

2024

Fossil Fuel Fraud

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Wes Henricksen, *Fossil Fuel Fraud*, 56 Case W. Res. J. Int'l L. 409 (2024)

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FOSSIL FUEL FRAUD

Wes Henricksen †

ABSTRACT

In some recent climate litigation cases, plaintiffs have added a claim for common law fraud, in addition to the more traditionally pursued claims for nuisance, negligence, and trespass. Fraud claims against fossil fuel companies center on the decades-long campaign of climate change doubt that was organized, funded, and carried out by oil, gas, and coal industry leaders, as well as public relations firms and industry advocacy groups working on their behalf. But while the doubt campaign certainly fits the fraud mold—a purposeful effort to mislead for profit—because it was aimed at defrauding the public at large, rather than defrauding a particular individual—it is not the kind of deceptive scheme that the fraud laws are good at addressing. The fraud laws, by their very nature, apply most naturally to personal frauds. Impersonal frauds aimed at millions, like that carried out by the fossil fuel industry, are mostly ignored (and thereby allowed) by law. Moreover, plaintiffs suing fossil fuel companies face unique challenges. This Article argues that this gap in the law, where the largest and most destructive frauds are generally ignored, should be closed. Until it is, it will continue to unfairly deprive those harmed by climate change of the opportunity to seek redress for injuries caused by the fossil fuel companies’ purposeful deceit of the public.

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I. INTRODUCTION

The number of climate litigation cases has increased in recent years due to “the mounting severity of the climate crisis” and “the inadequacy of public and private sector responses.”¹ “Between 2016 and 2019, more than 120 climate lawsuits were filed each year.”² In the past five years, the total number of climate lawsuits filed has doubled.³ According to a recent report by the Sabin Center for Climate Change Law and the U.N. Environment Programme (the “Sabin Report”), as of December 31, 2022, there were 2,180 climate change cases in courts worldwide.⁴ In the United States alone, there were 1,522 ongoing cases, with 658 cases in all other jurisdictions combined.⁵ Of course, “the jury is out over how influential climate litigation will prove to be.”⁶

These climate litigation cases have been brought under diverse legal theories. According to the Sabin Report, these can be grouped into six categories, one of which involves cases based on claims aimed at corporate liability and responsibility.⁷ This category represents a key set of climate cases, comprising all lawsuits “that name private parties as defendants,” like fossil fuel companies and greenhouse gas emitters,

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1. Jessica Wentz et al., *Research Priorities for Climate Litigation*, 11 EARTH’S FUTURE 1, 1 (2022).
 2. *Id.* at 1–2.
 3. Renee Cho, *Climate Lawsuits Are on the Rise. This is What They’re Based on.*, COLUM. CLIMATE SCH. (Aug. 9, 2023), <https://news.climate.columbia.edu/2023/08/09/climate-lawsuits-are-on-the-rise-this-is-what-theyre-based-on/> [https://perma.cc/3254-GKWL].
 4. MICHAEL BURGER & MARIA ANTONIA TIGRE, GLOBAL CLIMATE LITIGATION REPORT: 2023 STATUS REVIEW XIV (SABIN CENTER FOR CLIMATE CHANGE LAW & U.N. ENVIRONMENT PROGRAMMER).
 5. *Id.*
 6. Wentz et al., *supra* note 1, at 3.
 7. BURGER & TIGRE, *supra* note 4, at 26 (noting that the six categories are: (1) “climate rights” cases, (2) [d]omestic enforcement of international climate change commitments, (3) “keeping fossil fuels and carbon sinks in the ground,” (4) “[c]orporate liability and responsibility, (5) “[c]limate disclosures and greenwashing,” and (6) “[f]ailure to adapt and impacts of adaptation[.]”).

to hold them liable for harms resulting from climate impacts.⁸ Accordingly, these lawsuits attempt to hold liable those responsible for causing climate change and compensate those harmed. “Nearly two dozen states and cities in the United States of America have sued large fossil fuel companies seeking compensation for damages related to climate change.”⁹ Climate claims have also been filed by individuals and nonprofit groups.¹⁰ These suits against fossil fuel companies, which present numerous difficulties for plaintiffs,¹¹ have been brought under a variety of state law doctrines, such as nuisance, negligence, strict liability, and trespass—along with claims under consumer protection and unfair trade practices statutes.¹²

Recently, some climate plaintiffs have added fraud to their claims against corporate defendants.¹³ These fraud claims generally center on

8. *Id.* at 50.
9. *Id.* at 53.
10. *Held v. Montana*, CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Aug. 14, 2023) (“By prohibiting analysis of GHG emissions and corresponding impacts to the climate, as well as how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the [Montana Environmental Policy Act] Limitation violates Youth Plaintiffs’ right to a clean and healthful environment and is unconstitutional on its face.”); *Youth v. Gov: Montana, OUR CHILDREN’S TRUST*, <https://www.ourchildrenstrust.org/montana> [<https://perma.cc/F2VY-LFSS>].
11. *See Danielle Anne Pamplona & Julia Stefanello Pires, Prevention and Remediation Possibilities in Climate Litigation Against Corporations in Brazil*, 55 CONN. L. REV. 861, 875 (2023) (“Indeed, it can be a challenge to attribute civil liability for the impacts caused by climate change, since, ultimately, those harmed must demonstrate not only a link between a company’s activity and the resulting impact but also that climate change is the cause of the impact and that the defendant corporation has contributed to climate change.”).
12. BURGER & TIGRE, *supra* note 4, at 53; *see also* Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1387, 1416–17 (2020) (“All of the second-wave plaintiffs except Minnesota have brought state nuisance claims.”); Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors’ Duties*, 2020 UTAH L. REV. 313, 343 (2020) (“In 2018, the Pacific Coast Federation of Fishermen’s Association submitted a claim based on public state-based nuisance, negligence, strict liability, and failure to warn against a number of carbon-major corporations for damage caused to their industry from the impacts of climate change”) (discussing *Pacific Coast Fed’n of Fishermen’s Ass’ns, Inc. v. Chevron Corp.*, No. CGC-18-571285 (Cal. Super. Ct. Nov. 14, 2018)).
13. *See, e.g.,* Complaint at 1, *Cnty. of Multnomah v. Exxon Mobil Corp.*, 23CV25164 (Or. Cir. Ct. June 22, 2023) (bringing claims against *Exxon Mobile Corp.* for public nuisance, negligence, fraud and deceit, and trespass); *see also* Complaint at 197, 209, *Mun. of P.R. v. Exxon Mobil Corp.*, 3:22-cv-01550 (Dist. Ct. P.R. Nov. 22, 2022) (bringing claims for, inter alia, consumer fraud); *see also* *Minn. by Ellison v. Am. Petroleum Inst.*, 63 F.4th 703, 708 (8th Cir. 2023) (remanding to state court claims for, inter alia, common law fraud); *see also* Complaint at 1, 195–204,

the fossil fuel industry's campaign of climate change doubt.¹⁴ While some argue fraud claims cannot prevail in actions involving speech to the public on issues of public interest,¹⁵ others argue fraud claims are central to the effort to hold accountable those most responsible for causing harms arising from the climate change denial campaign.¹⁶ Part of the difficulty on this issue arises from the dissimilar ways people view the concept of "fraud" when carried out on a large scale, and how those divergent views line up with what people perceive to be the government's role in policing disinformation.¹⁷ The focus in this Article is to examine more closely this disagreement on the appropriateness of holding fossil fuel companies (and their allies and agents) liable in fraud for the climate change denial campaign they have created, funded, and carried out for over two decades. This Article concludes that these fraud claims, termed "fossil fuel fraud," are not only appropriate and feasible, but necessary too.

Part II of this Article explains how the fossil fuel industry's conduct in creating and carrying out its climate denial campaign amounted to a scheme to defraud the public. Part III explains the ways that fraud law generally fails to adequately address these kinds of deceptions, aimed not at individuals but at the public at large. And Part IV explains some of the unique challenges faced by plaintiffs suing corporate defendants for fraud in the climate change denial context.

Commonwealth v. Exxon Mobil Corp., 1984CV03333 (Mass. Super. Ct. Oct. 24, 2019) (alleging claims for, inter alia, "misleading the state's investors and consumers.").

14. See Complaint, Cnty. of Multnomah v. Exxon Mobil Corp., 23CV25164, *supra* note 13, at 4–8, 171–73.
15. See *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240–41 (D.C. 2016) ("Appellants contend that all the statements on which Dr. Mann bases his defamation claims are protected under the First Amendment because they expressed appellant's opinions about climate change, a matter of widespread public concern that 'must be resolved through the process of free and open debate, not through costly litigation.'").
16. See generally James Parker-Flynn, *The Fraudulent Misrepresentation of Climate Science*, 43 ENV'T. L. REP. NEWS & ANALYSIS 11098, 11099 (2013) (arguing some climate change denial speech may be unprotected).
17. In this article, "disinformation" will mean "verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm." In short, disinformation requires the three D's. To be disinformation, it must involve false information that is *disseminated* to the public, *deliberately*, in a *deceitful* manner. Jason Pielemeier, *Disentangling Disinformation: What Makes Regulating Disinformation So Difficult?*, 4 UTAH L. REV. 917, 919 (2020).

