State Climate Suits: The Case for a Limited Remedy

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In 2017, the cities of Oakland and San Francisco filed suit in California state court against BP, Shell, Chevron, ConocoPhillips, and ExxonMobil. The complaint asserted a claim of public nuisance and alleged that the energy company defendants had created or contributed to climate change by producing and promoting fossil fuel products for decades. Plaintiffs requested an abatement fund to construct infrastructure to adapt to climate harms such as sea level rise. In the short period since Oakland v. BP *was filed, over a dozen cities, counties, and states have brought climate suits against energy companies in state courts. The* Oakland *plaintiffs have filed what this Note refers to as a "limited remedy case" that includes a single public nuisance claim and seeks abatement funding. Many other local governments have brought "expansive remedy cases" that include a number of claims and seek damages, abatement funding, and other remedies.*

This Note considers these two different models of state law climate suits in the context of past and current climate litigation as well as litigation involving other widespread societal harms. It traces the development of this group of state law suits, referred to by scholars as a "second wave," from an unsuccessful "first wave" of climate suits brought in federal court. This first wave ended when federal courts held that the Clean Air Act displaced federal common law suits for climate harms, without determining whether state common law suits were preempted. Energy company defendants have attempted to replicate these first wave outcomes by removing the second wave cases to federal courts. In a trio of cases in 2020, federal appeals courts allowed three second wave suits, including Oakland*, to remain in state courts. The Supreme Court, however, recently decided one of those cases by allowing broader federal court review, potentially*

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jeopardizing plaintiffs' cases. The case will return to the Fourth Circuit Court of Appeals for review of the defendants' other grounds for removal. While the Supreme Court case was pending and with the Fourth Circuit case on the horizon, local governments have continued filing climate suits as part of a broader spectrum of climate litigation.

During the same period that second wave suits have been litigated, other groups of plaintiffs have filed constitutional cases such as Juliana v. United States *against governments and corporate law cases against energy companies. This Note contrasts the goals of local government plaintiffs with those of these other plaintiffs and discusses the traditional role of local governments as protectors of resident health and welfare. Additionally, it analyzes potential drawbacks of suits pursuing a number of remedies, including judicial hesitancy and difficulty of proving additional tort law elements. Finally, the Note discusses past cases that have successfully used public nuisance to address widespread environmental and public health harms from products such as lead paint and opioids. The Note argues that local governments should pursue limited remedy cases as they align with the traditional role of local governments, avoid the pitfalls of expansive remedy cases, and are modeled after successful cases that have obtained abatement funding for widespread harms.*

INTRODUCTION

Charleston, South Carolina faces a stark choice: retreat or adapt. Like other coastal cities, Charleston must quickly determine how to respond to climate change, which threatens to engulf its streets with sea level rise-induced flooding. Communities around the world will face climate effects, but cities like Charleston are already contending with the consequences of a warming planet. The 350-year-old city has experienced a five-fold increase in flooding in the last decade, along with hurricanes and storms that inundate low-lying areas.[1] Climate change exacerbates these weather events and will perpetually threaten the city as the sea rises.

In anticipation of those harms, the Army Corps of Engineers proposed a $1.75 billion adaptation program that includes an eight-mile-long sea wall, pump stations, and floodproofing measures.[2] If Congress were to approve the project, the state and city would need to contribute roughly $600 million in funding.[3] As the city confronts strained budgets in responding to flooding and the COVID-19 pandemic, it may struggle to fund the project even if local leaders prefer funding the project to retreating from rising seas.[4] Against this backdrop, in September 2020, Charleston filed one of the latest climate suits, *Charleston v. Brabham Oil*, seeking compensatory and punitive damages, equitable relief, and disgorgement

1. *See* Matthew Cappucci, *The Week Started with Major Coastal Flooding in Charleston. The Weather Was Beautiful.,* WASH. POST (Sept. 22, 2020, 4:20 PM), https://www.washingtonpost.com/weather/2020/09/22/charleston-flooding-king-tide/; *see also* Chloe Johnson, *Charleston Faces an Existential Choice Wall off the Rising Ocean or Retreat to High Ground*, POST & COURIER (May 5, 2021), https://www.postandcourier.com/rising-waters/charleston-faces-an-existential-choice-wall-off-the-rising-ocean-or-retreat-to-high-ground/article_f581b3a4-8edd-11ea-b5fa-ef8ba31c0a65.html.

2. U.S. ARMY CORPS OF ENG'RS, CHARLESTON PENINSULA, SOUTH CAROLINA: A COASTAL FLOOD RISK MANAGEMENT STUDY DRAFT FEASIBILITY REPORT/ENVIRONMENTAL ASSESSMENT 25, 26 (2020), *available at* https://www.sac.usace.army.mil/Portals/43/docs/civilworks/peninsulastudy/Draft%20Feasibility%20Report_EA.pdf.

3. *Id.* at 26.

4. *With Coronavirus Relief Stalled in Washington, City Budget Committee Works to Close $18M Shortfall*, CHARLESTON, SC (Nov. 12, 2020), https://www.charleston-sc.gov/CivicAlerts.aspx?AID=903.

of profits from companies that produced and promoted fossil fuels whose emissions cause climate change.[5]

In filing that suit, Charleston joined a growing roster of cities and states suing energy companies in state court for causing climate harms. Across different cases, this wave of state climate litigation seeks adaptation funding for programs like the Charleston sea wall. Some plaintiffs, like the City of Oakland, have filed cases that seek only abatement funding.[6] Many other cities, like Charleston, have filed cases seeking more expansive remedies such as compensatory and punitive damages. Those plaintiffs' complaints suggest they aim to achieve litigation goals such as forcing energy companies to pay for failing to warn the public about climate change despite knowing about its impending harms.[7]

Federal circuit courts recently sent three of these state climate cases, *City of Oakland v. BP*, *County of San Mateo v. Chevron*, and *City of Baltimore v. BP*, back to state court after defendants attempted to transfer them to federal court.[8] The remanded cases differ in the number of remedies that they seek in state court, with *San Mateo* and *Baltimore* plaintiffs pursuing several remedies while *Oakland* plaintiffs seek a limited remedy of abatement funding.[9]

This Note argues that cities and states that choose to file climate suits against energy companies should pursue what the Note refers to as "limited remedy cases." Limited remedy cases have two components: first, they primarily request an abatement remedy, often to address specific climate change impacts such as sea level rise, and second, they primarily or entirely rely on a public nuisance claim, rather than a broader array of state tort claims. Limited remedy cases contrast with what this Note refers to as "expansive remedy cases," which include a number of claims under state common law and statutes for a variety of remedies beyond abatement.

This Note argues that climate plaintiffs suing in state courts should file limited remedy cases for three reasons: (1) other climate litigants have sought and are currently seeking to achieve broader litigation goals that overlap with expansive remedy case goals, (2) abatement funding aligns with states' and cities' responsibility to protect residents, and (3) state courts may be more comfortable issuing limited remedies related to public nuisance claims rather

5. Complaint at 111, City of Charleston v. Brabham Oil Co., Inc., No. 2020-CP-10 (S.C. Ct. C.P. 9th Jud. Cir. Sept. 9, 2020) [hereinafter Charleston Complaint] (discussing industry greenwashing efforts).

6. *See* City of Oakland v. BP P.L.C., 969 F.3d 895, 902 (9th Cir. 2020).

7. *See, e.g.,* Charleston Complaint, *supra* note 5, at 113–14.

8. *See generally id.*; Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020), *vacated and remanded*, No. 20-884, 2021 WL 2044534 (U.S. 2021) (mem.); Mayor & City Council of Balt. v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021).

9. Abatement remedies require defendants causing a nuisance to end or lessen the severity of the nuisance. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 746 (2003). In the climate context, local government plaintiffs seek abatement awards that would fund climate adaptation measures, such as sea walls, that would reduce the effects of climate harms on communities and infrastructure. *See infra* Subpart I.C.

than expansive remedies for previously unrecognized climate harms in connection with other tort law claims.

Cities and states should pursue abatement funding—which will allow them to fulfill their role of protecting public health and welfare—rather than seeking broader climate action. Though some state courts have issued large abatement remedies in other public health and environmental cases,[10] they have yet to order remedies in climate cases. In deciding expansive remedy cases, state courts may be reluctant to issue unprecedented damages and other remedies for climate harms. Plaintiffs in limited remedy cases, meanwhile, rely on evolving public nuisance case law that state courts have applied to other widespread societal harms. Even a single granted climate remedy would establish useful precedent for local government plaintiffs who will be affected by climate change and would constitute at least one success after years of unsuccessful climate litigation.

Rather than assessing whether the judiciary should step in to address climate change in the face of the political branches' inaction, this Note acknowledges state cases' momentum and analyzes what remedies are best suited to accomplish litigants' goals. Scholars have diverged on whether courts should rule on climate cases.[11] They have also discussed the merits of state and federal jurisdiction for climate cases.[12] While this Note discusses the potential viability of state law cases in state or federal courts, it grounds that discussion in the current wave of state, county, and city-led cases and the ability of plaintiffs to obtain remedies.

Some legal scholars assert that plaintiffs should use state tort law "to the fullest extent possible," arguing that this strategy is better suited than federal common law to address climate harms.[13] Other observers argue that courts should not address climate change, insisting that it is a question for the political branches.[14] Still others rebut arguments against using state common law to confront climate change by asserting that it has a place in addressing climate change alongside federal policy.[15] Because federal rulings have largely rendered

10. *See infra* Subpart IV.B (discussing abatement remedies issued by state courts in litigation over widespread harms caused by lead paint and opioids).

11. *Compare* Cinnamon Piñon Carlarne, *The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis*, *in* DEBATING CLIMATE LAW (Benoit Mayer & Alexander Zahar eds., forthcoming 2021) (arguing that courts should address climate change and that judicial action on climate would fit with past action on broad social and environmental issues), *with* Guy Dwyer, *Climate Litigation The Red Herring among Tools to Mitigate the Effects of Climate Change*, *in* DEBATING CLIMATE LAW (Benoit Mayer & Alexander Zahar eds., forthcoming 2021) (asserting that climate litigation is poorly suited to addressing climate change because litigation is slow and remedies are difficult to implement).

12. *See, e.g.*, Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1387 (2020) (arguing that "state courts, which have the authority to create and develop state tort law and regularly decide tort claims, are usually more adept than federal courts at adjudicating those claims").

13. *See id.* at 1439.

14. *See* City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1029 (N D. Cal. 2018) ("[T]here are sound reasons why regulation of the worldwide problem of global warming should be determined by our political branches, not by our judiciary.").

15. Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49, 61 (2018) (discussing the argument that climate change is solely

state courts the only viable venue for common law climate cases against energy companies, this Note addresses the different cases being filed in state court.[16] With these cases pending, this Note analyzes plaintiffs' choice of remedies and argues that future local government plaintiffs should pursue limited remedy cases.

I. CLIMATE LITIGATION BACKGROUND

In the United States, scholars often distinguish between "first wave" cases brought in federal court and the current "second wave" of state court cases, which includes *Oakland, Baltimore*, *San Mateo*, and others.[17] This second wave of cases seeks a broader array of remedies than the first, which unsuccessfully sought injunctive relief and damages in federal courts.

A. First Wave

Litigants have attempted to use courts to address climate change for over a decade. Even before the Supreme Court held that the Environmental Protection Agency (EPA) had authority to regulate greenhouse gas (GHG) emissions in the 2007 case *Massachusetts v. EPA*, plaintiffs were bringing tort claims against energy industry defendants in federal courts.[18] Plaintiffs in this first wave of climate cases sued GHG emitters, such as utilities in *American Electric Power v. Connecticut* (*AEP*), filed in 2004, and fossil fuel producers in *Native Village of Kivalina v. ExxonMobil Corp.*, filed in 2008.[19] Both *AEP* and *Kivalina* plaintiffs asserted that defendants violated the federal common law of public nuisance, while the *Kivalina* plaintiffs also asserted a civil conspiracy claim.[20] The cases differed, however, in the remedies they sought.

The *AEP* plaintiffs requested injunctive relief that would have required electric utility and power company defendants, including American Electric Power and Xcel Energy, to cap their carbon emissions and reduce them

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a question of federal policy and concluding that "[t]hough clever in its confusions, our analysis concludes that the argument against the existence of state common law should not, in the end, prevail").

16. *See* Sokol, *supra* note 12, at 1405 (noting that past federal court decisions applied only to federal common law claims and that the current wave of state tort cases arose after those federal decisions).

17. *See id.* at 1387 (asserting that second wave cases are stronger than first wave cases because they are supported by mounting scientific evidence and continuing revelations of fossil fuel companies' disinformation campaigns); *see also* Carlarne, *supra* note 11, at 3 (framing the first wave as a "response to political inaction" on climate change).

