

Boulder v. Suncor and the Case for Judicial Climate Adaptation

INTRODUCTION

When Canadian oil sands developer Suncor Energy brings some of the world's dirtiest oil to market,¹ much of it comes by way of its Colorado refinery.² In *Board of County Commissioners of Boulder County v. Suncor Energy*, a group of Colorado communities sued Suncor for selling and marketing fossil fuels while deceiving the public about their contributions to global warming.³ *Boulder* is one of an increasing number of cases brought since 2017 by a diverse group of state and local governments facing climate adaptation costs.⁴ Courts have historically been reluctant to act on climate, in part because they see global warming as an abstract threat: too far in the future to cause injury today, too diffuse to hold any one actor responsible, and too complex for courts to fashion a remedy.⁵ And like other recent climate cases, *Boulder* remains stalled over questions of jurisdiction.⁶ Yet these cases have the potential to shape public debate and legal discourse even as they are litigated.⁷ As part of a larger legal mobilization for climate accountability, *Boulder* and its sibling cases offer powerful rejoinders to these familiar justifications for inaction.

Boulder brings the present-day climate crisis to the courtroom in three important ways. First, as the first case involving a group of inland communities

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1. See John Vidal, *Canadians Ponder Cost of Rush for Dirty Oil*, *GUARDIAN* (July 11, 2008, 9:18 AM), <http://www.theguardian.com/environment/2008/jul/11/fossilfuels.pollution>.

2. *Refining*, SUNCOR ENERGY, <https://www.suncor.com/en-ca/about-us/refining> (last visited Mar. 22, 2021).

3. *Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder)*, 965 F.3d 792, 798 (10th Cir. 2020), *vacated*, *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs*, 141 S. Ct. 2667 (2021).

4. See Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 *WASH. L. REV.* 1383, 1406–09 (2020).

5. See R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 *NOTRE DAME L. REV.* 295, 323 (2017) (“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.”).

6. See *infra* Part II.

7. See, e.g., Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 *J. ENV'T L.* 483, 501 (2018) (“The impact of litigation also has potential to extend beyond the direct effect of liability findings to include the more subtle effects of judicial pronouncements . . . or even gradual awareness and developing values brought about by a ‘radiating’ effect of publicised private liability.”).

suing fossil fuel companies, it widened the legal narrative of climate impacts beyond those linked to sea level rise. Second, it focused attention on companies' deception by bringing the first statutory consumer protection claim in climate litigation. Finally, *Boulder* highlighted the inadequacy of current doctrines and demonstrated the need for legal reform—a kind of judicial climate adaptation. In May 2021, the Supreme Court remanded *Boulder* to the Tenth Circuit to reconsider whether it belongs in state or federal court.⁸ But *Boulder*'s impact will not depend solely on the outcome of the jurisdictional questions at stake in the case. As it awaits further review, *Boulder* and cases like it are already helping to reframe climate change in the law.

I. BACKGROUND

A. Legal Background

Boulder is part of what scholars have called the “second wave” of climate liability litigation, following a wave that began in the mid-2000s and ended without any case being decided on its merits.⁹ In several first-wave cases, courts invoked the political question doctrine, deciding that climate change presents such a significant public issue that addressing it would infringe on the political branches of government.¹⁰ In *Connecticut v. American Electric Power Co.*, the district court dismissed the plaintiffs' public nuisance claims against power companies because it “touched on so many areas of national and international policy.”¹¹ Similarly, in *Native Village of Kivalina v. ExxonMobil Corp.*, a district court held that an Alaskan Native village that may be forced to relocate due to melting Arctic sea ice presented nonjusticiable political questions.¹² The court held that “the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch.”¹³ The court also found that Kivalina lacked standing to bring the case because it could not link its injuries to the defendants' greenhouse gas emissions.¹⁴

While most second-wave cases are still pending, the rulings thus far largely continue this trend of judicial avoidance. The Ninth Circuit dismissed *Juliana v.*

8. *Suncor Energy (U.S.A.) Inc. v. Bd. of Cty. Comm'rs*, 141 S. Ct. 2667 (2021); *see infra* Subpart II.B.

