

1-1-2020

Raising the Bar: New Wave of Climate Tort Litigation Blocks State and Local Governments Seeking Relief from Effects of Climate Change in Federal Court

Thomas Stirrat

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

25 Suffolk J. Trial & App. Advoc. 236 (2019-2020)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

RAISING THE BAR: NEW WAVE OF CLIMATE TORT LITIGATION BLOCKS STATE AND LOCAL GOVERNMENTS SEEKING RELIEF FROM EFFECTS OF CLIMATE CHANGE IN FEDERAL COURT

I. INTRODUCTION

As the effects of climate change have become more pronounced and severe, many local governments have increasingly turned to the federal judiciary to seek injunctive relief and monetary damages from both greenhouse gas emitters and producers.¹ Thus far, in climate change tort litigation suits, justiciability, displacement by the Clean Air Act, standing, and the political question doctrine have emerged as the primary hurdles for state and local governments and private citizens seeking relief in federal court.² Federal courts maintain a higher bar for standing than most state courts.³ Three recent federal court decisions have effectively shut the door to plaintiffs seeking relief for greenhouse gas emissions.⁴ While these decisions are unfortunate because they eliminated the federal court system as an avenue for redressing climate change torts, they ultimately came to the correct legal conclusions.⁵ The decisions accurately applied the federal

¹ See *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 470 (S.D.N.Y. 2018) (setting forth city's claims concerning significant effects of climate change on public health and property); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1021–22 (N.D. Cal. 2018) (demonstrating trend of state and local governments turning to judiciary for relief); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (explaining effect of federal common law on plaintiff's claims for injunctive and monetary relief).

² See Keith Goldberg, *Novel Ruling Redraws Battle Lines of Climate Change Suits*, LAW360 (Mar. 1, 2018, 9:01 PM), <http://www.law360.com/articles/1017385/novel-ruling-redraws-battle-lines-of-climate-change-suits> [<https://perma.cc/76F3-R78W>] (describing hurdles plaintiffs face in climate tort litigation suits).

³ See Goldberg, *supra* note 2 (“[F]ederal court[s] . . . ha[ve] a higher bar for establishing standing than state courts.”).

⁴ See *City of New York*, 325 F. Supp. 3d at 467 (emphasizing political question doctrine bars adjudication and Clean Air Act displaces action regardless); *City of Oakland*, 325 F. Supp. 3d at 1026 (stating political question doctrine bars justiciability); *County of San Mateo*, 294 F. Supp. 3d at 937 (reiterating that plaintiffs' cause of action is displaced). *But see* *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 U.S. Dist. LEXIS 32990, at *14 (N.D. Cal. Feb. 27, 2018) (holding plaintiffs' claims were not displaced by Clean Air Act).

⁵ See cases cited *supra* note 4 (assessing lower court decisions' legal reasoning).

common law displacement analysis and avoided interbranch conflict between the federal judiciary and the executive and legislative branches.⁶

In *California v. BP P.L.C.*, the court's preliminary order injected new uncertainty into climate tort litigation by stating that the global warming liability of several fossil fuel producers was a question of federal law.⁷ In his preliminary order, Judge William Alsup, of the United States District Court for the Northern District of California, stated that San Francisco and Oakland's claim that several fossil fuel producers promoted fossil fuel use justified federal jurisdiction, even though they knew global warming could harm coastal areas.⁸ However, in his final ruling, Judge Alsup changed his view by stating that the issue of global warming should be left to the other branches of government to resolve.⁹ In *City of New York and County of San Mateo*, the courts found that—even though the Clean Air Act still displaced the plaintiffs' claims—the political question doctrine made the suits nonjusticiable.¹⁰

In 2011, the Supreme Court held in *American Electric Power* that the Clean Air Act displaced the plaintiff's claims for damages caused by global warming, and consequently set aside the question of whether the plaintiffs had Article III standing (as established in *Massachusetts v. EPA*).¹¹ Following the *American Electric Power* decision, several questions, such as whether state and local governments have standing to sue greenhouse gas producers and whether the political question doctrine made the plaintiffs' claims non-justiciable, were placed on the backburner until cities developed a theory to bypass displacement.¹² Believing they had a new legal theory

⁶ See STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 278 (8th ed. 2018) (explaining court's reasoning for dismissing plaintiffs' complaint in *City of Oakland*).

⁷ See *California*, 2018 U.S. Dist. LEXIS 32990, at *14 (noting Clean Air Act does not address fossil fuels placed into flow of commerce); Goldberg, *supra* note 2 (stating energy producers' liability is question of federal law).

⁸ See *California*, 2018 U.S. Dist. LEXIS 32990, at *15 ("But plaintiffs' claims, if any, are governed by federal common law. Federal jurisdiction is therefore proper."); Goldberg, *supra* note 2 (emphasizing implications of *California* decision).

⁹ See *City of Oakland*, 325 F. Supp. 3d at 1029 ("The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case . . . courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches.").

¹⁰ See *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 472–76 (S.D.N.Y. 2018) (explaining how political question doctrine barred and displaced plaintiff's action); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (holding "federal common law does not govern" plaintiffs' claims).

¹¹ See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (noting Clean Air Act "speaks directly" to emissions from coal plants); *Massachusetts v. EPA*, 549 U.S. 497, 517–26 (2007) (stating that petitioners satisfied Article III standing requirement).

