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Fool Me Once, Shame On You: Promoting Corporate Accountability for the Human Rights Impacts of Climate Washing

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**GLOBAL AGENCY FOR HUMAN RIGHTS:
A CORPORATE DUTY?**

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“FOOL ME ONCE, SHAME ON YOU”:
PROMOTING CORPORATE ACCOUNTABILITY FOR
THE HUMAN RIGHTS IMPACTS OF
CLIMATE WASHING

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Abstract

Effective climate change governance faces two overarching challenges. The first is mobilizing the political will to regulate climate change with sufficient ambition. Second, when regulatory measures are in place to address climate change, the next challenge is ensuring that governmental and private sector entities are on track to comply with these time-sensitive climate governance commitments. This article addresses the second challenge. It reviews “climate washing” litigation that seeks to hold fossil fuel companies and other private sector entities accountable for misleading the public about their compliance with climate change mandates or goals. The article argues that climate washing tactics threaten human rights to health, property, food and water, and life, especially in vulnerable communities, by postponing effective climate regulation and thereby amplifying the risks from climate change-related events such as severe storms, flooding, heat, and droughts. It proposes to incorporate human rights compliance mechanisms into companies’ characterizations of their climate change compliance to help ensure these entities are transparent and truthful in their efforts to comply with climate change governance mandates or goals.

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Introduction

Corporations have a long history of engaging in deceptive and misleading statements to enhance their image and secure the respect of the public. With the advent of sustainability as a new legal and social ambition in the late 1980s, an environmentally conscious audience of consumers began to care more about corporations' practices regarding environmental protection and sustainability. Corporations responded in a way that sought to please this new generation of conscientious consumers by telling consumers what they wanted to hear regarding environmentally friendly and sustainable products and activities while not compromising their profit-driven model of operation. Tracing their origins to the 1980s, these "greenwashing" practices have persisted for nearly half a century.¹ Greenwashing is now a dictionary-defined term that refers to "the act or practice of making a product, policy, activity, etc. appear to be more environmentally friendly or less environmentally damaging than it really is."²

A persistent form of consumer deception in the past three decades, greenwashing has become progressively more common and institutionalized as a way of doing business.³ First, the *severity* of the

¹ For a discussion of the history and evolution of greenwashing practices, *see generally* Bruce Watson, *The troubling evolution of corporate greenwashing*, THE GUARDIAN (Aug. 20, 2016), <https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies> (tracing the evolution of greenwashing from the hotel towel context to greenwashing practices on a much larger and harmful scale in the 1980s, 1990s, and 2000s including Chevron's, DuPont's, and Nestle's deceptive advertising campaigns asserting that their environmentally damaging practices were safe and sustainable); Kenneth Partridge, *VW Scandal Just the Tip of the Greenwashing Iceberg*, COLUMBIA BUS. SCH. IDEAS & INSIGHTS (Oct. 23, 2015), <https://www8.gsb.columbia.edu/articles/ideas-work/vw-scandal-just-tip-greenwashing-iceberg> (confirming explosion of greenwashing practices by citing to 2010 report that found that 95 percent of "green" products on the market had at least one false or questionable claim).

² *Greenwashing*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/greenwashing> (last visited Nov. 2, 2022).

³ *See, e.g.*, Akriti Bhargava, Karla Martínez Toral & Aradhna Tandon, *Climate-Washing: Legal Liability for the New Green-Washing?*, ENERGY TRANSITION (June 30, 2022), <https://energytransition.org/2022/06/climate-washing-legal-liability-for-the-new-green-washing/> (referencing a recent European Commission report that found "42% of online market websites contain false, deceptive or exaggerated environmental claims and could qualify as unfair commercial practice under European

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deception increased. For example, greenwashing traces its origins to hotels' campaigns encouraging guests to reuse towels to promote environmental protection.⁴ This minor form of consumer deception scaled up dramatically shortly thereafter with the Volkswagen "dieselpgate" scandal, which involved deliberate installation of mechanisms to falsely convey compliance with motor vehicle emissions standards.⁵ Second, the *scope* of the deception also increased. For example, as consumer awareness of inhumane food production practices grew, the private sector returned to its greenwashing playbook to engage in what has come to be known as "humane washing." Examples of this practice include "humanely raised" chickens and "pasture-raised" eggs.⁶

Most disturbingly, a new generation of greenwashing known as "climate washing" has emerged in recent years that builds on traditional greenwashing and humane washing practices. Like greenwashing and humane washing, climate washing involves telling the public, in a dishonest or deceptive manner, what it wants to hear regarding compliance with or progress toward climate change mandates or goals.⁷ It seeks to preserve the status quo of a profit-driven business model while harming the public through stalled progress in addressing the climate emergency.

Compared to its predecessors in consumer deception, the consequences in the climate washing context are much higher given the

Union (EU) regulations").

⁴ See Watson, *supra* note 1 (noting that the term "greenwashing" was coined by environmentalist Jay Westerfeld in 1986 in a literary magazine essay that reflected on a visit to Fiji where he noticed a hotel sign encouraging customers to reuse towels to help protect the environment).

⁵ See generally David Zaring & John Paul MacDuffie, *Exhausted by Scandal: 'Dieselpgate' Continues to Haunt Volkswagen*, KNOWLEDGE AT WHARTON (Mar. 21, 2019), <https://knowledge.wharton.upenn.edu/article/volkswagen-diesel-scandal/> (discussing how after paying more than 30 billion in fines for using a "defeat device" to fake diesel emissions levels in more than a half million of its vehicles for several years, Volkswagen faces SEC charges for, among other things, making deceptive claims about the environmental impact of the company's "clean diesel" fleet. For a discussion of the Volkswagen "dieselpgate" scandal, see *infra* section I(B): *Greenwashing and Humane Washing*).

⁶ For a discussion of humane washing claims, see *infra* section I(B): *Greenwashing and Humane Washing*.

⁷ For a discussion of the types of claims at issue in the climate washing context, see *infra* section II: *Climate Washing Litigation*.

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urgency of the climate crisis. A human rights lens needs to be applied to this context to limit these deceptive practices and enhance the consequences for engaging in them. One example of climate washing is when companies convey their “net zero”⁸ commitments to the public. Through a variety of deceptive tactics, companies claim “carbon neutrality” while maintaining carbon-intensive business models. Moreover, the goal dates for their net-zero pledges are well into the future such that they may be forgotten by the time the company has to comply with them.⁹ This practice is tantamount to enabling and even rewarding someone who when asked to complete a task today always responds, “I’ll get to that tomorrow and I’ll do a great job with it when I do.” Talk is cheap.¹⁰ Failure to enhance accountability for meeting net-zero commitments unfairly shifts the burden of climate action to vulnerable populations and future generations and increases human health and environmental risks to these populations.¹¹

There has been an uptick in climate washing litigation claims in the U.S. and around the world in recent years.¹² These claims have

⁸ *What is Net Zero?* NET ZERO CLIMATE, <https://netzeroclimate.org/what-is-net-zero/> (last visited Jan. 21, 2023) (“Net zero” refers to “a state in which the greenhouse gases going into the atmosphere are balanced by removal out of the atmosphere. Net zero is an important standard in setting global climate governance targets because it is the state at which global warming stops.”).

⁹ See generally Albert C. Lin, *Making Net Zero Matter*, 79 WASH. & LEE L. REV. 679 (2022) (arguing that accountability and enforcement mechanisms must be implemented to promote compliance with net zero commitments).

¹⁰ See James Dyke, Robert Watson & Wolfgang Knorr, *Climate scientists: concept of net zero is a dangerous trap*, THE CONVERSATION (Apr. 22, 2021), <https://theconversation.com/climate-scientists-concept-of-net-zero-is-a-dangerous-trap-157368> (noting that climate pledges endorse a “burn now, pay later” approach to climate change mitigation). When such pledges are not backed by credible actions, climate washing litigation seeks to fill the void and secure accountability.

¹¹ Lin, *supra* note 9.

¹² See generally Scarlett Evans, *Climate Change and Greenwashing - the Tightening Net on Supermajors’ Climate Commitments*, POWER TECH (Apr. 7, 2022) (discussing increase in climate washing cases and different legal theories plaintiffs have relied on such as consumer protection law, climate law, or company law to evaluate whether climate-oriented pledges have been upheld); Lisa Benjamin et al., *CSSN Research Report 2022:1: Climate-Washing Litigation: Legal Liability for Misleading Climate Communications*, CLIMATE SOC. SCI. NETWORK (Jan. 2022), at 5, <https://cssn.org/wp-content/uploads/2022/01/CSSN-Research-Report-2022-1->

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targeted both governmental and private sector defendants. The threat of climate washing litigation helps the public apply pressure to companies to ensure that they are transparent and truthful in characterizing their responses to climate change.¹³ Some companies perceive the threat of climate washing litigation as an unfair “Catch-22” scenario: “[S]ay too little on climate, and risk being accused of inaction; say too much, and risk being accused of ... ‘climate-washing.’”¹⁴ Nevertheless, recent successes in climate washing litigation “should give companies pause” when characterizing the sustainability and environmental impact of their products and services.¹⁵ Moreover, when making claims concerning their plans and actions to fulfill net zero commitments, these claims need to be “credible,” “measurable,” and “ambitious,” and be accompanied by “short and medium-term interventions and allocation of adequate resources to deliver them.”¹⁶

Part I of this article provides a working definition of climate washing and examines the parameters of the climate washing context. It then discusses how although climate washing shares common attributes with its predecessors in private sector deception – greenwashing and humane washing – it also involves new and more dangerous forms of deception that require more stringent regulation. Part II addresses theories of accountability in climate washing litigation and examines

Climate-Washing-Litigation-Legal-Liability-for-Misleading-Climate-Communications.pdf (noting that at least 20 climate-washing cases have been filed in courts in the U.S., Australia, France, and the Netherlands since 2016).

¹³ Public deception on environmental and public health issues has a well-established history in the U.S. prior to the new wave of climate washing. *See generally* Jessica Wentz & Benjamin Franta, *Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages*, 52 ENV'T L. REP. 10995 (2023) (discussing history of industry deception tactics in the asbestos, lead paint, tobacco, and opioids contexts).

¹⁴ *See* Kai Alderson, Antonio DiDomenico & Ron Ezekiel, *Climate Washing Risks and How to Mitigate Them*, FASKEN (Feb. 28, 2022), <https://www.fasken.com/en/knowledge/2022/02/28-climate-washing-risks-and-how-to-mitigate-them> (addressing insights from Canadian firm on where companies are drawing the line on advertising or disclosing climate-related measures to avoid future climate washing litigation).

¹⁵ Renee Zaytsev, Riccardo DeBari & Edward Babbitt, *2021 ESG Litigation Offers Pointers For The Year Ahead*, LAW 360 (Jan. 3, 2022), <https://www.law360.com/articles/1450977/2021-esg-litigation-offers-pointers-for-the-year-ahead>.

¹⁶ Bhargava et al., *supra* note 3.

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three case studies in this field. Part III explores the nexus between climate change and human rights in a series of legal developments over the past two decades, which has reached a crescendo in recent years. Part IV establishes the connection between climate washing and human rights and proposes enhanced domestic and international accountability standards to address the human rights impacts of climate washing.

*I. Historical and Conceptual Foundations of Climate Washing**A. What is Climate Washing?*

Climate washing is a form of greenwashing that involves climate change compliance as the focus of the misleading communication. Also referred to as “climate-related greenwashing,” it has been defined as “the use of unsubstantiated or misleading claims about climate or environmental credentials, or the selective disclosure of climate performance.”¹⁷ Other definitions describe climate washing as “employing false claims, hiding important information that could help evaluate the meaning or context of a claim, and/or using vague or ambiguous terms.”¹⁸ Unlike greenwashing, however, climate washing claims can go beyond just the natural environment and address other aspects of climate change impacts such as human health and economics¹⁹ and, as this article argues, human rights consequences.

Although climate washing involves similar tactics of deception that have been and continue to be used in the greenwashing and humane washing contexts, it has some unique features and involves much higher stakes as a result of the private sector’s deception tactics. Climate washing litigation seeks to impose liability to avoid or diminish the significant impacts from the private sector’s efforts to mislead the public on climate change compliance. One challenge in evaluating climate washing tactics and their impacts is that because the field is so

¹⁷ Nigel Brook, Wynne Lawrence & Zaneta Sedilekova, *Insight on the Global Trends in Climate Change Litigation: 2022 Snapshot*, CLYDE & CO. (July 1, 2022), n.7, <https://www.clydeco.com/en/insights/2022/07/insight-on-the-global-trends-in-climate-change-lit>.

¹⁸ Bhargava et al., *supra* note 3.

¹⁹ Benjamin et al., *supra* note 12, at 4.

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new, the terminology has not yet crystallized. Some scholars and experts refer to climate washing tactics as another type of “greenwashing,”²⁰ while others label it “climate-washing.”²¹ This article refers to these practices as “climate washing” and hopes to help advance the literature with this label for these practices.

Climate washing claims have been filed against both governmental and private sector entities. These claims have two components: (1) they target either actions²² or products and (2) allege that these actions or products falsely or misleadingly²³ claim to address climate change.²⁴ This article focuses exclusively on private sector accountability for climate washing.²⁵

²⁰ See, e.g., Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities, and Regions, Report of UN High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities (Nov. 8, 2022), https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf. For a discussion of this report, see *infra* section IV(B): *International: New Accountability Mechanisms for Climate Washing*.

²¹ Benjamin et al., *supra* note 12, at 4.

²² “Actions” in this context typically involve climate change compliance characterizations such as net zero commitments and characterizations of initiatives that are purportedly climate-friendly or sustainable.

²³ Some private sector characterizations regarding climate change compliance are outright lies; however, the majority are more clever deceptions using vague language to intentionally confuse consumers. Both scenarios are actionable.

