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Rising Tide: The Second Wave of Climate Torts

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RISING TIDE: THE SECOND WAVE OF CLIMATE TORTS

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ABSTRACT

Fossil fuels and tobacco products share startling similarities. Both enjoy ubiquity, enable their users to keep pace with the ever-increasing demands of civilization, and choke the life out of those who partake and those who merely look on. The comparison extends to legal battles against their respective industries, as evidenced by a new wave of tort litigation in the federal courts of the United States. In a time where climate change was still establishing consensus, states took up the charge against tobacco companies who had successfully defended against private lawsuits over the deleterious health effects of tobacco. Those suits culminated in the Master Settlement Agreement, a Congressional compromise which preserved the tobacco industry while recompensing the injuries of and protecting citizens.

History may repeat itself as a mixture of public and private plaintiffs take to federal court to seek justice for climate damages including rising seas, oppressive weather, acid rain, and polluted air. These plaintiffs cite modern scientific consensus, which points unerringly to producers and emitters of greenhouse gases and carbon byproducts as the culprits. Even more addicting than tobacco, however, is the fossil fuel, and our civilization shows no sign of breaking the habit in the near future. Justice for these plaintiffs and for all affected parties—every human being and other living organism on this planet—may be reached in the United States by learning from the lessons of tobacco litigation. With the right outcome in this crucial climate, we may all yet breathe easier.

ABSTRACT 194
I. INTRODUCTION 195
II. THE RISE AND FALL OF THE FIRST WAVE 197
A. THE PLAINTIFFS OF THE FIRST WAVE 199
1. CONNECTICUT V. AMERICAN ELECTRIC POWER CO. 199
2. COMER V. MURPHY OIL USA, INC. 201

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3. CALIFORNIA V. GM 202
4. NATIVE VILLAGE OF KIVALINA V. EXXONMOBIL CORP 203
B. TRACKING THE FIRST WAVE 204
1. TIMELINE OF THE FIRST WAVE 204
2. DECONSTRUCTING THE DOCTRINAL DELAYS 206
I. STANDING 207
II. POLITICAL QUESTION 208
III. DISPLACEMENT BY *MASSACHUSETTS V. EPA* 209
IV. PREEMPTION 211
III. THE SECOND WAVE 212
A. CAUSES OF ACTION 213
1. NUISANCE IN THE SECOND WAVE 213
2. CONSPIRACY AND FAILURE TO WARN 215
B. STATE OR FEDERAL? VENUE OF THE SECOND WAVE 218
C. STRENGTH OF THE SECOND WAVE CLAIMS 221
D. LOOKING FORWARD 222
IV. CLIMATE SETTLEMENT AGREEMENT 222
A. SMOKE AND SMOKESTACKS: THE TOBACCO AND CARBON MAJORS 224
1. THE HISTORICAL DEVELOPMENT OF EACH CRISIS 224
2. HIDING THE CRISES 225
B. HOW TO SETTLE THE SEAS 228
V. CONCLUSION 230
APPENDIX 231

I. INTRODUCTION

"[Y]ou caused the . . . crisis; you pay for it."[1] With these words, Mississippi Attorney General Mike Moore declared the first state-led litigation against tobacco companies in the United States.[2]

[1] Michael Janofsky, *Mississippi Seeks Damages From Tobacco Companies*, N.Y. TIMES, May 24, 1994, at A12.
[2] *Id.*

While significant differences exist between the tobacco crisis and the ongoing battle with ecological collapse, climate plaintiffs seem to have taken Moore's words to heart. Beginning seventeen years ago in New York, governments and private entities have sought to enjoin the activities of or recover economic damages from energy companies for damages resultant of climate change.[3] These claims have since adapted to defendants' procedural tactics in the quest for resolution on the merits, finding support in rapidly advancing scientific consensus.[4] Such solidification of empirical outlook follows the rapid anthropogenic change in Earth's climate since the 1950s, which has been termed the "Great Acceleration."[5] Climate science has progressed from reasonable theories regarding carbon dioxide emission to robust consensus regarding and modelling of anthropogenic climate change in under thirty years.[6] This progress enables climate plaintiffs to more accurately and completely describe their losses and trace those losses back to greenhouse gas emitters, whose early study of climate change may make them complicit in disaster.

Historically, numerous attempts at systemic reform and industrial accountability have followed the tobacco plaintiffs' structure of iterating claims via "waves" as jurisprudence, public awareness, and scientific consensus develop.[7] In the case of climate change tort law, the "Second Wave" in the United States began in 2007, characterized by state law claims and capitalizing on strong scientific foundation.[8] Plaintiffs across the country seek monetary

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[3] *See* Connecticut v. Am. Elec. Power Co., Inc., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

[4] Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1386 (2020).

[5] Will Steffen et al., *The Trajectory of the Anthropocene: The Great Acceleration*, 2 ANTHROPOCENE REV. 81, 82-83 (2015).

[6] *See* WORKING GROUP I, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021 THE PHYSICAL SCIENCE BASIS 55 (2021).

[7] *See* Christine Shearer, *On Corporate Accountability: Lead, Asbestos, and Fossil Fuel Lawsuits*, 25 NEW SOLS.: J. ENV'T & OCCUPATIONAL HEALTH POL'Y 172, 175-79 (2015) (chronicling the evolution of tort actions against lead and asbestos manufacturers); *see also* Martin Olszynski et al., *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 GEO. ENV'T L. REV. 1, 9-12 (2017) (breaking down the history of tobacco litigation into "waves").

[8] Sokol, *supra* note 4.

damages, equitable relief, and admission of fault from the Carbon Majors—the oil companies responsible for most of the U.S.-based emissions. The battle has been long and rooted in procedure rather than factual allegations, due largely to the doomed First Wave of U.S. climate tort litigation and the jagged judicial landscape it created. The Second Wave seems more promising, which may precipitate a Congress-mediated settlement akin to the Master Settlement Agreement (MSA) that followed the state-led anti-tobacco litigation of the 1990s. The Carbon Majors have not yet sought a settlement agreement, likely because they are still protected by the procedural landscape of federal courts.

This Note will progress in three parts. Part II will thoroughly delineate the First Wave, as a solid grasp of its decisive procedural issues is crucial to understanding the nature of the Second Wave. Part III will discuss the strengths and weaknesses of the Second Wave cases in light of the landscape created by the breaking of the First Wave. While a full delineation of each cause of action under state and federal law goes beyond the scope of this Note, sufficient detail will be given to view the theories considering displacement under the Clean Air Act (CAA) or other relevant federal statutes. Part IV will argue for a mass settlement agreement akin to that used to decide the onslaught of state-led litigation faced by the Tobacco Majors—the largest tobacco companies and the historical precedent to the Carbon Majors. Support will be offered in the form of the economic necessity of fossil fuels, the benefits to public policy, and the suitability of the tobacco MSA to this issue. This section will explain the remarkable parallels between the Second Wave and U.S. tobacco litigation, focusing on the conspiracy and failure-to-warn allegations in both.

II. THE RISE AND FALL OF THE FIRST WAVE

Climate torts have been seriously analyzed as a viable strategy since 1998 at the latest.[9] An article published shortly after the release of the Intergovernmental Panel on Climate Change (IPCC) Second Assessment Report reflects the tenuous grasp of scientific climate consensus at the time. Much as with the First and Second

[9] *See* Eduardo M. Peñalver, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, 38 NAT. RES. J. 563, 564 (1998).

Assessment Reports, the article speaks with great certainty regarding the existence and anthropogenic nature of climate change, as well as the types of damages to be seen.[10] Similarly, the Reports and the article both articulate uncertainty surrounding the extent of such damages, providing tentative or broad estimates at best.[11] Despite the narrow scope of strong consensus globally—limited to the existence of a problem rather than any grasp of its breadth or depth—authorities twenty years ago conclusively identified real climate phenomena, their human-originated causes, and, most crucially, the possible damage to human populations and endeavors based on variable degrees of vulnerability.[12]

Appropriately, Eduardo Peñalver predicts that the application of existing tort law frameworks can provide climate justice and redress while sidestepping public policy deadlock.[13] Although Peñalver references toxic torts—a form of personal injury cause of action—in suggesting a tort framework, his work makes strong arguments for the application of tort law in general to climate justice.[14] Peñalver references the U.S. tobacco litigation settled in 1998, describing suits in which plaintiffs who received no damages were still satisfied because the Tobacco Majors were forced to admit complicity in covering up their health crisis.[15] In drawing the parallel between the tobacco crisis and the climate crisis, Peñalver describes "victims against a morally bankrupt tort injurer" who see tort law as an imposition of moral accountability.[16] Six years later, Peñalver's predictions bore fruit.

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[10] *See id.* at 566-67; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FIRST ASSESSMENT REPORT (1990) [hereinafter FIRST REPORT]; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SECOND ASSESSMENT REPORT (1995) [hereinafter SECOND REPORT].

[11] Peñalver, *supra* note 9, at 567-69; FIRST REPORT, *supra* note 10; SECOND REPORT, *supra* note 10.

[12] *See generally* FIRST REPORT, *supra* note 10; *see generally* SECOND REPORT, *supra* note 10.

[13] Peñalver, *supra* note 9.

[14] *See id.*

[15] *See id.* at 576.

[16] *See id.*

A. The Plaintiffs of the First Wave

In 2004, the plaintiffs in *Connecticut v. American Electric Power Co.* (*AEP*) filed suit seeking injunction of fossil fuel-based energy production activities under these very theories of interstate nuisance and state law torts.[17] The resultant "First Wave" comprised four significant cases of varying natures but with common threads that characterized this litigative push for climate justice. Notably, plaintiffs filed each of these four cases in federal court under state and federal common law causes of action, a decision that features prominently in the development of this area.[18] Each plaintiff sued under federal (and related state) common law causes of action, the significance of which this Note will explain below.[19] Beyond these common threads, each of the First Wave cases took its own approach to attacking the Carbon Majors.