II. THE FOSSIL FUEL INDUSTRY DEFRAUDED THE PUBLIC

The term “fraud” is, on one hand, a legal term of art used in connection with civil and criminal laws, each with similar but nonidentical elements.¹⁸ These include, for instance, common law deceit, wire fraud, and securities fraud.¹⁹ But on the other hand, “fraud” is also used frequently in nonlegal contexts to refer to instances where one intentionally misleads another to gain a tangible benefit while causing harm to the one deceived or to others, even if it does not “run afoul of the law.”²⁰ This second, nonlegal use of the term is rarely given a clear definition, but is nevertheless employed often, particularly in the news and on social media.²¹ Sometimes, the conduct described by this nontechnical use of the term runs afoul of the law – i.e., when it meets the elements of a tort or crime – but oftentimes it does not.²² This nontechnical use of the term is often used, for instance, by or against public figures, news networks, and political groups.²³ Nontechnical

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18. Wes Henricksen, *On the Legality of Defrauding the Public*, MARQ. L. REV. 5 (forthcoming in Apr. 2024), <https://ssrn.com/abstract=4396522>.
 19. See Greg Beeche, *Logistics, LLC v. Cross Country Constr., LLC*, 178 N.Y.S.3d 231, 236 (N.Y. App. Div. 2022) (discussing common law fraud under New York state law); 18 U.S.C. § 1343 (federal wire fraud statute); *United States v. Ramsey*, 565 F. Supp. 3d 641, 643–44 (E.D. Pa. 2021) (discussing criminal securities fraud under a federal statute); See Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, 96 ST. JOHN’S L. REV. 543, 560 (2022) (discussing common law deceit).
 20. See Henricksen, *On the Legality of Defrauding the Public*, *supra* note 18, at 6.
 21. See, e.g., Thomas Sowell Quotes (@ThomasSowell), X (Aug. 30, 2023, 7:44 PM), <https://twitter.com/ThomasSowell/status/1697032566266572856> [<https://perma.cc/G7JG-3Y45>] (“The oldest *fraud* is the belief that the political left is the party of the poor and the downtrodden.”) (italics added); see, e.g., Southern Sister Resister - Wordsmith #IAmTheStorm (@ResisterSis20), X (Aug. 30, 2023, 5:44 AM), <https://twitter.com/ResisterSis20/status/1696821115882987968> [<https://perma.cc/YU2U-MZ7T>] (“Republicans will nominate Donald Trump to run for president in 2024. . . . The ‘law and order’ party is a *fraud* just like the man, the criminal they choose over the Republic.”) (italics added).
 22. See, e.g., *id.*
 23. See Jon Cohen, *Almost Everything Tucker Carlson Said About Anthony Fauci This Week Was Misleading or False*, SCIENCE (Aug. 25, 2022, 6:10 PM), <https://www.science.org/content/article/almost-everything-tucker-carlson-said-about-anthony-fauci-week-was-misleading-or-false> [<https://perma.cc/K6VF-3KU4>] (discussing media figure calling Dr. Anthony Fauci a “dangerous fraud” for alleged wrongdoing, though not necessarily law-breaking); Celeste Sepessy, *Is Fraudulent News the ‘New Normal’?*, ASU NEWS (Apr. 10, 2019), <https://newscollab.org/2019/04/10/is-fraudulent-news-the-new-normal/> [<https://perma.cc/9FFM-LNBW>] (discussing what the author calls “fraudulent news,” which appears to refer to misleading or false news stories, which likely are protected free

“fraud” is far broader than the technical legal term. Thus, when one deploys the word “fraud,” “defraud,” or “fraudulent,” they must clarify in what context they are using the term.

Part II posits that the fossil fuel industry defrauded the public, at a minimum, in the nontechnical sense: industry leaders and agents disseminated intentional falsehoods about the existence and causes of climate change with the intent that the public buy into their falsehoods and act in reliance on them. As a result, the industry leaders and agents profited while causing harm to, among others, those who were misled.²⁴ This fraudulent conduct (and speech) may or may not meet the elements of a tort or crime. Correspondingly, it may or may not qualify as protected speech. These aspects of the analysis will be addressed in Part III. This part of the Article, by contrast, is concerned primarily with how the scheme operated, and why it constitutes fraud under any definition.

The idea that the fossil fuel industry defrauded the public, though still opposed by industry apologists,²⁵ is no longer novel or in serious dispute. Rather, the evidence now in the public domain, as reflected in *Massachusetts v. Exxon Mobile Corp.*, makes the case so overwhelming as to be effectively undisputed fact.²⁶ The climate change doubt campaign was aimed at deceiving the public – it was intentional, organized, vast, and well-funded.²⁷

speech); Farnoush Amiri, *Judge: Trump knew vote fraud claims in legal docs were false*, AP NEWS (Oct. 19, 2022, 7:20 PM), <https://apnews.com/article/capitol-siege-donald-trump-georgia-crime-congress-e285497c6a96f82ed08a0d561316029c> [<https://perma.cc/M8VB-78PZ>] (discussing false voter fraud claims made following the 2020 presidential election); MARC MORANO, GREEN FRAUD: WHY THE GREEN NEW DEAL IS EVEN WORSE THAN YOU THINK (2021) (making questionable and politically-motivated allegations to purportedly show that the Green New Deal is fraudulent).

24. See Henricksen, *On the Legality of Defrauding the Public*, *supra* note 18, at 6.
25. See, e.g., Richard Mandel & Craig P. Ehrlich, *The Prosecution of Climate Change Dissent*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 43, 45–46 (2017); see, e.g. Pippa Stevens et al, *Rex Tillerson Says Exxon Had No Incentive to Downplay Costs, Testifying in Climate Change Fraud Trial*, CNBC (Oct. 30, 2019, 4:04 PM EDT), <https://www.cnbc.com/2019/10/30/former-exxon-chief-says-company-had-no-incentive-to-downplay-costs.html> [<https://perma.cc/9878-TVAZ>].
26. See *Mass. v. Exxon Mobil Corp.*, 462 F. Supp. 3d. 31, 36 (D. Mass. 2020) (“Through the Global Climate Coalition, both Exxon and Mobil pushed a false narrative that climate science was plagued with doubts”).
27. See Michael Hiltik, *The Oil Companies Lied to Us About Climate Change. California Should Sue Them Into the Ground*, L.A. TIMES (Sept. 20, 2023, 3:00 AM) <https://www.latimes.com/business/story/2023-09-20/california-oil-companies-lawsuit-global-warming> [<https://perma.cc/WVY4-XVGF>]; see also Neela Banjee et al., *Exxon’s Own Research Confirmed Fossil Fuels’ Role in Global Warming Decades Ago*, INSIDE CLIMATE

The scheme to defraud the public began in 1988,²⁸ in response, not to the threat of climate change, but to the threat of public awareness of climate change.²⁹ By the time the fossil fuel companies began the scheme, they themselves had known of the certainty and causes of climate change for years.³⁰ Their own scientists had, a decade before, repeatedly warned them of the “catastrophic” and “irreversible” impacts of atmospheric and oceanic warming if oil and gas use continued unabated.³¹ In 1981, Exxon was already factoring global

NEWS (Sept. 16, 2015), <https://insideclimatenews.org/news/16092015/exxons-own-research-confirmed-fossil-fuels-role-in-global-warming/> [<https://perma.cc/J2MN-FA3V>]; see also Amy Westervelt, *How Fossil Fuel Industry Got Media to Think Climate Change Was Debatable*, WASH. POST (Jan. 10, 2019, 6:00 AM), <https://washingtonpost.com/outlook/2019/01/10/how-fossil-fuel-industry-got-media-think-climate-change-was-debatable/> [<https://perma.cc/U4ZR-YHU3>]; see also Geoffrey Supran & Naomi Oreskes, *What Exxon Mobil Didn't Say About Climate Change*, N.Y. TIMES (Aug. 22, 2017), <https://nytimes.com/2017/08/22/opinion/exxon-climate-change.html> [<https://perma.cc/9SPW-HA5X>]; see also Valerie Volcovici, *U.S. House Democrats Probe PR Firms' Work for Oil, Gas Companies*, (Sept. 15, 2022, 3:43 PM), REUTERS, <https://www.reuters.com/business/environment/oil-industrys-ad-firms-shun-us-hearing-climate-disinformation-2022-09-14/> [<https://perma.cc/5NAQ-5AAL>].

28. See SPENCER R. WEART, *THE DISCOVERY OF GLOBAL WARMING*, 115–16 (2008) (“A study of American media found that in 1987 most items that mentioned the greenhouse effect had been feature stories about the science, whereas in 1988 the majority of the stories addressed the politics of the controversy. It was not that the number of science stories declined, but rather that as media coverage doubled and redoubled, the additional stories moved into social and political areas . . . Before 1988, the journalists had drawn chiefly on scientists for their information, but afterward, they relied chiefly on sources who were identified with political positions or special interest groups.”).
29. See generally William C. Tucker, *Deceitful Tongues: Is Climate Change Denial a Crime?*, 39 *ECOLOGY L.Q.* 831, 843 (2012) (discussing the growing public awareness of climate change in 1988).
30. In 1965, the president of the American Petroleum Institute, a trade group that promotes the fossil fuel production and sales, stated internally to its members—including Shell, Chevron, BP, ConocoPhillips, and others—that “there is still time to save the world’s peoples from the catastrophic consequence of pollution, but time is running out.” Benjamin Franta, *Early Oil Industry Knowledge of CO₂ and Global Warming*, 8 *NATURE CLIM. CHANGE* 1024, 1024 (2018); see *Membership*, API <https://www.api.org/membership> [<https://perma.cc/8B3C-ZAZM>]; see also *Members*, API <https://www.api.org/membership/members> [<https://perma.cc/P6JU-XWAL>]; see also Hiroko Tabuchi, *Exxon Scientists Predicted Global Warming, Even as Company Cast Doubts, Study Finds*, N.Y. TIMES (Jan. 12, 2023), <https://www.nytimes.com/2023/01/12/climate/exxon-mobil-global-warming-climate-change.html> [perma.cc/488D-8THC]; see also Banjeree et al., *supra* note 27.
31. Tabuchi, *supra* note 30; Banjeree et al., *supra* note 27.

