A California Environmental Court to Adjudicate Climate Change

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INTRODUCTION

"This is an unprecedented case for any court, let alone a state court trial judge. But it is still a tort case."
— Senior Environmental Judge Jefferey Crabtree, 'Oahu First Circuit Court.[1]

For as long as climate change has been in the public consciousness, lawyers have tried to find the right legal vehicle to confront it. Today, many communities feeling the effects of climate change blame fossil fuel companies. They seek to make those most responsible for climate change pay under state tort law.

The case Judge Crabtree was referring to, *City & County of Honolulu v. Sunoco LP*, is one of many active climate tort suits.[2] Communities from all over the country—Honolulu to Hoboken, Baltimore to Boulder, New York to Oakland, and San Mateo to Rhode Island—have sued oil supermajors, the world's several largest oil and gas companies, for ongoing and future injuries to property.[3] Their complaints allege several theories, including public nuisance, deceptive promotion, and breach of duty to disclose the harmful environmental impacts of burning fossil fuels.[4] Although wedged into established tort boxes, these cases involve climate change—the most complex and pervasive issue of the modern era that threatens "unlimited harm."[5] So, are they cut-and-dried tort cases?

Judge Crabtree's statement oversimplifies climate change disputes by "attempting to assimilate [them] within ordinary legal frames."[6] To judges without Judge Crabtree's environmental law expertise, this case is far from simple. *Honolulu* and its sisters are *not* typical torts cases—they seek to force companies to internalize the cost of climate change, which is difficult to attribute and defies conventional tort law and court frameworks. In fact, courts have a history of avoiding climate change cases for how strange and unwieldy they are, "hesitat[ing] to tackle a global problem that hardly resembles run-of-the-mill

1. City & Cnty. of Honolulu v. Sunoco LP (*Honolulu*), No. 1CCV-20-0000380, 1, 2 (Haw. Cir. Ct. 2020).

2. *Id.*

3. *See* Rhode Island v. Shell Oil Prod. Co. (*Rhode Island*), 35 F.4th 44 (1st Cir. 2022); City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101 (9th Cir. 2022); Cnty. of San Mateo v. Chevron Corp. (*San Mateo*), 32 F.4th 733 (9th Cir. 2022); City of Hoboken v. Chevron Corp. (*Hoboken*), 45 F.4th 699 (3d Cir. 2022); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc. (*Boulder*), 25 F.4th 1238 (10th Cir. 2022); City of New York v. Chevron Corp. (*New York*), 993 F.3d 81 (2d Cir. 2021), Muns. of Puerto Rico v. Exxon Mobil Corp., No. 22-cv-01550 (filed D.P.R. Nov. 22, 2022) (*Puerto Rico*).

4. *Honolulu*, No. 1CCV-20-0000380 at 2–3.

5. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 352 (2011).

6. *See* R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 303 (2017).

public nuisances."[7] Through "deference, displacement, or deliberate sabotage,"[8] courts have used legal mechanisms to dodge climate cases, perhaps due to their complexity, scale, and massive financial stakes.[9] They cling to procedure to "duck and weave" away from deciding these cases on their merits.[10]

Honolulu is in a lineage of U.S. climate change suits beginning in the early 2000s. This first generation of litigation consisted predominantly of federal common law claims and faced considerable hurdles related to standing, justiciability, and preemption.[11]

A second generation of climate suits emerged around 2017 and was narrower in focus. Plaintiffs began to bring exclusively state common law claims against Big Oil—drawing a neat line between companies' conduct, climate change, and injuries suffered.[12] They claimed supermajors exacerbated climate change by burning fossil fuels, which released carbon dioxide and ultimately caused sea level rise, and were therefore liable for resulting injuries to county and municipal property.[13] The trillion dollar question in these cases—which seek large compensatory and punitive damages—is who is responsible for climate change.[14] This second generation of litigation faces its own major challenge: drawn-out venue disagreements between litigants.

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7. Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49, 51 (2018).

8. Weaver & Kysar, *supra* note 6, at 323.

9. *See id.* at 323–24 (discussing one case, Comer v. Murphy Oil USA, Inc. (*Comer*) No. 05-CV-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *vacated and reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc) (declining to reinstate the panel opinion) where courts appeared to use procedure to avoid deciding the case on substantive grounds).

10. Ewing & Kysar, *supra* note 5, at 350.

11. *See* Connecticut v. Am. Elec. Power (*AEP*), 564 U.S. 410, 424 (2011) (holding that the Clean Air Act (CAA) displaces federal common law right to seek "abatement of carbon dioxide emissions"); Native Vill. of Kivalina v. ExxonMobil Corp. (*Kivalina*), 696 F.3d 849, 858 (9th Cir. 2012) (holding that the community's federal public nuisance claim against twenty-four oil and gas companies was "displaced" by the CAA); People v. Gen. Motors Corp. (*General Motors*), No. C06-05755, 2007 WL 2726871, 16 (N.D. Cal. Sept. 17, 2007) (holding that state's federal common law nuisance claim seeking damages for various environmental harms presented a non-justiciable political question); Karen C. Sokol, *Seeking (Some) Justice in State Tort Law*, 95 WASH. L. REV. 1383 (2020) (providing the "generations" framework used here, based on the first and second "waves" of climate change suits).

12. *See, e.g.*, Rhode Island v. Shell Oil Prod. Co., 35 F.4th 44 (1st Cir. 2022); City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101 (9th Cir. 2022); Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022); City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022); City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021), Muns. of Puerto Rico v. Exxon Mobil Corp., No. 22-cv-01550 (filed D.P.R. Nov. 22, 2022).

13. *See, e.g.*, Kivalina, 696 F.3d at 853–54 (discussing a coastal native Alaskan tribe which brought an action for damages under federal common law claim of public nuisance against fossil fuel companies, alleging that the companies' greenhouse gas emissions had resulted in global warming which severely eroded city land).

14. *See* Mark John, *Science offers basis for national climate damage claims -study*, REUTERS (July 12, 2022), https://www.reuters.com/business/environment/science-offers-basis-national-climate-damage-

A third category of climate suits also arose around 2017. These suits were distinct from the second generation suits. They did not seek damages based on claims that companies *caused* climate change, but instead alleged that companies were liable for *failure to adapt* to climate change. Plaintiffs alleged businesses failed to consider foreseeable climate risks in infrastructure planning, engineering, or design and sought to make companies fund climate adaptation measures.[15] These climate adaptation suits are further distinct from the second generation cases because they often assert statutory and contract claims, in addition to tort claims.[16] Unlike second generation cases, they pursue both state and federal law claims.[17] Even so, state litigation may become prevalent within this third category as more states, cities, and counties develop climate action plans. Reason being, litigants may more easily state cognizable claims when causes of action arise out of specific provisions of state and local climate action plans.

Today, all three categories of litigation have failed to produce adequate relief for climate-related injustices. Instead, most cases end up with jurisdictional issues: stalling out or bouncing around courts due to their novelty and contentious nature. However, as discussed below, the U.S. Supreme Court recently denied industry defendants petitions for writ of certiorari regarding jurisdictional issues, so these second generation climate cases will be heard on their merits in state court soon.[18]

So, states must be better prepared to adjudicate these cases once they get to the merits. Climate change creates mitigation and adaptation needs across the country, especially in California, which faces flooding, erosion, fire, and extreme weather.[19] To armor against the rising tide of climate change and its accompanying flood of litigation, California should create a specialized environmental court to adjudicate state climate issues. A new court is necessary for overcoming the reluctance of generalist courts to adjudicate climate-related issues on the merits. This court would have jurisdiction over environmental issues and be carefully designed to handle complex climate issues. Importantly, a California environmental court would be better equipped to hear the technical

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claims-study-2022-07-12; NAT'L CTRS. FOR ENV'T INFO. (NCEI), ASSESSING THE U.S. CLIMATE IN 2021 (2022).

15. DEANNA MORAN & ELENA MIHALY, CONSERVATION L. FOUND., CLIMATE ADAPTATION AND LIAB.: A LEGAL PRIMER AND WORKSHOP SUMMARY REP. 6 (2018) (stating the case theory is that companies are responsible for considering and adapting in response to foreseeable climate change risks in building projects and other developments). Plaintiffs may allege that failure to adapt to climate change is violative of statute, and companies are negligent under duty of care in tort law or breach of contract. *Id.*

16. *See, e.g.*, Conservation L. Found., Inc. v. Shell Oil Prods. US, No. CV 17-396, 2020 WL 5775874 (D.R.I. Sept. 28, 2020) (suit filed by citizens with eleven causes of action, among which are allegations that Shell Oil violated Clean Water Act and Resource Conservation Recovery Act by failing to prepare a bulk storage and fuel terminal in Providence for climate change impacts).

17. *See, e.g.*, *id.*

18. *See infra* Part I.B.

19. OFF. OF THE ATT'Y GEN., CLIMATE CHANGE IMPACTS IN CAL., https://oag.ca.gov/environment/impact (last visited Apr. 3, 2023).

science and engineering principles that frequently arise in climate adaptation suits.

I. BACKGROUND: THE EVOLUTION OF THE CLIMATE SUIT

A. First Generation: Federal Law

Two decades ago, communities started suing corporations—fossil fuel producers, electric utilities, and automakers—in federal court seeking damages for the effects of climate change. Communities alleged these companies substantially caused climate change by burning fossil fuels and emitting greenhouse gasses.[20]

The first generation spanned nearly a decade, ending in 2011.[21] The suits from this era involved tort claims of nuisance, trespass, and negligence (including negligent failure to warn) against polluting corporations. Most of these were federal common law claims,[22] which courts found were displaced by federal statutes like the Clean Air Act[23] or were dismissed as non-justiciable political questions.[24] The failure of these federal suits to make it past the pleading stage effectively ended this first generation.

B. Second Generation: State Law, San Mateo, and Its Ilk

The second generation of climate change suits began roughly in 2017 and continues into the present. Unlike the first generation cases, plaintiffs' claims are based in state law. They seek compensatory and punitive damages, disgorgement of profits, and relief for alleged nuisances flowing from defendants' past pattern of conduct.[25] Distinct from first generation cases, second generation cases include a public deception angle—alleging misrepresentation and consumer-

20. *See, e.g.*, Connecticut v. Am. Elec. Power, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

21. The Court striking down plaintiff's federal nuisance claims in *AEP* in 2011 seemed to end the first generation of climate suits. This was the last climate suit of its kind filed in federal court. *See* Connecticut v. Am. Elec. Power, 564 U.S. 410, 424 (2011) (holding that CAA displaces federal common law right to seek "abatement of carbon dioxide emissions").

