

State Public Nuisance Claims and Climate Change Adaptation


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ARTICLE

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ALBERT C. LIN* & MICHAEL BURGER**

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I. INTRODUCTION

Lawsuits filed by the cities of San Francisco and Oakland in California state court allege that five of the world's largest oil companies actively campaigned to promote fossil fuel use even as they knew that their products would contribute to dangerous global warming and associated sea level rise. The suits, which initially rested on state public nuisance law alone, seek abatement orders requiring the defendants to fund adaptation measures ranging from the construction of sea walls to the elevation of low-lying property and buildings. Other coastal jurisdictions in California—and, separately, the State of Rhode Island, City of New York, City of Baltimore, King County (Washington), three local governments in Colorado, and an association of Pacific Coast fishermen—have filed similar suits asserting public nuisance as well as other tort, statutory, and public trust claims for sea level rise and other climate impacts, seeking both abatement and damages.

This Article explores the potential for state public nuisance claims to facilitate adaptation, resource protection, and other climate change responses by coastal communities in California.¹ The California public nuisance actions represent just the latest chapter in efforts to spur responses to climate change and attribute responsibility for climate change through the common law. Part II of this Article describes the California public nuisance lawsuits and situates them in the context of common law actions directed against climate change. Part III considers the preliminary defenses that defendants have raised and could raise in the California public nuisance lawsuits, including the existence of state common law in this context, separation of powers and the political question doctrine, displacement and preemption, and standing. Part IV considers the potential merits of the plaintiffs' public nuisance claims under California law.

A product manufacturer may be held liable for assisting in the creation of a public nuisance under California law if the manufacturer promoted a harmful product with knowledge of the

1. We do not address in detail other common law claims raised in the California cases or any of the claims brought in other jurisdictions.

hazards involved.² Defendants are likely to dispute whether their research and marketing efforts constituted promotion of a harmful product and whether they knew of the link between their products and the hazards of climate change. Outside of California, the law of public nuisance also may allow defendants to assert that they lacked control of the instrumentality of harm—i.e., fossil fuels—once they were sold to consumers. Ultimately, even if plaintiffs are successful in establishing the elements of public nuisance, courts will have to grapple with fashioning a suitable remedy. Although the primary relief sought, establishment of an abatement fund, seems relatively straightforward, courts nevertheless may hesitate to tackle a global problem that hardly resembles run-of-the-mill public nuisances.³

Notwithstanding the obstacles that plaintiffs face in litigating and proving public nuisance, fossil fuel companies face the prospect of protracted litigation and a risk of substantial liability. Beyond the immediate outcomes of specific cases, these suits could spur direct federal action on the issue, encourage an industry shift away from fossil fuels, and shape the narrative on the reality of—and responsibility for—climate change.

II. BACKGROUND

A. The California Lawsuits

The San Francisco and Oakland climate change lawsuits (collectively referred to as the “San Francisco Bay lawsuits”) are largely identical. Both suits name as defendants the “five largest investor-owned fossil fuel corporations in the world as measured by their historic production of fossil fuels.”⁴ The complaints allege

2. *County of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313, 324–25, 328 (Ct. App. 2006).

3. *See, e.g., California v. BP*, No. C 16-06011 WHA, No. C 17-06012 WHA, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018) (suggesting that “the scope of the worldwide predicament [of climate change] demands the most comprehensive view available” and that “[a] patchwork of fifty different answers to the same fundamental global issue would be unworkable.”).

4. First Amended Complaint at 2, *City of San Francisco v. BP*, No. 3:17-cv-06012-WHA (N.D. Cal. Apr. 3, 2018) [hereinafter SF Am. Compl.] (naming BP, Chevron, ConocoPhillips, Exxon Mobil, and Royal Dutch Shell as defendants); First Amended Complaint at 2, *City of Oakland v. BP*, No. 3:17-cv-06011-WHA

that these defendants “did not simply produce fossil fuels” but also engaged in sophisticated public relations “campaigns to promote pervasive fossil fuel usage” and downplayed risks even as they knew that their fossil fuels were contributing to global warming.⁵ As amended, the suits seek an abatement fund remedy pursuant to California and federal public nuisance law and identify various abatement projects that are already being planned or undertaken in response to sea level rise.⁶ Notably, the plaintiff cities “do not seek to impose liability” for damages, nor do they seek to restrain the defendants’ business operations.⁷ As the complaints state, “[these] case[s are], fundamentally, about shifting the costs of abating sea level rise harm . . . back onto the companies.”⁸

Of the recent climate change public nuisance litigation, the San Francisco Bay lawsuits have progressed relatively rapidly. Defendants removed the cases to federal district court, which denied the plaintiffs’ motions to remand the cases to state court and held that the plaintiffs’ nuisance claims “are necessarily governed by federal common law” (hereinafter “San Francisco Bay removal order”).⁹ The district court subsequently dismissed the suits, holding that the Clean Air Act displaced the claims to the extent that they were based on domestic greenhouse gas (“GHG”) emissions and that any foreign GHG emissions linked to the defendants must be addressed by Congress or the executive branch rather than the courts (hereinafter “San Francisco Bay dismissal

(N.D. Cal. Apr. 3, 2018) [hereinafter *Oakland Am. Compl.*] (naming BP, Chevron, ConocoPhillips, Exxon Mobil, and Royal Dutch Shell as defendants).

5. SF Am. Compl., *supra* note 4, at 3; *Oakland Am. Compl.*, *supra* note 4, at 2–3.

6. SF Am. Compl., *supra* note 4, at 1, 5, 58–61; *Oakland Am. Compl.*, *supra* note 4, at 5, 49–55.

7. SF Am. Compl., *supra* note 4, at 5; *Oakland Am. Compl.*, *supra* note 4, at 5.

8. SF Am. Compl., *supra* note 4, at 5; *Oakland Am. Compl.*, *supra* note 4, at 5.

9. *California*, 2018 WL 1064293, at *2.

order”).¹⁰ The plaintiffs have appealed the district court’s rulings to the Ninth Circuit.¹¹

The other California climate change lawsuits, filed individually by Marin County,¹² San Mateo County,¹³ the City of Imperial Beach,¹⁴ Santa Cruz County,¹⁵ the City of Santa Cruz,¹⁶ and the City of Richmond,¹⁷ and the Pacific Coast Federation of Fishermen’s Associations,¹⁸ are substantially broader than the San Francisco Bay lawsuits in several ways. First, these other suits allege a range of tort claims in addition to public nuisance, including: negligence, strict liability, trespass, failure to warn, and design defect.¹⁹ Second, these suits name as defendants not only the five oil companies named in the San Francisco Bay lawsuits, but also various other companies engaged in the production and sale of coal, oil, and natural gas.²⁰ Third, while these suits

10. *City of Oakland v. BP*, 325 F. Supp. 3d 1017, 1024–26 (N.D. Cal. 2018), *appeal filed*, Case No. 18-16663; *see also City of New York v. BP*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *appeal filed*, Case No. 18-2188 (finding New York City could not pursue nuisance and trespass claims against oil and gas companies for injuries arising from greenhouse gases).

11. *See* Notice of Appeal, *City of Oakland v. BP*, No. 18-16663 (N.D. Cal. Aug. 24, 2018).

12. Complaint, *County of Marin v. Chevron*, No. CV 1702586 (Cal. Super. Ct. Jul. 17, 2017) [hereinafter *Marin Compl.*].

13. Complaint, *County of San Mateo v. Chevron*, No. 17CIV03222 (Cal. Super. Ct. Jul. 17, 2017) [hereinafter *San Mateo Compl.*].

14. Complaint, *Imperial Beach v. Chevron*, No. C17-01227 (Cal. Super. Ct. Jul. 17, 2017) [hereinafter *Imperial Beach Compl.*].

15. Complaint, *City of Santa Cruz v. Chevron*, No. 17CV03243 (Cal. Super. Ct. Dec. 20, 2017) [hereinafter *City of Santa Cruz Compl.*].

16. Complaint, *County of Santa Cruz v. Chevron*, No. 17CV03242 (Cal. Super. Ct. Dec. 20, 2017) [hereinafter *County of Santa Cruz Compl.*].

17. Complaint, *City of Richmond v. Chevron*, No. C18-00055 (Cal. Super. Ct. Jan. 22, 2018) [hereinafter *Richmond Compl.*].

18. Complaint, *Pacific Coast Federation of Fishermen’s Associations, Inc. v. Chevron Corp.*, No. C18-571285 (Cal. Super. Ct. Nov. 14, 2018) [hereinafter *Pacific Coast Compl.*].

19. *Marin Compl.*, *supra* note 12, at 79–98; *San Mateo Compl.*, *supra* note 13, at 78–97; *Imperial Beach Compl.*, *supra* note 14, at 75–94; *City of Santa Cruz Compl.*, *supra* note 15, at 95–118; *County of Santa Cruz Compl.*, *supra* note 16, at 99–122; *Richmond Compl.*, *supra* note 17, at 90–112; *Pacific Coast Compl.*, *supra* note 18, at 76–90.

20. *Marin Compl.*, *supra* note 12, at 7–22; *San Mateo Compl.*, *supra* note 13, at 6–22; *Imperial Beach Compl.*, *supra* note 14, at 6–22; *City of Santa Cruz Compl.*, *supra* note 15, at 6–20; *County of Santa Cruz Compl.*, *supra* note 16, at 7–21; *Richmond Compl.*, *supra* note 17, at 6–20; *Pacific Coast Compl.*, *supra* note 18, at 7–25. All together, these defendants are alleged to be directly responsible

resemble the San Francisco Bay lawsuits in seeking “to ensure that the parties responsible for sea level rise bear the costs of its impacts”²¹ on the plaintiffs, some of them also seek to internalize the costs associated with other impacts from climate change, including drought and wildfire.²² Finally, these suits request—in addition to abatement—disgorgement of profits, compensatory damages, and punitive damages.²³

Like the San Francisco Bay lawsuits, the other California local government cases were removed to federal court. However, those other cases were assigned to a different federal judge, who remanded the San Mateo, Marin, and Imperial Beach cases to state court after determining that the claims should be governed by state common law rather than federal common law (hereinafter the “San Mateo remand order”).²⁴ At the time of this writing, the San Mateo remand order was on appeal before the Ninth Circuit, and the remand order was stayed pending resolution of the appeal; motions to remand the Santa Cruz and Richmond cases (hereinafter “Santa Cruz cases”), which were filed later, were also granted but stayed pending the appeal of the San Mateo remand order,²⁵ and then consolidated with the San Mateo appeal.²⁶

B. Common Law Litigation on Climate Change

The recent spate of climate cases are only the latest common law battles over climate change. Frustrated by the slow pace of legislative and regulatory responses, particularly at the federal level, and having suffered the adverse impacts of climate-related

for 20% of CO₂ emissions worldwide between 1965 and 2015. Marin Compl., *supra* note 12, at 3.

21. Marin Compl., *supra* note 12, at 4; San Mateo Compl., *supra* note 13, at 4; *see* Imperial Beach Compl., *supra* note 14, at 4.