¹² See Ferrey, *supra* note 6 (explaining how justiciability questions were sidelined).

that would allow federal courts to find oil companies liable for adversely contributing to climate change, Oakland, New York City, and the County of San Mateo filed complaints in numerous federal district courts seeking relief.¹³

Judge Alsup's preliminary order in *California* found that the Clean Air Act did not displace the plaintiff's common law nuisance claim; this temporarily removed the Clean Air Act as a hurdle for the plaintiffs suing energy producers in federal court.¹⁴ This raised the question of whether the court, in its final ruling, would address other justiciability concerns—such as the political question doctrine and standing—since the case had ostensibly survived displacement.¹⁵ However, Judge Alsup's final ruling in *City of Oakland* largely sidestepped the displacement question and held that global warming should be addressed by the other branches of government.¹⁶

This Note analyzes the implications of these recent federal court rulings, the initial uncertainty that existed in the wake of *American Electric Power* and *Kivalina*, and how *City of Oakland*, *County of San Mateo*, and *City of New York* dealt a devastating blow to climate advocates hoping for redress in the federal court system.¹⁷ Furthermore, this Note explores how displacement, standing, and the political question doctrine are three major hurdles plaintiffs face in their efforts to get federal courts to adjudicate their complaints.¹⁸ Finally, this Note not only argues that the lower courts correctly interpreted existing precedent and regulations by finding that suits brought by cities against energy producers are displaced, but also that global warming and its consequences are issues best left to the other branches of government to resolve.¹⁹

¹³ See Goldberg, *supra* note 2 (elucidating new theory presented in recent climate change tort litigation).

¹⁴ See *California*, 2018 U.S. Dist. LEXIS 32990, at *13–14 (explaining rationale for court's preliminary order). The court's holding is limited to the Ninth Circuit. *Id.*

¹⁵ See Goldberg, *supra* note 2 (describing questions raised by federal ruling).

¹⁶ See *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018) (explaining why judicial deference is appropriate in climate litigation).

¹⁷ See *California*, 2018 U.S. Dist. LEXIS 32990, at *13 (“[U]nlike *AEP* and *Kivalina*, which sought only to reach domestic conduct, plaintiffs' claims here attack behavior worldwide.”). The *California* case refers to the district court's preliminary order. Ferrey, *supra* note 6. In Judge Alsup's final ruling, the case name was changed to *City of Oakland*, but they are the same cases. Ferrey, *supra* note 6.

¹⁸ See Michael Byers et al., *The Internationalization of Climate Damages Litigation*, 7 WASH. J. ENVTL. L. & POL'Y 264, 272 (2017) (introducing threshold issues facing recent climate litigation).

¹⁹ See *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 472–76 (S.D.N.Y. 2018) (rejecting New York's claim that Clean Air Act displaces sale and production of fossil fuels); *City of Oakland*, 325 F. Supp. 3d at 1024–29 (demonstrating correct interpretation of existing precedent); County of

II. HISTORY

Federal courts only have jurisdiction over “cases and controversies.”²⁰ In *Lujan v. Defenders of Wildlife*, the Court identified the three prudential standing elements as the following: a personal injury that is concrete and imminent, an injury that is fairly traceable to the defendant, and that a favorable decision will likely redress the injury.²¹ In *EPA*, the Supreme Court held that Massachusetts had standing to sue the Environmental Protection Agency (“EPA”) to set emission standards for motor vehicles.²² The Court found there was an actual and imminent personal injury to Massachusetts by reasoning that rising sea levels had already begun to flood the state’s coastal land.²³ Since Massachusetts owned a large portion of the state’s coastal property, the Court held that the Commonwealth developed a particularized injury in its status as a landowner.²⁴ Additionally, the Court reasoned that the adverse effects of climate change would continually contribute to the severity of the Commonwealth’s injury.²⁵ The Court also held that U.S. motor vehicle emissions not only significantly contributed to U.S. greenhouse gas emissions, but were also partially responsible for the

San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (holding plaintiffs’ claims based on defendants’ conduct did not warrant federal court review).

²⁰ See U.S. CONST. art. III, § 2 (presenting requirements for standing). Article III states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

²¹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (describing three prudential elements plaintiff must satisfy to have standing).

²² See *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (presenting Court’s holding that Massachusetts had standing to sue).

²³ See *id.* at 522–24 (noting Court’s holding and reasoning). In other words, EPA argued that establishing emissions standards would only reduce domestic greenhouse gas emissions, and not eliminate them domestically or internationally. *Id.* The court rejected the EPA’s argument that their failure to regulate did not cause the plaintiff’s injury. *Id.*

²⁴ See *id.* at 522 (analyzing particularized injury in Massachusetts).

²⁵ See *id.* at 522–23 (emphasizing how climate change would continue to exacerbate plaintiff’s injury).

adverse effects of climate change for which the plaintiff sought relief.²⁶ In finding that the causation element of Article III standing was satisfied, the Court rejected the EPA's argument that incremental regulatory action is insufficient to meet the causation requirement.²⁷ The Court held that Massachusetts met the redressability element, reasoning that regulating motor vehicle emissions in the United States would reduce domestic greenhouse gas emissions is sufficient, and that completely eliminating greenhouse gas emissions was not necessary.²⁸

American Electric Power Co. v. Connecticut ("AEP") established the framework for evaluating whether the Clean Air Act displaces the plaintiff's common law nuisance claims for abatement of emissions.²⁹ The test for whether congressional legislation precludes a federal common law claim is whether the statute "speaks directly to the question" at issue.³⁰ In *AEP*, the Court held that the Clean Air Act displaced common law nuisance claims for damages caused by global warming; it also reasoned that Congress' delegation to the EPA to decide whether and how to regulate carbon-dioxide emissions displaced a federal common law claim for damages.³¹ In other words, the Court believed that the EPA served as the appropriate body to hold state, local, and the federal government liable for

²⁶ See *EPA*, 549 U.S. at 523–24 ("Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.").