22. The Court has considered federal common law to be both rare and limited, a "necessary expedient" when Congress has not addressed the issue at hand. *See* Comm. for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976).

23. *See, e.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (holding that community's federal public nuisance claim against twenty-four oil and gas companies was "displaced" by the CAA).

24. *See, e.g.*, Connecticut v. Am. Elec. Power, 582 F.3d 309, 324 (2d Cir. 2009) (holding that the city and states' claims against electric utilities for contributing to ongoing public nuisance of global warming was a non-justiciable political question because it required balancing of environmental and economic interests, which was "an initial policy determination of a kind clearly for non-judicial discretion"); People v. Gen. Motors Corp. (*General Motors*), No. C06-05755, 2007 WL 2726871, 16 (N.D. Cal. Sept. 17, 2007) (holding that state's federal common law nuisance claim seeking damages for various environmental harms presented a non-justiciable political question).

25. *See* Oral Argument at 20:55, BP P.L.C. v. Mayor of Baltimore (*Baltimore*), 141 S. Ct. 1532 (2021), https://www.ca4.uscourts.gov/OAarchive/mp3/19-1644-20220125.mp3.

fraud violations. They argue that companies have long known how harmful certain practices are for the environment, yet still engaged in campaigns of public deception. Fossil fuel companies "went out of their way to becloud the emerging scientific consensus and further delay changes . . . that would in any way interfere with their multibillion-dollar profits. All while quietly readying their capital for the coming fallout."[26]

In oral argument for *Mayor & City Council of Baltimore v. BP P.L.C.*, Attorney Victor Sher said that these cases "sadly cannot address global climate change."[27] Instead, today's cases attempt to strategically avoid the challenges of the first generation of climate suits, namely preemption,[28] by avoiding federal law entirely. The theory is that state courts adjudicate common law claims regularly, so they are better suited to evaluate the narrow tort claims alleged instead of climate disruption generally, as the first generation courts did.[29]

Second generation climate change suits also benefit from prior rulings on standing and venue. Standing is less difficult to prove for second generation plaintiffs since the U.S. Supreme Court in *Massachusetts v. Environmental Protection Agency* first granted standing to climate change plaintiffs.[30] However, a defense tactic of corporations targeted by the second generation suits has been to attempt to "federalize" the state claims. Plaintiffs have coevolved to shield their state law claims from being removed to federal court.

These jurisdictional questions played out in the Ninth Circuit in *County of San Mateo v. Chevron Corporation*, a second generation case like *Honolulu.*[31] *San Mateo* was a consolidation of three materially similar complaints filed in 2017 by California coastal communities against thirty oil and gas supermajors for their alleged role in contributing to global warming and sea level rise.[32] The County of San Mateo, the County of Marin, and the City of Imperial Beach argued the corporations caused injury and damages to real property in the past, and would continue to do so in the future.[33] The Ninth Circuit held there was no federal jurisdiction—despite the specter of global climate change that hung over the case—because the municipalities' claims were rooted in state law.[34]

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26. Rhode Island v. Shell Oil Prod. Co., 35 F.4th 44, 62 (1st Cir. 2022) (holding that removal was improper for a state court action against energy companies arising from various state-law tort claims).

27. *Baltimore* Oral Argument, *supra* note 25, at 20:48.

28. *See, e.g.*, Massachusetts v. Env't Prot. Agency (*Mass. v. EPA*), 549 U.S. 497 (2007); Comer v. Murphy Oil USA, Inc., 585 F.3d 855 (5th Cir. 2009); Connecticut v. Am. Elec. Power, 564 U.S. 410 (2011); *Kivalina*, 696 F.3d 849 (9th Cir. 2012).

29. Sokol, *supra* note 11, at 1405.

30. *Mass. v. EPA*, 549 U.S. at 499 (holding that Plaintiff had standing because there was a concrete and particularized injury that was either actual or imminent, that the injury was traceable to the defendant, and that it was likely a favorable decision would redress that injury).

31. Cnty. of San Mateo v. Chevron Corp. (*San Mateo*), 32 F.4th 733, 733 (9th Cir. 2022); *see* City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101, 1101 (9th Cir. 2022).

32. *San Mateo*, 32 F.4th at 744.

33. *Id.* at 744.

34. *Id*. at 745.

The complaints included injuries and damages related to sea level rise and asserted causes of action for public and private nuisance, strict liability for failure to warn, strict liability for design defect, negligence, negligent failure to warn, and trespass.[35] The plaintiffs alleged that the energy companies were responsible for substantial factors causing the increase in global mean temperature and sea level rise, including extraction and refining of fossil fuels, introduction of fossil fuel products into the stream of commerce, promotion of fossil fuel products, concealment of known hazards associated with use of those products, and failure to pursue less hazardous available alternatives.[36] In addition, the counties and city alleged they "have already incurred, and will foreseeably continue to incur, injuries and damages because of sea level rise caused by [the energy companies'] conduct," including flooding that damages or permanently destroys real property and injuries to roads and beach access.[37] Shortly after these complaints were filed, the County and the City of Santa Cruz, and the City of Richmond filed similar complaints in California state court.[38]

Defendants removed the case to federal court, claiming the suit was broadly focused on global climate change and demanding resolution under federal law.[39] The energy companies argued multiple bases for federal jurisdiction. They argued the counties' claims (1) raised disputed and substantial federal issues; (2) were preempted by federal law; (3) were based on "federal enclaves"; (4) arose from operations on the outer Continental Shelf; (5) arose from actions taken by the energy companies pursuant to a federal officer's directions; and (6) were related to bankruptcy cases.[40] The energy companies also sought to remove the Santa Cruz and Richmond cases to federal court on the same grounds.[41]

The Ninth Circuit denied removal on all six bases, affirming the district court's remand order.[42] The court reasoned that removal statutes should be construed narrowly in favor of remand to protect the jurisdiction of state courts, because "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute [authorizing removal] has defined."[43] This decision is consistent with the decisions of four other circuits.[44]

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35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 745; *see* City of Santa Cruz v. Chevron Corp., No. 17CV03243 (Cal. Super. Ct. 2017); City of Richmond v. Chevron Corp., No. C18-00055 (Cal. Super. Ct. 2018).
39. *San Mateo*, 32 F.4th at 744.
40. *Id.*
41. *Id.*
42. *Id.* at 764.
43. *Id.* (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).
44. The First, Third, Fourth, Ninth, and Tenth Circuits heard nearly identical tort suits against carbon majors and despite defendants' efforts at removal, all circuits remanded these cases to state court. *See* Rhode Island v. Shell Oil Prod. Co., 35 F.4th 44, 50–51 (1st Cir. 2022); Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178, 238 (4th Cir. 2022); City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101, 1106–07 (9th Cir. 2022); City of Oakland v. BP PLC (Oakland), 969 F.3d 895, 906 (9th Cir.

In *Baltimore*, the U.S. Supreme Court directed the federal appeals courts, which had previously remanded all these climate cases, to review their decisions on defendants' federal officer removal arguments.[45] In 2022, four of five circuits affirmed their prior decision to remand, frustrating defendants' attempts at a federal forum.[46]

The Second Circuit in *New York* took a different stance than its sister circuits by agreeing with defendants' removal argument.[47] The court determined that the city's state-law claims were displaced by federal common law because the action occurred in one of the "few and restricted enclaves" where a federal question arises.[48] Furthermore, it reasoned that global warming is a "uniquely international problem of national concern" that touches upon issues of federalism and foreign policy, and therefore federal common law, not state law, applies.[49] According to the court, this was not "merely a local spat about the City's eroding shoreline, which will have no appreciable effect on national energy or environmental policy."[50]

But for the second generation cases alleging violations of state tort law, including *San Mateo*, these jurisdictional issues appear to be over. As of April 2023, the U.S. Supreme Court denied fossil fuel companies' petition for writ of certiorari on the jurisdictional issues of the climate cases.[51] Therefore, the several circuits' remands to state courts, after industry defendants removed to federal court, were untouched.

C. Future of Climate Suits: Climate Adaptation

The third category of climate suit focuses on companies' responsibility to adapt to climate change and reduce disaster risk. While these cases arose around the same time as *San Mateo* and second generation cases, they have distinct characteristics. Communities allege that companies have legal duties under tort law, contract law, and statutes to adapt to climate risk through engineering,

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2020); *San Mateo*, 32 F.4th at 745; City of Hoboken v. Chevron Corp., 45 F.4th 699, 706 (3d Cir. 2022); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1246 (10th Cir. 2022). The Second Circuit agreed with defendants' arguments that federal law applies. City of New York v. Chevron Corp., 993 F.3d 81, 91 (2d Cir. 2021).

45. BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1538 (2021) (holding that the Fourth Circuit erred when it concluded that its remand order was limited to determining whether the defendants properly removed the case under the federal officer removal statute).

46. *See Rhode Island*, 35 F.4th at 50–51; *Baltimore*, 31 F.4th at 238; *Honolulu*, 39 F.4th at 1106–07; *Oakland*, 969 F.3d at 906; *San Mateo*, 32 F.4th at 745; *Hoboken*, 45 F.4th at 706; *Boulder*, 25 F.4th at 1246.

47. *New York*, 993 F.3d at 91.

48. *Id.* at 89 (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

49. *Id.* at 85.

50. *Id.* at 91.

51. *See, e.g.*, Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022), *cert. denied sub nom.* Chevron Corp. v. San Mateo Cnty., California, 143 S. Ct. 1797 (2023).

building, and business practices.[52] They claim that defendants failed to act reasonably in the face of foreseeable climate risk.[53] The avenues of potential liability include statutes and rules that impose general duties on manufacturers and companies to reduce risk and take reasonable precautions.[54] Because many of these energy companies and manufacturer defendants handle toxic substances, a heightened duty may exist due to public health and safety implications.[55]

In *Conservation Law Foundation v. ExxonMobil Corp.*, plaintiffs alleged that Exxon violated a marine terminal's Clean Water Act permit by failing to consider the impacts of climate change in their marine terminal's design and construction.[56] The court held that the allegations of imminent harm were sufficient for standing and that the complaint included sufficient facts to state claims that Exxon violated the Clean Water Act permit by failing to consider weather events induced by climate change in its Storm Water Pollution Prevention Plan.[57]

These climate adaptation cases[58] are structurally different from *San Mateo* and its ilk. First, they allege liability under a broader range of mechanisms outside of tort,[59] contract, statute, and in some cases, public trust.[60] Second, they often allege violations of federal law and are therefore heard in federal court. Third, they arguably involve more technically complex principles and processes than the second generation cases—including not only a technical understanding of climate science, but also engineering principles for determining the nature of risk of a particular climate hazard, and the extent of the party's position to adapt to that risk.[61]

Despite their differences, there is an element that unites these two categories of cases: both types of actions will continue to proliferate as the effects of climate change grow starker and as governments continue to enact climate action plans. Venue disputes may plague climate adaptation cases, too.