22. *See, e.g.*, City of Santa Cruz Compl., *supra* note 15, at 34–40; County of Santa Cruz Compl., *supra* note 16, 34–35, 39–40.

23. Marin Compl., *supra* note 12, at 99; San Mateo Compl., *supra* note 13, at 98; Imperial Beach Compl., *supra* note 14, at 95; City of Santa Cruz Compl., *supra* note 15, at 119; County of Santa Cruz Compl., *supra* note 16, at 123; Richmond Compl., *supra* note 17, at 112; Pacific Coast Compl., *supra* note 18, at 90.

24. County of San Mateo v. Chevron, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018), *appeal filed* Case No. 18-15503.

25. County of Santa Cruz v. Chevron, 3:18-cv-00450-VC, 3:18-cv-00458-VC, 3:18-cv-00732-VC (N.D. Cal. July 10, 2018).

26. *See* Order Consolidating Appeals, County of Santa Cruz v. Chevron, No. 18-16376 (9th Cir. Aug. 20, 2018).

slow-onset changes and extreme events, past plaintiffs have filed a number of suits invoking common law doctrines.²⁷ These suits have named fossil fuel companies, power companies, and automobile manufacturers as defendants, and they have sought to assign responsibility to these actors for their roles in emitting GHGs, promoting uses of their products that emit GHGs, and concealing the serious threats posed by climate change.²⁸

The tort theories expressed in these earlier lawsuits are similar to those we are seeing now: trespass, negligence, strict liability (for design defect and failure to warn), private nuisance, public nuisance, and civil conspiracy.²⁹ From the outset, commentators have observed that attempts to apply such theories to the complex and “super wicked problem” of climate change are likely to encounter difficulties with respect to basic elements of traditional tort analysis—especially duty, breach, and causation.³⁰

27. See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012); *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010), *petition for writ of mandamus denied sub nom.* In re *Comer*, 562 U.S. 1133 (2011) (*Comer I*); *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (*Comer II*); *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

28. See *Am. Elec. Power Co.*, 564 U.S. at 418 (naming as defendants the Tennessee Valley Authority and four private companies that operate fossil-fuel fired power plants); *Kivalina*, 696 F.3d at 853 n.1 (naming as defendants multiple oil companies and power companies); *Comer*, 585 F.3d at 859 (naming as defendants companies engaged in energy, fossil fuels, and chemical industries); *General Motors Corp.*, 2007 WL 2726871, at *1 (noting that six defendant automakers produce vehicles that emit over 20% of anthropogenic carbon dioxide emissions in U.S.).

29. See *Am. Elec. Power Co.*, 564 U.S. at 429 (asserting federal and state public nuisance claims); *Kivalina*, 696 F.3d at 853 (asserting federal public nuisance claim); *General Motors Corp.*, 2007 WL 2726871, at *2 (asserting federal and state public nuisance claims); *Comer*, 585 F.3d at 859–60 (alleging state law claims of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy).

30. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1158–60 (2009) (discussing characterization of climate change as a “super wicked problem”). See Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135, 136 (2011) (noting common law climate change cases “pose unique difficulties because current atmospheric levels of GHGs result from the cumulative emissions of millions or billions of emitters” and “no specific injury can be attributed to any specific polluter”); Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 3 (2011) (“[C]ourts in all likelihood will agree with commentators that nuisance and other

With respect to the element of duty, it is not obvious what the duty of ordinary care requires in the context of climate change.³¹ Moreover, demonstrating breach of the duty of care generally requires a showing that the harms from defendants' activities outweighed the benefits.³² Such a showing can be difficult to make in light of the social value and ubiquity of GHG-generating activities. Finally, the causation analysis is complicated by the multiplicity of GHG sources and the difficulty of attributing specific events to specific sources or, in some instances and to varying degrees, to climate change more generally.³³

Of the available tort theories, public nuisance has been regarded by some as the most promising for climate change plaintiffs because it focuses on harms to the general public rather than harms to individual landowners or victims.³⁴ Characterizing climate change as a public nuisance fits within a long history of addressing pollution problems as public nuisances, albeit on a different scale.³⁵ Public nuisance doctrine requires proof of an unreasonable and substantial interference with a public right.³⁶ As such, it arguably offers the advantage of allowing plaintiffs to direct courts' attention to the severity of the harms suffered rather than on the balancing of those harms against the social benefit of defendants' conduct.³⁷

Climate change litigation has invoked not only tort claims, but also the public trust doctrine. In a series of public trust cases brought in state and federal courts around the country, youth plaintiffs suing federal and state governments have contended that the defendants have abdicated their trust duty to protect the

traditional tort theories are overwhelmed by the magnitude and the complexity of the climate change conundrum.”).

31. Kysar, *supra* note 30, at 10–20.

32. *Id.* at 28.

33. *Id.* at 29–42.

34. *Id.* at 24.

35. *See, e.g.,* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); *see generally* Tracy D. Hester, *A New Front Blowing In: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENVTL. L. J. 49, 56 (2012) (discussing various uses of public nuisance to address environmental threats).

36. Restatement (Second) of Torts §§ 821B(1), 821B(1)(a) (Am. Law Inst. 1979); Dan B. Dobbs, *The Law of Torts* 1334 (2000) (defining public nuisance as “a substantial and unreasonable interference with a right held in common by the general public, in use of public facilities, in health, safety, and convenience”).

37. Kysar, *supra* note 30, at 25.

atmosphere and other natural resources.³⁸ Alleging a trust duty based on the common law or on constitutional provisions, these plaintiffs have generally sought to compel more stringent government regulation of GHG emissions, as well as more protective management of public lands.³⁹

Thus far, courts have viewed common law tort and public trust claims in climate change cases with a mix of annoyance, skepticism, curiosity, and inspiration. Some trial courts have held that threshold issues preclude consideration of the claims, finding that plaintiffs lack standing or that their cases pose nonjusticiable political questions.⁴⁰ Two U.S. Court of Appeals panels, meanwhile, have held that there is no threshold bar to such claims.⁴¹ Where cases have survived threshold challenges they have generally foundered on other grounds.⁴²

38. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 12 (D.D.C. 2012) (alleging violation of federal public trust); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1263 (D. Or. 2016) (alleging violation of federal public trust and substantive due process); *Sanders-Reed v. Martinez*, 350 P.3d 1221, 1222–23 (N.M. Ct. App. 2015) (alleging violation of state public trust duty to protect atmosphere); *Kanuk v. State, Dep’t of Natural Res.*, 335 P.3d 1088, 1090–91 (Alaska 2014) (alleging breach of state’s public trust obligations under state constitution).

39. *See, e.g., Alec L.*, 863 F. Supp. 2d at 14 (seeking injunction directing “six federal agencies to take all necessary actions to enable carbon dioxide emissions to peak by December 2012 and decline by at least six percent per year beginning in 2013”); *Juliana*, 217 F. Supp. 3d at 1234 (challenging “decisions defendants have made across a vast set of topics—decisions like whether and to what extent to regulate CO₂ emissions from power plants and vehicles, whether to permit fossil fuel extraction and development to take place on federal lands, how much to charge for use of those lands, . . .”).

40. *See, e.g., Oakland*, 325 F. Supp. 3d at 1024–26 (dismissing federal common law nuisance claims on displacement and separation of powers grounds); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876–83 (N.D. Cal. 2009) (dismissing federal common law nuisance claims on grounds that plaintiffs lacked standing and that their tort claims were nonjusticiable to the political question doctrine), *aff’d on alternative grounds*, 696 F.3d 849, 858 (9th Cir. 2012); *Sanders-Reed*, 350 P.3d at 1225–27 (holding state public trust claim displaced by state statute); *Kanuk*, 335 P.3d at 1096–1103 (affirming dismissal of state public trust claims either for lack of justiciability or on prudential grounds). *See also Alec L. v. McCarthy*, 561 F. App’x. 7, 7 (D.C. Cir. 2014) (affirming dismissal of climate change suit based on federal public trust doctrine on grounds that public trust doctrine is a matter of state law).

41. *Comer I*, 585 F.3d at 860; *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 392 (2d Cir. 2009).

42. *See infra* notes 52–55 and accompanying text (discussing *Comer*); *see also infra* notes 43–46 and accompanying text (discussing *Am. Elec. Power Co.*).

The Supreme Court directly addressed the availability of federal public nuisance as a means to address greenhouse gas emissions in *American Electric Power Co. v. Connecticut* (“*AEP*”).⁴³ Led by Connecticut and several other states, the plaintiffs in *AEP* asserted public nuisance claims and sought injunctive relief against electric power companies collectively responsible for one-tenth of U.S. carbon dioxide emissions.⁴⁴ The Court held such claims to be unavailable under federal law, explaining that “the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement” of carbon emissions.⁴⁵ Displacement resulted from Congress’ delegation of authority to regulate carbon emissions, regardless of whether EPA had actually exercised that authority.⁴⁶

Following the *AEP* decision, a plausible case still could have been made for the viability of federal public nuisance actions for damages, an issue not raised in the *AEP* litigation. However, the Ninth Circuit rejected this possibility in *Kivalina v. ExxonMobil Corp.*⁴⁷ While acknowledging that “the lack of a federal remedy may be a factor to be considered in determining whether Congress has displaced federal common law,” the Ninth Circuit, applying Supreme Court precedents on displacement, held “if a cause of action is displaced, displacement is extended to all remedies.”⁴⁸

Although *AEP* and *Kivalina* yielded unfavorable outcomes for plaintiffs seeking to redress climate change through federal public nuisance, their holdings were fairly narrow. Claims based on doctrines other than federal public nuisance remain potentially viable and continue to be litigated.⁴⁹ Moreover, as described further in Part III, neither *AEP* nor *Kivalina* foreclosed the possibility that a public nuisance claim based on *state law* might be viable. In *AEP*, the Supreme Court expressly left the matter open for consideration in further litigation.⁵⁰ And in *Kivalina*, the

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

44. *Id.* at 418.

45. *Id.* at 424.

46. *Id.* at 426.

47. *Kivalina*, 696 F.3d at 857.

48. *Id.*

49. See, e.g., *Juliana*, 217 F. Supp. 3d at 1262–63 (denying motion to dismiss plaintiffs’ claim that government’s fossil fuel policies violate federal public trust doctrine and the U.S. Constitution).

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

concurrency noted that “[d]isplacement of the federal common law does not leave those injured by air pollution without a remedy,” and suggested state nuisance law as “an available option to the extent it is not preempted by federal law.”⁵¹

The availability of state common law claims was separately taken up in *Comer v. Murphy Oil USA*, where plaintiff property owners alleged that certain power, fossil fuel, and chemical companies’ GHG emissions contributed to climate change and exacerbated the harmful effects of Hurricane Katrina, constituting a private nuisance as well as a public nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.⁵² The case involved a convoluted procedural history, featuring a dismissal in district court, a reversal at the Fifth Circuit, an *en banc* decision to vacate the reversal due to failure to muster a quorum, the plaintiffs’ filing a writ of mandamus asking the Supreme Court to reinstate the panel decision, the denial of the writ,⁵³ the plaintiffs’ re-filing their case in district court, and dismissal based on res judicata grounds—though not, ultimately, on the merits.⁵⁴ Notably, the Fifth Circuit held in the first go-around that a diversity suit brought under state common law for damages was materially distinguishable from public nuisance claims brought under federal common law and seeking an injunction.⁵⁵ The panel did not address the merits of the public or private nuisance claims, leaving that for a prospective trial⁵⁶ but, given the rigmarole just described, a trial never occurred.