²⁷ See *id.* at 499 ("That a first step might be tentative does not by itself negate federal-court jurisdiction.").

²⁸ See *id.* at 525–26 ("Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.").

²⁹ See generally *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (introducing test for whether congressional legislation excludes federal common law).

³⁰ See *id.* at 424 ("The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue."). The question is "whether Congress has provided a sufficient legislative solution to the particular issue to warrant a conclusion that the legislation has occupied the field to the exclusion of federal common law." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012) (restating displacement test), quoting *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 777 (7th Cir. 2011) (declining to assert jurisdiction over claims Supreme Court has yet to consider).

³¹ See *Am. Elec. Power Co.*, 564 U.S. at 427 (discussing Court's holding and reasoning). "If States (or EPA) fail to enforce emissions limits against regulated sources, the Act permits 'any person' to bring a civil enforcement action in federal court." *Id.* at 425. In other words, the EPA provides a means to seek limits on domestic powerplants' carbon dioxide emissions. *Id.* As this was the same relief that the plaintiffs in *AEP* sought, their claims were ultimately displaced by the Clean Air Act. *Id.*

violating emissions standards.³² The EPA has the power to “inspect and monitor regulated sources of carbon dioxide emissions, to impose administrative penalties for non-compliance, and to commence civil actions against polluters in federal court.”³³

Additionally, the Clean Air Act permits any person to bring a civil enforcement action in federal court if either the EPA or the States “fail to enforce emissions limits against regulated sources.”³⁴ More importantly, not only can States and private parties petition the EPA to set emissions limits for a particular pollutant or source of pollution—if there are none already—but the EPA’s decision is also reviewable in federal court.³⁵ Thus, the Supreme Court concluded that the Clean Air Act provided a way to seek limits on carbon dioxide emissions from domestic powerplants—the precise relief the plaintiffs sought through federal common law.³⁶ In addition to displacing claims for enjoining emissions, the Ninth Circuit held in *Native Village of Kivalina v. ExxonMobil Corp.*, that the Clean Air Act also displaced federal common law nuisance claims for damages caused by global warming.³⁷ In *Kivalina*, the Native Village of Kivalina alleged that the greenhouse gas emissions emitted by numerous energy producers contributed to global warming and severely deteriorated the tribe’s land.³⁸ As a result, Native Village of Kivalina members believed that the energy producers should pay damages to them.³⁹ The Ninth Circuit held that if a

³² See 42 U.S.C. § 7411(d) (2018) (“The Administrator shall have the same authority . . . to enforce the provisions of such plan in cases where the State fails to enforce them as he would have . . . with respect to an implementation plan.”); *EPA*, 549 U.S. at 526 (identifying that EPA serves as accountability mechanism for climate related injuries).

³³ See 42 U.S.C. §§ 7411(c)(2), d(2), 7413, 7414 (2018) (stating federal statutes which give authority to administrators, such as EPA); *Am. Elec. Power Co.*, 564 U.S. at 425 (discussing Supreme Court’s application of federal statutes giving power to EPA).

³⁴ See 42 U.S.C. § 7604(a) (2018) (permitting “any person” to bring civil action against governmental agencies or Administrators); *Am. Elec. Power Co.*, 564 U.S. at 425 (describing how climate change cases are not necessarily immune from judicial review).

³⁵ See *Am. Elec. Power Co.*, 564 U.S. at 425 (explaining process to hold EPA accountable).

³⁶ See *id.* (noting Clean Air Act provided remedy for plaintiffs’ injuries).

³⁷ See *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) (“In sum, the Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief.”).

³⁸ See *id.* at 853 (“Kivalina alleges that massive greenhouse gas emissions emitted by the Energy Producers have resulted in global warming, which, in turn, has severely eroded the land where the City of Kivalina sits and threatens it with imminent destruction.”).

³⁹ See *id.* (“Kivalina seeks damages under a federal common law claim of public nuisance.”).

cause of action is displaced, displacement is extended to all remedies.⁴⁰ Consequently, the court concluded that, regardless of the desired remedy, the Clean Air Act still displaced a cause of action that centered on domestic greenhouse gas emissions.⁴¹

The political question doctrine is another traditional obstacle to climate suit cases.⁴² The political question doctrine is a separation of powers issue and is “designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government.”⁴³ As a result, political questions are deemed “nonjusticiable.”⁴⁴ In *Baker*, the Court set out six situations in which something may describe a political question.⁴⁵ Additionally, *Baker* established a high threshold for non-justiciability, stating that “[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question’s presence.”⁴⁶ In *Am. Elec. Power Co.*, the Second Circuit found no textual commitment in the Constitution that granted authority to the Executive or Legislative Branches to resolve issues concerning carbon

⁴⁰ See *id.* at 857 (“[D]isplacement of a federal common law right of action means displacement of remedies.”).