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52. MORAN & MIHALY, *supra* note 15, at 7; *see* Conservation L. Found., Inc. v. Shell Oil Prods. US, No. CV 17-396, 2020 WL 5775874 (D.R.I. Sept. 28, 2020) (where citizens alleged that Shell violated the Clean Water Act and the Resource Conservation Recovery Act by failing to prepare a bulk storage fuel terminal in Providence, RI for climate change impacts).

53. MORAN & MIHALY, *supra* note 15, at 7.

54. *Id.* at 5.

55. *Id.*

56. Conservation L. Found. v. ExxonMobil Corp., 578 F. Supp. 3d 119 (D. Mass. 2021).

57. *Id.*

58. *See, e.g.*, Conservation L. Found. v. Shell, 2020 WL 5775874; Harrison County v. Mississippi River Commission, No. 19-cv-00986, 2021 WL 4164679 (S.D. Miss. Sept. 13, 2019) (dismissing the claims of Mississippi cities, counties, and organizations representing the Mississippi lodging and tourism and commercial fishing industries asserting that the Mississippi River Commission and the U.S. Army Corps of Engineers unlawfully failed to consider impacts to coastal communities and natural resources when they opened a spillway).

59. *See, e.g.*, MORAN & MIHALY, *supra* note 15, at 7–11.

60. *See* Watson v. U.S. Army Corp. of Engineers, No. 19-cv-00989 1, 2 (S.D. Miss. 2021) (alleging that opening of a spillway occurred without sufficient consideration of environmental impacts to the Mississippi Sound and natural resources of the public trust).

61. MORAN & MIHALY, *supra* note 15, at 5–6.

Climate change plaintiffs are still testing out new legal strategies to see what sticks. Plaintiffs seek ways to forestall defendants' attempts to remove these cases to federal court. A recently filed case, *Municipalities of Puerto Rico v. Exxon Mobil Corp.*, sidesteps state law entirely and sues supermajors under federal criminal law, specifically the Racketeer Influenced and Corrupt Organizations (RICO) Act, for dishonest business practices.[62] This suit's novel legal approach may help it avoid "a complex and protracted jurisdictional conflict"[63] like that faced by *San Mateo* and its ilk. Still, the status quo judicial system is unequipped to adjudicate *San Mateo*, *Conservation Law Foundation*, *Puerto Rico*, and similar suits on the merits.

II. PROBLEMS WITH CLIMATE CHANGE IN THE COURTS

Beyond seeking new legal approaches to hold businesses accountable for climate change, a new forum for these cases is necessary, given courts' failure to adjudicate substantive issues related to climate impacts. The threshold question is whether courts are equipped to handle climate change at all. Some argue that addressing climate change is outside of the judiciary's powers and is instead a policy issue that the legislative and executive branches must handle.[64] Some legal scholars are wary of the dangers of "stretching the bounds of judicial authority to address massive problems of massive scale and complexity."[65] Likewise, a court in another common law country declined to decide climate change tort suits, stating that "the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts."[66] Indeed, some scholars argue the remit of the courts should be limited to "incremental development and not . . . radical change," meaning climate change should be dealt with exclusively by regulation and legislation.[67]

However, it is neither prudent nor desirable for the judiciary to abdicate its power to speak on climate change issues. Strong climate change regulation and legislation may be possible in other countries,[68] but it is not politically realistic

62. Muns. of Puerto Rico v. Exxon Mobil Corp., No. 22-cv-01550, 7–9 (filed D.P.R. Nov. 22, 2022).

63. Joseph Winters, *Puerto Rican cities sue Big Oil over climate collusion*, GRIST (Dec. 1, 2022), https://grist.org/beacon/puerto-rican-cities-sue-big-oil-over-climate-collusion/.

64. *See* CHRIS WOLD ET AL., CLIMATE CHANGE IN THE COURTS: JURISDICTION AND COMMON LAW LITIGATION, CH. 17: CLIMATE CHANGE AND THE LAW, 1, 2 LEXISNEXIS (2013).

65. Weaver & Kysar, *supra* note 6, at 295.

66. Smith v. Fonterra Co-Operative Group Ltd NZCA 552 (21 Oct. 2021), Judgment, para. 16.

67. *Id.* at 15.

68. *See, e.g.*, Joe Lo, *Finland sets world's most ambitious climate target in law*, CLIMATE HOME NEWS (May 31, 2022), https://www.climatechangenews.com/2022/05/31/finland-sets-worlds-most-ambitious-climate-target-in-law/.

at the federal level in the United States.[69] Congress has failed to put forth modern environmental statutes to address climate change and executive action to address the issue lacks durability.[70] Furthermore, the U.S. Supreme Court in *West Virginia v. Environmental Protection Agency* recently constrained federal administrative agencies' authority to regulate climate.[71] Judicial action is necessary for applying and interpreting law on these issues, absent meaningful action by other federal branches.

Furthermore, the judiciary should decide legal climate issues because it has a duty to interpret and make law.[72] It is the role of the judge to develop the law by applying it to new situations that arise.[73] This involves engaging with both the procedure *and substance* of the law. Climate rulings are valuable complements to legislative and executive action, "foster[ing] needed interaction across levels of government."[74] Extended further, "the cross-cutting nature of climate change" makes this litigation a potential mechanism for "spurring and fine-tuning" governmental action.[75]

But judges are often challenged by the unwieldy shape of climate cases. Despite the frequency of environmental litigation and application of common law to environmental harms generally, climate change does not easily fit within existing statutory frameworks or tort law.[76]

A. Applying Tort Law to Catastrophe

The framework of tort law may be ill-fitting for addressing the drivers and impacts of climate change, but it seems the most viable option absent modern climate legislation.[77] Tort lawsuits are the relief valve when plaintiffs have no

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69. *See, e.g.*, Faye Shen Li Thijssen, *How partisanship hinders action on environmental policy*, THE FULCRUM (Mar. 22, 2022), https://thefulcrum.us/big-picture/Leveraging-big-ideas/environmental-gridlock.

70. Climate action on the federal level largely relies on 1970s environmental statutes like the CAA, Clean Water Act, National Environmental Policy Act, etc. The 2022 Inflation Reduction Act will primarily subsidize clean energy development but lacks the teeth to punish dirty energy producers. It is "half of the scissors." Interview with Douglas Kysar, Professor at Yale L. Sch. (Oct. 19, 2022). While President Biden's 2021 Executive Order 14008: Tackling the Climate Crisis at Home and Abroad is a protective action, this action is susceptible to being undone by future administrations.

71. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2607–08 (2022) (holding that pursuant to the "major questions doctrine," in certain extraordinary cases involving statutes that confer authority upon an administrative agency, the agency must point to clear congressional authorization for the authority it claims). This may make it more difficult for the EPA to make climate change rules. *See id.*

72. *See* PAUL STEIN, WHY JUDGES ARE ESSENTIAL TO THE RULE OF LAW AND ENVIRONMENTAL PROTECTION, JUDGES AND THE RULE OF LAW: CREATING THE LINKS: ENVIRONMENT, HUMAN RIGHTS AND POVERTY 53, 56 (Thomas Greiber ed., 2006).

73. *Id.*

74. Hari Osofsky, *The Continuing Importance of Climate Change* Litigation, WASH. & LEE SCH. OF L. 1, 4 (2010).

75. *Id.*

76. WOLD, *supra* note 64, at 1.

77. Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 LEWIS & CLARK ENV'T L. J. 1, 7 (2011).

other option; climate suits rely on state tort law out of necessity. Climate change, however, poses unique problems that existing legal frameworks, such as tort law, are not built to handle. The causes and impacts of climate change are "diffuse and disparate in origin, lagged and lattice[d] in effect" as to make traditional ways of understanding and resolving pollution disputes "buckle and shake."[78] Legal frameworks were not built to consider the "threat of unlimited harm."[79] So the catastrophes it unleashes "destabilize the concept of law."[80] Tort law requires bright lines of causation, but tracing alleged climate injuries back through complex webs—especially applied to diffuse carbon emissions—makes redressability tricky.[81] As a result, plaintiffs like those in *San Mateo* work strategically within the limited legal framework, seeking redress for climate change at a granular and individualized level.[82]

Tort law also presents significant hurdles for climate change plaintiffs. Some scholars claim that tort law gives courts "ample . . . doctrinal weaponry . . . to prevent climate change torts suits from reaching a jury."[83] *San Mateo* and its ilk are big, unconventional cases, and the immensity of climate change disasters may dissuade judges from deciding these issues.[84] In sum, the scale, technical nature, financial stakes, and ill-fitting nature of climate change in existing legal frameworks suggest that California superior courts may be reluctant to adjudicate *San Mateo* on the merits.[85]

B. Generalist Courts' Avoidance: Justice Delayed is Justice Denied

Generalist courts are reluctant to wade into these nebulous waters, taking a "duck and weave" strategy to avoid these cases, even where the legal elements of plaintiffs' grievances bear particularized relationships to defendants' wrongdoing.[86] Some courts have avoided engaging with the merits of these cases through the political question doctrine, standing, and implied preemption.[87] Notably, in *Comer v. Murphy Oil USA, Inc.*, plaintiffs who suffered property damage in Hurricane Katrina sued fossil fuel companies for allegedly contributing to global warming through emitting greenhouse gasses, which

78. *Id.*
79. Ewing & Kysar, *supra* note 5, at 352.
80. Weaver & Kysar, *supra* note 6, at 296.
81. WOLD, *supra* note 64, at 19 (stating *Mass. v. E.P.A.* petitioners' difficulty in demonstrating causation and redressability was difficult due to a "mismatch between the source of their alleged injury — catastrophic global warming — and the narrow subject matter of the Clean Air Act provision at issue").
82. *See* Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733, 744 (9th Cir. 2022).
83. Kysar, *supra* note 77, at 4 (stating that because anthropogenic greenhouse gas emissions are essentially a collective action problem "so pervasive and so complicated as to render at once both all of us and none of us responsible," courts can easily dodge adjudicating these climate change issues).
84. Weaver & Kysar, *supra* note 6, at 323.
85. *See San Mateo*, 32 F.4th at 744.
86. *See* Ewing & Kysar, *supra* note 5, at 350.
87. *Id.*

added to the force of Katrina.[88] The court set aside a decision favorable to plaintiffs after it lost a quorum when several judges recused themselves.[89] This effectively ended the proceedings without engaging with the merits of procedural obstacles or substance of tort claims.[90] Moreover, even if the case had moved forward notwithstanding the quorum issue, it is likely that the court would have found other procedural grounds on which to dismiss the case.