So, despite over a decade of litigation, courts have yet to definitively decide the substantive question of whether state public nuisance claims may be premised on direct or indirect GHG emissions. After both the Supreme Court ruling in *AEP* and the Ninth Circuit ruling in *Kivalina*, the plaintiffs declined to pursue any remaining claims in state court,⁵⁷ and the *Comer* precedent is

51. *Kivalina*, 696 F.3d at 866 (Pro, J., concurring).

52. *Comer II*, 839 F. Supp. 2d at 852–53.

53. *Comer I*, 562 U.S. at 1133.

54. *Comer II*, 839 F. Supp. 2d at 855–57.

55. *Comer I*, 585 F.3d at 878–79.

56. *Id.* at 880.

57. Adam Wernick, *Will These Alaska Villagers Be America’s First Climate Change Refugees?*, PUBLIC RADIO INT’L (Aug. 9, 2015), <https://perma.cc/W7UJ-GMHH>.

inconclusive. The current wave of California public nuisance lawsuits could open a significant new chapter in climate change litigation by forcing courts to address the merits of state public nuisance law—or they may never get there.

III. PRELIMINARY DEFENSES

At the time of this writing, defendants had successfully removed the San Francisco Bay lawsuits to federal court and prevailed on a motion to dismiss after convincing the district court to analyze the claims under federal common law rather than state law.⁵⁸ Meanwhile, plaintiffs had successfully moved to remand the San Mateo, Marin, Imperial Beach, Santa Cruz, and Richmond cases to state court, persuading another judge in the same district court that state common law should govern the cases.⁵⁹ The result is that there are conflicting opinions within the Northern District of California on whether federal or state law applies. This Part describes and assesses the merits of some of the most visible preliminary defenses, including those already raised in support of removal and dismissal.

A. Existence of a State-Based Common Law Claim for Nuisance

Perhaps the most important threshold question confronting all of the California cases is whether state public nuisance and other common law claims for abatement and/or damages resulting from climate change are available. In the San Francisco Bay lawsuits, defendants successfully argued that the local governments' claims, though styled as state common law claims, are necessarily federal common law claims.⁶⁰ Originally, defendants offered two slightly different arguments. First, they argued that courts have recognized a federal common law public nuisance claim for climate change and, therefore, there can be no state common law public nuisance claim.⁶¹ Second, they argued that the cases involve

58. *California*, 2018 WL 1064293, at *2.

59. *County of San Mateo*, 294 F. Supp. 3d at 937; *see also* Order Granting Motions to Remand, *County of Santa Cruz*, No. 3:18-cv-00732-VC (July 10, 2018).

60. *California*, 2018 WL 1064293, at *2.

61. Notice of Removal at 19, *California v. BP*, No. 3:17-cv-06012-EMC (N.D. Cal. Oct. 20, 2017) [hereinafter BP Notice of Removal].

“uniquely federal interests” requiring the application of federal common law.⁶² The district court ruled in their favor, finding that:

Plaintiffs’ claims for public nuisance, though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United States and all other nations. It demands to be governed by as universal a rule of apportioning responsibility as is available . . . [P]laintiffs’ claims, if any, are governed by federal common law.⁶³

While the question emerged in the removal context, the answer is important beyond the outcome of that particular battle. If 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 Supreme Court’s holding in *AEP* that the Clean Air Act displaced federal common law suits against GHG emitters.⁶⁴ Indeed, this is one of the key elements of the San Francisco Bay dismissal order.⁶⁵ But, the implications go even further. At the core of the argument against the existence of state public nuisance claims is the notion that common law has no proper role to play when it comes to climate change—whether it be in addressing the sources of GHG emissions or the adverse impacts that result from them—because all of it is wrapped up in federal policies pertaining to energy, economy, security, and appropriate levels of air pollution control, a complex web of national and foreign affairs concerns governed by congressional statutes and executive branch authority. Though clever in its confusions, our analysis concludes that the argument against the existence of state common law should not, in the end, prevail.

1. The Argument from Precedent

One argument defendants marshaled in support of limiting common law climate change litigation to federal common law went, in essence, like this: (1) Courts in *AEP* and *Kivalina* have

62. *Id.* at 3.

63. *California*, 2018 WL 1064293, at *5.

64. *Am. Elec. Power Co.*, 564 U.S. at 424.

65. *Oakland*, 325 F. Supp. 3d 1017, 1024–26.

recognized the existence of a federal common law cause of action for public nuisance;⁶⁶ (2) These and other judicial opinions have made statements to the effect that there cannot be a federal common law cause of action and a state common law cause of action that apply to the same matter;⁶⁷ (3) Therefore, there is only a federal common law cause of action for the nuisance of climate change.⁶⁸

However, as the district court found in the San Mateo remand order, precedent runs directly counter to the conclusion that only federal law can apply to climate change public nuisance claims.⁶⁹ Indeed, prior to the San Francisco Bay removal order, every court that looked at the question of the viability of state-based nuisance and tort claims for climate change came to the opposite conclusion.⁷⁰ The Supreme Court's view is that the existence of a federal common law claim that has been displaced by federal legislation does *not* erase the possibility of state common law claims; rather, it converts the availability of state claims into a question of statutory preemption.⁷¹ Thus, in her opinion for a unanimous court in *AEP*, Justice Ruth Bader Ginsburg noted that, in addition to their federal common law public nuisance claims, plaintiffs had also pled state common law claims for nuisance under the laws of various states in which emitting sources were located.⁷² Regarding the viability of those claims, Justice Ginsburg wrote:

In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act . . . None of the parties have briefed preemption or otherwise addressed the

66. BP Notice of Removal, *supra* note 61, at 5–11.

67. *Id.*

68. *Id.* at 4, 7–10.

69. *County of San Mateo*, 294 F. Supp. 3d at 937–38.

70. *See supra* notes 50-56 and accompanying text.

71. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 327–29 (1981) (noting the Clean Water Act preserved state common law cause of action in an area previously governed by federal common law).

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

availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.⁷³

In regards to the supplemental state law claims filed in *Kivalina*, the Ninth Circuit panel noted simply that the district court had declined to exercise supplemental jurisdiction and dismissed the claim without prejudice to re-file in state court.⁷⁴ Below, the district court had explained its decision by stating that a federal court “may decline to exercise supplemental jurisdiction over a claim if it has dismissed all claims over which it has original jurisdiction.”⁷⁵ In at least one judge’s view, then, a federal district court *does not* have original jurisdiction over a case claiming a state common law nuisance for climate change-related harm.

This view is consistent with the Fifth Circuit panel’s 2009 opinion in *Comer v. Murphy Oil (Comer I)*⁷⁶ and the District Court for the Southern District of Mississippi’s decision three years later in the next *Comer v. Murphy Oil (Comer II)*,⁷⁷ the only other decisions to address the question of jurisdiction in this context. In *Comer I*, plaintiffs seeking damages for injuries suffered as a result of Hurricane Katrina had invoked federal jurisdiction based on diversity of citizenship.⁷⁸ The Fifth Circuit panel concurred, reasoning that it had original jurisdiction over a class action worth more than \$5 million where diversity of the parties is present.⁷⁹ That the Fifth Circuit later vacated the decision is of no moment, as the decision to do so was based on its failure to convene a quorum for an *en banc* rehearing.⁸⁰ This had the effect of reinstating the district court’s dismissal of the case on political question and standing grounds.⁸¹ The district court dismissed the largely identical complaint filed in *Comer II* on several grounds:

73. *Id.* The district court in the San Francisco Bay lawsuits, while denying the motion to remand, quoted Justice Ginsburg’s opinion on this point in acknowledging that “AEP did not reach the plaintiffs’ state law claims.” *California*, 2018 WL 1064293, at *2 (quoting *Am. Elec. Power Co.*, 564 U.S. at 429).

74. *Kivalina*, 696 F.3d at 854–55.

75. *Kivalina*, 663 F. Supp. 2d at 882.

76. *Comer I*, 585 F.3d at 878–79.

77. *Comer II*, 839 F. Supp. 2d at 865.

78. *Comer I*, 585 F.3d at 859–61.

79. *Id.* at 860 n.1.

80. *Comer I*, 607 F.3d at 1055.

81. *Id.*

res judicata, political question, standing, and preemption.⁸² The Fifth Circuit upheld dismissal based on *res judicata*.⁸³ None of the foregoing supports the idea that state law claims do not exist. Instead, the *Comer* cases appear to validate the existence of the claims, even while doing away with them before reaching the merits.

In short, we agree with the holding of the San Mateo remand order that precedent plainly clears the pathway for state common law claims, even if they may eventually be dismissed on preemption or other grounds.⁸⁴

2. The Argument from Federal Interests

Defendants' argument that there are "uniquely federal interests" at issue in the latest climate change cases derives from the authority the Supreme Court has declared for courts to create and apply federal common law where a lawsuit implicates "uniquely federal interests."⁸⁵ The Supreme Court has described these cases as those "narrow areas [that are] . . . concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."⁸⁶ In seeking to convert the plaintiff governments' claims into federal common law claims, defendants posited that climate change is both an issue concerning the rights and obligations of the United States and a matter implicating foreign relations.⁸⁷

The first argument re-styles the political question doctrine as a constraint on state law rather than federal courts and, if endorsed by the courts, could empower federal common law to hold domain over a broad swath of policy areas that touch on energy, environment, and natural resources. The political question doctrine limits federal courts' jurisdiction by delineating certain cases as nonjusticiable, based on a number of factors.⁸⁸ The

82. *Comer II*, 839 F. Supp. 2d at 855–66.

83. *Comer II*, 718 F.3d at 466–69.

84. *County of San Mateo*, 294 F. Supp. 3d at 937.

85. *E.g.*, *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988).

86. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (citations omitted).

87. *See* BP Notice of Removal, *supra* note 61, at 9–11.

88. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

“uniquely federal interests” doctrine, by contrast, vests federal courts with exclusive jurisdiction over certain cases involving “the rights and obligations of the United States.”⁸⁹ The category of cases where courts have found “the rights and obligations of the United States” to be sufficiently at stake to warrant the exclusive application of federal common law is highly circumscribed. It applies only when the United States is a party to an action, such as a contract dispute where the United States is a party to the contract.⁹⁰ Although the defendants in the California cases were in some instances operating pursuant to federal licenses and permits, and their production and sale of fossil fuels were arguably consistent with domestic energy policy preferences, the United States was and is not a party to the defendants’ actions.