9. *See, e.g.*, Sokol, *supra* note 4, at 1406–23; Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 849 (2018).

10. *See* Sokol, *supra* note 4, at 1389.

11. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011). The Second Circuit disagreed, but the Supreme Court later held that the federal common law claims were displaced by the Clean Air Act. *See Am. Elec. Power Co.*, 564 U.S. at 419, 424.

12. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

13. *Id.* at 877.

14. *Id.* at 882.

United States under the political question doctrine, finding that the youth plaintiffs demanding federal climate action under the public trust doctrine sought a remedy too sweeping for a court to supervise without violating the separation of powers.¹⁵ A district court also initially dismissed *City of Oakland v. BP P.L.C.*, one of several suits brought by California cities against fossil fuel companies, in the interest of deferring to the other branches of government.¹⁶ In *Oakland*, the court found the scope of the plaintiffs' theory linking fossil fuel sales to global warming to be "breathtaking," because it could apply to the sale of fossil fuels anywhere in the world where the seller knew that their products contributed to global warming.¹⁷ However, the Ninth Circuit, finding the district court had lacked subject matter jurisdiction, vacated and remanded the case with instructions to further remand to state court if jurisdiction cannot be found.¹⁸ Today it remains to be seen how state courts will grapple with this and other second-wave cases.

B. Case Background

In June 2018, the Counties of Boulder and San Miguel and the City of Boulder sued Suncor Energy and Exxon Mobil in Colorado state court.¹⁹ They alleged that the defendants produced, marketed, and sold fossil fuels while misleading the public and concealing their knowledge that these products would contribute to catastrophic global warming.²⁰ They brought claims for state public and private nuisance, trespass, unjust enrichment, civil conspiracy, and violations of the Colorado Consumer Protection Act.²¹ The plaintiffs sought past and future compensatory damages, as well as remediation or abatement of climate-related harms in their communities.²²

The controversy in *Boulder* to date has been over jurisdiction. The defendants first removed the case to federal court on seven grounds, and the district court rejected all seven, remanding the case to state court.²³ While such remands are generally unreviewable by higher courts, there was a statutory exception for one claim: federal officer jurisdiction.²⁴ The defendants claimed

15. *Juliana v. U.S.*, 947 F.3d 1159, 1173 (9th Cir. 2020).

16. *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018), *vacated*, 969 F.3d 895 (9th Cir. 2020).

17. *Id.* Unlike those in most later second-wave cases, the plaintiffs in *Oakland* did not base liability on the defendants' deception. "At one point, counsel seemed to limit liability to those who had promoted allegedly phony science to deny climate change. But at oral argument, plaintiffs' counsel clarified that any such promotion remained merely a 'plus factor.'" *Id.*

18. *City of Oakland v. BP PLC*, 969 F.3d 895, 911–12 (9th Cir. 2020).

19. *Boulder*, 965 F.3d 792, 798 (10th Cir. 2020).

20. Amended Complaint and Jury Demand at ¶¶ 407–43, *Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020), *cert. granted and vacated*, 141 S. Ct. 2667 (2021).

21. *Id.* at ¶¶ 444–530.

22. *Id.* at ¶¶ 532–34.

23. *Bd. of Cnty. Comm'rs v. Suncor (U.S.A.) Inc.*, 405 F. Supp. 3d at 981.