⁴¹ See *Kivalina*, 696 F.3d at 857 (“Thus, *AEP* extinguished *Kivalina*’s federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions.”).

⁴² See *Goldberg*, *supra* note 2 (noting political question doctrine may be relevant if displacement issue satisfied in climate cases).

⁴³ See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 321 (2d Cir. 2009) (“The political question doctrine is ‘primarily a function of the separation of powers . . . designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government,’ where that other branch is better suited to resolve an issue.”) (internal citations omitted).

⁴⁴ See *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (Political questions are “unjusticiable” when there is “an undeniable difference between finding no federal jurisdiction at the outset of a case and declaring that a particular matter is inappropriate for judicial resolution only after some consideration of the merits.”).

⁴⁵ See *Baker*, 369 U.S. at 210 (explaining test that determines whether something is political question). Something is a non-justiciable political question if:

[(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.

Id. at 217.

⁴⁶ See *id.* at 217 (indicating high bar for non-justiciability based on political question doctrine).

dioxide emissions and concluded that the first *Baker* factor did not apply.⁴⁷ The court also found that the second *Baker* factor did not apply because settled principles of tort and public nuisance law already provide the court guidance in assessing the plaintiffs' claims.⁴⁸ Addressing the third *Baker* factor the court held that the plaintiffs did not need to await an initial policy determination in order to proceed on their federal common law nuisance claim since courts have the power to act when regulatory gaps exist.⁴⁹ The court also held that the fourth, fifth, and sixth *Baker* factors did not apply because there is no unified U.S. policy on greenhouse gas emissions.⁵⁰

The Second and Ninth Circuit Courts are the only circuits that addressed the issue of Article III standing in climate suits.⁵¹ In *AEP*, the Supreme Court was divided on the issue of whether the plaintiffs had Article III standing under *EPA* to sue the power plants.⁵² While four of the justices held that the plaintiffs had standing, four held that the plaintiffs did not.⁵³ As a result, the Second Circuit's ruling that the plaintiffs had standing was upheld.⁵⁴ In holding that the plaintiffs had Article III standing to sue the domestic power plants, the Second Circuit addressed each element of prudential standing.⁵⁵ First, the court held that the plaintiffs showed injury in fact because of the injuries that they already sustained and would continue

⁴⁷ See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 325 (2d Cir. 2009) (explaining why first *Baker* factor did not apply). When *AEP* later reached the Supreme Court, the Court was split on whether the plaintiffs had Article III standing. See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011). The Court, nonetheless, held that the plaintiffs' claims were displaced by the Clean Air Act. *Id.* at 424.

⁴⁸ See *Am. Elec. Power Co.*, 582 F.3d at 329 ("Accordingly, we do not agree that there are no judicially discoverable and manageable standards for resolving this case. Well-settled principals of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs' claims and the federal courts are competent to deal with these issues.").

⁴⁹ See *id.* at 330 ("The district court's reasoning in this regard is inapposite in a case making a federal common law of nuisance claim where, if regulatory gaps exist, common law fills those interstices.").

⁵⁰ See *id.* at 331–32 ("[T]here really is no unified policy on greenhouse gas emissions. Allowing this litigation where there is a lack of a unified policy does not demonstrate any lack of respect for the political branches, contravene a relevant political decision already made, or result in multifarious pronouncements that would embarrass the nation.").

⁵¹ See *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1135 (9th Cir. 2013) (explaining standing in climate suits); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 321 (2d Cir. 2009) (discussing Article III standing and political question doctrine in climate suits).

⁵² See *Am. Elec. Power Co.*, 564 U.S. at 420 (acknowledging decision involved "equally divided court" on whether plaintiffs had standing).

⁵³ See *id.* at 420 (highlighting result of Court's holding and schism between justices).

⁵⁴ See *Goldberg*, *supra* note 2 (describing effect of Court's split decision in *AEP*).

⁵⁵ See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 339–49 (2d Cir. 2009) (introducing Second Circuit's standing analysis and rationale).

to face in the future, such as rising sea levels.⁵⁶ Second, the court held that the plaintiffs satisfied the causation requirement because the defendant's emissions contributed to their injuries.⁵⁷ Finally, the court held that the plaintiffs satisfied the redressability requirement, reasoning that reducing the defendant's emissions would slow increases in global emissions and reduce the magnitude of the plaintiffs' injuries.⁵⁸ As a result, the court held that the plaintiffs would be better off with a remedy.⁵⁹ The court stressed that the proposed remedy need not address or prevent all harm from a variety of other sources.⁶⁰

When analyzing whether a plaintiff has Article III standing, courts generally impose a higher burden of proof on private individuals than they do on sovereign states.⁶¹ In *Bellon*, the Ninth Circuit held that conservation groups did not have Article III standing to sue Washington state environmental agencies under the Clean Air Act for failing to set and apply certain standards for greenhouse gas emissions from oil refineries.⁶² More specifically, the court held that—even though the conservation groups provided evidence that their members suffered injury in fact from the failure to control emissions—the groups did not establish the causality and redressability elements required for standing.⁶³ In distinguishing *Bellon* from *EPA*, the Ninth Circuit reasoned that the plaintiff's causation chain was too attenuated to satisfy the second prong of the test and the parties were not a sovereign state entitled to the more relaxed standard for evaluating standing set forth in *EPA*.⁶⁴ The court noted that in the present case, greenhouse gas emissions from five oil refineries in Washington made up

⁵⁶ See *id.* at 341–44 (“We find that Plaintiffs have sufficiently alleged future injury. Given the current injury alleged by the States, and the future injuries alleged by all Plaintiffs, we hold that Plaintiffs have alleged injury-in-fact.”).