warming and sea level rise into business models of its multi-billion-dollar capital projects.³² By 1988, anthropogenic climate change was old news, not only for climate scientists, but for those companies whose products were causing it.³³

But that year, 1988, saw a cascading series of events that catapulted climate change from something spoken of only at academic conferences and in corporate boardrooms, to something discussed on the nightly news and on the front page of newspapers. It started with record-breaking heatwaves, the worst drought North America had experienced since the Dust Bowl, record-breaking crop failures, and raging wildfires, some of which incinerated a significant portion of Yellowstone National Park.³⁴ And it culminated in a series of televised Senate hearings on global warming, where Dr. James Hansen famously dropped a bombshell: scientists, he said, were now more than ninety-nine percent certain that the burning of fossil fuels was heating the planet, that warming was getting worse, and that the results, if nothing was done to stop the warming, would be catastrophic.³⁵ Those hearings, and particularly Dr. Hansen's testimony, led to numerous TV news reports and front-page stories on global warming.³⁶

This jump-started a movement to curb, or outright ban, the use of fossil fuels. Oil, gas, and coal restrictions were discussed by numerous national governments, such as those in Germany, Italy, Japan, Finland,

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32. Betsy Reed, *Exxon Knew of Climate Change in 1981, Email Says—but It Funded Deniers for 27 more years*, THE GUARDIAN (Jul. 8, 2015, 16:41 EDT), <https://www.theguardian.com/environment/2015/jul/08/exxon-climate-change-1981-climate-denier-funding> [https://perma.cc/YKB8-PXX3].
 33. Tucker, *supra* note 29, at 834; *see* Banjeree et al., *supra* note 27.
 34. John Roach, *1988 Heat Wave Had People Wondering Whether 'God Is Against Us'*, ACCUWEATHER, <https://www.accuweather.com/en/weather-news/heat-wave-and-drought-were-so-devastating-it-had-americans-declaring-god-is-against-us/481031> [https://perma.cc/YS38-SWML].
 35. *Greenhouse Effect and Global Climate Change: Hearing on 100-661 Before the Committee on Energy and Natural Resources*, 100th Cong. 116–20 (1988) (testimony of Dr. James Hansen, Director, NASA Goddard Institute for Space Studies); Peter Sinclair, *Judgment on Hansen's '88 Climate Testimony: 'He Was Right'*, YALE CLIMATE CONNECTIONS (Jun. 20, 2018), <https://yaleclimateconnections.org/2018/06/judgment-on-hansens-88-climate-testimony-he-was-right> [https://perma.cc/NKV5-UW83].
 36. Phillip Shabecoff, *Global Warming Has Begun, Expert Tells Senate*, N.Y. TIMES (Jun. 24, 1988), <https://www.nytimes.com/1988/06/24/us/global-warming-has-begun-expert-tells-senate.html> [https://perma.cc/VMJ9-PV5Z]; Michael Weisskopf, *Scientist Says Greenhouse Effect is Setting In*, WASH. POST (June 24, 1988), <https://washingtonpost.com/archive/politics/1988/06/24/scientist-says-greenhouse-effect-is-setting-in/3844f00f-42f4-420f-8811-62de6c989d8f/> [https://perma.cc/DX52-2NT4].

Norway, Sweden, Denmark, and the United Kingdom³⁷ Congress moved quickly in the same direction.³⁸ Then, on December 6, 1988, the United Nations established the Intergovernmental Panel on Climate Change (IPCC), a collaboration of leading scientists from around the world, which remains today as the foremost authority on the certainty, causes, and effects of climate change.³⁹

But the movement never got off the ground. It was hindered by those profiting off causing climate change—the fossil fuel industry.⁴⁰ The fossil fuel industry launched a crusade to raise doubt about the existence and causes of climate change, even though its own scientists had previously raised the alarm that climate change was happening, fossil fuels were causing it, and its effects would be globally “catastrophic.”⁴¹

The nuts and bolts of the industry’s disinformation campaign can, and has, filled books.⁴² In essence, it involved a two-step strategy. Step

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37. See generally Rie Watanabe & Lutz Mez, *The Development of Climate Change Policy in Germany*, 5 INT’L REV. ENV’T STRATEGIES 109 (2004); see also GOV’T OF JAPAN, JAPAN’S ACTION CLIMATE REPORT ON CLIMATE CHANGE (1994); see also *Italy to Cut Coal-Fired Power to Minimum*, REUTERS (July 5, 2023, 9:12 AM), <https://reuters.com/sustainability/climate-energy/italy-orders-reduce-minimum-coal-fired-power-plants-production-2023-07-05/> [<https://perma.cc/M57U-JSYT>]; see also HC Deb (Nov. 10, 1989) (159) cols 1301–67 (UK) (British parliamentary discussion of the openness to impose a carbon “tax on the use of all coal, oil, gas”); see also Julius Andersson & Giles Atkinson, *The Distributional Effects of a Carbon Tax: The Role of Income Inequality* 6 (Ctr. for Climate Change Econ., Working Paper No. 378, 2020) (discussing Sweden’s discussions of carbon taxing in 1988 and 1989); see also Alexis R. Rocamora, *The Rise of Carbon Taxation in France* 10 (IGES Working Paper, 2017) (noting that carbon taxes were imposed in Finland, Norway, Sweden, and Denmark between 1990 and 1992).
38. See, e.g., *Greenhouse Effect and Global Climate Change: Hearing before the Comm. on Natural Resources*, 100th Cong. (1998); see also WES HENRICKSEN, IN FRAUD WE TRUST: HOW LEADERS IN POLITICS, BUSINESS, AND MEDIA PROFIT FROM LIES (forthcoming) (discussing at greater length the American political debate on the fossil fuel industry’s role in causing climate change).
39. *History of the IPCC*, Intergovernmental Panel on Climate Change [IPCC], <https://www.ipcc.ch/about/history/> [<https://perma.cc/MH9D-3L95>].
40. See generally Tucker, *supra* note 29, at 837 (noting that the fossil fuel industry’s PR efforts “regrettably succeeded, as is apparent both in widespread public confusion regarding climate change and in U.S. governmental paralysis in addressing the problem.”).
41. Tabuchi, *supra* note 30.
42. For further discussion of this topic see NAMOI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT (2010); Geoffrey Supran & Naomi Oreskes, *The Forgotten Oil Ads that Told Us Climate Change Was Nothing*, THE GUARDIAN (Nov. 18, 2021), <https://www.theguardian.com/environment/2021/nov/18/the-forgotten-oil-ads-that-told-us-climate-change-was-nothing> [<https://perma.cc/JS9Q-BHUX>]; Supran & Oreskes,

one, as observed by journalist Amy Westervelt, was to “target media outlets to get them to report more on the ‘uncertainties’ in climate science, and position industry-backed contrarian scientists as expert sources for media.”⁴³ Step two was to “target conservatives with the message that climate change is a liberal hoax, and to paint anyone who took the issue seriously as ‘out of touch with reality.’”⁴⁴

To accomplish both aims, companies like ExxonMobil, Shell, Chevron, British Petroleum (BP), and other industry leaders, hired public relations firms, like Edelman, Singer, Story, and Pac/West.⁴⁵ They created a new trade group, the Global Climate Coalition, to push false and deceptive messages to the public.⁴⁶ They also used the powerful corporate lobbying group, American Petroleum Institute,⁴⁷ to craft and disseminate the message of climate change doubt, frequently demonizing climate science and scientists. One paid-for editorial, published in *The New York Times* in 1992, was titled *Apocalypse No.*⁴⁸ It said the American people were being “inundated by the media with

What Exxon Mobil Didn't Say About Climate Change, *supra* note 27; Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communications (1977–2014)*, 12 ENV'T. RSCH. LETTERS 1 (Aug. 23, 2017); Franta, *supra* note 30; Jessica Wentz & Benjamin Franta, *Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages*, 52 ENV'T L. REP. 10995, 10995 (2022); Banjeree et al., *supra* note 27.

43. Westervelt, *supra* note 27.

44. *Id.*

45. See, e.g., Robert J. Brulle & Carter Werthman, *The Role of Public Relations Firms in Climate Change Politics*, 169 CLIMATIC CHANGE (SPECIAL ISSUE) 8 (2021); Tiffany Hsu, *A.P.R. Giant Is Caught Between Climate Pledges and Fossil Fuel Clients*, (Dec. 12, 2021), N.Y. TIMES, <https://nytimes.com/2021/12/10/business/media/a-p-r-giant-is-caught-between-climate-pledges-and-fossil-fuel-clients.html> [https://perma.cc/BHX8-QVMD]; Volcovici, *supra* note 27; *Examining the Role of PR Firms in Preventing Action on Climate Change Before the Subcommittee on Oversight and Investigations for the House Committee on Natural Resources*, 117th Cong. 7–17 (2022) (testimony of Christine Arena, CEO and Founder, Generous Ventures, Inc.).

46. Complaint, *Cnty. of Multnomah v. Exxon Mobil Corp.*, *supra* note 13, at 7; David Hasemyer & John H. Cushman Jr., *Exxon Sowed Doubt About Climate Science for Decades by Stressing Uncertainty*, INSIDE CLIMATE NEWS (Oct. 22, 2015), <https://insideclimatenews.org/news/22102015/exxon-sowed-doubt-about-climate-science-for-decades-by-stressing-uncertainty/> [https://perma.cc/TA6H-CFB2].

47. See Jeffrey Pierre and Scott Newman, *How Decades of Disinformation About Fossil Fuels Halted U.S. Climate Policy*, NPR (Oct. 27, 2021, 10:35 AM), <https://www.npr.org/2021/10/27/1047583610/once-again-the-u-s-has-failed-to-take-sweeping-climate-action-heres-why> [https://perma.cc/7D4P-WKTR].