1. *Connecticut v. American Electric Power Co.*

The first case of the First Wave, *AEP* featured numerous plaintiffs with varying degrees of sovereignty: the City of New York; the States of California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin; and three nonprofit land trusts.[20] The defendants were five private electric power companies, sued for their production of Greenhouse Gases (GHGs) and subsequent contribution to climate change.[21] The interstate plaintiffs sued these defendants in a New York federal district court, applying

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[17] Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).
[18] Complaint, Connecticut v. American Electric Power Co., 04 Civ. 5669/04 Civ. 5670 (S.D.N.Y. July 21, 2004) [hereinafter AEP Complaint]; Amended Complaint, Comer v. Nationwide Mutual Insurance Co., 1:05-cv-00436 (S.D. Miss. Sept. 30, 2005) [hereinafter Comer Amended Complaint]; Complaint, California v. General Motors Corp., 06-cv-05755 (N.D. Cal. Sept. 20, 2006) [hereinafter GM Complaint]; Complaint, Native Village of Kivalina v. ExxonMobil Corp., 4:08-cv-01138-SBA (N.D. Cal. Feb. 26, 2008) [hereinafter Kivalina Complaint].
[19] AEP Complaint, *supra* note 18, at 43-45; Comer Amended Complaint, *supra* note 18, at 13; GM Complaint, *supra* note 18, at 12-13; Kivalina Complaint, *supra* note 19, at 62-67.
[20] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418 (2011).
[21] *Id.*

federal—and correlative state—common law claims.[22] The complaint referenced sea level rise (SLR) and public health detriments, as well as ecosystemic and hydrologic damage.[23] The *AEP* plaintiffs did not seek monetary compensation for climate change.[24] Instead, they sought injunction of the defendants' polluting activities—namely power generation via combustion of fossil fuels.[25] To support this prayer for relief, the *AEP* plaintiffs alleged that the power companies had caused a public nuisance; they offered no other causes of action for the court to consider.[26]

AEP is notable for several reasons. First, plaintiffs comprised a mixture of private institutional and public plaintiffs, meaning different interests with respect to climate change.[27] Despite these differences, the plaintiffs were able to complain to the court system of identical ills joined in one civil action, which arguably reflects the ubiquitous impact of environmental harms upon humanity. The combined efforts also have the effect of bolstering the plaintiffs' burden of demonstrating Article III standing under the Case or Controversy Clause. Primarily, common sense dictates that a joint suit expands the cognizable harms to legitimate interests of the plaintiffs, who have different experiences and are therefore susceptible to different disruptions. A secondary effect, however, becomes more evident with the Supreme Court's decision in *Massachusetts v. EPA*—covered in greater detail below—which affords states a lower bar of standing to demonstrate their capacity to bring a lawsuit.[28] Private plaintiffs potentially benefit from these auspices if they march alongside the state banner, though this remains an open question.

The approach taken by the *AEP* plaintiffs also suffers from some disadvantages. Unlike the tobacco suits, the plaintiffs here included no causes of action for civil conspiracy, failure to warn,

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[22] AEP Complaint, *supra* note 18, at 43-49.
[23] *Id.* at 22-43.
[24] *Id.* at 49.
[25] *Id.*
[26] *Id.* at 43-49.
[27] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418 (2011).
[28] Massachusetts v. E.P.A., 549 U.S. 497, 520 (2007).

products liability, or any other assertion beyond public nuisance.[29] Further, the complaint cites concrete and quantifiable economic damages due to the increasingly hostile climate, in a startlingly cognizant attempt to value environmental harms.[30] Despite this, the plaintiffs sought injunction rather than damages,[31] arguably leaving money on the table and instead demanding a substantial reduction of power generation—a policy issue courts would (and did) hesitate to touch.[32]

2. *Comer v. Murphy Oil USA, Inc.*

Next to be filed in the First Wave, *Comer v. Murphy Oil USA, Inc.* saw Mississippi homeowners sue oil companies after Hurricane Katrina destroyed or damaged their real property and injured or killed their loved ones.[33] *Comer* is unique in the First Wave and exceedingly rare in the overall context of climate tort litigation because its plaintiffs were private individuals—a certified class—rather than institutions or quasi-sovereign entities.[34] As such, they sought redress in Mississippi federal district court under the theory of negligence.[35] The plaintiffs sought damages, both compensatory and punitive, as well as declaratory relief.[36] These plaintiffs attempted to capitalize on a scientific theory still building consensus in present day: global warming has intensified the frequency and severity of natural disasters.[37]

Comer stands out for its private plaintiffs, its inclusion of punitive damages, and the assertion that polluters are responsible for intensification of natural disasters. The use of individual plaintiffs truly tested the limits of the Standing Doctrine, asking the court to find that everyday people are sufficiently directly affected by

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[29] AEP Complaint, *supra* note 18.
[30] *Id.* at 22-43.
[31] *Id.* at 49.
[32] *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *see also* Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009).
[33] Comer Amended Complaint, *supra* note 18.
[34] *Id.* at 3-4.
[35] *Id.* at 13.
[36] *Id.* at 16.
[37] *Id.* at 10-13.

pollution via climate change to be entitled to remuneration out of the polluters' pockets. Punitive damages require the deciding court or jury to view the defendants' conduct sufficiently harmful or deplorable to require financial punishment.[38] The demand for such a measure here is noteworthy because the *Comer* plaintiffs are the only plaintiffs of the First Wave to explicitly seek these damages out, rather than folding them into a prayer for other relief "as this Court deems just and proper."[39] Again, however, the complaint makes no allegation that the Carbon Majors failed to warn the public or engaged in civil conspiracy, distinguishing *Comer* from the tobacco litigation as with *AEP*.[40]

3. *California v. GM*

The third case of the First Wave was *California v. General Motors Corp.* (*GM*), filed in 2006.[41] Here, the State of California sued automotive manufacturers and distributors for climate harms including public health detriment, hydrologic disruptions, SLR, and wildfires.[42] The plaintiff alleged public nuisance under both federal and state common law, referencing "millions of dollars" of ecosystemic and economic damage.[43] California sought compensatory damages from the automobile companies, as well as a declaratory judgment for future damages as climate change continues to affect the State's interests.[44]

GM stands apart from the rest of the First Wave because of its focus on auto companies and its request for future damages. The nature of the defendants alters the question of standing because automobile companies cause carbon emissions largely through the use of their products by consumers; California strangely sought no relief under theories of products liability or consumer protection.[45]

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[38] RESTATEMENT (SECOND) OF TORTS, § 908(l) (AM. L. INST. 1965).
[39] *Cf.* AEP Complaint, *supra* note 18, at 49; GM Complaint, *supra* note 18, at 14; Kivalina Complaint, *supra* note 18, at 67.
[40] Comer Amended Complaint, *supra* note 18.
[41] GM Complaint, *supra* note 18.
[42] *Id.* at 5-14.
[43] *Id.* at 10.
[44] *Id.* at 14.
[45] *Id.*

The request for ongoing damages mirrors the perpetuity provisions of the tobacco Master Settlement Agreement described in Part IV, potentially foreshadowing the developments this Note predicts.

4. *Native Village of Kivalina v. ExxonMobil Corp.*

Native Village of Kivalina v. ExxonMobil Corp. entered the fray in 2008, with the complaint filed in California federal district court.[46] The plaintiffs comprised two municipal entities, the City and Village of Kivalina, suing as their Alaskan town lost more and more of its limited shoreline to SLR.[47] This case received substantial media coverage due to its premise: an idyllic fishing village helplessly swallowed by the sea.[48] Like the plaintiffs in *AEP*, the *Kivalina* plaintiffs sought to enjoin the polluting activities in the hope of slowing SLR.[49] Like the plaintiffs in *GM*, they sought ongoing compensatory relief in addition to present damages.[50] *Kivalina* stands apart from the other cases in its thorough causes of action, including both public and private nuisance as well as conspiracy and concert of action.[51]

This Note advises special attention to *Kivalina* for two reasons: conspiracy and optics. First, the case boasts a comprehensive complaint—nearly as long as the other three combined—rife with scientific citation and history of the climate issue.[52] This thorough approach critically includes damning internal documents from the carbon industry demonstrating an awareness and understanding of the climate threat.[53] The studies therein and their results were kept from the public, with the oil industry undertaking public campaigns spreading information contrary to its own findings—downplaying

[46] Kivalina Complaint, *supra* note 18.
[47] *Id.* at 4-5.
[48] Alan Taylor, *The Impact of Climate Change on Kivalina, Alaska*, ATLANTIC (Sept. 18, 2019), https://www.theatlantic.com/photo/2019/09/photos-impacts-climate-change-kivalina-alaska/598282.
[49] Kivalina Complaint, *supra* note 18, at 67.
[50] *Id.*
[51] *Id.* at 62-67.
[52] *Id.* at 31-58.
[53] *Id.* at 58-62.

the impending threat.[54] *Kivalina*'s conspiracy cause of action rests on these documents, more of which have emerged since 2008.[55] The plaintiffs' arguments in this case were strengthened by both these alarming revelations and the compelling image of a unique landscape threatened with oblivion. Despite its ultimate failure, *Kivalina* bore the greatest lessons for the Second Wave on how to lodge powerful climate complaints.

