions, then climate change will enter prominently into tort law's evolutionary dynamics.").

264. *See supra* section II.A.

265. *See generally, e.g.*, JACOB CARTER ET AL., THE STATE OF SCIENCE IN THE TRUMP ADMINISTRATION: DAMAGES DONE, LESSONS LEARNED, AND A PATH TO PROGRESS 15 (2019) ("[T]he Trump administration has repeatedly ignored, dismissed, or suppressed the science of climate change, limiting the ability of federal scientists to speak about, report on, or even study it. The administration has also removed, revoked, and suppressed mentions of climate change in agency documents and pointed instead to elements of uncertainty about the magnitude of impacts and the human causes of climate change rather than the overwhelming U.S. and international consensus on its very significant risks and the unequivocal evidence that recent warming is primarily caused by human activities.").

266. *See id.* at 17 (stating that "[c]limate science is . . . absent or has been removed from critical science-based policies at the EPA," and providing examples of this in rulemakings).

267. *See* Robbie Gramer, *Trump's Shadow War on Climate Science*, FOREIGN POL'Y (July 31, 2019, 3:38 PM), https://foreignpolicy.com/2019/07/31/trumps-shadow-war-on-climate-science-state-department-intelligence-analyst-resigns-white-house-muzzles-intelligence-assessment-climate-change-environment/ [https://perma.cc/Y6GC-X2Q7] (quoting a climate scientist who lost her position at the National Park Service because she "was a climate scientist in a climate-denying administration," and reporting that a former senior official at the Department of Interior "described a

Agriculture,[268] and State Department.[269]

The Trump Administration's systematic suppression of climate science is part of the way it supports its efforts to dismantle the climate protections that were in place and to justify its refusal to provide the much more extensive protections that are necessary[270] while accelerating approval

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'culture of fear, censorship, and suppression' within the Trump administration on climate science," and said that "studies on the health impacts of coal mining and chemicals in drinking water have been muzzled or delayed and the phrase 'climate change' stripped from reports").

268. *See* Helena Bottemiller Evich, *Agricultural Department Buries Studies Showing Dangers of Climate Change*, POLITICO (June 23, 2019, 5:04 PM), https://www.politico.com/story/2019/06/23/agriculture-department-climate-change-1376413 [https://perma.cc/XRN7-8JFB] (finding the Trump Administration suppressed "dozens of government-funded studies that carry warnings about the effects of climate change, defying a longstanding practice of touting such findings by the Agriculture Department's acclaimed in-house scientists" and these findings "revealed a persistent pattern in which the Trump administration refused to draw attention to findings that show the potential dangers and consequences of climate change, covering dozens of separate studies. The administration's moves flout decades of department practice of promoting its research in the spirit of educating farmers and consumers around the world, according to an analysis of USDA communications under previous administrations"); Helena Bottemiller Evich, *'It Feels Like Something Out of a Bad Sci-Fi Movie'*, POLITICO (Aug. 5, 2019, 5:14 AM), https://www.politico.com/story/2019/08/05/ziska-usda-climate-agriculture-trump-1445271 [https://perma.cc/VU68-CW95] (Lewis Ziska, a leading climate scientist who authored one of those studies—one about how rice is losing nutrients because of rising CO_2 levels—resigned after the Trump Administration questioned his findings and "tried to minimize media coverage of the paper." Ziska, who had worked at the USDA's Research Service for over twenty years, told a Politico reporter that the atmosphere at the agency had changed dramatically after Trump's election in 2016: "Any [research] related to climate change was seen as extremely vulnerable. . . . No one wanted to say climate change, you would say 'climate uncertainty' or you would say 'extreme events.' Or you would use whatever euphemism was available to not draw attention.").