48. Supran & Oreskes, *The Forgotten Oil Ads that Told Us Climate Change Was Nothing*, *supra* note 42.

dire predictions of global warming catastrophes.”⁴⁹ “Unfortunately,” the piece went on, “the media hype proclaiming that the sky was falling did not properly portray the consensus of the scientific community.”⁵⁰ Industry leaders and their affiliates published dozens of similar paid-for editorials from 1989 to 2004.⁵¹ These had titles like *Tomorrow’s Energy Needs*, *Unsettled Science*, and *Directions for Climate Research*,⁵² but their objective-sounding titles were followed by paragraphs jam-packed with falsehoods, half-truths, and misleading claims.⁵³ The companies also hired scientists like Wei-Hock Soon,⁵⁴ Fred Singer,⁵⁵ and Patrick Michaels⁵⁶ to produce research papers, editorials, TV commentary, and presentations to spread the climate change doubt messages under the banner of “science.” These academics were paid millions.⁵⁷ For decades, the industry talking points they disseminated were cited to support the idea that scientists were divided on the issue, and there was a legitimate

49. *Id.*

50. *Id.*

51. Supran & Oreskes, *What Exxon Mobil Didn’t Say About Climate Change*, *supra* note 27, Supran & Oreskes, *Assessing ExxonMobil’s Climate Change Communications*, *supra* note 42; see also Jane McMullen, *The Audacious PR Plot that Seeded Doubt About Climate Change*, BBC (July 23, 2022), <https://www.bbc.com/news/science-environment-62225696> [<https://perma.cc/42T5-PN8W>].

52. Connor Gibson, *How Exxon Used the New York Times to Make You Question Climate Science*, GREENPEACE (Aug. 28, 2017), <https://www.greenpeace.org/usa/exxon-used-new-york-times-make-question-climate-science/> [<https://perma.cc/J4HD-P68D>].

53. *Id.*

54. Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. TIMES (Feb. 21, 2015), <https://www.nytimes.com/2015/02/22/us/ties-to-corporate-cash-for-climate-change-researcher-Wei-Hock-Soon.html> [<https://perma.cc/7GJW-Y8UG>].

55. Leo Hickman, *Climate Sceptics—Who Gets Paid What?*, THE GUARDIAN (Feb. 15, 2012, 17:12 GMT), <https://theguardian.com/environment/2012/feb/15/climate-sceptics-pai-heartland-institute> [<https://perma.cc/F46V-SUD2>].

56. *Patrick Michaels*, DESMOG, <https://www.desmog.com/patrick-michaels/> [<https://perma.cc/52A2-GU5T>].

57. UNION OF CONCERNED SCIENTISTS, *THE CLIMATE DECEPTION DOSSIERS* 6–8 (2015); NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT* 10–11 (Bloomsbury Press 2010); UNION OF CONCERNED SCIENTISTS, *TACTICS, MIRRORS & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO’S SMOKE TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE* 31–33 (2007).

“debate.”⁵⁸ Recent reports show the “debate” was, and had been all along, a myth invented by the industry.⁵⁹

The politicization of the issue was, from the beginning, central to the campaign of climate doubt. Climate doubt falsehoods were strategically spread through conservative talk radio shows, news networks, online media, and podcasts.⁶⁰ A U.S. Senate report in 2020 titled “Dark Money” laid bare how “giant fossil fuel corporations have spent billions – much of it anonymized through scores of front groups – during a decades-long campaign to attack climate science and obstruct climate action.”⁶¹ In Jane Mayer’s book of the same name, *Dark Money*, Mayer goes into great detail to show how the Koch brothers and others in the oil and gas industries spent millions to raise climate doubt, with that money going overwhelmingly to conservative think tanks, media platforms, academic institutions, as well as Republican-aligned politicians and political groups.⁶² In return, Republicans, with the help of a handful of Democrats, rewarded the industry with billions in subsidies, tax breaks, and other preferential treatment.⁶³

The biggest gift to the industry, however, was a green light to keep extracting and selling fossil fuels. In achieving this, the industry got

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58. See, e.g., Andy Ho, *Who or What is the Real Culprit? Not All Experts Agree that Man is to Blame; Others Point the Finger at Oceans or the Sun*, STRAITS TIMES, May 1, 2007 (noting that, in 2003, Wei-Hock Soon told the Harvard Crimson newspaper that “natural climate fluctuations could be a dominant factor in the recent warming,” adding that “natural factors could be more important than previously assumed.”); see David Herring, *Isn't There a Lot of Disagreement Among Climate Scientists About Global Warming*, NOAA (Feb. 3, 2020), <https://www.climate.gov/news-features/climate-qa/isnt-there-lot-disagreement-among-climate-scientists-about-global-warming> [<https://perma.cc/9DHV-PS9J>].
59. Rasmus E. Benestad, et al., *Learning from Mistakes in Climate Research*, THEORETICAL & APPLIED CLIMATOLOGY 126, 699–700 (2016).
60. HENRICKSEN, *supra* note 38.
61. Emily Holden, *Democrats' Climate Plan Takes Aim at the Fossil Fuel Industry's Political Power*, THE GUARDIAN (Aug. 24, 2020, 5:00 PM), <https://www.theguardian.com/us-news/2020/aug/24/democrats-climate-plan-fossil-fuel-industry> [<https://perma.cc/SN6T-F5JT>].
62. See JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 200 (Doubleday 2016).
63. *Id.* In one instance, for example, a fossil fuel industry lobbyist revealed a list of U.S. Senators who were “crucial” to ExxonMobil’s lobbying efforts to spread climate change doubt and avoid regulation of fossil fuels. Sarah K. Burris, *ExxonMobil Lobbyist 'Deeply Embarrassed' After He Accidentally Reveals 11 Senators He Says He relies on to Push Big Oil's Agenda*, RAW STORY (June 30, 2021, 9:19 PM), <https://www.rawstory.com/exxonmobil-controls-11-senators/> [<https://perma.cc/W8XV-UNY4>].

exactly what it wanted. It made trillions of dollars.⁶⁴ Indeed, six of the largest oil companies alone have made 2.4 trillion dollars in profits since 1990,⁶⁵ and the oil industry's profits in 2022 alone were four trillion dollars.⁶⁶ This makes the climate doubt campaign arguably the most profitable fraud scheme in history.

III. THE LAW'S FAILURE TO ADEQUATELY ADDRESS FRAUD ON THE PUBLIC

If it is true the fossil fuel industry has largely gotten away (so far) with defrauding the public, it would beg explanation. Why has the law failed to stop it or punish those who carried it out? The answer is two-fold. First, the way the law is written and applied focuses unwisely on one-on-one deceptions, while virtually ignoring schemes to defraud the public at large.⁶⁷ Second, due in part to this gap in the fraud laws, the First Amendment has been weaponized in a way that makes it now a sword for the spreaders of fraudulent disinformation, rather than a shield for the public as it was intended.⁶⁸

A. *Fraud Law is Written and Applied in a Manner that Often Ignores Fraud on the Public*

1. How the Law Is Written

The laws put in place to target fraud comprise a constellation of civil and criminal doctrines that, collectively, address the acts of wrongdoers who purposefully deceive others in self-serving, harmful manners.⁶⁹ This includes, for instance, common law deceit,⁷⁰ mail and

64. TAXPAYERS FOR COMMON SENSE, PADDING BIG OIL'S PROFITS: COMPANIES BANK TRILLIONS, TAXPAYERS GET THE BILL 1 (Feb. 2020) ("The six largest oil and gas companies reported an excess of \$55 billion in combined profits in 2019 alone. These six companies have generated \$2.4 trillion in profits since 1990.").

65. Those companies are ExxonMobil, Royal Dutch Shell, BP, Chevron, Total S.A., ConocoPhillips. In one recent year, 2019, these six companies made over \$55 billion. *Id.*

66. Nerijus Adomaitis, *Oil and Gas Industry Earned \$4 Trillion Last Year, Says IEA Chief*, REUTERS (Feb. 14, 2023, 7:09 AM), <https://www.reuters.com/business/energy/oil-gas-industry-earned-4-trillion-last-year-says-iea-chief-2023-02-14/> [<https://perma.cc/XYX3-8R8L>].

67. *See infra* Part III.A.

68. *See infra* Part III.B.

69. *See* Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, *supra* note 19, at 580 (discussing fraud law generally).

70. *Id.* at 573.

wire fraud,⁷¹ securities fraud,⁷² and fraud-based consumer protection laws.⁷³ Conduct that runs afoul of these, and other similar laws, is actionable. Each such fraud-based claim traces its origins back to the common law tort of deceit, also known as fraud or misrepresentation, which itself is over two centuries old.⁷⁴ The tort of deceit has changed little since its inception.⁷⁵ Today, all fifty states have common law deceit as an actionable tort, although it goes by different names in different jurisdictions.⁷⁶

In every permutation, however, deceit has the same nine elements. They are listed differently among the states,⁷⁷ thus, they vary in their form. Yet, they do not vary in substance. The nine elements are: (1) the speaker made a representation; (2) the representation was false; (3) the representation was material; (4) the speaker knew the representation was false, or made it recklessly without adequate knowledge of its truth or falsity; (5) the speaker intended to induce reliance on the representation; (6) the listener relied on the representation; (7) the listener's reliance was justifiable; (8) the listener was harmed; and (9) the listener's harm was caused by their reliance on the representation.⁷⁸

These elements make it clear the law applies to one-on-one frauds. There is a speaker, who makes the false representation, and a listener,

71. *Id.*

72. *Id.*

73. *See, e.g., id.* (noting false advertising).

74. *See id.* at 574; *see also* Pasley v. Freeman (1789) 100 Eng. Rep. 450 (KB), All ER Rep 31, 34, 37.

