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USING STATE LAW BEFORE THE GLACIERS THAW: CLIMATE TORTS AFTER *BP V. BALTIMORE*

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I. INTRODUCTION

We are living in the beginning stages of Earth's sixth mass extinction.[1] Since the Industrial Revolution of the nineteenth century, the burning of fossil fuels has released huge quantities of carbon dioxide and other greenhouse gasses ("GHGs") into the atmosphere.[2] The increased concentration of GHGs causes the atmosphere to retain more heat.[3] Consequently, ecosystems and weather patterns shift and change faster than most plants, animals, and human societies can adapt.[4] Climate change threatens global peace, crashes economies, and creates humanitarian crises.[5]

Scientists have understood that atmospheric carbon dioxide warms and insulates the climate since the early 1800s.[6] Since 1958, fossil fuel companies have known that their products specifically contribute to climate change; since 1978, they have known that the climate crisis was and is "great and urgent."[7] Still, these companies continued to produce, market, and

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1. *See* ELIZABETH KOLBERT, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY 2–3, 107–08, 113, 176–77 (2014) (detailing human activities like pollution, habitat destruction, and greenhouse gas emissions that are driving the extinction).

2. *See The Causes of Climate Change*, NASA: GLOBAL CLIMATE CHANGE, VITAL SIGNS OF THE PLANET, https://climate.nasa.gov/causes/ (last visited Oct. 6, 2022) (explaining that atmospheric carbon molecules retain unique isotopic fingerprints that reveal their sources).

3. *See id.* (explaining the greenhouse effect).

4. *See, e.g.*, Ary A. Hoffman & Carla M. Sgro, *Climate Change and Evolutionary Adaption*, 270 NATURE 479, 479, 481, 483 (2011) (recommending incorporating evolutionary processes into wildlife management to minimize biodiversity loss).

5. *See Tackling the Climate Crisis*, U.S. DEP'T OF DEF., https://www.defense.gov/spotlights/tackling-the-climate-crisis/ (last visited Oct. 6, 2022) (publishing regular Climate Adaptation Plans and Risk Analyses for the U.S. military).

6. *See* Guy Callendar, *The Man Who Discovered Global Warming in 1938*, MEDIUM (Oct. 5, 2021), https://medium.com/our-changing-climate/guy-callendar-the-man-who-discovered-global-warming-in-1938-a322626c8a74 (describing that nineteenth century scientists theorized but did not yet have proof of climate change).

7. Chris McGreal, *Big Oil and Gas Kept a Dirty Secret for Decades. Now They May Pay the Price*, THE GUARDIAN (June 30, 2021, 3:00 PM) (internal quotations omitted), https://www.theguardian.com/environment/2021/jun/30/climate-crimes-oil-and-gas-environment (revealing that the American Petroleum Institute first acknowledged climate change in 1958).

peddle their harmful products.[8] Fossil fuel companies also spent billions of dollars on pseudo-scientific research that denied climate change and denied that their products were the primary cause thereof.[9] In response to discovering the decades-long cover-up, many cities, states, businesses, and individuals have turned to courts to hold fossil fuel companies liable for their disastrous contributions to the climate crisis.[10]

This Comment describes the contours of one piece of the climate litigation ecosystem: suits brought under state-level tort and consumer protection laws.[11] It argues that the Second Circuit erred in dismissing New York City's state lawsuit against the world's largest fossil fuel companies.[12] Part II presents the history of domestic climate litigation.[13] Part III argues that the Second Circuit erred in dismissing the City's case because the Court relied on nonexistent federal common law, violated the well-pleaded complaint rule that makes the plaintiff the master of the complaint, and erroneously found nonjusticiable political questions.[14] Part IV recommends that cities, states, and individuals should commence more suits in state courts to build momentum and precedent, put more evidence of fossil fuel companies' deception on the record, and widen the legal narrative of climate impacts beyond oft-referenced sea level rise.[15] Part V concludes by reiterating that the principles of federalism mandate that state tort claims be allowed to proceed without federal preemption, as a matter of both law and policy.[16]

8. *See id.* (calling climate change denial "the most consequential cover-up" in history).

9. *See id.* (describing industry-wide conspiracy).

10. *See* U.S. CLIMATE CHANGE LITIG., *http://climatecasechart.com/us-climate-change-litigation* (last visited Nov. 19, 2022) (providing an exhaustive list of climate cases).

11. *See infra* Part III.

12. *See infra* Part III.

13. *See infra* Part II, notes 17–116 (differentiating based on filing venue).

14. See *infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part V.

II. BACKGROUND

A. Two Waves of Climate Litigation Reveal a Changing Tort Landscape

Scholars and practitioners group U.S. climate change litigation into two "waves."[17] The first wave lasted from the early 2000s until approximately 2011.[18] First-wave plaintiffs filed federal common-law claims in federal courts against the U.S. government and the world's largest oil and gas companies.[19] They sought injunctive relief for the defendants' contribution to global warming.[20] In 2011, the Supreme Court decided that the Clean Air Act ("CAA") displaced all federal common-law claims to regulate emissions.[21] Following *American Electric Power Co.,* plaintiffs changed tactics.[22] For the second wave, plaintiffs filed state claims in state courts.[23]

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17. *See, e.g.*, Albert C. Lin, *The Second Wave of Climate Change Public Nuisance Litigation*, 51 ABA TRENDS 10, 10 (2019) (grouping litigation into two distinct groups based on venue).

18. *See* Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1386 (describing the first wave of climate litigation in federal court that ended with *American Electric Power Co. v. Connecticut* in 2011).

19. *See* Lin, *supra* note 17, at 11 (characterizing first-wave strategy as an attempt to compel the judiciary to regulate GHG emissions); *see also*, Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 497 (2007) (suing the Environmental Protection Agency); Comer v. Murphy Oil USA, 585 F.3d 855, 559 (5th Cir. 2009) (suing Murphy Oil, Shell Oil, ExxonMobil, Peabody Energy, and other fossil fuel-heavy energy companies); Korsinsky v. U.S. Env't Prot. Agency, No. 05 Civ. 859 (NRB), 2005 WL 2414744, at *1 (S.D.N.Y. 2005) (suing the U.S. Environmental Protection Agency and New York State environmental agencies); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 410 (2011) (suing owners and operators of fossil fuel-powered power plants); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012) (suing ExxonMobil, BP, Chevron, ConocoPhillips, and other fossil fuel-heavy energy companies).

20. *See, e.g.*, *Am. Elec. Power Co.*, 564 U.S. at 410 (2011) (filing federal common-law claims for public nuisance).

21. *See id.* at 426 (holding that the Clean Air Act displaces federal common-law claims for injunctive relief); *see also Native Vill. of Kivalina*, 696 F.3d at 858 (extending the *AEP* decision to claims for damages).

22. *See* Lin, *supra* note 17, at 10 (arguing that second-wave suits formed as a direct result of the *AEP* holding).

23. *See, e.g.*, Oakland v. BP P.L.C., 969 F.3d 895, 901 (9th Cir. 2020) (filing in California state court under Cal. Civ. Code §§ 3475, 3480, 3491, 3494 and Cal. Civ. Proc. Code § 731); Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 34, 38 (D. Mass. 2020) (filing in Massachusetts state court under the Massachusetts Consumer Protection Act); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 965 F.3d 793, 799 (10th Cir. 2019) (filing in Colorado state court under tort theories of nuisance, trespass, unjust enrichment, civil conspiracy, and the Colorado Consumer Protection

The question at the heart of the second wave is whether the CAA, as a federal statute, preempts state-law claims for damages to compensate for climate change-related costs.[24] This open question has created a circuit split that ultimately only the Supreme Court can resolve.[25]

1. The First Wave

During the first wave of climate litigation, cities and states filed federal common-law claims in federal courts across the country.[26] Courts ultimately dismissed every first-wave case on the pleadings, citing the political question doctrine, standing doctrine, or CAA displacement.[27]

The most influential first-wave suit effectively ended it: *American Electric Power Company v. Connecticut* (hereinafter referred to as "*AEP*"). In *AEP*, eight states, New York City, and three environmental organizations sought injunctive relief against four electric power companies and the Tennessee Valley Authority.[28] The *AEP* plaintiffs alleged that the defendants substantially and unreasonably interfered with public welfare by driving global warming.[29] Federal courts regularly apply public nuisance, a federal common law claim, to interstate pollution issues.[30] However, in *AEP*, the

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Act); Rhode Island v. Chevron Corp., 979 F.3d 50, 50 (1st Cir. 2019) (filing in Rhode Island state court under tort theories of nuisance, products liability, trespass, impairment of the public trust, and the Rhode Island Environmental Rights Act). *But see* New York v. Chevron Corp., 993 F.3d 81, 81 (2d Cir. 2021) (filing New York state claims in U.S. federal court).

24. *See* Noah Star, *State Courts Decide State Torts: Judicial Federalism & The Costs of Climate Change, a Comment on City of Oakland v. BP PLC (9th Cir. 2020)*, 45 HARV. ENV'T L. REV. 195, 207 (2021); *see also* Am. Elec. Power Co. v. Connecticut, 564 U.S. at 429 (leaving the issue of preemption "open for consideration on remand").

25. *See* New York v. Chevron Corp., 993 F.3d at 85, 95–96 (holding that, per *AEP*, the CAA preempts state-law climate torts).

26. *See, e.g.*, Complaint at 1, Connecticut v. Am. Elec. Power Co., Inc., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), (No. 1:04-CV-05669) (seeking relief under public nuisance doctrine).