The argument that climate change involves “disputes implicating the conflicting rights of States or our relations with foreign nations” sufficient to require a uniform federal rule was found persuasive by the district court in the San Francisco Bay lawsuits.⁹¹ In its removal order, the district court declared “[t]aking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable.”⁹² Even more directly, the district court stated “the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution.”⁹³

This line of reasoning recalls the argument offered by EPA in 2003, when it denied a petition to regulate GHGs from motor vehicles because, among other things, doing so “might impair the President’s ability to negotiate with ‘key developing nations’ to reduce emissions.”⁹⁴ The Supreme Court rejected the idea that vague allusions to foreign affairs could justify EPA’s decision not

89. *Tex. Indus., Inc.*, 451 U.S. at 641.

90. *Boyle*, 487 U.S. at 519; Diane P. Wood, *Back to the Basics of Erie*, 18 LEWIS & CLARK L. REV. 673, 687–89 (2014).

91. *California*, 2018 WL 1064293, at *2–3 (quoting *Tex. Indus.*, 451 U.S. at 641).

92. *Id.* at *3.

93. *Id.*

94. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007).

to exercise its statutory authority then,⁹⁵ and courts should reject the argument that similar allusions could foreclose the availability of state common law claims now. This prong of the “uniquely federal interests” analysis has, like the “rights and obligations of the United States” prong, been applied in a far narrower set of cases. In particular, courts have determined that cases involving questions of international law, the Act of State doctrine, or competing interests of states in their sovereign capacity may require federal common law.⁹⁶

None of these apply here. First, it is implausible that courts in the United States will treat climate change as a matter bound by and confined to international law. Although climate change is the subject of international agreements, those agreements do not preclude subnational efforts to address the problem (in fact, such efforts are encouraged), nor do they purport to address the liability of nonstate actors. Second, the Act of State doctrine—which concerns acts done by a foreign government within its own territory—is irrelevant to these nuisance cases against fossil fuel companies.⁹⁷ Third, the states are already undertaking extensive efforts to address climate change, both independently and in small groups.⁹⁸ The present cases simply do not involve a conflict between states in their sovereign capacity, such as interstate disputes over boundaries or water apportionment.⁹⁹

In our view, it is not the case that there is only one kind of public nuisance action that applies to climate change and its related harms, and that the action is a federal one. The case law addressing the issue is overwhelmingly to the contrary, and the expansion of the “uniquely federal interests” test to cover climate change is untenable. If the state common law claims are to fail, it should be on a basis other than that they simply do not exist.

95. *Id.* at 533–34.

96. Wood, *supra* note 90, at 692–95.

97. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (“The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”).

98. See *U.S. State Climate Action Plans*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, <https://perma.cc/46DW-KR6C>.

99. See Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U.L. REV. 585, 596–99 (2006).

B. Separation of Powers and the Political Question Doctrine

The separation of powers issues implicated by the California public nuisance cases have emerged in a number of different, often blended forms, which evoke the political question doctrine, foreign policy preemption, the dormant Commerce Clause, and other concepts. For the purpose of analytic simplicity, here we address arguments against justiciability based on the political question doctrine, which encompasses many, if not necessarily all, of the related concepts.

In *Baker v. Carr*, the Supreme Court enumerated six factors or “formulations” that may indicate to federal courts the existence of a non-justiciable political question:

Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁰⁰

In *AEP*, the federal district court originally found that the case raised a political question necessarily left for the political branches because it required an initial policy determination of a nonjudicial kind.¹⁰¹ The Second Circuit reversed this judgment, finding that courts have long adjudicated complex environmental nuisance cases, and that the political question doctrine did not pose a bar.¹⁰² The Supreme Court’s view of the matter is somewhat obscure. Justice Ginsburg noted in her opinion that “[f]our members of the Court” found that neither standing nor any “other threshold

100. *Baker*, 369 U.S. at 217.

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

102. *Id.*

obstacle bars review.”¹⁰³ A footnote in the opinion refers to the political question doctrine,¹⁰⁴ but neither the footnote nor the text offers an explanation of exactly how the justices voted on the matter. All of which leaves the political question issue, as it applies to a federal common law claim seeking an injunction against GHG emissions, unresolved at the highest level.

The facts of the California cases, however, are different. Plaintiffs have framed their cases not in relation to climate change mitigation policy but rather in relation to these private actors’ individual and collective conduct, which includes not only producing GHG emissions, but also interacting with the market and with regulators in a sustained disinformation campaign.¹⁰⁵ Plaintiffs are not seeking to establish a specific policy in regards to GHG emissions, public lands management, or other matters of federal agency discretion. Rather, they are seeking abatement and damages for harms caused by market behavior they claim was, among other things, knowing, negligent, and intentionally misleading.¹⁰⁶ Thus, the analysis in federal court should, in theory, differ.

If the cases are remanded to state court, or if state law is applied in federal court, the political question doctrine would appear inapplicable. Under California law, the political question doctrine “compels dismissal of a lawsuit when complete deference to the role of the legislative or executive branch is required and there is nothing upon which a court can adjudicate without impermissibly intruding upon the authority of another branch of government.”¹⁰⁷ These conditions do not apply to the plaintiffs’ claims, which are based on the common law and do not threaten to intrude on the authority of the legislature or the executive branch. Likewise, in *Comer I*, the Fifth Circuit panel conducted an extensive analysis and held that the political question doctrine did not bar state nuisance claims.¹⁰⁸ The political question doctrine

103. *Id.* at 420.

104. *Id.* at 420 n.6.

105. *See, e.g.*, SF Am. Compl., *supra* note 4, at 41–49.

106. *See supra* notes 21 – 23 and accompanying text.

107. *Schabarum v. California Legislature*, 70 Cal. Rptr. 2d 745, 750 (Cal. Ct. App. 1998).

108. *Comer I*, 585 F.3d at 875–76.

does not appear to be intended to apply to actions invoking state common law claims.

C. Federal Displacement and Statutory Preemption

In *AEP*, the Supreme Court found that a public nuisance case brought in federal court under federal common law had been displaced by the Clean Air Act.¹⁰⁹ Because the Court had previously held in *Massachusetts v. EPA* that EPA was authorized to regulate GHGs by federal legislation,¹¹⁰ there was no longer room for federal common law. In the San Francisco Bay dismissal order, the district court found that this precedent controlled to the extent the federal nuisance claims involved defendants' domestic activities.¹¹¹ If state nuisance cases are converted into federal ones, one might expect this result to repeat. By contrast, in the San Mateo remand order, the district court noted that in *AEP* "the Supreme Court noted that the question of whether such state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law (a question the Court did not resolve)," and that "[t]his seems to reflect the Court's view that once federal common law is displaced by a federal statute, there is no longer a possibility that state law claims could be superseded by the previously-operative federal common law."¹¹²

It remains an open question whether state claims, such as those pled in the California cases, are preempted by federal legislation including the Clean Air Act, the Mineral Leasing Act, the Outer Continental Shelf Lands Act, and other statutes setting federal policies for GHG emissions and fossil fuel extraction, transportation, and consumption.¹¹³ Notably, in the San Mateo remand order, the district court found that the claims were not removable on the basis of "complete preemption," as defendants did not point to any statutory provision that would implicate such

109. *Am. Elec. Power Co.*, 564 U.S. at 424.

110. *Massachusetts*, 549 U.S. at 532.

111. *Oakland*, 325 F. Supp. 3d at 1024.

112. *San Mateo*, 294 F. Supp. 3d at 937.

113. In *Comer I*, a Fifth Circuit panel concluded that federal preemption was inapplicable to plaintiffs' state common law claims because there was no federal legislation barring state suits. *Comer I*, 585 F.3d at 879–80.

preemption.¹¹⁴ The court also noted that “[t]here may be important questions of ordinary preemption, but those are for the state courts to decide upon remand.”¹¹⁵

Courts’ analyses of ordinary preemption of state common law, should they reach the issue, may rest on *North Carolina v. Tennessee Valley Authority (“TVA”)*, in which the Fourth Circuit dismissed a common law nuisance action brought by the state of North Carolina against TVA.¹¹⁶ The lawsuit focused on emissions from TVA-operated power plants in Alabama and Tennessee, which were alleged to cause air pollution and associated health problems in North Carolina.¹¹⁷ The Fourth Circuit held that North Carolina plaintiffs could not seek redress under North Carolina law for defendants’ out-of-state activities and that, even if the plaintiffs had brought public nuisance claims under Alabama or Tennessee law, those claims would have failed because the defendants’ facilities held valid permits to emit pollutants.¹¹⁸ The court reasoned that the defendants could not be held liable under state public nuisance for the same interstate polluting activities covered by the permits, noting that “[c]ourts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government.”¹¹⁹

The Third and Sixth Circuits reached the opposite conclusion. In *Bell v. Cheswick Generating Station*, the Third Circuit held that Pennsylvania plaintiffs could seek damages under Pennsylvania law for “ash and contaminants settling on their property,” even though those pollutants had come from facilities permitted to emit under the Clean Air Act.¹²⁰ In *Merrick v. Diageo Americas Supply, Inc.*, a case dealing with fungus growing on plaintiffs’ property as

114. *San Mateo*, 294 F. Supp. 3d at 937–38.

115. *Id.* at 938.

116. *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 312 (4th Cir. 2010).

117. *Id.* at 296.

118. *Id.* at 308–09.

119. *Id.* at 309 (quoting *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981)). The court held that the emissions from the Tennessee Valley Authority’s 11 coal-fired power plants “cannot logically be public nuisances under Alabama and Tennessee law where TVA is in compliance with EPA NAAQS, the corresponding state SIPs, and the permits that implement them.” *Id.* at 310.

120. *Bell v. Cheswick Generating Station*, 734 F.3d 188, 189, 197 (3d Cir. 2013) (“[T]he suit here, brought by Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania, is not preempted.”).

a result of emissions from defendant’s whiskey distillery,¹²¹ and in *Little v. Louisville Gas & Elec. Co.*,¹²² a case closely resembling *Bell v. Cheswick*, the Sixth Circuit found that courts “distinguish[] between claims based on the common law of the source state—which are not preempted by the Clean Air Act—and claims based on the common law of a non-source state—which are preempted by the Clean Air Act.”¹²³

Even if the reasoning of *North Carolina v. TVA* were correct, there is at least one key distinction between it and the California cases: the facilities in *TVA* were specifically permitted to pollute under the standards set through the Clean Air Act, and the permits in question authorized the pollution in question. Here, by contrast, few of the federal programs through which defendants have operated, and few of the foreign governments that have permitted them to operate in other jurisdictions, have, until recent years, considered or disclosed, far less sought to regulate, the downstream GHG emissions associated with their activities.¹²⁴ Although defendants have already raised preemption-like issues on other, non-Clean Air Act grounds, the preemptive effect of those statutes remains to be seen.

D. Standing

Standing is a question that comes up in most climate change lawsuits, and it is a threshold issue in any challenge to government action, or inaction, in the climate change arena. But, the California cases involve common law tort claims. The elements of standing—*injury, causation, redressability*—constitute the merits of the case.¹²⁵ Were plaintiffs harmed in a tortious manner? Did defendants cause that harm? Are plaintiffs entitled to abatement?

121. *Merrick v. Diageo Am. Supply, Inc.*, 805 F.3d 685, 690 (6th Cir. 2015) (“The states’ rights savings clause of the Clean Air Act expressly preserves the state common law standards on which plaintiffs sue.”).