75. Richard H. Gibson, *Credit Card Dischargeability: Two Cheers for the Common Law and Some Modest Proposals for Legislative Reform*, 74 AM. BANKR. L.J. 129, 135 (2000) (“At this point, fraud is one of those basic common law concepts, whose shape has not changed in centuries and is unlikely to change much in the future.”).

76. These include, for instance, “fraud,” “deceit,” “common law fraud,” “common law deceit,” “intentional misrepresentation,” “fraudulent misrepresentation,” and “fraudulent inducement.” *See, e.g.,* DAN B. DOBBS ET AL., THE LAW OF TORTS § 664, *Fraudulent (Intentional) Misrepresentation: Elements and Burdens* (2d ed.) (“Intentional misrepresentation is often called fraud or fraudulent misrepresentation.”).

77. *See* Nelson v. McCall Motors, Inc., 630 S.W.3d 141, 146–47 (Tex. App. 2020) (listing the deceit elements in Texas); *see also* Barnett v. Arkansas Transp. Co., 800 S.W.2d 429, 429–30 (Ark. 1990) (listing the deceit elements in Arkansas); *see also* Daugert v. Holland Furnace Co., 130 S.E.2d 763, 765 (Ga. Ct. App. 1963) (listing the deceit elements in Georgia).

78. *See* Nelson v. McCall Motors, Inc., 630 S.W.3d 141, 146–47 (Tex. App. 2020); *see also* Barnett v. Arkansas Transp. Co., 800 S.W.2d 429, 429–30 (Ark. 1990); *see also* Daugert v. Holland Furnace Co., 130 S.E.2d 763, 765 (Ga. 1963).

who relies on it to their detriment.⁷⁹ Several elements virtually necessitate a one-on-one interaction between the speaker and listener. Element five, for instance, requires that the speaker intended to cause the listener to rely on the false representation.⁸⁰ This assumes a personal interaction between them, whereby the speaker has designs on deceiving the listener. Other elements, such as elements six and nine, both support this one-on-one requirement. These elements reflect “the typical fact situation in which the classic tort of misrepresentation and deceit evolved,” which involved “privity of dealing” and “personal contact between potential defendant and potential plaintiff.”⁸¹

Goldberg, Sebok, and Zipursky explored why deceit claims always must have a reliance element.⁸² They concluded that “reliance is an element of fraud because, like all torts, fraud is a relational wrong.”⁸³ Unlike a criminal prohibition, “[t]orts are ways of acting whereby one person breaches a legal obligation of non-injury that is owed to another person or persons.”⁸⁴ Thus, the requirement that there be some legal duty owed from the speaker to the listener is a necessary component of deceit by the sheer fact that it is a species of tort.⁸⁵ Thus, the unique way the law of deceit is crafted requires an interaction of some kind between the speaker and listener, or at least a relational obligation of noninjury. This means that where a speaker intends to defraud another individual, the law clearly applies. However, where the speaker intends to defraud the public at large, it does not.⁸⁶

2. How the Law Is Applied

Even though the elements of common law deceit, and by extension many other fraud-based claims, strongly suggest one-on-one interaction, this does not necessarily preclude applying the law of deceit to instances

79. See DOBBS ET AL., *supra* note 76.

80. *Id.*

81. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 744–45 (1975).

82. John C.P. Goldberg et. al., *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1010 (2006).

83. *Id.*

84. *Id.*

85. *Id.*

86. In American Jurisprudence 2d, the authors make no mention of fraud on the public. The closest they come is in Volume 37, Section 14. There, the authors include a single sentence that reads, “A court will not lend its aid to enforce a transaction that would work a fraud on the public.” The authors cite a single Mississippi state court case from 1917 to support this statement. 37 AM. JUR. 2D FRAUD AND DECEIT § 14 (2013).

of fraud on the public that lack personal interaction.⁸⁷ On occasion, courts have applied current common law deceit doctrine to conduct by those who defraud the public, rather than target individuals.⁸⁸ A federal court in New York, for instance, held that in some claims against tobacco companies, the state's common law deceit tort could be used by smokers injured by smoking to recover damages even if the tobacco companies' false representations were not directed specifically at the injured victim.⁸⁹ The court there held:

It is not necessary that the misrepresentation be made directly to the party claiming to be defrauded. Thus, while some connection between accuser and the accused must exist, a cause of action will not fail merely because the party making misrepresentations did not communicate directly to those who relied on them to their detriment. Misrepresentations made to the public at large may give rise to a claim of fraud so long as the plaintiff was part of the class of persons intended to receive the misrepresentations.⁹⁰

Another federal court, this one in Georgia, also held that common law deceit may apply to schemes to defraud the public, at least in cases involving the asbestos industry.⁹¹ There, the court held:

Even where the representations are made to the public at large, or to a particular class of persons, as long as they are given with the intention of influencing any member of the public or of the class to whom they may be communicated, any one injured through the proper reliance thereon may secure redress.⁹²

If either quoted passage actually reflected the way fraud law is generally applied, it might help eliminate the law's blind spot for fraud on the public. But that is not the case. These cherrypicked quotes are anomalies and have been narrowly construed to apply only to the facts in each particular case—tobacco and asbestos, respectively.⁹³ What these two cases make clear, however, is that the law of deceit could, in principle, at least be applied—and has been applied—to some fraud on the public. But, what about victims of those falsehoods whose injuries

87. See *In re Simon II Litig.*, 211 F.R.D. 86, 140 (E.D.N.Y. 2002); see also *Starling v. Seaboard Coast Line R. Co.*, 533 F. Supp. 183, 193 (S.D. Ga. 1982).

88. See *In re Simon II Litig.*, 211 F.R.D. at 140; see also *Starling*, 533 F. Supp. at 193.

89. *In re Simon II Litig.*, 211 F.R.D. 86 at 140.

90. *Id.*

91. See *Starling*, 533 F. Supp. at 193.

92. *Id.* at 192–93.

93. See generally *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002); see also *Starling*, 533 F. Supp. at 193.

did not necessarily result from their own personal reliance on the deceptive messages?

There appears to be a gap between, on one hand, the reach of the law on harmful self-serving dishonesty—which generally requires some interaction, obligation, or reliance between the wrongdoer and victim—and, on the other hand, the myriad of ways that some, including the fossil fuel industry, spread knowing or reckless falsehoods for profit while causing harm to those misled, to others, and to society at large.⁹⁴ Part of this gap might be filled by Restatement (Second) of Torts § 310, which states:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor

(a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and

(b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.⁹⁵

But while this doctrine, which some courts have followed,⁹⁶ provides for liability against those who spread knowing or reckless falsehoods, even when the harm results to third persons, it is limited to liability only for physical harm.⁹⁷ This is of little avail when it comes to fossil fuel fraud. From one perspective, a great deal of physical harm has resulted from anthropogenic climate change; indeed, one study asserts that climate change now kills nine million people per year.⁹⁸ Most of these deaths result from small particle respiratory infections and related respiratory illnesses.⁹⁹ In recent years, this has amounted to

94. See generally Umain Irfan, *Pay Attention to the Growing Wave of Climate Change Lawsuits*, VOX (June 4, 2019, 11:13 AM), <https://www.vox.com/energy-and-environment/2019/2/22/17140166/climate-change-lawsuit-exxon-juliana-liability-kids> [<https://perma.cc/3P29-G5Z3>] (discussing the challenges faced by climate change litigators).

95. RESTATEMENT (SECOND) OF TORTS § 310 (AM. L. INST. 1965).

96. See, e.g., *In re Zofran Ondansetron Prod. Liab. Litig.*, 261 F. Supp. 3d 62, 75 (D. Mass. 2017); see also *Conte v. Wyeth, Inc.*, 85 Cal. Rptr. 3d 299, 312 (Cal. Ct. App. 2008).

97. See, e.g., *In re Zofran Ondansetron Prod. Liab. Litig.*, 261 F. Supp. 3d at 72–73; see also *Conte v. Wyeth, Inc.*, 168 Cal. App. 4th 90 at 89, 104.

98. Henricksen, *On the Legality of Defrauding the Public*, *supra* note 18, at 50–51 (citing Karn Vohra et al., *Global Mortality from Outdoor Fine Particle Pollution Generated by Fossil Fuel Combustion: Results from GEOS-Chem*, 195 ENV'T RSCH, 2021).

99. Vohra et al., *supra* note 98, at 16–17.

approximately one in every five deaths worldwide.¹⁰⁰ “Without fossil fuel emissions, the average life expectancy of the world’s population would increase by more than a year, while global economic and health costs would fall by about \$2.9 trillion.”¹⁰¹ Yet, physical harm is only part of the damage caused by climate change. In fact, “[c]limate change causes harm in unusual and unexpected ways,”¹⁰² and “threatens to destroy entire communities and cultures.”¹⁰³ To the extent such harm can even be causally connected with the actions of a wrongdoer, much of it is economic and property damage, to which Section 310 has no application.¹⁰⁴ Of course, given the difficulty that causation poses in climate litigation seeking to hold fossil fuel companies liable, even those damages are difficult to adjudicate.¹⁰⁵

The upshot is that the laws aimed at addressing harmful self-serving dishonesty have a gaping hole in them, which is what the fossil fuel industry exploited in its campaign of climate change denial. This is a shortcoming of how the law is written and applied. As a result, the fossil fuel industry was able to pull off a fraud scheme that netted it trillions of dollars.¹⁰⁶ To date, it has not suffered fraud liability—outside the securities fraud context, which is outside the scope of this Article. Thus, many fraud schemes aimed at the public occupy a blind spot in the fraud laws.

B. *The Weaponization of Free Speech*

The free speech clause of the First Amendment states, “Congress shall make no law . . . abridging the freedom of speech.”¹⁰⁷ Like other

100. *See id.* at 22.