27. *See, e.g.*, California v. Gen. Motors Corp., No. C06–05755 MJJ, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) (holding that climate damages from auto manufacturers posed a nonjusticiable political question); *see also* Comer v. Murphy Oil USA, 585 F.3d 855, 867–69 (5th Cir. 2009) (holding that plaintiffs' fraud claims against defendants were too generalized); *Am. Elec. Power Co.*, 564 U.S. at 426 (holding that the CAA is Congress's "considered judgment" on GHG emissions).

28. *Am. Elec. Power Co.*, 564 U.S. at 415, 419 (seeking carbon emissions caps).

29. *Id.* at 415 (acknowledging that the plaintiffs believed that the defendants are the largest carbon dioxide emitters in the United States).

30. *See, e.g.*, Illinois v. Milwaukee, 406 U.S. 91, 104 (1972) (holding that federal

Supreme Court held that the CAA displaced all federal common-law claims regarding GHG emissions.[31] Federal common law is rare; it exists only where no federal law controls and courts see a great need for uniformity.[32] Per *AEP*, Congress intended for the CAA to fully occupy the climate regulatory space when it gave almost total authority to the EPA for such regulation.[33] The Court further held that even if the EPA declined to use its CAA authority to regulate GHGs, Congress had still given that power to the EPA.[34] Thus, the Court held that the CAA displaced any federal common-law claims on GHG emissions, even if no regulations existed.[35]

After *AEP*, the Ninth Circuit briefly considered whether the CAA likewise displaced federal common-law claims seeking *damages*.[36] In *Native Village of Kivalina v. ExxonMobil*, a Native Alaskan community sought compensation from fossil fuel companies alleged to have substantially contributed to climate change.[37] Like the *AEP* plaintiffs, the *Kivalina* plaintiffs filed federal common-law claims in federal court.[38] The Ninth Circuit concluded that the CAA displaced all federal common-law claims regarding GHG emissions, including those seeking monetary compensation.[39] Therefore, Kivalina's residents had no remedy under federal common law.[40]

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common law applied to interstate water pollution because such law "is not inconsistent" with the federal Water Pollution Control Act).

31. *See Am. Elec. Power Co.*, 564 U.S. at 415 (holding that the CAA displaces federal common law on GHG emissions).

32. *See id.* at 423 (calling federal common law an "unusual exercise") (citing Milwaukee v. Illinois, 451 U.S. 304, 314 (1981)); *see also* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (holding that adjudicating on a stolen government check required courts to create a federal common-law rule).

33. *See* 42 U.S.C. § 7401 (2022) (authorizing federal, state, and local government action to prevent air pollution).

34. *See* Sokol, *supra* note 18, at 1404 ("Thus, even if the EPA never regulates carbon dioxide emissions, federal common-law is not available" to plaintiffs seeking to curb GHG emissions).

35. *See Am. Elec. Power Co.*, 564 U.S. at 415 (dismissing the suit).

36. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012) (adjudicating on financial compensation for climate change in the wake of *AEP*).

37. *See id.* at 853–54 (alleging that defendants purposefully concealed emissions and global climate change data, leading to decades of political inaction on climate).

38. *See id.* (seeking damages to alleviate land loss due to sea level rise).

39. *See id.* at 857–58 (holding that ordering compensation for GHG emissions amounted to industry regulation, which is EPA's role).

40. *See id.* at 858 (dismissing Kivalina's claims).

Other first wave cases were similarly terminated.[41] In *California v. General Motors Corporation*, California sued the six largest motor vehicle manufacturers for their alleged contributions to climate change.[42] California brought claims under both federal and state common law and sought damages for economic losses.[43] The district court ruled that the pleadings raised nonjusticiable political questions that would require making policy decisions about global vehicle manufacturing.[44] Because the U.S. Constitution guarantees a separation of powers among the three branches, courts cannot make decisions reserved for the legislative and executive branches.[45] The district court dismissed California's claims.[46]

2. The Second Wave

To avoid the first wave's CAA displacement barrier, second-wave complaints alleged violations of state (statutory and common) law rather than federal common law.[47] The second wave of climate cases began in 2017 when several California cities filed tort claims against fossil fuel companies under state laws.[48] Over a dozen states and one private organization have

41. *See, e.g.*, California v. Gen. Motors Corp., No. C06–05755 MJJ, 2007 WL 2726871, at *6–17 (N.D. Cal. Sept 17, 2007) (dismissing California's state-law claims for lack of subject matter jurisdiction and lack of a well-pleaded complaint).

42. *See id.* at *1–2 (alleging that California has already spent millions of dollars to predict and plan for climate impacts).

43. *See id.* at *2 (seeking to hold defendants jointly and severally liable for public nuisance).

44. *See id.* at *6 (applying the six *Baker* factors to conclude that plaintiffs raised nonjusticiable political questions); *see also* Baker v. Carr, 369 U.S. 186, 216–17 (1962) (establishing characteristics of nonjusticiable political questions).

45. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) (holding that the Constitution created three separate branches and tasked courts with policing each branch's "outer limits of power"); *see also Baker*, 369 U.S. at 216–17 (identifying six characteristics of nonjusticiable political questions reserved for other branches).

46. *See Gen. Motors*, at *16–17 (dismissing California's federal common-law claims with prejudice as nonjusticiable political questions, but dismissing California's state-law claims without prejudice with direction to refile in state court).

47. *See* Lin*, supra* note 17, at 10 ("[The] second-wave of climate change public nuisance cases [are] based on state law.").

48. *See, e.g.*, Cnty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 934 (N.D. Cal. 2018) (filing in California state court for nuisance, negligence, and products liability); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1021 (N.D. Cal. 2018) (filing in California state court for public nuisance).

commenced second-wave suits by filing in state courts under state laws.[49] Only one second-wave plaintiff has filed in federal court (though still under state law).[50]

For plaintiffs, state claims offer several strategic advantages over federal ones. First, the CAA cannot displace state claims; federal statutes only displace federal common law.[51] Second, state courts use more relaxed standing doctrines and are thus less likely to dismiss suits for lack of standing or justiciability.[52] Third, state tort law is robust and well-suited to providing relief to parties injured by legal market conduct.[53] Fourth, state courts regularly hear and create new tort law, and are better suited than federal courts to apply tort precedent to novel climate cases.[54] Fifth, in the years between the first and second wave, investigators uncovered mountains of evidence that defendants' conduct led to plaintiffs' injuries.[55]

The procedural histories of most second-wave cases are remarkably similar to one another: after becoming aware of the claims, fossil fuel defendants divest the original state court of any judicial power by removing to federal court.[56] While the district court decides whether it can hear the

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49. *See* Lin, *supra* note 17, at 10 (grouping litigation into two distinct groups based on venue); *see also* U.S. CLIMATE CHANGE LITIG., http://climatecasechart.com/us-climate-change-litigation (last visited Nov. 19, 2022) (maintaining a comprehensive database of domestic climate change litigation).

50. *See* New York v. BP P.L.C., 325 F. Supp. 3d 466, 470 (S.D.N.Y. 2018) (filing in federal court under state laws of nuisance and trespass); *see also* Lin, *supra* note 17, at 10 (noting that defendants have removed several second-wave cases to federal court).

51. *See* Steven Kahn, *Displacing an Incomplete Preemption and Displacement Analysis: Doctrinal Errors and Misconceptions in the Second Wave of State Climate Tort Litigation*, 35 J. LAND USE & ENV'T L. 169, 174 (2020) (calling displacement a "horizontal limitation" on federal courts' power to create common law).

52. *See* Sokol, *supra* note 18, at 1414–15 (explaining that many state courts have more relaxed standing requirements because they (1) enjoy general jurisdiction, (2) regularly adjudicate torts, and (3) help contribute to tort law's evolution).

53. *See id.* at 1415–16 (describing how state common-law has provided relief for other public nuisances like lead in paint, firearms, and opioids).

54. *See id.* at 1433–34 (stating that state tort law is a richer body than federal tort law, which has not evolved much since *Erie* in 1983); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (holding that there is no general federal common law).

55. *See generally* Complaint at §§ 4.A–.K, Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (arguing that fossil fuel companies "affirmatively acted to obscure" climate change); *see also* Sokol, *supra* note 18, at 1434 (arguing that tort law balances the scales between vulnerable and powerful parties).

56. *See generally* Notice of Removal at § 2.6, Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (alleging eight removal grounds, including that the case

case, the suit stalls, wasting time, money, and emotional resources.[57]

While removal is commonplace in litigation, second-wave fossil fuel defendants use the tool fraudulently.[58] Second-wave defendants typically assert a number of different removal grounds, but always ultimately posit two arguments: (1) climate change and the fossil fuel industry are so large in scope that federal court is the only proper forum and (2) once in federal court, the CAA immediately displaces the federal claims.[59] These "fraudulent" removal motions aim to kill any valid state-law cases before they begin.[60]

Next, district courts often recognize the defendants' fraudulent removal tactic and remand the cases back to state courts.[61] Defendants then appeal the district courts' remand decisions to higher federal courts.[62] In 2021, the question of federal appellate review of remand orders reached the Supreme Court.[63] When the Court agreed to hear the Fourth Circuit's case, other courts paused their analogous cases and watched.[64]

B. Appellate Courts Must Review the Entirety of Remand Orders if Defendants Raised Federal Officer Removal Jurisdiction

In 2018, the Mayor and the City Council of Baltimore (hereinafter referred to together as "Baltimore") sued twenty-six fossil fuel companies in

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"necessarily raise[d]" federal jurisdiction); Baker v. Carr, 369 U.S. 186, 217 (1962) (identifying characteristics of nonjusticiable political questions).

57. *See, e.g.*, Martin v. Franklin Cap. Corp., 546 U.S. 132, 141 (2005) (holding that courts may impose financial penalties if reasons for removal are obviously unreasonable).

58. *See* Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. 87, 88 (2021) (characterizing "fraudulent removal" as technically legal but definitely shady).

59. *See id.* at 88–89 (arguing that court sanctions are imperfect deterrents).