²⁴ See Benjamin et al., *supra* note 12, at 5 (providing elements of climate washing litigation). In addition to actions and products, a third category – disclosure of climate investments and finance risks – has become more common in recent years. It typically involves misinformation to gain investor confidence around companies’ environmental social governance (ESG) claims. See *What is greenwashing in investing?* U.S. BANK, <https://www.usbank.com/investing/financial-perspectives/investing-insights/what-is-greenwashing.html>; see also *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, U.S. SECURITIES & EXCHANGE COMM’N (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46>. In March 2022, the SEC proposed rule changes to add climate-related disclosures and greenhouse gas emissions. This rule, however, focuses on informing investors of whether their investments are environmentally friendly to avoid financial greenwashing and climate washing as opposed to combating the environmental damage.

²⁵ For a discussion of recent climate washing claims against governments, see *generally Are Governments at COP26 Guilty of Greenwashing?* <https://leading.business.columbia.edu/features/are-governments-at-cop26-guilty-of-greenwashing>;

B. Greenwashing and Humane Washing

Greenwashing involves claims that companies make regarding steps they are taking to be more environmentally conscious or characterizations of their products and the impacts they may have. There is a complex set of drivers that incentivize companies to engage in greenwashing. First, the absence of robust law and regulations governing standards for communicating environmental messages inspires companies' interest to appear environmentally friendly without fear of repercussions.²⁶ Second, competitors in the marketplace who have been communicating positively about their environmental performance, truthful or not, entice companies to engage in greenwashing to avoid losing competitive advantage.²⁷ Third, non-market pressures, such as activists, NGOs and media, directly or indirectly pressure companies to greenwash because of the reputational risk associated with a negative environmental compliance track record that can undermine their business.²⁸ Therefore, greenwashing is perceived as an easy alternative to costly and time-consuming revamping of their business practices that brings the same benefits without the expense and effort.²⁹

One globally infamous example of greenwashing is the Volkswagen "diesel-gate" debacle. This scenario involved "defeat device" software that Volkswagen installed in its diesel engines that could detect that it was being tested and would accordingly change the performance to show improved results on the test.³⁰

Climate change - is YOUR government greenwashing? <https://www.verdict.co.uk/climate-change-government-greenwashing/>.

²⁶ Sonya Shah, *An Analysis of Greenwashing: The Legal Framework in the UK* (2022) (unpublished LL.M. thesis manuscript), at 10 (citing Magali A. Delmas & Vanessa Cuerel Burbano, *The Drivers of Greenwashing*, 54 CAL. MGMT. REV. (2011), <https://journals.sagepub.com/doi/10.1525/cmr.2011.54.1.64>).

²⁷ *Id.*

²⁸ *Id.* at 10-11.

²⁹ *Id.* at 11 (citing Khaled Diab, *Why do corporations greenwash?* *Aljazeera* (Mar. 5, 2022), <https://www.aljazeera.com/opinions/2022/3/5/why-do-corporations-greenwash>).

³⁰ Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), <https://www.bbc.com/news/business-34324772>.

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In the Volkswagen case, the Federal Trade Commission (FTC) and Environmental Protection Agency (EPA) launched the investigation as it was not only an environmental issue,³¹ but a business case involving false and misleading advertising claims. The installation of the defeat devices was an elaborate fraud scheme that was intended to “fool government emissions tests” and provide “false certification to government authorities that the vehicles were compliant” with deceptive marketing of the vehicles to consumers as “clean diesel.”³² Moreover, it was not just one year of cars or one specific model. The violations came from consecutive annual models from 2009 until 2015.³³

Even at the start of the federal agencies’ investigative process, there was concern that the combination of minimal FTC fines for false or misleading advertising and the unlikelihood of enforcement “action in cases of deceptive or fraudulent environmental claims” would ultimately lead to more greenwashing.³⁴ Unfortunately, this concern has proven to be true since 2015 as companies have continued to engage in greenwashing and climate-washing practices more than ever to appeal to environmentally minded consumers and investors.³⁵ Nevertheless, Volkswagen ultimately paid a high price for its track record of

³¹ The defeat device’s adverse effects also impacted human health. For a discussion of the impact of the defeat device on public health, *see generally* Steven R.H. Barrett et al., *Impact of the Volkswagen emissions control defeat device on US public health*, 10 ENV’T RES. LETTERS 114005 (2015), <https://iopscience.iop.org/article/10.1088/1748-9326/10/11/114005>.

³² Daniel Jacobs & Lawrence P. Kalbers, *The Volkswagen Diesel Emissions Scandal and Accountability*, CPA J. (July 2019), <https://www.cpajournal.com/2019/07/22/9187/>.

³³ *Id.*

³⁴ *See* Kenneth Partridge, *VW Scandal Just the Tip of the Greenwashing Iceberg*, COLUMBIA BUS. SCH. IDEAS & INSIGHTS (Oct. 23, 2015), <https://www8.gsb.columbia.edu/articles/ideas-work/vw-scandal-just-tip-greenwashing-iceberg> (citing to a report that found 95 percent of “green” products on the market include at least one false or questionable claim). For a discussion of how the U.S. can learn from the EU experience in regulating greenwashing, *see* Natalie M. Roy, *Climate Change’s Free Rider Problem: Why We Must Relinquish Freedom to Become Free*, 45 WM. & MARY ENV’T L. & POL’Y REV. 821 (2021) (discussing stricter laws in the EU that leave little room for greenwashing).

³⁵ Jennifer Hijazi, *‘Climate-Washing’ Brawls Will Target New Sectors, Governments*, BLOOMBERG L. (Jan. 14, 2022), <https://news.bloomberglaw.com/environment-and-energy/climate-washing-brawls-will-target-new-sectors-governments>.

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flagrant deception. By 2019, the company's costs from the scandal were over \$32 billion, still rising with more pending litigation.³⁶

While the Volkswagen scandal is one of the most notorious greenwashing transgressions, it overshadows a wide range of greenwashing tactics many companies have employed since the 1980s.³⁷ There are several categories of these tactics, three of which are most relevant to understanding the rise in climate-washing efforts.³⁸

The first category involves encouraging consumers to engage in environmentally responsible behavior without disclosing the company's role in exacerbating the climate crisis. Companies engaged in this practice include HSBC,³⁹ Mercedes-Benz,⁴⁰ Coca-Cola,⁴¹ and

³⁶ See Zaring & MacDuffie, *supra* note 5. The degree of public attention involved in the Volkswagen scenario obscures the fact that the company was not alone in employing emission-cheating software to get the right results to tout the product as sustainable. Other car companies that had engaged in this brand of deception include BMW, Ford, Chevrolet, Mercedes-Benz, and Audi. See also Eric D. Lawrence & Frank Witsil, *Lawsuit accuses GM of using emission defeat devices*, DETROIT FREE PRESS (May 25, 2017), <https://www.freep.com/story/money/cars/general-motors/2017/05/25/lawsuit-gm-emission-defeat-devices/345915001/>.

³⁷ See generally *Companies Accused of Greenwashing*, TRUTH IN ADVERTISING (Apr. 22, 2022), <https://truthinadvertising.org/articles/six-companies-accused-greenwashing/> (summarizing several categories of greenwashing claims against several companies).

³⁸ *Id.*

³⁹ *HSBC's Environmental Claims*, TRUTH IN ADVERTISING (Oct. 20, 2022), <https://truthinadvertising.org/articles/hsbcs-environmental-claims/>. The Advertising Standards Authority in the U.K. has banned HSBC ads for misleading consumers by making references to “net zero” and a commitment to plant two million trees while continuing to support industries that emit high levels of carbon dioxide and other greenhouse gasses.

⁴⁰ *BlueTEC Vehicles*, TRUTH IN ADVERTISING, <https://truthinadvertising.org/class-action/bluetec-vehicles/> (last visited Jan. 15, 2022). Multiple lawsuits were consolidated against Mercedes-Benz alleging that the company falsely marketed their vehicles as “clean diesel” despite their elevated pollution levels in lab tests and that they exceeded emission standards.

⁴¹ *Earth Island Institute v. Coca-Cola*, Civ. Action No. 21-1926 (PLF) (D.C. Cir. Mar. 24, 2022), slip op. at 2, http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220324_docket-121-cv-01926_opinion-and-order.pdf (alleging that Coca-Cola engaged in “false and deceptive” marketing by referring to itself as sustainable while “polluting more than any other beverage company and actively working to prevent effective recycling measures in the U.S.”).

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Quorn Foods.⁴² The second category is encouraging customers to take insufficient action to promote change. Companies that have engaged in this practice include KLM Royal Dutch Airlines,⁴³ United Airlines,⁴⁴ and Oatly.⁴⁵ The third category concerns products that are marketed as sustainable when in reality, the manufacturing process is ultimately not eco-friendly. Companies that have engaged in this

⁴² Flora Southey, *Quorn advert banned over carbon footprint claim: 'It was never our intention to mislead consumers'*, TRUTH IN ADVERTISING (Oct 26, 2022), <https://www.foodnavigator.com/Article/2020/09/30/Quorn-advert-banned-over-carbon-footprint-claim-It-was-never-our-intention-to-mislead-consumers>. The Advertising Standards Authority in the U.K. concluded that Quorn Foods, producer of meat substitutes, did not substantiate in its advertisements the basis for the claimed reduction of its carbon footprint.

⁴³ *KLM Royal Dutch Airlines' CO2ZERO Carbon Offset Program*, TRUTH IN ADVERTISING (Oct. 3, 2022), <https://truthinadvertising.org/articles/klm-royal-dutch-airlines-co2zero-carbon-offset-program/> (noting that KLM was accused of false, deceptive, and misleading advertising when touting a carbon offset system as sufficient for customers to negate the environmental impact of flying, when there was no credible evidence to back the system or claim).

⁴⁴ *United Airlines' 'Offset Your Flight' Booking Option*, TRUTH IN ADVERTISING (Sept. 15, 2022), <https://truthinadvertising.org/articles/united-airlines-offset-your-flight-booking-option/> (discussing how United Airlines' booking system purportedly allowing customers to purchase a carbon offset or carbon credit to finance environmental work does not actually reduce greenhouse gas emissions from flying and the certification process for the carbon offset system is flawed, ultimately misleading customers about their overall environmental impact).

⁴⁵ *Oatly's Environmental Claims*, TRUTH IN ADVERTISING (Feb. 2, 2022), <https://truthinadvertising.org/articles/oatlys-environmental-claims/> (examining how Oatly's claim that cutting dairy and meat from diets was the single biggest lifestyle change to reduce environmental impact was not based on any studies or long term data, but rather based on analysis of a single climate expert whose analysis was overstated).

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practice include Red Lobster,⁴⁶ Nestle,⁴⁷ and Kohl's.⁴⁸ Each of these categories have resurfaced in various ways in the recent growth of climate washing.⁴⁹

⁴⁶ Red Lobster has sustainability representations such as “Seafood with Standards” and “Traceable. Sustainable. Responsible.” on its menu. These representations, however, have been found to be nothing more than efforts to mislead consumers because the company harvests from regions not deemed sustainable by the Monterey Bay Aquarium Seafood Watch due to “environmentally destructive practices, poor reporting of environmental data and standards, and overuse of antibiotics.” The harvesting process also is inhumane, harming female shrimps in order to increase reproduction. See Class Action Complaint, *Marshall v. Red Lobster Management LLC*, (June 11, 2021), <https://truthinadvertising.org/wp-content/uploads/2021/07/Marshall-v-Red-Lobster-complaint.pdf>; see also Jemima Webber, *World's Largest Seafood Chain, Red Lobster, Under Fire for 'Deceptive' Sustainability Claim*, PLANT BASED NEWS (Dec. 30, 2021), <https://plantbasednews.org/culture/law/red-lobster-lawsuit-sustainable/>.

⁴⁷ A class-action lawsuit was filed against Nestle for labeling their chocolates as “sustainably sourced” and that the product “supports” farmers when the cocoa was harvested at farms using child and slave labor with “virtually no environmental standards in place.” See Second Amended Class Action Complaint, *Walker v. Nestle USA*, (Apr. 24, 2019), <https://truthinadvertising.org/wp-content/uploads/2021/04/Walker-v-Nestle-2nd-amended-complaint.pdf>; see also *Class action lawsuit filed against Nestle for child slavery on cocoa harvest in West African farms*, BUSINESS & HUMAN RTS. RESOURCE CTR. (Apr. 24, 2019), <https://www.business-humanrights.org/en/latest-news/usa-class-action-lawsuit-filed-against-nestle-for-child-slavery-on-cocoa-harvest-in-west-african-farms/>.

⁴⁸ Kohl's claims that its fiber products are “bamboo,” “produced free of harmful chemicals, using non-toxic materials, in a way that is non-polluting and safe for humans and the environment,” and are “providing an environmental benefit.” Complaint for Civil Penalties, Permanent Injunction, And Other Relief, *U.S. v. Kohl's Inc.* (Apr. 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2023171KohlsComplaint.pdf. The company sold many products marked as “bamboo” with “Cleaner Solutions” tags attached or descriptions that promise sustainability or environmental friendliness. However, the products are rayon or other materials and ultimately are produced with hazardous air pollutants and are not as environmentally friendly or “clean” as they claim to be given the production methods. See *id.*; see also Lesley Fair, *\$5.5 million total FTC settlements with Kohl's and Walmart challenge “bamboo” and eco claims, shed light on Penalty Offense enforcement*, FED. TRADE COMM'N (Apr. 8, 2022), <https://www.ftc.gov/business-guidance/blog/2022/04/55-million-total-ftc-settlements-kohls-and-walmart-challenge-bamboo-and-eco-claims-shed-light>.