B. Tracking the First Wave

Understanding the current state of climate tort litigation requires a clear grasp of the issues and procedural causality of the First Wave. The cases often affected one another; they all faced the same doctrinal hurdles; and their collective fate hinged on a small amount of Supreme Court jurisprudence. Still, only two of the four First Wave cases contributed meaningfully to shaping the Second Wave; *Comer* and *GM* fell flat for tangential but equally concerning reasons. This section begins with a summary of the First Wave's procedural history, then goes back to cover the doctrines courts applied against the plaintiffs, and then concludes with a look at the Supreme Court jurisprudence and doctrines that created a hazardous landscape for modern climate litigants. Most important to note throughout this is that thus far, no climate tort lawsuit has ever reached the merits in United States courts.

1. *Timeline of the First Wave*

The district court in New York dismissed *AEP* in 2005 and the plaintiffs appealed the decision before the other three cases were filed.[56] *Comer* and *GM* were dismissed in 2007, and *Kivalina* in 2009.[57]

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[54] Oliver Milman, *Oil firms knew decades ago fossil fuels posed grave health risks, files reveal*, GUARDIAN (Mar. 18, 2021, 5:00 PM), https://www.theguardian.com/environment/2021/mar/18/oil-industry-fossil-fuels-air-pollution-documents; *see* discussion *infra* Part IV.

[55] Milman, *supra* note 54.

[56] Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

[57] Comer v. Murphy Oil USA, Inc., No. 1:05–CV–436–LG–RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007); California v. Gen. Motors Corp., No. C06–

All four cases saw dismissal under the Political Question Doctrine (PQD),[58] with *Comer* and *Kivalina* also failing the Standing Doctrine analysis in each of their district courts.[59] Shortly before *Kivalina*'s dismissal, however, the Second Circuit Court of Appeals reversed the dismissal of *AEP*, ruling that the plaintiffs' claims were justiciable under the PQD.[60] This appeared to reinvigorate the First Wave, with *Comer*'s dismissal reversed less than a month later by the Fifth Circuit Court of Appeals.[61] The Fifth Circuit panel held that all of the *Comer* plaintiffs' claims were justiciable under the PQD and that most satisfied the Standing requirement.[62] This ray of hope shone very briefly before the First Wave began crashing down.

GM dismissed its own appeal due to increased regulation by the Obama Administration,[63] leaving three First Wave cases remaining. *Comer* fell next, as the Fifth Circuit reheard the appeal en banc and saw the case dismissed in May 2010—without reaching the doctrinal questions decisive in the lower court or the panel decision.[64] While *Kivalina* pended appeal, the Supreme Court of the United States granted certiorari to the defendants in *AEP*.[65] Given the breadth of claims and multiple prayers for relief in *Kivalina*, this

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05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. Sept. 30, 2009).

[58] *Comer*, 2007 WL 6942285, at *1; *General Motors Corp.*, 2007 WL 2726871, at *16; *ExxonMobil Corp.*, 663 F. Supp. 2d at 871-77; *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274.

[59] *Comer*, 2007 WL 6942285, at *1; *ExxonMobil Corp.*, 663 F. Supp. 2d at 882.

[60] Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009).

[61] Comer v. Murphy Oil USA, Inc., 585 F.3d 855 (5th Cir. 2009) (decided on October 16).

[62] *Id.* at 879-80.

[63] Motion to dismiss appeal, California v. General Motors Corp., No. 07-16908 (9th Cir. June 19, 2009).

[64] Order, Comer v. Murphy Oil USA, Inc., No. 07-60756 (5th Cir. May 28, 2010). The dismissal took place after an en banc court failed to gain a quorum of nine judges. However, instead of leaving the panel decision intact, the judges admitted that en banc rulings are impossible without a quorum and then nonetheless **proceeded** to reverse the panel's findings. More disturbing still, the judges made no reference to the PQD or standing, instead dismissing the entire action on procedural measures regarding how to appropriately file an appeal. Three inflamed, appalled dissents were filed. *Id.*

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

decision would be decisive for the justiciability of climate torts and the ability of the First Wave to proceed to actual jury trials. Instead, the Supreme Court reversed the Second Circuit's favorable ruling to the *AEP* plaintiffs based on a single case: *Massachusetts v. EPA*.[66]

The Supreme Court reversed the Second Circuit's *AEP* decision purely on the ground of displacement, refusing to address the PQD or standing issues.[67] As explained below, the Displacement Doctrine dictates that federal common law claims are obviated by federal regulation of the topic in a way that obligates dismissal by the court.[68] In ruling that the EPA's authority displaced federal common law claims based on GHG emission—the entire basis of the First Wave—the *AEP* decision effectively foreclosed any such claims in perpetuity, destroying federal climate nuisance common law. As such, the Ninth Circuit affirmed *Kivalina*'s dismissal on the basis of displacement, casting aside the issues of political questions or standing.[69] In breaking the First Wave, the *AEP* decision set clear boundaries for any future attempts at climate change tort litigation. These boundaries involve four procedural doctrines: Political Question, Standing, Displacement, and Preemption.

2. *Deconstructing the Doctrinal Delays*

The legal theories that held back the First Wave range in complexity and clarity. The trial courts all agreed that standing and the PQD were dispositive to the First Wave.[70] The two U.S. Circuit Courts of Appeal able to decide prior to the *AEP* Supreme Court ruling—the Second and Fifth Circuits—both disagreed.[71] The Ninth Circuit in *Kivalina*, meanwhile, affirmed the district court's dismissal

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[66] *Id.*
[67] *Id.* at 429.
[68] Sokol, *supra* note 4, at 1402.
[69] Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).
[70] Comer v. Murphy Oil USA, Inc., No. 1:05–CV–436–LG–RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007); California v. Gen. Motors Corp., No. C06–05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. Sept. 30, 2009); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).
[71] Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 392-393 (2d Cir. 2009); Comer v. Murphy Oil USA, Inc., 585 F.3d 855, 879-80 (5th Cir. 2009).

on displacement grounds rather than reaching the issues of political questions or standing.[72] In essence, this means that the only two Circuit Courts of Appeal to directly rule on climate tort standing and policy considerations have found these claims justiciable under both doctrines. Because the Supreme Court also declined to reach those doctrines, the question of climate tort justiciability remains open, with support in two of two circuits to have spoken on the issue. A brief summary of these doctrines follows.

i. Standing

The Standing Doctrine comes from Supreme Court interpretation of Article III of the United States Constitution which, via the Case or Controversy Clause, defines the scope of the judicial branch.[73] Standing has three requirements: concrete and particularized injury of an actual or imminent nature; traceability of that injury to the actions of the defendant; and the possibility of redress by court action.[74] The nature of climate torts provides many avenues from which to assail plaintiffs' standing. Defendants in actions regarding environmental damages would argue that the injuries suffered by plaintiffs are not concrete or imminent, cannot be traced directly to carbon emissions, and cannot be halted by court orders affecting the listed defendants alone. The only Circuit Courts of Appeal to conduct this analysis in the First Wave rejected these arguments as the Supreme Court did in *Massachusetts v. EPA,* finding that the environmental harms are imminent or actualized; that the defendants had made a meaningful contribution to the problem; and that courts are able to remedy *some* of the plaintiffs' injuries.[75] Much of this reasoning comes from the Supreme Court's ruling in *Massachusetts v. EPA*.[76]

Massachusetts v. EPA ruled conclusively that EPA has the authority to regulate GHGs under the CAA.[77] To do so, however, the

[72] ExxonMobil Corp., 696 F.3d at 858.
[73] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
[74] *Id.* at 560-61.
[75] Comer, 585 F.3d at 863-69.
[76] Massachusetts v. E.P.A., 549 U.S. 497, 521-26 (2007).
[77] *Id.* at 528-33.

Court first had to find that the plaintiffs—twelve states, three cities, one U.S. territory, and numerous interest groups[78]—had standing to challenge the judgment of the EPA in refusing to regulate GHGs.[79] In so holding, the Court outlined scientific consensus and rejected the argument that a widely distributed or gradual harm cannot serve as a basis for standing.[80] To summarize, the Supreme Court of the United States explicitly stated—a full decade prior to the Second Wave—that GHG pollution and its deleterious effects on local climate and SLR are sufficiently established and concrete to sue the producers of those emissions. Given the rapid advancement of scientific climate consensus and comprehension, that gap demonstrates the long-standing, judicially accepted conclusion that anthropogenic climate change causes harm. This victory has less impact for private plaintiffs due to the Court's hefty reliance on the doctrine of special solicitude—a quasi-sovereign prerogative of the states to protect public health and resources—in justifying its affirmative standing analysis.[81] An equally divided Supreme Court in *AEP* held that "at least some of" the climate tort plaintiffs had standing to sue GHG producers.[82]

ii. Political Question

Far more complex is the PQD, which originates from the seminal constitutional law case of *Marbury v. Madison*.[83] Expanded upon in *Baker v. Carr*, the doctrine deems unreviewable any question of law involving the exclusive purview of other branches of government.[84] The Supreme Court in *Baker* outlined six types of issue that generally meant the existence of political questions.[85] As the Fifth

[78] *Id.* at 501-03.
[79] *Id.* at 516.
[80] *Id.* at 521-23.
[81] *Id.* at 519-20.
[82] *Id.* at 420.
[83] Marbury v. Madison, 5 U.S. 137 (1803).
[84] Baker v. Carr, 369 U.S. 186, 217 (1962).
[85] *Id.* These factors are: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the

Circuit panel in *Comer* articulated, the *Baker* factors are "open-textured, interpretive guides" rather than encompassing definitions.[86] That opinion held that as with most common law tort claims, the plaintiffs' claims in *Comer* did not constitute political questions.[87] The *Comer* court also distinguished the claims for injunction or ongoing compensation in *AEP* and *GM* respectively from the *Comer* situation because the plaintiffs in *Comer* sought present damages rather than equitable or future relief and were therefore less likely to tread on policy determinations.[88] While vacated on other grounds, the *Comer* decision is the only circuit court opinion to address the PQD in climate torts and was decided in favor of climate litigants.

iii. Displacement by *Massachusetts v. EPA*

The true threat to the Second Wave lies in the paired doctrines that shut down *AEP* and *Kivalina*. The Displacement Doctrine, as described above, is a Supreme Court paradigm that invalidates federal common law in the presence of overriding regulation.[89] The Court in *Milwaukee v. Illinois* described the federal common law as "an unusual exercise of lawmaking by federal courts" where judiciaries attempt to fill in legislative or regulatory gaps when forced to answer a legal question surrounding them.[90] The Court reasoned that such a placeholder law ought to be ignored in the presence of regulation directly addressing the matter.[91] The Supreme Court's decision in *Massachusetts v. EPA* interpreted the

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impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

[86] Comer v. Murphy Oil USA, Inc., 585 F.3d 855, 872 (5th Cir. 2009).