101. Oliver Milman, ‘Invisible Killer’: Fossil Fuels Caused 8.7m Deaths Globally in 2018, *Research Finds*, THE GUARDIAN (Feb. 9, 2021, 14:50 EST), <https://theguardian.com/environment/2021/feb/09/fossil-fuels-pollution-deaths-research> [<https://perma.cc/2K5E-G9CZ>].

102. Mariah Stephens, *The Great Climate Migration: A Critique of Global Legal Standards of Climate Change-Caused Harm*, 23 SUSTAINABLE DEV. L. & POL’Y 16, 17 (2023).

103. A.S. Flynn, *Climate Change, Takings, and Armstrong*, 46 ECOLOGY L.Q. 671, 679 (2019).

104. *See* David A. Grossman, *Warming Up to A Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENV’T. L.J. 1, 3 (2003) (“Many of climate change’s costs are harms to property produced at least partially as a result of human actions.”).

105. Stephens, *supra* note 102; *see* *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1129 (D.N.M. 2011)).

106. John Kostyack et al., *Exposing a Ticking Time Bomb: How Fossil Fuel Industry Fraud is Setting us up for a Financial Implosion—and what Whistleblowers Can Do About It*, NAT’L WHISTLEBLOWER CTR. 13–14 (July 2020), <https://www.whistleblowers.org/wp-content/uploads/2020/07/NWC-Climate-Risk-Disclosure-Report.pdf>.

107. U.S. CONST. amend. I.

liberties provided in the Bill of Rights, the right to free speech was intended to provide protection of individuals against those in power.¹⁰⁸ Indeed, the text of it frames the right as one held by the people against the government—“Congress shall make no law.” Even beyond this, the historical context makes clear that the First Amendment was adopted in response to restrictive licensing and seditious libel laws in England.¹⁰⁹

The licensing laws required that anyone who wished to publish written material must first obtain a permit, or “license,” from the King.¹¹⁰ The permit could be granted or denied at will.¹¹¹ Once granted, it could be revoked.¹¹² This granted those in power a failsafe manner of silencing critics.

Similarly, the seditious libel laws in England made it a crime to say or write anything unfavorable about the state or its leaders.¹¹³ This law rested on “the principle that the king was above public criticism and as a result, statements critical of the government were forbidden.”¹¹⁴ Truth was no defense. In fact, because truthful accusations might do more damage to the government’s reputation than false ones, the seditious libel laws treated truthful accusations with greater seriousness than

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108. There is, however, an ongoing debate over whether the primary aim of the Bill of Rights was to protect individuals against the government, or to protect states against federal power. Compare Andre Mathis, *Criminal Law-State v. Sawyer: Tennessee Supreme Court Holds That a Police Officer Cannot Read an Affidavit to a Person in Custody Without Giving Miranda Warnings*, 36 U. MEM. L. REV. 1171, 1183 (2006) (“The purpose of the Bill of Rights was, and still is, to protect the rights of the people; and courts should continue to expand individual rights . . .”), with Charles F. Hobson, *James Madison, the Bill of Rights, and the Problem of the States*, 31 WM. & MARY L. REV. 267, 268 (1990) (“To them the essential purpose of a bill of rights was to protect state rights, not individual rights.”).
109. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES & POLICIES* 1006 (7th ed. 2023) (“There is thus little doubt that the First Amendment was meant to prohibit licensing of publication such as existed in England and to forbid punishment for seditious libel.”).
110. Sandra Lynn Jordan, *Bering v. Share: Abortion Protestors Lose Ground in the State of Washington*, 18 CUMB. L. REV. 205, 207 (1988).
111. See *id.* at 207–08.
112. See *id.*; see also Thomas E. Crocco, *Inciting Terrorism on the Internet: An Application of Brandenburg to terrorist Websites*, 23 ST. LOUIS U. PUB. L. REV. 451, 460, n. 35 (2004) (noting that under England’s licensing law, “presumably the government could revoke the license at will, thereby effectively controlling what was printed”).
113. ZECHARIAH CHAFFEE, JR., *FREE SPEECH IN THE UNITED STATES* 19 (Harvard Univ. Press 1941).
114. Chioma Chukwu-Smith, *The International Convention on the Elimination of all Forms of Racial Discrimination: An Analysis of Article 4’s Implementation on Hate Speech in the United States, Japan, and Germany*, 65 ST. LOUIS U. L.J. 945, 953 (2021).

false ones.¹¹⁵ In 1703, for instance, a polemicist named John Tutchin published a pamphlet that alleged the King and government officials of engaging in bribery and corruption.¹¹⁶ The allegations, according to Tutchin, were true.¹¹⁷ At his trial, he was found guilty of seditious libel.¹¹⁸ The conviction was upheld on appeal. Chief Justice Holt dismissed the idea that truthfulness was a defense.¹¹⁹ The violation of law, he clarified, was not that Tutchin said something false, but that he made those in power look bad.¹²⁰

The free speech clause was a backlash against the ways that those in power oppressed people by censoring or silencing them.¹²¹ It was seen as necessary to protect the right of people to think freely and to say what they think. Its primary purpose then, according to Professor Zechariah Chaffee, was “to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible.”¹²²

Thus, the First Amendment was intended as a shield for the people against those in power. It guarantees the right to peacefully picket, protest, march, assemble, and speak truth to power.¹²³ It is why people can generally insult government leaders without being jailed. Of course, the right to free expression is not unlimited.¹²⁴ For example, the U.S. has often clamped down on freedom of speech during wartime.¹²⁵ But in

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115. See generally Philip A. Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985) (discussing the history of seditious libel).
116. See Transcript of record, *R. v. Tutchin (1704) (UK)*, reprinted in, 14 A COMPLETE COLLECTION OF STATE TRIALS 1095, 1121 (T. Howell, 1812).
117. See *id.* at 1128.
118. See *id.* at 1129.
119. See *id.* at 1128, 1195.
120. *Id.* at 1128; see also Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 822 (1984).
121. See generally *Amdt1.7.1 Historical Background on Free Speech Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-1/ALDE_00013537/ [<https://perma.cc/5KHQ-C5B3>].
122. CHAFFEE, *supra* note 113, at 21.
123. See, e.g., *Zimmerman v. D.C.A. at Welleby, Inc.*, 505 So. 2d 1371, 1375–76 (Fla. App. 4th 1987); see also *Know Your Rights: Protestor’s Rights*, ACLU, <https://aclu.org/know-your-rights/protesters-rights> [<https://perma.cc/N8MC-AL2B>].
124. See *What Does Free Speech Mean?*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does> [<https://perma.cc/7LGA-RF5A>].
125. Michael P. Goodyear, *Inherent Powers and the Limits of Public Health Fake News*, 95 ST. JOHN’S L. REV. 319, 360 (2021).

general, the First Amendment does an admirable job of protecting the right of people to speak freely.

Professor Catherine MacKinnon observed, however, that freedom of speech has been turned on its head.¹²⁶ She wrote, “[o]nce a defense of the powerless, the First Amendment over the last hundred years has mainly become a weapon of the powerful.”¹²⁷ In practical terms, this means the claim, “it is my free speech right to say what I want,” has been hijacked by wealthy and powerful interests, not to defend the people telling truth to power but, to dictate “truth” from those in power down onto the people.¹²⁸ From Big Tobacco to Fox News, groups and organizations with enormous private power have claimed that it is their right, just as it is for individuals, to say what they want, regardless of falsity or harmfulness.¹²⁹ Too often, however, they are not expressing an opinion or view. Rather, they are pushing a narrative they know is false, but which serves their own self-interests, at the expense of the people to whom they speak.¹³⁰ This weaponization of the First Amendment has been discussed by numerous courts, including the U.S. Supreme Court.¹³¹ Professor MacKinnon gave an eloquent summary of the central problem of the weaponization of the First Amendment:

126. See Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1223 (2020).

127. *Id.*

128. *Id.* at 1223–24.

129. See, e.g., *Petition for a Writ of Certiorari at 9, Food & Drug Admin., et al. v. Brown & Williamson Tobacco Corp., et. Al.*, 529 U.S. 120 (1998) (No. 98-1152); see also Noah Feldman, *Fox News Can Be Held Accountable While Protecting Free Speech*, N.Y. TIMES (Mar. 18, 2023, 8:04 AM), https://washingtonpost.com/business/2023/03/18/dominion-libel-lawsuit-against-fox-news-tests-media-s-free-speech/542efdf2-c587-11ed-82a7-6a87555c1878_story.html [<https://perma.cc/75UT-QVX9>].

130. See Garret Epps, *Constitutional Myth #5: Corporations Have the Same Free-Speech Rights as Individuals*, THE ATLANTIC (June 23, 2011), <https://www.theatlantic.com/national/archive/2011/06/constitutional-myth-5-corporations-have-the-same-free-speech-rights-as-individuals/240874/> [<https://perma.cc/5X4R-QU98>].

131. See *Rogers v. Mroz*, 502 P.3d 986, 988–99 (Ariz. 2020), *cert. denied sub nom. Young v. Rogers*, 142 S. Ct. 2781 (2022); see also *AH Aero Servs., LLC v. Heber City*, No. 2:17-CV-1118, 2022 WL 1266121, at *1 (D. Utah Apr. 28, 2022); see also MacKinnon, *supra* note 126, at 1282–83 (2020) (noting that Justice Elena Kagan spoke of “weaponizing” the First Amendment in a dissenting opinion); see also *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (“There is no sugarcoating today’s opinion. The majority . . . prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”).