Courts have also avoided these cases by deeming them non-justiciable under the political question doctrine.[91] A non-justiciable political question arises when a court is faced with making a policy determination beyond the judicial scope of discretion.[92] The U.S. Supreme Court has held that the political question doctrine should be invoked sparingly—only when a court cannot exercise jurisdiction without interfering with the powers of another branch.[93] Though a narrow doctrine, state and federal courts have invoked it to dismiss common law suits involving climate change.[94] On the other hand, the U.S. Supreme Court has recognized that courts in air pollution cases must balance reducing pollution and its social costs with protecting industrial development for economic benefit.[95] Even when a court has heard a climate case on the merits, it has shied away from awarding plaintiffs the damages they seek.[96]

Generalist judges are reluctant arbiters of climate cases. Some even admit their lack of expertise in this arena. In a suit involving interstate air pollution—which is similarly complicated and substantively comparable to climate suits—Justice Harlan noted the Court's "sense of futility" in adjudicating air pollution cases, which are "complex technical and political matters."[97] He said, "this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage."[98]

In an attempt to better adjudge these complex cases, Judge William Alsup, the California district court judge presiding over *California v. BP p.l.c.*, asked

88. Comer v. Murphy Oil USA, 585 F.3d 855, 860–61 (5th Cir. 2009).

89. Comer v. Murphy Oil USA, 607 F.3d 1049, 1055 (5th Cir. 2010).

90. Ewing & Kysar, *supra* note 5, at 368.

91. WOLD, *supra* note 64, at 2.

92. *See* Baker v. Carr, 369 U.S. 186, 210 (1962) (holding that to preserve separation of powers, judges should not interfere with legislative and executive political issues). The Court set out six formulations for determining a political question, as well as a high bar for non-justiciability. *Id.* The Court said that unless one formulation is "inextricable from the case at bar, there should be no dismissal . . . on the ground of a political question's presence." *Id.*

93. WOLD, *supra* note 64, at 2.

94. *Id.*

95. Connecticut v. Am. Elec. Power, 406 F. Supp. 2d 265, 272 (S.D.N.Y 2005).

96. *See* Weaver & Kysar, *supra* note 6, at 323.

97. *See* Ohio v. Wyandotte Chemical Corp., 401 U.S. 493, 501–02 (1971) (deciding that in a public nuisance case brought by Ohio against a chemical company to abate an alleged nuisance from dumping of mercury, the Court could not exercise jurisdiction on (1) issues based in local law, and (2) complex, novel, and technical factual questions in which the U.S. Supreme Court lacked expertise).

98. *Id.* at 504.

parties for a five-hour climate science tutorial.[99] Judge Alsup was willing to dip a toe into the substantive issues that other courts have avoided. These cases are difficult, and actions like this underscore the fact that many generalist judges lack the tools, or take the initiative, to wade through them.

Furthermore, in its July 2022 memorandum and order on the *Conservation Law Foundation* Plaintiff's Motion to Compel Production of Documents, the Rhode Island District Court suggested it was overwhelmed by this "complex case" with the potential for expensive and probing discovery.[100] Despite a lengthy briefing, Judge Lincoln Almond expressed he was "left to navigate this dispute in the fog" and advocated for a vague "measured approach" to discovery.[101] At the 2002 Global Judges Symposium, judges from the high courts of more than fifty countries concluded that "deficiency in the knowledge, relevant skills and information . . . is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law."[102]

In essence, climate cases raise complex questions of law and fact, "necessitating decisions that are scientifically and technically informed, sustainable, enforceable, and effective in both the short and long term."[103] It is not merely that these cases implicate highly specialized concepts, but that generalist courts lack the requisite tools and are generally wary to adjudicate them. A new legal approach is required to meet the challenge of climate change's pervasive impacts on society, as courts are reluctant to issue rulings on the merits. Generalist courts have shown they are unwilling and unable to deliver substantive climate change jurisprudence. Courts have not forged new territory but have taken a "business as usual" approach.[104] Scholars who surveyed 201 climate cases filed through 2010 concluded that courts have managed to say very little about climate change.[105] The complicated issues of science and engineering that arise in climate cases require expertise. These cases cry out for a new system to deliver fair process and substantive adjudication.[106]

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99. Umair Irfan, *The judge in a federal climate change lawsuit wants a science tutorial*, VOX (updated Mar. 21, 2018), https://www.vox.com/energy-and-environment/2018/3/20/17129354/climate-change-lawsuit-tutorial-alsup (last visited Oct. 20, 2022); *see* California v. BP p.l.c., No. C 17-06011, 2018 WL 1064293 (N.D. Cal. Feb. 2018) (later renamed City of Oakland v. BP p.l.c).

100. Memo. and Ord. on Motion to Compel Production of Documents Responsive to Plaintiff's First Set of Requests for Production, Conservation L. Found. v. Shell, C.A. No. 17-396 1, 3 (D.R.I. July 2022).

101. *Id.*

102. UNITED NATIONS ENV'T PROGRAMME, JOHANNESBURG PRINCIPLES ON THE ROLE OF LAW AND SUSTAINABLE DEVELOPMENT 14 (2002).

103. LINDA YANTI SULISTIAWATI ET AL., UNITED NATIONS ENV'T PROGRAMME (UNEP), ENVIRONMENTAL COURTS AND TRIBUNALS: A GUIDE FOR POLICY MAKERS ii (2022).

104. David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change In the Courts: A New Jurisprudence or Business as Usual?* 64 FLA. L. REV. 15, 15 (2012).

105. *Id.*

106. *See id.*

III. SPECIALIZED ENVIRONMENTAL COURTS FOR CLIMATE CHANGE

Specialized environmental courts may be better homes for climate cases for several key reasons: expertise, consistency, accountability, innovation, and efficiency. Specialized courts differ from generalist courts in that they have limited subject-matter jurisdiction over a particular field of law. Often rulings on the same subject matter tend to promote efficiency and expertise that may not be found in a generalist court. California has several specialized courts: family, probate, collaborative justice courts (including drug, mental health, DUI, homeless, veterans, and reentry courts), juvenile, and traffic courts.[107] Superior court judges are typically appointed, assigned, or self-selected to serve on specialized courts based on experience and substantive knowledge.[108]

Specialized courts have focused dockets, and their narrow jurisdiction strengthens the whole judicial system. Family court, for example, has been praised for both unburdening generalist courts of complicated disputes, and more nimbly resolving issues where urgency is required, like in domestic violence cases.[109] California recognizes family law is "a specialized area of the law that requires dedication and study" and requires a specialized forum.[110]

Specialized courts are successful. Colorado's water courts are a case in point. This specialized judicial body exclusively oversees disputes over water rights applications within the state—an issue made increasingly contentious by climate change and a twenty-year megadrought in the region that has exacerbated scarce water resources.[111] The seven water courts—one for each watershed—have jurisdiction over disputes involving applications for water rights and enforcement matters from the Division of Water Resources.[112] This court system has unique procedures and is staffed with judges, Division of Water Resources engineers, and referees to assist applicants and consult with engineers about the merits of a water rights application.[113] Due to the complexity and frequency of water rights issues in Colorado, this court system incorporates judicial and engineering expertise and community participation in the water rights permitting process. In a 2008 public survey, respondents said the top three features of the water courts were knowledgeable judges, knowledgeable water referees, and

107. About California Courts, THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/2113.htm (last visited Oct. 21, 2022).

108. *See, e.g.*, 2022 Cal. Rules of Court, Standard 5.30(e), https://www.courts.ca.gov/cms/rules/index.cfm?title=standards&linkid=standard5_30 (last visited Oct. 21, 2022).

109. *What are the family court benefits*, LAWS (Dec. 23, 2019), https://family.laws.com/family-court/family-court-benefits (last visited Oct. 21, 2022).

110. 2022 Cal. Rules of Ct., Standard 5.30(e), *supra* note 108.

111. Colo. River Drought Conditions, Statement of Tanya Trujillo, U.S. DEP'T OF THE INTERIOR (Oct. 15, 2021), https://www.doi.gov/ocl/colorado-river-drought-conditions (last visited Nov. 12, 2022).

112. *Water Courts*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/Water/Index.cfm (last visited Oct. 21, 2022).

113. Rule 6(b), Uniform Local Rules for All State Water Court Divisions, COLO. STATE COURTS (last updated June 3, 2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Water_Court_Committee/Water%20Law%20Rules%206_2022.pdf.

fairness of outcomes.[114] Clearly, specialized courts can provide expertise, efficiency, and innovation to create fair outcomes.

Environmental courts are a type of specialized court. Environmental courts began to proliferate in 2000 and have steadily gained worldwide traction.[115] In 2021, there were 2,116 environmental courts in sixty-seven countries.[116] Committed judges or civil leaders may establish environmental courts, but there is no rigid formula—these courts are diverse in composition and function and occupy a variety of positions within their respective judicial systems.[117] Most environmental courts have exclusive jurisdiction over disputes involving environmental laws, including land use permitting and development and natural resources disputes, and may oversee enforcement and appellate decisions.[118] Environmental courts often have unique and flexible procedures that make them more responsive to the complex nature of environmental suits, and many may also be equipped to adjudicate climate suits.[119] Climate change has been effectively adjudicated in environmental courts abroad.[120]

Environmental courts are promising alternatives to traditional courts for several reasons. First, climate change litigants may benefit from trying cases before judges that, through repeated exposure to such cases, accumulate technical expertise on multifaceted scientific and legal concepts and can thus deliver more sophisticated decisions.[121] Second, because of judges' familiarity with typical environmental legal issues, environmental courts may be more judicially efficient and reduce the length of resolution for these cases.[122] Third, environmental courts are more likely to deliver consistent applications of environmental law.[123] This stability facilitates the application of new

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114. JUSTICE GREGORY J. HOBBS, JR., WATER COURT COMMITTEE OF THE COLORADO SUPREME COURT, REPORT TO THE CHIEF JUSTICE 7 (SUP. CT. OF COLO. Aug. 1, 2008), https://www.courts.state.co.us/userfiles/file/Court_Probation/Water_Courts/Final_Report_August_1_2008.pdf.

115. *See* SULISTIAWATI ET AL., *supra* note 103, at i.

116. *See id.*

117. *List of Environmental Adjudicatory Bodies and Legal Authorities*, PACE L. SCH., https://law.pace.edu/sites/default/files/IJIEA/primary_sources/List_of_Resources_from_Various_Environmental_Courts_and_Tribunals.pdf (last visited Nov 2, 2022).

118. GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, THE ACCESS INITIATIVE, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 1 (2009).

119. *See id.* at 15.

120. *See* SULISTIAWATI ET AL., *supra* note 103, at ii; *see, e.g.*, Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority NSWLEC 92 (2021) (ruling that the Environment Protection Authority had failed in its duty to ensure the protection of the environment from climate change, and further ordered the environmental watchdog to develop "environmental quality objectives, guidelines and policies to ensure environment protection" from climate change.)

121. Eeshan Chaturvedi, *Green Courts: The Way Forward?*, CORNELL POL'Y REV. 1, 3 (2017) (arguing that environmental judges, because of their expertise, can reduce the scope of cases to vital issues on which resolution of the case depends, and as a result, lawyers may feel less compelled to establish a comprehensive record, which reduces overall costs).

122. *See id.*

123. Domenico Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, 29 PACE ENV'T L. REV. 441, 445 (2012).

environmental norms and helps innovate existing environmental legal frameworks. Finally, the actions of environmental courts can galvanize governments and policymakers to prioritize the environment in decision-making.[124]

Despite the prevalence of environmental courts internationally, they are uncommon in the United States. The United States has just two state-level environmental courts in Vermont and Hawaii. The federal government considered establishing a national environmental court in the early 1970s but decided against it.[125] The idea of a national Article III environmental court arose because the court system was purportedly stretched to capacity and environmental litigation was skyrocketing.[126] Opposition to the proposed national environmental court was based on several arguments: (1) jurisdiction would be difficult to define; (2) environmental litigation involves a broad range of issues outside of the environmental sphere, so narrow expertise would be insufficient; (3) a specialized court may lack institutional strength and risk being captured by interest groups; and (4) an environmental court could spur the creation of more specialized courts and fragment the judicial system.[127]

Stagnation pervades environmental law in the United States, and environmental courts with expertise and multidisciplinary consultation are essential updates to the field. Establishing a national environmental court—which was seriously considered in the 1970s—could have staved off some of this stagnation. Additionally, relevant major environmental statutes, which were passed in the early 1970s, are ill-equipped to handle the complexities of climate change.[128] Modern conditions require narrow expertise to handle this immense issue. Like Justice Harlan said in *Ohio v. Wyandotte Chemical Corp.*, environmental issues may also be complex political matters.[129] Therefore, environmental courts should seek consultation from other experts, decisionmakers, and stakeholders regarding the "polycentric and multidisciplinary" problem of climate change.[130] An environmental court should by-design require expert opinion when cases implicate issues of law and policy outside of the environment. Finally, an environmental court would not likely fracture the judiciary, as the 1970s decisionmakers feared. As discussed above,

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124. PRING & PRING, *supra* note 118, at 15.

125. *See* George P. Smith II, *Does the Environment Need a Court?*, 57 JUDICATURE 150, 150 (1973) (citing Walter Kiechel Jr., Deputy Assistant Att'y Gen., Lands and Res. Div., U.S. Dep't of Just., Environmental Court *Vel Non*, Speech at the Conference on Environmental Law (Apr. 27, 1973), *in* 3 E.L.R. 50013 (May 1973)).

126. *Id.*

127. *Id.* at 151–52.

128. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671q (1970); Clean Water Act, 33 U.S.C. §§ 1251–1387 (1972).

129. *See* Ohio v. Wyandotte Chemical Corp., 401 U.S. 493, 501–02 (1971).

130. *See* Justice Brian J. Preston, *Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study*, 29 PACE ENV'T L. REV. 396, 396 (2012).

specialized courts exist on all levels of the judicial system and tend to function well alongside generalist courts.

With courts already overburdened and understaffed[131] and climate litigation exploding, conditions are ripe for governments to reconsider creating environmental courts. Fifty years later, it is unlikely that the "most direct resolution of present uncertainties in this area is re-education of federal and state judges . . . to 'environmental law.'"[132] Environmental law is no longer a "new commercially packaged body of law," but has evolved into a complex field.[133] While the status quo may have worked in the 1970s, the modern urgency of climate change and environmental issues necessitate a new, specialized court to aptly interpret, apply, and enforce environmental laws.

A state-level approach appears to be the most promising, due to difficulties in cultivating political action at the federal level. With Congress in gridlock and climate change as polarizing as ever, states are best suited to create new environmental courts. Furthermore, state application minimizes the jurisdiction-defining problem that vexed the 1970s decisionmakers.

A. Expertise, Consistency, Efficiency, Accountability, and Innovation

Technical expertise can improve both the quality of decision-making and efficiency.[134] Judges with expertise may be more comfortable evaluating technical expert testimony and balancing environmental harms with economic benefits.[135] In addition, these judges may be more capable of determining appropriate remedies[136] and "reduc[ing] the scope of the legal framework to the vital issues on which resolution of the case depends."[137] Indeed, the Land and Environment Court of New South Wales, Australia was created on the belief that an expert judiciary could "ably deliver consistency in decision-making, decrease delays (through its understanding of the characteristics of environmental disputes) and facilitate the development of environmental laws, policies and principles."[138]

But technical expertise alone is an insufficient basis for creating an environmental court. These courts must be able to integrate and evaluate multi-disciplinary issues. A siloed environmental court inhibits cross-pollination of legal theories, which is often a source of evolution in the law.[139] This concern may be mitigated in design. Some environmental courts have commissions of

131. *See, e.g.*, JUDGES Act, H.R. 4885, 117th Cong. (2021–2022) (Bill introduced in 2021 to add new federal judges to deal with weighty caseloads and understaffing in courts across the United States).
132. Smith II, *supra* note 125, at 153.
133. *See id.*
134. PRING & PRING, *supra* note 118 at 14.
135. *Id.*
136. Preston, *supra* note 130, at 426.
137. Chaturvedi, *supra* note 121, at 2.
138. Preston, *supra* note 130, at 403.
139. Chaturvedi, *supra* note 121, at 16.

legal and non-legal professionals that judges consult for external but related issues, allowing for more complete consideration of multi-disciplinary issues.[140]

Additionally, environmental courts may promise judicial efficiency. Cases can be heard more quickly if the judge is familiar with the questions of law and policy. If there is a pattern to the cases an environmental court hears, the court can more easily develop local rules to expedite those cases. Therefore, it is likely this court will be quicker than its generalist counterparts.

Bankruptcy court offers an example of how specialized courts can be highly efficient. In the past two decades, bankruptcy courts have resolved cases 46 percent faster than before.[141] These efficiency improvements were made through creative approaches in a local court.[142] An environmental court, too, with its narrower focus than generalist courts, may be nimbler and efficient in its protocols. Improvements in efficiency are necessary for climate cases, which, given their complexity and financial stakes they involve, are liable to have lengthy and expensive discovery regardless of venue. However, pace depends on the inclination of judges, parties involved, and the unique features of any given case.

Some argue that efficiency may be disadvantageous because arguments spend less time percolating in front of a court. If litigants believe their judge is an expert in environmental law, they may assume the judge has knowledge of the issues and be less likely to pursue innovative arguments—inside and outside of environmental law—to make their case.[143] However, given the difficulties of applying traditional legal frameworks to these issues, plaintiffs' arguments in climate suits have hardly remained static or confined to a single strategy. The particularly tense adversarial relationship between fossil fuel defendants and community plaintiffs has created "siege-like battle[s]" leading to "increasingly robust and complex litigation."[144] Lawyers have had to pursue radical legal approaches with these cases, and innovative approaches would continue to develop even within a specialized court system.

With an environmental court, generalist courts' caseloads will be reduced, which may promote greater efficiency across the judiciary. Faster processing speeds open access to justice. Litigants may place more confidence in judges with subject matter expertise, and in turn, may save time and money because they are less compelled to establish a comprehensive record in an environmental court. An environmental court opinion may save generalist appellate judges time

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140. PRING & PRING, *supra*, note 118, at 22 (citing several countries that have environmental commissions alongside law judges, including Sweden, New South Wales, and New Zealand).

141. *Bankruptcy Courts Recognized for their Efficiency*, AM. BANKR. INST. (Dec. 2004), https://www.abi.org/abi-journal/bankruptcy-courts-recognized-for-their-efficiency (last visited Oct. 21, 2022).

142. *Id.*

143. Chaturvedi, *supra* note 121, at 16.

144. Markell & Ruhl, *supra* note 104, at 15.

learning issues on review because the fact-finding court has extensive experience with the issues.

Next, environmental courts can promote environmental values through easy access to litigation.[145] Environmental courts may also highlight the field of law and thereby encourage lawyers to cultivate expertise in environmental law and climate issues. This can create innovation in the law.[146]

Establishing a new court will impress upon society that climate change must be adjudicated with special consideration. Environmental courts may make environmental issues more visible, and spur elected officials to prioritize climate change in decision-making.[147] However environmental courts are not substitutes for legislation. Rather, they give authority to environmental legislation by ensuring laws are consistently interpreted and enforced. They may also spur regulatory and private action.

Finally, environmental courts may also be agile in responding to changes in environmental law and therefore more capable of adjudicating environmental law than generalist courts. Environmental law is complex and evolving. A takeaway from the 2002 Global Judges Symposium was that the judiciary must stay "well informed of the rapidly expanding boundaries of environmental law and aware of its . . . critical role in the enhancement of the public interest in a healthy and secure environment."[148] Naturally, environmental courts will be most attuned to these frequent shifts in law.

The environmental courts in Vermont and Hawaii are useful frameworks to analyze for the benefits, challenges, and implementation of environmental courts. The two courts are also instructive for developing an environmental court (or system of courts) in California.

B. Environmental Courts in Vermont and Hawaii

1. Vermont

Vermont's Environmental Division was established in 1990 by the state legislature.[149] After a group of environmentalists was elected to state government positions in the 1980s, the environmental court was advanced by opponents who wanted a "watchdog" to protect against zealous enforcement.[150]

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145. Amirante, *supra* note 123, at 445.

146. *Id.*

147. PRING & PRING, *supra* note 118, at 14.

148. JOHANNESBURG PRINCIPLES, *supra* note 102, at 5.

149. *See* VT. STAT. ANN. tit. 4, §§ 1001–04 (2010). The Environmental Division was created as part of the Uniform Environmental Enforcement Act adopted in the 1989 legislative session. JANUARY, 2013 REPORT TO THE LEGISLATURE REGARDING ACT 98 (1989) UNIFORM ENVIRONMENTAL ENFORCEMENT ACT, VT. AGENCY OF NAT. RES. (2013), https://dec.vermont.gov/sites/dec/files/ced/documents/Annl2012.pdf.