18. Am. Elec. Power Co., Inc. v. Conn., 564 U.S. 410 (2011) (first public nuisance claim for climate change harms filed in 2004 by several states and the City of New York).

19. *See id.* at 410; Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854 (9th Cir. 2012); *see also* Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009) (Mississippi landowners brought state law claims in federal court against fossil fuel and energy companies for climate harms including sea level rise. A Fifth Circuit majority ultimately dismissed the case); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (public nuisance action against automakers for creating and contributing to climate change).

20. *Am. Elec. Power Co.*, 564 U.S. at 410; *Native Vill. of Kivalina*, 696 F.3d at 849.

annually.[21] *AEP* differed from *Kivalina* in that it sought a remedy to directly limit defendants' future emissions. The Supreme Court determined that Congress had designated EPA, rather than federal judges, to be the "primary regulator of greenhouse gas emissions" and rejected *AEP* plaintiffs' request for relief.[22] The Native Village of Kivalina, located in Alaska, meanwhile, facing the "impending destruction of its land," sought damages for harms caused by past emissions.[23] Given Kivalina's location on an island imminently threatened by rising seas, the Army Corps of Engineers concluded that Kivalina would need to be relocated; plaintiffs therefore sought $400 million to pay for that relocation.[24] Neither set of plaintiffs recovered on their federal common law claims.[25]

Plaintiffs were unsuccessful as the first wave ended when courts in *AEP* and *Kivalina* held that the Clean Air Act displaced *federal* common law suits for damages and injunctive relief.[26] Further, the Supreme Court was especially hesitant in *AEP* about suits seeking injunctive remedies aimed at forcing entities to reduce emissions. Specifically, the *AEP* plaintiffs had estimated that such suits could potentially be mounted against thousands of large GHG emitters, a situation that the Court determined "[could] not be reconciled with the decision-making scheme Congress enacted" around GHG emissions.[27] But these decisions did not resolve whether federal law preempted *state* common law claims.[28] Current second wave cases are pursuing a variety of remedies, but plaintiffs have explicitly noted that the cases do not seek to limit energy company defendants' emissions.[29]

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21. *Am. Elec. Power Co.*, 564 U.S. at 419.

22. *Id.* at 428–29.

23. *Native Vill. of Kivalina*, 696 F.3d at 853.

24. Complaint for Damages and Demand for Jury Trial at ¶ 1, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2012) (No. C 08-1138).

25. *Am. Elec. Power Co.*, 564 U.S. at 429 (holding that the Clean Air Act displaced federal common law, barring recovery on those claims); *Native Vill. of Kivalina*, 696 F.3d at 858 (applying the U.S. Supreme Court's holding that the Clean Air Act displaces federal common law actions for injunctions to hold that it also displaces those actions that seek damages, leaving plaintiffs unable to recover on those claims).

26. *Am. Elec. Power Co.*, 564 U.S. at 424 ("We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants."); *Native Vill. of Kivalina*, 696 F.3d at 858 ("the Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief.").

27. *Am. Elec. Power Co.,* 564 U.S. at 429.

28. *Id.* (holding that "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand").

29. *See* Complaint for Public Nuisance at 5, California v. BP P.L.C., RG17875889 (Cal. Super. Ct. Alameda Cnty. Sept. 19, 2017) ("The People do not seek to impose liability on Defendants for their direct emissions of greenhouse gases and do not seek to restrain Defendants from engaging in their business operations.") [hereinafter Oakland Complaint].

B. Second Wave

After federal courts in first wave cases did not rule on whether federal law preempted state common law claims, dozens of cities, counties, and states brought claims under state tort law and state unfair trade practices acts in a second wave of climate litigation.[30] Nearly all second wave cases have been filed in state courts with the exception of a case brought by New York City in federal court.[31] As of this writing, new second wave cases have been filed in Hawai'i state court by the County of Maui in October 2020 as well as by Annapolis and Anne Arundel County in Maryland state court in February and April 2021.[32] Nearly all of the second wave plaintiffs are coastal municipalities and states, with the exception of Boulder, Colorado, which is also seeking a number of remedies related to climate adaptation to confront inland climate harms such as drought and wildfires.[33] Boulder's case suggests that the second wave may not be confined solely to coastal cities but could grow to include a number of inland cities.

Unlike first wave plaintiffs, who sued emitters like electric utilities, second wave plaintiffs have sued large fossil fuel producers, here referred to as "energy companies," as defendants and have targeted defendants' production and promotion of fossil fuels instead of their emissions.[34] This framing of energy company defendants as promoters and producers of climate change-causing fossil fuels, rather than as emitters themselves, is central to the shared theory of second wave plaintiffs' cases and to the remedies requested.

While the remedies sought across cases vary, each is motivated by a unifying theory: Energy companies profited from promoting and producing fossil fuels while deceiving the public about climate change and externalizing climate costs.[35] Cities and states are suffering and will suffer climate effects that

30. Karen Savage, *Maui Oil Companies Should Pay for Climate Damages They Caused*, CLIMATE DOCKET (Oct. 12, 2020), https://www.climatedocket.com/2020/10/12/maui-climate-damages-lawsuit/.

31. Complaint, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18 cv 182) (New York City filed its lawsuit in federal court based on diversity jurisdiction with claims of public and private nuisance similar to other second wave cases that allege wrongful production and promotion of fossil fuels).

32. Complaint, Cnty. of Maui v. Sunoco LP, No. 2CCV-20-0000283 (Haw. Cir. Ct. Oct. 12, 2020) [hereinafter Maui Complaint]; Complaint, City of Annapolis v. BP P.L.C., C-02-CV-21-000250 (Md. Cir. Ct. Feb. 22, 2021); Complaint, Anne Arundel Cnty. v. BP P.L.C., 1:21-cv-01323 (Md. Cir. Ct. Apr. 26, 2021).

33. Complaint and Jury Demand, Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc., 2018CV030349, at 103–05 (Colo. Dist. Ct. Apr. 17, 2018).

34. The Ninth Circuit referred to defendants as "energy companies" in both *San Mateo* and *Oakland*. *See* City of Oakland v. BP P.L.C., 969 F.3d 895, 901 (9th Cir. 2020); Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586, 593 (9th Cir. 2020); *see also* Sokol, *supra* note 12, at 1433 ("The second-wave climate claims allege that the defendants' marketing of fossil fuel products was tortious—not, like the first-wave climate tort cases or all other federal nuisance claims in [U.S.] Supreme Court cases, the defendants' emissions or other types of pollutant discharge.").

35. *See* Charleston Complaint, *supra* note 5, at 1 (asserting that energy companies "have known for nearly half a century that unrestricted production and use of fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate," but "have promoted and profited from a massive

will only become more severe.[36] The local governments' cases differ in which remedies they seek and which aims they prioritize through their choice of remedy.[37]

Plaintiffs' complaints suggest a number of goals related to changing energy company conduct and obtaining funding. First, cities request funding for abatement programs and compensation for climate effects that they are suffering and will suffer.[38] Second, state climate case plaintiffs seek to force energy companies to internalize climate costs that the companies have externalized onto society.[39] Third, plaintiffs position these state suits to further expose energy company disinformation campaigns and deceptive practices.[40] Fourth, plaintiffs aim to deter future fossil fuel production through damages, public scrutiny, and negative signals to stakeholders including investors and insurance companies.[41] Fifth, plaintiffs may build leverage to reach larger settlements with energy companies that could require companies to abandon fossil fuel extraction, dramatically increase renewable energy investment, and stop greenwashing advertisements.[42]

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increase in the extraction, production, and consumption of" fossil fuels); *see also* Maui Complaint, *supra* note 32, at 1 (using the same cited language from the Charleston complaint).

36. *See* Charleston Complaint, *supra* note 5, at 2 ("City of Charleston, its departments and agencies, along with the City's residents, infrastructure, and natural resources, suffer the consequences of Defendants' campaign of deception."); *see also* Oakland Complaint, *supra* note 29, at 33 ("Defendants have caused or contributed to accelerated sea level rise from global wanning, which has and will continue to injure public property and land located in the City of Oakland.").

37. Oakland Complaint, *supra* note 29, at 34 (requesting an abatement fund remedy as well as attorney's fees and other costs); Maui Complaint, *supra* note 32, at 134 (requesting compensatory damages, equitable relief including abatement, punitive damages, disgorgement of profits, and costs of the suit).

38. *City of Oakland*, 969 F.3d at 902 (observing that "[c]ities seek an order of abatement requiring the Energy Companies to fund a 'climate change adaptation program'").

39. Lin & Burger, *supra* note 15, at 54 (noting that the *County of Santa Cruz v. Chevron* plaintiffs "seek to internalize the costs associated with other impacts from climate change, including drought and wildfire").

40. *See* Sokol, *supra* note 12, at 1387 (noting that second wave plaintiffs are using state tort law, which the author believes is "better suited than federal common law for claims based on documentation of companies' disinformation campaigns designed to suppress and obfuscate scientific evidence of harm caused by their products"); *see also* Daniel Farber, *The Climate Change Lawsuits Against Big Oil, Explained*, THE APPEAL (Jan. 29, 2021), https://theappeal.org/the-lab/explainers/the-climate-change-lawsuits-against-big-oil-explained/ (suggesting that energy companies' public image will be harmed by climate lawsuits, whether through additional exposure of disinformation through the discovery process or by bringing "more attention to the role of the industry in causing climate change").

41. *See* Cinnamon P. Carlarne, *U.S. Climate Change Law A Decade of Flux and an Uncertain Future*, 69 AM. U. L. REV. 387, 448 (2019) (arguing that "[c]arbon majors will be forced to be more transparent and accountable not only to their shareholders, investors, and employees, but also to the general public"); *see also* Lisa Benjamin, *The Road to Paris Runs through Delaware Climate Litigation and Directors' Duties*, 2020 UTAH L. REV. 313, 318 (2020) (asserting that "[e]ven if these renewed litigation efforts experience setbacks or are ultimately unsuccessful, corporations are likely to be the subject of increased regulatory and public scrutiny as a result").

42. *See generally* Reeva Dua, *Driving on Empty The Fate of Fossil Fuel Companies in Climate Nuisance Litigation*, 4 COLUM. HUM. RTS. L. REV. ONLINE 115 (2019) (arguing that plaintiffs should pursue a master settlement agreement with energy companies rather than pursue damages claims that

State climate cases also build on each other by using the same studies and evidence. Plaintiffs provide evidence that energy companies expanded fossil fuel extraction, promotion, and production after World War II despite awareness of the detrimental effects of this expansion.[43] Nearly three-quarters of all industrial carbon dioxide has been emitted since the 1960s—plaintiffs and scholars refer to this period as the "Great Acceleration."[44]

The complaints contain extensive evidence of energy companies' knowledge of climate change during the Great Acceleration period as well as of deceptive practices the companies used to introduce doubt into public climate discourse, which likely delayed regulatory action.[45] Plaintiffs also present evidence showing that defendants' internal studies predicted climate change effects and accurately forecasted GHG levels and climate harms decades before they occurred.[46] Further, the complaints contain evidence that energy companies continue to mislead the public through greenwashing campaigns that present defendants as "sustainable energy companies."[47] Plaintiffs also uniformly cite climate science that shows plaintiffs will suffer climate harms.[48] Sophisticated climate science allows plaintiffs to predict local climate harms and assign shares of emissions to individual entities.[49]

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could bankrupt energy companies and have adverse outcomes such as pushing further fossil fuel extraction to satisfy debt obligations).

43. *See, e.g.*, Maui Complaint, *supra* note 32, at 2–6 (citing Pierre Friedlingstein et al., *Global Carbon Budget 2019*, 11 EARTH SYS. SCI. DATA 1783 (2019); Will Steffen et al., *The Trajectory of the Anthropocene The Great Acceleration*, 2 ANTHROPOCENE REV. 81 (2015); R. J. Andres et al., *A Synthesis of Carbon Dioxide Emissions from Fossil-Fuel Combustion*, 9 BIOGEOSCIENCES 1845 (2012)) (explaining that "[t]he rate at which Defendants have extracted and sold fossil fuel products has exploded since the Second World War" despite defendants' awareness of the effects of GHG pollution); Charleston Complaint, *supra* note 5, at 3 (citing the same studies and outlining the same timeline of emissions); Complaint at 2, Cnty. of San Mateo v. Chevron Corp., No. 17CIV03222 (Cal. Super. Ct. July 17, 2017) [hereinafter San Mateo Complaint] (citing some of the same studies with a similar timeline).

44. Complaint at 4, State v. BP Am., Inc., No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020) [hereinafter Delaware Complaint] (citing a study on the time period in question and the Great Acceleration).

45. Oakland Complaint, *supra* note 29, at 22–27 (asserting that the American Petroleum Institute (API) had evidence in 1968 that GHGs would lead to climate change and that industry "spent millions of dollars on campaigns to discredit climate science").