269. *See, e.g.*, Juliet Eilperin, *Intelligence Aid, Blocked from Submitting Written Testimony on Climate Change, Resigns from State Dept.*, WASH. POST (July 10, 2019), https://www.washingtonpost.com/climate-environment/2019/07/10/intelligence-aide-blocked-submitting-written-testimony-climate-change-resigns-state-department/?noredirect=on&utm_campaign=Carbon%20Brief%20Daily%20Briefing&utm_medium=email&utm_source=Revue%20newsletter&utm_term=.9d787aa7564b [https://perma.cc/A29N-NY69] (reporting the Trump Administration's refusal to allow a State Department scientist to submit written testimony to the House Intelligence Committee because the administration objected to statements about the national security threats presented by climate change, including: "Absent extensive mitigating factors or events, we see few plausible future scenarios where significant possibly catastrophic—harm does not arise from the compounded effects of climate change"); Rod Schoonover, *The White House Blocked My Report on Climate Change and National Security*, N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/30/opinion/trump-climate-change.html [https://perma.cc/5G5Q-7N5H] (Explaining his decision to quit, he said: "Science has long intersected with intelligence analysis. . . . [T]he [administration's] decision to block the written testimony is another example of a well-established pattern in the Trump administration of undercutting evidence that contradicts its policy positions. Beyond obstructing science, this action also undermined the analytic independence of a major element of the intelligence community. When a White House can shape or suppress intelligence analysis that it deems out of line with its political messaging, then the intelligence community has no true analytic independence. I believe such acts weaken our nation.").

270. *See, e.g.*, STATE ENERGY & ENV'T IMPACT CTR., N.Y.U. SCH. OF L., CLIMATE & HEALTH

and construction of pipelines[271] and increasing drilling on federal lands and offshore.[272] As this Article goes to press, the administration has accelerated its destruction of vital environmental and public health protections, by exploiting the coronavirus pandemic to abdicate its responsibility to enforce basic environmental and public health regulations governing the fossil fuel industry,[273] to expedite oil and gas lease sales and permitting of pipelines and on federal lands,[274] to provide the industry with relief from royalty payments that were already well

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SHOWDOWN IN THE COURTS 3–4 (2019) (detailing the Trump administration's repeal or weakening of "six rules [that] provide the largest and best near-term opportunities to reduce climate pollution from the highest contributors to greenhouse gas emissions: the power sector (coal-fired electric generation); the transportation sector (cars and light trucks); the oil and gas sector; and the waste sector (landfills) . . . . these sources and sectors are core drivers of U.S. contributions to global climate change and, because of the legal obligation to reduce their emissions, they provide the most important near-term opportunity to reduce greenhouse gas emissions and fight against climate change. And yet the administration is doing the opposite, causing great harm to public health and the environment, as recently laid out in the Fourth National Climate Assessment and highlighted throughout this report. In short, the Trump administration is preparing to take us over the climate cliff").

271. *See, e.g.*, Nicholas Kusnetz*, Trump Aims to Speed Pipeline Projects by Limiting State Environmental Reviews*, INSIDECLIMATE NEWS (Apr. 11, 2019), https://insideclimatenews.org/news/11042019/trump-pipeline-executive-order-environmental-review-keystone-xl-clean-water-act-states-rightsbra [https://perma.cc/8EKP-5Z8W] (reporting on two executive orders limiting environmental reviews of pipelines).

272. John Schwartz, *Major Climate Change Rules the Trump Administration is Reversing*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/climate/climate-rule-trump-reversing.html [https://perma.cc/UU3N-GD67].

273. *See* Oliver Milman & Emily Holden, *Trump Administration Allows Companies to Break Pollution Laws During Coronavirus Pandemic*, THE GUARDIAN (Mar. 27, 2020), https://www.theguardian.com/environment/2020/mar/27/trump-pollution-laws-epa-allows-companies-pollute-without-penalty-during-coronavirus [https://perma.cc/84AC-48TM] ("In an extraordinary move that has stunned former EPA officials, the Trump administration said it will not expect compliance with the routine monitoring and reporting of pollution and won't pursue penalties for breaking these rules . . . There is no end date set for this dropping of enforcement."). It bears mention that the Trump Administration announced that it was lifting compliance obligations a week after receiving a letter from the American Petroleum Institute, the industry trade association discussed *supra* section III.B, making that very request. *See* Letter from Michael J. Sommers, President & Chief Exec. Officer, API, to Donald J. Trump, President, U.S. (Mar. 20, 2020), https://www.api.org/~/media/Files/News/Letters-Comments/2020/3202020-API-Letter-to-President-Trump.pdf [https://perma.cc/JK4K-Z83Y] ("[T]he oil and natural gas industry needs to maintain safe and reliable operations [during the pandemic], taking into consideration that there may be limited personnel capacity to manage the full scope of the current regulatory requirements. As such, we will be requesting assistance in temporarily waiving non-essential compliance obligations from the relevant agencies and departments within your Administration and/or their state counterparts.").