150. George (Rock) Pring & Catherine (Kitty) Pring, *Increasing Environmental Courts and Tribunals Prompts New Global Institute*, 3 J. OF CT. INNOVATION 11, 17 (2010).

The Environmental Division is a court of record with limited subject-matter jurisdiction over environmental cases throughout the state. It has two specialized superior court judges, both appointed for six year terms by the governor.[151] The court hears roughly seventy-five to two hundred cases in a typical year.[152] The court's primary authority covers the enforcement of state environmental laws, municipal land use decision appeals, environmental permit appeals arising out of the state natural resources agency,[153] and Act 250 actions.[154] Its jurisdiction does not include environmental issues arising from state common law. For example, a recent collection of environmental health tort cases regarding drinking water contamination was not within the Environmental Division's jurisdiction; instead, the cases were heard in the state's civil division.[155] As is common in many courts, parties may request that an environmental judge be specially assigned to hear a civil division matter that requires environmental law expertise.[156] At its inception, the Vermont Environmental Division only had jurisdiction over environmental enforcement, but in 1996 it gained appellate jurisdiction over municipal land use decisions and was granted appellate jurisdiction over Act 250 decisions in 2005.[157]

The Environmental Division follows the Vermont Rules of Civil Procedure and is governed by the Vermont Rules for Environmental Court Proceedings. Environmental Division decisions are appealed directly to the Vermont Supreme Court.[158] The court may order alternative dispute resolution (ADR).

Expertise is a valuable feature of Vermont's Environmental Division, according to those within the system. Alexander J. LaRosa, a frequent litigator in the Environmental Division, believes that the court's "expertise is in the weighty procedure of land use zoning and law and not in the technical science."[159]

According to Judge Thomas Walsh, one of the two sitting judges on the Environmental Division, knowledge of environmental issues was not required

151. VT. STAT. ANN. tit. 4, § 1001(c)–(d).

152. *See Vt. Super. Ct., Env't. Div. Decisions*, JUSTIA, https://law.justia.com/cases/vermont/environmental-court (last visited Oct. 23, 2022). Note that 2020, 2021, and 2022, are outliers where caseload was smaller due to the COVID-19 pandemic. *See id.*

153. Environmental Division, VT. JUDICIARY, https://www.vermontjudiciary.org/environmental (last visited Oct. 10, 2022).

154. VT. STAT. ANN. tit. 10 § 6001; *Act 250 Program*, VT. NAT. RES. BD., https://nrb.vermont.gov/act250-program (last visited Oct. 22, 2022) (noting that Act 250 is a land use and development law that requires larger developments to compliment Vermont's "unique landscape, economy, and community needs").

155. *See* Jim Therrien, *Attorney General Files Suit Against Chemical Firms over PFAS*, BRATTLEBORO REFORMER (June 27, 2019), https://www.reformer.com/local-news/attorney-general-files-suit-against-chemical-firms-over-pfas/article_0ad618c5-2d57-5510-872f-639d8832ea01.html.

156. *See* VT. STAT. ANN. tit. 4 § 22.

157. *Id.*

158. Vt. R. Env. Ct. Proc. 1.

159. Virtual Interview with Alexander J. LaRosa (Oct. 17, 2022).

for his job, but it has been useful.[160] "Having [prior] exposure to environmental issues like wastewater management, pollution, and being familiar with a lot of federal and state regulations" helps him in his current role, but much of what he has learned he acquired through steady exposure to cases in his courtroom.[161] He recognizes that generalist judges may avoid the cases he hears "because the substance of the law is very unique."[162]

Indeed, land use and deed cases are procedurally and substantively complex, and "wading through the complexity [of these cases]" is not something you "want a collection of lay persons to do."[163] Educating a jury on these complex issues would be time consuming.[164] So, the Environmental Division uses bench trials, where the rules of evidence tend to be more relaxed. Judges are confident in their capabilities to afford evidence the appropriate weight and credibility without having to consider the impacts of evidence on a jury.[165]

In LaRosa's opinion, the Environmental Division is a benefit in a state with rigorous land use and development laws. "The volume of cases could not fit through a civil division that's already stretched. The environmental system is a . . . judicially efficient way to process a high number of cases" with complicated and specific procedures."[166] Judge Walsh believes that the Environmental Division reflects the state's priority to protect natural resources and directs citizens to "pay special attention" to environmental issues.[167]

2. Hawaii

Hawaii's environmental court was authorized by the legislature in 2014 and has exclusive jurisdiction over state environmental statutes in the Hawaii Revised Statutes Chapter 604A-2.[168] The court's jurisdiction has been a source of controversy. In 2014, the state legislature sided with developers in refusing to grant environmental courts jurisdiction over land use and development laws.[169] In 2020–21, the environmental court's caseload was mostly violations related to fishing and marine life.[170] After formation, the Hawaii Supreme Court designated twenty-two judges in Hawaii's district courts (small claims) and

160. *See* Virtual Interview with Judge Thomas Walsh (Oct.18, 2022).
161. *Id.*
162. *Id.*
163. LaRosa Interview, *supra* note 159.
164. Judge Walsh Interview, *supra* note 160.
165. *See* LaRosa Interview, *supra* note 159.
166. *Id.*
167. Judge Walsh Interview, *supra* note 160.
168. 2014 Haw. Sess. Laws 1-13.
169. GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, ENVIRONMENTAL COURTS AND TRIBUNALS: A GUIDE FOR POLICY MAKERS 30–31 (2016).
170. ANNUAL REPORT FOR 2021, HAW. ACCESS TO JUST. COMM'N 2, 4, 70 (2021), https://www.courts.state.hi.us/wp-content/uploads/2022/02/020122_scmf-11-432_HIAccessToJusticeCmsn_CRPT.pdf.

circuit courts (larger claims) as environmental judges.[171] The court does not involve expert commissions or provide ADR. Critics call the court "a commendable, but minimalist, first step in improving environmental justice, simply to require judges to devote time each month to environmental cases . . . and it does not yet reflect . . . the sophistication of the Vermont Environmental Court."[172]

3. Jurisdiction Takeaways

California's environmental court system should build on frameworks already active in Vermont and Hawaii, with broader jurisdiction to include both state environmental laws and common law actions involving climate change. Neither Vermont's nor Hawaii's environmental courts have jurisdiction over state common law cases involving climate change.[173] As Hawaii's environmental court shows, it can be politically difficult to start an environmental court with broad jurisdiction.[174] However, conditions are different in California. While Vermont and Hawaii are small states with correspondingly small judiciaries, [175] California has the political leadership, citizenry, and judicial and financial resources that make feasible an environmental court with broad jurisdiction over climate cases.

Limiting this new court's jurisdiction solely to climate change issues would be too restrictive to have maximum utility. The rationales for adjudicating climate change issues in these courts[176] also applies to environmental disputes at large. California environmental courts should have jurisdiction over both environmental law and common law cases involving climate change because both categories are similarly technical and would benefit from specialized judges, as evidenced by the Vermont and Hawaii courts.[177] This grouping also ensures efficient use of judicial resources.

171. *Id.*

172. PRING & PRING, *supra* note 169, at 31.

173. *See* City & Cnty. of Honolulu v. Sunoco LP (*Honolulu*), No. 1CCV-20-0000380, 1, 8 (Haw. Cir. Ct. 2020). It was not intended that Judge Crabtree, an environmental judge, would preside over *Honolulu*. *See id.* The case was originally assigned to Judge Cataldo, of the civil division, and then temporarily re-assigned to Judge Crabtree when Judge Cataldo was assigned to a criminal calendar. *See id.* The ruling was not a decision of Hawaii's Environmental Court, precisely because it does not have jurisdictional authority over state tort claims. *See id.*

174. *See* PRING & PRING, *supra* note 169, at 50.

175. In October 2022, Vermont's population is roughly 645,000 people and Hawaii's population is 1.42 million. *Vermont: 2020 Census*, U.S. CENSUS BUREAU (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/vermont-population-change-between-census-decade.html; *Hawaii: 2020 Census*, U.S. CENSUS BUREAU (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/hawaii-population-change-between-census-decade.html.

176. *See infra* Part III.A.

177. *See infra* Part III.B.1 and 2.

IV. A CALIFORNIA ENVIRONMENTAL COURT

California, with its ample judicial resources and political concordance, is the best laboratory for a climate-prepared environmental court. California's court system must evolve commensurate with the pace of the legislature and agencies' progressive climate plans. As the largest state judiciary,[178] the largest state economy,[179] and nearly the fourth largest economy in the world,[180] California has the budget, and judicial resources—including trained California Environmental Quality Act (CEQA) judges—to support a system of environmental courts better suited to adjudicate climate change for several reasons.

First, a California environmental court to adjudicate climate change is politically feasible. There is public demand for enhanced environmental accountability as Californians generally support state climate action.[181] Fifty-four percent of Californians say it is important that the state is a world leader in fighting climate change,[182] most Californians support state efforts to address global warming and would support such action even if costly,[183] and California has led the nation in progressive climate laws and policies.[184] State agencies and the legislature are committed to fighting climate change in innovative ways.[185]

Second, California has an extensive workforce of environmentally trained judges and lawyers to populate the new court, including the state court judges trained to adjudicate CEQA cases. Third, traditional courts have provided no assurance that they can adequately decide climate suits on the merits. Given the

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178. *See* About California Courts, *supra* note 107.

179. The economy of California is the largest in the United States, with a $3.36 trillion gross state product as of 2021. *Gross Domestic Product (GDP) of the United States in 2021, by State*, STATISTA (Sep. 30, 2022), https://www.statista.com/statistics/248023/us-gross-domestic-product-gdp-by-state/.

180. Matthew A. Winkler, *California Poised to Overtake Germany as World's No. 4 Economy*, BLOOMBERG (Oct. 24, 2022), https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy.

181. *See* MARK BALDASSARE ET AL., PUB. POL'Y INST. OF CAL. (PPIC), CALIFORNIANS' VIEWS ON CLIMATE CHANGE (2018).

182. *Id.*

183. *Id.*

184. *See e.g.*, Global Warming Solutions Act of 2006 (AB 32), CAL. HEALTH & SAFETY CODE §§ 38500–38599 (2006) (setting an absolute statewide limit on greenhouse gas emissions and becoming landmark legislation); Senate Bill 32, CAL. HEALTH & SAFETY CODE § 38566 (2016) (raising the state's goal for greenhouse gas emissions to 40 percent below 1990 levels by 2030); Resolution 22-12, CAL. AIR. RES. BD. (CARB) (2022) (banning gas cars by 2035).