⁵⁷ See *id.* at 347 (“Plaintiffs have sufficiently alleged that their current and future injuries are ‘fairly traceable’ to Defendants’ conduct It is sufficient that they allege that Defendants’ emissions contribute to their injuries.”).

⁵⁸ See *id.* at 348–49 (emphasizing satisfaction of redressability and rejecting defendants’ arguments).

⁵⁹ See *id.* at 349 (“In conclusion, we hold that all Plaintiffs have standing to maintain their actions.”).

⁶⁰ See *Am. Elec. Power Co.*, 582 F.3d. at 348 (“In other words, that courts could provide some measure of relief would suffice to show redressability, and the proposed remedy need not address or prevent all harm from a variety of other sources.”).

⁶¹ See *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1145 (9th Cir. 2013) (discussing individuals’ burden of proof to show standing).

⁶² See *id.* at 1136 (referencing court’s holding on Article III standing).

⁶³ See *id.* at 1141, 1146 (emphasizing court’s narrow holding on causality and redressability).

⁶⁴ See *id.* at 1142–43, 1145 (distinguishing *Massachusetts* from case at bar).

5.9% of emissions in the state.⁶⁵ However, the plaintiffs did not provide any evidence that placed that statistic in perspective to assess whether the refineries made a meaningful contribution to global greenhouse gas levels.⁶⁶ The court's explanation for why the plaintiffs failed the redressability requirement rested on many of the same reasons enumerated in the court's causation analysis.⁶⁷

In *City of New York* and *County of San Mateo*, federal district court judges held that the Clean Air Act still displaced the plaintiffs' claims—even though the plaintiffs claimed they were suing energy producers for discrediting scientific research that established greenhouse gas emissions contributed to climate change.⁶⁸ In *County of San Mateo*, the court concluded that the plaintiffs' framing of their arguments was ultimately a distinction without a difference because their claims still rested on receiving damages for rising sea levels and soil erosion.⁶⁹ Applying *AEP* and *Kivalina* to *County of San Mateo*, the court concluded that the former did not confine their holdings about displacement of federal common law to particular sources of emissions; rather, the court stated that any claim based on the interstate effect of domestic greenhouse gas emissions was displaced by the Clean Air Act.⁷⁰ As a result, the court rejected the city's argument that its climate change-related injuries were from the production and sale of fossil fuels, and instead concluded that the city's injuries resulted from an attenuated chain of events involving the combustion and sale of fossil fuels.⁷¹ Likewise, in *City of New York*, the court concluded that federal common law was not only displaced when damages for domestic emissions were at issue,

⁶⁵ See *id.* at 1145–46 (suggesting defendant's small contribution to plaintiff's injuries negates causation link).

⁶⁶ See *Bellon*, 732 F.3d at 1146 (“While this may be a significant portion of state emissions, Plaintiffs do not provide any evidence that places this statistic in national or global perspective to assess whether the refineries’ emissions are a ‘meaningful contribution’ to global GHG levels.”).

⁶⁷ See *id.* at 1146–47 (presenting similarities in court's causation and redressability analysis).

⁶⁸ See *City of New York*, 325 F. Supp. 3d at 472–75 (suggesting plaintiff's subjective purpose for suing is not material to displacement); *County of San Mateo*, 294 F. Supp. 3d at 937 (holding subjective purpose of suit has no bearing on displacement).

⁶⁹ See *County of San Mateo*, 294 F. Supp. 3d at 937 (“Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists.”).

⁷⁰ See *id.* at 937 (stating court's holding); see also *City of New York*, 325 F. Supp. 3d at 472–75 (noting that Clean Air Act displaces all claims based on injuries from climate change); *California v. BP P.L.C.*, No. C 17-06011, 2018 U.S. Dist. LEXIS 32990, at *3 (N.D. Cal. 2018) (rejecting public nuisance claim under state law for global warming tort actions).

⁷¹ See *County of San Mateo*, 294 F. Supp. 3d at 937 (rejecting county's argument that fossil fuels caused its climate change related injuries).

but so were claims against energy producers' contributions to climate change and rising sea levels.⁷²

In contrast to *City of New York* and *County of San Mateo*, the court in *California* initially issued a preliminary order that the plaintiffs' claims were not displaced by federal law.⁷³ The plaintiff's believed the defendants were liable because they engaged in large scale efforts to discredit scientific research on global warming while also producing fossil fuels.⁷⁴ The plaintiffs advanced three arguments for rejecting federal jurisdiction—each of which the court initially rejected.⁷⁵ First, the plaintiffs argued that extending federal common law to the current dispute would over extend the scope of federal nuisance law.⁷⁶ The court responded that the transboundary effects of global warming required a federal uniform solution; thus, federal common law displaced the plaintiff's state law claims.⁷⁷ Second, the plaintiffs argued that the Clean Air Act displaced federal common law claims.⁷⁸ The court argued that *California* was distinct from *AEP* and *Kivalina* because the plaintiffs' claims centered around the defendant's course of action to produce and sell fossil fuels while simultaneously

⁷² See *City of New York*, 325 F. Supp. 3d at 472–74 (“[T]he Clean Air Act displaces claims arising from damages caused by domestic greenhouse gas emissions because Congress has expressly delegated these issues to the EPA.”).