60. *See id.* at 88 (opining that defendants know they can get away with the tactic).

61. *See* Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538, 574 (D. Md. 2019) (remanding to Maryland state court).

62. *See generally* Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532 (2021) (seeking Supreme Court review of a federal district court's remand to Maryland state court).

63. *See generally* BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1532 (2021) (granting the fossil fuel companies' writ of certiorari requesting appellate review of the remand orders).

64. *See, e.g.*, Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733, 745–46 (waiting for the Supreme Court's decision in *BP v. Baltimore*); Order to Stay Proceedings, City of Charleston v. Brabham Oil Co., Civil Action No.: 2:20-cv-03579-BHH (D.S.C. May 27, 2021) (staying proceedings).

Maryland state court.[65] Baltimore alleged that the defendants purposefully concealed climate science and failed to keep the public safe from their harmful products.[66] Baltimore further alleged that because of the defendants' actions, the city's residents, infrastructure, and natural resources face heatwaves, extreme precipitation, land loss, and related climate change impacts.[67] Baltimore filed eight claims based on Maryland law, seeking monetary damages, civil penalties, and equitable relief.[68]

A few days after Baltimore filed, two defendants removed the case to the U.S. District Court for the District of Maryland.[69] Those defendants, Chevron Corporation and Chevron U.S.A. Inc. (hereinafter referred to as "Chevron"), asserted eight grounds for removal.[70] Four of Chevron's grounds for removal relied on federal-question jurisdiction: Baltimore's claims (1) were governed by federal common law, (2) raised disputed and substantial issues of federal law, (3) were completely preempted by federal statute, and (4) were based on actions that occurred on federal enclaves.[71]

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65. *See generally* Mayor of Baltimore v. BP P.L.C., 952 F.3d 452, 457 (4th Cir. 2020) (suing multinational oil and gas companies for purposefully concealing scientific evidence, orchestrating disinformation campaigns, and promoting expanded uses of their products).

66. *See* Complaint at 1–5, 87, 90, BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1532 (2021) (alleging industry-wide conspiracy to undermine public support for climate regulation).

67. *See id.* at 4 (describing that Baltimore's geographical location on the eastern seaboard leaves it particularly vulnerable to climate disruption).

68. *See id.* at 107–30 (bringing claims of public nuisance, private nuisance, strict liability for failure to warn, strict liability for design defect, negligent design defect, negligent failure to warn, trespass, and violations of the Maryland Consumer Protection Act).

69. *See* Notice of Removal by Defendants Chevron Corp. and Chevron U.S.A., Inc., Mayor of Baltimore v. BP P.L.C., No. 1:18-CV-02357, 2018 WL 10075718, at *1 (D. Md. July 31, 2018) (asserting eight removal grounds including 28 U.S.C. § 1441, the federal officer removal statute); *see also* 28 U.S.C. § 1441 (2022) (allowing defendants to remove state cases that could have commenced in federal court: cases with either diverse parties or in which plaintiff's prayers for relief rely on federal law).

70. *See BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. at 1546.

71. *See* Notice of Removal by Defendants Chevron Corp. and Chevron U.S.A., Inc., *Mayor of Baltimore v. BP P.L.C.*, 2018 WL 10075718, at *3 (arguing that plaintiff's claims confer federal jurisdiction under 28 U.S.C. § 144(a) and § 1331); *see also* Boley v. United Tech. Corp., 487 U.S. 500, 504 (1988) (holding that federal common law governs issues of such uniquely federal concern that utilizing state law would be detrimental to national policy); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 315 (2005) (holding that federal tax provisions confer federal-question jurisdiction because a patchwork approach would disrupt federal-state relations); U.S.

Another four grounds relied on federal statutes: Chevron's charged conduct occurred (1) on the Outer Continental Shelf, (2) within navigable waters, (3) under authority of federal officers, and (4) by now-bankrupt subsidiaries and affiliates.[72] The district court considered each removal ground but ultimately found that none conferred federal jurisdiction.[73] The district court remanded the case back to Maryland state court.[74]

Chevron appealed the remand order, and the Fourth Circuit took the case.[75] Until recently, appellate courts did not typically review district courts' remand orders.[76] However, in 2011, Congress added an exception for cases removed pursuant to one of the removal grounds that Chevron had asserted: 28 U.S.C. § 1447(d), the "Federal Officer Removal Statute."[77] The Fourth Circuit decided that it had authority to consider the Federal Officer Removal ground because of § 1447(d), but was powerless to review Chevron's other seven removal grounds.[78] Looking only at the Federal Officer Removal Statute ground, the Fourth Circuit affirmed the district court's remand.[79]

At this point, a circuit split arose.[80] The Seventh Circuit disagreed with

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CONST. art. I, § 8, cl. 17 (stating that federal law governs cases that arise from activities conducted on U.S. territories, forts, arsenals, and dockyards).

72. *See* BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1536. (2021); 43 U.S.C. § 1349(b)(1) (2022) (authorizing Outer Continental Shelf Removal); 28 U.S.C. § 1333(1) (2022) (authorizing Admiralty Jurisdiction Removal); 28 U.S.C. § 1442(a)(1) (2022) (authorizing Federal Officer Removal); 28 U.S.C. § 1452(a) (2022) (authorizing Bankruptcy Removal).

73. *See BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. at 1536 (finding that none of the defendants' grounds for removal justified retaining federal jurisdiction).

74. *See id.* (reviewing all of defendants' bases for removal).

75. *See id.* at 951 ("The Fourth Circuit read § 1447(d) as authorizing it to review only the part of the district court's remand order discussing § 1442.").

76. *See* 28 U.S.C. § 1447(d) (2022) (prohibiting appellate review of remand orders except in enumerated cases).

77. *See id.* (allowing appellate review of remand orders if defendants asserted Federal Officer Removal or Civil Rights Removal).

78. *See* Mayor of Baltimore v. BP P.L.C., 952 F.3d 452, 460 (4th Cir. 2020) (holding that the proper interpretation of 28 U.S.C. § 1447(d) prohibits appellate review of all remand orders except those explicitly listed).

79. *See id.* at 457, 460 (relying on *Noel* and not, as defendants argued, *Yamaha*). *Compare* Noel v. McCain, 538 F.2d 633, 635 (4th Cir. 1976) (holding that appellate courts may not review removal grounds except those explicitly listed in 28 U.S.C. § 1447(d)), *with* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 204 (1996) (holding that appellate courts may hear all removal grounds for interlocutory appeals within maritime contexts).

80. *See BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. at 1537 (taking the case to

the Fourth Circuit's reading of 28 U.S.C. § 1447(d).[81] In *Lu Junhong v. Boeing Company*, the Seventh Circuit reasoned that § 1447(d) allowed for appellate review of the entire remand order if the order contained the Federal Officer Removal ground.[82]

When Chevron appealed the Fourth Circuit decision, the Supreme Court granted certiorari to resolve the circuit split.[83] The Court held that when defendants raise *any* grounds for statutory appeal (like the Federal Officer Removal Statute), the appellate court must consider *all* the removal grounds.[84] The Supreme Court remanded the case to the Fourth Circuit with orders to review Chevron's other grounds for removal.[85]

When the case landed back at the Fourth Circuit, the Court considered the remaining seven removal grounds.[86] It ultimately decided that none of Chevron's removal grounds held water.[87] The Fourth Circuit once again affirmed the remand.[88] As of writing, Baltimore's suit waits in queue at the original Maryland state court, four years after its original filing.[89]

C. The Second Circuit Breaks with Sister Courts in Holding that the Clean Air Act Preempts State Climate Torts

The same year that Baltimore commenced its suit, New York City (hereinafter referred to as "the City") sued five fossil fuel giants for damages

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resolve the circuit split between the Fourth and Seventh Circuits' interpretations of 28 U.S.C. § 1447(d)).

81. *See* Lu Junhong v. Boeing Co., 792 F.3d 805, 812 (7th Cir. 2015) (holding that principles of judicial economy, as well as the plain text of 28 U.S.C. § 1447(d), requires appellate review to consider the entire remand order).

82. *See id.* at 811 ("Section 1447(d) itself authorizes review of the remand order, because the case was removed (in part) pursuant to § 1442.").

83. *See BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. at 1537.

84. *See id.* at 1540 (relying on *Yamaha* to rule that appellate courts must hear all removal grounds); *see also* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 204 (1996) (holding that appellate courts may review all parts of interlocutory decisions, not only those explicitly named in authorizing statute, § 1292(b)).

85. *See BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. at 1543 (declining to consider any of the claims or removal grounds).

86. *See* Mayor of Baltimore v. BP P.L.C., 31 F.4th 178, 197 (4th Cir. 2022) (reviewing the defendants' removal grounds *de novo*).

87. *See id.* at 200, 204 (holding that defendants' removal grounds violated the well-pleaded complaint rule and preemption rule).

88. *See id.* at 238 (declining to decide Baltimore's claims on their merits).

89. *See id.* (affirming remand to Maryland state court).

related to climate change.[90] As in other second-wave suits, the City's complaint alleged violations of state tort law.[91] However, the City is the only second-wave plaintiff to originally sue in federal, rather than state, court.[92] In a new approach, the City brought state-law nuisance and trespass claims against defendants BP, Chevron, ConocoPhillips, Exxon, and Shell in a federal district court.[93] By filing in federal court, the City hoped to avoid the fight over removal and by filing state-law claims, it hoped to avoid CAA displacement.[94] The City requested damages for past and future costs of "climate-proofing" the City, as well as an injunction if the defendants did not pay.[95]

The New York District Court dismissed the City's complaint with prejudice.[96] First, the court decided that the City's claims were federal, not state, common-law claims.[97] Second, the court held that the CAA displaced those federal common-law claims.[98] Third, the court ruled that climate change posed too complex and political an issue for any court to decide at all.[99]

On appeal, the Second Circuit affirmed the district court's dismissal, stating that "artful pleading cannot transform the City's complaint into anything other than a suit over global [GHG] emissions."[100] The Second

90. *See* Complaint at 8–10, New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (suing BP, Chevron, ConocoPhillips, ExxonMobil, and Royal Dutch Shell).