The freedom of speech has at the same time gone from a rallying cry for protesters against dominant power to a claimed immunity of those who hold dominant power. Thus weaponized, the First Amendment has morphed from a vaunted entitlement of structurally unequal groups to have their say, to expose their inequality, and to seek equal rights, to a claim by dominant groups to impose and exploit their hegemony.¹³²

In effect, then, the free speech clause has gone from a shield *against those in power* to a weapon used *by those in power* against the people it was put in place to protect. This has contributed to the paradox of fraud law, whereby those who mislead for profit in a harmful manner are often acting within the law when their falsehoods are targeted at a large enough audience. This occurs because falsehoods aimed at individuals or small groups are generally deemed unprotected speech, whereas falsehoods aimed at millions hold the highest protections, often under the guise of either political speech or speech on a matter of public interest.¹³³

The weaponization of the First Amendment benefits those who disseminate disinformation, and harms those who fall for or are otherwise injured by it. Many who have access to the public megaphone use that privileged position to deceive the public for self-serving purposes.¹³⁴ By doing this, they gain money, power, and other benefits.¹³⁵ The public pays a heavy price.¹³⁶ This weaponization has nothing to do with protecting people's views and beliefs, but is rather a cover for the powerful to manipulate public opinion for their own profit, agenda, or political advantage—and the powerful do it under the banner of free speech. Those defrauding the public have turned the First Amendment into the opposite of what it was designed to be.

132. MacKinnon, *supra* note 126, at 1124.

133. See Kaitlyn Poirier, *Constitutional Law—the First Amendment Retaliation Doctrine—A Public Employee's Rights Regarding Perceived Political Association Retaliation: Dye v. Office of the Racing Commission*, 702 F.3d 286 (6th Cir. 2012), 81 TENN. L. REV. 367, 370–71 (2014) (noting political speech “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

134. See Henricksen, *On the Legality of Defrauding the Public*, *supra* note 18, at 39–43 (noting how leaders in politics, business, and media defraud the public for profit, political advantage, and other aims).

135. *Id.*

136. See Vohra et al., *supra* note 98, at 1–2, 6.

IV. PLAINTIFFS ALLEGING FRAUD-BASED CLAIMS AGAINST FOSSIL FUEL COMPANIES FACE UNIQUE CHALLENGES.

There are a range of remedies sought in the attempt to hold fossil fuel companies accountable for climate damages. These include regulatory fines, penalties, injunctions, criminal prosecution, securities law civil enforcement, consumer protection claims, climate damage reparations,¹³⁷ and individual civil claims.¹³⁸ Among civil claims against fossil fuel companies, fraud has not been a primary focus of most plaintiffs.¹³⁹ Instead, plaintiffs have more often alleged other torts, like public nuisance or trespass, or statute-based consumer protection claims.¹⁴⁰ However, common law deceit, or fraud, is one tort claim available to plaintiffs suing fossil fuel companies.¹⁴¹ Increasingly, plaintiffs suing gas and oil companies for climate harms are alleging fraud and fraud-based claims.¹⁴² These include claims for common law

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137. See Marco Grasso & Richard Heede, *Time to Pay the Piper: Fossil Fuel Companies' Reparations for Climate Change*, 6 ONE EARTH 459, 459 (2023); see also Marie Lutz & Jenny Rowland-Shea, *How the Federal Government Can Hold the Oil and Gas Industry Accountable*, CAP 20 (Sept. 19, 2023), <https://americanprogress.org/article/how-the-federal-government-can-hold-the-oil-and-gas-industry-accountable/> [<https://perma.cc/LG7Z-FYR4>]; see also Reza Zarghamee et al., *An Updated Look at Civil Liability and Litigation Risks Associated With Climate Change*, PILLSBURY (Nov. 4, 2021), <https://www.pillsburylaw.com/en/news-and-insights/civil-liability-and-litigation-risks-associated-with-climate-change.html> [<https://perma.cc/4N8F-SNK4>].
138. See Wentz & Franta, *supra* note 42, at 10995.
139. See generally Complaint, County of San Mateo v. Chevron Corp., No. 171V03222 (Super. Ct. July 17, 2017) (alleging claims for nuisance, negligence, and trespass).
140. *Id.*; Katie Jones, *Confronting Climate Damage*, TRIAL, June 2023, at 28, 30 [by municipalities against fossil fuel companies] assert purely tort claims, some purely statutory consumer protection claims, and some both.”); see also City of Oakland v. BP P.L.C., No. C 17-06011 WHA, 2022 WL 14151421, at *1 (N.D. Cal. Oct. 24, 2022) (remanding state law public nuisance claim by cities against oil and gas companies to state court in California).
141. See Minnesota by Ellison v. Am. Petroleum Inst., 63 F.4th 703, 708, 717 (8th Cir. 2023) (remanding state common law fraud claims against fossil fuel industry defendants to state court).
142. See, e.g., Complaint, Cnty. of Multnomah v. Exxon Mobil Corp., *supra* note 13, at 1; Memorandum Opinion at 2, Platkin v. Exxon Mobil Corp., 22-v-06733 (D.N.J., Jun. 20, 2023) (bringing claims for, inter alia consumer fraud); Complaint, Puerto Rico, *supra* note 13, (bringing claims for, inter alia, consumer fraud and RICO); Petition for Writ of Certiorari at 3, Minnesota v. Am. Petroleum Inst., 63 F.4th 703 (8th Cir. 2023)(bringing claims for, inter alia common law fraud).

fraud,¹⁴³ fraud-based consumer protection claims,¹⁴⁴ and RICO actions alleging a conspiracy to defraud the public.¹⁴⁵ Common law fraud, in particular, has, until recently, rarely been alleged by climate plaintiffs. One reason is the large difficulty in prevailing in such claims.¹⁴⁶

Plaintiffs alleging common law fraud against a fossil fuel company face unique challenges. These include the classification of climate change denial messages as political speech, and the difficulty of establishing intent, reliance, and causation.¹⁴⁷ Each will briefly be discussed below.

A. *Classification of Climate Change Doubt as Political Speech*

Under the First Amendment, not all speech is protected equally. Political speech enjoys the highest speech protections.¹⁴⁸ Commercial speech, however, is regarded as a “second-class” form of expression, and accordingly receives a lower level of constitutional protection.¹⁴⁹ That is, “commercial speech is constitutionally protected but governmental burdens on this category of speech are scrutinized more leniently than burdens on fully protected noncommercial speech.”¹⁵⁰ Because of this, the way climate change denial messages by fossil fuel companies are categorized—as political or commercial—has a great effect on the protections afforded them.

The core definition of commercial speech is that it is “speech that proposes a commercial transaction.”¹⁵¹ “It’s important to recognize, however, that this definition is just a starting point.”¹⁵² “Speech that does no more than propose a commercial transaction ‘falls within the

143. See Complaint, Cnty. of Multnomah v. Exxon Mobil Corp., *supra* note 13, at 7 (bringing claims for inter alia common law fraud).

144. See Memorandum Opinion, *Platkin*, *supra* note 142, at 2 (bringing claims for, inter alia consumer fraud); Complaint, *Puerto Rico*, *supra* note 13, at 4, 10 (bringing claims for, inter alia, consumer fraud and RICO).

145. See Complaint, *Puerto Rico*, *supra* note 13, at 10.

146. Teal E. Luthy, *Common Law Claims for Fraud*, 65 UNIV. CHI. L. REV. 1001, 1002 (1998).

147. See *Wentz and Franta*, *supra* note 42, at 10996–10997.

148. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and obscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.”).

149. *Id.*

150. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515 (7th Cir. 2014).

151. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 481–83 (1989).

152. *Jordan*, 743 F.3d at 516.

core notion of commercial speech,' but other communications also may 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.'¹⁵³ The Supreme Court has "made clear that advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech."¹⁵⁴ Courts do not apply any bright line rule to determine if speech is commercial.¹⁵⁵ Rather, courts recognize a "common-sense distinction" between commercial speech and other varieties of speech.¹⁵⁶ Courts have taken the Supreme Court's guidance "as suggesting certain guideposts for classifying speech that contains both commercial and noncommercial elements; relevant considerations include whether: (1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech."¹⁵⁷

Clearly, in the case of the climate doubt campaign, "the speaker[s] ha[d] an economic motivation for the speech."¹⁵⁸ Nevertheless, climate change is also "a matter of public concern and is not likely to be considered commercial speech under modern First Amendment doctrine."¹⁵⁹ As noted by Professor Shannon Roesler, "when commercial speech is 'inextricably intertwined' with fully protected speech, the Court treats all the speech as fully protected."¹⁶⁰ Moreover, "after *Citizens United*, courts are even more likely to limit the category of commercial speech in favor of noncommercial corporate speech."¹⁶¹ Robert Cowen pointed out that "[t]his means that courts are less likely to characterize a newspaper ad that expresses Exxon's views regarding climate change as commercial speech."¹⁶² And "[t]he same is true of speech by corporate executives to the media."¹⁶³ The result is that fossil fuel companies are likely able to raise the First Amendment as a defense

153. *Id.* (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983)); *Fox*, 492 U.S. at 475.

154. *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 637 n.7 (1985) (internal quotation marks omitted).

155. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978).

156. *Id.*

157. *See, e.g. Jordan*, 743 F.3d at 517 (citing *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66–67 (1983)) (internal quotation marks omitted).

158. *Id.*

159. Robert K. Cowan, *Time for Plan(et) b? Why Securities Litigation Is a Misguided Attempt at Regulating Climate Change*, 33 *Geo. ENV'T L. REV.* 333, 360 (2021).

160. Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 *GEO L.J.* 447, 509 (2018).