24. *Boulder*, 965 F.3d at 799.

that oil companies' government leases to mine the Outer Continental Shelf made them federal officers for the purpose of federal court jurisdiction.²⁵ They also argued that this single reviewable claim allowed the appeals court to review all the others.²⁶ The Tenth Circuit disagreed,²⁷ joining several other circuits in holding that one reviewable claim does not confer appellate jurisdiction over others.²⁸ The Supreme Court came to the opposite conclusion in *BP P.L.C. v. Mayor of Baltimore*, however.²⁹ This led the Court to vacate the Tenth Circuit decision in *Boulder* and remand the case for further consideration.³⁰

II. ANALYSIS: HOW *BOULDER* MAKES THE CASE FOR JUDICIAL CLIMATE ADAPTATION

Legal mobilization theory provides a useful way to consider how *Boulder* and other second-wave climate cases might influence future judicial action on climate—regardless of their own outcomes in court. Legal mobilization scholarship takes a broad view of law's power, transcending the study of “simple instrumental indicators for the effects of winning and losing lawsuits” to examine how legal claims and discursive framings are constructed and lead to change in and out of the courtroom.³¹ Scholars use the concept of “framing” to describe how legal actors “shape which issues are seen as problems, which are discussed, and which are taken up for action.”³² As part of a legal mobilization for climate action, second-wave plaintiffs make “social and political as well as scientific judgments” that not only reflect the current context of litigation, but also help to shape it by “critiqu[ing] existing structural arrangements and institutional practices.”³³ For the *Boulder* plaintiffs, this process has included asserting new injuries and claims that push courts toward their own form of climate adaptation.

A. Impacts and Immediacy

Second-wave climate litigants are calling on courts to recognize the immediacy of climate harms. Even judges and legal observers who are

25. *Id.* at 820–21.

26. *Id.* at 799.

27. *Id.* at 819.

28. *See, e.g.,* *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *but see* *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015) (finding it is the district court's order that is reviewable under the statutory exception at issue, rather than any individual question within it); *see also* *Boulder*, 965 F.3d at 802–04 (discussing the circuit split). The Tenth Circuit rejected defendants' argument regarding the federal officers exception as well, and remanded the case again to state court. *Boulder*, 965 F.3d at 821–27.

29. *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1538 (2021).

30. *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs*, 141 S. Ct. 2667 (2021).

31. Michael McCann et al., *Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States*, 38 L. & SOC. INQUIRY 288, 290 (2013).

32. Lisa Vanhala, *Coproducing the Endangered Polar Bear: Science, Climate Change, and Legal Mobilization*, 42 L. & POL'Y 105, 109 (2020).

33. *Id.*

sympathetic to climate science sometimes talk about climate change as a future phenomenon—a narrative framing that gravely limits the availability of judicial intervention today.³⁴ Without an injury that is “imminent, not conjectural or hypothetical,” plaintiffs may lack standing to bring cases in federal and many state courts.³⁵ Yet this view of climate change lags behind current science, as increasingly sophisticated attribution studies are able to link atmospheric warming to a growing range of already-occurring climate impacts.³⁶ Second-wave climate liability complaints offer a more useful narrative frame by telling the stories of present-day climate impacts and the millions of dollars in expenses that plaintiffs have already incurred in managing them.³⁷ The diversity of harms alleged across more than a dozen second-wave cases in varied ecological and economic contexts is a powerful reminder that climate change is causing injuries now.

The city and counties in *Boulder* were the first inland plaintiffs among the second-wave cases, widening the scope of climate-related injuries confronting the courts.³⁸ The coastal cities who filed the initial second-wave claims had primarily alleged current and future injuries related to sea level rise, such as storm surges, erosion and loss of coastline, and saltwater intrusion in drinking water.³⁹ Boulder faces a different set of issues. Colorado has seen precipitation changes and increases in extreme heat that are linked to drought, wildfires, forest

34. See, e.g., *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 n.8 (N.D. Cal. 2018), *vacated*, 969 F.3d 895 (9th Cir. 2020). (“Although plaintiffs allege that global warming has already caused sea level rise, Oakland and San Francisco have yet to build a seawall or other infrastructure for which they seek reimbursement. . . . Oakland and San Francisco may eventually incur expense over and above federal outlays, but that is neither certain nor imminent.”); Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENV’T L. 1, 44 (2011) (arguing that successful climate tort claims would require expanding harm “to include much more by way of anticipatory injury than courts currently recognize”).

35. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); see generally Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RES. L. 349 (2015).