[87] *Id.* at 873.

[88] *Id.* at 879.

[89] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423-24 (2011). See Sokol, *supra* note 4, at 18-19 for a detailed summary of the Milwaukee/International Paper line of cases that form Supreme Court jurisprudence on federal statutory preemption of federal common law claims.

[90] Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) (quoted by Am. Elec. Power Co., 564 U.S. at 423).

[91] *Id.* at 315.

EPA's regulation authority to include GHGs, gutting the claims in *AEP* under the Displacement Doctrine.[92]

Massachusetts v. EPA saw the Supreme Court hold in favor of the environmental litigants, announcing that the EPA had the authority under the CAA to regulate GHGs.[93] Dozens of litigants at the state, city, and private level had sued the EPA for its failure to do so.[94] The Supreme Court held that due to its own departmental policy, the EPA held GHGs under their purview and could not deny an authority to regulate.[95] This should have been an unqualified victory for environmentalists, a step in forcing the government to regulate the main driver of anthropogenic climate change.

The holding instead proved fatal to the First Wave. Directly applying the Displacement Doctrine, the Court in *AEP* found that the EPA's authority to regulate GHGs under the CAA vitiated the plaintiffs' federal claims.[96] This holding went beyond the nuisance cause of action alleged by the *AEP* plaintiffs, expressly displacing "any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants."[97] The Court readily disposed of the argument that the EPA had done nothing to actually regulate GHGs at the time of suit; the ability to do so and avenues for enforcement through the CAA were sufficient, regardless of the EPA's decision not to act.[98] In one broad stroke, the federal common law tort claims of every First Wave plaintiff were dead in the water, all because of the ecological victory in *Massachusetts v. EPA*. The fact that the federal government may regulate GHGs has thus displaced any and all federal common law tort claims alleging harms via GHG emission. Rather than a complete loss, however, the Supreme Court handed climate plaintiffs a chance in the last paragraph of its opinion.

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[92] Am. Elec. Power Co., 564 U.S. at 424-25.
[93] Massachusetts v. E.P.A., 549 U.S. 497, 534-45 (2007).
[94] *Id.* at 510-14.
[95] *Id.* at 528-30.
[96] Am. Elec. Power Co., 564 U.S. at 424.
[97] *Id.*
[98] *Id.* at 425-26.

iv. Preemption

Writing for the majority, Justice Ginsburg closed out the *AEP* opinion by addressing the state common law claims the plaintiffs had paired with the federal variants.[99] Her passage references another Supreme Court case that defined the Preemption Doctrine: *International Paper Co. v. Ouellette*.[100] The Court in *Ouellette* stated that federal common law "preempts" state common law, much in the same way that executive regulation displaces federal common law.[101] Had the Court decided in *AEP* to chain in sequence this displacement and preemption, future plaintiffs would be barred from filing climate complaints under state common law with any federal analogue, as the relevant state law would be preempted by federal common law, then the federal common law would be displaced by EPA's regulatory authority, and the suit would be dismissed.[102] Conversely, an express preservation of those claims in Justice Ginsberg's opinion would have permitted future climate tort litigation or even the First Wave claims to survive. Neither decision took place here.[103]

The Court instead held that state common law claims *may* be available depending "on the preemptive effect of the federal Act."[104] The Court stopped there, remanding to the lower courts rather than addressing the preemptive effect of the CAA.[105] Despite the Court's decision to remand the case, no further proceedings are recorded for the *AEP* line of cases. Therefore, the preemptive effect of the CAA upon state common law remained an open question at the end of the First Wave. The CAA itself notably contains two savings clauses.[106] The first and most relevant states that "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 enforcement of any

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[99] *Id.* at 429.
[100] *Id.* (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 488 (1987)).
[101] Int'l Paper Co. v. Ouellette, 479 U.S. 481, 488 (1987).
[102] This Note refers to this phenomenon as PDDS—the Preemption-Displacement-Dismissal Shuffle.
[103] Am. Elec. Power Co., 564 U.S. at 429.
[104] *Id.*
[105] *Id.*
[106] 42 U.S.C. § 7604(e); 42 U.S.C. § 7416.

emission standard or limitation or to seek any other relief . . . ."[107] Thus far, three Circuit Courts of Appeal have cited *AEP* and held that this clause protects state common law claims under the CAA.[108] While climate tort actions against GHG emitters may no longer proceed under federal common law causes of action, state law claims remain viable for the moment. The Second Wave of U.S. climate tort litigation is founded directly upon these state law claims.

III. THE SECOND WAVE

Beginning in 2017 with three cases from California, climate tort plaintiffs resurrected the prayers of the First Wave. Twenty-one complaints have been filed under state common law causes of action as of August 2022.[109] Some consolidation has occurred, leaving the number of actions before the courts at sixteen—four times that of the First Wave.[110] Of these sixteen actions, zero have reached consideration of the merits.[111] The lengthy procedural battle has peaked as two of the Second Wave cases returned from the Supreme Court in 2021, both on decisions that only elongate the process of venue selection.[112] This Part will first characterize the Second Wave cases as influenced by the First Wave, including their causes of action and supporting data. Next, a summary of the substantial decisions to date will illustrate the heavy focus on venue and displacement. Finally, this Part will analyze the risk posed to the Carbon Majors by this litigative push, and the potential ramifications of successful suit.

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[107] 42 U.S.C. § 7604(e).

[108] City of New York v. Chevron Corp., 993 F.3d 81, 99-100 (2d Cir. 2021); Bell v. Cheswick Generating Station, 734 F.3d 188, 197 n. 7 (3d Cir. 2013); Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685, 693 (6th Cir. 2015).

[109] *U.S. Climate Change Litigation: Common Law Claims*, CLIMATE CASE CHART, http://climatecasechart.com/case-category/common-law-claims.

[110] *See infra* Appendix.

[111] Common Law Claims, *supra* note 109.

[112] BP P.L.C. v. Mayor & City Council of Baltimore, 141 S. Ct. 1532 (2021); Chevron Corp. v. San Mateo County, California, 141 S. Ct. 2666 (2021).

A. Causes of Action

The Second Wave cases largely proceed on state common law claims, though ten of the sixteen have added state statutory claims based on consumer protection, fraud, or environmental protection.[113] Fifteen of the sixteen have included the same nuisance claims ubiquitous within the First Wave, albeit under their state common law analogues.[114]

1. *Nuisance in the Second Wave*

The nuisance theory is more potent for the Second Wave plaintiffs than for those of the First Wave because of the shifting climate situation. Scientific consensus on the anthropogenic nature of climate change has not only strengthened but broadened over the relatively brief history of the field.[115] We now have a far greater understanding of the sources of climate change as well as the predicted impacts, which further eases the standing analysis for would-be climate plaintiffs.[116] Beyond the consensus and modelling, however, climate damages themselves are mounting significantly, spurring the current slew of lawsuits.[117]

The State of Maryland is home to one of the more prominent plaintiffs in the Second Wave, the City of Baltimore. Recently, Maryland put forth estimates of $27 billion to build sea walls necessary to avoid the loss of thousands of homes, business, and farmlands from oceanic flooding precipitated by climate change.[118] These estimates and actual costs abound, with more thorough Second

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[113] *See infra* Appendix.
[114] *See infra* Appendix.
[115] Hoesung Lee, *Statement on the 30th anniversary of the IPCC First Assessment Report*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Aug. 31, 2020), https://www.ipcc.ch/2020/08/31/st-30th-anniversary-far.
[116] *Id.*
[117] Solomon Hsiang et al., *Estimating economic damage from climate change in the United States*, 356 SCI. 1362 (2017), https://www.science.org/doi/10.1126/science.aal4369.
[118] Dan Rodricks, *Maryland estimate for seawalls against rising tides: $27 billion*, BALT. SUN (June 28, 2019), https://www.baltimoresun.com/opinion/columnists/dan-rodricks/bs-md-rodricks-sunday-column0630-story.html.

Wave plaintiffs including such figures in their complaints.[119] Industries affected by ocean acidification, homeowners suffering from intensified storms and increased wildfires, and so on contribute to the mounting costs of climate change and therefore to the plaintiffs' nuisance actions.