46. Maui Complaint, *supra* note 30, at 48 (discussing Stanford Research Institute report delivered to API in 1969 predicting CO_2 "concentrations would reach 370 parts per million ("ppm") by 2000 – almost exactly what it turned out to be (369 ppm)").

47. *Id.* at 100 (alleging that "[d]efendants continue to expand fossil fuel production and typically do not even include non-fossil energy systems in their key performance indicators or reported annual production statistics"); *see also* Charleston Complaint, *supra* note 5, at 111.

48. Oakland Complaint, *supra* note 29, at 28–32 (outlining predicted temperature and sea level rise threatening Oakland infrastructure); *see also* Geetanjali Ganguly et al., *If at First You Don't Succeed Suing Corporations for Climate Change*, 83 OXFORD J. LEGAL STUD. 841, 852 (2018) (discussing plaintiffs' use of "up-to-date sea-level-rise science and vulnerability evaluations" to model future damages in cities like Oakland or Imperial Beach).

49. *See* Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATIC CHANGE 229, 229–30 (2014) (analyzing oil, natural gas, coal, and cement producers' contributions to climate change; noting individual emissions from large fossil fuel companies).

The second wave narrative also includes other actors that were aware of climate change, introduced products that exacerbated it, and misled the public regarding its severity. Some plaintiffs, such as the County of Maui, have identified fossil fuel trade associations such as the American Petroleum Institute (API) as relevant non-parties to their suits. The County of Maui argues that groups like API "conducted early climate research, distributed their findings to Defendants, and engaged in a long-term course of conduct to misrepresent, omit, and conceal the dangers of Defendants' fossil fuel products."[50] Charleston and the County of Maui list other organizations such as the Global Climate Coalition that resisted GHG reduction efforts and that included automakers as members.[51] Second wave plaintiffs, however, have chosen not to name trade associations or automakers as defendants, even though recent investigations show some automakers similarly knew about climate change decades ago.[52]

Future plaintiffs in state climate lawsuits may consider adding additional defendants, such as automakers or trade associations, or continue naming them as relevant non-parties to strengthen their argument that industry actors deceived the public while promoting products that would make climate change worse. Claims against energy companies, however, may be more viable than those against automakers because climate science research has quantified emissions attributable to energy companies and their disinformation campaigns are more extensively documented.[53] Just as first and second wave plaintiffs have differed in choice of defendants, future plaintiffs may also sue additional entities if courts issue decisions that expand legal avenues to address climate change.

C. Second Wave Cases: Expansive and Limited Remedy Case Comparison

Most state climate cases include multiple causes of action and seek remedies beyond abatement funding for climate adaptation efforts. *Baltimore*, *Charleston*, *San Mateo*, and *State of Delaware v. BP*[54] are all expansive remedy cases that seek multiple remedies. These cases generally have two categories of claims: (1) state tort law claims such as public nuisance, failure to warn, and trespass; and (2) statutory claims under unfair trade practices laws.[55]

Expansive remedy plaintiffs request a wide variety of remedies. *Charleston* plaintiffs request compensatory damages, treble damages, punitive damages,

50. Maui Complaint, *supra* note 32, at 35.

51. *Id.* at 39.

52. Maxine Joselow, *Exclusive GM, Ford Knew about Climate Change 50 Years Ago*, E&E NEWS (Oct. 26, 2020), https://www.eenews.net/stories/1063717035.

53. *See* Heede, *supra* note 49, at 237 (calculating global GHG emissions attributable to individual energy companies from the industrial revolution to the year 2010).

54. *See* Delaware Complaint, *supra* note 44, at 217.

55. *See* San Mateo Complaint, *supra* note 43 (*San Mateo* plaintiffs only assert state common law claims and not statutory claims); *see also* Charleston Complaint, *supra* note 5, at 133 (asserting violations of South Carolina Unfair Trade Practices Act along with state tort claims).

disgorgement of profits, and abatement remedies.[56] *Delaware* plaintiffs, meanwhile, request compensatory damages, statutory damages for state fraud act violations, punitive damages, and other remedies the court deems appropriate.[57] Expansive remedy cases typify the second wave trend of iterating on earlier cases as later expansive remedy cases often add new causes of action and requested remedies.

While most second wave plaintiffs are pursuing expansive remedy cases, others have filed limited remedy cases that primarily seek abatement funding on a claim of public nuisance.[58] While the potential estimated damages for these cases are lower than for expansive remedy cases, the requested abatement remedies would still help address climate harms. Accordingly, limited remedy cases are not limited in the amount of abatement funding requested but in that they primarily, or only, seek abatement funding rather than other remedies.

Among the cases recently remanded to state courts, *Oakland* is the clearest example of a limited remedy case. The *Oakland* case is limited along several dimensions in that it: (1) has one claim, (2) is brought only against the five largest fossil fuel supermajors (BP p.l.c., Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation, and Royal Dutch Shell plc), and (3) seeks only abatement funding to respond to sea level rise.[59] As this Note argues, the more modest, delimited strategy in the *Oakland* case is consistent with the role of cities, may assuage judicial discomfort with issuing more drastic remedies such as injunctions or punitive damages, and is in line with precedent favorable to plaintiffs seeking abatement remedies.[60] But the future viability of second wave cases, whether limited or expansive, has been cast in further doubt by the recent Supreme Court *Baltimore* decision and will be further clarified by the Fourth Circuit's future decision in the case.[61]

D. Removal of Second Wave Cases and Supreme Court Review of Baltimore

As the second wave has gained momentum, energy company defendants have attempted to replicate first wave defendants' successes in federal court.[62] If federal law governs, then the Clean Air Act may also bar the state tort claims at

56. Charleston Complaint, *supra* note 5, at 136 (requesting treble damages under the Unfair Trade Practices Act, S.C. Code § 39-5-140 (2021)).

57. Delaware Complaint, *supra* note 44, at 217.

58. *See, e.g.*, Complaint, King Cnty. v. BP P.L.C., No. 18-2-11859 (Wash. Super. Ct. Oct. 17, 2018) (King County, Washington case seeking abatement funding).

59. *See* Oakland Complaint, *supra* note 29, at 4–5 (explicitly limiting the remedy requested to "funding an abatement program to build sea walls and other infrastructure that are urgently needed to protect human safety and public and private property in Oakland").

60. *See infra* Parts II–IV.

61. Mayor & City Council of Balt. v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021).

62. Sokol, *supra* note 12, at 1417 (noting that defendants in the second wave "seek[] to 'federalize' the state law claims, and to then reassert the largely successful arguments that resulted in dismissals of first wave cases").

issue in these cases, which would prevent plaintiffs from obtaining the remedies they seek. Defendants relied on the removal process to move the *Oakland*, *Baltimore*, and *San Mateo* cases to federal court, where energy companies presumably believe they would receive more favorable rulings.[63]

All three groups of defendants invoked a number of grounds for removal including federal question and federal officer removal. *San Mateo* defendants, for example, asserted that they acted under federal officers based on contracts to supply fuel to the federal government.[64] As in *San Mateo*, the *Baltimore* defendants sought removal based on contractual relationships with the federal government, including military supply agreements and leases.[65] Ultimately, however, each circuit court rejected the defendants' grounds for removal and remanded the cases to state court.[66]

In *Oakland*, the Ninth Circuit noted that a small number of state law claims arise under federal law and held that removal was improper as: (1) the nuisance claim failed to raise a substantial federal question and (2) the state claims were not preempted by the Clean Air Act.[67] The Ninth Circuit in *San Mateo* held that defendants failed to show that federal officer removal was proper because the contracts showed "arm's length" transactions, rather than close relationships.[68] Further, the court dismissed the other removal grounds and found that appellate review under 28 U.S.C. § 1447(d) was limited.[69] Similarly, the Fourth Circuit determined its review in *Baltimore* to be limited under 28 U.S.C. § 1447(d).[70] Accordingly, the court dismissed the appeal for lack of jurisdiction with respect to all removal bases except federal officer removal and then held the contractual relationships to be insufficient to justify that ground.[71]

These remand orders appeared to encourage new second wave plaintiffs, with Charleston and Delaware filing suit soon after the orders. *Baltimore* defendants petitioned the Supreme Court for a writ of certiorari, which the Court

63. Under 28 U.S.C. § 1441, defendants may remove cases brought in state court when federal courts have original jurisdiction. Relevant for the second wave cases, defendants may seek removal under 28 U.S.C. § 1442 in cases that target federal officers or persons acting under federal officers. 28 U.S.C. § 1442 (2018).

64. Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586, 600 (9th Cir. 2020), *vacated and remanded*, No. 20-884, 2021 WL 2044534 (U.S. 2021) (mem.).

65. *See Baltimore*, 952 F.3d at 458, 463.

66. *Id.* at 471 (holding that federal officer removal was not warranted and that the court of appeals lacked jurisdiction to review other removal grounds); *San Mateo*, 960 F.3d at 603 (also holding that federal officer removal was not warranted and that the court lacked jurisdiction to review other removal grounds); City of Oakland v. BP P.L.C., 969 F.3d 895 (9th Cir. 2020) (holding that cities' state law claims did not raise a federal question and remanding the case to district court to determine an alternative basis for jurisdiction and to state court if no other basis found).

67. *Oakland*, 969 F.3d at 906–08.

68. *San Mateo*, 960 F.3d at 601.

69. *Id.* at 598.

70. *Baltimore*, 952 F.3d at 459.

71. *Id.* at 468.

granted in October 2020.[72] The Court granted review to determine the scope of federal appellate court review of remand decisions. At issue was whether 28 U.S.C. § 1447(d) permits federal appellate courts to review any issue in a district court's order remanding cases to state court or whether the review is limited to the grounds invoked in the district court decision.[73] Prior to the case, observers opined that if the Supreme Court determined that the cases can be removed to federal court and if appellate courts have broad review of removal issues, then the second wave may meet the same end as the first.[74]

The Supreme Court issued its ruling in the *Baltimore* case on May 17, 2021, holding by a vote of seven to one that the Fourth Circuit erred in holding that appellate review of removal grounds was limited under 28 U.S.C. § 1447(d) to federal officer removal under § 1442.[75] Instead, the Court held that federal appeals courts can review each removal ground and, stopping short of reviewing those grounds, remanded the case to the Fourth Circuit to review other grounds invoked by the energy company defendants.[76] Justice Sotomayor dissented, arguing that the Court's decision would allow defendants to "sidestep § 1447(d)'s bar on appellate review by shoehorning a § 1442 or § 1443 argument into their case for removal."[77] As the case moves to the Fourth Circuit, the majority's decision will require the appellate court to review the district court's entire remand order. The Supreme Court's opinion, then, provides another opportunity for defendants to keep their case in federal court and avoid proceedings in state court. The decision in that Fourth Circuit case will determine whether Baltimore may continue its case in state court and also whether the growing roster of second wave cases may meet the same fate in federal court as the first wave.

Plaintiffs' ability to litigate the merits of their cases and obtain the requested remedies will depend on whether the cases may continue in state court. If federal courts have jurisdiction over the cases, they are likely to find the cases preempted under the first wave precedent. The U.S. Supreme Court's decision in *Baltimore*, therefore, was favorable for the energy company defendants but did not entirely

72. BP P.L.C. v. Mayor & City Council of Balt., 141 S. Ct. 1532 (2021) (mem.). The Supreme Court's decision expands appeals court review of removal grounds, but the Fourth Circuit's future decision in the case will ultimately determine whether the *Baltimore* case can proceed in state court. This Note addresses plaintiffs' aims and choice of remedies as cities, counties, and states continue to file cases and make choices about how to proceed with the litigation in light of the recent Supreme Court decision and pending Fourth Circuit review.

73. *Id.*

74. *See* Lin & Burger, *supra* note 15, at 61 (arguing that "[i]f all climate change public nuisance cases are federal, then it is possible that all of them could be dismissed out of hand, due to the [U.S.] Supreme Court's holding in AEP that the Clean Air Act displaced federal common lawsuits against GHG emitters").

75. BP P.L.C. v. Mayor & City Council of Balt., 141 S. Ct. at 1543 ("The Fourth Circuit erred in holding that it was powerless to consider all of the defendants' grounds for removal under § 1447(d)."). Justice Alito did not take part in the case.