36. See Michael Burger et al., *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV’T L. 57, 65 (2020) (surveying the current state of attribution science); see also *id.* at 153–54 (“Attribution data is a valuable complement to impact projections as it can be used to establish an existing injury while also lending credibility to projections of future harm.”).

37. See, e.g., Complaint at ¶ 175, *Cnty. of San Mateo v. Chevron Corp.*, No. 17CIV03222 (Cal. Ct. Super. July 17, 2017) 2017 WL 3048970 (explaining that the plaintiffs had incurred millions of dollars of expenses related to planning for and predicting future sea level rise).

38. See *Climate Liability Litigation Cases Underway to Make Climate Polluters Pay*, PAY UP CLIMATE POLLUTERS, <https://payupclimatepolluters.org/cases> (last visited Sept. 4, 2021). Since *Boulder* was filed, a second inland plaintiff, Minnesota, has sued a fossil fuel trade group for harms related to extreme heat in urban centers, crop damage, and flooding. Complaint at ¶¶ 139–71, *Minnesota v. Am. Petrol. Inst.*, No. 20-1636 (D. Minn. June 24, 2020), 2021 WL 1215656.

39. See, e.g., Complaint, *supra* note 37, at ¶¶ 165–77; First Amended Complaint for Public Nuisance at ¶¶ 1, 8–9, 128–29, *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (2018) (No. 17-cv-06011). The Santa Cruz and New York City complaints also noted some climate impacts unrelated to sea level, such as heat waves. Complaint at ¶¶ 221–46, *City of Santa Cruz v. Chevron Corp.*, No. 17CV03243 (Cal. Ct. Super. Dec. 20, 2017); Complaint at ¶¶ 107–08, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18 Civ. 182).

die-off, and bark beetle outbreaks.⁴⁰ The plaintiffs also explained that their economies depend on snow and cold weather, citing threats to the state's \$5 billion ski industry already posed by "low-snow" winters and shorter seasons.⁴¹

Bringing the harms facing inland communities into the public narrative of climate change—and into judicial awareness—is a critical step.⁴² However, plaintiffs may have more difficulty showing causation when climate impacts are the result of complex interactions between many variables.⁴³ Wildfires, for example, are linked to sprawl and the building of electrical systems in previously remote areas.⁴⁴ But as scientists have become increasingly confident that anthropogenic climate change is contributing to the frequency and severity of these extreme events,⁴⁵ the law must catch up. *Boulder* and similar cases may help judges recognize the imperative of adapting jurisprudence to the present-day climate crisis.

B. Culpability and Duplicity

Judges adopt another limiting narrative frame when they accept the premise that because we all contribute to climate change, none can be held responsible.⁴⁶ Second-wave plaintiffs push back on this perception by assigning liability not on the basis of defendants' greenhouse gas emissions, but on their actions to mislead the public.⁴⁷ This distinction clarifies the defendants' moral responsibility that

40. Amended Complaint and Jury Demand at ¶ 140, *Bd. of Cnty. Comm'rs. v. Suncor (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) (No. 18-cv-01672).

41. *Id.* at ¶ 144. Since the *Boulder* plaintiffs filed their complaint in 2018, Colorado's climate impacts have only become more severe. 2020 was Colorado's third driest year on record, with nearly a fourth of the state in an extreme drought. Michael Elizabeth Sakas, *Colorado Wildfires Are Climate Change In the Here and Now' — And a Sign of Summers to Come*, COLO. PUB. RADIO (Aug. 20, 2020), <https://www.cpr.org/2020/08/20/colorado-wildfires-climate-change-drought-snowpack/>. Nearly 700,000 acres burned, which included three of the largest fires in state history. Hillary Rosner, *Boulder, Colorado Wakes up to the Threat of Worsening Wildfires*, NAT'L GEOGRAPHIC (Oct. 26, 2020), <https://www.nationalgeographic.com/environment/2020/10/boulder-isnt-ready-to-evacuate-for-wildfires/>.