These nuisance claims, while important, are more tenuous given the direct risk of the Preemption-Displacement-Dismissal Shuffle (PDDS) established via the *AEP* and *Kivalina* decisions. In fact, the two cases of sixteen to include only nuisance and trespass claims have already been dismissed. *King County v. BP* was removed to a federal venue, where the plaintiffs filed a notice of voluntary dismissal for—in part—failure to state a claim.[120] Twelve states filed an amicus curiae brief in support of the dismissal of King County's claims, saying that the abatement funds sought could jeopardize future attempts by states to regulate or settle climate damages.[121] *New York v. BP*, meanwhile, was dismissed by the Southern District of New York, which ruled that the federal claims—the only claims brought by the plaintiffs—were displaced by the CAA.[122] The Second Circuit Court of Appeals affirmed this dismissal, essentially repeating the downfall of *AEP* and *Kivalina*.[123]

While these cases appear to bode poorly for the Second Wave, it is important to note two distinguishing factors. First, both dismissed cases involved only nuisance and trespass claims.[124] Oddly, the complaints in both *King County* and *New York v. BP* discussed the "mens rea" of the Carbon Majors—they explicitly related the defendants' internal memoranda to those of the tobacco industry—yet neither attempted to capitalize on that evidence by

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[119] See, for example, the complaints in the Appendix, also available at http://climatecasechart.com/case-category/common-law-claims.

[120] City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021); Notice of Voluntary Dismissal, King County v. BP P.L.C., 2:18-cv-00758-RSL (W.D. Wash. Sept. 28, 2021).

[121] Amicus Brief, King County v. BP P.L.C., 2:18-cv-00758-RSL (W.D. Wash. Oct. 3, 2018).

[122] City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 471-75 (S.D.N.Y. July 19, 2018).

[123] *Chevron Corp.*, 993 F.3d at 89-103

[124] *See infra* Appendix.

alleging conspiracy, failure to warn, or unjust enrichment.[125] Second, the New York plaintiffs filed in federal court under federal common law, despite the clear outcome of the First Wave.[126] If anything, the dismissal of *New York v. BP* only demonstrates the importance of learning from history.

2. *Conspiracy and Failure to Warn*

Contrasting *King County* and *New York v. BP*, the rest of the Second Wave boasts ubiquitous allegations that the Carbon Majors either actively or negligently failed in an existing duty to keep the public in the loop. All fourteen cases invoke some version of this assertion in their causes of action, often combining but always including at least one of the following: failure to warn, unjust enrichment, and conspiracy.[127] These are the most consequential claims in the Second Wave for three reasons: they are a far greater defense against preemption by federal common law, they have strategic similarities to successful tobacco litigation, and they invoke shocking evidence from the Carbon Majors' own internal memoranda and studies.

As evidenced by the dismissed cases, PDDS continues to be a substantial obstacle for climate tort plaintiffs. Given that nuisance federal common law has been expressly displaced, other claims with more resistance to preemption and displacement would bolster the survivability of GHG-related actions. Conspiracy is a cause of action involving two or more parties agreeing and intending to commit an illegal act.[128] Conspiracy law is highly variable between state jurisdictions regarding its requirements and consequences. However, federal conspiracy law is almost entirely statutory, enacted by Congress rather than created by judiciaries as common law.[129] This favors the environmental plaintiffs of the Second Wave who have

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[125] Complaint at 3, City of New York v. BP P.L.C., 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018) [hereinafter NY v. BP Complaint]; Complaint at ¶ 6, King County v. BP P.L.C., 18-2-11859-0 (Wash. Super. Ct. May 9, 2018).
[126] NY v. BP Complaint, *supra* note 125, at 1.
[127] *See infra* Appendix.
[128] *Conspiracy*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[129] CHARLES DOYLE, CONG. RSCH. SERV., FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 3 (2020).

raised conspiracy claims under state law because, while the legal standards are more variable, there is no direct path from state law claims to federal displacement as there is with nuisance claims.

Failure to warn occupies a similar relationship to nuisance with respect to the dichotomy between state and federal law. Here a form of product liability, failure to warn alleges that the defendants had an affirmative duty to advise the plaintiffs of a risk and failed to do so, either negligently or under strict liability.[130] The ten Second Wave cases to bring this cause of action have alleged that the Carbon Majors knew or should have known that fossil fuels as a product posed severe hazard to the global climate and to ecological and public health.[131] State failure to warn claims are also protected from preemption or displacement, though in a different way from state conspiracy claims. The PDDS resistance comes from Supreme Court jurisprudence surrounding prescription drug litigation, which creates a presumption against preemption of state failure to warn claims in favor of state police powers under the U.S. Constitution.[132] Second Wave plaintiffs like the City of Baltimore have invoked police powers and the doctrine of special solicitude from *Massachusetts v. EPA*, possibly granting them these increased protections.[133]

In addition to their greater staying power in state courts, these causes of action are tried and true litigation strategies in transformative or systemic tort law. The tobacco settlement described in Section III followed state-led tort lawsuits alleging conspiracy, special failure to warn, and other similar causes of action. The Second Wave plaintiffs have universally cited to the tobacco litigation as an analogue, regardless of whether their causes of action include conspiracy and failure to warn or merely trespass and nuisance.[134] These complaints, most of which exceed 100 pages, tend to include identical snippets from the editorials and public disinformation

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[130] *Failure to warn*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[131] *See infra* Appendix.
[132] Amanda N. Hart, *Federal Preemption of State-Law Failure-to-Warn Claims: Has the Presumption Against Preemption Gone Too Far?*, 6 SEVENTH CIRCUIT REV. 308, 312 (2010).
[133] Complaint at 5, Mayor & City Council of Baltimore v. BP P.L.C., 24-C-18-004219 (Md. Cir. Ct. July 20, 2018) [hereinafter Baltimore v. BP Complaint].
[134] *See generally infra* Appendix.

campaigns undertaken by the Carbon Majors to obfuscate the growing consensus on anthropogenic climate change.[135] Many of the Second Wave complaints use identical language in this regard, demonstrating some level of coordination and a broad awareness of the importance of this type of allegation; for example, the California-based complaints shared particularly harsh language reflective of the Carbon Majors' shocking conduct:

> Defendants' wrongful conduct was oppressive, malicious, and fraudulent, in that their conduct was willful, intentional, and in conscious disregard for the rights of others. Defendants' conduct was so vile, base, and contemptible that it would be looked down upon and despised by reasonable people, justifying an award of punitive and exemplary damages in an amount subject to proof at trial, and justifying equitable disgorgement of all profits Defendants obtained through their unlawful and outrageous conduct.[136]

Though described in greater detail in Part IV, the internal findings of the Carbon Majors use existentially horrific language to describe the potential impacts of climate change decades before the First Wave, then justify their obfuscation of these facts. The earliest such memorandum dates back to the 1950s, at which point oil companies had already realized the danger of GHG pollution.[137] Capitalizing on this evidence as the tobacco plaintiffs did will surely prove threatening to the Carbon Majors, which explains the truly ferocious procedural battle now waged by those defendants.

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[135] *Id.*

[136] Complaint at 80-81, County of San Mateo v. Chevron Corp., 17-CIV-03222 (Cal. Super. Ct. July 17, 2017) [hereinafter San Mateo Complaint]; Complaint at 78, City of Imperial Beach v. Chevron Corp., C-17-01227 (Cal. Super. Ct. July 17, 2017) [hereinafter Imperial Beach Complaint]; Complaint at 81-82, County of Marin v. Chevron Corp., CIV-17-02586 (Cal. Super. Ct. July 17, 2017) [hereinafter Marin County Complaint]; Complaint at 103, City of Santa Cruz v. Chevron Corp., 17CV03243 (Cal. Super. Ct. Dec. 20, 2017) [hereinafter Santa Cruz Complaint].

[137] Charles A. Jones, *A Review of the Air Pollution Research Program of the Smoke and Fumes Committee of the American Petroleum Institute*, 8 J. AIR POLLUTION CONTROL ASS'N 268, 269 (1958).

B. State or Federal? Venue of the Second Wave

Plaintiffs mostly learned their lesson after the demise of the First Wave. Every Second Wave action—save for the cautionary tale of *New York v. BP*—was filed in state court.[138] This and the abundance of state law claims together likely evidence the understanding of plaintiffs that the *AEP* decision has made GHG litigation a hostile landscape in the federal courts. Defendants also understand this procedural minefield, as evidenced by the defense strategy in every Second Wave case (except *New York v. BP*) of filing for removal to federal district court.[139] This question of removal and remand reached the Supreme Court twice in 2021, after two cases were remanded back to state court by their respective Circuit Courts of Appeal.[140]

Seven of the twenty-two complaints in the Second Wave have come out of California, ultimately consolidated under three cases: *County of Santa Cruz v. Chevron Corp.*, *County of San Mateo v. Chevron Corp.*, and *City of Oakland v. BP*.[141] Defendants removed all three actions to federal court but plaintiffs successfully obtained remands and defended the remands in the Ninth Circuit.[142] The fossil fuel defendants filed for certiorari with the Supreme Court, which accepted petitions for *City of Oakland* and *San Mateo*, with *Santa Cruz* consolidated under the latter.[143] *City of Oakland* was denied Supreme

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[138] *See infra* Appendix.

[139] *U.S. Climate Change Litigation: Common Law Claims*, *supra* note 109.

[140] BP P.L.C. v. Mayor & City Council of Baltimore, 141 S. Ct. 1532 (2021); Chevron Corp. v. San Mateo County, California, 141 S. Ct. 2666 (2021).

[141] *City of Oakland v. BP p.l.c.*, CLIMATE CASE CHART, http://climatecasechart.com/case/people-state-california-v-bp-plc-oakland (last visited Mar. 16, 2023); *County of Santa Cruz v. Chevron Corp.*, CLIMATE CASE CHART, http://climatecasechart.com/case/county-santa-cruz-v-chevron-corp (last visited Mar. 16, 2023); *County of San Mateo v. Chevron Corp.*, CLIMATE CASE CHART, http://climatecasechart.com/case/county-san-mateo-v-chevron-corp (last visited Mar. 16, 2023).