76. *Id.*

77. *Id.* (Sotomayor, J., dissenting).

eliminate the possibility that these cases will be able to continue in state courts. Prior to the decision, legal academics believed that a broad ruling was unlikely, although they were uncertain about the outcome.[78] After the decision, some legal scholars noted that the opinion focused on narrow procedural issues and opined that the decision was not a complete victory for the defendants as the Court did not itself undertake review of the removal grounds or issue an opinion that was overtly skeptical of the climate cases.[79]

The Fourth Circuit decision will determine whether *Baltimore* will be heard in state or federal court, where defendants hope the cases will be dismissed just like the first wave cases.[80] If these cases are allowed to continue in state court, however, plaintiffs will have a better chance to present evidence of energy companies' past conduct, argue for remedies, and build precedent for future state and local government plaintiffs who will be affected by climate change in the years to come.[81] While the Supreme Court's *Baltimore* decision was a victory for energy company defendants, it did not confine second wave cases to the fate of the first wave. The Fourth Circuit review of the removal grounds will likely determine the future of a second wave of climate cases that continues to grow alongside other climate litigation efforts.

II. STATE COURT CLIMATE PLAINTIFFS' ROLE WITHIN BROADER SPECTRUM OF CLIMATE LITIGANTS

The second wave of climate litigation cases sits within a broad spectrum of climate litigation occurring in the United States and throughout the world.[82] This

78. *See* John Schwartz, *Supreme Court Case Could Limit Future Lawsuits against Fossil Fuel Industry*, N.Y. TIMES (Jan. 19, 2021), https://www.nytimes.com/2021/01/19/climate/supreme-court-baltimore-climate-change.html (discussing UC Berkeley School of Law Dean Erwin Chemerinsky's doubt that "the industry's tactic to pry open a broader appeal would work" and noting UCLA Professor Sean Hecht as agreeing such a decision was unlikely, but adding, "you never really know what the justices will do").

79. John Schwartz, *Supreme Court Gives Big Oil a Win in Climate Fight with Cities*, N.Y. TIMES (May 17, 2021), https://www.nytimes.com/2021/05/17/climate/supreme-court-baltimore-fossil-fuels.html ("While the companies won the day, 'it was a bullet dodged' for Baltimore, said Patrick Parenteau, an expert on environmental law at Vermont Law School. 'The oil companies were looking for a kill shot,' he said, in which the justices would vote to throw the Baltimore case and the rest out, or at least use language in the decision that would send a message to the lower court that the cases would get a skeptical hearing at the Supreme Court level.").

80. Rebecca Hersher, *Supreme Court Considers Baltimore Suit against Oil Companies over Climate Change*, NPR (Jan. 19, 2021), https://www.npr.org/2021/01/19/956005206/supreme-court-considers-baltimore-suit-against-oil-companies (quoting an attorney for energy company defendants discussing the first wave cases: "[w]e're hopeful that the court will look at this the exact same way it did the previous cases").

81. *See* Sokol, *supra* note 12, at 1388 (arguing that "as a matter of both law and policy" that removal and preemption should not be allowed and that "path-breaking state climate tort claims [should be] allowed to proceed").

82. *See generally* Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation A Review of Research on Courts and Litigants in Climate Governance*, WIRES CLIMATE CHANGE (Mar. 4, 2019) (surveying climate litigation in the United States and Europe and noting trends across the litigation,

spectrum of plaintiffs includes corporate shareholders, nongovernmental organizations, climate activists, and a host of other litigants.[83] These plaintiffs seek wide-ranging remedies, from fossil fuel divestment to mandated systemic government reform. With the lanes toward such remedies already occupied by other litigants, local government plaintiffs should pursue limited remedies that benefit their residents, rather than pursuing wider structural changes. As other plaintiffs pursue varied remedies and litigation paths, plaintiffs will still be able to pursue remedies even if other paths close.

A. Constitutional Rights Cases Seeking Systemic Policy Changes: Juliana *Litigation*

City and state climate plaintiffs can focus narrowly on obtaining abatement remedies, rather than accomplishing broader climate litigation goals, because other plaintiffs have designed suits more directly to achieve systemic change. Second wave cases have been working through federal courts at the same time as constitutional rights and public trust cases, namely the *Juliana* litigation in which youth plaintiffs claimed that the federal government's failure to act on climate change violates their constitutional rights.[84] The *Juliana* plaintiffs' primary form of requested relief was "an order requiring the government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric CO2.'"[85] The Ninth Circuit concluded that the relief was beyond its constitutional authority to grant and dismissed the case without reaching the merits of plaintiffs' claims.[86] The court later denied a rehearing en banc, but lawsuits modeled on *Juliana* have been filed in state and federal courts.[87] Though the Ninth Circuit denied the *Juliana* plaintiffs' requests for relief, the organization representing the *Juliana* plaintiffs has also filed state constitutional cases in several state courts.[88]

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including an increased focus on human rights in climate cases and different timescales for effects in cases brought by cities than in cases brought by plaintiffs asserting human or constitutional rights violations).

83. *See id.* at 7 (discussing the widening lens of climate litigation research that encompasses a wide array of litigants).

84. Juliana v. United States, 947 F.3d 1159, 1164–65 (9th Cir. 2020).

85. *Id.* Plaintiffs also alleged that the government had violated the public trust doctrine and that portions of the federal Energy Policy Act were unconstitutional. *Id.* at 1165 & n.2.

86. *Id.* at 1171 ("[I]t is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan.").

87. *See* Petition for Rehearing En Banc, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082); Richard Frank, *The End of the Juliana Litigation–Or Is It?*, LEGAL PLANET (Feb. 15, 2021), https://legal-planet.org/2021/02/15/the-end-of-the-juliana-litigation-or-is-it/; Reynolds v. State, No. 2018-CA-819 (Fla. Cir. Ct. June 10, 2020) (dismissing plaintiffs' complaint, but plaintiffs have subsequently appealed); Aji P. *ex rel.* Piper v. State, 480 P.3d 438 (Wash. Ct. App. 2021) (Washington state case seeking declaratory and injunctive relief for alleged injury caused by Washington's creation and maintenance of a fossil-fuel based energy system).

88. *See State Legal Actions Now Pending*, OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/pending-state-actions (listing seven pending state law cases asserting violations of constitutional rights to a livable climate and other claims) (last visited June 3, 2021).

Whereas *Juliana* sought to spur sweeping governmental policy reform, state climate cases seek comparatively narrow remedies against energy companies.[89] With other plaintiffs pursuing broader constitutional cases, cities and states can narrow the scope of their cases to obtain tangible and meaningful relief from climate harms for their residents. While the *Juliana* case involved a nationwide remedy, the Ninth Circuit's reluctance to consider such relief is another example of courts failing to grant significant remedies in climate change cases. As this Note will discuss below, local government climate plaintiffs may find state courts more willing to grant limited remedies modeled after those granted in other cases involving public health and environmental harms.[90] Second wave plaintiffs can further narrow their climate litigation goals as corporate law cases work through the courts and further expose industry disinformation.

B. Shareholder Litigation and Corporate Law Investigations

Cities do not need to bring cases that aim to punish corporate disinformation or change behavior, as corporate law cases are already designed to achieve those goals. Instead, cities can focus more narrowly on obtaining abatement funding. State attorneys general and state agencies are better positioned to investigate corporate malfeasance than municipalities bringing common law suits.[91] For example, California's Attorney General's Office has a Corporate Fraud Section that investigates fraud as well as violations of the state Unfair Competition Law and California False Claims Act.[92] While second wave plaintiffs may indirectly pressure corporations to change their behavior by increasing public scrutiny and potential legal liability, corporate law can more directly exert pressure on corporate boards.

Climate lawsuits brought under corporate law have proliferated in recent years.[93] Plaintiffs have sued energy companies alleging they failed to comply with fiduciary duties and disclosure laws and filed misleading corporate

89. Carlarne, *supra* note 41, at 449–50 (asserting that while *Juliana* sought to "embed the responsibility to address climate change at the heart of legal obligations the state owes to its citizenry," the current wave of city-led litigation targets energy companies and seeks common law remedies).

90. *Infra* Part IV.

91. States including New York, California, and Massachusetts all have dedicated divisions within their attorney general's office to investigate fraud such as consumer and corporate fraud. *Corporate Fraud Section*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/cfs (last visited June 3, 2021); *Bureau of Consumer Frauds & Protection*, STATE OF N.Y. OFFICE OF THE ATT'Y GEN., https://ag.ny.gov/bureau/consumer-frauds-bureau (last visited June 23, 2021); *Learn about the Attorney General's Public Protection and Advocacy Bureau*, STATE OF MASS. OFFICE OF THE ATT'Y GEN., https://www.mass.gov/service-details/learn-about-the-attorney-generals-public-protection-and-advocacy-bureau (last visited June 23, 2021).

92. *See Corporate Fraud Section*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/cfs (last visited June 3, 2021).

93. Benjamin, *supra* note 41, at 353 (observing that "[s]everal suits and investigations have been launched in the United States that involve corporate and securities law, including securities disclosure claims, as well as investigations by the New York and Massachusetts Attorneys General").

statements about climate risks.[94] Many of the corporate law cases are against directors of the same energy companies facing state common law suits.[95] These director suits highlight the financial risks both of transitions to low-carbon infrastructure and of climate damage to physical assets that may threaten corporate profits.[96] These suits could reorient the profit-maximizing directive of corporate boards to analyze climate risks and even incentivize corporate action on climate change.[97] While ExxonMobil prevailed in a securities fraud suit brought by the New York Attorney General, the case increased scrutiny on the company's practices, with other lawsuits following, including one brought by the Massachusetts Attorney General.[98]

Shareholder suits and state attorney general investigations seek to expose fraud and change corporate behavior. While some city-led suits seek to expose corporate behavior, the primary aim of most second wave suits is to obtain remedies.[99] Corporate filings suggest that corporate suits and public pressure have already influenced corporate behavior, though such references remain sparse. Chevron's 10-K filing,[100] for example, highlights climate and clean energy initiatives and notes that, as public focus on climate harms grows, the company faces an increased possibility of litigation and governmental investigation.[101] Chevron noted that such suits could adversely affect the company's finances, though Chevron "management believes that these proceedings are legally and factually meritless" and will fight the suits.[102] ExxonMobil similarly notes the potential for investigations and lawsuits to adversely affect the company's business while dismissing the viability of private suits.[103] Despite the companies' posture around these suits, energy company

94. *Id.* at 317 (noting corporate law claims against carbon-major corporations).

95. *Id.* at 353–55 (listing several lawsuits and investigations against carbon majors including ExxonMobil).

96. *Id.* at 348.

97. *Id.* at 320.

98. *See* People v. Exxon Mobil Corp., 119 N.Y.S. 3d 829 (N.Y. Sup. Ct. 2019) (dismissing both of the attorney general's claims); *see also* Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020) (remanding to state court Massachusetts attorney general's case against Exxon for violations of state Consumer Protection Act).

99. Charleston Complaint, *supra* note 5, at 133–36 (outlining claim that energy company defendants violated the South Carolina Unfair Trade Practices Act through unfair and deceptive practices around the effects of fossil fuel products and resulting climate harms).

100. The 10-K form is an annual report filed by public companies with the Securities and Exchange Commission that summarizes company financial performance with parts that discuss risk, the market, and future projections. *How to Read a 10-K/10-Q*, SEC (Jan. 26, 2021), https://www.sec.gov/fast-answers/answersreada10khtm.html.

101. CHEVRON, Annual Report Form 10-K, at 21 (2019) *available at* https://chevroncorp.gcs-web.com/static-files/87b5b33d-4328-494b-afe9-6a0dc01dd556/.

102. *Id.* at 88.

103. EXXONMOBIL, FACTORS AFFECTING FUTURE RESULTS (2021), *available at* https://corporate.exxonmobil.com/-/media/Global/Files/investor-relations/Factors-affecting-future-results.pdf?la=en&hash=12CA14842B 0D2F96418281816328C3E794193A46 (noting that "[w]e also may be adversely affected by the outcome of litigation, especially in countries such as the United States in which very large and unpredictable punitive damage awards may occur; by government enforcement

defendants have acknowledged in required Securities and Exchange Commission filings that these shareholder suits and governmental investigations may have adverse financial impacts.

In the ongoing climate litigation occurring globally, different types of plaintiffs all play unique individual roles. Across the broad spectrum of climate litigation, plaintiffs are pursuing varied remedies aimed at different climate goals. The *Juliana* plaintiffs have asserted broader claims, while state court plaintiffs "localize the global effects of climate change to specific communities."[104] Future local government plaintiffs should focus on those localized effects. Shareholder litigation and corporate law investigations by state attorneys general, meanwhile, seek to directly change corporate behavior and to expose energy company disinformation. With other litigants pursuing broad cases or cases more directly aimed at corporate boards, local government plaintiffs can focus on obtaining abatement funding rather than attempting to alter energy company conduct.