42. See Brian Kennedy, *Most Americans Say Climate Change Affects Their Local Community, Including 70% Living near Coast*, PEW RSCH. CTR. (June 29, 2020), <https://www.pewresearch.org/fact-tank/2020/06/29/most-americans-say-climate-change-impacts-their-community-but-effects-vary-by-region-2/> (finding that among both Republicans and Democrats, Americans who live closer to a coast are more likely to perceive greater climate impacts in their area).

43. Burger et al., *supra* note 36, at 100.

44. *Id.* at 105. Similarly, droughts are "highly complex meteorological events (with many factors affecting their probability, severity, and duration)." *Id.*

45. See *id.* at 88–89.

46. See, e.g., *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018), *vacated*, 969 F.3d 895 (9th Cir. 2020) (asking "would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?"); see also Kysar, *supra* note 34, at 4 (discussing how climate change represents "the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible").

47. See Sokol, *supra* note 4, at 1412–15; see also Neela Banerjee et al., *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, INSIDE CLIMATE NEWS (Sept. 16, 2015), <https://insideclimatenews.org/news/16092015/exxons-own-research-confirmed-fossil-fuels-role-in->

is at the heart of these claims.⁴⁸ Borrowing lessons from the successful legal mobilization against tobacco,⁴⁹ plaintiffs emphasize that fossil fuel companies knew for decades that their products were likely to cause catastrophic climate change and acted to hide this knowledge from the public.⁵⁰

Boulder took this strategy a step further, as the plaintiffs were the first to bring a state consumer protection law claim alongside tort claims.⁵¹ Others soon followed, and six of eight climate liability cases brought in 2020 included a consumer protection claim.⁵² State consumer protection law developed in response to concerns about the imbalance of power and information between buyers and sellers, making it an appropriate tool to hold fossil fuel companies accountable for disinformation.⁵³ While most of the second-wave plaintiffs have theories of liability based on the acts of selling and deceptively marketing fossil fuels, consumer protection claims put courts' attention more squarely on the harm caused by the deception.

The *Boulder* plaintiffs filed their claim under the Colorado Consumer Protection Act, which broadly prohibits deceptive trade practices, including knowingly or recklessly making a false representation or failing to disclose material information about a product.⁵⁴ Many states do not permit non-consumers to take advantage of the private right of action, but Colorado and several others permit any person who has been injured to sue, which opens an avenue for plaintiff cities as well.⁵⁵ Cities and states are increasingly deploying

global-warming/ (documenting Exxon's knowledge of its products' role in fueling catastrophic climate change and its subsequent financing of inaccurate climate science).

48. Bringing claims rooted in consumer protection may also help plaintiffs avoid displacement by the Clean Air Act. See Sokol, *supra* note 4, at 1415.

49. See McCann et al., *supra* note 31, at 295 ("After persistent failures in hundreds of actions invoking conventional tort claims, claimants in and out of court began to focus on a different challenge—that corporations knowingly, willfully conspired to supply disinformation or outright lies intended to mislead the public about scientific research on tobacco . . .").

50. Like the tobacco plaintiffs, most second-wave climate plaintiffs have brought public nuisance claims, as well as a variety of other tort claims. See generally Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49 (2018). However, the focus on defrauding the public in both tobacco and climate cases makes these claims more akin to "crimtors" than traditional civil tort liability. See McCann et al., *supra* note 31, at 312 (noting that "allegations of willful fraud and quasi-criminal conspiracy supplemented, if not overshadowed, traditional tort claims that routinely floundered on deference to individual consumer responsibility" in the tobacco context).

51. Among the second-wave plaintiffs, they were also the first to bring unjust enrichment and conspiracy claims. See *Climate Liability Litigation Cases Underway to Make Climate Polluters Pay*, *supra* note 38.

52. See *id.*

53. See Megan Bittakis, *Consumer Protection Laws Not Just for Consumers*, 13 WYO. L. REV. 439, 444 (2013) (noting how the development of state consumer protection law was animated by a concern over the imbalance of power between sellers and buyers).