[142] Order, County of Santa Cruz v. Chevron Corp., 3:18-cv-00732-VC (9th Cir. 2018) [hereinafter Santa Cruz v. Chevron Order]; Order, City of Oakland v. BP P.L.C., No. 18-16663 (9th Cir. 2020); Order, County of San Mateo v. Chevron Corp., No. 18-16376 (9th Cir. 2020).

[143] Chevron Corp. v. County of San Mateo, 141 S. Ct. 2666 (2021), *cert. granted*, (No. 20-884); City of Oakland v. BP P.L.C., 593 U.S. (2021), *cert. denied*, (No. 20-1089).

Court review, leaving intact the reversal of the denial of remand.[144] *San Mateo*, however, saw the Supreme Court vacate the Ninth Circuit's affirmance of the remand back to state court.[145] In vacating *San Mateo*, the Court cited its decision a week prior in *BP v. Baltimore*, which reviewed a Fourth Circuit decision to affirm the remand of that case to state court.[146] The reviewing courts in these cases considered only the statutory provisions for removal based on federal officer jurisdiction—the entire basis for the defendants' removal motions—because they assumed that review of a removal motion permits consideration only of the given rationales for removal.[147] The Supreme Court identified a circuit split regarding this reasoning and rejected the positions of the Fourth and Ninth Circuits in *Baltimore* and *San Mateo*, holding that reviewing courts may "review the merits of *all* theories for removal that a district court has rejected."[148]

As of writing, the plaintiffs in both *Baltimore* and *San Mateo* have won remand for the second time in their respective circuits under the Supreme Court's broader standard quoted above.[149] The *Baltimore* case was particularly energized. Thirteen states, various special interest groups, and numerous legal scholars composed the numerous amicus curiae briefs filed.[150] The *Baltimore* plaintiffs also filed a letter submitting another Second Wave case as a supplemental authority, further linking the sixteen civil actions.[151] *Baltimore* awaits a second petition of certiorari to the Supreme Court, as the defendants seek to defeat the reaffirmance of remand to state court.[152] *San Mateo* has been stayed pending a petition for writ of certiorari by

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[144] Order List, 593 U.S., No. 20-1089 (2021).
[145] Chevron Corp., 141 S. Ct. at 2666 (2021).
[146] BP P.L.C. v. Mayor & City Council of Baltimore, 141 S. Ct. 1532, 1543 (2021).
[147] *Id.* at 1536.
[148] *Id.* at 1537 (emphasis added).
[149] County of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022); Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022).
[150] *Mayor & City Council of Baltimore v. BP p.l.c.*, CLIMATE CASE CHART, http://climatecasechart.com/case/mayor-city-council-of-baltimore-v-bp-plc (last visited Mar. 16, 2023).
[151] Letter, Mayor and City Council of Baltimore v. BP P.L.C., No. 19-1644 (4th Cir. Sept. 17, 2021) (listing City of Hoboken v. ExxonMobil Corp. as a supplemental authority).
[152] *Mayor & City Council of Baltimore v. BP p.l.c.*, *supra* note 150.

the defendants in that case, who also seek to challenge the reaffirmance of remand.[153]

The *Baltimore* and *San Mateo* case lines both carry tremendous weight in the Second Wave, while demonstrating the highly intertwined nature of the cases overall. The District of South Carolina stayed proceedings in *City of Charleston v. Brabham Oil Co., Inc.*, pending the Fourth Circuit ruling in *Baltimore v. BP* (*Baltimore II*).[154] Following that very ruling, the Tenth Circuit reaffirmed a remand of a Second Wave case.[155] Defendants in the two other Maryland-based cases have since sought a stay pending the *Baltimore* defendants' second petition for certiorari to the Supreme Court.[156] The defendants in *Pacific Coast Federation of Fishermen's Ass'ns v. Chevron Corp.* actually received such a stay while the petition pends.[157] The First Circuit reaffirmed a district court remand order a Second Wave case following the two Supreme Court decisions.[158] The Ninth Circuit in *City & County of Honolulu v. Sunoco LP* affirmed its remand order in that case and the consolidated *County of Maui v Sunoco LP*, citing its *San Mateo II* decision and the affirmance of remand from three other circuits.[159] The plaintiffs in *Minnesota v. American Petroleum Institute* referenced the decisions of *Baltimore II, San Mateo II*, and *Rhode Island II* as supplemental authority against the appeal of the remand

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[153] Santa Cruz v. Chevron Order, *supra* note 142; Notice, Mayor & City Council of Baltimore v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020) [hereinafter Baltimore v. BP Notice].

[154] Baltimore v. BP Notice, *supra* note 153.

[155] Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1246 (10th Cir. filed Feb. 8, 2022).

[156] Order, City of Annapolis, Maryland v. BP P.L.C., No. 21-cv-00772 ELH (D. Md. May 19, 2021); Order, Anne Arundel County v. BP P.L.C., No. 1:21-cv-01323 (D. Md. June 27. 2022).

[157] Joint Stipulation to Stay Proceedings, Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp., 3:18-cv-07477-VC (N.D. Cal. Nov. 14, 2018).

[158] Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44, 52-53 (1st Cir. 2022) (rehearing denied).

[159] City & County of Honolulu v. Sunoco LP, 39 F.4th 1101, 1106 (9th Cir. 2022) (citing County of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022); Shell Oil Prods. Co., 35 F.4th at 52-53; Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022); and Suncor Energy (U.S.A.) Inc., 25 F.4th at 1246.

affirmance in their case line.[160] With nearly every case seeing at least one affirmance of remand, even after multiple vacations of such by the Supreme Court, there appears to be hope for the Second Wave to survive the procedural barriers of the past and reach proper jury trials on the merits.

C. Strength of the Second Wave Claims

Overall, the current civil actions facing the Carbon Majors seem quite potent. As the Majors are almost certainly aware, the only real hope of defeating the Second Wave climate plaintiffs lies in the PDDS procedural tactic. The aforementioned doctrinal hurdles pose different levels of threat to the Second Wave.

With respect to standing, plaintiffs should have all they need to satisfy Article III and the associated Supreme Court jurisprudence. The *Massachusetts v. EPA* decision very clearly spoke in favor of climate standing for states due to their "quasi-sovereign interests."[161] The Court accepted the scientific consensus on anthropogenic climate change in that April 2007 ruling, months before the IPCC released the Fourth Assessment Report.[162] The Court also rejected claims that GHG emissions by American fossil fuel companies could not be traced to climate harms because of the substantial pollution by foreign sources or the global nature of the issue, saying that a "meaningful contribution" to the issue sufficed for some degree of fault and liability.[163] Plaintiffs' standing arguments have only improved since then. The IPCC has recently released its Sixth Assessment Report, which demonstrates an even more potent climate consensus and increasingly dire projections of damage.[164] Carbon emissions also continue to increase from U.S. Carbon Majors,

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[160] Letter, State of Minnesota v. American Petroleum Institute, No. 21-1752 (8th Cir. Apr. 13, 2022); Letter, State of Minnesota v. American Petroleum Institute, No. 21-1752 (8th Cir. Apr. 26, 2022); Letter, State of Minnesota v. American Petroleum Institute, No. 21-1752 (8th Cir. May 27, 2022).
[161] *See* Massachusetts v. EPA, 549 U.S. 497, 520 (2007).
[162] *Id.* at 521-25.
[163] *Id.* at 525.
[164] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SIXTH ASSESSMENT REPORT (2023).

hammering home the industry's meaningful contribution (per *Massachusetts v. EPA*) to the issue.[165]

The issue of political questions has a more ambiguous application to state law claims, as the PQD generally precludes claims in federal courts rather than state courts.[166] The remaining cases seeking injunction or equitable relief may nonetheless tread on the distinction highlighted by the Fifth Circuit in *Comer* between redress that alters policy-relevant business practices and mere compensation to damaged parties. As such, those prayers for relief may be assailable under an argument of public policy, especially if the relevant states have their own versions of the PQD.

D. Looking Forward

The Second Wave will likely undergo another substantial development or three before this Note reaches publication. More cases may arise, though to join the fray before the settlement of the venue question would leave plaintiffs poorly equipped to survive in a rapidly developing field. The Second Wave may successfully draw blood from the Carbon Majors, or it may simply pave the way for a Third Wave further down the line. As the plaintiffs in *GM* saw the Obama Administration's GHG regulation, so too may future regulation obviate the field of climate torts. The "wait-and-see" attitude, however, has fared poorly in handling the global climate. The following Part proposes a measure that would be possible if the Second Wave successfully overcomes its procedural hurdles, and if courts are not too quick to defend fossil fuels for policy reasons.

IV. CLIMATE SETTLEMENT AGREEMENT

With the immense factual support of the plaintiffs' claims and the steady battle against the fossil fuel defendants' procedural tactics, the Second Wave poses a real risk to the Carbon Majors. A single

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[165] *Global Greenhouse Gas Emissions Data*, U.S. ENV'T PROT. AGENCY (Feb. 15, 2023), https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data#:~:text=Global%20carbon%20emissions%20from%20fossil,increase%20from%201970%20to%202011.

[166] Baker v. Carr, 369 U.S. 186, 210-11 (1962).

victory before a jury could break down the levy and flood this industry with costly litigation, given that anthropogenic climate change affects every human being on the planet. While weary or offended environmentalists may cheer at the thought, the unfortunate truth is that our civilization runs on oil.[167] If fossil fuel usage stopped tomorrow, it would not be outlandish to expect mass starvation and untreatable medical emergencies, given that most of our transportation and electricity comes from fossil fuels. Realizing this, the United States alone provides subsidy of approximately $20 billion annually.[168] According to the International Monetary Fund, fossil fuel companies are subsidized worldwide for over 6% of the global GDP.[169] Both for profitability and survival, governments would surely not permit these industries to be bankrupted or enjoined from their activities. At the same time, pollution cannot continue at the present scale, and any wrongdoing by these companies must be redressed. This leads us to consider the Tobacco Master Settlement Agreement as way forward for civilization as a whole (via unbroken supply chains and technology) and the living, air-breathing beings composing it.