122. *Little v. Louisville Gas & Elec. Co.*, 805 F.3d 695, 698 (6th Cir. 2015).

123. *Merrick*, 805 F.3d at 693.

124. See Michael Burger and Jessica Wentz, *Downstream and Upstream Emissions Analysis: The Proper Scope of NEPA Review*, 41 HARV. ENVTL. L. REV. 109 (2017).

125. See Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241, 1248—49 (2011) (noting that the standing analysis involves many assumptions and speculation, fact-intensive inquiry, competing experts, and weighing of evidence).

Those questions constitute the whole case, not a preliminary matter to determine justiciability. In such circumstances where the standing and merits inquiries overlap, a plaintiff need not prove its case in order to avoid dismissal on standing grounds; rather, a case should be dismissed only if “entirely frivolous” or having “no foundation in law.”¹²⁶

Standing was an issue in *AEP*. In her opinion, Justice Ginsburg noted that “[f]our members of the Court would hold that at least some plaintiffs have Article III standing.”¹²⁷ Justice Sonia Sotomayor did not participate in that decision, meaning, it is safe to assume, that Justice Anthony Kennedy voted to uphold his own opinion from *Massachusetts v. EPA*, which found that Massachusetts had standing to sue due to harm suffered from sea level rise associated with global warming.¹²⁸ (That opinion, importantly, relied on the “special solicitude” owed states due to their quasi-sovereign status.¹²⁹) Given Justice Kennedy’s retirement, it is unknown whether there will be five votes for the broad proposition that states have standing to sue for climate change, in either a regulatory or common law context, or whether the Court will reverse that core holding from *Massachusetts*.

The Fifth Circuit squarely addressed the issue of whether non-state plaintiffs had Article III standing to bring a state public nuisance claim in *Comer I*. The court noted that there was no question that the plaintiffs satisfied the injury-in-fact and redressability requirements, as they alleged specific harm and sought damages to compensate for the harm.¹³⁰ The court held that it was not appropriate to rule on causation at the motion to dismiss stage, because it “essentially calls upon us to evaluate the merits of plaintiffs’ causes of action, [and] is misplaced at this threshold standing stage of the litigation.”¹³¹

The Fifth Circuit also found that the plaintiffs in *Comer I* “easily satisf[ied] Mississippi’s ‘liberal standing requirements.’”¹³²

126. *Louisiana Energy & Power Auth. v. Fed. Energy Regulatory Comm’n*, 141 F.3d 364, 367–68 (D.C. Cir. 1998).

127. *Am. Elec. Power Co.*, 564 U.S. at 420.

128. *Massachusetts*, 549 U.S. at 519–27.

129. *Id.* at 520.

130. *Comer I*, 585 F.3d at 863–64.

131. *Id.* at 864.

132. *Id.* at 862 (quoting *Van Slyke v. Bd. Tr’s of State Inst. of Higher Learning*, 613 So.2d 872, 875 (Miss. 1993)).

If any of the California cases proceed under state law, state standing requirements will apply, regardless of whether they proceed in state or federal court (though Article III requirements will also apply if they proceed in federal court).¹³³ In contrast to the United States Constitution, however, neither the California Constitution nor California case law imposes a “case or controversy” requirement.¹³⁴ Rather, California courts generally may hear “a suit by a citizen in the undifferentiated public interest.”¹³⁵ California law does require a plaintiff to have a cause of action in his own right and to pursue it in his own name, but courts have declined to characterize these requirements of substantive law in terms of standing.¹³⁶

IV. SUBSTANCE OF THE PUBLIC NUISANCE CLAIMS

Assuming that the plaintiffs can overcome the preliminary defenses, proving the substance of the public nuisance claims will be challenging. Nonetheless, the defendants face some vulnerability to liability under California public nuisance law, which will be the focus of this Part. Moreover, although *AEP* would seem to cast doubt on the availability of a federal public nuisance claim, the factual differences between the claims here and the claims asserted in *AEP* suggest that federal public nuisance law merits some attention as well.

A. California Public Nuisance Law

California law defines a nuisance as:

133. *See* *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 173 (2d Cir. 2005) (“Where, as here, jurisdiction is predicated on diversity of citizenship, a plaintiff must have standing under both Article III of the Constitution and applicable state law in order to maintain a cause of action.”).

134. *Nat’l Paint & Coatings Assn. v. California*, 68 Cal. Rptr. 2d 360, 365 (Ct. App. 1997).

135. *Id.*

136. *Jasmine Networks, Inc. v. Superior Court*, 103 Cal. Rptr. 3d 426, 432–37 (Ct. App. 2009).

Anything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway[.]¹³⁷

A private nuisance involves interference with use or enjoyment of private property, whereas a public nuisance involves interference with public rights or use of public property.¹³⁸ While the exact contours of public nuisance doctrine vary by jurisdiction, public nuisance generally includes the following elements: “(1) an unreasonable and substantial interference (2) with a public right (3) where the defendant has control of the instrumentality causing the nuisance[.]”¹³⁹ or where the defendant created or assisted in creating the nuisance.¹⁴⁰

At common law, public rights subject to public nuisance included rights to unobstructed highways and waterways, as well as rights to unpolluted air and water.¹⁴¹ Many states define public nuisance by statute and thereby incorporate a broad notion of public rights.¹⁴² In California, a public nuisance is a nuisance that “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.”¹⁴³ An interference with public rights is substantial if it causes significant harm and unreasonable if the gravity of the harm inflicted outweighs the social utility of the activity at issue.¹⁴⁴ Unlike in some other jurisdictions, “liability for nuisance

137. CAL. CIV. CODE § 3479 (West 2016).

138. See RESTATEMENT (SECOND) OF TORTS §§ 821B, 821D.

139. See Albert C. Lin, *Deciphering the Chemical Soup: Using Public Nuisance to Compel Chemical Testing*, 85 NOTRE DAME L. REV. 955, 974 (2010).

140. *City of Modesto Redev. Agency v. Superior Court*, 13 Cal. Rptr. 3d 865, 872 (Ct. App. 2004).

141. See *State v. Lead Indus. Ass’n*, 951 A.2d 428, 453 (R.I. 2008) (describing public right); see DOBBS, *supra* note 36, at 1335; Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 815 (2003) (describing fact patterns constituting public nuisance under common law).

142. See DOBBS, *supra* note 36, at 1334.

143. CAL. CIV. CODE § 3480.

144. *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 325.

[in California] does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.”¹⁴⁵

A California municipality in which a public nuisance exists may bring a representative action in the name of the people of California to abate the nuisance.¹⁴⁶ This first type of public nuisance claim traces back to the common law use of public nuisance by the state to enjoin an ongoing harm.¹⁴⁷ California law also authorizes a second type of public nuisance claim: any person, including a public entity, who has a property interest “injuriously affected” by a nuisance may seek injunctive relief, abatement, or damages.¹⁴⁸ This second, non-representative, type of claim reflects the common law rule allowing private persons to bring a public nuisance action if they have suffered special injury.¹⁴⁹ If the special injury involves interference with the use and enjoyment of land, this public nuisance claim may overlap with a private nuisance claim.¹⁵⁰

Public nuisance actions were typically aimed at parties whose conduct directly created the nuisance condition, such as a facility emitting pollution or a person blocking a waterway with refuse.¹⁵¹ In recent years, public nuisance actions also have been brought against product manufacturers to address harms associated with use of their products by a third party. These lawsuits, which lay

145. *Id.* (quoting *Modesto Redev. Agency*, 13 Cal. Rptr. 3d at 872).

146. CAL. CIV. PROC. CODE § 731 (West 2015).

147. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmts. a & b (noting early history of nuisance as “an infringement of the rights of the Crown” and subsequently as “a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large”); *id.* § 821C cmt. a (“The original remedies for a public nuisance were a prosecution for a criminal offense or a suit to abate or enjoin the nuisance brought by or on behalf of the state or an appropriate subdivision by the proper public authority.”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 90, at 643 (5th ed. 1984) (discussing usual remedies of “criminal prosecution and abatement by way of an injunctive decree or order”).

148. CAL. CIV. PROC. CODE § 731.

149. *See* RESTATEMENT (SECOND) OF TORTS § 821C(1) (allowing private plaintiff who has “suffered harm of a kind different from that suffered by other members of the public” to recover damages for public nuisance).

150. *See id.* § 821C(1) cmt. e (noting potential overlap between public nuisance and private nuisance actions); *see also id.* § 821B cmt. h.

151. *See* DOBBS, *supra* note 36, at 1334–35, 1338.

the foundation for the climate change public nuisance actions, are discussed below.

B. Lead Paint Litigation

Among the public nuisance cases brought against product manufacturers, litigation against manufacturers of lead paint has been particularly prominent. Two California appellate court opinions are especially significant to the climate change cases. *County of Santa Clara v. Atlantic Richfield Co.*, a 2006 pre-trial opinion, recognized that public nuisance can apply to a defendant's *past* activity that contributes to a *present* nuisance.¹⁵² *Atlantic Richfield* opened the door to holding product manufacturers liable for abating a public nuisance based on their past promotion of a hazardous product.¹⁵³ A 2017 post-trial opinion in the same litigation, *People v. Conagra*, clarified the elements of a public nuisance claim in California while largely upholding a trial verdict against the paint manufacturers.¹⁵⁴

The California lead paint litigation began with allegations by a group of government entities that the presence of lead in homes and buildings throughout the state constituted a public nuisance.¹⁵⁵ The plaintiffs further alleged that the defendants had contributed to the nuisance by promoting the use of lead paint and failing to warn about its hazards notwithstanding their knowledge of lead's dangers.¹⁵⁶ Based on these allegations, the plaintiffs filed both a representative public nuisance action seeking abatement and a non-representative public nuisance action seeking damages.¹⁵⁷

After the trial court sustained defendants' demurrer, the appellate court in *Atlantic Richfield* reversed in part and held that the plaintiffs should be allowed to proceed with the representative

152. *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 329.

153. *Id.*

154. *People v. Conagra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 551–52 (Ct. App. 2017).

155. *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 324.

156. *Id.* at 324–25, 328.

157. *Id.* at 324, 331.

public nuisance action for abatement.¹⁵⁸ The appellate court’s analysis focused on whether the defendants created or assisted in the creation of a nuisance.¹⁵⁹ As the court noted, the plaintiffs did not merely allege that the defendants had produced a defective product or failed to warn of a defective product.¹⁶⁰ While such allegations might support a product liability action, they would not suffice to establish a nuisance.¹⁶¹ The plaintiffs’ complaint went further, however, asserting that the defendants had affirmatively created or assisted in creating a widespread public health hazard by “promot[ing] lead paint for interior use with knowledge of the hazard that such use would create.”¹⁶² These allegations were central to the court’s rejection of the defendants’ argument that the plaintiffs were disguising a products liability claim as a nuisance action. As the court explained, the alleged conduct was “far more egregious than simply producing a defective product or failing to warn of a defective product”; rather, it was akin “to instructing the purchaser to use the product in a hazardous manner”—conduct that would result in nuisance liability.¹⁶³

The court was less receptive to the non-representative public nuisance claim, which sought damages for special injury rather than abatement.¹⁶⁴ This cause of action, the court explained, “is much more like a products liability cause of action because it is, at its core, an action for *damages for injuries caused to plaintiffs’ property by a product*, while the core of the representative cause of action is an action for remediation of a public health hazard.”¹⁶⁵ Accordingly, the appellate court upheld the dismissal of the non-representative public nuisance claim.¹⁶⁶

158. *Id.* at 330. In California, a demurrer may seek dismissal of a plaintiff’s complaint for failure to state a claim upon which relief can be granted. CAL. CIV. PROC. CODE § 430.10(e).