III. CLIMATE LITIGATION GOALS: THE ROLE OF CITIES AND EXPANSIVE REMEDY CASE PITFALLS

A. Abatement Remedies Align Most Closely with the Role of Local Governments

Local governments should focus their remedy strategies to align best with their responsibilities to protect residents. Their traditional role as guardians of public health, safety, and welfare is well defined and should inform remedy choices in future cases. Cities and states are traditionally responsible for the exercise of police power to protect public welfare including by addressing environmental harms.[105] In this role, cities and counties have begun to pursue a number of legal avenues to address climate change including local energy planning and changes to zoning ordinances.[106] Climate lawsuits that seek abatement remedies fit within this role of local governments to prepare for and protect their residents from climate harms.

Historically, local governments have brought public nuisance suits to abate injuries to a public right and have been authorized to recover funds to abate the

proceedings alleging non-compliance with applicable laws or regulations; or by state and local government actors as well as private plaintiffs acting in parallel that attempt to use the legal system to promote public policy agendas, gain political notoriety, or obtain monetary awards from the Company").

104. Setzer & Vanhala, *supra* note 82, at 9.

105. Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 ECOLOGY L.Q. 575, 593 (2017) (noting that cities "generally derive sufficient authority from either home rule grants or underlying police power to allow them to take action to protect the local environment").

106. *See* Kevin Perron, *"Zoning Out" Climate Change Local Land Use Power, Fossil Fuel Infrastructure, and the Fight against Climate Change*, 45 COLUM. J. ENV'T L. 573, 581 (2020) (discussing second wave litigation as part of cities' role as "actors in the fight against climate change").

injuries.[107] Beyond common law public nuisance suits, "[i]t is not unusual for local ordinances to provide that a municipality has the authority to abate a nuisance and then to sue the person responsible for the nuisance for the costs."[108] Limited remedy cases for abatement thus fit closely with traditional city responsibilities to abate public harms and to recover funding for those abatement efforts. Limited remedy cases, by design, seek to do just that without expanding to other climate goals.

Beyond these traditional justifications for local governments' role in acquiring abatement funding, recent city-led litigation also reinforces the role of cities "as distinct and meaningful polities" and protectors of vulnerable residents.[109] Professor Sarah Swan argues that "plaintiff cities" serve an important role in acting quickly to redress widespread societal injuries through lawsuits.[110] Under this view, lawsuits by cities are important not just because they can obtain abatement funding but also because they communicate to vulnerable groups most harmed by societal wrongs that those wrongs will not go unnoted or unaddressed.[111] Because cities are the closest level of government to those they serve, Swan argues, they are also well positioned to take remedial action to protect their residents and themselves.[112] Abatement remedies are directly targeted at addressing injuries, while other remedies do not align as closely with this view of cities as entities with a legitimate moral and political claim to act to address climate harms.

City and county complaints, implicitly and often explicitly, recognize local governments' responsibility to protect residents from the impending effects of climate change. For example, the County of Maui brought its action "as an exercise of its police power, which includes but is not limited to its power to prevent injuries to and pollution of the County's property and waters, to prevent and abate nuisances, and to prevent and abate hazards to public health, safety, welfare, and the environment."[113] Climate litigation can provide funding for local governments, like Charleston and Maui, that are already planning and seeking funding to adapt to climate change effects in order to protect their residents.

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107. Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 TENN. L. REV. 803, 818 (2010) (noting that "[g]overnments, namely states and municipalities, are the principal plaintiffs in public nuisance suits," and that, in a classic example where a private party blocked a public road, "a government entity can sue the offending party to stop blocking the public road and to remediate whatever damage they caused to the road, but not for monetary damages").

108. DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION 149–50 (2010).

109. Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1232 (2018).

110. *Id.*

111. *See id.* at 1290.

112. *Id.* at 1251 (arguing that "[i]n other words, they can see the problem, and they suffer injury from the problem. It therefore seems logical that they would also be a good choice for attempting to remedy the problem").

113. Maui Complaint, *supra* note 32, at 6.

B. Expansive Remedy Cases: Judicial Reluctance and Unintended Consequences

Whereas plaintiffs in limited remedy cases seek abatement in line with a well-established role for cities, expansive remedy cases request a number of remedies that would not assist with climate adaptation. While expansive remedy cases may advance other climate litigation goals beyond obtaining abatement, they are also likely to heighten state court hesitance to issue climate remedies and may also cause negative unintended effects on energy company conduct. Plaintiffs' requested damages and abatement often sum to billions of dollars, though precedent indicates that state court judges would be hesitant to issue such significant awards. Though these remedies more directly address broader climate litigation goals, plaintiffs should avoid pursuing them as they remove the focus from abatement remedies and could jeopardize future recovery.

Requested abatement funding is significant alone without considering other categories of damages. While plaintiffs do not request specific abatement amounts, the complaints suggest that each plaintiff is seeking billions of dollars to fund abatement. For example, the County of Maui requests abatement and asserts that "[m]ore than $3.2 billion in assets" are located within areas vulnerable to sea level rise by the year 2100.[114] This figure "does not include the cost to fortify, rebuild, or relocate critical infrastructure."[115] Other remedies such as disgorgement of profits and punitive damages, however, would not assist cities and counties in funding those efforts and may have unintended consequences such as forcing energy company bankruptcy that would deprive local governments of needed funding.

Several expansive remedy plaintiffs are pursuing disgorgement of profit remedies that would force companies to internalize externalized costs and reduce profits from fossil fuel production that has caused climate harms.[116] While plaintiffs do not specify the amount of profits to be disgorged, disgorgement of profits for decades of fossil fuel production would unquestionably involve billions of dollars.[117] State courts hearing suits over other widespread public health and environmental harms have hesitated to issue such sizeable awards and would likely do the same when faced with such large sums in expansive remedy cases.[118]

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114. *Id*. at 104.

115. *Id*. at 106.

116. *Id*. at 72 (arguing that the disinformation "campaign enabled Defendants to accelerate their business practice of exploiting fossil fuel reserves, and concurrently externalize the social and environmental costs of their fossil fuel products"); *see also* San Mateo Complaint, *supra* note 43, at 107 (requesting "that the court award equitable disgorgement of all profits Defendants obtained through their unlawful and outrageous conduct" and elsewhere noting that ExxonMobil alone posted a $10 billion quarterly profit in 2005).

117. *See* Dua, *supra* note 42, at 136.

118. *See infra* Subpart IV.B.3 (discussing Oklahoma trial court order granting one year of abatement funding for opioid harms rather than a comprehensive $17 billion remedy requested by plaintiffs).

Plaintiffs in expansive remedy cases often also request punitive damages. In its complaint, the County of Maui "requests an award of punitive damages in an amount reasonable, appropriate, and sufficient to punish those Defendants for the good of society and deter Defendants from ever committing the same or similar acts."[119] Charleston's complaint uses nearly identical language.[120] Rather than narrowly seeking to obtain abatement funding in line with the role of cities outlined above, these plaintiffs frame their requests for punitive damages as a way to punish and deter energy company conduct.

The scale of damages requested in expansive remedy cases may heighten state court judges' background reluctance to engage with climate cases and add motivation for judges to find ways to dismiss cases or question plaintiffs' standing. State courts have previously been hesitant to order large requested damages, even when they have found liability for harms from opioids and lead paint.[121] Expansive remedy requests may heighten background judicial reluctance to issue remedies in climate change cases.

State courts confronting massive damages for climate liability may follow the lead of past courts in cases such as *AEP* and *Kivalina* and, as noted by legal academics, use "a variety of self-limiting procedural and jurisdictional doctrines' to find for defendants."[122] State judges may narrowly apply tort elements, analyze standing to deny plaintiffs a hearing on the merits of their cases, or pursue other methods in line with other courts that have avoided issuing remedies for climate change tort plaintiffs.[123] State court judges, more accustomed to traditional tort law cases than federal judges, may avoid analyzing second wave plaintiffs' underlying claims by dismissing suits that seek expansive remedies for climate harms.

State court judges may see large climate damages as politically fraught in states where judges are elected and where electorates oppose climate action. On

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119. Maui Complaint, *supra* note 32, at 129 (explaining that punitive damages claims are requested to punish energy companies' continued conduct despite those companies knowing that fossil fuel "products were defective and dangerous").

120. Charleston Complaint, *supra* note 5, at 124 (requesting "an award of punitive damages in an amount reasonable, appropriate, and sufficient to punish those Defendants for the good of society and deter Defendants from ever committing the same or similar acts").

121. Douglas A. Kysar, *What Climate Change Can Do about Tort Law*, 41 ENV'T L. 1, 35 (2011) ("Subsequent cases against the lead paint industry, handgun manufacturers, and subprime mortgage lenders have also revealed only faint appetite among courts for creative use of the public nuisance cause of action.").

122. R. Henry Weaver & Douglas A. Kysar, *Courting Disaster Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 313 (2017) ("When presented with claims of massive harm, common-law courts often find their way to a judgment for defendants. In recent years, a variety of self-limiting procedural and jurisdictional doctrines have arisen to effectuate this approach. Even when a court reaches the merits of a disaster lawsuit, it will often read doctrines narrowly—or ignore them entirely—in order to avoid an enormous recovery for the plaintiff.").

123. *Id.* at 323 ("Although the precise legal grounds for rejecting climate change claims have varied, the sheer size of climate change disasters always weighs heavily on judges' minds. Whether through deference, displacement, or deliberate sabotage, anxious courts have found ways to ignore the climate change plaintiff.").

the other hand, Professor Jonathan Zasloff has argued that state court judges, unlike federal judges, are often electorally accountable and this accountability weighs in favor of state court adjudication of climate harms.[124] While some judges in states with electorates that oppose climate action may be hesitant to engage with climate cases, those in other jurisdictions may see engaging with these climate cases as politically advantageous.

State courts may also be reluctant to impose punitive damages or disgorgement of profits on energy companies that operate globally and still have significant economic importance.[125] State courts may hesitate when confronted with expansive remedy cases and the vast number of possible plaintiffs, defendants, and damages awards that could easily reach hundreds of billions of dollars if punitive damages and disgorgement of profits are allowed.[126] Further, some states have passed tort reform statutes that may limit state court ability to grant punitive damages.[127] State courts have also issued reduced abatement awards in suits without other requested remedies such as punitive damages.[128] State courts have reduced abatement awards when they have found that the amount awarded exceeded the defendants' responsibility for the harm.[129] Cities and counties should consider the possibility of reduced abatement awards when analyzing whether to pursue damages.

Even if granted, significant damages awards could have unintended consequences, such as depriving future plaintiffs of abatement funds or forcing energy companies to engage in conduct that would increase emissions. A 2019 analysis of the damages requested in the then-pending state climate cases found the total potential damages to exceed $200 billion, a figure that continues to grow as plaintiffs file new climate suits.[130] Punitive damages and disgorgement of

124. *See* Jonathan Zasloff, *The Judicial Carbon Tax Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827, 1859 (2008) (arguing that elections of state judges weighs in favor of adjudicating climate claims in state court rather than federal court, but noting that "[c]limate change is politically fraught: resolution of the issue involves literally tens of billions of dollars in damages, potentially far-reaching changes in environmental and energy policy, and enormous implications for the texture of human life itself. In this context, to have unelected judges determine policy direction seems somewhat perverse").

125. Kysar, *supra* note 121, at 26 (2011) (discussing the remedy sought in *AEP* and noting that courts "are understandably reluctant to shut down activities of central economic importance"). Significant damages could jeopardize fossil fuel production, which is still central to economic productivity despite the need to aggressively reduce emissions to address climate change.

126. Michael Burger et al., *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV'T L. 57, 228 (2020) ("[C]ourts may be hesitant to adjudicate claims against governments or private actors given that the numbers of potential claimants and defendants in public trust and tort actions as well as the scope of potential court decisions and the scale of potential compensation awards are huge.").

127. *Id.*

128. *Infra* Subpart IV.B.1.

129. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 546 (Ct. App. 2017) (reducing award issued by trial court in lead paint litigation, as the appellate court found insufficient evidence to find causal connection between manufacturers' promotions and lead paint content in homes built during a period of years).

130. Dua, *supra* note 42, at 127.

profits could increase damages to be paid by energy companies well beyond levels required to compensate cities or to fund adaptation programs.[131] While the estimated $200 billion in damages against energy companies may pressure them to settle, the defendants would likely be unable to pay this full amount and might declare bankruptcy if state courts awarded such sizeable damages.[132] The COVID-19 pandemic has already strained energy company finances with a number of smaller firms filing for bankruptcy throughout 2020.[133] If damages became so significant that they forced energy companies into bankruptcy, a number of local governments may be unable to recover necessary abatement funding as they plan for climate change.[134] Additionally, bankrupt companies may also be incentivized to sell fossil fuel assets to other companies not subject to the litigation, who would use those assets to further extract and produce fossil fuel products.[135]

Large recoveries in current cases could jeopardize future plaintiffs' ability to recover. As state climate cases proliferate, cases in the same state may be consolidated, as the San Francisco and Oakland cases were combined in *Oakland*.[136] Broader consolidation of cases is unlikely, however, given that these cases are brought under different state law regimes. If expansive cases continue to proliferate, then large recoveries in early cases may later jeopardize local government plaintiffs' ability to recover even limited abatement remedies. Bankrupt energy companies may be required to pay senior creditors, sell assets to other companies who may engage in further fossil fuel extraction, or pursue their own continued fossil fuel production to pay their debts.[137] Plaintiffs would be considered unsecured creditors who would only be paid after secured creditors were fully paid, which could jeopardize or delay payment to plaintiffs.[138] Cities should consider these unintended consequences and their need for abatement

131. *See id.* at 135–36.