185. *See e.g.*, *Climate Change Partnerships*, CAL. ENERGY COMM'N (CEC), energy.ca.gov /about/campaigns/international-cooperation/climate-change-partnerships (last visited Oct. 22, 2022) (explaining that nearly a dozen California state agencies are members of an "intergovernmental climate action team"); *Gavin Newsom Signs Sweeping Climate Measures, Ushering in New Era of World-Leading Climate Action*, OFF. OF GOV. GAVIN NEWSOM (Sep. 16, 2022), https://www.gov.ca.gov/2022/09/16/governor-newsom-signs-sweeping-climate-measures-ushering-in-new-era-of-world-leading-climate-action/#:~:text=Establishes%20a%20setback%20distance%20of,3%2C200%20feet%20of%20these%20facilities (explaining that California passed a series of progressive climate measures in fall 2022, including SB 1137, which established a setback distance of 3,200 feet between any new oil wells and homes, schools, parks, or businesses).

rapid pace of climate change, a new venue should be designed to handle related litigation. California will continue to be hit hard by the devastating effects of climate change. Litigation like *San Mateo* will proliferate in California, so the state needs a dedicated court to receive this influx and prevent a backlog in the system.

A. A Growing Body of Litigation

California will continue to experience climate change in full force. Rising seas and strengthening storms erode coastline and threaten coastal communities, which include 75 percent of California's population and an ocean economy of $44 billion per year.[186] Wildfire conditions will continue to destroy communities and ecosystems.[187] Persistent drought exacerbates the state's water crisis.[188] Increasingly high temperatures create deadly conditions for communities in the San Joaquin Valley.[189] And statewide blackouts from weather-related events, such as extreme heat, inflict considerable damage.[190] Global trends suggest that the six counties to bring lawsuits, consolidated in *San Mateo*, will be followed by other communities experiencing climate change injuries and seeking redress through litigation.[191] Disputes will also arise over whether and how companies adapt to climate change.

To best adjudicate these critical issues, the features of a California environmental court must be carefully designed. Special consideration should be given to predicting the multi-disciplinary nature and pervasive impacts of a ruling. The following Part evaluates a non-exhaustive list of principles for a California environmental court or court system.

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186. *See Sea-Level Rise*, OCEAN PROT. COUNCIL, https://www.opc.ca.gov/opc-climate-change-program/sea-level-rise-2/ (last visited Nov. 12, 2022).

187. *See Wildfires & Climate Change*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/wildfires-climate-change (last visited Nov. 12, 2022).

188. *See Current drought conditions*, STATE OF CAL. DROUGHT ACTION, https://drought.ca.gov/current-drought-conditions/ (last visited Nov. 12, 2022).

189. *See Overview of Projected Change in the California Central Valley*, CAL. CLIMATE COMMONS, http://climate.calcommons.org/article/central-valley-change (last visited Nov. 12, 2022).

190. *See* Anne C. Mulkern, *California Faces Summer Blackouts from Climate Extremes*, SCI. AM. (May 23, 2022), https://www.scientificamerican.com/article/california-faces-summer-blackouts-from-climate-extremes/.

191. *See* UNITED NATIONS ENVIRONMENTAL PROGRAMME, GLOBAL CLIMATE LITIGATION REPORT: 2020 STATUS REVIEW 2 (Jan. 26, 2021), https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y). Between 2016–2020, the number of climate change litigation cases surged, standing at 1,550 in thirty-eight countries. *Id.* As of July 2020, some 1,200 of these cases were filed in the United States. *Id.* The United States leads globally with roughly three-quarters of all climate change cases filed since 1986. *See* Ben Clapp & Casey J. Snyder, *Climate Change Litigation Trends 2015-2020*, 36 NAT. RES. & ENV'T. 145 (2021). Of approximately forty ongoing climate change lawsuits against carbon-intensive companies worldwide, thirty-three are in the United States. *Id.* The years this report was written, 2019 and 2020, saw the most climate change cases filed in back-to-back years. *Id.*

B. Features and Mechanisms

1. Formation

There are several pathways of legal authority for establishing a California environmental court. Both Vermont's and Hawaii's environmental courts were established by legislation.[192] California could follow a similar approach and establish a superior court subdivision dedicated to environmental matters through the legislature. In addition, any presiding judge could theoretically create a new environmental division, including through a subdivision of the superior courts. Subject-matter-specific divisions already exist in California superior courts—criminal and civil are at the top level, followed by specialized departments, like family, complex civil, and probate divisions.[193] Any presiding judge of a metropolitan county could create a new environmental division. While this is a piecemeal, one-environmental-court-at-a-time approach, it could still effectively establish a system of environmental courts.

A second pathway to creating a California environmental court is by constitutional amendment. California's courts of record are created and defined by Article 6 of the California Constitution.[194] Article 6, Section 1 vests judicial power in three state courts: supreme, appeal, and superior.[195] Creating a new court would require an amendment to this provision of the state constitution, either through a legislature-proposed or citizen-initiated ballot measure.

Finally, the Judicial Council could pursue an incremental introduction to environmental courts by authorizing a pilot project located in one of the state's larger counties, like the Pretrial Pilot Program authorized in the Budget Act of 2019.[196] This incremental approach may be the cheapest and fastest to implement, even if it is less impactful than a statewide operation. This could be a variant on the existing complex civil[197] or asbestos/CEQA divisions.[198] This formation mechanism is beneficial because it offers an incremental, experimental approach to environmental courts by creating a pilot in a centralized location. However, a pilot environmental court may require narrower jurisdiction and limited caseload due to low court capacity.

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192. *See* VT. STAT. ANN. tit. 4 § 1001; HAW. REV. STAT. § 604A.

193. *California Judicial Branch Fact Sheet*, JUD. COUNCIL OF CAL. (Aug. 2022), https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf.

194. Cal. Const. art. VI §§ 1–3.

195. *Id.*

196. *See* PRETRIAL PILOT PROGRAM: FINAL REPORT TO THE LEGISLATURE, JUD. COUNCIL OF CAL., (July 21, 2023) (stating that in the Budget Act of 2019, the California Legislature allocated $75 million to the Judicial Council to implement and evaluate two-year pilot projects in trial courts related to pretrial decision-making, and that the pretrial pilot program had the goal of increasing safe and efficient release of individuals booked into jail).

197. *Complex Civil Litigation*, SUPER. CT. OF CAL., CNTY. OF SANTA CLARA, https://www.scscourt.org/court_divisions/civil/complex/civil_complex.shtml (last visited Oct. 23, 2022).

198. *See Asbestos/CEQA Department*, SUPER. CT. OF CAL., CNTY. OF SAN FRANCISCO, https://sf.courts.ca.gov/divisions/civil-division/asbestos-ceqa-department (last visited Sep. 17, 2023).

Formation through constitutional amendment, described above, would likely be the most durable of the three approaches for empowering a long-lasting system of environmental courts, though it would be distinct from California's other specialized courts, which exist as Superior Court subdivisions.

2. Jurisdiction and Caseload

California environmental courts should have authority to hear issues arising out of state environmental statutes—including disputes involving land use and development, water rights and pollution, air pollution, natural resources, wildlife, as well as climate change.[199] To hear cases like *San Mateo*, the California environmental court would need jurisdiction over filings which "directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts," including cases in common law involving climate change.[200]

It is desirable to give California environmental courts broader jurisdiction than the those in Vermont and Hawaii for several reasons. First, California's plentiful judicial resources would allow it to allocate judges and court staff—including trained CEQA judges—to a system of environmental courts. Therefore, California environmental courts will likely have the capacity to oversee a broader range of cases than its smaller state counterparts. Second, California has a demonstrated commitment to innovation in environmental matters. An environmental court with jurisdiction over climate change in common law would be a novel approach in the United States. A court with jurisdiction over *both* environmental laws and climate issues may inspire similarly positioned states to follow suit.

3. Level, Judicial Appointments, and Appeals

Like in Vermont and Hawaii, California's environmental courts will benefit from expert trial-level judges, given the fact-intensive nature of environmental cases and their tendency to include highly technical expert testimony. Following the organization of Colorado's water courts, California's environmental courts should comprise a system where each court is responsive to the varied and unique environmental concerns of a given California community. If formed through constitutional amendment or superior court subdivision, an ideal approach would be to create six courts, placing each environmental court in the largest metropolitan superior court in each of the six appellate districts in the state.[201] In

199. An environmental court could have exclusive jurisdiction over judicial proceedings involving, but not limited to the California Environmental Quality Act, California Endangered Species Act, the Water Code, the California Air Resources Act, the California Coastal Act, and sections of the Public Resources Code and Health and Safety Code (including Proposition 65).

200. Markell & Ruhl, *supra* note 104, at 27.

201. Six state environmental courts might exist across the state. Environmental courts could be organized in superior courts in San Francisco for the First District, Los Angeles for the Second District,

a geographically and demographically diverse state, a system of California environmental courts can ensure accessibility, consistent application of environmental laws, and coordinated functioning throughout the state.

Judges may serve on the environmental court by appointment or assignment. If the environmental courts are formed through a constitutional amendment, the environmental judges may be appointed by the governor, like in Vermont.[202] If the environmental court is formed as a subdivision of the superior court, environmental judges must be assigned by superior court judges[203] or state supreme court judges.[204] These environmental court judges should also be permitted to hear non-environmental cases in superior courts on occasion when necessary, similar to courts in Vermont and Hawaii. The method by which judges are placed on these new courts is less important than their training and the expertise they develop during their tenure on the bench.

A California environmental court system should build upon the existing CEQA division framework by allowing existing CEQA judges to evolve into environmental court judges. California already requires the Superior Court of each county with a population of more than 200,000 to appoint one or more judges to specialize in CEQA cases.[205] The California legislature recognized the benefits of "develop[ing] expertise in . . . land use and environmental laws, so that those judges will be available to hear, and quickly resolve, actions."[206] Expertise is also desirable for adjudicating the state's other complex environmental laws.

Given the technical nature of the cases, climate torts cases may be better as bench trials because of the judge's expertise, the considerable amount of time it would take to educate the jury, and the relaxed rules of evidence, which could benefit cases requiring a lot of technical expert testimony. On the other hand, jury trials for common law climate cases would allow the public inside the courtrooms where pressing issues are decided. A jury can also check biased judges.[207]

Sacramento for the Third District, San Diego for the Fourth District, Fresno for the Fifth District, and San Jose for the Sixth District.

202. *See* VT. STAT. ANN. tit. 4 § 1001(c) (proscribing that a Vermont environmental judge must be "nominated, appointed, confirmed, paid, and retained, and shall receive all benefits in the manner of a superior judge").