159. *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 325.

160. *Id.* at 328.

161. *Id.*

162. *Id.*; *see also id.* (“A public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative conduct that assisted in the creation of a hazardous condition.”).

163. *Id.*

164. *Id.* at 331.

165. *Id.*

166. *Id.*

The subsequent bench trial on the representative public nuisance action resulted in an order that the defendants establish a \$1.15 billion abatement fund.¹⁶⁷ The trial court found that the defendants promoted lead paint with constructive, if not actual, knowledge that using lead paint would create a hazard.¹⁶⁸ Applying the substantial factor approach to causation, the court held three of the corporate defendants jointly and severally liable for the public nuisance.¹⁶⁹

On appeal, the court held in *People v. Conagra* that substantial evidence did not support causation as to residences built after 1950.¹⁷⁰ The court of appeals noted that the defendants stopped promoting lead paint for interior residential use after that date and ordered the trial court to recalculate the amount of the abatement fund accordingly.¹⁷¹ However, the bulk of the trial court's judgment was upheld, including its finding that the defendants had actual knowledge of the hazard during the time they promoted lead paint.¹⁷²

The plaintiffs also prevailed on several issues relevant to climate change public nuisance litigation. First, the appellate court rejected defendants' argument that lead paint in private residences did not interfere with a public right:

Residential housing, like water, electricity, natural gas, and sewer services, is an essential community resource. Indeed, without residential housing, it would be nearly impossible for the "public" to obtain access to water, electricity, gas, and sewer

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

168. *Id.* at *8–10, *25.

169. *Id.* at *46, *61.

170. *Conagra*, 227 Cal. Rptr. 3d at 546–47.

171. *Id.* at 546, 598.

172. *Id.* at 529–34. The U.S. Supreme Court rejected defendants' petition for writ of certiorari to review the decision. *Conagra Grocery Prods. Co. v. Cal.*, 139 S. Ct. 377 (2018); *Sherwin-Williams Co. v. Cal.*, 139 S. Ct. 378 (2018). The lead paint manufacturers also proposed but later withdrew a ballot measure to approve a \$2 billion bond to pay for lead paint abatement, for which the manufacturers would otherwise be responsible, and to declare lead paint not to be a public nuisance. See Liam Dillon, *Paint Companies Pull Lead Cleanup Measure from California's November Ballot*, L.A. TIMES (June 28, 2018), <https://perma.cc/5ER9-7X39>; *California Lead Paint Liability Initiative Heads to Ballot*, THE ASSOCIATED PRESS (June 26, 2018), <https://perma.cc/N3G5-EEHH>.

services. Pervasive lead exposure in residential housing threatens the public right to essential community resources.¹⁷³

Second, the court rejected the assertion that the abatement order constituted “nothing more than a thinly-disguised damage award . . . for unattributed past harm[.]”¹⁷⁴ In the court’s view, the abatement order did not award any costs that the plaintiffs had already expended on lead remediation; rather, the order established an abatement fund to be used solely for funding prospective remediation efforts.¹⁷⁵ Characterizing the difference “between an abatement order and a damages award [a]s stark,” the court observed that an abatement order is an equitable remedy whose “sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiff,” whereas damages “are directed at compensating the plaintiff for prior accrued harm[.]”¹⁷⁶ Finally, the court distinguished public nuisance decisions from other jurisdictions in which lead paint manufacturers had prevailed, noting that “a defendant’s control of the nuisance is not necessary to establish liability in a representative public nuisance action in California.”¹⁷⁷

Indeed, the California opinions represent a marked departure from rulings in other jurisdictions, where similar efforts to invoke public nuisance have been rejected. Most notably, the Rhode Island Supreme Court stepped in to overturn a verdict—the first of its kind in the United States—that had imposed liability on lead paint manufacturers under a public nuisance theory.¹⁷⁸ Because “defendants were not in control of any lead pigment at the time the lead caused harm,” the court held, they were “unable to abate the alleged nuisance,” and state “public nuisance law simply does not provide a remedy for this harm.”¹⁷⁹ The requirement that defendants have control over the instrumentality creating the nuisance when the harm occurs—an element absent from

173. *Conagra*, 227 Cal. Rptr. 3d at 552.

174. *Id.* at 568.

175. *Id.* at 569.

176. *Id.*

177. *Id.* at 594.

178. *Lead Indus. Ass’n*, 951 A.2d at 434, 480.

179. *Id.* at 435.

California law—was pivotal to the decision.¹⁸⁰ The New Jersey Supreme Court reached a similar result in rejecting various municipalities' public nuisance claims for damages against paint manufacturers.¹⁸¹ Explaining that the plaintiffs' claims "sound in products liability causes of action" rather than public nuisance, the New Jersey court took note of a state statute that declared lead paint to be a nuisance and focused on the conduct of the premises owner.¹⁸² In the climate change public nuisance cases, the defendants will likely raise concerns similar to the Rhode Island high court's worry "over the ease with which a plaintiff could bring what properly would be characterized as a products liability suit under the guise of product-based public nuisance."¹⁸³

C. PCB Litigation

Efforts to apply the California lead paint decisions to other instances of environmental pollution are now working their way through the courts. Most notably, a number of West Coast cities have asserted public nuisance claims to address polychlorinated biphenyl ("PCB") contamination.¹⁸⁴ The underlying theory in each of these cases is that Monsanto, which manufactured and sold products containing PCBs, should be liable for cleaning up PCBs that wound up in the environment as a result of, or after, the use of those products.¹⁸⁵ While these cases have yet to be fully litigated, the rulings to date hold some promise for plaintiffs bringing climate change public nuisance claims.

In *City of San Jose v. Monsanto Co.*, three San Francisco Bay Area cities allege that ongoing contamination of San Francisco Bay

180. *Id.* at 449–50. The court's ruling also rested on its determination that the asserted "right to be free from the hazards of unabated lead" did not qualify as "a public right as that term traditionally has been understood in the law of public nuisance." *Id.* at 453.

181. *In re Lead Paint Litig.*, 924 A.2d 484, 499–502 (N.J. 2007).

182. *Id.* at 492–503. In addition, the New Jersey litigation was an action for damages rather than abatement. *Id.* at 502.

183. *Lead Indus. Ass'n*, 951 A.2d at 456; *see also In re Lead Paint Litig.*, 924 A.2d at 505.

184. *See* Peter Hayes, *Public Nuisance PCB Suits Against Monsanto Could Have Far-Reaching Impact*, 31 TOXICS L. RPT. 285 (2016).

185. *See id.*

has forced them to spend money to reduce PCB discharge.¹⁸⁶ The plaintiffs rely on a non-representative public nuisance claim, which requires them to demonstrate “a property interest injuriously affected by the nuisance.”¹⁸⁷ The district court initially rejected the cities’ contention that stormwater polluted by the defendants’ PCBs constituted such an interest.¹⁸⁸ However, the California legislature subsequently enacted a law granting local entities a right to use captured stormwater, prompting the court to reverse its initial ruling.¹⁸⁹ Further, the court found sufficient allegations of a causal connection between Monsanto’s actions and the asserted nuisance, based on the cities’ assertion that “Monsanto knew that PCBs were dangerous, concealed that knowledge, promoted the use of PCBs in a range of applications, and gave disposal instructions that were likely to cause environmental contamination.”¹⁹⁰

PCB contamination of San Diego Bay has led to public nuisance litigation raising representative and non-representative claims. In contrast to *Atlantic Richfield*, where the court dismissed the non-representative public nuisance claim because of its overlap with products liability law,¹⁹¹ both types of claims have survived motions to dismiss.¹⁹² The district court in *San Diego v. Monsanto* specifically found that the non-representative public nuisance

186. *City of San Jose v. Monsanto Co.*, 231 F. Supp. 3d 357, 360–61 (N.D. Cal. 2017).

187. *Id.* at 361.

188. *Id.* at 360–61 (noting earlier ruling that stormwater is public water belonging to the state).

189. *Id.* at 362.

190. *Id.* at 363–64. The litigation has since been stayed pending administrative proceedings in which the cities seek reimbursement from the state of California for the costs of retrofitting their stormwater systems to filter out PCBs. Order Further Staying Case; Continuing Status Conference, *City of San Jose v. Monsanto Co.*, No. 5:15-cv-03178-EJD, No. 5:15-cv-05152-EJD, No. 5:16-cv-00071-EJD (N.D. Cal. Aug. 20, 2018) (further staying case and continuing status conference until February 2019); *City of San Jose v. Monsanto Co.*, 2017 WL 3335735, at *3 (N.D. Cal. 2017).

191. *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 313.

192. *San Diego Unified Port Dist. v. Monsanto Co.*, No.15-cv-578-WQH-JLB, 2016 WL 5464551, at *4–8 (S.D. Cal. 2016) (holding that the port district has the authority to bring a representative public nuisance action for abatement); *City of San Diego v. Monsanto Co.*, No. 15-cv-578-WQH-AGS, 2017 WL 5632052, at *6 (S.D. Cal. 2017) (allowing the city’s non-representative public nuisance action to proceed after concluding that the city had sufficiently alleged a property interest in its municipal stormwater system).

claim does not involve “a disguised products liability claim,” but rather aims at the “remediation of a public health hazard” and redress for harm to the city’s stormwater system.¹⁹³

Similar cases have also been brought against Monsanto outside California. The city and port of Portland, Oregon have alleged special injury from expending funds to investigate, monitor, analyze, and remediate PCB contamination.¹⁹⁴ The State of Oregon has filed suit seeking abatement and damages for PCB contamination on lands and in waters owned, controlled, or held in trust by the state.¹⁹⁵ Additionally, in Washington State, public nuisance claims by the cities of Seattle and Spokane have thus far survived motions to dismiss for failure to state a claim. The district court in *City of Seattle v. Monsanto Co.* held that the city, as an owner of property abutting contaminated waterways and as the operator of wastewater and stormwater systems facilitating the migration of PCBs into the waterways, had alleged the necessary injury to bring a public nuisance claim.¹⁹⁶ The court also found sufficient allegations of causation-in-fact and legal causation: the city had not only alleged that “Monsanto’s PCBs are the same PCBs that Seattle is paying to clean up,” but also that environmental harm from the routine use of PCBs was foreseeable.¹⁹⁷ The district court in *City of Spokane v. Monsanto Co.* reached a similar conclusion.¹⁹⁸

Proving causation in the PCB cases may be easier than in the climate change cases. Monsanto was the sole manufacturer of

193. *City of San Diego*, 2017 WL 5632052, at *7–8 (quoting *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 313).