91. See *id.* at 68, 70, 72 (asserting causes of action for public nuisance, private nuisance, and trespass under New York common law).

92. *See, e.g.*, BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1536 (2021) (attempting to bypass the defendants' predictable fraudulent removal).

93. *See* New York v. Chevron Corp., 993 F.3d 81, 88 (2d Cir. 2021) (filing in the Southern District of New York under diversity jurisdiction); 13E Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Juris.* § 3605 (3d ed. 2022) (describing the purpose of diversity jurisdiction as providing a neutral forum).

94. *See New York v. Chevron Corp.*, 993 F.3d at 88 (filing in federal court under state law); *see also BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. at 1536 (holding that remand orders are appealable to higher federal courts).

95. *See id.* at 87 (describing the costly mitigation measures that the City financed).

96. *See id.* at 89 (hearing the case *de novo*).

97. *See id.* at 88–89 (holding that GHG emissions are inherently a federal issue and therefore governed by federal law).

98. *See id.* at 88 (holding that the Supreme Court's *AEP* decision controlled and prohibited federal common-law climate claims).

99. *See id.* at 85–86, 88 (holding that other government branches were better suited to navigate the international relations inherent to fossil fuel regulation because the regulation is so politically charged).

100. *Id.* at 91 (holding that the City did not file a well-pleaded complaint).

Circuit decided that any climate injury, no matter how particularized or causally clear, lies beyond the reach of state law.[101] The Second Circuit published three main holdings: (1) the City's state-law claims were actually federal common-law claims, (2) the CAA displaced those federal common-law claims, and (3) foreign policy concerns foreclosed the Court's ability to adjudicate on extraterritorial conduct by international fossil fuel companies.[102]

In reaching these conclusions, the Second Circuit made several legal errors. First, the Court relied on nonexistent federal common law for climate change that supposedly displaced the City's state-law claims.[103] As the Supreme Court decided in *AEP*, the CAA displaces all federal common law regarding GHG emissions.[104] Therefore, federal common-law claims for GHG emissions do not exist.[105] In asserting that New York City's state common-law claims were in fact federal common-law claims, the Second Circuit defied Supreme Court precedent.[106]

Second, the Second Circuit violated the well-pleaded complaint rule, which makes the plaintiff the master of their complaint.[107] Plaintiffs can avoid federal court by alleging only state-law claims.[108] Federal defenses, such as those asserted by the fossil fuel defendants, do not confer federal jurisdiction.[109]

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101. *See id.* at 85 (holding that global warming presents an international problem best left to politicians and legislatures, rather than judge-made law).

102. *See id.* at 88, 93, 100–01 (holding that allowing the case to proceed would effectively impose strict liability on fossil fuel companies, which would harm international relations due to the globality of fossil fuel supply chain).

103. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011) (holding that the CAA displaced any federal common-law claims regarding GHG emissions).

104. *See id.* at 425–28 (holding that federal judges lack the technical and scientific skills to regulate fossil fuels); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 819–23 (1938) (holding that federal courts must apply state law to cases without federal questions; courts cannot use federal common law except in rare circumstances).

105. *See Am. Elec. Power Co.*, 564 U.S. at 429 (holding that the CAA displaces all federal common-law claims, reversing, and remanding).

106. *See id.* at 415 (holding that the CAA and EPA actions it authorizes displace federal common-law public nuisance claims against GHG emitters); *see also* New York v. Chevron Corp., 993 F.3d 81, 91 (2d Cir. 2021) (holding that the City raised federal claims despite claiming it raised state ones).

107. *See* Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112–13 (1936) (holding that the plaintiff's cause of action determines jurisdiction).

108. *See id.* at 112–13 (making the complainant the master of jurisdiction).

109. *See* Caterpillar, Inc. v. Williams, 482 U.S. 386, 386 (1987) (holding that claims for individual contracts do not confer federal jurisdiction, even though the employer raised federal defenses based on national labor laws).

The Supreme Court has clarified and reiterated the well-pleaded complaint rule on several occasions, and it is now a pillar of U.S. law.[110] The Supreme Court has identified a few rare exceptions to the well-pleaded complaint rule.[111] However, New York City's claims do not fall into the narrow class of state-law claims that confer federal jurisdiction.[112] Therefore, the City remains the master of its complaint, and its claims should stand.[113]

Third, the Second Circuit erroneously opined that adjudicating the case would require making unconstitutional policy decisions about the fossil fuel industry at large. To maintain a separation of powers, courts may not make nonjusticiable political decisions.[114] However, under Supreme Court precedent, New York City's claims are fully justiciable and nonpolitical.[115] Although the political branches interact with the broad field of climate change, the Second Circuit legally must still adjudicate New York City's narrow claims for damages.[116] Additionally, the Second Circuit's decision

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110. *See* Wright & Miller, *supra* note 93, at § 3566 (explaining that courts should apply the rule before addressing any other jurisdictional issues); *see also* Osborn v. Bank of the United States, 22 U.S. 738, 823 (1824) (holding that any federal ingredient confers federal jurisdiction); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 149 (1908) (narrowing federal jurisdiction to cases with federal claims in the complaint only); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 309 (2005) (holding that certain state-law claims are so consequential to federal policy that they must confer federal jurisdiction).

111. *See Grable & Sons Metal Prods., Inc.*, 545 U.S. at 309 (finding federal jurisdiction if federal claims are (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution without disrupting the federal-state balance of power); Gunn v. Minton, 568 U.S. 251, 260–62 (2013) (holding that an attorney malpractice claim did not implicate the federal system as a whole).

112. *See* Mayor of Baltimore v. BP P.L.C., 31 F.4th 178, 208 (4th Cir. 2022) (adjudicating on the same climate tort claims, but in Maryland instead of New York, and concluding that they did not confer federal jurisdiction).

113. *See id.* at 208 (holding that defendants wrongfully removed Baltimore's case to federal court because the well-pleaded complaint did not confer federal jurisdiction).

114. *See* Schabarum v. California Legislature, 60 Cal. App. 4th 1205, 1215 (Ct. App. 2008) (holding that constitutional challenges to laws are judiciable questions); Baker v. Carr, 369 U.S. 186, 217, 235–36 (1961) (identifying characteristics of nonjusticiable political questions: (1) an explicit constitutional commitment of the issue to another branch, (2) a lack of judicially demonstratable or manageable standards, (3) the impossibility of deciding the issue without making a political choice; (4) a strong chance of disrespecting another branch, (5) an unusual need to adhere to a political decision, and (6) a strong chance of inter-governmental embarrassment).

115. *See Baker*, 369 U.S. at 217 (holding that federal jurisdiction was proper based on Federal Officer Removal jurisdiction).

116. *See* Milwaukee v. Illinois, 101 S. Ct. 1784, 1792 (1980) (holding that federal

to federalize and dismiss the state-law claims is inconsistent with every other circuit court that has recently heard this issue.[117]

III. ANALYSIS

A. The Second Circuit Erred in Holding that the Clean Air Act Preempts State Climate Torts Because it Relied on Nonexistent Federal Common Law

In *New York v. Chevron*, the Second Circuit decided that the City's state-law claims were, in fact, federal-law claims.[118] However, the Supreme Court's *AEP* decisions holds that there can be no federal common law for GHG emissions because the CAA fully occupies that field.[119] The Second Circuit's opinion creates a federal common-law claim for a brief moment. Then, as soon as that federal common-law claim comes into existence, the CAA immediately displaces it.[120] Since U.S. courts do not account for quantum mechanics, federal common law on GHG emissions cannot both exist and not exist at the same time.

Courts have fashioned federal common law in a "few and restricted" areas: where federal questions have no statutory answers.[121] One of the largest areas of federal common law is interstate pollution, since no federal statute controls.[122]

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statutes displace common-law claims only where Congress has clearly intended and so indicated).

117. *See, e.g.*, Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733, 764 (9th Cir. 2022) (adhering to the Supreme Court's "deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts" by remanding San Mateo's state claims to state court).

118. *See* New York v. Chevron Corp., 993 F.3d 81, 91–92 (2d Cir. 2021) (holding that "the City's lawsuit is no different" than dozens of cases that "applied federal [common] law to disputes involving interstate air or water pollution").

119. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 410 (2011) (holding that the CAA "and EPA actions it authorizes displace any federal common-law right to seek abatement of carbon dioxide emissions" from fossil fuel companies).

120. *See New York v. Chevron Corp.*, 993 F.3d at 95 (claiming that because GHG emissions are of national importance, federal common law must govern, but federal common law is preempted and therefore immediately disappears).

121. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (finding that there is no general federal common law); Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) (finding federal common law in rare circumstances involving unions and actions by federal officers); *see also* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469 (1942) (Jackson, J., concurring) (describing that courts may make federal common law where Congress is silent and states lack province).

122. *See* New York v. Chevron Corp., 993 F.3d at 91 (providing a list of cases that have used federal common law for interstate air and water pollution issues).