203. *See* California Family Court Standard 5.30(a) (stating that in California, presiding judge of the superior court should assign judges to the family court).

204. *See* HAW. REV. STAT. § 604A(1)(b) (stating that the chief justice of the Hawaii Supreme Court designates environmental judges); Water Courts, *supra* note 112 (noting that Colorado water court judges are trial level judges appointed by the Supreme Court with jurisdiction over the determination of water matters within the division).

205. Cal. Pub. Res. Code § 21167.1.

206. *Id.* § 21167.1(b).

207. *See* Ted Hamilton, *Putting the Climate Necessity Defense in Front of Juries*, EARTH ISLAND J. (July 17, 2017), https://www.earthisland.org/journal/index.php/articles/entry/climate_necessity_defense_front_juries.

Finally, like the Vermont Environmental Division and the Colorado water courts, California environmental court decisions should be directly appealed to the California Supreme Court. This is because environmental cases tend to involve a high degree of fact and law intertwined, which could present some challenges due to the asymmetric knowledge between the specialized and generalist courts. Direct appeal would preserve the fact-finding court's expertise and remove a layer of review on the legal issues.

4. Procedures and Oversight

California environmental courts should use the California Rules of Civil Procedure with additional procedures to ensure accessibility and equity. For example, the Vermont Environmental Division has special procedures to assist *pro se* litigants.[208] California environmental court rules should also aim for expeditious proceedings and provide opportunities for public participation. Community members directly impacted by environmental issues should be given opportunities to engage with the legal process, as is standard in the Colorado water courts.[209] Furthermore, a California environmental court system may create rules regarding disclosure of expert testimony and discovery that are tailored to the highly technical nature of environmental law.

Judicial training programs should be required to develop and maintain competency in judges' specialized knowledge of environmental laws and technical evidence.[210] California should consider creating a duty for judges to discuss climate cases with an advisory committee due to the complex and cross-cutting nature of climate change litigation, especially where rulings can have enormous impacts on our society and economy. This group may include technical advisors and California Supreme Court judges to assist in fact-finding and provide legal guidance and oversight. A committee can ensure that decision-making is consistent across the environmental courts. Such guidance may prove especially useful while the environmental court is in its nascency. However, committee members should be carefully selected to avoid opportunities for capture of the court by special interest groups.

A California environmental court committee may function like the Colorado Water Court Committee, which oversees periodic judicial training, "identif[ies] rule and/or statutory change to achieve efficiencies in water court cases while still protecting quality outcomes; and ensure[s] the highest level of

208. VT. STAT. ANN. tit. 4 §1001(g)(1).

209. James S. Witwer & P. Andrew Jones, *Statutory and Rule Changes to Water Court Practice*, 38 NAT. RES. & ENV'T L.–WATER L., 53, 53 (June 2009) (detailing how the Colorado Supreme Court Chief Justice directed the Water Courts' oversight committee to establish an agenda and process that allowed persons who have any interest in water-related matters to provide additional issues, information, and proposals to the committee).

210. *See* Judge Meredith Wright, *The Vermont Environmental Court*, 3 J. OF CT. INNOVATION 201, 203 (2010).

competence in water court participants."[211] One member of the Colorado Supreme Court is the designated liaison to the Colorado water courts.[212] A committee overseen by one or several California Supreme Court justices could secure consistency, fairness, and efficiency across California's environmental courts. A committee would be useful for providing guidance to individual environmental court judges overseeing high stakes climate cases, especially if bench trials are the default. Committees can also establish a methodology for measuring court performance and productivity.

5. Dispute Resolution and Remedies

A system of California environmental courts should be designed to remedy complex environmental issues both through judicial resolution and ADR. One major benefit of specialized courts is the expeditious resolution of environmental cases. California environmental courts can achieve efficiency both through judges with expertise—due to their familiarity with typical patterns of facts and applicable laws in cases—and through careful case management practices. California environmental judges should be empowered to order mediation, consistent with most courts. Environmental courts may be more efficient than generalist courts if they frequently use and recommend ADR.[213] Starting in 2009, the Vermont Environmental Division ordered mediation for 36 percent of active disputes.[214] Nearly 79 percent of those disputes resolved through mediation.[215] In other words, 28 percent of the active disputes that otherwise would have required judicial action were resolved through mediation. [216]

ADR may be particularly productive in California environmental courts, as it has been in the Vermont Environmental Division, because it allows litigants to air grievances that are outside of the scope of the case. This method of dispute resolution may be used more in run-of-the-mill environmental law cases but would probably be unrealistic and disfavored in divisive climate cases involving Big Oil.

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211. *Water Court Committee*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=27 (last visited Oct. 23, 2022).

212. *Id.*

213. *See* Hon. Justice Brian J. Preston, *The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse – Part II*, 19 AUSTRALASIAN DISP. RESOL. J. 144, 144 (2008) (stating how in New South Wales, Australia, the Land and Environment Court has a model "multidoor courthouse," which uses different adjudication pathways, ADR, and social services)*;* Justice Nicola Pain et al., *Restorative Justice for Environmental Crime: An Antipodean Experience*, INTL. UNION FOR CONSERVATION OF NATURE ACAD. OF ENV'T L. COLLOQUIUM, 1, 15 (June 2016) (detailing how in New Zealand's Environment Court some parties are required to participate in a "restorative justice" process, in which the community that has been harmed assists in designing the sentences for environmental violators).

214. Judge Meredith Wright, *supra* note 210, at 213.

215. *Id.*

216. *Id.*

C. Impacts on the Judicial System

Environmental courts are beneficial to the judicial system for their long-term practical utility and symbolic value. First, they can most effectively apply and enforce California environmental laws. Delegating environmental cases to these courts may also unburden generalist courts of these complex cases. Second, environmental courts may precipitate public involvement in these issues and further signal to citizens the state's commitment to climate action in the climate change era.

Opponents argue that specialized environmental courts could fragment the judicial system, complicate the system's functioning, and undermine the power of the courts.[217] This has not been true in Vermont, where the Environmental Division has functioned harmoniously within the state judiciary for thirty-two years. On the contrary, environmental courts will streamline the functioning of the judicial system by reducing the generalist courts' caseloads and providing environmental litigants with a new venue for accountability. Furthermore, cooperation between the generalist and environmental courts is possible, just as existing specialized courts in California work well as superior court subdivisions. Colorado's stand-alone water courts are also exemplars of cooperation between generalist and specialized courts.

Environmental courts provide an edge over generalist courts in adjudicating the "variety of complex, multidisciplinary issues constitut[ing] the crux of environment-related cases, including climate change, economic changes, political shifts and resource insecurities."[218] With proper training, oversight, and advisory features, a California environmental court system will be durable for confronting the swell of climate litigation the state faces as disasters grow more frequent.

Technical expertise is important in the third category of climate cases—climate adaptation. Instead of seeking liability for *causing* climate change, like in *San Mateo*, these cases allege liability for defendants' *failure to adapt to* climate change.[219] The scope of liability in these cases is broad, given that mere knowledge of climate impacts could be used to establish a legal duty.[220] Engineers could also be found liable if they knew or should have known about risks resulting from climate change but designed a structure based on outdated rainfall, floodplain, or storm surge maps.[221] If future adaptation cases proceed under exclusively state law, they would be best adjudicated by a California environmental court.

Because these cases are weedier than second generation suits, judicial subject-matter expertise will impact the fairness of an outcome. For example, an

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217. PRING & PRING, *supra* note 169, at 15.
218. SULISTIAWATI ET AL., *supra* note 103, at 62.
219. *See, e.g.*, Conservation L. Found. v. Shell, C.A. No. 17-396 1, 1 (D.R.I. 2020).
220. MORAN & MIHALY, *supra* note 15, at 8.
221. *Id.*

environmental court judge may be more inclined to engage with the technical concepts of green structural engineering in *Conservation Law Foundation v. Shell* and allow an appropriate level of discovery.[222]

Climate adaptation cases will likely continue to be popular as states issue climate action plans[223] and litigants have a relatively low bar for bringing a valid claim. Where these cases are based on state law claims, a California environmental court is best suited oversee them.[224]

CONCLUSION

Justice delayed is justice denied. Generalist courts have been unequipped and reluctant arbiters of justice for litigants in *San Mateo* and the cases that preceded it. Climate change "is being channeled in the courts through a set of stale environmental laws and old common law doctrines."[225] When judges maneuver away from the merits of climate change issues, law becomes an inoperable tool to solve these disputes. Such a "super-wicked" problem—of enormous scope and complexity[226]—demands a commensurately creative solution.

With the U.S. Supreme Court's 2023 denial of certiorari on these cases, *San Mateo* will be heard in California state court. Its sister cases, including *Honolulu*, *Rhode Island*, *Boulder*, and *Baltimore* will be heard in their respective state courts. It remains to be seen how state court will adjudicate *San Mateo* on the merits. However, for future climate tort cases of this ilk, a system of California environmental courts is both a practical and innovative solution. It builds upon successful frameworks in Vermont and Hawaii and would be the first state environmental court with jurisdiction over climate change in common law. California is the best laboratory for a climate-prepared environmental court, given its robust judicial resources and political will. Climate disasters are striking harder and more frequently. California will continue to be hit hard by climate change. Global consensus is coalescing behind putting the costs of climate change on polluters.[227] Litigation against supermajors will punctuate California

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222. *See, e.g.*, Conservation L. Found. v. Shell, C.A. No. 17-396 1, 1 (D.R.I. 2020).

223. *See U.S. State Climate Action Plans*, CEN. FOR CLIMATE & ENERGY SOL. (Aug. 2022), https://www.c2es.org/document/climate-action-plans/ (indicating that as of 2022, thirty-three U.S. states have, or are developing/updating, climate action plans).

224. Questions beyond the scope of this Note remain: (1) Will litigants' strategies change in a specialized environmental court? More specifically, will the climate change suit playbook—that has evolved from federal to state suits, from broad to narrow claims—be adapted for a new venue? (2) Will defendants still try to remove these cases to a federal court?

225. Markell & Ruhl, *supra* note 104, at 76.

226. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009).

227. William James et al., *COP27: Polluters must pay for climate change, poor nations tell rich*, MSN, https://www.msn.com/en-us/news/world/cop27-polluters-must-pay-for-climate-change-poor-nations-tell-rich/ar-AA13RHs5 (last visited Dec. 15, 2022) (indicating that at COP-27, leaders called for polluters to pay for developing nations to mitigate and adapt to climate disasters).

court dockets well into the future, especially the ascendant issue of climate adaptation. A system of California environmental courts with technical expertise, narrow focus, and specific design would be best equipped to fairly adjudicate this growing body of high stakes climate litigation.