⁷³ See *California*, 2018 U.S. Dist. LEXIS 32990, at *13–14 (“Here, the Clean Air Act does not provide a sufficient legislative solution to the nuisance alleged to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law.”). Here, the plaintiffs actually wanted to stay in state court, so they argued against federal jurisdiction. *Id.* at *3. But see *City of New York*, 325 F. Supp. 3d at 472–74 (reasoning claims are displaced by Clean Air Act because plaintiff's injuries arose from greenhouse gases); *County of San Mateo*, 294 F. Supp. 3d at 937 (holding Clean Air Act displaces claims for injunctive relief and damages for climate change injuries).

⁷⁴ See *California*, 2018 U.S. Dist. LEXIS 32990, at *4 (“[P]laintiffs' state law nuisance claims are premised on the theory that—despite long-knowing that their products posed severe risks to the global climate—defendants produced fossil fuels while simultaneously engaging in large scale advertising and public relations campaigns to discredit scientific research on global warming, to downplay the risks of global warming, and to portray fossil fuels as environmentally responsible and essential to human well-being.”).

⁷⁵ See *id.* at *10 (noting that plaintiff advanced three different arguments for rejecting federal jurisdiction). Defendants likely removed the case to federal court because they recognized that there is a higher bar for satisfying Article III standing in federal court, as opposed to state court. Goldberg, *supra* note 2. Consequently, the plaintiffs argued for a denial of the removal and for the case to remain in state court. *California*, 2018 U.S. Dist. LEXIS 32990, at *14.

⁷⁶ See *California*, 2018 U.S. Dist. LEXIS 32990, at *10–11 (“Extending federal common law to the current dispute, plaintiffs caution, would extend the scope of federal nuisance law well beyond its original justification.”).

⁷⁷ See *id.* (arguing that “the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution.”).

⁷⁸ See *id.* at *11–12 (presenting plaintiff's second argument surrounding Clean Air Act).

deceiving the public about the consequences of global warming.⁷⁹ Third, the plaintiffs argued that the well-pleaded complaint rule barred the motion.⁸⁰ The court held that the plaintiffs' claims depended on a global complex of cause and effect involving all nations and the relationships between the United States and other nations, and as a result, a uniform rule was required.⁸¹

In a complete reversal, the *California* court drastically changed course in its final ruling and held that the plaintiffs' producer sale and deception theories were still defeated by both displacement and the political question doctrine—like in *City of New York* and *County of San Mateo*.⁸² First, the Clean Air Act preempted the plaintiff's claims because the harm that the plaintiffs alleged was still caused by fossil fuel emissions, and not just the extraction or sale of fossil fuels.⁸³ Second, the portion of the plaintiffs' complaint that sought damages for the energy producers' conduct and emissions contributing to the global adverse effects of climate change, while not addressed by the *AEP* or *Kivalina* decisions, was nonetheless precluded by the need for judicial deference to other branches of government to resolve transnational problems like climate change.⁸⁴

While the Supreme Court has held that "the control of interstate pollution is primarily a matter of federal law," there is still some uncertainty as to whether plaintiffs' state law claims survive federal displacement analysis.⁸⁵ In *Texas Industries Inc. v. Radcliff Materials, Inc.*, the Supreme Court held that where "the interstate . . . nature of the controversy makes it inappropriate for state law to control . . . our federal system does not permit

⁷⁹ See *id.* at *12–14 (presenting court's attempt to distinguish case at bar from *AEP* and *Kivalina*).

⁸⁰ See *id.* at *14 ("[T]he well-pleaded complaint rule does not bar removal of these actions.").

⁸¹ See *California*, 2018 U.S. Dist. LEXIS 32990, at *14–15 (discussing plaintiff's claims are governed by federal common law).

⁸² See *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018) (comparing court's final ruling from preliminary ruling).

⁸³ See *id.* ("The February 27 order concluded that because plaintiffs' nuisance claims centered on defendants' placement of fossil fuels into the flow of international commerce, and because foreign emissions are out of the EPA and Clean Air Act's reach, the Clean Air Act did not necessarily displace plaintiffs' federal common law claims.").

⁸⁴ See *id.* ("Nevertheless, these claims are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems, as now explained.").

⁸⁵ See *Int'l Paper Co. v. Ouellete*, 479 U.S. 481, 492 (1987) (quoting Supreme Court's position on pollution and federal displacement analysis); see also *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (stating federal common law governs claims regarding pollution); *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (demonstrating Congress's role in creating federal remedies for pollution).

the controversy to be resolved under state law.”⁸⁶ As a result, when plaintiffs bring climate suits for damages caused by the transboundary effects of greenhouse gas emissions indirectly caused by energy producers, some courts stated that their claims arise under federal law and require a uniform standard of decision.⁸⁷ On the other hand, other courts indicated that state law claims may survive when plaintiff’s federal common law claims have been displaced by the Clean Air Act.⁸⁸ Courts are split on whether local government claims for relief are displaced and also preempted by federal law.⁸⁹ This uncertainty means that there may be room for plaintiffs to bring their nuisance claims in state court and not be preempted by federal law.⁹⁰ As such, it is necessary that the federal judiciary clarify whether state law nuisance claims are preempted by the Clean Air Act.⁹¹

Until recently, courts were split as to whether the political question doctrine would make these climate cases nonjusticiable.⁹² In *American*

⁸⁶ See *Texas Industries Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (stating that federal law controls resolution of interstate controversies).