274. *See, e.g.*, Amy Westervelt & Emily Gertz, *The Climate Rules Being Rolled Back During the COVID-19 Pandemic*, DRILLED NEWS (Apr. 6, 2020), https://www.drillednews.com/post/the-climate-covid-19-policy-tracker [https://perma.cc/WQJ8-TH6G] (documenting and mapping fossil fuel-friendly changes being made by the Trump Administration during the pandemic, including opening comment periods on pipeline projects and oil and gas leases).

below market value for extraction on federal lands,[275] and to urge Congress to allocate billions in stimulus funding to bail out the industry by purchasing near worthless oil for the Strategic Petroleum Reserve as other storage sites have been filled.[276]

In such a situation, state tort law is one among many legal and policy tools urgently needed to address the myriad climate harms exacerbated by the federal government's actions and failures to act. This is the gap-filling role that state tort law has been serving for this country's residents for decades. In addition to redressing harms and deterring corporate misconduct,[277] tort law can serve to "prod" federal policymakers to take much-needed actions to protect those that they serve.[278]

The defendants' second-wave strategy of federalizing state tort law threatens to cut off this vital avenue of redress and of corporate accountability in the U.S. system at the time that we are facing the most serious threats that we have ever faced. Now more than ever, state tort law must be allowed to serve its long-standing functions that provide the public with a safety net when federal protections are weak or non-existent.

CONCLUSION

In sum, the second-wave defense strategy of federalizing state tort law is wrong-headed as a legal matter, and disastrous as a policy matter. *All* law is going to have to deal with the climate crisis in order to be relevant, whether it be international, national, or local. Tort law is a small but important part of all state law in this country. The second-wave climate

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275. *See* Heather Richards, *BLM to Expedite Royalty Relief During Pandemic*, E&E NEWS (Apr. 27, 2020), https://www.eenews.net/eenewspm/2020/04/27/stories/1062988129 (last visited Aug. 10, 2020) (reporting on guidance issued by the Bureau of Land Management "encourag[ing] producers to apply for either a suspension of federal leases or a reduced royalty rate from the existing 12.5% of fair market value").

276. *See* Stephen Cunningham et al., *Funding to Fill U.S. Strategic Petroleum Reserve Cut from Stimulus Plan*, WORLD OIL (Mar. 25, 2020), https://www.worldoil.com/news/2020/3/25/funding-to-refill-us-strategic-petroleum-reserve-cut-from-stimulus-plan [https://perma.cc/SZ39-E77G]; Sam Meredith, *The Hunt for Oil Storage Space Is On—Here's How It Works and Why It Matters*, CNBC (Apr. 22, 2020, 3:07 AM), https://www.cnbc.com/2020/04/22/oil-prices-heres-how-oil-storage-works-and-why-capacity-matters.html [https://perma.cc/44DW-26ZM].

277. *Cf.* David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95, 126–27 (2005) ("Tort liability serves two important and related functions unserved by regulation: tort liability compensates those injured by products found to impose an unjustified risk, and, in so doing, it deters excessive risk-taking by forcing the risk-taker to absorb the costs that come with marketing a product that imposes an unjustifiable risk of harm.").

278. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 423 (2011); Am. Elec. Power Co. v. Connecticut (*AEP*), 564 U.S. 410, 418 (2011) (noting the plaintiffs filed their claim in that case "well before" the EPA had even recognized carbon dioxide and other greenhouse gases as "pollutants" subject to regulation under the CAA).

tort suits are part of larger global movement of resorting to the courts to demand climate justice that the IPCC presciently predicted over a decade ago. The current era of climate disruption and its catastrophic threats demand not only new and improved legal and policy mechanisms, but also the use of current ones—including state tort law—to the fullest extent possible.