In 2011, the Supreme Court decided that plaintiffs may not use federal common law to bring climate suits, differentiating climate from other pollution issues.[123] Earlier, in *Massachusetts v. Environmental Protection Agency*, the Court held that the CAA granted the EPA sole authority to regulate GHG emissions (as air pollution) from new motor vehicles.[124] The Court built on this precedent in *AEP*, holding that the CAA displaced all federal common-law claims regarding GHG emissions.[125]

In *AEP*, the Supreme Court explained that federal statutes quite easily displace federal common law: the test is simply whether a statute addresses the narrow question at issue.[126] Since the CAA authorized the EPA to regulate air pollution, and *Massachusetts* held that GHGs are air pollutants, the *AEP* Court concluded that CAA fully occupied the field of regulating GHG emissions.[127] Thus, the Second Circuit's assertion that New York City brought federal common-law claims for GHG emissions is incorrect.[128] No such federal common law exists.[129]

B. The Second Circuit Erred in "Federalizing" New York City's Claims Because the Complaint Alleged Violations of State Law Only

The Second Circuit erred in *New York v. Chevron* because it violated the well-pleaded complaint rule.[130] The City alleged violations of New York state law alone and carefully avoided raising federal questions.[131] The Second Circuit should have adjudicated the case on its state-law merits. Instead, the Court held that climate change is too big, too complex, and too

123. *See Am. Elec. Power Co*., 564 U.S. at 410.

124. *See* Massachusetts v. EPA, 549 U.S. 497, 528 (2007) (relying on plain statutory language to conclude that the CAA authorizes the EPA to regulate harmful air pollutants, including GHGs).

125. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) (holding that a federal statute that fully covers a regulatory issue—like the CAA does for GHG emissions—displaces federal common law unless Congress explicitly states otherwise).

126. *See id.* at 424 (citing Mobil Oil Corp. v. Higginbotham, 436 U.S. 918, 925 (1978)) (internal quotations omitted).

127. *See id.* at 424 (holding that the CAA is Congress's considered judgment on GHG regulation).

128. *See id.* at 415 (holding that the CAA displaces federal common-law claims for GHG regulation).

129. *See id.* at 426 (holding that the CAA "occupies" that field).

130. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 153 (1908) (holding that federal jurisdiction is conferred only through diversity of parties or by a federal cause of action).

131. *See* New York v. Chevron Corp., 993 F.3d 81, 88 (2d Cir. 2021) (concluding erroneously that the City's claims were governed by federal common law).

international for state law.[132] In doing so, the Court "federalized" what were legitimate state-law claims, in violation of the well-pleaded complaint rule.[133]

Federal courts can only adjudicate on cases authorized by statute or enumerated in the Constitution.[134] The Constitution grants federal courts original jurisdiction to hear cases "arising under" the Constitution or federal laws.[135] An early Supreme Court interpreted this clause broadly, holding that it conferred original federal jurisdiction to all cases with even one federal element.[136] Later, statutory and common law doctrine limited federal question jurisdiction.[137]

Title 28 of the U.S. Code, Section 1331 reiterates that federal courts have original jurisdiction over cases arising under the Constitution and federal laws.[138] In *Louisville & Nashville Railroad Company v. Mottley*, the Supreme Court held that § 1331 created the well-pleaded complaint rule, which confers original jurisdiction to federal courts only when a federal question appears on the face of a complaint.[139] Under the well-pleaded complaint rule, anticipated defenses based in federal law do not confer federal question jurisdiction.[140] Courts must remain laser-focused on the

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132. *See id.* at 93–95 (concluding that the goal of the City's suit is to impose strict liability for fossil fuel emissions worldwide, and therefore must be brought under federal law).

133. *See Louisville & Nashville R.R. Co.*, 211 U.S. at 153 (holding that to allow anticipated defenses to confer federal jurisdiction would improperly shift the burden of proof to the plaintiff before she ever steps into court).

134. *See* U.S. CONST. art. III, § 2 (conferring original jurisdiction to federal courts under limited circumstances).

135. *Id.*

136. *See* Osborn v. Bank of the United States, 22 U.S. 738, 823 (1824) (holding that federal courts can claim original jurisdiction over cases with a federal "ingredient" because (1) such cases are the "most important" and (2) if such jurisdiction were not conferred, cases would be apportioned to be heard in multiple venues at the same time, possibly leading to conflicting rulings).

137. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg, 545 U.S. 308, 308 (2005) (holding that state-law claims with embedded federal issues confer federal question jurisdiction); Gunn v. Minton, 568 U.S. 251, 251 (2013) (holding that 28 U.S.C. § 1338(a), which provides for exclusive federal jurisdiction over cases involving patents, does not deprive courts of subject matter jurisdiction over state-law malpractice claims).

138. 28 U.S.C. § 1331 (2022).

139. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 153 (1908) (holding that allowing anticipated defenses to confer federal jurisdiction would deprive plaintiffs of choice of venue).

140. *See id.* (holding that doing so would rob plaintiffs of choice of venue).

plaintiff's complaint to determine jurisdiction.[141]

The *Grable* exception to the well-pleaded complaint rule gives federal courts original jurisdiction over state-law claims that automatically implicate federal issues.[142] Specifically, the exception confers federal jurisdiction over a state-law claim if a federal issue is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.[143] Without performing a thorough *Grable* analysis, the Second Circuit incorrectly found federal issues embedded in the City's state-law claims.[144] Had the Second Circuit performed a proper analysis, it would have concluded that New York law alone provided both the cause of action and the remedy for the City's injuries.

First, the City's complaint did not "necessarily" raise any federal issues.[145] The City accused the defendants of deceptively marketing their products with full knowledge that consumers would be harmed, in violation of state—not federal—tort law. The majority of the complaint described the concrete and particularized climate injuries that New Yorkers face.[146] Another part described the mountains of evidence against the defendants.[147] The complaint failed to include any federal claims whatsoever, thus failing the first prong of *Grable*'s four-part test.[148] The City simply aimed to hold bad market actors accountable for their actions and force them to internalize some negative externalities of their products.[149] This is precisely what tort

141. *See id.* at 150 (holding that because the plaintiffs properly raised only state claims, the defendant's defenses based in federal statute did not confer federal question jurisdiction).

142. *See Grable & Sons Metal Prods., Inc.*, 545 U.S. at 314–15 (holding that the plaintiff's state-law property claims required interpreting federal statute).

143. *See* Gunn v. Minton, 568 U.S. 251, 258 (2013).

144. *See* New York v. Chevron Corp., 993 F.3d 81, 92 (2d Cir. 2021) (concluding that since twenty-three states filed *amicus* briefs, a unified federal law must govern).

145. *See* Mayor of Baltimore v. BP P.L.C., 31 F.4th 178, 209 (4th Cir. 2022) (finding that Maryland plaintiffs bringing similar claims did not raise embedded federal issues in their state-law claims).

146. *See New York v. Chevron Corp.*, 993 F.3d at 86 (describing that the City is especially vulnerable due its 520-mile coastline, concentrated population, and sprawling old infrastructure).

147. *See id.* (describing one such cost: a city-wide $20 billion infrastructure project following Hurricane Sandy).

148. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 308 (2005) (holding the plaintiff's state-law claims required interpreting federal statute).

149. *See New York v. Chevron Corp.*, 993 F.3d at 86 (acknowledging that climate change is expensive, necessitating huge infrastructure and public health projects).

law has evolved to do.[150] Given that the Clean Air Act displaces any relevant federal common-law claims, state law is the only available place to address the City's concerns.[151]

To satisfy the second *Grable* element, a state-law claim must present an "actually disputed" federal issue.[152] While climate change broadly is a federal concern with indisputably international implications, this case is about making producers internalize the societal costs of their products.[153] The nebulously federal matter that is climate change in *New York v. Chevron* bears little resemblance to the disputed federal issue in *Grable*.[154] There, a federal law required the government to give notice before seizing private property.[155] The plaintiff, Grable, argued that the statute required personal service for land seizure.[156] Because service was improper, Grable accused the government of unlawfully seizing his land.[157] Although Grable sued under state law, the Supreme Court held that his case warranted federal jurisdiction because the claims required resolution of an unsettled interpretation of federal statute.[158] *New York v. Chevron* does not implicate any unsettled question of federal law.[159] Here, there is no federal law embedded in the claims at all, let alone a disputed one.

Third, the City did not raise "substantial" federal issues in its complaint.

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150. *See* Mayor of Baltimore v. BP P.L.C., 31 F.4th 178, 221 (4th Cir. 2022) (holding that climate torts are proper when plaintiffs suffer injuries causally related to defendants' market conduct); *see also* Stuart M. Speiser et al., 1 Amer. L. Torts § 1:3. (describing the purpose of tort law as compensating victims, shifting losses to responsible parties, and deterring wrongful conduct).

151. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) (holding that the CAA preempts climate-related federal common-law claims because it "speaks directly to the question at issue") (citing Massachusetts v. E.P.A., 549 U.S. 497 (2007)).

152. *Grable & Sons Metal Prods., Inc.*, 545 U.S. at 308.

153. *See New York v. Chevron Corp.*, 993 F.3d at 92 (mischaracterizing the City's claim regarding GHG emissions regulation instead of reading the plain language).

154. *Compare New York v. Chevron Corp.*, 993 F.3d at 88 (holding that global warming – as suggested by its name - is a federal issue), *with Grable & Sons Metal Prods.*, 545 U.S. at 308 (holding that federal-question jurisdiction was proper because the case turned on interpreting a sufficiently substantial federal issue).

155. *See Grable & Sons Metal Prods.*, 545 U.S. at 308 (describing the case as a battle over interpreting 26 U.S.C. § 6335).

156. *See id.*

157. *See id.*

158. *See id.* at 309 (holding that the federal statute's meaning was disputed, essential to the case, and of great federal interest).

159. *See* Mayor of Baltimore v. BP P.L.C., 31 F.4th 178, 238 (4th Cir. 2022) (holding that state tort law provides a remedy for climate harms without necessitating interpreting federal statute or disrupting the balance of power between branches).