132. *See id.* at 127.

133. Liz Hampton, *U.S. Energy Bankruptcy Surge Continues on Credit, Oil-Price Squeeze,* REUTERS (Aug. 11, 2020, 11:33 AM), https://www.reuters.com/article/us-north-america-oil/u-s-energy-bankruptcy-surge-continues-on-credit-oil-price-squeeze-idUSKCN25727W ("More than 50 oil and gas firms have filed for bankruptcy since oil prices crashed in March, led by exploration and production companies with 29 filings.").

134. *See* Dua, *supra* note 42, at 136 ("If climate nuisance plaintiffs manage to win their lawsuits and are granted compensatory damages, punitive damages, or disgorgement of profits in the range of hundreds of billions of dollars, then oil and gas companies may file for Chapter 11 protection. By funding trust accounts, the reorganized oil and gas companies would be protected from current and future climate nuisance-related liability.").

135. *See id.* at 138 (describing oil company bankruptcy as "an undesired result, as it would simply transfer the ownership of the oil and gas assets to other companies who are not parties to the lawsuits and whose actions will continue to exacerbate climate change").

136. City of Oakland v. BP P.L.C., 969 F.3d 895, 901–02 (9th Cir. 2020). Other cases in California have been consolidated, including cases originally brought by Santa Cruz and Richmond that were consolidated with the *San Mateo* appeal. *See* Cnty. of Santa Cruz v. Chevron Corp., No. 18-16376 (9th Cir., consolidated Aug. 20, 2018).

137. *See* Dua, *supra* note 42, at 132–33.

138. *Id*. at 118.

funding as they design lawsuits and consider the damages remedies they will request from state courts.

C. Potential Pitfalls of Other Expansive Remedy Case Claims and Goals

In addition to requesting punitive damages and disgorgement of profits, expansive remedy plaintiffs also seek remedies in connection with failure-to-warn claims and violations of state unfair trade practices laws. City and other local government plaintiffs will likely face hurdles in successfully proving these claims in state court. But these claims are not necessary to expose energy company misconduct and disinformation.

Delaware, as a state with broader law enforcement powers than a city, is uniquely positioned among the second wave plaintiffs to bring failure-to-warn claims. In its 2020 complaint, the State of Delaware asserts that energy companies failed to warn consumers including the state and its residents "of the climate effects that inevitably flow from the intended or foreseeable use of their fossil fuel products."[139] The County of Maui, in contrast, also brought claims for failure to warn in its complaint but asserted a more attenuated chain of causation to claim that the defendants engaged in conduct to mislead the county and its residents.[140] While Delaware, as a state, may reasonably bring failure-to-warn claims, local governments face additional barriers in establishing that the defendants' challenged failure to warn extended directly to their residents. The County of Maui's complaint suggests local governments will seek to show that energy company disinformation efforts extended specifically to their local areas and residents of their localities. This showing may present another hurdle for plaintiffs to clear before achieving a remedy and could heighten overall state court reluctance to issue any remedies.

In addition to bringing failure-to-warn claims, a handful of expansive remedy cases seek statutory damages for fraud act violations.[141] Courts may be less hesitant to issue statutory damages for fraud act violations than damages for tort claims that have not previously been applied to climate change. Findings of fraud act violations and liability for failure to warn could have broader significance in the public and legal narrative around climate change and who is responsible for the impending crisis that municipalities will face.

Liability for failure to warn or for fraud action violations fits within the second wave narrative discussed above, but these claims are not necessary to expose energy company disinformation and may encounter reluctant state courts.

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139. Delaware Complaint, *supra* note 44, at 198.

140. Maui Complaint, *supra* note 32, at 8–9 (discussing assertions of Sunoco LP's failure to warn, the County argues that Sunoco's "conduct was intended to reach and influence the County, as well as its residents and residents of the State of Hawai'i, among others, to continue unabated use of Defendants' fossil fuel products in and outside Hawai'i, resulting in the County's injuries").

141. *See* Charleston Complaint, *supra* note 5, at 133; *see also* S.C. CODE § 39-5-140 (2013) (South Carolina Unfair Trade Practices Act authorizing courts to issue treble damages if they find defendants willingly or knowingly violated the law by using unfair or deceptive practices).

While energy company disinformation campaigns have been exposed in the public, a finding of liability would formally punish these campaigns.[142] If the cases were to reach discovery, the cases would "undoubtedly lead to even more evidence" of energy company disinformation.[143] An expansive remedy case, however, is not required to reach discovery and further expose energy company misconduct. Limited remedy cases, such as *Oakland*, also allege that energy companies misled the public and those plaintiffs seek to obtain more evidence of energy company disinformation through the litigation process.[144]

As with significant damages remedies, remedies connected to these additional claims require plaintiffs to make additional showings to state courts that have yet to issue any climate remedies. While not all expansive remedy cases seek equitable relief, state courts may be unwilling or unable to enjoin energy conduct that occurs outside of their state.[145] Relatedly, state statutes may constrain state court ability to apply state statutes outside of state borders.[146] Expansive remedy plaintiffs may also face state courts hesitant to issue additional remedies or find liability for other claims. The additional requested remedies could increase courts' background hesitancy to deal with the merits of climate cases, further jeopardizing potential recovery of abatement remedies.[147] To minimize this possibility, cities should pursue abatement remedies that have been granted in other state cases involving widespread harms, such as lead paint contamination or the effects of the opioid crisis, rather than seeking to prove additional claims that are not directly related to funding adaptation efforts.[148]

142. *See generally* NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT (2010) (documenting industry efforts to spread disinformation and sow doubt about science generally and discussing campaigns and strategies to stall regulatory action on smoking, DDT, the ozone hole, and global climate change).

143. Sokol, *supra* note 12, at 1413–14 (noting that "[i]t bears emphasis that the second-wave plaintiffs' allegations of these dual "acceleration" timelines are supported by extensive documentary evidence *in their complaints*; none of the cases have even reached discovery yet. And, given their promising new litigation strategies, some may very well proceed to discovery, which will undoubtedly lead to even more evidence.").

144. Oakland Complaint, *supra* note 29, at 21 ("Defendants promoted massive use of fossil fuels by misleading the public about global warming.").

145. *See* Michael Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 12 SUSTAINABLE DEV. L. & POL'Y 11, 12–14, 12 (2012) (questioning how state courts will assert jurisdiction over and enforce judgments against out-of-state defendants).

146. *See* Tracy Hester, *Climate Tort Federalism*, 13 FIU L. REV. 79, 98 (2018) (noting that "state court systems will interpret a state statute to apply outside the borders of that state only upon a clearly expressed desire by the state legislature to grant its law an extraterritorial reach").

147. *See* Albert C. Lin, *Dodging Public Nuisance*, 11 U.C. IRVINE L. REV. 489, 506 (2020) (outlining doctrines invoked by courts, including political question doctrine and the presumption against extraterritoriality, to avoid addressing the merits of climate change tort cases).

148. *See infra* Subpart IV.B.1.

IV. LIMITED REMEDY CASES ARE STRENGTHENED BY EMPHASIS ON A PUBLIC NUISANCE CLAIM

Limited remedy cases that seek abatement on a single claim of public nuisance build on favorable precedent in which public nuisance claims have been used to address other public health and environmental harms. Because *Oakland* is the main limited remedy case currently being litigated and because several cities in California have filed second wave suits, this Part will discuss *Oakland*'s public nuisance claim and public nuisance doctrine in California. As will be discussed below, however, plaintiffs in other jurisdictions have filed public nuisance claims to address harmful products such as opioids, tobacco, and lead paint. While plaintiffs in California first succeeded in reaching final judgment on the merits of their public nuisance claims in lead paint litigation, plaintiffs in other jurisdictions have also successfully used public nuisance cases to reach large settlements and to obtain abatement funding in opioid litigation.

The *Oakland* case relies on a single claim of public nuisance under California law. California's public nuisance law is broadly stated.[149] California state courts have allowed public nuisance claims to be brought against manufacturers that promoted harmful products with knowledge of the hazards those products would create.[150] The breadth of California public nuisance doctrine allows the *Oakland* plaintiffs to use one claim to address energy company production and promotion of fossil fuels.[151] Furthermore, the doctrine allows local governments to bring representative public nuisance suits to abate nuisances on behalf of the people of the state.[152] The *Oakland* plaintiffs, accordingly, are requesting abatement funding for future projects that they will need to address climate impacts, namely sea level rise.[153]

Despite the *Oakland* plaintiffs' reliance on a single claim and request for abatement, a limited remedy award would have several positive effects for the plaintiffs and the second wave of climate cases. First, and most importantly, the abatement remedy would fund adaptation efforts in the San Francisco Bay Area. Second, discovery would likely further expose energy company disinformation

149. CAL. CIV. CODE § 3479 (2021) ("A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.").

150. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 529 (Ct. App. 2017) (upholding trial court finding that lead paint defendants had actual knowledge of lead paint dangers when they "produced, marketed, sold, and promoted lead paint" and upholding the creation of an abatement fund to address the public nuisance).

151. *See* Lin & Burger, *supra* note 15, at 84–86 (discussing breadth of California public nuisance doctrine and asserting that defendants' promotion of fossil fuels and campaigns to deny climate change appear sufficient to establish a causal connection for public nuisance).

152. CAL. CIV. PROC. CODE § 731 (2021).

153. Oakland Complaint, *supra* note 29, at 34 (requesting "an abatement fund remedy to be paid for by Defendants to provide for infrastructure in Oakland necessary for the People to adapt to global warming impacts such as sea level rise").

campaigns.[154] Third, if a court awards the *Oakland* plaintiffs a remedy, such precedent would be promising for similarly situated coastal cities in states with broad public nuisance laws. While the *Oakland* case is benefitted by broad public nuisance doctrine and would establish favorable precedent if successful, judges and legal scholars have previously cautioned against using public nuisance to address broader societal harms.

A. Public Nuisance Is a Controversial Claim but Could Address Climate Harms

While plaintiffs have brought public nuisance claims to address public health and environmental harms, using public nuisance to address these harms has been controversial. Some legal academics and industry lawyers have argued that public nuisance is inappropriate or inadequate to address climate change.[155] Other scholars and lawyers argue that public nuisance can address climate harms and provide needed abatement funding.[156] Criticisms of public nuisance climate cases, and accompanying abatement remedies, fall into at least three categories:

(1) Public nuisance and associated remedies are not equally broad across jurisdictions and so may not carry the same potential force in different states;[157]

(2) Plaintiffs are attempting to use public nuisance claims to force regulatory regimes and climate policy that must be enacted by legislatures and policy makers, not by courts;[158] and

(3) Climate change does not match well with traditional public nuisance doctrine and has so far been more successful in achieving settlements than favorable judgments.[159]

As noted above, the first group of arguments against using public nuisance in state climate actions is that public nuisance doctrine is not equally broad across states. The elements of public nuisance vary across states but generally include

154. *Id.* at 23 (asserting that the fossil fuel industry had a "strategy to invest millions of dollars to manufacture uncertainty on the issue of global warming, directly emulating a similar disinformation campaign by the tobacco industry").

155. *See* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1 (2011) (arguing that public nuisance should be regarded as a public action and that state legislatures must authorize courts to use public nuisance to address societal problems like climate change before courts do so).

156. *See* Lin & Burger, *supra* note 15, at 92 (asserting that public nuisance actions can provide needed abatement funding for cities).

157. *Id.* at 85 (distinguishing California nuisance law, which is broad, from that of other states such as New Jersey and Rhode Island, where courts have required plaintiffs to prove other elements such as control of the public nuisance).

158. Merrill, *supra* note 155, at 54 (arguing that public nuisance is a public action that must be subject to legislative direction and that the claim cannot be used to address a societal harm unless the legislature authorizes that use).

159. *See* Donald G. Gifford, *Climate Change and the Public Law Model of Torts Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 258–59 (2010) (asserting that public interest tort litigation is different from traditional tort law, exists outside the traditional tort law framework, and has been dismissed in the past).