⁴⁹ For a discussion of some of these climate washing tactics and the litigation that seeks to promote accountability for these deceptive practices, see *infra* section II: *Climate Washing Litigation*.

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Building on the long-standing tradition of greenwashing, humane washing is the practice of overstating higher-welfare farming practices in labeling animal product food. The point of humane washing is to ultimately deceive consumers who desire more humanely raised meat, eggs, and dairy products and are willing to pay more for such products.⁵⁰ In the U.S., statutes prohibiting false advertising and unfair, deceptive, or abusive practices (UDAP) in the sale of goods, including food, exist in all 50 states.⁵¹ The “reasonable consumer standard” applies in most states when evaluating whether a marketing practice is false or deceptive.⁵² Because terms like “humane,” “sustainable,” and “caring” have no legal definition, companies in the food industry “attach such terms to products that are not produced in the way that reasonable consumers would understand those terms.”⁵³

Litigation in recent years challenging humane washing has been largely successful in the court of public opinion and, despite

⁵⁰ *Study Shows Humanewashing is Costing Animals - and Consumers - Too Much. We've Got Solutions*, ASPCA (June 28, 2022), <https://www.asPCA.org/news/study-shows-humanewashing-costing-animals-and-consumers-too-much-weve-got-solutions>.

⁵¹ KIM E. RICHMAN & CLARK BINKLEY, *Policy by Way of Litigation: Protecting Animals, the Environment, and Public Health*, in WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW? 258 (Randall S. Abate ed., 2d ed. 2020), https://www.eli.org/sites/default/files/book_pdfs/00_animal_law_2nd_ed_front_matter_0.pdf.

⁵² *Id.* at 259.

⁵³ *Id.* at 256; see generally Animal Welfare Institute, *Label Confusion 2.0: How the USDA Allows Producers to Use “Humane” and “Sustainable” Claims on Meat Packages and Deceive Customers* (Sept. 2019), https://awionline.org/sites/default/files/publication/digital_download/19LabelConfusionReport.pdf.

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some formidable obstacles,⁵⁴ in the courts as well. Suits against companies that professed to sell “pasture-raised”⁵⁵ eggs or provide “extraordinary care and comfort”⁵⁶ for their cows were successful in raising public awareness and awareness within the food industry of inhumane practices at these companies, and prompting internal and criminal investigations and removal of products from some grocers’ shelves.⁵⁷ Two suits succeeded with settlements that required companies engaged in humane washing to discontinue use of misleading packaging⁵⁸ and labels.⁵⁹ A complaint in another case⁶⁰ survived a motion to dismiss where the court concluded that a reasonable consumer

⁵⁴ Preemption is a vexing challenge in humane washing claims against the meat industry. See RICHMAN & BINKLEY, *supra* note 51, at 269 (noting that “USDA’s oversight of packaging and labeling ... can mean that representations made on meat products’ labels have effectively been ‘approved’ by the federal regulator” and would thus preempt UDAP state law claims on grounds of conflict preemption).

⁵⁵ *Animal Legal Defense Fund Announces Resolution in Egg Labeling Lawsuit Against Handsome Brook Farm*, ALDF (Mar. 6, 2018), <https://aldf.org/article/animal-legal-defense-fund-announces-resolution-in-egg-labeling-lawsuit-against-handsome-brook-farm/>.

⁵⁶ See Complaint, Michael v. Fairlife, Ltd. Liab. Co. et al., No. 1:19cv-03924 (N.D. Ill. Nov. 22 2019).

⁵⁷ See Michelle Gant, *Fairlife Dairy Products Pulled from Store Shelves Amid Animal Abuse Controversy*, TODAY (June 9, 2019), <https://www.today.com/food/fairlife-dairy-products-pulled-store-shelves-amid-animal-cruelty-controversy-t155783>.

⁵⁸ RICHMAN & BINKLEY, *supra* note 51, at 275 (citing *Trader Joe’s Cage-Free Egg Lawsuit Reaches Settlement in a Win for Truth in Advertising*, ALDF.ORG (June 29, 2018), <https://aldf.org/article/trader-joes-cage-free-egg-lawsuit-reaches-settlement-in-a-win-for-truth-in-advertising/>) (noting that Trader Joe’s agreed to remove misleading packaging on its cage-free eggs that depicted images of chickens foraging outdoors in open spaces).

⁵⁹ LaTravia Smith, *The “Fowl” Practice of Humane Labeling: Proposed Amendments to Federal Standards Governing Chicken Welfare and Poultry Labeling Practices*, 18 SUSTAINABLE DEV. L. & POL’Y BRIEF 17, 19 (2017), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1599&context=sdlp> (discussing how Perdue agreed to remove misleading “humanely raised” labels in response to class action suit alleging the company charged more for chicken with these labels when these chickens were subjected to extreme pain and harsh living conditions).

⁶⁰ *Organic Consumers Ass’n v Ben & Jerry’s Homemade, Inc.*, 2018 CA 4850 B, 2019 D.C. Super. LEXIS 1 (Jan. 7, 2019) (the case was ultimately dismissed for failure to establish misrepresentation.); see also Ellie French, *Judge dismisses deceptive marketing lawsuit against Ben & Jerry’s*, VT DIGGER (May 11, 2020), <https://vtdigger.org/2020/05/11/judge-dismisses-deceptive-marketing-lawsuit->

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could interpret humane washing labels as inaccurately conveying that its dairy products were exclusively sourced from “caring” providers.

Despite the progress and victories in these humane washing lawsuits, humane washing practices persist and continue to be challenged in the court system. In a recent development in humane washing litigation, PETA filed a class action lawsuit in July 2022 against Organic Valley, a Wisconsin dairy company that exports products nationwide and to 25 countries, for its allegedly misleading labels.⁶¹ PETA filed the suit on behalf of a California consumer who alleged that she was misled into buying Organic Valley’s products at premium prices based on the company’s claims that it treated the cows “with love.”⁶² PETA alleges that Organic Valley’s practices are inconsistent with this claim as the company regularly takes newborn calves away too early from their mothers, which PETA asserts is “inhumane” and “cruel.”⁶³ PETA claims that Organic Valley’s deceptive practices give the company a competitive edge in the industry as consumers would rely on this purported “humane treatment of animals” claim when purchasing the product.⁶⁴

As long as there are gaps in the legal framework and insufficient penalties for misconduct, greenwashing and humane washing practices in the private sector have continued and will continue unabated. Three decades of these efforts to mislead the public have evolved into widespread industry practice in seeking to secure the public’s interest in and preference for their products. This tradition of deception and lies has provided a foundation for the latest development

against-ben-jerrys-%EF%BB%BF/#:~:text=A%20federal%20judge%20has%20dismissed,former%20gubernatorial%20candidate%20James%20Ehlers.

⁶¹ Press Release, *Organic Valley Dairy Co. Hit With Consumer Lawsuit for Cruel Separation of Newborn Calves From Their Mothers*, PETA.ORG (July 19, 2022), <https://www.peta.org/media/news-releases/organic-valley-dairy-co-hit-with-consumer-lawsuit-for-cruel-separation-of-newborn-calves-from-their-mothers/>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*; see also Tim Carman, *Suit against Organic Valley calls separating cows from calves inhumane*, WASH. POST (July 19, 2022), <https://www.washingtonpost.com/food/2022/07/19/organic-valley-lawsuit-peta/> (noting that “Organic Valley posted sales of \$1.2 billion in 2020, a record for the co-op at a time when milk sales have been plummeting for years, despite an uptick early in the pandemic.”).

in the private sector's vague and deceptive advertising tactics and disinformation to the public: climate washing.

II. Climate Washing Litigation

The Paris Agreement⁶⁵ ushered in a new era of climate accountability. On the coattails of the climate change mitigation and adaptation commitments that the parties made pursuant to this agreement, an explosion of climate accountability lawsuits ensued against governments and corporations around the world. The first wave of this litigation involved lawsuits against governments and corporations to enhance their climate mitigation ambition. Two of the most well-known cases in this first wave were from the Netherlands. The *Urgenda*⁶⁶ case is an example of compelling higher ambition in climate mitigation against the government of the Netherlands, whereas *Milieudefensie v. Royal Dutch Shell*⁶⁷ is an example where a fossil fuel company was compelled to enhance its climate mitigation measures.

⁶⁵ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S., NO. 16-1104 <https://unfccc.int/process/conferences/pastconferences/paris-climate-change-conference-november-2015/paris-agreement> [hereinafter "*Paris Agreement*"].

⁶⁶ *Urgenda Found. v. Kingdom of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.

⁶⁷ *Milieudefensie et al. v Royal Dutch Shell Plc*, The Hague District Court, ECLI:NL:RBDHA:2021:5337, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-1.pdf (unofficial English translation of decision); see also Maurits Dolmans & Michael J. Preston, *Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company*, CLEARY GOTTlieb NEWS & INSIGHTS (June 30, 2021), <https://www.clearlygottlieb.com/news-and-insights/publication-listing/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company> (on March 22, 2022, Shell appealed the decision); see also *Shell filed appeal against landmark Dutch climate ruling*, REUTERS (Mar. 29, 2022), <https://www.reuters.com/business/sustainable-business/shell-filed-appeal-against-landmark-dutch-climate-ruling-2022-03-29/> (for a discussion of this case's implications for climate washing governance, see *infra* section IV(B): *International: New Accountability Mechanisms for Climate Washing*).

The second wave of these lawsuits involved a new focus on climate washing. With the enactment of these climate change compliance commitments, governments and private sector entities sought to appease the public through climate washing campaigns. A new line of cases emerged in 2018, which sought to hold governments and corporations responsible for their lies and misleading statements regarding climate change compliance.

Part II first reviews the theories of accountability involved in this line of cases at the federal and state levels. It then examines three case studies in climate washing. These case studies involve misleading characterizations from (1) Royal Dutch Shell and KLM airlines regarding compliance with their climate change commitments; (2) Oatly regarding the carbon footprint of its oat milk products; and (3) the oil and gas industry regarding the climate compliance benefits of blue hydrogen.

A. Theories of Accountability

Climate washing litigation gained traction in 2018 in the nationwide litigation brought by states, counties, and cities against the fossil fuel industry in the *BP v. Baltimore*⁶⁸ line of cases. The governmental entity plaintiffs in these cases sought damages from leading multinational oil and gas companies to contribute to the climate adaptation costs that these states, counties, and cities face.⁶⁹ The complaints alleged that the defendants' emissions substantially contributed to global climate change and that these companies knew for decades that their products and processes released greenhouse gas emissions that cause climate change and warming, and that those effects would be irreversible.⁷⁰ The plaintiffs also alleged that these companies, in

⁶⁸ *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (holding that the Fourth Circuit erred in concluding that its review of the remand order was limited to determining whether the defendants properly removed the case under the federal officer removal statute).

⁶⁹ Michael Copley, *Federal judges deal the oil industry another setback in climate litigation*, NPR (Aug. 18, 2022), <https://www.npr.org/2022/08/18/1118188330/federal-judges-deal-the-oil-industry-another-setback-in-climate-litigation>.

⁷⁰ *See, e.g., Complaint*, *Mayor and City Council of Baltimore v. BP P.L.C.*, at 1 (July 20, 2018), http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2018/20180720_docket-24-C-18-004219_complaint.pdf.

addition to having this knowledge and taking no mitigating action, further engaged in a

[c]oordinated, multi-front effort to conceal and deny their own knowledge of those threats, discredit the growing body of publicly available scientific evidence, and persistently create doubt in the minds of customers, consumers, regulators, the media, journalists, teachers and the public about the reality and consequences of the impacts of their fossil fuel pollution.⁷¹

This deliberate deception component of the *BP v. Baltimore* line of cases provided a foundation for climate washing litigation in courts around the world for the past several years and has prompted similar accountability lawsuits.⁷² More recent climate washing cases involve companies' efforts to mislead the public regarding their track records on climate compliance and their plans for future compliance. Examples of these claims include a line of cases against ExxonMobil regarding its marketing tactics concerning the impacts of fossil fuels and its investment in clean energy sources in the name of climate mitigation.⁷³

⁷¹ *Id.*

⁷² See, e.g., *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F. 4th 1238 (10th Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.*, 960 F. 3d 586 (9th Cir. 2020), *cert. granted, judgment vacated sub nom. Chevron Corp. v. San Mateo Cnty., California*, 210 L. Ed. 2d 830 (2021); *Rhode Island v. Shell Oil Products Co., L.L.C.*, 35 F. 4th 44 (1st Cir. 2022); *City & Cnty. of Honolulu v. Sunoco LP*, 21-15313, 2021 WL 1017392 (9th Cir. Mar. 13, 2021).

⁷³ See, e.g., *Order, City of New York v. ExxonMobil Corp.*, 1:21-cv-04807-VEC (S.D.N.Y. Nov. 12, 2021), http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2021/20211112_docket-121-cv-04807_order.pdf; *Commonwealth v. Exxon Mobil Corp.*, 489 Mass. 724, 187 N.E. 3d 393 (2022); *Defendants' Response to Plaintiff's Fifth Notice of Supplemental Authority, Vermont v. ExxonMobil Corp.*, 2:21-cv-00260-wks, (D. Vt. 2022), http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220902_docket-221-cv-00260_response.pdf; *Appellant's Response, Connecticut v. ExxonMobil Corp.*, 21-1446 (2d Cir. 2022), http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220831_docket-21-1446_letter.pdf (These cases allege that ExxonMobil misled and deceived consumers in each jurisdiction. In addition to these cases, the *BP v. Baltimore* case also lists ExxonMobil as one of

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With climate washing recognized as an urgent and growing problem that needed to be addressed through litigation, plaintiffs employed a wide range of legal theories in efforts to assign liability to these companies' misrepresentations to the public. One avenue of potential relief is filing complaints with the FTC alleging violations of the *Green Guides*.⁷⁴ The FTC issued the *Green Guides* in 1992 as guidelines for environmental marketing claims.⁷⁵

In a climate washing case involving the *Green Guides*, environmental groups filed a complaint with the FTC against Chevron alleging that its deceptive business practices that “overstate investment in renewable energy and its commitment to reducing fossil fuel pollution” violate the *Green Guides*.⁷⁶ Filed jointly by Earthworks, Global Witness, and Greenpeace, the case is the first to use the *Green Guides* in a case against fossil fuel companies for customer deception regarding climate impacts. The environmental groups allege that Chevron's advertisements and promotions misrepresent the company's actual environmental harm and activities, and that the company's “Climate Change Resilience” report only exacerbates greenwashing tactics with no real commitments to sustainability.⁷⁷

Plaintiffs also have filed lawsuits in state court asserting a wide range of common law liability theories. State law theories have included alleged violations of state consumer protection laws, unjust enrichment, products liability, negligence, fraud and misrepresentation, and public nuisance.⁷⁸ In a consumer protection law action, *District of*

many defendants.).