When faced with a similar existential threat at the hands of state litigants, the Tobacco Majors sought out a remedy from Congress. Negotiating with the National Association of Attorneys General, the Tobacco Majors secured a resolution of claims in the form of a national settlement agreement, permitting their continued

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[167] *See, e.g.*, P.K. Senecal & Felix Leach, *Diversity in Transportation: Why a mix of propulsion technologies is the way forward for the future fleet*, 4 RESULTS ENG'G 1 (2019); John Muyskens et al., *Mapping how the United States generates its electricity*, WASH. POST (Mar. 28, 2017), https://www.washingtonpost.com/graphics/national/power-plants/?utm_term=.ceceb6272e1d; Jeremy Hess et al., *Petroleum and Health Care: Evaluating and Managing Health Care's Vulnerability to Petroleum Supply Shifts*, 101 AM. J. PUB. HEALTH 1568 (2011).

[168] Clayton Coleman & Emma Dietz**,** *Fact Sheet: Fossil Fuel Subsidies: A Closer Look at Tax Breaks and Societal Costs (2019)*, ENV'T & ENERGY STUDY INST. (July 29, 2019), https://www.eesi.org/papers/view/fact-sheet-fossil-fuel-subsidies-a-closer-look-at-tax-breaks-and-societal-costs.

[169] David Coady et al., *Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates*, (Int'l Monetary Fund, Working Paper No. 2019/089, 2019).

existence with certain caveats.[170] This Part proceeds by comparing and contrasting the Tobacco and Carbon Majors, then highlighting the important provisions to include in a Climate Settlement Agreement (CSA) and advising policy approaches to maximize the restorative environmental impact of such an approach.

A. Smoke and Smokestacks: The Tobacco and Carbon Majors

Congress-mediated settlement agreements have not always worked for waves of transformative tort litigation. Lead and asbestos plaintiffs tended to see class action settlements instead of an approach involving the executive branch.[171] At the time of writing, a major settlement in the U.S. opioid crisis has been blocked by a federal judge, leading to further delay in the process of securing an outcome.[172] However, remarkable parallels exist between the tobacco litigation of the 1990s and the Second Wave of climate torts. These parallels suggest that the GHG climate crisis is ripe for resolution in the same way.

1. *The Historical Development of Each Crisis*

Consider first the history of each crisis. Humans have used tobacco for millennia,[173] while anthropogenic climate change has existed since approximately the mid-1900s.[174] This ought to demonstrate the tremendous impact brought by climate change as opposed to tobacco use. The first scientific publication to seriously model anthropogenic climate change was published in 1896,[175] nearly

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[170] *The Master Settlement Agreement*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement (last visited Aug. 7, 2022).
[171] Shearer, *supra* note 7.
[172] Geoff Mulvihill, *Judge rejects Purdue Pharma's sweeping opioid settlement*, AP NEWS (Dec. 16, 2021), https://apnews.com/article/business-health-lawsuits-opioids-colleen-mcmahon-1e96ea41f783d8f5db0a024fbb304c1f.
[173] Jordan Goodman, TOBACCO IN HISTORY AND CULTURE (2005).
[174] *How Do We Know Climate Change is Real?*, NASA (Mar. 7, 2023), https://climate.nasa.gov/evidence.
[175] Clive Thompson, *How 19th Century Scientists Predicted Global Warming*, JSTOR DAILY (Dec. 17, 2019), https://daily.jstor.org/how-19th-century-scientists-predicted-global-warming.

seven decades before U.S. Surgeon General Luther Terry reported a definitive link between tobacco and cancer.[176] Private epidemiological studies linked mortality and tobacco initially in the 1920s and quite thoroughly by 1950,[177] while environmental science connected human activity with global warming as early as 1896.[178]

The legal histories are also similar with respect to timing and development. A wave of private litigants filed suit against the Tobacco Majors, beginning in the 1950s and numbering over 800 by 1994.[179] However, these lawsuits all failed and the plaintiffs were left without redress.[180] Subsequently, the attorneys general of over forty states filed suit on behalf of their constituents and the state public.[181] This parallels the failure of the First Wave—albeit for different procedural reasons—and the subsequent national push of cross-referential state-led litigation. By this logic, the next step in climate tort litigation would be a mass settlement.

2. *Hiding the Crises*

Plaintiffs of the Second Wave draw parallels between the misconduct of the tobacco industry and their fossil fuel opponents in many of their complaints. Many of the complaints reference Steve Milloy, a tobacco industry frontliner who served as the senior environmental lobbyist on ExxonMobil's "Global Climate Science Team" (GCST).[182] These complaints highlight the startling similarity

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[176] *Smoking & Tobacco Use: A Brief History*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 19, 2021), https://www.cdc.gov/tobacco/data_statistics/sgr/history/index.htm.

[177] *Id.*

[178] *See* Svante Arrhenius, *On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground*, 9 PHIL. MAG. & J. SCI. 237, 269-273 (1896).

[179] Robin Miller, *Validity, Construction, Application, and Effect of Master Settlement Agreement (MSA) Between Tobacco Companies and Various States, and State Statutes Implementing Agreement, Use and Distribution of MSA Proceeds*, 25 A.L.R. 6th 435.

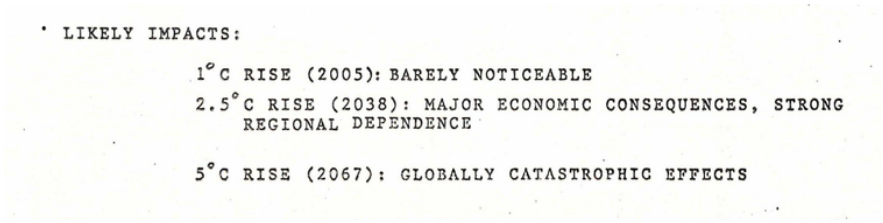
[180] *Id.*

[181] *See* Janofsky, *supra* note 1 ("Mississippi today became the first state to demand that cigarette makers bear the health care costs of smoking.").

[182] *E.g.*, San Mateo Complaint, *supra* note 136, at 59; Complaint at 61, Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp., CGC-18-571285 (Cal. Super. Ct. Nov. 14, 2018) [hereinafter Pacific Coast Complaint]; Complaint at

between this GCST and the tobacco industry's "Advancement of Sound Science Coalition" which routinely obfuscated public dialogue regarding the risks of tobacco.[183] The complaints include examples of the Carbon Majors' efforts, long-term knowledge of the risks of GHG emissions, and their coordinated disinformation campaigns.[184]

The fossil fuel industry had knowledge of the risks of climate change since the 1960s, only becoming more certain of the grave danger as time passed.[185] Many of these internal memoranda and hidden studies contain truly horrific concepts, such as the possible abandonment of entire countries like Bangladesh as they disappear to oceanic inundation.[186] That particular memorandum, kept hidden from the public until an investigative journalist unearthed it decades later, then proceeded to advise that the energy industry "also has its own reputation to consider" and should avoid "public anxiety and pressure group activity."[187] Instead, the Carbon Majors embarked on public disinformation campaigns intended to downplay the very existence of climate change, as shown in the two images below:



188

86, City of Annapolis v. BP P.L.C., C-02-CV-21-000250 (Md. Cir. Ct. Feb. 22, 2021) [hereinafter Annapolis Complaint].

[183] *See* Goodman, *supra* note 173.

[184] *Id.*

[185] Milman, *supra* note 54.

[186] SHELL GLOB., THE GREENHOUSE EFFECT 26 (1988).

[187] *Id.* at 28.

[188] Benjamin Franta, *What Big Oil knew about climate change, in its own words*, CONVERSATION (Oct. 28, 2021, 6:21 PM), https://theconversation.com/what-big-oil-knew-about-climate-change-in-its-own-words-170642.

189

[189] *See, e.g.*, Baltimore v. BP Complaint, *supra* note 133, at 76; Pacific Coast Complaint, *supra* note 182, at 55.

The first image shows the likely impacts of GHG emissions across sixty-two years as presented to an American Petroleum Institute (API) panel in 1980. The second image displays three examples of climate disinformation advertisements published by the Carbon Major-funded Information Council for the Environment (ICE) since 1991, which appear in various Second Wave complaints. This disregard for the wellbeing of millions closely mirrors the tobacco industry's own disinformation and suppression campaigns, albeit on a scale that threatens global existence.[190] Further, the majority of Americans believe that global warming is a serious problem as of 2010.[191] If ever a time existed for Congress to step in and negotiate a settlement between the states and the Carbon Majors, now would be such a time.

B. How to Settle the Seas

Congress tailored the tobacco MSA to the issues faced by both that industry and the states suing them. While the needs and concerns of climate litigants undoubtedly differ, the MSA regardless holds important lessons that the Second Wave would do well to remember before proceeding into jury trials. The gist of the agreement is that in return for behavioral restrictions, payments in perpetuity, and transparency with public documents, tobacco signatories would be inured from further liability to the majority of the litigation facing it at the time.[192] The MSA contains several provisions that do not apply directly to fossil fuel companies, such as a prohibition on youth-targeted marketing, brand-name merchandise, free samples, and cartoons.[193] Highly relevant provisions of the MSA follow.