"(1) an unreasonable and substantial interference (2) with a public right (3) where the defendant has control of the instrumentality causing the nuisance, or where the defendant created or assisted in creating the nuisance."[160] While several states in which second wave cases have been filed, such as California and South Carolina, have broad public nuisance doctrines, other states require control of the instrumentality causing the public nuisance instead of allowing the alternative of the defendant creating or assisting in creating the nuisance. Applying public nuisance to climate change would be an extension of certain state courts' broad application of public nuisance to other broad harms.[161]

California and Oklahoma have broad public nuisance doctrines, which may have allowed past public nuisance litigation to succeed in those states where it may have failed in other jurisdictions.[162] Both jurisdictions have allowed abatement remedies that provide funds to address widespread harms.[163] South Carolina also broadly defines public nuisance as an offense "against the public order and economy of the state" that "annoys, injures, endangers, renders insecure or interferes with the rights of property of the whole community, or any considerable number of persons."[164] Accordingly, *Charleston* plaintiffs allege that defendants substantially contributed to a nuisance that affects the community in public places but do not need to assert that defendants currently control the instrumentality causing the nuisance.[165] Even in jurisdictions that have required control, however, plaintiffs may be able to distinguish climate as a public nuisance.

Some states, such as Rhode Island, require that defendants control the public nuisance at the time of the harm.[166] Even in jurisdictions where control is required, however, public nuisance may be more applicable to climate harms that "involve a level of ongoing conduct and control" by energy companies.[167] Courts, most notably in the New Jersey and Rhode Island lead paint litigation, also ruled that public nuisance abatement remedies were unnecessary or

160. Lin & Burger, *supra* note 15, at 74.

161. *Id.* at 84 ("[C]limate change defendants face risks of liability in California and perhaps other states that have incorporated broad conceptions of public nuisance.").

162. *See* Matthew J. Sanders, *How and Why State and Local Governments Are Suing the Fossil-Fuel Industry for the Costs of Adapting to Climate Change*, ABA TRENDS (May 7, 2020), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2019-2020/may-june-2020/how-and-why-state/ (noting that Oklahoma and California both have broad public nuisance statutes, indicating that litigation may be most successful in those states).

163. *See* State v. Purdue Pharma LP, No. CJ-2017-816, 2019 WL 4019929, at *20 (Okla. Dist. Ct. Aug. 26, 2019) (awarding multimillion dollar abatement fund to address opioid harms); People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 598 (Ct. App. 2017) (upholding abatement funding awarded to address lead paint contamination).

164. State v. Turner, 18 S.E. 2d 376, 378 (S.C. 1942).

165. *See* Charleston Complaint, *supra* note 5, at 120–21.

166. State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 456 (R.I. 2008) (holding that plaintiffs failed to show that defendants were in control of lead paint at the time it caused harm, as required under Rhode Island public nuisance precedent).

167. Lin & Burger, *supra* note 15, at 85.

inappropriate in light of existing legislative abatement schemes.[168] While New Jersey and Rhode Island had both created statutory remedies that could be sought from landlords,[169] no such legislative scheme exists for plaintiffs to recover abatement funding for climate harms.[170] State courts hearing climate public nuisance cases would not be able to rely on the backstop of a statutory remedy as they did in rejecting the lead paint cases. Even in the absence of legislative responses to climate change, the second category of arguments against using public nuisance to address climate harms asserts that legislation is a more appropriate way to address the problem.

Scholars, judges, and attorneys have argued that public nuisance actions are improper vehicles for addressing climate harms. In the *Oakland* litigation, federal district court Judge Alsup wrote that the problem of climate change "deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case."[171] State attorneys general argued that "the need for broad agreement in addressing global climate change is precisely why courts should not be involved."[172] Professor Thomas Merrill similarly wrote that "the legislature must speak before courts use public nuisance law to adjudicate lawsuits targeting controversial social harms."[173] Similar doctrinal arguments were made against using public nuisance as a vehicle to other harmful products such as handguns.[174] These arguments, however, ignore the background fact that Congress has failed to act on climate change.

These doctrinal arguments are unpersuasive because they argue for legislative solutions against a backdrop of legislative inaction and ignore the functional benefits of public nuisance claims to obtain abatement remedies. On the first point, critics of public nuisance as a vehicle to address climate harms often note the need for a national solution.[175] Scholars supportive of second wave cases respond by arguing that these cases are a direct response to the ongoing

168. *See* GIFFORD, *supra* note 108, at 153 (2010) (noting that the Rhode Island "court also made it clear that its decision did 'not leave Rhode Islanders without a remedy'" because the state had a statutory scheme for lead paint abatement).

169. *Lead Indus. Ass'n*, 951 A.2d at 456 (discussing two Rhode Island statutes that provide for penalties and rights of action against property owners); *In re* Lead Paint Litig., 924 A.2d 484, 492–94 (N.J. 2007) (discussing New Jersey statutes that address lead paint contamination and abatement).

170. Lin & Burger, *supra* note 15, at 92 (observing that plaintiff municipalities are bringing climate suits in the absence of legislative and executive responses to climate change and climate harms).

171. City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018).

172. Brief of Indiana and 17 Other States as Amici Curiae in Support of Defendants-Appellees, City of Oakland v. BP P.L.C., 969 F.3d 895 (9th Cir. 2020) (No. 18-16663).

173. Merrill, *supra* note 155, at 31.

174. *See* Gifford, *supra* note 9, at 765 (noting the argument that plaintiffs in handgun public nuisance cases were seeking to change how handguns were produced and distributed in the courts because legislatures had not been willing to mandate those changes).

175. Merrill, *supra* note 155, at 46 (arguing that "[g]lobal warming presents a different conundrum, but here the problem is that only a truly global tribunal could be said to be in a position to adjudicate the matter in a truly impartial fashion. No such tribunal exists that is likely to obtain jurisdiction over the necessary parties in the foreseeable future. What is needed is a diplomatic solution or, failing that, national action to mitigate expected harms from climate change.").

failure of national governments to address climate change.[176] In the absence of legislative or executive action on climate change, public nuisance lawsuits can provide needed funding for municipal abatement responses.[177] While a national coordinated response to climate change is necessary, plaintiff cities like Charleston require abatement funding now and cannot wait for legislative action that has yet to materialize in the decades that Congress has been aware of climate change.[178]

The doctrinal arguments discussed above also allow courts to avoid grappling with the harms of climate change. Legal scholars have argued that courts should address the merits of public nuisance cases involving climate harms rather than avoiding these cases.[179] Doctrinal objections to these public nuisance actions often hinge on the idea that climate suits endeavor for "climate change policy through individual abatement actions."[180] But cities that pursue limited abatement remedies for public nuisance claims are not trying to shape climate policy; they are simply trying to obtain needed abatement funds to protect their residents.

Public nuisance actions would allow cities to recover abatement funding in the absence of governmental action and in line with traditional tort law principles. Vic Sher, a partner at Sher Edling LLP, who is involved with several state climate cases including *Maui* and *Oakland*, argues that characterizing these claims as climate change solutions is wrong. Instead, these cases "seek remedies under well-established principles of state tort law for past wrongful corporate conduct that has caused plaintiffs' climate change-related injuries."[181] Rather than pushing public nuisance doctrine beyond its traditional bounds, these cases seek funding for abatement of a widespread harm that climate science increasingly suggests will have measurable harms at the local level.

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176. *See* Sokol, *supra* note 12, at 1385 (discussing an Intergovernmental Panel on Climate Change report and other studies finding that climate change cases have proliferated as national governments have failed to act and are part of a global phenomenon of holding government and businesses accountable for failing to address climate change).

177. Lin & Burger, *supra* note 15, at 92 ("[I]n the absence of adequate legislative and executive responses to climate change, the plaintiff municipalities face very real harms from climate change and significant costs in adapting to rising sea levels. Public nuisance actions offer a potentially viable mechanism for abating the ongoing threat and financing the adaptation necessitated by the defendants' past and present conduct.").

178. Chris Mooney, *30 Years Ago Scientists Warned Congress on Global Warming. What They Said Sounds Eerily Familiar,* WASH. POST (June 11, 2016, 9:40 AM), https://www.washingtonpost.com/news/energy-environment/wp/2016/06/11/30-years-ago-scientists-warned-congress-on-global-warming-what-they-said-sounds-eerily-familiar/ (discussing a congressional hearing on climate change in 1986).

179. *See* Lin, *supra* note 147, at 537 (arguing that courts have used avoidance mechanisms to not reach the merits of public nuisance claims in climate change cases and noting that plaintiffs will still face barriers such as proving causation but concluding that "courts can and should decide whether defendants' production, promotion, and sale of fossil fuels constitutes a public nuisance").

180. Lin & Burger, *supra* note 15, at 91.

181. Vic Sher, *Forum versus Substance Should Climate Damages Cases Be Heard in State or Federal Court?*, 72 STAN. L. REV. ONLINE 134 (2020).

Finally, the last set of arguments against using public nuisance to address climate change is centered on the fact that other plaintiffs have rarely, and only recently, begun to win final judgments rather than settlements. Plaintiffs successfully obtained remedies or settlements on public nuisance claims in opioid and lead paint litigation, but courts and legal academics have been hesitant to apply public nuisance doctrine to other societal harms. Courts dismissed public nuisance cases against handgun manufacturers for a variety of reasons including that harms were too remote and because plaintiffs failed to show a causal link between manufacturers' conduct and handgun violence.[182] Critics of the state climate litigation argue that it should be rejected because, in their view, it relies on similarly weak causal theories despite advancing climate attribution science that some observers believe will make causation easier to prove in these cases.[183] Opponents of climate litigation urge courts to be wary of entertaining broad public nuisance actions seeking injunctive relief or damages remedies designed by plaintiffs to "pressure defendants to settle and, in doing so, agree to a judicially-enforced regulatory regime."[184] Limited remedy cases, however, seek abatement funding and not to persuade courts to craft broader remedies or regulatory schemes beyond this relief.

In recent decades, courts have applied public nuisance doctrine and granted abatement remedies in other cases involving products that caused societal harms. While handgun and some lead paint litigants failed to obtain abatement remedies from state courts, other plaintiffs have used the claim successfully.[185] As will be outlined below, state and municipal plaintiffs have succeeded when they relied on public nuisance claims for abatement.

B. Limited Remedy Cases Build on Past Public Nuisance Case Successes

Second wave climate plaintiffs that bring limited remedy cases continue a trend of public interest public nuisance litigation.[186] Plaintiffs have successfully brought limited remedy cases against the tobacco industry, paint manufacturers, and opioid companies. Though courts largely did not address the merits of the public nuisance claims in the tobacco litigation and rejected those claims in handgun litigation, plaintiffs more recently succeeded in obtaining judicial orders for abatement funding in opioid and lead paint litigation.[187]

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182. *See* Donald G. Gifford, *Climate Change and the Public Law Model of Torts Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 234–40 (2010) (summarizing public nuisance litigation against gun manufacturers and noting that courts routinely dismissed public nuisance claims).

183. *See* Burger et al., *supra* note 126, at 61–62 (arguing that "[s]ignificant advances in climate change detection and attribution science—the branch of science which seeks to isolate the effect of human influence on the climate and related earth systems—have continued to clarify the extent to which anthropogenic climate change causes both slow onset changes and extreme events").

184. Lin, *supra* note 147, at 259.

185. *Id.* at 491.

186. *Id.* (noting that "[p]ublic interest public nuisance litigation, referring to public nuisance actions aimed at broad social problems, has been the subject of substantial academic commentary").

187. *Id.* at 498–500.

By seeking an abatement remedy connected to a public nuisance claim, limited remedy plaintiffs take advantage of favorable precedent while reducing their burden of proof. Limited remedy plaintiffs may ultimately find an easier path to achieving a remedy in state court as a result. "Proceeding on a public nuisance theory may be more attractive to climate change plaintiffs, primarily because there are fewer elements" to establish than other tort claims asserted by climate plaintiffs such as failure to warn or design defect.[188] Failure to warn, a claim asserted by *San Mateo* plaintiffs under California law, requires plaintiffs to prove several elements, including that the product had risks that were generally accepted in the scientific community.[189] Public nuisance, meanwhile, has fewer elements for plaintiffs to prove.

As noted, public nuisance "is a substantial and unreasonable interference with a right held in common by the general public" and is broadly stated in several states.[190] Plaintiffs have used this broadly defined public nuisance doctrine to fill in regulatory gaps left by legislative failures to regulate dangerous products. Even when public nuisance claims were not litigated to a remedy, earlier cases involving environmental and public health threats ended with sizeable settlements.[191] State courts, especially California state courts, have issued remedies for public nuisances in environmental and public health cases, and this precedent may indicate a judicial willingness to issue an abatement remedy for climate change harms.