⁷⁴ Federal Trade Comm'n, *Guides for the Use of Environmental Marketing Claims* (“*Green Guides*”), 16 C.F.R. pt. 260 (2022).

⁷⁵ Federal Trade Comm'n, *Environmentally Friendly Products: FTC's Green Guides*, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides>. The guidelines were revised in 1996, 1998, and 2012. *Id.*

⁷⁶ *Accountability groups file first of its kind FTC complaint against Chevron for misleading consumers on climate action*, EARTHWORKS (Mar. 16, 2021), <https://earthworks.org/releases/accountability-groups-file-first-of-its-kind-ftc-complaint-against-chevron-for-misleading-consumers-on-climate-action/>.

⁷⁷ *Id.*

⁷⁸ *See, e.g., Minnesota v. API*, No. 20-1636 (JRT/HB), 2021 U.S. Dist. LEXIS 157845 (D. Minn. 2021) (alleging failure to warn under common law theories of strict liability and negligence as well as common law fraud and misrepresentation); *District of Columbia v. ExxonMobil Corp.*, 2022 U.S. Dist. LEXIS 205645 (relying on state

Columbia v. Exxon Mobil Corp.,⁷⁹ the District of Columbia's complaint alleges that ExxonMobil and other fossil fuel company defendants violated the D.C. Consumer Protection Procedures Act by engaging in intentionally misleading and deceptive greenwashing campaigns, both in the past when the companies knew that their products were harmful, and as the companies continued such practices.⁸⁰ Modeled after tobacco companies' past misinformation campaigns on the harms of cigarettes and tobaccos, the fossil fuel companies have orchestrated a public relations tactic by employing the Advancement of Sound Science Coalition, a fake grassroots citizen group created by Big Tobacco, and employing scientists with no climate background, all while continuing to privately invest in harmful projects.⁸¹ As the public learned of the companies' activities, the companies then switched tactics to misleading the public about a supposed transition away from fossil fuels.⁸²

The three main allegations in the complaint against the defendants involved: (1) "executing a long-term communications campaign to undermine climate change science," (2) "misrepresenting the scale of investments to reduce carbon emissions," and (3) "obscuring the damaging impact their products have on the environment."⁸³ The District asserted that the case should be heard in the District because a D.C. law was violated, there are many D.C. consumers individually impacted, and a sufficient number of advertisements had been run

law misrepresentation and fraud in consumer protection action).

⁷⁹ District of Columbia v. ExxonMobil Corp., Civil Action No. 20-1932 (TJK), 2022 U.S. Dist. LEXIS 205645 (D.D.C. Nov. 12, 2022).

⁸⁰ *Id.* at 3; see also *Beyond Pesticides v. ExxonMobil Corp.*, Civ. Action No. 20-1815 (TJK), 2021 U.S. Dist. LEXIS 53032 (D.D.C. Mar. 22, 2021) (nonprofit organization filed action under D.C. Consumer Protection Procedures Act and fossil fuel company defendants sought to remove case to federal court on similar grounds). On April 23, 2021, the D.C. Circuit denied the petition for permission to appeal. See also Order, *Beyond Pesticides v. ExxonMobil Corp.*, No. 21-8001 (D.C. Cir. 2021), http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2021/20210423_docket-21-8001_order.pdf.

⁸¹ *AG Racine Sues Exxon Mobil, BP, Chevron, and Shell for Misleading Consumers About the Role Fossil Fuels Play in Climate Change*, OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA (June 25, 2020), <https://oag.dc.gov/release/ag-racine-sues-exxon-mobil-bp-chevron-and-shell>.

⁸² *Id.*

⁸³ *Id.*

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electronically, displayed, and printed in D.C.⁸⁴ The defendants sought to remove the case to federal court on several grounds including: (1) the claims raise disputed and substantial federal questions, (2) federal-officer removal applies, and (3) the claims are removable under the Class Action Fairness Act.⁸⁵ The court granted the District’s motion to remand, holding that the defendants failed to show that the claims “necessarily” arose under federal common law, and further did not successfully identify a question that would be considered to have raised “disputed and substantial” federal questions.⁸⁶

In another case under the D.C. Consumer Protection Procedures Act, a public interest organization sued plastic producer, Blue Triton Brands, for deceptive marketing practices aimed at ensuring “climate conscious” consumers of the brand’s dedication to being environmentally friendly and maintaining sustainable practices even though the company’s business practices have a detrimental effect on human and environmental health.⁸⁷ The complaint alleges that this behavior violates DC’s Consumer Protection Procedures Act. The defendant, Blue Triton, claimed that the statements were “non-actionable,” “aspirational” or “unquantifiable” statements of puffery. The court concluded that the question of whether a statement was likely to mislead the average consumer was a question for the jury and held that the Plaintiff “pled sufficient facts to establish a plausible claim” that

⁸⁴ District of Columbia v. ExxonMobil Corp., 2022 U.S. Dist. LEXIS 205645, 20.

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 5. A similar case was filed in Minnesota. Alleging that the defendants engaged in a “campaign of deception,” the State’s complaint included five counts: (1) violations of the Minnesota Consumer Fraud Act; (2) failure to warn under common law theories of strict liability and negligence against all Defendants except API; (3) common law fraud and misrepresentation; (4) violations of the Minnesota Deceptive Trade Practices Act; and (5) violations of the Minnesota False Statement in Advertising Act. Minnesota v. API, No. 20-1636 (JRT/HB), 2021 U.S. Dist. LEXIS 157845 (D. Minn. Aug. 20, 2021). The defendants sought to remove the action to federal court, citing many of the same grounds as the D.C. v. ExxonMobil case. As of this writing, the case is pending as the appellants have filed a motion for an emergency stay of the remand order pending appeal. Motion of Appellants for an Emergency Stay of the Remand Order Pending Appeal, District of Columbia v. ExxonMobil Corp., 2022 U.S. Dist. (Dec. 23, 2022), http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20221223_docket-22-7163_motion.pdf.

⁸⁷ Earth Island Inst. v. BlueTriton Brands, 2022 D.C. Super. LEXIS 11.

Blue Triton's statements could mislead a reasonable consumer.⁸⁸ Blue Triton sought to dismiss the claim on the grounds that these statements were non-actionable, but the court denied this motion.⁸⁹

The recent explosion in climate washing litigation has been propelled by ExxonMobil's efforts to mislead the public about its role in exacerbating climate change. In 2019, the Commonwealth of Massachusetts sued ExxonMobil alleging that the oil giant intentionally misled consumers and investors about climate change and its relation to the fossil fuels from which the company derives substantial profits.⁹⁰ Alleging violations of the Massachusetts Consumer Protection Act, the complaint included four counts against ExxonMobil: (1) misrepresenting and failing to disclose material facts regarding climate change risks; (2) making materially false and misleading statements to Massachusetts investors regarding its use of a proxy cost of carbon; (3) deceiving Massachusetts consumers by misrepresenting the environmental benefit of using its Synergy and 'Green' Mobil 1 products and failing to disclose the risks of climate change caused by its fossil fuel products; and (4) deceiving Massachusetts consumers by promoting false and misleading greenwashing campaigns.⁹¹

A similar case currently pending in France involves environmental organizations seeking an order against TotalEnergies compelling the oil company to make more explicit efforts to curb emissions. The claimants allege that TotalEnergies misled consumers about its efforts to fight climate change with its recent "reinvention" marketing campaign.⁹² In the campaign, the company claimed that it

⁸⁸ *Id.* at 14.

⁸⁹ *Id.* at 15.

⁹⁰ *Commonwealth v. Exxon Mobil Corp.*, Nos. 146628, 1984CV03333-BLS1, 2021 Mass. Super. LEXIS 371 (June 22, 2021).

⁹¹ *Id.* In another state lawsuit, *Connecticut v. ExxonMobil Corp.*, the State filed claims under statutes prohibiting deceptive or unfair trade practice against ExxonMobil. No. 3:20-cv-1555 (JCH), 2021 U.S. Dist. LEXIS 111334 (D. Conn. June 2, 2021) (The State claimed that ExxonMobil engaged in misleading advertisements intended to cast doubt on the relationship between fossil fuels and climate change. The court remanded the case to the Connecticut Superior Court.).

⁹² Simon Jessop et al., *Environmental groups sue TotalEnergies over climate marketing claims*, REUTERS (Mar. 2, 2022), <https://www.reuters.com/business/sustainable-business/environmental-groups-sue-totalenergies-over-climate-marketing-claims-2022-03-03/>.

could reach net-zero carbon emissions by 2050 while continuing to produce fossil fuels in violation of European consumer law.⁹³ Other local authorities joined the case, and in a major milestone, the cities of Paris and New York joined the suit against the company to “force a major energy player to respect the Paris Agreement.”⁹⁴ The critical element of deception here is that TotalEnergies is claiming that net zero can be achieved while continuing to produce and sell fossil fuels, with Greenpeace likening this deceptive marketing to tobacco companies’ misinformation campaigns regarding the harmful effects of cigarettes.⁹⁵

B. Three Case Studies

This section describes three case studies in recent climate washing contexts to offer a view of the landscape of these practices in different contexts. The first case study examines two companies’ climate washing “actions” in their efforts to mislead the public in characterizing their progress on climate change compliance. These examples are from the Netherlands and involve KLM Airlines and Royal Dutch Shell. The second case study involves a U.S. company, Oatly, and its efforts to mislead the public on the degree of climate friendly impacts from its oat milk products.⁹⁶ The third case study involves the

⁹³ *Id.*

⁹⁴ Dominique Vidalon, *Paris and New York join climate litigation against TotalEnergies*, REUTERS (Sept. 21, 2022), <https://www.reuters.com/markets/commodities/paris-new-york-join-climate-litigation-against-totalenergies-2022-09-21/>.

⁹⁵ *Environmental groups sue TotalEnergies for misleading the public over Net Zero*, CLIENTEARTH (Mar. 3, 2022), <https://www.clientearth.org/latest/press-office/environmental-groups-sue-totalenergies-for-misleading-the-public-over-net-zero/>; see also Scarlett Evans, *TotalEnergies Sued for Alleged Greenwashing*, Offshore Technology (Mar. 30, 2022) (discussing claimant’s comparison of climate-washing advertising to tobacco advertising in case against TotalEnergies for pledging to reach net zero by 2050, while continuing to participate in practices that would make this objective less feasible).

⁹⁶ Second Consolidated Complaint for Violation of the Federal Securities Laws *In re Oatly Group AB Securities Litigation*, 1:21-cv-06360-AKH (S.D.N.Y. Aug. 17, 2022), http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220817_docket-121-cv-06360_complaint.pdf.

fossil fuel industry's efforts to promote blue hydrogen as "clean, renewable, and sustainable."⁹⁷

Climate washing litigation involving "actions" generally arises when a company makes commitments regarding climate change compliance and either has lied about its past progress and compliance or is making promises with no intention to take action.⁹⁸ These claims typically are difficult to prove, especially given that many such pledges of compliance have arisen in recent years; therefore, it is harder to demonstrate lack of progress or it simply has not been long enough to prove clear inaction on the part of the private entity.⁹⁹ An example of such a claim is when campaigners for Fossilvrij NL alleged in a letter to KLM, a Dutch aviation company, that the company made misleading advertising claims under its "Fly Responsibly" campaign because carbon dioxide sequestration measures and use of alternative fuels still do not make flying a sustainable activity as there is no such way to fly sustainably at present.¹⁰⁰

Similarly, nine law students filed a climate washing complaint in 2021 against Royal Dutch Shell with the Netherlands' Advertising Code Committee.¹⁰¹ The complaint alleged that Shell's efforts to mislead customers about its climate change compliance efforts through its

⁹⁷ Riken, *Scientists Discover a New, Sustainable Way to Make Hydrogen for Fuel Cells and Fertilizers*, SCI. TECH. DAILY (Mar. 17, 2022), <https://scitechdaily.com/scientists-discover-a-new-sustainable-way-to-make-hydrogen-for-fuel-cells-and-fertilizers/>.

⁹⁸ For a discussion of climate washing definitions, see *infra* section I(A): *What is Climate Washing?*

⁹⁹ See Maxine Joselow, *Utility climate pledges amount to 'greenwashing,' report says*, WASH. POST (Oct. 4, 2022), <https://www.washingtonpost.com/politics/2022/10/04/utility-climate-pledges-amount-greenwashing-report-says/> (discussing examples of utilities companies across the country not following through on their climate commitments).