⁸⁷ See *City of New York*, 325 F. Supp. 3d at 472 (reiterating that climate change requires uniform solution). However, departure from judicial abstention in creating a uniform climate change solution would interfere with separation of powers and foreign policy. *Id.*; *California v. BP P.L.C.*, No. C 17-06011, 2018 U.S. Dist. LEXIS 32990, at *6–7 (N.D. Cal. 2018) (stating Supreme Court’s holding that pollution is under federal common law).

⁸⁸ See *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) (recognizing that some state law claims may survive federal preemption under certain circumstances).

⁸⁹ See *id.* (highlighting uncertainty of state law claim’s survival).

⁹⁰ See *Ferrey*, *supra* note 6, at 277 (suggesting state courts may remain viable option for plaintiffs seeking relief from climate injuries).

⁹¹ See *id.* (stating that in *AEP*, Court “never answered the viability of state rather than federal nuisance law.”). While the Supreme Court never decided the viability of whether state nuisance law remained a viable claim, the Third Circuit held that similar common law claims were not preempted. *Id.*

⁹² See *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018) (“Thus, to the extent that the City seeks to hold Defendants liable for damages stemming from foreign greenhouse gas emissions, the City’s claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of ‘serious foreign policy consequences.’”); *but see California v. BP P.L.C.*, No. C 17-06011, 2018 U.S. Dist. LEXIS 32990, at *9–10 (N.D. Cal. 2018) (“If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints . . . the extent of any judicial relief should be uniform across the nation.”); see also Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C.L. REV. 201, 250–56 (2010) (discussing why climate cases would be barred by *Baker* factors under political question doctrine). Judicial rulings on climate change would contradict President Trump’s decision to increase domestic energy production and withdraw from the Paris Climate Accord. See *President Donald J. Trump is Unleashing American Energy Dominance*, WHITEHOUSE (May 14, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unleashing-american-energy-dominance/> [https://perma.cc/3CEB-E544] (describing President Trump’s plan to increase energy independence).

Electric Power Co., the Second Circuit held that there was no textually demonstrable constitutional commitment of the issue to a specific branch of government.⁹³ The court reasoned that there was nothing in the Constitution that granted any one branch of government the power to regulate greenhouse gas emissions; therefore, the court could rule on whether the EPA could be compelled to set emissions standards for automobiles.⁹⁴ In addressing the second *Baker* factor, the Second Circuit held that there was no lack of judicially discoverable and manageable standards for resolving the case.⁹⁵ The court reasoned that the defendant's arguments were undermined by the fact that federal courts successfully ruled on complex common law public nuisance cases for over a century, such as public nuisance cases between states.⁹⁶ The court pointed to *Missouri v. Illinois*⁹⁷ ("*Missouri I*"), a case where Missouri sought to prevent Illinois from discharging sewage into a channel that emptied into the Mississippi River—which likely would have made a large stretch of the river unusable for humans.⁹⁸ In *Missouri v. Illinois*⁹⁹ ("*Missouri II*"), the Court carefully weighed the scientific and expert evidence offered and concluded that Missouri had not established injury or causation.¹⁰⁰ The Second Circuit similarly pointed to the case of *Georgia v. Tenn. Copper Co.*, where the Supreme Court set definitive emissions limits, imposed monitoring requirements, and divided costs between the defendants after Georgia alleged that poisonous emissions from Tennessee Copper Company plants were destroying land in Georgia.¹⁰¹ Moreover, the Second Circuit reasoned that federal courts have long been

⁹³ See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 324–25 (2d Cir. 2009) (acknowledging Second Circuit's *AEP* holding).

⁹⁴ See *id.* ("We find no textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions or other forms of alleged nuisance.").

⁹⁵ See *id.* at 326 (articulating Second Circuit's analysis of second *Baker* factor as applied to defendant's claims).

⁹⁶ See *id.* (outlining history of federal court decisions adjudicating public nuisance cases).

⁹⁷ 180 U.S. 208 (1901).

⁹⁸ See *Am. Elec. Power Co.*, 582 F.3d at 326 (highlighting *Missouri v. Illinois* adjudication); see also *Missouri v. Illinois*, 180 U.S. 208, 212–13 (1901) (*Missouri I*) ("[T]he Sanitary District of Chicago, as aforesaid, has been discharging its sewage matter and filth in the Chicago river.").

⁹⁹ 200 U.S. 496 (1906).

¹⁰⁰ See *Am. Elec. Power Co.*, 582 F.3d at 326–27 (discussing *Missouri II* holding).