The City readily conceded that climate change is an international crisis.[160] However, a *Grable* substantiality inquiry does not ask whether a problem is local or global, but rather whether relief would implicate the federal system as a whole.[161] Substantial federal issues pose direct legal challenges to federal laws, calling into question the constitutionality of statutes or government actions.[162] The City's attempt to mitigate costs incurred by injurious products would not impact any federal law or policy, nor would it reinterpret any part of the Constitution.[163]

The Second Circuit ruled that it could not allow the City's claims to proceed because doing so would effectively shutter the fossil fuel industry. That regulatory decision, the Second Circuit held, belonged to policymakers alone.[164] That the fossil fuel industry's unscrupulous business practices might be its demise is no reason to dismiss the City's claims.[165] Victims may seek justice even if doing so harms their abusers, including in the field of environmental injustice.[166] If second-wave suits prevail, fossil fuel companies could face fifty different damages rulings, each adjudicated in accordance with that state's laws.[167] While such a scenario would undoubtedly have significant effects on the fossil fuel industry, it would still not raise "substantial" federal issues necessary to satisfy the *Grable*

160. *See New York v. Chevron Corp.*, 993 F.3d at 86 ("Global warming is one of the greatest challenges facing humanity today.").

161. *See* Gunn v. Minton, 568 U.S. 251, 260 (2013) (holding that the Internal Revenue Service's interest in satisfying tax delinquency is important enough to confer federal-question jurisdiction); *see also* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 813 (1986) ("[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.").

162. *See Gunn*, 568 U.S. at 261 (holding that a state-law claim over whether defendant bank could purchase certain bonds conferred federal-question jurisdiction because it required determining the constitutional validity of those bonds) (citing Smith v. Kansas City Title & Trust Co., 225 U.S. 180, 245–46 (1921)).

163. *See* Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733, 748 (9th Cir. 2022) (holding that state climate tort claims do not confer federal question subject matter jurisdiction because they simply do not ask federal questions).

164. *See New York v. Chevron Corp.*, 993 F.3d at 93.

165. *See* Lisa Benjamin & Sara Seck, *The Escalating Risks of Climate Litigation for Corporations*, 18 SCITECH LAW 10, 13 (2021) (explaining that fossil fuel companies face increasing pressure from investors, regulators, and litigators to limit their emissions).

166. *See* The Hague, 26 mei 2021, ECLI C/09/571932 m.nt. (Milieudefensie/Royal Dutch Shell P.L.C.) (Neth.) (holding that the Dutch government violated its duty of care to its people by allowing climate change and ordering fossil fuel defendants to reduce their global carbon emissions by forty-five percent by 2030).

167. *See New York v. Chevron Corp.*, 993 F.3d at 86 (asserting that such a "patchwork" scenario would devastate the global economy).

exception.[168]

Fourth, *New York v. Chevron* fails the last element of the *Grable* test because using state law to hold fossil fuel companies accountable would not disturb the state-federal balance of power.[169] Despite what the Second Circuit opined, *New York v. Chevron* is a case about making product producers internalize the costs of their harmful products. Asking who should bear the costs of societal harms is the core inquiry of tort law.[170] Torts, in turn, are almost exclusively housed in state law.[171] State law should govern climate harms, just as it governs other tortious conduct.[172] There is nothing uniquely federal about climate injuries that other societal harms do not share.[173]

C. The Second Circuit Erred in Holding that Greenhouse Gas Emissions Regulations Belong Solely to Other Branches Because Local Impacts of Climate Change Do Not Present Nonjusticiable Political Questions

The planet's rapidly warming climate is the result of a series of deeply political decisions.[174] Governments and individuals alike choose sides in this cost-benefit analysis every time they willingly utilize fossil fuels.[175] While

168. *See Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th at 748 (holding that San Mateo's similar state-law tort claims, however damaging to the defendants, did not meet the *Grable* exception because they did "not require any interpretation of federal statutory or constitutional issue").

169. *See* Mayor of Baltimore v. BP P.L.C., 31 F.4th 178, 209 (4th Cir. 2022) (holding that courts maintain this balance of power when they allow state courts to adjudicate their areas of "special responsibilities," and torts are one of these areas).

170. *See, e.g.*, Landstar Inway Inc. v. Samrow, 325 P.3d 327, 339 (Wash. Ct. App. 2014) (holding that tort law aims to restore plaintiffs to their condition prior to the defendant's harmful action).

171. *See* Sokol, *supra* note 18, at 1433 (noting that state common law is a richer body than federal common law due to *Erie*); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (curbing the creation of federal common law).

172. *See* Watson v. Philip Morris Co., Inc., 551 U.S. 142, 145 (2007) (holding that defendant tobacco companies could not remove state-law claims of fraudulent advertising to federal court).

173. *See id.* (holding that state-law torts against internationally-marketed and federally-regulated tobacco companies belong in state courts).

174. *See* Massachusetts v. E.P.A., 549 U.S. 497, 500 (2007) (holding that the EPA, an agency headed by political appointees, is authorized to regulate GHG emissions); *see also* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 426 (2011) (holding that the EPA can legally and voluntarily decline to regulate emissions).

175. The ability to choose to use or avoid fossil fuels is usually a function of privilege, power, and circumstance. Oftentimes, fossil fuels are unavoidable. This reality does not

climate change itself is an undeniably complex, global, and divisive issue, state-law climate torts are not themselves political questions.[176]

A case presents a nonjusticiable political question when any one of the *Baker* factors is present.[177] The Second Circuit erroneously found three *Baker* factors in *New York v. Chevron* that rendered the case nonjusticiable. Specifically, the Second Circuit found: (1) The second *Baker* factor (lack of appropriate legal standards) when it held that that state laws were inadequate and could not address the claims, (2) the third *Baker* factor (inherent political decisions) when it held that there are already laws and treaties on climate, and (3) the fourth *Baker* factor (disrespect for other branches) when it held that the City's claims undermined past federal policy choices.[178] In addition to incorrectly finding these *Baker* factors, the Second Circuit violated its own 2009 precedent where it found that climate torts did not present nonjusticiable political questions.[179]

First, the Second Circuit claimed that it had no judicial standards by which to resolve the City's claims.[180] Cases are nonjusticiable under this *Baker* factor when courts lack a clear picture of the controlling law or when someone would be in violation thereof.[181] The Second Circuit held that

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preclude a fossil-free future. *See, e.g.*, Carola Rackete, *What Privilege Means in the Climate Crisis Fight*, N.Y. TIMES (Dec. 2, 2021) https://www.nytimes.com/2021/12/02/special-series/climate-crisis-responsibility-privilege.html (arguing that citizens of the Global North bear primary responsibility for limiting their fossil fuel consumption). *But see* Heather McTeer Toney, *How to Talk About Climate Change Without the Distraction of Privilege*, MISS. FREE PRESS (Oct. 27, 2020) https://www.mississippifreepress.org/6425/how-to-talk-about-climate-change-with-the-distraction-of-privilege (describing how some popular climate solutions, like vegetarianism and renewable energy tax incentives, further entrench systemic racism).

176. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (creating judicial standards for determining nonjusticiable political questions).

177. *See id.* at 250 (considering whether political gerrymandering was a nonjusticiable political question).

178. *See id.* at 217 (creating six categories of claims that pose nonjusticiable political questions); *see also* New York v. Chevron Corp., 993 F.3d 81, 86, 93 (2d Cir. 2021) (holding that the City was attempting to impose strict liability on all GHG emissions worldwide, which is beyond the province of Article III courts).

179. *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 321–32 (2nd Cir. 2009) (applying the *Baker* analysis to federal tort claims that would regulate national GHG emissions and concluding that the claims could proceed).

180. *See Baker*, 369 U.S. at 209–11 (holding that clear judicial standards ensure uniformity in rulings and prevent unreasonable or biased judicial discretion).

181. *See* Vieth v. Jubelirer, 541 U.S. 267, 280–81, 288 (2004) (holding that a standard for violating anti-gerrymandering law was indiscernible because the Constitution

climate torts were "simply beyond" state law because it had no blueprint to follow when almost everyone in the world uses fossil fuels.[182] The Second Circuit was wrong: the well-established doctrine of contributory negligence exists and may reduce or apportion damages when a court finds that the harmed party contributed to its own injuries.[183]

Sorting out state-law climate damages would be tedious, but not unmanageable.[184] The Second Circuit itself previously held that climate torts are justiciable because there *are* judicially-discoverable and -manageable standards for resolving them.[185] In a 2009 opinion, the Second Circuit noted that courts are "masterful" at employing public nuisance doctrine to adjudicate liability among interstate polluters.[186] It further stated that courts are adept at applying "well-settled" tort principles to "new and complex" issues, like climate change.[187]

The Second Circuit's 2009 assertion is still true. Well-established tort law gives courts a blueprint for apportioning climate relief.[188] New Yorkers have used state law to make polluters pay for decades, even when the facts are complex.[189] For example, in *Boomer v. Atlanta Cement Co.*, a small group of New York landowners successfully utilized state nuisance law to enjoin damages from a nearby cement factory.[190] In *Abbatiello v. Monsanto Co.*, a

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provides no right to proportional representation and the Supreme Court Justices could not agree).

182. *See New York v. Chevron Corp.*, 993 F.3d at 86, 92–93.

183. *See, e.g.*, Copart Indust. v. Consol. Edison Co. N.Y., Inc., 362 N.E.2d 968, 970 (N.Y. 1977) (holding that contributory negligence may be a defense where a pollution-related nuisance claim is based on negligent conduct).

184. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 329 ("Federal courts have long been up to the task of assessing complex scientific evidence in cases….").

185. *See id.* at 326 (holding that courts can draw from at least one hundred years of successful adjudication on complex nuisance as a blueprint for climate torts).

186. *Id.* at 329; *see also, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230, 236–39 (1907) (weighing the magnitude of injury, causation, abatement, costs, and benefits of four air-polluting copper foundries and granting injunctive relief to plaintiff).

187. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 329 (holding that federal common-law climate tort claims are sufficiently "discrete" questions that do not require courts to make policy decisions).

188. *See id.* at 329 (holding that federal common-law climate torts are just like regular torts wherein the court must decide causation and decide a remedy).

189. *See id.* at 329 ("The fact that a case may present complex issues is not a reason for federal courts to shy away from adjudication . . . .").

190. *See* Boomer v. Atlanta Cement Co., 257 N.E.2d 870, 874–75 (N.Y. 1970) (holding that a factory's air pollutants unreasonably damaged private property, even though the plant operated legally and sustained the local economy).

federal court allowed state-law fraud, negligence, nuisance, and trespass claims to proceed against Monsanto after the company sold products containing toxics to a third-party auto manufacturer.[191]

The Second Circuit also erroneously found the third *Baker* factor when it held that the City's claims required that the Court make an initial policy decision.[192] This is the vaguest *Baker* factor that lends itself to overbroad application. In the climate field, the Second Circuit previously interpreted this language to mean that nonjusticiable political questions are those that "only the political branches are empowered to act" upon.[193] That interpretation is consistent with the Supreme Court's assertion that courts are barred from hearing "political questions" but not "political cases."[194] While Congress has already revealed its answer to the question of who should regulate GHG emissions (the EPA), it has remained silent on the separate issue of compensating climate victims.[195] The Supreme Court has held that legislative silence on an issue "falls far short" of expressing its intent to supplant action by other branches.[196] Thus, the Second Circuit should have interpreted Congress's silence on the issue of climate compensation as a sign that that the issue was fully justiciable.[197]

The Second Circuit noted that the broad issue of climate change is already the subject of numerous interstate partnerships, state and federal statutes, and

191. *See* Abbatiello v. Monsanto Co., 522 F. Supp. 2d 524, 541 (S.D.N.Y. 2007) (allowing claims to proceed because Monsanto had "substantially" contributed to plaintiffs' injuries).

192. *See* Baker v. Carr, 369 U.S. 186, 217, 230 (1962) (holding that hearing nonjusticiable questions would amount to creating policy, which in turn would allow the "guaranties embedded in the Constitution of the United States [to be] manipulated out of existence" (quoting Gomillion v. Lightfoot, 364 U.S. 339, 344–45 (1960)).

193. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 330, 332 (holding that courts cannot hear cases that are either: (1) textually committed within the language of the Constitution to the political branches; or (2) substantially affect foreign policy).

194. *See Baker*, 369 U.S. at 217.

195. *See* Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 429 (2011) (leaving the question open for consideration on remand).

196. *See* United States v. Texas, 507 U.S. 529, 535 (1993) (holding that because the Debt Collection Act is silent on the issue of whether the federal government may collect prejudgment interests on debts owed by states, common law was available to fill in the gaps).

197. *See* Milwaukee v. Illinois, 451 U.S. 304, 321–22 (1981) [hereinafter Milwaukee II] (holding that plaintiffs may rely on federal common law only where a federal statute and its ensuing regulatory regime do not fully occupy the space).

international treaties.[198] That the political process has created certain climate-related agreements does not mean that climate broadly—let alone the narrower question of damages—lies outside the court's power. The Supreme Court addressed the question of narrowness in *Milwaukee v. Illinois* (hereinafter referred to as "*Milwaukee II*"), which the Second Circuit used to support its decision in *New York v. Chevron*.[199] In *Milwaukee II*, the Supreme Court held that the Federal Water Pollution Act of 1972 (hereinafter referred to as "FWPA") displaced the State of Illinois's federal common-law nuisance claims for interstate water pollution.[200] Five months after Illinois filed, Congress passed the FWPA, a precursor to the Clean Water Act.[201] The Supreme Court held that the new FWPA "thoroughly addressed" the narrow issue of wastewater effluents into Lake Michigan from urban areas, and therefore displaced Illinois' common-law claims.[202] In contrast to *Milwaukee II*, no statute, treaty, or other agreement governs New York City's narrow request for damages to help them "weather the storm" of climate change. Therefore, nothing precludes the City from bringing state common-law claims.[203]

Lastly, the Second Circuit found the fourth *Baker* factor when it concluded that a ruling on the merits of *New York v. Chevron* might "step on the toes" of the other branches.[204] The Court held that imposing damages upon the defendants would deny the legislature its right to pass laws and the President his right to control foreign relations.[205] However, nothing about apportioning damages in accordance with well-established tort law precludes

198. *See* New York v. Chevron Corp., 993 F.3d 81, 86 (2d Cir. 2021) (holding that the City's common-law claims "sidestep" regulatory and enforcement frameworks that compensate frontline communities for climate injuries).

199. *See id.* at 89–90; *Milwaukee II*, 451 U.S. at 307–08.

200. *See Milwaukee II*, 451 U.S. at 311–12, 321–22 (holding that Illinois's federal common-law claims could continue only if the claims arose in "an area of national concern" absent "an applicable Act of Congress").

201. *See id.* at 310–13.

202. *See id.* at 319–20 (holding that Illinois could sue neighboring states for violating FWPA but that common-law claims could not stand).

203. *See* Milwaukee II, 406 U.S. 91, 104 (1972), *superseded by statute*, Clean Air Act of 1970, 42 U.S.C. § 7401 (2022) *et seq*., *as recognized in* Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2530 (2011) (recognizing the now-outdated right of states to sue in federal court under federal common law for abatement of water pollutant discharge).

204. *New York v. Chevron Corp.*, 993 F.3d at 102.

205. *See id.* at 103.

the legislative branch from passing new laws.[206] Courts regularly create new precedent that Congress later legislates.[207] In 1857, Congress famously overturned the Supreme Court's decision to deny Dred Scott his citizenship by passing the Thirteenth and Fourteenth Amendments.[208] Today, Congress is squabbling over whether to codify *Roe v. Wade* and related decisions after the Supreme Court recently ruled that the Constitution does not confer a right to abortion.[209] Likewise, state and federal legislatures remain free to create climate laws.

The Second Circuit expressed fear that foreign nations might retaliate if the City succeeded in its case against major world economic players.[210] However, just as courts regularly adjudicate on matters that are later codified into law, so too do they make decisions that may affect international diplomacy. For example, in *Klinghoffer*, the Second Circuit held that the 1985 murder of a Jewish-American man by Palestinian Liberation Organization agents presented a justiciable question despite its context.[211] That killing came in the wake of the murder of another American man during the Hezbollah-backed hijacking of Trans World Airlines Flight 847.[212] Although the Second Circuit admitted that the *Klinghoffer* case could affect foreign relations, it held that the case was an "ordinary tort suit" for wrongful death.[213] The case prompted Congress to pass the Antiterrorism Act of

206. *See* Milwaukee v. Illinois, 451 U.S. 304, 311–13, 321–22 (1980) (holding that Congress may, at any time, pass new laws that codify, invalidate, or modify past judicial opinions).

207. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (paving the way for the Voting Rights Act of 1965 and the Fair Housing Act of 1986).

208. *See* Dred Scott v. Sandford, 60 U.S. 393, 453–54 (1857) (holding that the African-American plaintiff, Dred Scott, could not be free because under the Constitution he was property, not a person) (superseded by constitutional amendment).

209. *See* Roe v. Wade, 410 U.S. 113, 162–64 (1973) (holding that the Constitution conferred right to abortion). *But see* Dobbs v. Jackson Women's Health Org., 597 U.S. 1, 79 (overruling precedent and conferring the question of abortion rights to the legislative branch).

210. *See* New York v. Chevron Corp., 993 F.3d 81, 101–02 (2d Cir. 2021) (citing a general judicial presumption against extraterritoriality to hold that climate change is too global for state torts).

211. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amminstrazione Straordinaria, 937 F.2d 44, 49, 50 (2d Cir. 1991).

212. *Hijacking of TWA Flight 847*, FBI, https://www.fbi.gov/history/famous-cases/hijacking-of-twa-flight-847 (last visited Jul. 22, 2022).

213. *See Klinghoffer*, 937 F.2d at 49 (finding standard tort elements of duty, breach, injury, and causation amid a fraught political backdrop).

1990.[214]

The existence of multiple laws, agreements, and treaties regarding GHG emissions suggests that the political branches may in fact welcome court-ordered climate damages.[215] Far from disrespecting the other branches, climate torts align with the political trend toward a greener economy.[216] In 2019, the New York legislature passed the Climate Leadership and Community Protection Act, which aims to decrease the state's carbon emissions by eight-five percent by 2050.[217] New York City has also pledged to reduce its GHG emissions in alignment with international treaties that the United States is not a party to.[218] On the federal front, President Biden has issued multiple Executive Orders on environment and made climate a pillar of his presidential bid.[219] The House of Representatives recently apportioned almost eight billion dollars more than it did last year to environmental agencies.[220] If the Second Circuit wanted to avoid disrespecting the other branches, it should have ruled on the merits of *New York v. Chevron*.

IV. POLICY RECOMMENDATIONS

For decades (if not centuries), environmental activists have used judicial courts to advance their priorities.[221] As the environmental movement has

214. S. 740, 102 Cong., Statement of Senator Chuck Grassley, 137 Cong. Rec. 8143 (1991) (enacted as 18 U.S.C. § 2333) (providing federal remedies for victims of international terrorism).

215. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (1970) (establishing a cooperative system of federally-approved, state-enacted regulations on air emissions).

216. *See, e.g.*, Exec. Order No. 14008, 86 Fed. Reg. 7619, 7619 (Feb. 1, 2021) (establishing the White House Office of Domestic Climate Policy and the National Climate Task Force).

217. *See* S. 6599, 2019 Leg., 2019–2020 Reg. Sess. (N.Y. 2019).