¹⁰⁰ See *Fossilvrij NL v. KLM*, <http://climatecasechart.com/non-us-case/fossilvrij-nl-v-klm/>; *Fossilvrij/KLM, Rb., Amsterdam* (July 7, 2022); see also Anthony Deutsch, Kirstin Ridley & Simon Jessop, *Dutch airline KLM sued over greenwashing claims*, REUTERS (July 6, 2022), <https://www.reuters.com/business/aerospace-defense/dutch-airline-klm-sued-over-greenwashing-ads-2022-07-06/>.

¹⁰¹ Sarah George, *Shell's carbon offsetting ad is greenwashing, rules Dutch watchdog* EURACTIV (Sept. 21, 2021), <https://www.euractiv.com/section/all/news/shells-promotion-of-carbon-offsets-is-greenwashing-rules-dutch-watchdog/>.

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“Drive CO₂ Neutral” advertising campaign constituted greenwashing.¹⁰² Shell’s campaign offers customers buying gas and diesel to “choose to pay an extra fee that will fund carbon offsetting”¹⁰³ to support projects including tree planting. The Committee upheld the complaint, noting that “Shell had not provided evidence – publicly or to the students directly – that it is offsetting the emissions in full.”¹⁰⁴

Products tend to be easier targets for litigation asserting false or misleading communication. In the Oatly case, consumers alleged that Oatly oat milk company and its officials made false and misleading statements at an investor presentation regarding the greenhouse gas emissions and energy consumption associated with manufacturing its product.¹⁰⁵ In a report published two months after the company’s initial public offering in the United States, the company’s misconduct was brought to light,¹⁰⁶ with allegations of misleading green credentials as well as cherry-picked data that is not inclusive of all its operations when touting itself as more sustainable than cow’s milk or even other nondairy alternatives.¹⁰⁷ Some of the allegations include failing to account for their expansion in Asia and the United States, having a facility in New Jersey that has failed to be EPA-compliant for several quarters, having wastewater byproduct without a treatment facility, and using more water in the production process at the New Jersey facility than its European counterparts.¹⁰⁸

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Complaint for Violations of the Federal Securities Law, *Bentley v. Oatly Group AB* (July 30, 2021), http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2021/20210730_docket-121-cv-06485_complaint.pdf; see also Emilie Ruscoe, *Oat Milk Co. Wants Out of Investors’ Greenwashing Suit*, LAW360 (Apr. 11, 2022), <https://www.law360.com/articles/1482723/oat-milk-co-wants-out-of-investors-greenwashing-suit> (discussing Oatly’s reaction to the greenwashing claims filed against it).

¹⁰⁶ *Id.*

¹⁰⁷ Amelia Lucas, *Oatly accused of overstating revenue and greenwashing by activist short Spruce Point*, CNBC (July 14, 2021), <https://www.cnbc.com/2021/07/14/oatly-accused-of-overstating-revenue-and-greenwashing-by-activist-short-spruce-point-.html>.

¹⁰⁸ *Id.*

Notwithstanding the dangers of the deceptive behavior at issue in the KLM, Royal Dutch Shell, and Oatly case studies described above, each example involves just one industry participant's behavior on one topic. The most potentially dangerous form of climate washing in the private sector now is the promotion of blue hydrogen as a clean and renewable source of energy. The embrace of blue hydrogen, and its other "colors," rose to prominence on the international stage at COP 26 in Glasgow, Scotland in November 2021.¹⁰⁹ This industry-wide strategy is tantamount to promoting a new government initiative on climate mitigation. It threatens to undo progress or opportunity for compliance with climate commitments. Worse still, it seeks to institutionalize a GHG-intensive process and preserve the climate crisis status quo by cloaking blue hydrogen in "clean energy transition" clothing.

The different "colors" of hydrogen are used to distinguish different production methods and their associated environmental impact. "Blue" hydrogen is used to refer to natural-gas based hydrogen production with carbon capture and storage. The process involves capturing and permanently storing substantial amounts of carbon dioxide from natural gas reforming, enabling the remaining hydrogen to be a source of low-carbon energy. To accurately assess total GHG emissions, however, the leakage and flaring rates must be accounted for at all stages of production, transportation, and storage in the blue hydrogen process. If those additional factors are not considered, the environmental impact of blue hydrogen can be incorrectly estimated.¹¹⁰

Blue hydrogen facilities are being developed around the world. As of March 2022, there were 31 active global blue hydrogen plants

¹⁰⁹ Hans van Leeuwen, *How hydrogen became the talk of the town at COP 26*, FINANCIAL REV. (Nov. 12, 2021), <https://www.afr.com/policy/energy-and-climate/how-hydrogen-became-the-talk-of-the-town-at-cop26-20211111-p597zz>.

¹¹⁰ See Turner Jackson, *3 Questions: Blue Hydrogen and the world's energy systems*, MIT NEWS (Oct. 17, 2022), <https://news.mit.edu/2022/3-questions-emre-gencer-blue-hydrogen-1017>; see also 'Green' versus 'blue' hydrogen, and the futility of 'colours', MONASH UNIV. (Mar. 22, 2022), <https://lens.monash.edu/@technology/2022/03/22/1384527/green-versus-blue-hydrogen-and-the-futility-of-colours> (explaining the different colors of hydrogen and noting that "[w]e should welcome all options that enable low-carbon hydrogen to play a role in decarbonising our energy systems, and stop focusing on colours.").

and 63 blue hydrogen projects.¹¹¹ In the U.S., two major blue hydrogen facilities are moving forward in California¹¹² and Louisiana.¹¹³ In Canada, blue hydrogen facilities may encounter fewer obstacles than other alternatives as they would not require as much investment in new facilities.¹¹⁴

Blue hydrogen is already the subject of climate washing litigation in the U.S. and Australia. In the U.S., a suit has been filed contesting the proposed facility in Louisiana.¹¹⁵ Local attempts have been made to block a multibillion-dollar company from storing carbon under the lake and surrounding swamp.¹¹⁶ The goal of the new local ordinance is to halt construction for Class V injection wells, which

¹¹¹ Current Blue Hydrogen Projects (as of Mar. 8, 2022), <https://stratasadvisors.com/Insights/2022/030922-BlueHydrogen>.

¹¹² Christopher Lenton, *California Resources to Sequester Carbon at State's First Blue Hydrogen Project*, NATURAL GAS INTELLIGENCE (Dec. 8, 2022), <https://www.naturalgasintel.com/california-resources-set-to-deploy-states-first-blue-hydrogen-project/> (discussing that California Resources Corp., the largest carbon producer in the state, has announced a new planned blue hydrogen facility in Kern County. It would be the first of its kind in California, with full operations projected by the end of 2025.).

¹¹³ See Press Release, *Gov. Edwards, Air Products Announce \$4.5 Billion Blue Hydrogen Clean Energy Complex*, OFFICE OF THE GOVERNOR (Oct. 14, 2021), <https://gov.louisiana.gov/index.cfm/newsroom/detail/3421>; Louisiana Clean Energy Complex Page, <https://www.airproducts.com/campaigns/la-blue-hydrogen-project> (last visited Jan. 22, 2023) (discussing that in October 2021, Governor Edwards and Air Products announced plans for Air Products' \$4.5 billion blue hydrogen clean energy complex in Ascension Parish, Louisiana. Air Products is an industrial gas manufacturer that provides hydrogen and other gases to refineries, chemical plants and other customers. Set to be operational in 2026, the planned project would be the world's largest permanent carbon dioxide sequestration facility to date and would include a blue hydrogen manufacturing complex.).

¹¹⁴ See generally Brendan Downey et al., *Pathways to Net-Zero: Opportunities for Canada in a Changing Energy Sector*, 59 ALBERTA L. REV. 226 (2021) (noting that Alberta and Saskatchewan could be best positioned to support a blue hydrogen industry as part of the Canada Hydrogen Strategy, which envisions a national "hydrogen economy" that uses hydrogen for a variety of uses).

¹¹⁵ David Iaconangelo, *LA. legal showdown may preview national battle over hydrogen*, ENERGY WIRE (Nov. 16, 2022), <https://www.eenews.net/articles/la-legal-showdown-may-preview-national-battle-over-hydrogen/>.

¹¹⁶ Halle Parker, *World's leading hydrogen company sues Louisiana parish over carbon capture project*, WWNO 89.9 (Oct. 24, 2022),

would be used for the proposed facility for one year to understand potential concerns as well as in response to local residents who expressed frustration from being left out of the planning process of a project that would affect them directly.¹¹⁷ The proposed plant has been touted by many as a cleaner energy source for the state's industrial plants, which currently account for about 2/3 of the state's carbon footprint, but such claims of benefit may not be enough to convince residents and local authorities to outweigh immediate ecological harm.¹¹⁸ In Australia, the Australasian Centre for Corporate Responsibility (ACCR) sued energy company, Santos, alleging among other claims that Santos engaged in misleading conduct by representing that the hydrogen Santos produces is "clean" or "zero emissions" without explaining what the net zero plan entailed.¹¹⁹ This case is the first of its kind in the world.¹²⁰

The sustainability of blue hydrogen has been called into question in various contexts. For example, although Germany unveiled plans to significantly increase the ambition of its national hydrogen strategy, blue hydrogen is not part of that strategy and no subsidies will be available for it.¹²¹ Despite the widespread support for blue hydrogen in the oil and gas industry,¹²² the government of Germany expressed concerns about blue hydrogen due to the methane emissions

<https://www.wwno.org/coastal-desk/2022-10-24/worlds-leading-hydrogen-company-sues-louisiana-parish-over-carbon-capture-project>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Media Release, *Australasian Centre for Corporate Responsibility expands landmark Federal Court case against Santos*, ACCR.ORG (Aug. 25, 2022), <https://www.accr.org.au/news/australasian-centre-for-corporate-responsibility-expands-landmark-federal-court-case-against-santos/>.

¹²⁰ Susanne J. Harris, Wei Na Sim & Bertha Y. M. Cheung, *New Allegations in World-first Lawsuit Over Clean Energy and Zero Emissions Claims*, EYE ON ESG (Sept. 25, 2022), <https://www.eyonesg.com/2022/09/new-allegations-in-world-first-lawsuit-over-clean-energy-and-zero-emissions-claims/>.

¹²¹ Nikolaus J. Kurmayer, *German government disavows blue hydrogen*, EURACTIV (Jan. 17, 2022), <https://www.euractiv.com/section/energy/news/german-government-disavows-blue-hydrogen/>.

¹²² For example, ExxonMobil enthusiastically characterizes blue hydrogen as a "low-carbon hydrogen that produces no CO₂." *Hydrogen: A low-carbon fuel*, <https://corporate.exxonmobil.com/climate-solutions/hydrogen>. The company also asserts that blue hydrogen may "one day be the lowest-cost option to decarbonize

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in the manufacturing and volatile gas prices affecting the availability of gas in the blue hydrogen production process.¹²³ The government determined that blue hydrogen is not a “stepping stone” to a clean energy future because it locks in a long-term process with the required storage element.¹²⁴

Research studies confirm these concerns about blue hydrogen. One study concluded that while overall carbon dioxide emissions are lower for blue hydrogen compared to gray hydrogen, the methane emissions are higher.¹²⁵ The study is based on the assumption that the captured carbon dioxide can be successfully stored indefinitely, and even then the authors were reluctant to justify blue hydrogen as a viable option given the other hazards of the production process.¹²⁶ Moreover, a report from the International Renewable Energy Agency determined that blue hydrogen investments may be riskier than those in green hydrogen. Green hydrogen costs are expected to go down as soon as 2030.¹²⁷ Given the considerable time involved in the long-term projects for blue hydrogen, there is significant potential for stranded

industrial heating, residential heating ... and heavy-duty vehicles.” This description does not include any discussion of the limitations or concerns associated with reliance on blue hydrogen. *Id.* ExxonMobil plans to develop blue hydrogen facilities in Baytown, Texas and Southampton, U.K. *Id.*; see also *ExxonMobil Baytown Hydrogen Plant*, <https://corporate.exxonmobil.com/-/media/global/files/hydrogen/xom-baytown-hydrogen-announcement-infographic.pdf>.

¹²³ *Id.*

¹²⁴ *Id.*; but see Alex Haynes, *The difference between green hydrogen and blue hydrogen*, PETROFAC <https://www.petrofac.com/media/stories-and-opinion/the-difference-between-green-hydrogen-and-blue-hydrogen/> (stating Petrofac, a U.K. energy services company, appears to suggest that blue hydrogen is an inevitable stepping stone in noting, “The future is a transition from grey, through blue, to green hydrogen.”).

¹²⁵ Robert W. Haworth & Mark Z. Jacobson, *How green is blue hydrogen?* ENERGY SCI. & ENG’G (2021), <https://web.stanford.edu/group/efmh/jacobson/Articles/Others/21-Green-VsBlueH2.pdf> (examining the lifecycle GHG emissions of blue hydrogen accounting for emissions of both carbon dioxide and unburned fugitive methane).