194. *Port of Portland v. Monsanto Co.*, No. 3:17-cv-00015-PK, 2017 WL 4236561, at *8 (D. Or. 2017).

195. Complaint at 50, *Oregon v. Monsanto Co.*, No. 3:18-cv-00238 (D. Or. Jan. 4, 2018); Jes Burns, *Oregon Sues Monsanto For PCB Clean-Up Costs*, OR. PUB. BROADCASTING (Jan. 4, 2018), <https://perma.cc/UYJ9-H6JL>.

196. *City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096, 1106 (W.D. Wash. 2017). Washington law defines a public nuisance as “one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.” WASH. REV. CODE § 7.48.130 (West 2017). Washington law authorizes a nuisance action “by any person whose property is . . . injuriously affected or whose personal enjoyment is lessened by the nuisance” and a private action for public nuisance if it is “specially injurious” to the plaintiff. *Id.* at §§ 7.48.020, 7.48.210.

197. *City of Seattle*, 237 F. Supp. 3d at 1106–07.

198. *City of Spokane v. Monsanto Co.*, No. 2:15-CV-00201-SMJ, 2016 WL 6275164, at *7–9 (E.D. Wash. 2016).

PCBs in the United States, whereas multiple sources manufacture products whose use results in GHG emissions. Nonetheless, this distinction may be of little significance in California and other jurisdictions that impose tort liability under a substantial factor approach.

D. Public Nuisance Suits Beyond Environmental Contamination

Other product manufacturers that have been targeted in public nuisance actions include tobacco companies, gun manufacturers, and opioid manufacturers and distributors.¹⁹⁹ These cases have asserted harms to public health and safety and sought to recover costs expended by state and local governments in addressing those harms. The tobacco litigation, which revealed that the tobacco industry had manipulated nicotine levels and covered up the risks of smoking, was resolved through a multibillion dollar settlement.²⁰⁰ By contrast, public nuisance claims against gun manufacturers were almost uniformly unsuccessful, as courts found too attenuated the causal connection between the manufacture of guns and the expenses incurred by municipalities in responding to gun violence.²⁰¹ The opioid public nuisance claims, now reflected in hundreds of lawsuits, appear to be patterned after the tobacco litigation and aimed at pressuring the defendants into settlement.²⁰²

These efforts to expand public nuisance beyond the more limited settings to which public nuisance traditionally applied

199. *See Is the Public Nuisance Universe Expanding?*, BLOOMBERG BNA (Jan. 31, 2017), <https://perma.cc/W2WF-CTJX>.

200. *See* DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES* 128–32, 175–76 (2010).

201. *See* GIFFORD, *supra* note 200, at 133–36; *see also* Peter H. Schuck, *Why Regulating Guns Through Litigation Won't Work*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 225, 225–26 (Timothy D. Lytton ed., 2005). Such suits were eventually barred with the passage of the Protection of Lawful Commerce in Arms Act in 2005. *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, §§ 2–4, 119 Stat. 2095 (codified at 15 U.S.C. §§ 7901–7903 (2006)).

202. *See* Jeanne Whalen & Sara Randazzo, *Ohio Takes Steps Toward Resolution of Opioid Litigation*, WALL ST. J. (Jan. 11, 2018), <https://perma.cc/9C6L-JEH3>; Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 OKLA. L. REV. 359, 382–87 (2018).

have prompted criticisms of such efforts as “unprincipled,”²⁰³ “foreign to [public nuisance]’s historical context,”²⁰⁴ and “out of step with widely shared precepts about the proper assignment of roles among different legal institutions in our society.”²⁰⁵ Similar critiques are likely to be aimed at the climate change cases as well.

E. Applying California Public Nuisance to Climate Change Litigation

What do the various public nuisance cases portend for efforts to apply state public nuisance law to climate change? Courts in some states have been reluctant to hold product manufacturers liable under public nuisance for harms resulting from product use or misuse. However, as explained below, climate change defendants face risks of liability in California and perhaps other states that have incorporated broad conceptions of public nuisance.

California law, as reflected in the lead paint decisions, interprets public nuisance to cover circumstances and conduct that fall outside the scope of public nuisance in some other states. In particular, *Conagra* emphasized that “[c]ontrol is not required in California for a public nuisance action, and California’s laws [unlike New Jersey law] do not assign exclusive responsibility for lead paint remediation to property owners.”²⁰⁶ *Conagra* similarly distinguished the Rhode Island lead paint decision as “based on lack of control (which does not apply in California) and lack of interference with a public right . . . [which] is not consistent with California’s broader statutory definition of a public nuisance.”²⁰⁷

This Section discusses the application of public nuisance law to the California climate change lawsuits. The issues highlighted in *Conagra*—lack of control and definition of a public right—could prove determinative.

203. Schwartz et al., *supra* note 202, at 388.

204. GIFFORD, *supra* note 200, at 837.

205. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 5 (2011).

206. *Conagra*, 227 Cal. Rptr. 3d at 594 (internal citation omitted).

207. *Id.*

1. Control

Courts that require control as a condition of liability have emphasized the importance of control at the time the damage occurs “because the principal remedy for the harm caused by [public] nuisance is abatement.”²⁰⁸ If the climate change cases are litigated on the merits, defendants likely will contend they cease to exert control over their products once the products are sold and thus should not be liable for abatement. Any interference with a public right, they may argue, arises from the burning of fossil fuels after control has already passed to consumers.

However, California law does not require control of the instrumentality as an element of public nuisance. The *Atlantic Richfield* and *Conagra* decisions suggest that courts will deem the plaintiffs’ request for climate adaptation funding as an appropriate form of abatement.²⁰⁹ Furthermore, even in jurisdictions where control of the instrumentality is required, the Rhode Island and New Jersey lead paint decisions may be distinguishable in that the climate change cases involve a level of ongoing conduct and control that the lead paint cases do not. The San Francisco complaint, for example, alleges that the defendants continue to promote fossil fuels and doubts about global warming today despite overwhelming evidence of the dangers.²¹⁰

2. Causation

While California law does not require control as an element of public nuisance, it does require causation—i.e., that “the defendant created or assisted in the creation of the nuisance.”²¹¹ In public nuisance litigation against product manufacturers, establishing causation is a more manageable task than

208. *Lead Indus. Ass’n*, 951 A.2d at 449. See also *In re Lead Paint Litig.*, 924 A.2d at 499 (“[A] public entity which proceeds against the one in control of the nuisance may only seek to abate, at the expense of the one in control of the nuisance”).

209. Cf. Kysar, *supra* note 30, at 27 (suggesting that in public nuisance actions “governmental plaintiffs may seek to style their prayer for relief as equitable in nature, even though it simply amounts to a request for monetary funds to reimburse public entities for climate change adaptation”).

210. SF Am. Compl., *supra* note 4, at 3, 41–48.

211. *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 325 (quoting *Modesto Redev. Agency*, 13 Cal. Rptr. 3d at 872).

demonstrating control. Causation requires proof of both causation-in-fact as well as proximate cause.²¹²

Causation-in-fact is satisfied if the defendants' conduct was a substantial factor in causing the nuisance.²¹³ Here, the climate change plaintiffs will have to show: (1) that the defendants promoted the use of fossil fuels with knowledge of the hazard such use would create, and (2) that these promotional efforts played more than a negligible role in contributing to global warming-induced sea level rise.²¹⁴ The plaintiffs' assertions—that defendants have known of the catastrophic risks posed by their fossil fuel products for decades and nonetheless promoted their widespread use through advertisements, campaigns to deny climate change, and efforts to emphasize the uncertainties of climate science²¹⁵—appear sufficient to allege a causal connection. Whether courts would find the alleged conduct a substantial factor in causing the nuisance is less certain: while the defendants in the San Francisco complaint are alleged to be five of the nine “largest cumulative producers of fossil fuels worldwide from the mid nineteenth century to present[,]”²¹⁶ they collectively appear responsible for approximately 7.4 percent of cumulative global GHG emissions, according to one methodology of tracing emissions to certain actors.²¹⁷

The second aspect of causation, proximate cause, presents uncertainties as well. Proximate cause is concerned “with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.”²¹⁸ A cause-in-fact may fall

212. *Conagra*, 227 Cal. Rptr. 3d at 545.

213. *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214 (Cal. 1997).

214. *Cf. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 325–28 (discussing public nuisance elements in context of lead paint litigation).

215. SF Am. Compl., *supra* note 4, at 41–49.

216. *Id.* at 33.

217. See Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions, Study Says*, GUARDIAN (July 10, 2017), <https://perma.cc/RG9J-TMHE> (listing respective cumulative GHG emissions of top 100 producers from 1988–2015 as percentage of global GHG emissions); *cf.* Kysar, *supra* note 30, at 39 (“[T]he climate change context poses distinct conceptual problems in terms of attribution, given the participation of so many actors in bringing about emissions. . .”).

218. *Conagra*, 227 Cal. Rptr. 3d at 545 (quoting *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 69 P.3d 965, 969 (Cal. 2003)). See also Eric Biber, *Law in the Anthropocene Epoch*, 106 GEO. L.J. 1, 42–43 (2017) (explaining that proximate

short of proximate causation “where there is an independent intervening act that is not reasonably foreseeable” or the defendant’s conduct is so remote that “it would be considered unjust to hold him or her legally responsible.”²¹⁹ Here, the fossil fuel company defendants are likely to argue that the ultimate consumers of fossil fuels are directly responsible for GHG emissions and should be considered an intervening cause.²²⁰ Similar contentions were rejected in the lead paint litigation, however, and could be rejected here as well.²²¹ Consumers’ burning of fossil fuels was intended by the defendants, and the resulting GHG emissions were completely foreseeable. This stands in contrast to the public nuisance litigation brought against gun manufacturers, where the criminal use of handguns qualified as an intervening cause largely because it was not intended by the manufacturers.²²²

3. Public Right

The somewhat indeterminate concept of public right is also likely to be litigated. In *Conagra*, the court rejected the defendants’ argument that no public right was at stake because interior residential lead paint “causes only private harms in private residences.”²²³ The court articulated a “public right’ to housing that does not poison children” and found even private residential housing to be “an essential community resource[,]” “like water, electricity, natural gas, and sewer services.”²²⁴ This interpretation of public right is broader than common law understandings of the concept, which focused on the use of public places or the activities

cause reflects considerations such as whether a defendant’s actions are important enough to warrant litigation, whether the impacts of an action are too complicated to sort out, and whether recognition of extended chains of liability might paralyze potential actors).

219. 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW TORTS § 1335 (11th ed. 2017).

220. Cf. Biber, *supra* note 219, at 43 (noting potential argument that “climate change is ultimately the product of emissions from the activities of billions of people over decades and even centuries.”).

221. *Conagra*, 227 Cal. Rptr. 3d at 545–46.

222. See GIFFORD, *supra* note 200, at 822 (noting that injury from handguns results from a third-party’s criminal use of handguns rather than from proper use of the product).

223. *Conagra*, 227 Cal. Rptr. 3d at 552.