1. California Lead Paint Litigation

Recent litigation against lead paint manufacturers and trade associations in California provides the strongest precedent for limited remedy cases brought by cities in California for climate harms. The State of California, representing several municipalities, brought a public nuisance action against paint companies for promoting and selling lead paint for decades while misleading the public about lead paint's health risks.[192] A California trial court ordered the paint manufacturers to pay $1.15 billion into an abatement fund to address indoor lead paint contamination in ten municipalities.[193] An appellate court ordered a

188. Benjamin Reese, *Too Many Cooks in the Climate Change Kitchen The Case for an Administrative Remedy for Damages Caused by Increased Greenhouse Gas Concentrations*, 4 MICH. J. ENV'T & ADMIN. L. 355, 371 (2015).

189. San Mateo Complaint, *supra* note 43, at 84–85; Jud. Council Cal. Civ. Jury Instructions (2020), CACI No. 1205, *available at* https://www.justia.com/trials-litigation/docs/caci/1200/1205/.

190. DAN B. DOBBS, THE LAW OF TORTS 1334 (2000).

191. *See* Janet Wilson, *$423-Million MTBE Settlement Is Offered*, LA TIMES (May 8, 2008, 12:00 AM), https://www.latimes.com/archives/la-xpm-2008-may-08-me-mtbe08-story.html ($423 million settlement offer in the MTBE litigation); *see also Master Settlement Agreement*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/tobacco/msa (last visited June 3, 2021).

192. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (Ct. App 2017).

193. People v. Atl. Richfield Co., No. 100CV788657, 2014 WL 1385823, at *61 (Cal. Super. Ct. Mar. 26, 2014).

recalculation of the fund amount.[194] Ultimately, the manufacturers reached a $305 million settlement with the municipalities.[195]

The lead paint litigation is favorable precedent for the state climate litigants, especially for plaintiffs who similarly bring a single public nuisance claim and seek only abatement remedies.[196] The underlying facts are strikingly analogous: both the lead paint litigation and the climate cases involve a widespread threat, government plaintiffs, and an abatement remedy. The lead paint industry, like the fossil fuel industry, promoted products with campaigns and trade association efforts to increase sales while simultaneously combating mounting evidence of product dangers.[197] Notably, a California appeals court in an earlier case in the lead paint litigation, *County of Santa Clara v. Atlantic Richfield*, recognized a public nuisance claim based on defendants' past promotion of lead paint with the knowledge that the product was harmful.[198] *Oakland* plaintiffs are similarly seeking funding to abate a public nuisance from defendants who affirmatively promoted products, fossil fuels, that they knew would cause widespread detrimental effects.

With this precedent of granting abatement funding for public nuisances, California state courts may be more willing to award plaintiffs' requested climate adaptation relief. [199] As noted by Albert Lin and Michael Burger, however, even plaintiffs in jurisdictions that required control in lead paint public nuisance cases could seek to distinguish climate cases in that "the climate change cases involve a level of ongoing conduct and control that the lead paint cases do not."[200]

2. Tobacco Litigation

Like the limited remedy climate plaintiffs, some of the earliest state plaintiffs in litigation against the tobacco industry primarily relied on public

194. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 598 (Ct. App 2017).

195. Don Thompson, *Lead Paint Suppliers to Pay $305 Million to Settle California Lawsuit*, PBS (July 17, 2019, 6:22 PM), https://www.pbs.org/newshour/nation/lead-paint-suppliers-to-pay-305-million-to-settle-california-lawsuit.

196. *See* California v. Atl. Richfield Co., No. 1-00-CV-788657, 2014 WL 280526, at *4 (Cal. Super. Ct. Jan. 7, 2014) (noting that the cities and counties' "claims against defendants originally included causes of action for fraud, strict liability, negligence, unfair business practices, and public nuisance" but that plaintiffs ultimately filed a fourth amended complaint that "alleged a single cause of action for public nuisance, and sought only abatement").

197. *See* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (Ct. App. 2017) (holding that "[s]ince the evidence supports the trial court's finding that [defendant] Fuller knew of the danger that such use would create for children at that time, there is substantial evidence that Fuller promoted lead paint for interior residential use with the requisite knowledge").

198. Cnty. of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313 (Ct. App. 2006) (approving of plaintiffs' theory of "liability for the public nuisance created by lead paint" based on the defendants' "affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards").

199. Lin & Burger, *supra* note 15, at 85.

200. *Id.*

nuisance claims.[201] Though courts largely did not reach the merits of the claims, the tobacco litigation formed a model of state and local governments bringing public nuisance suits to address public health harms.[202]

State attorneys general secured the largest civil litigation settlement in history to resolve tobacco litigation.[203] The tobacco companies ultimately agreed to an estimated $206 billion settlement after at least forty states filed suit alleging public nuisance and other claims with requests for monetary and equitable relief.[204] The tobacco settlement included limitations on industry advertising that could be a model for negotiating energy company changes, such as investing more in renewable energy and transitioning away from fossil fuels.[205] The litigation spurred broader societal discussion of the proper role of regulation in addressing smoking harms.[206] Widespread public nuisance claims against the fossil fuel industry could similarly boost public discourse around how to address climate change.

Courts largely did not adjudicate the public nuisance claims in the tobacco litigation as the industry defendants settled before courts reached the merits of those claims.[207] Though these actions primarily seek abatement funding, public nuisance actions could similarly motivate energy company defendants to reach a master settlement or spur congressional action even if the complaints were not litigated to a remedy.[208] Litigation resulted in congressional debates over tobacco and some commentators have suggested that successful climate lawsuits could similarly spur congressional action.[209] Although Congress's failure to ultimately approve the tobacco master settlement may indicate that public nuisance litigation is not sufficient to spur legislative action on climate change, second wave climate plaintiffs could still use the public nuisance model from tobacco litigation to obtain substantial abatement funding.

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201. GIFFORD, *supra* note 108, at 5–7 (2010) ("Mississippi, the first state to file against the manufacturers and an important leader in coordinating most of the state lawsuits, primarily rested its case . . . on an obscure common-law tort known as public nuisance.").

202. *Id.* at 4 (arguing that "[t]he success of this novel form of litigation required abrupt changes in the law governing both the standing of the state to sue as *parens patriae* and the principal substantive claim of public nuisance").

203. PUB. HEALTH L. CTR., THE MASTER SETTLEMENT AGREEMENT: AN OVERVIEW (2019), *available at* https://www.publichealthlawcenter.org/sites/default/files/resources/MSA-Overview-2019.pdf.

204. *See Master Settlement Agreement*, *supra* note 191 (compilation of documents for the $206-billion Master Settlement Agreement in the tobacco litigation).

205. *See* Dua, *supra* note 42, at 141.

206. *See* Lin & Burger, *supra* note 15, at 92.

207. GIFFORD, *supra* note 108, at 132 (2010) (noting that the tobacco litigation "settled before significant rulings on the merits of its claims").

208. *See* Lin & Burger, *supra* note 15, at 92 ("Successful public nuisance actions against fossil fuel defendants could prompt federal legislation to address climate change.").

209. *Id.*

3. Opioid Cases

Plaintiffs have also recently sued a variety of companies for causing or contributing to widespread harms from opioids. States are currently negotiating a settlement of over $26 billion from pharmaceutical companies for harms related to the opioid crisis.[210] As with tobacco and climate suits, state and local government plaintiffs asserted public nuisance and other claims against opioid manufacturers.[211] Whereas the tobacco litigation ended in settlements rather than courts addressing the merits of plaintiffs' claims, an Oklahoma trial court ordered abatement funding of $572 million in an opioid case based on a public nuisance claim.[212] Though the award is sizeable, it only funds one year of abatement rather than the $17 billion that Oklahoma sought for more comprehensive efforts.[213] The state sued several defendants who ultimately settled, while Johnson & Johnson chose to go to trial rather than settle.[214]

While the Oklahoma opioid plaintiffs have so far succeeded, climate change may present a more challenging public nuisance case and path to a final remedy. Both the opioid and climate plaintiffs base their public nuisance cases on theories of introducing harmful products into the stream of commerce and misleading the public about those products' effects.[215] Despite these apparent similarities, public nuisance may be a less appropriate cause of action for climate change. Climate change causes more dispersed harms than the opioid crisis has, and causation may be harder to establish in climate cases. Professor Richard Ausness has noted that "[p]roving causation is much tougher with climate change because you have so many potential actors and they're spread out all over the world, while with opioids you know who the manufacturers are and the distributors—it's a relatively small group of people."[216]

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210. Sara Randazzo, *States Seek $26.4 Billion from Drug Companies in Opioid Litigation*, WALL ST. J. (Aug. 18, 2020, 5:30 AM), https://www.wsj.com/articles/states-seek-26-4-billion-from-drug-companies-in-opioid-litigation-11597743000.

211. Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405, 440 (2020) (comparing lawsuits brought by private individuals to public nuisance suits and observing that those public nuisance "lawsuits filed by state and local governments, and even American Indian nations, have been much more successful").

212. State v. Purdue Pharma LP, No. CJ-2017-816, 2019 WL 4019929, at *20 (Okla. Dist. Ct. Aug. 26, 2019).

213. Michelle M. Mello et al., *Stanford Legal Experts on the Oklahoma Opioids Verdict and Ongoing Litigation*, SLS BLOGS (Aug. 28, 2019), https://law.stanford.edu/2019/08/28/stanford-legal-experts-on-the-oklahoma-opioids-verdict-and-ongoing-litigation/ ("Oklahoma provided a detailed plan laying out what would be needed to abate the opioid problem in the state. The costs added up to $572 million for the first year, and that's what the judge awarded—not the $17 billion Oklahoma sought for a multi-year abatement effort.").

214. *Id.*

215. Karen Savage, *After Opioids, Will Climate Change Be the Next Successful Liability Battle?*, CLIMATE DOCKET (Sept. 12, 2019), https://www.climatedocket.com/2019/09/12/opioids-liability-climate-change/ (noting that the opioid litigation relied on a theory that putting "a product into the stream of commerce and misleading consumers about it in a way that causes harm" constitutes a public nuisance and that the climate public nuisance theory is similar).

216. *Id.*

Even if state courts found liability for climate harms as the Oklahoma court did for opioid harms, those courts could similarly reduce abatement awards to far less than plaintiffs' requested amounts. Abatement funding, even if reduced, would still be valuable to cities like Charleston that are currently planning adaptation efforts. Further, liability and a remedy in one case would provide favorable precedent for similarly situated cities and could gradually build pressure for an industry settlement for funding to a number of cities. Indeed, the opioid litigation currently involves settlement discussions of a much larger figure of up to $26 billion, though those discussions remain unresolved at the time of this writing.[217]

CONCLUSION

After the removal decisions in *Baltimore*, *San Mateo*, and *Oakland*, a number of plaintiffs have brought new climate cases in state court that seek a variety of remedies. As more cities, counties, and states consider bringing climate change lawsuits, they should resist the trend of filing expansive remedy cases. Instead, plaintiffs should look to *Oakland*'s single claim and limited abatement remedy as a model of climate litigation that is more appropriate for cities and more likely to succeed in state courts. Although the merits of these cases have not yet been reached, state courts may be more willing to grant abatement remedies than unprecedented damages that carry potential unintended consequences.

The first wave of climate cases and constitutional rights litigation like *Juliana* in federal court suggest that future plaintiffs will face courts skeptical of broad climate remedies. Limited remedy cases, however, allow courts to model remedies off remedies issued in prior cases where defendants produced harmful products while deceiving the public. The history of public nuisance litigation to address broader societal harms with discernible local effects shows that state courts are willing to issue significant abatement remedies. Lessons from the lead paint and opioid litigation illustrate that sizeable awards and settlements in climate public nuisance cases are possible; indeed, energy company defendants may be encouraged to settle if state climate cases are allowed to remain in state court and more plaintiffs file such cases. While plaintiffs continue to face uncertainty and barriers, most notably the recent Supreme Court decision in and pending Fourth Circuit review of the *Baltimore* litigation, state climate cases are a viable remaining avenue for climate litigation in the United States.

Prospective local government plaintiffs should continue to monitor the initial group of second wave cases and pursue limited remedy cases. These

217. Brian Mann, *Drug Companies Plan Tax Breaks to Offset $26 Billion Opioid Settlement*, NPR (Mar. 9, 2021, 9:30 AM), https://www.npr.org/2021/03/09/974863967/drug-companies-plan-tax-breaks-to-offset-26-billion-opioid-settlement (reporting that "[f]our of America's biggest healthcare companies are close to a $26 billion settlement for their role making and distributing highly addictive opioid medications").

limited remedy cases can allow cities, counties, and states to fulfill their duty to preserve the welfare and safety of their residents by allowing them to access abatement funding. Rather than attempting to accomplish litigation goals that are pursued by other litigants, cities can focus on limited remedy cases to obtain with the merits of climate cases. As climate harms continue to threaten the residents of cities like Charleston and Oakland, the choice of remedy may determine whether state climate suits move forward. This choice of remedy, in turn, may determine whether local governments can adapt or whether they will instead be forced to retreat.