¹²⁶ *Id.*

¹²⁷ Leigh Collins, *Why multi-million-dollar blue hydrogen investments might fast end up as ‘stranded assets,’* RECHARGE NEWS (Jan. 17, 2022), <https://www.rechargenews.com/energy-transition/why-multi-million-dollar-blue-hydrogen-investments-might-fast-end-up-as-stranded-assets/2-1-1146527>.

assets, especially when the alternative would be both cheaper and more environmentally friendly.¹²⁸

Researchers at Cornell and Stanford expressed even greater concern about the sustainability of blue hydrogen, warning that it may harm the climate more than burning fossil fuels.¹²⁹ Blue hydrogen is an energy-intensive process and its GHG emissions are not significantly lower than gray hydrogen.¹³⁰ Expressing concerns about the need to store blue hydrogen emissions long-term without any leakage, the study concluded that “green” hydrogen remains the most ecologically friendly option, but it is only a small sector.¹³¹ Another study confirmed that renewables and green hydrogen show the strongest GHG reduction potential of the various supply pathways; however, blue hydrogen, in a “best-case scenario” could be effective.¹³²

III. Climate Change and Human Rights Nexus

To establish that climate washing has human rights impacts, the threshold connection between climate change and human rights must first be established. Prior to 2005, this connection would have been difficult to establish. Human rights and climate change were considered fundamentally distinct realms of legal inquiry that did not intersect. Thanks to ambitious and creative lawyering in the climate justice movement in the early 2000s, a new field of jurisprudence was launched that corresponds closely with the advent of the Anthropocene era. Climate change and human rights is now a rapidly growing area in law practice and legal scholarship. It traces its roots to the Inuit

¹²⁸ *Id.*

¹²⁹ Blaine Friedlander, *Touted as clean, ‘blue’ hydrogen may be worse than gas or coal* CORNELL CHRONICLE (Aug. 12, 2021), <https://news.cornell.edu/stories/2021/08/touted-clean-blue-hydrogen-may-be-worse-gas-or-coal>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Hydrogen Council, *Hydrogen Decarbonization Pathways* (Jan. 19, 2021), <https://hydrogencouncil.com/en/hydrogen-decarbonization-pathways/> (evaluating three hypothetical supply scenarios – green-only, blue-only, and combined – with region-specific combinations).

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petition before the Inter-American Commission on Human Rights in 2005.¹³³

Part III first examines the evolution of the climate change and human rights nexus to underscore the global recognition of the human rights dimensions of climate change impacts across many legal instruments and contexts. It then provides recent examples of how this nexus is being leveraged to provide human rights protection remedies for climate change impacts.

A. From the Inuit Petition to the Philippines Human Rights Commission

The thawing of the Arctic prompted the Inuit community to file a petition to the Inter-American Commission on Human Rights. Witnessing the landscape they had called home for generations melt before their eyes, the Inuit people were determined to raise global awareness of their plight and seek a remedy under international human rights law.

In a terse two-paragraph letter,¹³⁴ the Commission denied the petition. It stated that “the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”¹³⁵ Despite losing this battle, the petition ultimately helped forge the connection

¹³³ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, (Dec. 7, 2005), *available at* http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf; For a discussion of the climate change and human rights arguments asserted in the Inuit Petition, see generally Elizabeth Kronk Warner & Randall S. Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 OTTAWA L.J. 113 (2013).

¹³⁴ Decision of Inter-American Commission, *available at* http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf.

¹³⁵ *Id.*

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between human rights and environmental protection in domestic and international law.¹³⁶

A decade of advocacy in the courts and in the international negotiations at the annual United Nations Framework Convention on Climate Change (UNFCCC) Conferences of the Parties (COPs) ensued seeking to formally recognize the human rights implications of climate change. A major victory was secured in the language of the Paris Agreement in 2015. One clause of the preamble to the Agreement acknowledges the human rights dimensions of climate change:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity[.]¹³⁷

Though seemingly symbolic and not groundbreaking, this language blazed a trail for many significant strides in formalizing the connection between climate change and human rights on the global stage. Several important developments in domestic and international courts and tribunals, a domestic human rights commission, and in UN bodies ensued on the coattails of the Paris Agreement. Taken together, these developments institutionalized the connection between climate change and human rights and human rights and environmental protection more generally.

The first major step forward involved private sector accountability for the human rights impacts from climate change. In 2015, a petition was filed with the Philippines Human Rights Commission concluding that the “carbon majors” may be accountable for human

¹³⁶ See THE CTR. FOR INT’L ENV’T. L., *Climate Change and Human Rights: A Primer* (Revised July 2013), 3-4, https://www.ciel.org/wp-content/uploads/2014/11/CC_HRE_8July2013.pdf.

¹³⁷ Paris Agreement, *supra* note 65.

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rights violations. The Philippines Commission on Human Rights (CHR) released a final report in 2022 in response to the 2015 petition requesting the CHR to conduct an inquiry into the impact of climate change on the human rights of Filipino people and the role of “carbon majors” in causing these impacts.¹³⁸

Beyond addressing the nexus between climate change and human rights violations, which was originally addressed in the 2005 Inuit petition, the CHR report highlighted a novel assertion: “private business enterprises, not just States, have the obligation to respect and uphold human rights, as advocated under the United Nations Guiding Principles on Business and Human Rights.”¹³⁹ It also recommended that the “carbon majors” be held responsible for their contributions to climate change. Although the report does not carry the authority of a traditional domestic or international court or tribunal decision, it nonetheless has already had tremendous influence on the growth of this area of the law.

The CHR report made several significant findings. Some highlights of these findings include: (1) climate change is a human rights issue; (2) the Philippines is the fifth most climate change-affected country over a 20-year period, yet the country only accounts for 0.3% of global emissions, which forces the Filipino people to bear a disproportionate burden of climate change impacts; (3) climate change imperils rights to life, health, food security, water and sanitation, livelihood, adequate housing, preservation of culture, self-determination, development, nondiscrimination, and the rights of future generations and intergenerational equity; (4) Indigenous peoples are at the “front lines of climate change” and play a unique role in conservation as “inheritors and practitioners of unique cultures” but are also uniquely at risk; (5) governments’ refusal to undertake meaningful climate change

¹³⁸ *National Inquiry on Climate Change Report*, Commission on Human Rights of the Philippines (2022), <https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf> (for purposes of the petition, the term “carbon majors” refers to the leading multinational oil and gas companies that collectively represent over 70% of global GHG emissions.); see also *New report shows just 100 companies are source of over 70% of emissions*, CDP, (July 10, 2017), <https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions>.

¹³⁹ *Id.*

mitigation measures may be categorized as a human rights violation; and (6) states' failure to fulfill their duties to enact or enforce appropriate laws to ensure that businesses respect human rights does not absolve business enterprises from the responsibility to respect human rights.¹⁴⁰

The fifth and sixth conclusions described above reflect significant progress on climate change and human rights and are especially significant for the analysis in Part IV of the article. First, the conclusion that "governments' refusal to undertake meaningful climate change mitigation measures may be categorized as a human rights violation" responds to the request that was not recognized in the Inuit petition decision in 2006 and subsequently was recognized in a climate change and human rights case in 2022 involving the Torres Straits Islanders.¹⁴¹ The recognition of inaction as a foundation for a human rights violation is important when responding to climate washing, which involves companies' failure to act to deliver on their claims to the public regarding climate change compliance. Second, the conclusion that "states'" failure to fulfill their duties to enact or enforce appropriate laws to ensure that businesses respect human rights does not absolve business enterprises from the responsibility to respect human rights" is especially important in advocating for avenues to enhance corporate accountability for human rights impacts from climate washing tactics.¹⁴²

The report also recognized that the UNGP and OECD Guidelines guide corporations' responsibilities. Specifically, the Principles on Climate Change Obligations of Enterprises direct businesses to take specific measures with regard to GHG emissions and climate change.¹⁴³ Among businesses, the report determined that the most significant offenders are the carbon majors who not only account for the

¹⁴⁰ *See id.*

¹⁴¹ For a discussion of this landmark case, *see infra* section III(B): *Enshrining the Climate Change and Human Rights Nexus*.

¹⁴² For a discussion of these recommendations for increased corporate accountability for climate washing, *see infra* section IV: *Addressing the Human Rights Implications of Climate Washing*.

¹⁴³ Expert Group on Climate Obligations of Enterprises, *Principles on Climate Obligations of Enterprises*, at 4-7 (2018), <https://climateprinciplesforenterprises.files.wordpress.com/2017/12/enterprisesprincipleswebpdf.pdf>.

majority of emissions, but who also had early knowledge of their products' adverse impacts on the environment and climate and did nothing. Worse still, the carbon majors instead prevented action through "willful obfuscation and obstruction."¹⁴⁴

The carbon majors are the predominant private actors engaged in the climate washing tactics described in Part II of this article. This conduct can and should be restricted by the UNGP and OECD Guidelines, as will be discussed in Part IV. The CHR report noted that even though the UNGP are not binding, they may be incorporated into domestic legislation to enforce actions against corporations.¹⁴⁵ The report further determined that potential action or compensation may not be required from the carbon majors themselves, but rather from all business enterprises in each of the carbon majors' respective value chains,¹⁴⁶ which helps respond to a systemic problem with a systemic solution.

B. Enshrining the Climate Change and Human Rights Nexus

The CHR report represents a tremendous step on the path toward institutionalizing the link between climate change and human rights and the importance of seeking corporate accountability for human rights impacts from climate change. Its significance notwithstanding, the report is but one piece of a multi-part landscape of significant developments since the Paris Agreement that have helped advance the linkage between climate change and human rights.

¹⁴⁴ Nicholas Kusnetz, *In the Philippines, a Landmark Finding Moves Fossil Fuel Companies' Climate Liability into the Realm of Human Rights*, INSIDE CLIMATE NEWS (May 15, 2022), <https://insideclimatenews.org/news/15052022/philippines-fossil-fuels-climate-liability/>.

¹⁴⁵ A similar progression has already occurred in Canada. Aspects of the mandates in the non-binding UN Declaration on the Rights of Indigenous Peoples (UNDRIP) were implemented as binding legislation in UNDRIP Act in 2021. See Sander Duncanson et al., *Federal UNDRIP Bill becomes law*, <https://www.osler.com/en/resources/regulations/2021/federal-undrip-bill-becomes-law> (noting that "federal law-makers will be required to consider consistency with UNDRIP when adopting new statutes and amendments, and courts will look to UNDRIP as a tool to interpret law in Canada.").

¹⁴⁶ Sara Schonhardt & Lesley Clark, *How a Philippine inquiry could shape global climate litigation*, E&E News (May 16, 2022), <https://www.eenews.net/articles/how-a-philippine-inquiry-could-shape-global-climate-litigation/>.

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At the international level, the UN General Assembly's (UNGA's) recognition of a human right to a clean, healthy, and sustainable environment in July 2022¹⁴⁷ is the crown jewel of several recent global developments on climate change and human rights. After years of advocacy efforts, this recognition can mobilize efforts to protect vulnerable populations around the world from the human rights impacts of governments' and corporations' actions or inaction on climate change.¹⁴⁸ The years ahead will be an important period of seeking to mainstream this protection into domestic legislation, and domestic and international courts' and tribunals' decision-making on climate change and human rights issues.¹⁴⁹

A significant case in 2022 involving the Torres Strait Islanders in Australia extended the ambition and impact of what an international decision-making body can do to recognize the human rights impacts from climate change. In this case, eight Australian nationals and six of their children, all indigenous inhabitants of small, low-lying islands in the Torres Strait region of Australia, filed a complaint against the government of Australia.¹⁵⁰ The Islanders claimed that climate change and

¹⁴⁷ U.N. General Assembly Res. U.N. Doc. A/76/L.75, (July 26, 2022), available at <https://digitallibrary.un.org/record/3982508?ln=en>.

¹⁴⁸ See, e.g., Maria Alejandra Serra Barney & Richard Harvey, *The UN officially recognised the right to a healthy environment. Here's what that means.*, GREENPEACE (Aug. 9, 2022), <https://www.greenpeace.org/international/story/55098/un-resolution-right-healthy-environment-legal-historic/> (discussing potential implications of the UNGA resolution for ongoing and upcoming climate litigation and how such cases may leverage the resolution for enhanced human rights protection from climate change impacts).

¹⁴⁹ See generally Naomi Hart, *Climate Change in Law: Current Perspectives. Week 2. Series 2. The Human Right to a Clean and Healthy Environment under Custom and Treaty*, ESSEX COURT CHAMBERS (Feb. 21, 2023), <https://essexcourt.com/publication/climate-change-in-law-current-perspectives-week-2-series-2/> (noting while there is near consensus among states declaring the existence of a human right to a clean and healthy environment in the UNGA resolution, it is unclear whether the necessary "opinio juris" can be derived). States have different interpretations of the resolution with Pakistan calling it a "political text," the U.K. claiming that there is no "international consensus" on the legal basis for this human right, and the United States claiming that while the resolution reflects "moral and political aspirations," it is not customary international law. *Id.*

¹⁵⁰ Daniel Billy and others v. Australia (*Torres Strait Islanders Petition*), CLIMATE CASE CHART <http://climatecasechart.com/non-us-case/petition-of-torres-strait-is->

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changes in weather patterns had harmful consequences on their livelihood, culture, and traditional way of life.¹⁵¹ Recent tidal surges and flooding destroyed graves and left human remains scattered across islands. Relocating is not an option as there is great cultural and religious significance in that many important ceremonies are only meaningful if performed in the community's native lands, which are currently threatened.¹⁵² Moreover, weather changes have harmed the land itself, degrading land and trees, and reducing the food available from their traditional farming and fishing practices.¹⁵³

The UN Human Rights Committee concluded that "Australia's failure to adequately protect indigenous Torres Strait Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home."¹⁵⁴ The Committee noted this matter is not merely one of damage to resources from State inactivity or potential future damage. Rather, it is a mix of environmental and human rights impacts as State actions and inaction have contributed already to climate change impacts that have destroyed the Islanders' homes and will continue to do so. The Committee asked Australia to compensate the Islanders "for the harms uttered, engage in meaningful consultations with their communities to assess their needs, and take measures to continue to secure the communities' safe existence on their respective islands."¹⁵⁵ The *Daniel Billy* decision is groundbreaking in that it marks the

landers-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/; *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, U.N. HUMAN RTS. TREATY BODIES (Sept. 22, 2022), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f135%2fD%2f3624%2f2019&Lang=en.

¹⁵¹ *Id.* at 13.

¹⁵² *Id.* at 3.

¹⁵³ *Id.* at 7.