218. *See* NYC Mayor's Office of Climate & Environmental Justice, *1.5°C: Aligning New York City with the Paris Climate Agreement*, CITY OF N.Y., https://www1.nyc.gov/site/sustainability/codes/1.5-climate-action-plan.page (last visited Apr. 26, 2023).

219. *See* Press Release, White House Briefing Room, Fact Sheet: President Biden's Executive Actions on Climate to Address Extreme Heat and Boost Offshore Wind (July 20, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/20/fact-sheetpresident-bidens-executive-actions-on-climate-to-address-extreme-heat-and-boost-offshore-wind/.

220. *See* Press Release, House Committee on Appropriations, Appropriations Committee Approves Fiscal Year 2023 Interior, Environment, and Related Agencies Funding Bill (Jun. 29, 2022), https://appropriations.house.gov/news/press-releases/appropriations-committee-approves-fiscal-year-2023-interior-environment-and.

221. *See* Rex Weyler, *A Brief History of Environmentalism*, GREENPEACE (Jan. 5,

transformed, its legal strategy has likewise shifted. In the early twentieth century, racist conservationists sought to preserve the "American wilderness" by forcibly removing indigenous people from now-National Parks and Forests.[222] In the late twentieth century, hippie activists succeeded in pushing Congress to enact sweeping environmental legislation that cleaned up water and air pollution.[223] Today, the movement's rhetoric has moved from nature-centric preservationism toward organizing models that recognize climate change's disparate impacts on marginalized communities.[224] Litigators can aid the climate movement in one simple way: by filing more claims. Initiating more climate suits will build a stronger, deeper, and more diverse legal record of climate change drivers and impacts.[225]

The process of developing legal theory and putting it into practice in the service of social change is called "legal mobilization."[226] Many social movements have successfully deployed the law to reach their goals through legal mobilization, including the movements for suffrage, civil rights, labor rights, same-sex marriage, and tobacco regulation.[227] Legal mobilization theory posits that past cases influence future judicial action on the same

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2018), https://www.greenpeace.org/international/story/11658/a-brief-history-of-environmentalism/.

222. *See* Jedediah Purdy, *Environmentalism's Racist History*, THE NEW YORKER (Aug. 13, 2015), https://www.newyorker.com/news/news-desk/environmentalisms-racist-history.

223. *See Milestones in EPA and Environmental History*, EPA, https://www.epa.gov/history/milestones-epa-and-environmental-history (last visited Aug. 17, 2022).

224. *See Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice (last visited Aug. 17, 2022).

225. *See* Brandy Doyle, *Boulder v. Suncor and the Case for Judicial Climate Adaptation*, 48 ECOLOGY L. Q. 719, 726 (2021) (arguing that each climate case brings unique facts that add to a growing judicial record).

226. *See* Emilio Lehoucq & Whitney Taylor, *Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?*, 45 LAW & SOC. INQUIRY 166, 167 (Feb. 2020).

227. *See, e.g.*, Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 L. & SOC'Y REV. 669, 692–95 (2009) (concluding that successful legal mobilization campaigns for workers' rights necessitate community support); Michael McCann et al., *Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States*, 38 L. & SOC. INQUIRY 288, 292–95 (2013) (describing legal mobilization as the core of anti-tobacco campaigning). *But see* Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L. J. 663, 701 (2012) (cautioning against "too successful" legal mobilization that provoke especially powerful countersuits).

subjects, regardless of their individual final outcomes.[228]

Legal mobilization is important because courts tend to avoid breaking with precedent or sisters courts' rulings.[229] Mobilizing by filing more climate claims in more courts can help overcome this precedent barrier. More cases put more data on the record, which means greater chances of favorable outcomes.[230] While lawyers are infamously bad at math, numbers (of filings) work for climate justice.

Legal mobilization for the climate – in the form of filing more claims in more courts – not only advances a simple game of numbers, but also helps address the sticky issue of causation. So far, courts have been reluctant to find a close enough causal relationship between global GHG emissions and specific climate injuries to assign liability.[231] However, as courts become more familiar with plaintiffs' arguments, they may find those arguments more persuasive.[232] Putting more climate cases in front of more judges helps build and shape a legal narrative that could lead to favorable outcomes.[233]

Additionally, more filings will show courts that climate injuries are imminent, diverse, and omnipresent. Until recently, most climate plaintiffs faced relatively well-known climate impacts like sea-level rise and warming temperatures.[234] In 2018, Boulder challenged this narrow view of climate change when it asserted that Colorado—a landlocked state with abundant natural resources—is shockingly vulnerable to climate change.[235] In its

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228. *See* NaJaime, *supra* note 227 at 722 (explaining that legal mobilization transcends the facts or outcomes of specific cases to build a common judicial framing and understanding of the charged topic).

229. *See* Higby v. Mahoney, 396 N.E.2d 183, 184–85 (N.Y. 1979) (identifying the factors courts should consider before modifying precedent).

230. *See* Doyle, *supra* note 225, at 726 (arguing that a greater number and diversity of cases creates a richer legal narrative that help pro-climate plaintiffs).

231. *See* Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 TENN. L. REV. 803, 838 (2010) (noting that definitively tracing climate impacts to emissions to individual defendants is "impossible").

232. *See* Lawrence K. Marks, *Judicial Education as Paramount to Achieving Excellence*, 90 N.Y. STATE BAR J. 36, 36 (2018) (arguing that judges must have in-depth knowledge of the social issues they adjudicate on).

233. *See id.* at 36 (characterizing educating judges as "essential" to the "effective administration of justice").

234. *See, e.g.*, New York v. Chevron Corp., 993 F.3d 81, 86 (2d Cir. 2021) (acknowledging New York City's vulnerability to sea level rise because of its 520-mile coastline).

235. *See* Complaint at 139–96, Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022) (No. 1:18-CV-01672) (listing climate impacts including

second-wave complaint against fossil fuel companies, Boulder described facing "precipitation changes, larger and more frequent wildfires, increased concentrations of ground-level ozone, higher transmission of viruses and disease from insects, altered streamflows, bark beetle outbreaks, forest die-off, reduced, snowpack, and drought."[236] Widening the legal narrative of climate impacts can only help courts better understand and adjudicate on these issues in unlikely places.[237]

V. CONCLUSION

By political design, the judicial branch has limited power.[238] Courts have one main job: to interpret and uphold the law.[239] This critical function does not proscribe them, however, from changing over time. Rather, it requires them to engage in constant, critical re-analysis and to occasionally right the ship. Laws, their effects, and their interpretations change as the country does. Second-wave climate change plaintiffs are simply asking courts to do their job: apply old legal concepts (tort liability) to novel societal issues (climate change).[240] The judiciary has the tools to apportion climate liability and redistribute climate harms; it must only decide to act.

Awarding climate damages is not only a policy decision; it is a legal imperative.[241] As this Comment argues, the Second Circuit legally erred in dismissing New York City's claims because it relied on nonexistent federal common law, violated the well-pleaded complaint rule, and found nonjusticiable political questions where there were none.[242] The Second Circuit made these decisions because it incorrectly believes that federal law completely preempts state-law claims regarding GHG emissions.[243]

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shifting precipitation patterns, worse drought, hotter summers, more wildfires, and invasive species).

236. *See id.* at 139–96.

237. *See* Doyle, *supra* note 225, at 722 (arguing that nontraditional plaintiffs who file climate suits help broaden the legal narrative of climate impacts by calling on courts to recognize the immediacy and ubiquity of climate harms).

238. *See* U.S. CONST. art. III. (conferring original federal jurisdiction).

239. Rittenhouse v. Eisen, 404 F.3d 395, 397 (6th Cir. 2005).

240. *See* Bethea v. Robert J. Adams & Assoc., 352 F.3d 1125, 1127 (7th Cir. 2003).

241. *See supra* Part III.

242. *See id.*

243. *Compare* New York v. Chevron Corp., 993 F.3d 81, 95 (2d Cir. 2021) (undertaking an incomplete preemption analysis of federal common law instead of correctly undertaking a complete preemption analysis of state law), *with* Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538, 561 (D. Md. 2019) (undertaking a complete

Complete preemption allows defendants to remove state actions to federal court even in cases in which the plaintiff's cause of action lies in state law alone.[244] In essence, complete preemption transforms state-law claims into federal ones in permissible violation of the well-pleaded complaint rule.[245]

However, a state claim cannot be completely preempted unless Congress has unambiguously stated that it intended for some federal law to completely crowd out a given field so that no state law can touch that issue.[246] Whether the CAA does that for climate damages is unsettled at best, preposterous at worst.[247] Without using the words, the Second Circuit has completely preempted climate change lawsuits without good cause.[248] Someday soon, the Supreme Court will need to settle this debate. Climate justice cannot wait.

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preemption analysis using almost identical facts and circumstances and concluding that state torts belong in state courts).

244. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (holding that certain federal laws so completely occupy an issue that all claims invoking the issue automatically confer federal jurisdiction).

245. *See id.* at 64 (holding that violation of union contracts is one such area that Congress has completely preempted).

246. *See* Franchise Tax Bd. Cal. v. Constr. Lab. Vacation Trust So. Cal., 463 U.S. 1, 23, 24 (1983) (holding that a union-related suit fell under federal jurisdiction because the issue was governed by federal law).

247. *See Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d at 562 (holding that defendants failed to prove that Congress intended the CAA to be the exclusive remedy nationwide for air pollution injuries); *see also* Clean Air Act, 42 U.S.C. § 7604(e) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek . . . any other relief" not explicitly offered in the CAA).

248. *See New York v. Chevron Corp.*, 993 F.3d at 95 (holding that the *AEP* and *Kivalina* decisions prove that Congress intended for the CAA to completely preempt GHG emissions claims).