54. COLO. REV. STAT. § 6-1-105 (2020).

55. See Dee Pridgen, *The Dynamic Duo of Consumer Protection State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 943 (2017) (noting that most state consumer protection statutes are limited to consumer plaintiffs in the context of consumer transactions). Although the Boulder plaintiffs must rely on the private right of action, later second-wave consumer

both consumer protection law and mass tort law to address issues related to legal but potentially harmful products which were marketed in a misleading way, such as tobacco, subprime loans, and opioids.⁵⁶ This focus on deception was an important strategic shift in “the symbolic politics of agenda transformation” during the tobacco litigation, and it has become central to the push for climate accountability as well.⁵⁷

C. Redressability and Reform

As the previous Subparts illustrate, one of the biggest barriers to judicial climate action is the outdated law itself. Archaic doctrines and restrictive standing requirements reflect a classical liberal worldview that cannot comprehend complex global harms or time-delayed injuries.⁵⁸ As Professor Douglas Kysar has observed, “[w]hen even the most dystopian climate change scenario . . . fails to register as a responsibility of any actor anywhere, our principles of causal and moral attribution need to be rethought.”⁵⁹ Writing in the context of mass tort law, Kysar argues that climate change suits could force a judicial reckoning that goes beyond climate.⁶⁰ By highlighting the inadequacy of current law to address injustice and suffering on a vast scale, climate suits could have “the salutary effect of fostering judicial recognition of just how complex and interrelated social, economic, and environmental systems are.”⁶¹

If so, *Boulder* and other second-wave cases may help lead this shift. One possible direction is the expansion of consumer protection law. Just as tort law will need to stretch to encompass climate harms, consumer protection law will be forced to adapt as well.⁶² For example, much of the misleading information spread by fossil fuel companies has been disseminated by industry trade associations and seemingly independent front groups, a practice often called astroturfing.⁶³ It is not clear whether consumer protection statutes prohibit such practices.⁶⁴ But adapting existing law to address dark money and disinformation

protection cases were brought as state enforcement actions, powerful tools that eliminate some of the issues of injury and causation. *See id.* at 920–23; *see also, e.g., Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021).

56. *See* Pridgen, *supra* note 55, at 922–26.

57. McCann et al., *supra* note 31, at 295.

58. *See* Kysar, *supra* note 34, at 54; *see also id.* at 44 (noting that winning climate cases would require courts “to stretch in plaintiffs’ direction at nearly every stage” of the tort analysis).

59. *Id.* at 4.

60. *Id.* at 71.

61. *Id.* at 45.

62. *See* Sokol, *supra* note 4, at 1438 (“All law is going to have to deal with the climate crisis in order to be relevant, whether it be international, national, or local.”).

63. *See* Henry Steinberg, Note, *Civil Conspiracy up in Smoke: How Similar are Cigarettes and Smokestacks?*, 18 HASTINGS W. N.W. J. ENV’T L. & POL’Y 155, 174–77 (2012); Matthew J. Scott, *Ripping up the Astroturf: Regulating Deceptive Corporate Advertising Methods*, 105 IOWA L. REV. 431, 436 (2019).

64. *See* Scott, *supra* note 63, at 450 (noting that a typical claim under these statutes “focuses on defective products and outright false advertising rather than astroturfing and similar practices”).

campaigns is an urgent project for the future of environmental protection and consumer protection law more generally. *Boulder* pushes courts to take up that project.

CONCLUSION

Climate plaintiffs today confront a legal system that has so far “cowered before catastrophe” rather than dealing with the merits of their cases.⁶⁵ Whether or not the second wave of climate litigation will crest the barriers to judicial action, it is already eroding the narrative frames that hold them up. *Boulder*’s contributions to this legal mobilization effort include telling the story of inland climate impacts, introducing a consumer protection claim, and challenging existing law to recognize climate harms. Boulder County and other second-wave plaintiffs are calling on courts to join them, and adapt.

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65. Weaver & Kysar, *supra* note 5, at 329.

We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.