¹⁵⁴ *Australia violated Torres Strait Islanders' rights to enjoy culture and family life, UN Committee finds*, U.N. HUMAN RTS. OFFICE, OFFICE OF THE HIGH COMM'R (Sept. 23, 2022), <https://www.ohchr.org/en/press-releases/2022/09/australia-violated-torres-strait-islanders-rights-enjoy-culture-and-family>.

¹⁵⁵ Views adopted by the Committee, *supra* note 147, at 16.

[f]irst time an international tribunal has found a country has violated human rights through inadequate climate policy; the first time a nation state has been found responsible for [its] greenhouse gas emissions under international human rights law; and, the first time that peoples' right to culture has been found to be at risk from climate impacts.¹⁵⁶

Though the decision is not legally binding, it is significant because experts on the Committee determined that commitments in an international treaty had been breached. Less than two decades after the Inuit petition was flatly rejected, the new field of climate change and human rights now has precedent that can be leveraged in many ways in future domestic and international law contexts.

Cases asserting rights-based violations from climate change impacts at the national level have encountered some obstacles,¹⁵⁷ but several have been successful¹⁵⁸ and have served as models for other countries. Many of the lawsuits against governments have been filed by youth plaintiffs, which reflect an embedded human rights component regarding the duty to protect future generations from climate change impacts to the maximum extent possible due to their disproportionate vulnerability.

¹⁵⁶ Press Release, *Torres Strait Islanders win historic human rights legal fight against Australia*, CLIENT EARTH (Oct. 23, 2022), <https://www.clientearth.org/latest/press-office/press/torres-strait-islanders-win-historic-human-rights-legal-fight-against-australia/>.

¹⁵⁷ See, e.g., *Juliana v. U.S.*, 947 F.3d 1159 (9th Cir. 2020) (dismissed on redressability grounds); *Carvalho v. European Parliament* ("The People's Climate Case"), OJC 285, 13.8.2018 Case T-330/18, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment-1.pdf (dismissed on standing grounds).

¹⁵⁸ See, e.g., *Urgenda Found. v. Kingdom of the Netherlands*, Supreme Court, Dec. 20, 2019, ECLI:NL:HR:2019:2007 (*Urgenda/Netherlands*) (Neth.), <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>; *Neubauer, et al. v. Germany* (English translation), available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324_11817_order-1.pdf.

At the subnational level, promising developments are unfolding in the U.S. and Canada. *Held v. State of Montana*¹⁵⁹ and *Mathur v. Her Majesty the Queen in Right of Ontario*¹⁶⁰ are premised on similar legal theories. In the wake of suits that failed to compel the national governments in each country to respond more effectively to climate change on rights-based theories under federal law, these cases seek declaratory relief at the sub-national levels. In *Held*, the youth plaintiffs assert that the right to a clean and healthy environment under Montana's state constitution is allegedly violated by the State's decision to pursue fossil-fuel intensive energy policies in the state. In *Mathur*, the youth plaintiffs assert that the insufficient ambition in the government's GHG emission reduction target climate policies undertaken at the provincial level in Ontario infringe on constitutionally protected rights to life and security of the person and to equality rights under the Federal Charter. The *Mathur* case proceeded to trial in October 2022¹⁶¹ and the *Held* case is scheduled for trial in June 2023.¹⁶²

IV. Addressing the Human Rights Implications of Climate Washing

Building on the climate change and human rights nexus foundation discussed in Part III, Part IV argues that climate washing threatens the integrity and effectiveness of protections that have been implemented to avoid or diminish the human rights impacts from climate

¹⁵⁹ Order Denying Motion to Dismiss, *Held v. State*, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 4, 2021), available at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/6112b9d83cde100cb673f36e/1628617176778/CDV-2020-307++++Order+on+Motion+to+Dismiss+%281%29.pdf>.

¹⁶⁰ *Mathur v. Her Majesty the Queen in Right of Ontario*, 2020 ONSC 6918.

¹⁶¹ Lynda Collins, Nathalie Chalifour & Anne Levesque, *The first climate rights lawsuit in Canada had its day in court: It won't be the last*, <https://www.thestar.com/opinion/contributors/2022/10/02/the-first-climate-rights-lawsuit-in-canada-had-its-day-in-court-it-wont-be-the-last.html>.

¹⁶² *Montana Climate Youth Announce New Dates for Historic Trial*, OUR CHILDREN'S TRUST (Oct. 4, 2022), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/633c491b5c4a93522390877e/1664895260077/2022.10.04.Montana+Trial+Dates.pdf>. For a detailed discussion of the implications of the *Held* and *Mathur* cases, see generally Randall S. Abate, *Youth and Indigenous Voices in Climate Justice: Leveraging Best Practices from U.S. and Canadian Litigation*, 45 PUB. LAND & RESOURCES L. REV. 77 (2022).

change. As such, effective climate washing regulation requires human rights safeguards.

The first step in advocating for the need for these human rights safeguards is to establish the connection between climate washing and human rights impacts. First, climate change impacts have human rights implications, as established in the Paris Agreement and in many other legal instruments and decisions. Second, multinational corporations (MNCs) have legal commitments to reduce climate change impacts and meet climate mitigation goals. In fact, it is these very legal commitments that are triggering the wave of climate washing claims that are addressed in this article. Third, noncompliance with these commitments causes adverse human rights consequences – or at least increases the risk of such consequences – from climate change impacts. Fourth, climate washing is a form of noncompliance with MNCs’ climate change commitments. Therefore, climate washing causes human rights violations – or at least increases the risk of such violations – from climate change.

With the human rights implications of climate washing firmly established, Part IV proposes a two-part strategy to enhance corporate accountability for the human rights impacts of climate washing at the U.S. and international levels. First, under U.S. law, the *Green Guides* in their current form are not equipped to combat the human rights impacts of climate washing effectively and need to be revised to embrace the threat of climate washing. Second, at the international level, the UN Guiding Principles on Business and Human Rights (UNGPs)¹⁶³ and the Climate Change and Business Guidance Document issued pursuant to the UNGPs¹⁶⁴ can be leveraged to address climate washing in all of its forms.

¹⁶³ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Office of the High Comm’r For Hum. Rts. (2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

¹⁶⁴ *Climate Change and Business*, U.N. Office of the High Comm’r For Hum. Rts. (2021), [https://www.ohchr.org/sites/default/files/Documents/Issues/Climate Change/materials/KMBusiness.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Climate%20Change/materials/KMBusiness.pdf).

A. Domestic: Enhance Effectiveness of the Green Guides

The FTC issued the *Green Guides*¹⁶⁵ in 1992 as guidelines for environmental marketing claims. The guidelines were revised in 1996, 1998, and 2012,¹⁶⁶ but have not been updated in the past decade. Due to technological advancements and new methods of advertising, the *Green Guides* are overdue for revision.¹⁶⁷ Commentators have criticized the *Green Guides* as inadequate to address modern greenwashing challenges.¹⁶⁸ Fortunately, in December 2022, the FTC issued a Request for Public Comment for its upcoming revision of the *Green Guides*.¹⁶⁹

Two revisions would improve the relevance of the *Green Guides* to address climate washing. First, the *Green Guides* should be made mandatory rather than advisory. Given the economic and political power that the carbon majors wield in their engagement with the public, mere advisory guidelines hold no promise of adequate protection of the public from the perils of climate washing tactics. With a continued weak federal presence in regulating and enforcing climate washing tactics, climate washing regulation is in danger of replicating the status of the limited federal role in climate change regulation, which has forced adversely affected parties to rely on creative use of

¹⁶⁵ Federal Trade Comm'n, *Guides for the Use of Environmental Marketing Claims* ("Green Guides"), 16 C.F.R. pt. 260 (2022).

¹⁶⁶ Federal Trade Comm'n, *Environmentally Friendly Products: FTC's Green Guides*, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides>.

¹⁶⁷ See generally Isabel Teuton, *Greenwashing: In the Age of Sponsored Ads, "Organic" Mugs, and Diversity Initiatives*, 17 RUTGERS BUS. L. REV. 214 (2022).

¹⁶⁸ *Id.* at 223 (arguing that fines alone may not be adequate to deter greenwashing practices); see also Claire Fischer, *Is Twitter the New FTC and EPA? Publicized Private Action as the Anti-Greenwashing Mechanism in Modern Society*, 33 GEO. ENV'T L. REV. 315 (2021) (arguing that the *Green Guides* are incomplete for effective enforcement of product deception and need to be supplemented with class actions and consumer action); Robin M. Rotman, Chloe J. Gossett & Hope D. Goldman, *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 ADMIN. L. REV. 417 (2020) (asserting that the *Green Guides* should be made binding rather than merely advisory to better address greenwashing in the context of fraudulent "organic" claims for home goods and personal care products).

¹⁶⁹ Federal Trade Comm'n, *FTC Seeks Public Comment on Potential Updates to its 'Green Guides' for the Use of Environmental Marketing Claims* (Dec. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims>.

the courts for protection, especially at the state level. Although some states have laws specifically addressing environmental marketing claims, piecemeal efforts at the state level risk failing to send a uniform and cohesive message to the carbon majors regarding the risk of accountability for climate washing tactics.

Second, while pending proposed revisions to the *Green Guides* may help limit climate washing on products, they are not equipped to address the “action” component of climate washing. In essence, full transparency and disclosure should be the norm in how the private sector communicates with the public on its climate compliance track record and its future plans for compliance. Much like corporate environmental governance under many federal environmental laws, climate washing tactics should face at least harsh civil penalties for inadequate transparency and accountability and potential criminal liability for egregious offenses. Given the track record of carbon majors like ExxonMobil in knowing the climate risks of its activities, proceeding in disregard of that knowledge, and engaging in disinformation campaigns regarding the reliability of climate science, this behavior would face criminal liability under other statutes. For example, the Resource Conservation and Recovery Act (RCRA)¹⁷⁰ has a false statements provision¹⁷¹ that assigns criminal liability for lying to government authorities regarding compliance with the statute.

Consistent with the aforementioned recommendations, the FTC should adopt disclosure and monitoring regulations like those recently implemented regulations in the EU.¹⁷² This new Corporate Sustainability Reporting Directive (CSRD) represents an overhaul of existing corporate sustainability regulations in the EU. It requires reporting on issues from “environmental sustainability and social rights to human rights and governance factors.”¹⁷³ A second directive, the Corporate Sustainability Due Diligence Directive (CS3D),¹⁷⁴ accompanies the CSRD. The purpose of the CS3D is to “anchor human

¹⁷⁰ 42 U.S.C. § 6901- 6992k (2018).

¹⁷¹ *Id.* § 6928(d)(3).

¹⁷² Mark Segal, *EU Lawmakers Adopt Corporate Sustainability Reporting Rules*, ESG TODAY (Nov. 10, 2022), <https://www.esgtoday.com/eu-lawmakers-adopt-corporate-sustainability-reporting-rules/>.

¹⁷³ *Id.*

¹⁷⁴ Ashley Smith-Roberts, *Everything you need to know about the EU CSDD & EU*

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rights and environmental considerations,” while the CSRD serves as the main reporting obligation associated with the CS3D.¹⁷⁵ Ideally, companies will “promote human rights and environmental considerations in their own operations and through their value chains by identifying, preventing, mitigating, and accounting for their adverse human rights and environmental impacts.”¹⁷⁶

The new rules also align with the criteria in the EU’s climate goals. They also apply to all large companies regardless of whether they are listed in stock markets and to non-EU companies that have substantial activity in the EU.¹⁷⁷ With regard to climate washing, the rules are geared to ensure collection of adequate information to determine whether a claim is false.¹⁷⁸ The reporting requirements include any negative sustainability impacts as well as any remedial actions taken to address those impacts.¹⁷⁹

Given that the EU’s approach is a significant leap forward in combating climate washing, the U.S. is unlikely to rally the requisite political will to embrace that degree of regulatory ambition as climate washing tactics persist in the near term. In the meantime, encouraging

CSRD, LEVIN SOURCES (May 3, 2022), <https://www.levinsources.com/knowledge-centre/insights/eu-csdd-eu-csrd-mining>.

¹⁷⁵ *Id.*

¹⁷⁶ Xavier Haranger & Charles Herzecke, *Recent EU Initiatives Focus on Sustainability, Forced Labor*, MORGAN LEWIS (Nov. 16, 2022), <https://www.morganlewis.com/pubs/2022/11/recent-eu-initiatives-focus-on-sustainability-forced-labor>.

¹⁷⁷ Musonda Kapotwe et al., *EU Corporate Sustainability Reporting Directive – disclosure obligations for EU and non-EU companies*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Dec. 11, 2022), <https://corpgov.law.harvard.edu/2022/12/11/eu-corporate-sustainability-reporting-directive-disclosure-obligations-for-eu-and-non-eu-companies/>.

¹⁷⁸ See Do Good People, *The EU’s new rules against greenwashing: CSRD*, <https://www.dogoodpeople.com/csr-trends/sustainable-regulations/the-eus-new-rules-against-greenwashing-csrd/> (last visited Feb. 26, 2023) (noting that the new rules are designed to target greenwashing through information reporting and public disclosure).