224. *Id.*

of an entire community.²²⁵ It is also broader than the view expressed in a comment to the Second Restatement of Torts:

Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.²²⁶

In finding the presence of lead in private housing to infringe upon a public right, the *Conagra* court arguably glossed over the Restatement's distinction between a violation of a public right and multiple violations of private rights.

The public right element of public nuisance is nonetheless likely to be satisfied in the climate change litigation, whether under the *Conagra* approach or the narrower common law understanding. Public nuisance has long encompassed interference with public highways, navigable waterways, and clean air.²²⁷ Climate change interferes with the use and enjoyment of not only the waterways and the air, but also a host of public places, including sewer and stormwater infrastructure, port infrastructure, public roads, and public beaches.²²⁸ It is a classic "public bad" involving "undesirable effects that are nonexcludable and nonrivalrous."²²⁹

4. Tortious Conduct

Historically, public nuisance has been understood as "a type of harm resulting from a defendant's conduct," as opposed to a type of tortious conduct.²³⁰ Nevertheless, courts sometimes require

225. See GIFFORD, *supra* note 200, at 815.

226. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g.

227. See GIFFORD, *supra* note 200, at 815; Lin, *supra* note 139, at 980–81 (discussing *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907), a U.S. Supreme Court decision applying public nuisance law to air pollution).

228. SF Am. Compl. *supra* note 4, at 53–57; Kysar, *supra* note 30, at 13 (describing public nuisance "as the logical cause of action to pursue" in climate change litigation "since it imports a duty to avoid injurious conduct to rights that are held by the public in common").

229. Merrill, *supra* note 205, at 8.

230. GIFFORD, *supra* note 200, at 155; see Merrill, *supra* note 205, at 16.

proof of some sort of tortious conduct. As the Restatement (Second) of Torts puts it: a defendant’s “interference with the public right [must be] intentional or . . . unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities.”²³¹

With respect to product manufacturers, the tortious conduct at issue in a public nuisance case is the promotion of a product “with knowledge of the hazard that such use would create.”²³² Actual knowledge is required and may be proven through circumstantial evidence as to what a defendant must have been aware of.²³³ The climate change public nuisance complaints allege that the defendants knew that fossil fuels were contributing to global warming and nonetheless sought to promote their use.²³⁴ Specific allegations cite a 1968 report informing the defendants that carbon dioxide emissions from fossil fuels were “almost certain” to produce “significant” temperature increases,” as well as internal company documents from the 1980s warning of “catastrophic” climate effects.²³⁵ If proven, these allegations appear sufficient to demonstrate the required knowledge.

To prove that a defendant’s interference with a public right is tortious, plaintiffs must also establish unreasonableness—a requirement that weighs the gravity of the harm against the utility of the conduct.²³⁶ The factors that courts consider in assessing unreasonableness include: whether the conduct significantly interferes with public health or safety; “whether the conduct is proscribed by statute . . . or regulation;” and “whether the conduct is of a continuing nature or has . . . [a] long-lasting effect[.]”²³⁷ Notably, the specific conduct that should be analyzed for

231. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e.

232. *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 328.

233. *Conagra*, 227 Cal. Rptr. 3d at 529–30.

234. SF Am. Compl., *supra* note 4, at 41–49.

235. *Id.* at 35–36.

236. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (referring to RESTATEMENT (SECOND) OF TORTS §§ 822, 826–31); *Atlantic Richfield Co.*, 40 Cal. Rptr. 3d at 325 (noting that “interference must be both substantial and unreasonable” and explaining that interference “is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted”).

237. See RESTATEMENT (SECOND) OF TORTS §§ 821B(2)(a)–(c); see also *Lead Indus. Ass’n*, 951 A.2d at 447 (noting that analysis of reasonability “will depend upon the activity in question and the magnitude of the interference it creates”).

unreasonableness is defendants' promotion of fossil fuels with knowledge of its hazards, not the useful product itself.²³⁸ The social utility of this specific conduct appears minuscule in comparison to the long-lasting and devastating harms of climate change.

If courts reach the substantive merits of the climate change public nuisance claims, the fossil fuel defendants face risks of liability. Although the defendants will hotly contest issues of causation, public rights, and benefit-harm balancing, California public nuisance law appears sufficiently broad to encompass defendants' conduct and resulting harms.

F. Federal Public Nuisance

The district court's decision to keep the San Francisco Bay lawsuits in federal court rested on its determination that the plaintiffs' claims "are necessarily governed by federal common law."²³⁹ The court acknowledged that the Clean Air Act displaced federal common law claims against domestic emitters of GHGs, per *AEP* and *Kivalina*, but reasoned that the San Francisco Bay lawsuits were arguably distinguishable because they aimed at "an earlier moment in the train of industry"—the production and sale of fossil fuels.²⁴⁰ Nonetheless, in later dismissing the case, the court found this distinction legally irrelevant, stating "[i]f an oil producer cannot be sued under the federal common law for their own emissions, *a fortiori* they cannot be sued for someone else's."²⁴¹ The court also declined to recognize a federal public nuisance claim for non-U.S. emissions—which are outside the scope of the Clean Air Act—on the ground that their regulation is best left to the political branches of government.²⁴²

Even if a court were to reach the substantive merits of a federal public nuisance claim, proof of public nuisance may be more difficult under federal law than under California law. A line of Supreme Court decisions recognizes states' ability to bring federal public nuisance actions to abate air and water pollution produced

238. *Cf. Conagra*, 227 Cal. Rptr. 3d at 596.

239. *California*, 2018 WL 1064293, at *2.

240. *Id.* at *4.

241. *Oakland*, 325 F. Supp. 3d at 1024.

242. *Id.* at 1024–28.

by other states or out-of-state industries.²⁴³ These decisions have left the precise contours of federal public nuisance law relatively undefined, however, and courts have looked to state standards and the Second Restatement of Torts to fill in the details.²⁴⁴ Lower courts have generally adopted the Restatement definition of public nuisance as a substantial and unreasonable interference with a right common to the general public.²⁴⁵ While the Restatement does not explicitly condition liability on a defendant's control of the instrumentality causing the nuisance, federal courts may well adopt the majority view among the states that such control is required.²⁴⁶ As discussed above, the defendants in the climate change cases will likely contend that control of the instrumentality rests in the hands of their customers rather than themselves.²⁴⁷ Furthermore, in determining whether defendants' conduct was unreasonable, federal courts may be inclined to balance the social utility of fossil fuel use against the harms of climate change—a balancing approach less favorable than one focused more narrowly on defendants' promotion of fossil fuels with knowledge of its hazards.²⁴⁸

V. CONCLUDING OBSERVATIONS

Developing climate change policy through individual abatement actions is less than ideal. Tort law typically addresses harms to identifiable persons resulting from actions by identifiable

243. See *Illinois v. Milwaukee*, 406 U.S. 91, 103–05 (1972) (*Milwaukee D*); *Tennessee Copper*, 206 U.S. at 237–38; *Missouri v. Illinois*, 200 U.S. 496, 519–21 (1906); see also *Am. Elec. Power Co.*, 564 U.S. at 419–20. For a detailed discussion of the Supreme Court's federal public nuisance jurisprudence, see Mark P. Nevitt & Robert V. Percival, *Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?*, 96 WASH. U.L. REV. 441 (2018).

244. *Milwaukee I*, 406 U.S. at 107; *Michigan v. United States Army Corps of Eng'rs*, 758 F.3d 892, 904 (7th Cir. 2014); *Connecticut*, 582 F.3d at 309; *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1234 (3d Cir. 1980), *vacated on other grounds*, 453 U.S. 1 (1981).

245. *Connecticut*, 582 F.3d at 351–52.

246. See Lin, *supra* note 139, at 974 n.97.

247. See, e.g., Motion of Defendant to Dismiss First Amended Complaints at 19, *City of Oakland v. BP*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-cv-6011-WHA).

248. See *Oakland*, 325 F. Supp. 3d at 1025 (dicta suggesting a broad balancing of harms and benefits of fossil fuel use).

actors, rather than broader threats to society.²⁴⁹ In terms of legitimacy, policymaking ideally occurs through democratically accountable legislative processes and authorized agency rulemaking, not litigation.²⁵⁰ Furthermore, a coordinated federal policy can bring agency expertise and resources to bear on a complicated problem involving multiple actors and generate a more effective response.²⁵¹ Yet, in 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.

Successful public nuisance actions against fossil fuel defendants could prompt federal legislation to address climate change. Public nuisance litigation against the tobacco industry led to a negotiated settlement that—had it been approved by Congress—would have largely resolved defendants' liability in exchange for curbing tobacco advertising and recognizing FDA authority over tobacco products.²⁵² Public nuisance litigation against the gun industry also led to congressional efforts—this time successful—that insulated the industry from liability.²⁵³ The outcomes of these previous efforts to apply public nuisance hint at the difficult road ahead for advocates of climate change action. Even if they achieve favorable judgments in their actions for abatement, a legislated solution to climate change is not guaranteed to follow. These advocates will need to convince courts, policymakers, and the general public that the fossil fuel defendants should be held responsible for contributing to climate change and

249. See Biber, *supra* note 219, at 45.

250. See Merrill, *supra* note 205, at 5 (“As a public action, the proper institution to determine the parameters of public nuisance liability is the legislature—or some institution delegated authority to do so by the legislature—not courts based on a claim of common law authority.”); GIFFORD, *supra* note 200, at 200–01.

251. See GIFFORD, *supra* note 200, at 199–200.

252. See *id.* at 132, 173–74. The settlement agreement that was ultimately adopted did not establish FDA regulatory authority over tobacco products, but required no congressional approval. See *id.* at 175–76.

253. See *id.* at 136.

that legislated policy to address climate change is warranted.²⁵⁴ Ultimately, legislated outcomes might range from the creation of an adaptation fund financed by fossil fuel companies in exchange for protection from tort liability, or imposition of a carbon tax whose proceeds could be redistributed to local governments and individual citizens, to—at the other extreme—preemption of state tort litigation.²⁵⁵

There are also potential outcomes short of success on the merits and/or a legislative fix that could still advance the ball on climate change. These cases represent a new pressure point on the fossil fuel industry, and a new spotlight on that industry's engagement with climate law and policy. They make the case that these companies are not passive players who merely responded to consumer demand for fossil fuels but are bad actors who have lied for years to generate ever larger profits at the expense of the local governments and individual citizens and residents who bear the costs of climate impacts. The drama of the courtroom setting could mobilize the public's interest and give life to local activism on these issues. Moreover, the prospect of adverse judgments might nudge fossil fuel companies to accelerate their own transition away from past practices, towards new approaches to providing energy to consumers.

254. *Cf. id.* at 136–37 (considering possible explanations for why tobacco litigation and gun litigation yielded differing outcomes).

255. *See generally* Daniel A. Farber, *Adapting to Climate Change: Who Should Pay*, 23 J. LAND USE & ENVTL. L. 1, 26–36 (2007) (discussing four approaches for allocating adaptation costs based on who should pay: beneficiaries of adaptation measures, the public, GHG emitters, or beneficiaries of climate change); Hester, *supra* note 35, at 74–75 (discussing state tort reform initiatives aimed at eliminating or limiting public nuisance actions).