161. Cowan, *supra* note 159, at 360.

162. *Id.*

163. *Id.* at 360–61.

against any effort to hold them liable for messages disseminated as part of their climate change doubt campaign.¹⁶⁴

B. Intent, Reliance, and Causation

Intent and reliance are required fraud elements.¹⁶⁵ That is, to prevail, a plaintiff must establish both that the defendant intended to mislead the specific plaintiff, or the plaintiff is within the “class of persons whom [the defendant] intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation.”¹⁶⁶ The plaintiff bringing the action is required to have acted, or refrained from acting, in justifiable reliance on the misrepresentation.¹⁶⁷ These elements work well for one-on-one frauds where one deceives another, for instance, into overpaying for a low-quality product or investing in a get-rich-quick scheme. Yet, it does not do so for those who carried out the climate change doubt campaign.

Many people and communities suffering harm from the effects of climate change were not themselves targeted by the fraud scheme any more than anyone else. This is because the scheme was not aimed at deceiving a small class of people. It was aimed at everyone. Moreover, plaintiffs bringing such lawsuits often arguably did not themselves personally rely on any particular climate doubt message, at least not in the way reliance normally works for fraud claims.¹⁶⁸ Normally, for intent and reliance to be met, there must be a transaction entered into or an important decision made, and the false message must be material to the act of entering, or the decision to enter, into that transaction.¹⁶⁹ But that is not how fossil fuel fraud works. Therefore, a “plaintiff harmed by global warming, whether because her seaside home is flooded or because her crops have been destroyed by higher temperatures and drier air”—or, for that matter, if she is one of the millions who are killed

164. *See, e.g.*, Plaintiff’s Original Petition for Declaratory Relief at 23, *Exxon Mobil Corp. v. Walker*, No. 017-284890-16 (Tex. Dist. Ct. Tarrant Cnty. Apr. 13, 2016).

165. *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 224 (3d Cir. 2008); *Bd. of Educ. of Chicago v. A, C & S, Inc.*, 546 N.E.2d 580, 591 (Ill. 1989).

166. RESTATEMENT (SECOND) OF TORTS § 5381 (AM. L. INST. 1977).

167. *See Hunt*, 538 F.3d at 222–24; *see also A, C & S, Inc.*, 546 N.E.2d at 452–60.

168. *See Parker-Flynn, supra* note 16, at 11107 (“How could a climate change victim show that he or she relied on the misrepresentations of a think tank or scientist? Would the victim first have to prove that he or she actually heard the misrepresentation, and then changed his or her actions accordingly?”).

169. RESTATEMENT (SECOND) OF TORTS § 538 (AM. L. INST. 1977) (“Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material.”).

annually from the effects of climate change¹⁷⁰—typically “has no recourse in fraud because she cannot establish that her damages arose out of her reliance on the false statement or omission.”¹⁷¹

Causation, though rarely an enumerated fraud element, is nevertheless required through the reliance element.¹⁷² That is, “courts only rarely addressed questions of proximate cause [in fraud cases,] and usually determined factual cause by whether the plaintiff proved reliance on the defendant’s misrepresentation, so long as the plaintiff’s reliance was a ‘substantial factor in determining the course of conduct that result[ed] in his loss.’”¹⁷³ A victim of fraud can meet this substantial factor even if the reliance was not the sole or even predominant factor influencing his conduct.¹⁷⁴ Nevertheless, this substantial factor of reliance poses unique problems for climate change plaintiffs. Any claim against a gas or oil company for fossil fuel fraud must necessarily “involve complex chains of causation with many potential contributing factors and . . . require a judge to referee a battle of expert witnesses and to ultimately determine where the weight of the evidence falls.”¹⁷⁵ How likely is it that a plaintiff harmed by a severe weather event, a wildfire, or encroaching oceanic tides will try to prove that their reliance on a particular fossil fuel company’s misrepresentations was a substantial factor in causing their injury? The difficulty in satisfying this requirement makes some claim that this element is an “insurmountable barrier” to fraud liability for fossil fuel companies.¹⁷⁶ This is particularly true given that “defendants in the fossil fuel disinformation cases may argue that government decisions about climate policy and greenhouse gas (GHG) regulation are a superseding cause of the plaintiffs’ injuries.”¹⁷⁷

170. Wes Henricksen, *Intended Injury: Transferred Intent and Reliance in Climate Change Fraud*, 72 ARK. L. REV. 713, 745 (2020); Laura Millan, *Climate Change Linked to 5 Million Deaths a Year, New Study Shows*, BLOOMBERG (July 7, 2021, 5:30 PM), <https://www.bloomberg.com/news/articles/2021-07-07/climate-change-linked-to-5-million-deaths-a-year-new-study-shows> [https://perma.cc/TSE6-2VU3].

171. Henricksen, *Intended Injury*, *supra* note 170.

172. See John C.P. Goldberg et. al., *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1001–02 (2006) (noting “some courts break [fraud] down into elements without isolating causation by name . . .”).

173. Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 865 (2011) (quoting RESTATEMENT (SECOND) OF TORTS § 546 (AM. L. INST. 1977)).

174. See *id.* at 868.

175. Elizabeth Dubats, *An Inconvenient Lie: Big Tobacco Was Put on Trial for Denying the Effects of Smoking; Is Climate Change Denial Off-Limits?*, 7 NW. J. L. & SOC. POL’Y 510, 512 (2012).

176. Parker-Flynn, *supra* note 16, at 11106.

177. Wentz & Franta, *supra* note 42, at 11003.

Moreover, the very nature of how climate change operates and injures makes it difficult to pin the harms on any one particular defendant. As noted by Professor Albert Lin, “it is difficult to directly trace any dramatic event or personal harm to climate change; climate change has multiple and diffuse causes; and the most serious projected harms of climate change are long-term and geographically distant.”¹⁷⁸

This brief introduction only scrapes the surface of this important issue—the difficulty that fossil fuel fraud plaintiffs face in proving some fraud elements. In short, the very nature of how fossil fuel fraud is carried out and harms victims makes it a poor fit for common law fraud. Thus, plaintiffs in such cases face high hurdles in proving intent, reliance, and the substantial factor connection between their reliance and harm.

V. CONCLUSION

Society operates on a set of values everyone rarely thinks about but nevertheless lives by.¹⁷⁹ One being that one should not be permitted to defraud another, cause harm, or get away with fraud. Most feel entitled not to be taken advantage of in a harmful way, particularly if it causes the loss of something important, like money, property, health, or life. This is partially because it is well known that if someone is targeted by fraud, the fraud-feasor may be liable both civilly and criminally. It is a common right not to be defrauded, and people therefore have a corresponding obligation not to defraud others.

This value is codified in law. The law is designed to reinforce the value, to give it teeth. It is supposed to deter wrongful conduct, punish those who commit it, and protect those who might otherwise fall victim to it.

However, the laws put in place to codify the fraud principle overwhelmingly ignore fraud schemes aimed at the public at large.¹⁸⁰ This has ramifications in many areas of life, from political campaigns and partisan news networks to corporate propaganda and police misconduct coverups.¹⁸¹ The fossil fuel industry is one of the

178. Albert C. Lin, *Does Geoengineering Present A Moral Hazard?*, 40 *ECOLOGY L.Q.* 673, 695 (2013) (citing Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 *COLUM. L. REV.* 503, 507 (2007)).

179. See Charlotte Nickerson, *Value Consensus in Sociology*, *SIMPLY SOCIO.* (Apr. 20, 2023), <https://simplysociology.com/value-consensus.html> [<https://perma.cc/EB68-VX2N>] (“A successful society is based on value consensus, of people agreeing around a shared set of norms and values that enables people to cooperate and work together to achieve shared goals.”).

180. See Henricksen, *On the Legality of Defrauding the Public*, *supra* note 18, at 20.

181. See, e.g., Beven Hurley, *Initial Memphis Police Report Falsely Claims Tyre Nicols ‘Fought’ Officers*, *INDEP.* (Feb. 1, 2023, 16:53 GMT), <https://>

beneficiaries of this paradox of fraud laws, whereby small frauds aimed at individuals are criminalized but large frauds aimed at millions are ignored. The industry used this loophole to defraud the public, and a significant portion of the trillions of dollars the industry made in the past decade can be traced to the success of its efforts to mislead the public about the existence and causes of climate change.¹⁸² Fossil fuel fraud has been one of the most lucrative swindles in history. Many view this as a failure of the law to address one of society's most pressing issues.¹⁸³ To adequately address this issue, and to ensure it does not recur, the gap in the fraud laws that allowed this scheme to be so profitable must be closed. Fraud on the public, particularly when carried out by large industries aimed at covering up the harm caused by their products or operations, must be treated like any other type of fraud.

[independent.co.uk/news/world/americas/crime/tyre-nichols-body-cam-video-release-memphis-police-b2273826.html](https://www.independent.co.uk/news/world/americas/crime/tyre-nichols-body-cam-video-release-memphis-police-b2273826.html) [https://perma.cc/9DCE-SK3F] (showing police department released false report covering up harmful conduct committed by officers against a suspect).

182. *See supra* Section III.

183. *See, e.g.,* Isabelle Valdes et al., *KFF Misinformation Poll Snapshot: Public Views Misinformation as a Major Problem, Feels Uncertain About accuracy of Information on Current Events*, KFF (Dec. 15, 2023), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-misinformation-poll-snapshot-public-views-misinformation-as-a-major-problem-feels-uncertain-about-accuracy-of-information/> [https://perma.cc/6DAT-6V96] (national poll finding that “a vast majority of adults (83%) say the spread of false and inaccurate information in the United States is a ‘major problem’”); *see also* Christopher St. Aubin & Jacob Liedke, *Most American Favor Restrictions on False Information, Violent Content Online*, PEW RSCH CTR. (July 20, 2023), <https://www.pewresearch.org/short-reads/2023/07/20/most-americans-favor-restrictions-on-false-information-violent-content-online/> [https://perma.cc/MQS7-E826] (finding a majority of Americans are in favor of legal restrictions on false information).