¹⁷⁹ Gibson Dunn, *European Union’s Corporate Sustainability Reporting Directive – What Non-EU Companies with Operations in the EU Need to Know*, (Nov. 2, 2022), <https://www.gibsondunn.com/european-union-corporate-sustainability-reporting-directive-what-non-eu-companies-with-operations-in-the-eu-need-to-know/>.

companies to adopt a sustainability pledge¹⁸⁰ or a comparable declaration on “climate integrity” or the like may be a viable alternative. This approach is essentially a social contract in which the company and the consumer have something to gain. The company seeks to be recognized as having a “green” image. In exchange for that special status that will enhance its bottom line, the company must provide something of value in return: a pledge that the company conducts its business in a manner that merits that recognition.¹⁸¹

While the sustainability or climate integrity pledge may initially appear to be yet another opportunity for greenwashing and climate washing, companies’ disregard of their pledges to conduct their business in an environmentally conscious manner provides at least a moral if not legal foothold for affected members of the public to pursue accountability actions for climate washing. The FTC also could provide guidance on the legal effect of the pledge. The effect of non-compliance with the pledge would resemble acting contrary to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), another non-binding instrument. While UNDRIP is merely a declaration that does not carry binding consequences for noncompliance, it carries moral force by reflecting a significant consensus of the global community on aspirations for conduct with respect to Indigenous peoples’ protections.¹⁸²

Similarly, if the UN endorses a sustainability or climate accountability pledge, it could have an effect similar to the UNGP or the UNGA’s recognition of a right to a clean, healthy, and sustainable environment. It provides traction for future accountability efforts, much

¹⁸⁰ See generally John P. Vail, *The Need for a Sustainability Pledge: Fighting Planned Obsolescence*, 13 *GEO. WASH. J. ENERGY & ENV’T L.* 1 (2022) (proposing a sustainability pledge from companies whereby the companies vow to eliminate planned obsolescence practices if they desire to be considered “sustainable”).

¹⁸¹ In other contexts, governmental and nongovernmental entities “certify” such compliance in programs such as the Marine Stewardship Council’s certification of sustainable seafood. As a foundation for potential accountability in future climate washing litigation, however, the pledge could suffice as an effective self-governance measure that would provide mutual benefits to the companies and the public.

¹⁸² Under international law, today’s soft law is tomorrow’s hard law. This principle is reflected in the UNDRIP Act in Canada, which is binding legislation that requires governmental entities to strive to ensure that their actions conform with aspects of the non-binding principles in UNDRIP.

like the general and aspirational language in the Paris Agreement preamble regarding the human rights dimensions of climate change has provided a valuable foothold for accountability theories in domestic and international courts and tribunals.

B. International: New Accountability Mechanisms for Climate Washing

Domestic law at times percolates up to influence international law, yet international law in most instances trickles down to impact domestic law practices. In the case of proposed responses to combat climate washing, however, there can be a productive simultaneous exchange between domestic and international levels of governance that can be mutually beneficial.

From a top-down perspective, the UNGA resolution and significant case law developments like the *Daniel Billy* case have and will continue to mainstream human rights implications and responsibilities into climate change governance. Standards and norms for a new area of “climate due diligence” are evolving to govern business activities to avoid environmental and human rights impacts. The European Commission’s CS3D issued in February 2022¹⁸³ is an example of such climate-related standards of care.

This new directive requires EU member states to enact national laws that create a “corporate due diligence duty” to “identify, prevent, mitigate, and account for external harm resulting from adverse human rights and environmental impacts in the company’s own operations, its subsidiaries and in the value chain.”¹⁸⁴ The adverse human rights impacts would be anything resulting in a violation of an enumerated human right or a violation of an unlisted right that impairs a legal interest protected by an international human rights instrument.¹⁸⁵ An adverse environmental impact is one that would result from a violation

¹⁸³ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive, COM (2022) 71 final (Feb. 23, 2022) [hereinafter CS3D].

¹⁸⁴ *Id.*

¹⁸⁵ Michael Littenberg et al., *A Q&A on the European Commission’s Proposed Corporate Sustainability Due Diligence Directive*, OXFORD BUS. L. BLOG (May 10, 2022), <https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/05/qa-european->

of an obligation pursuant to one of 12 environmental conventions such as the Paris Agreement or the Convention on Biological Diversity.¹⁸⁶ These commitments will apply to companies formed in an EU member state as well as those formed outside, depending on the organization of their business.¹⁸⁷ Beyond monitoring and attempting to remedy their adverse impacts, if for some reason the actual impact cannot be avoided or minimized the company may be required to temporarily suspend commercial activities or even terminate the business relationship for the relevant activities if the impact is considered “severe.”¹⁸⁸

The need to combat climate washing received global attention at the United Nations Framework Convention on Climate Change Conference of the Parties, which was held in Glasgow, Scotland in November 2021 (COP 26).¹⁸⁹ With many companies making ambitious pledges to reduce their greenhouse gas emissions to zero, the international community is fully aware of and concerned about the uptick in climate washing tactics in the private sector. A UN High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities was assembled to address these concerns. This expert group is headed by Catherine McKenna, the former Minister of Environment and Climate Change in Canada.

To discourage “dishonest climate accounting,” this Expert Group issued a report, “Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities, and Regions,”¹⁹⁰ in November 2022 that recommends that companies make public disclosures of

commissions-proposed-corporate-sustainability-due#:~:text=In%20February%202022%2C%20the%20European,aspects%20of%20the%20proposed%20Directive.

¹⁸⁶ *Id.*; CS3D, *supra* note 183.

¹⁸⁷ Littenberg, *supra* note 185.

¹⁸⁸ *Id.*

¹⁸⁹ UN Climate Change Conference UK 2021, <https://ukcop26.org/> (last visited Jan. 24, 2023).

¹⁹⁰ Report of UN High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities, and Regions*, at 6 (Nov. 8, 2022), https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf.

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their progress toward their net zero goals using verified and comparable data.¹⁹¹ In her executive summary to the report, McKenna boldly declared, “It’s time to draw a red line around greenwashing.”¹⁹²

The report encourages regulators to make these disclosures mandatory. Two important themes in the report reflect recognition of the climate washing behavior trends discussed in Part II. First, investing in new fossil fuel supplies is inconsistent with claims of progress toward net zero.¹⁹³ Second, companies making such green claims must not simultaneously lobby against proposed new climate governance measures.¹⁹⁴

The recommendations in the report are ambitious and represent an important first step to combat climate washing. Yet like all UN guidance documents, the recommendations in the report are non-binding. It will be essential for regulators to answer the call in this report and implement the recommended accountability measures. Market-based measures and public pressure will help ensure that these objectives are met, but they will fall short without government regulation of this pressing concern.

Efforts to combat climate washing at the international level must also address the human rights impacts of these tactics. The UN Guiding Principles on Business and Human Rights (UNGP)¹⁹⁵ address obligations of states and business to “protect, respect, and remedy” human rights in conducting economic development. A decade after the release of the UNGP, a new guidance document connecting these principles to climate change was released in 2021.¹⁹⁶ This guidance is highly relevant in connecting climate change compliance practice and human rights consequences of those actions.¹⁹⁷ Pursuant to this guidance document on climate change, states and businesses should strive to:

¹⁹¹ *Id.* at 7.

¹⁹² *Id.* at 6.

¹⁹³ *Id.* at 7.

¹⁹⁴ *Id.*

¹⁹⁵ *Supra* note 163.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*; see also Stephanie Triefus, *Climate change as a business and human rights issue*, HUMAN RTS. HERE (Mar. 11, 2021), <https://www.humanrightshere.com/post/climate-change-as-a-business-and-human->

- (1) Prevent climate-related human rights harms through enhanced ambition for rights-based climate action;
- (2) Guarantee access to information and transparency including through climate disclosure and reporting processes;
- (3) Ensure transparency and align lobbying activities related to carbon-intensive activities with the responsibility to respect human rights;
- (4) Ensure meaningful, informed and effective public participation in climate related decisions and actions;
- (5) Protect environmental human rights defenders and civic space;
- (6) Ensure the right of all persons to benefit from science and its applications;
- (7) Ensure policy coherence and support a just transition to a decarbonized and climate resilient economy; and
- (8) Ensure justice and equity in climate action.”¹⁹⁸

Of these recommendations, the duty to “ensure transparency and align lobbying activities related to carbon-intensive activities with the responsibility to respect human rights” is most relevant to climate washing regulation.

Apart from its impact on climate litigation overall, the decision in *Milieudefensie v. Royal Dutch Shell*¹⁹⁹ is also significant in extending the private sector’s climate due diligence duties to avoid human rights impacts. The court relied on an “unwritten standard of care” in Dutch tort law that imposes a duty not to act in conflict with what unwritten law regards as “proper social conduct.”²⁰⁰ Courts may interpret this standard in light of prevailing social norms and conventions and, as a result, it evolves with time.²⁰¹ In assessing the “proper social conduct” standard for Shell in this case, the court evaluated several elements, which included international “soft law” instruments such as the UNGP and the OECD Guidelines for Multinational Enterprises,²⁰²

rights-issue.

¹⁹⁸ *Supra* note 163.

¹⁹⁹ *Milieudefensie et al.*, *supra* note 67.

²⁰⁰ *Id.*; Dolmans & Preston, *supra* note 67.

²⁰¹ *Id.*

²⁰² OECD GUIDELINES FOR MULTINATIONAL ENTER., L. BLOG <http://mneguidelines.oecd.org/guidelines/> (last visited Jan. 24, 2023).

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both of which impose a non-binding responsibility on companies to respect human rights.²⁰³

The court concluded that Shell must reduce its emissions as a policy-setting holding of a group responsible for a significant share of global CO₂ emissions.²⁰⁴ The court also held that Shell's responsibility exists independently of a state's ability or commitment to fulfill its own human rights obligations.²⁰⁵ The court determined that Shell had a corporate duty of care towards citizens of the Netherlands and due diligence obligations under Dutch tort law. It required Shell to reduce its CO₂ emissions from its global operations by at least 45% by 2030 compared to 2019 emissions levels, and to make its best efforts to reduce its customers' emissions by the same percentage. Shell's duty to uphold human rights was essential to the court's reasoning. The Shell decision has a profound impact because it essentially applies the reasoning from *Urgenda*, the most impactful climate litigation case against a government entity to compel more ambitious climate regulation to the private sector.

On the same day as the decision against Shell, the Australian Federal Court in *Sharma v. Minister for the Environment*, recognized a governmental obligation to ensure that children are not harmed by future coal projects. The *Sharma* decision was the first in the world to impose a direct duty of care on a government official to protect young people from the future impacts of climate change.²⁰⁶ The court emphasized that "all enterprises regardless of their size, sector, operational context, ownership and structure" have a responsibility to respect human rights, suggesting that all companies must do their part to help prevent dangerous climate change.²⁰⁷ The decision was applauded around the world as a major victory for climate change and human

²⁰³ Milieudefensie, et al. *supra* note 67; Dolmans & Preston, *supra* note 67.

²⁰⁴ Milieudefensie et al., *supra* note 67.

²⁰⁵ *Id.*

²⁰⁶ Adam Morton, *Australian court finds government has duty to protect young people from climate crisis*, THE GUARDIAN (May 27, 2012), <https://www.theguardian.com/australia-news/2021/may/27/australian-court-finds-government-has-duty-to-protect-young-people-from-climate-crisis>.

²⁰⁷ *Sharma v. Minister for the Env't*, (2021) FCA 560.

rights. Unfortunately, on March 15, 2022, the decision was reversed on appeal.²⁰⁸

The confluence of these two landmark decisions on climate change and human rights is significant for the prospect of effective climate washing regulation under public and private international law. First, the cases reflect a growing consensus on the corporate duty of care pertaining to the human rights dimensions of climate change. Transparency and accountability are the principles that accompany this new duty of care, much like environmental impact assessment became a new international norm quickly with the advent of sustainability goals in international environmental law treaties and soft law. Ensuring effective progress on climate mitigation by abiding by the corporate duty of care is becoming synonymous with the duty to respect and protect fundamental human rights such as health, food, water, property, and life. Second, the corporate duty of care norm is a front-end strategy that can effectively be tied to climate washing regulation laws and principles through mechanisms like the UNGP. Back-end accountability litigation like the cases reviewed in this article will continue to be an important tool to complement these front-end mandates in the fight against climate washing.

Conclusion

The global climate crisis is daunting in scope and presents vexing governance challenges. Climate washing tactics are the latest obstacle in securing effective progress in climate governance. These tactics have been challenged in courts and administrative bodies around the world. Plaintiffs are starting to gain traction in these efforts under a variety of legal theories; however, law reform is urgently needed. Just as it would be impossible to address climate change mitigation one case at a time when seeking to compel governments to raise their

²⁰⁸ Minister for the Env't v. Sharma, (2022) FCAFC 35; *see also* Maria Antonia Tigre, *Australian Federal Court Dismisses the Novel Duty of Care Previously Found in Sharma: What Does it Mean for Future Climate Litigation in Australia?* CLIMATE L. BLOG (Mar. 21, 2022), <https://blogs.law.columbia.edu/climatechange/2022/03/21/australian-federal-court-dismisses-the-novel-duty-of-care-previously-found-in-sharma-what-does-it-mean-for-future-climate-litigation-in-australia/>.

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regulatory ambition, significant setbacks will also ensue if legal mechanisms are not implemented in a uniform and proactive manner to restrict climate washing tactics on the front end rather than relying exclusively on time-consuming, reactive accountability lawsuits to address the impacts of these deceptive tactics.

The urgent need to implement these efforts is compounded by the threat of the human rights impacts from climate washing tactics. Failure to achieve climate mitigation targets presents grave threats to human rights, especially to disproportionately burdened nations and communities. The global community has made remarkable progress in the past two decades in securing legal recognition of the nexus between climate change and human rights. The next level of protection required in the decade ahead is to recognize and regulate the human rights impacts of climate washing tactics.

Front-end measures and more effective reactive compliance measures can be implemented at the U.S. and international levels in a complementary manner to address the human rights impacts of climate washing. Revising the FTC *Green Guides* and using the UNGP can require enhanced transparency and disclosure for companies' climate change compliance assertions. Much like other areas of domestic and international environmental law compliance, new norms are emerging that govern companies' conduct in the post-Paris Agreement landscape to address the climate crisis. One such emerging norm is corporate climate due diligence, which can be extended to regulate climate washing tactics to ensure that the Paris Agreement's ambitious climate mitigation targets will be achieved while limiting human rights impacts from climate change to the maximum extent possible.