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[190] Lisa Bero, *Implications of the Tobacco Industry Documents for Public Health and Policy*, 24 ANN. REV. PUB. HEALTH 267 (2001).
[191] Naomi Oreskes, *My Facts Are Better Than Your Facts: Spreading Good News about Global Warming*, *in* HOW WELL DO FACTS TRAVEL?: THE DISSEMINATION OF RELIABLE KNOWLEDGE 136, 136-66 (Peter Howlett & Mary S. Morgan eds., 2011).
[192] *Master Settlement Agreement*, PUB. HEALTH L. CTR., https://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf (last visited Mar. 13, 2023).
[193] *Id.* §§ 3(a), (b), (f), (g).

The MSA includes limitations on lobbying[194] and a prohibition on involvement in the expenditure of the settlement proceeds,[195] which would serve environmental agendas well by extricating the influence of the fossil fuel lobby from economic environmental policy. This goal is furthered in the MSA by forcible dissolution of various lobbying and private research groups.[196] The analogous approach for fossil fuels would be the dissolution of their special interest groups such as the routinely problematic API. The climate crisis may also benefit from the MSA's prohibitions on agreements between the companies to suppress research and on material misrepresentations.[197]

The next relevant provision of the MSA involved the establishment of the National Public Education Fund, a public institution dedicated to rectifying the public disinformation campaigns undertaken by the Tobacco Majors.[198] Given the substantial disinformation tactics undertaken by the fossil fuel industry, this provision translates over quite well between the crises. The tobacco industry funds this foundation via payment of their Relative Market Share as determined at the time.[199] Additionally, the Majors were forced to pay a lump sum at the time of settlement and an annual ongoing payment based on their tobacco profits.[200]

Although a respectable model for a climate settlement to resolve the Second Wave, the MSA lacks certain provisions essential to the ultimate phaseout of fossil fuels. First, it is important to specify that any payments by the Carbon Majors go to truly helpful causes. Without a conscious knowledge of the field and the messages of the IPCC, such a settlement may be a stopgap and do more against transformative litigation than for climate remediation. Second, the Climate Settlement Agreement cannot have the effect of incentivizing the Carbon Majors to increase pollution in order to make up for lost profits. Rather than removing their subsidies and diminishing their

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[194] *Id.* § 3(m).
[195] *Id.* § 3(n).
[196] *Id.* § 3(o).
[197] *Id.* §§ 3(q), (r).
[198] *Master Settlement Agreement*, *supra* note 192, § 6.
[199] *Id.* § 6(b).
[200] *Id.* § 9.

returns on fuel sales, the CSA must use those subsidies as a carrot to promote conversion of the Carbon Majors to a more sustainable energy industry. Existing subsidies would return with production or infrastructure support for renewable technologies and research for such. Finally, the CSA should require signatories to publicly acknowledge their fault, to demonstrate zero tolerance for self-enriching social detriment.

V. CONCLUSION

The alternative to settling the Second Wave is to watch these claims play out in court, perhaps waiting for a solution from other branches of government to obviate such tiresome litigation. The inconvenient truth, however, is that we as a civilization do not have time to wait. Every moment that GHG pollution persists adds time to the suffering of the global environment and the hardships of its people. To wait for these claims to return to their appropriate venue, rise to the Supreme Court on other procedural issues, filter through to jury trials, pass through to higher courts on appeal, and so on, is an untenable and insulting delay. Every day we do not settle the seas, their rise will endanger another tomorrow.

APPENDIX

Table of Second Wave Cases

Plaintiffs	Date Filed	Nuisance/ Trespass Claims	Failure to Warn/Conspiracy Claims	Relevant Statutes
San Mateo County, California[201]	7/17/2017	Public nuisance (county and state) Private nuisance Trespass	Failure to warn (strict/negligent) Design defect (strict)	N/A
City of Imperial Beach, California[202] **(under San Mateo)**	7/17/2017	Public nuisance (county and state) Private nuisance Trespass	Failure to warn (strict/negligent) Design defect (strict)	N/A
Marin County, California[203] **(under San Mateo)**	7/17/2017	Public nuisance (county and state) Private nuisance Trespass	Failure to warn (strict/negligent) Design defect (strict)	N/A

[201] San Mateo Complaint, *supra* note 136.
[202] Imperial Beach Complaint, *supra* note 136.
[203] Marin County Complaint, *supra* note 136.

Plaintiffs	Date Filed	Nuisance/ Trespass Claims	Failure to Warn/Conspiracy Claims	Relevant Statutes
City of Santa Cruz, California[204]	7/17/2017	Public nuisance (county and state) Private nuisance Trespass	Failure to warn (strict/negligent) Design defect (strict) Negligence	N/A
State of California (San Francisco)[205] **(under Oakland)**	9/19/2017	Public nuisance	Funding	N/A
State of California (Oakland)[206]	9/19/2017	Public nuisance	Funding	N/A
City of Baltimore, Maryland[207]	7/20/2018	Public nuisance Private nuisance Trespass	Failure to warn (strict/negligent) Design defect (strict)	Maryland Consumer Protection Act
City of Boulder, Colorado[208]	4/17/2018	Public nuisance	Civil conspiracy Unjust	Colorado Consumer Protection

[204] Santa Cruz Complaint, *supra* note 136.
[205] Complaint, People of State of California v. BP P.L.C. (San Francisco), CGC-17-561370 (Cal. Super. Ct. Sept. 19, 2017).
[206] Complaint, People of State of California v. BP P.L.C. (Oakland) v. BP P.L.C., RG-17-875889 (Cal. Super. Ct. Sept. 19, 2017).
[207] Baltimore v. BP Complaint, *supra* note 133.
[208] Complaint, Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc., 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018); Amended Complaint, Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc., 2018CV030349 (Colo. Dist. Ct. June 11, 2018).

Plaintiffs	Date Filed	Nuisance/ Trespass Claims	Failure to Warn/Conspiracy Claims	Relevant Statutes
		Private nuisance Trespass	enrichment	Act
City of New York, New York[209]	1/9/2018	Public nuisance Private nuisance Trespass	N/A	N/A
King County, Washington[210]	5/9/2018	Public nuisance Trespass	N/A	N/A
Pacific Coast Federation of Fishermen's Associations[211]	11/14/2018	Nuisance	Failure to warn (strict/negligent) Design defect (strict) Negligence	N/A
State of Rhode Island[212]	7/2/2018	Public nuisance Trespass Impairment of public trust resources	Failure to warn (strict/negligent) Design defect (strict/negligent)	State Environmental Rights Act
City of Richmond,	1/22/2018	Public nuisance	Failure to warn (strict/negligent)	N/A

[209] NY v. BP Complaint, *supra* note 125.
[210] Complaint, King County v. BP P.L.C., 18-2-11859-0 (Wash. Super. Ct. May 9, 2018).
[211] Pacific Coast Complaint, *supra* note 182.
[212] Complaint, Rhode Island v. Chevron Corp., PC-2018-4716 (R.I. Super. Ct. July 2, 2018).

Plaintiffs	Date Filed	Nuisance/ Trespass Claims	Failure to Warn/Conspiracy Claims	Relevant Statutes
California[213] **(under Santa Cruz)**		Private nuisance Trespass	Design defect (strict/negligent)	
City of Charleston, South Carolina[214]	9/9/2020	Public nuisance Private nuisance Trespass	Failure to warn (strict/negligent)	Unfair Trade Practices Act
State of Delaware[215]	9/10/2020	Nuisance Trespass	Negligent failure to warn	Consumer Fraud Act
City of Hoboken, New Jersey[216]	9/2/2020	Public nuisance Private nuisance Trespass	Negligence	Consumer Fraud Act
City of Honolulu, Hawaii[217]	3/9/2020	Public nuisance Private nuisance Trespass	Failure to warn (strict/negligent)	N/A

[213] Complaint, City of Richmond v. Chevron Corp., C18-00055 (Cal. Super. Ct. Jan. 22, 2018).
[214] Complaint, City of Charleston v. Brabham Oil Co., 2020CP1003975 (S.C. Ct. Com. Sept. 9, 2020).
[215] Complaint, Delaware v. BP America Inc., N20C-09-097 (Del. Super. Ct. Sept. 10, 2020).
[216] Complaint, City of Hoboken v. Exxon Mobil Corp., HUD-L-003179-20 (N.J. Super. Ct. Sept. 2, 2020).
[217] Complaint, City & County of Honolulu v. Sunoco LP, 1CCV-20-0000380 (Haw. Cir. Ct. Mar. 9, 2020).

Plaintiffs	Date Filed	Nuisance/ Trespass Claims	Failure to Warn/Conspiracy Claims	Relevant Statutes
Maui County, Hawaii[218] (under Honolulu)	10/12/2020	Public nuisance Private nuisance Trespass	Failure to warn (strict/negligent)	N/A
State of Minnesota[219]	6/24/2020	N/A	Failure to warn (strict/negligent) Fraud and misrepresentation Deceptive trade practices	Consumer Fraud Act False Statements in Advertising Act
City of Annapolis, Maryland[220]	2/22/2021	Public nuisance Private nuisance Trespass	Failure to warn (strict/negligent)	Consumer Protection Act
Anne Arundel County, Maryland[221]	4/26/2021	Public nuisance Private nuisance Trespass	Failure to warn (strict/negligent)	Consumer Protection Act

[218] Complaint, County of Maui v. Sunoco LP, 2CCV-20-0000283 (Haw. Cir. Ct. Oct. 12, 2020).
[219] Complaint, Minnesota v. American Petroleum Institute, 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020).
[220] Annapolis Complaint, *supra* note 182.
[221] Complaint, Anne Arundel County v. BP P.L.C., C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021).