¹⁰¹ See *id.* at 327 (using *Tennessee Copper Co.* as another example); see also *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238–39 (1907) (noting Supreme Court granted injunctive relief to Georgia). The Court explained that it was "satisfied, by a preponderance of evidence, that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case within the requirements of [*Missouri II*]." *Tennessee Copper Co.*, 206 U.S. 238–39.

able to assess “complex scientific evidence in cases where the cause of action was based [. . .] on the federal common law or [. . .] a statute.”¹⁰²

In addressing the third *Baker* factor, the court held that it was not impossible to decide the case without an initial policy determination based clearly for nonjudicial discretion.¹⁰³ The court reasoned that just because the Clean Air Act did not provide the plaintiffs with their sought remedy did not mean plaintiffs would have to wait for the Legislative and Executive Branches to craft a comprehensive solution to global warming.¹⁰⁴ Regarding the fourth, fifth, and sixth *Baker* factors, the court reasoned that allowing this litigation absent an unified policy by the federal government did not demonstrate any lack of respect for the other branches of government, contravene a relevant political decision already made, or result in multiple different policies that would embarrass the nation.¹⁰⁵ The *City of New York* and *City of Oakland* cases challenged the Second Circuit’s analysis of the political question doctrine in climate litigation by holding that political question doctrine bars federal courts from adjudicating claims seeking injunctive and monetary relief for damages caused by both greenhouse gas emitters and producers.¹⁰⁶

III. ANALYSIS

The lower courts appropriately decided that the political question doctrine barred them from adjudicating the plaintiffs’ claims on the merits.¹⁰⁷ In *Jesner v. Arab Bank, PLC*,¹⁰⁸ the Supreme Court held that where judicial action may have significant foreign relations implications, courts should be

¹⁰² See *Am. Elec. Power Co.*, 582 F.3d at 329 (quoting Second Circuit’s reasoning).

¹⁰³ See *id.* at 330 (presenting court’s analysis of third *Baker* factor).

¹⁰⁴ See *id.* at 331 (“Plaintiffs here may seek their remedies under the federal common law. They need not await an ‘initial policy determination’ in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century.”).

¹⁰⁵ See *id.* at 332 (detailing Second Circuit’s holding).

¹⁰⁶ See *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018) (“To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government.”); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024–29 (N.D. Cal. 2018) (“[T]he worldwide problem of global warming should be determined by our political branches, not by our judiciary.”).

¹⁰⁷ See *City of New York*, 325 F. Supp. 3d at 467 (concluding that litigating these actions for injuries would conflict with separation of powers); *City of Oakland*, 325 F. Supp. 3d at 1029 (holding that regulation of global warming be left to political branches not judiciary); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (finding removal to federal court unwarranted where federal common law does not exist).

¹⁰⁸ 138 S. Ct. 1386 (2018).

particularly wary of infringing upon the discretion of the legislative and executive branches in managing foreign affairs.¹⁰⁹ For both *City of New York* and *City of Oakland*, the courts applied *Jesner* in finding that when cities seek to hold foreign oil and gas companies liable for greenhouse gas emissions, their claims are barred by the need for judicial caution in the face of serious foreign policy consequences that may result from adjudicating such claims.¹¹⁰ In *City of Oakland*, the court reasoned that litigating an action for domestic injuries from foreign greenhouse gas emissions in federal court would implicate the interests of foreign and domestic governments, and arbitrarily see a single judge or jury in California “impose an abatement fund” upon these international companies as a result of the effects of their transnational operations.¹¹¹

Similarly, in *City of New York*, the court stated that such conduct would “severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches.”¹¹² In *AEP*, the Second Circuit found that a decision by a federal court concerning common law nuisance brought by domestic plaintiffs against domestic powerplants for their emissions did not create a national or international emissions policy.¹¹³ In both *City of New York* and *City of Oakland*, the courts distinguished *AEP* from the cities’ claims, which were against both foreign and domestic oil

¹⁰⁹ See *Jesner*, 138 S. Ct. at 1399–1419 (warning courts should be cautious when cases have significant foreign relations implications). See generally *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 109–17 (2013) (discussing foreign relation implications). *Kiobel* warned that where a claim “reaches conduct within the territory of another sovereign,” concerns of “unwarranted judicial interference” in foreign policy “are all the more pressing.” *Id.* at 116–17; *City of Oakland*, 325 F. Supp. 3d at 1026 (emphasizing judicial deference to political branches of government in matters implicating foreign relations).

¹¹⁰ See *Jesner*, 138 S. Ct. at 1407 (reiterating courts should be careful when certain cases may have significant foreign policy implications); see also *City of New York*, 325 F. Supp. 3d at 475–76 (“To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government. Accordingly, the Court will exercise appropriate caution and decline to recognize such a cause of action.”); *City of Oakland*, 325 F. Supp. 3d at 1025–29 (emphasizing need for “great caution” where relief would equate to governing foreign energy policy).

¹¹¹ See *City of Oakland*, 325 F. Supp. 3d at 1026 (explaining balancing pros and cons of fossil fuel consumption should be left to other branches). Allowing nuisance suits to be adjudicated in different United States district courts would interfere with the determinations of other government branches on how the United States should interact with the energy industry. *Id.*

¹¹² See *City of New York*, 325 F. Supp. 3d at 476 (announcing decision).

¹¹³ See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 325 (2d Cir. 2009) (“A decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a national or international emissions policy (assuming that emissions caps are even put into place).”).

companies—all of whom produce and sell fossil fuels globally.¹¹⁴ The courts implied that federal judiciary opinions holding international oil companies accountable for greenhouse gas emissions would have enormous foreign policy consequences, and consequently, that judicial deference was necessary under the political question doctrine.¹¹⁵ Therefore, the courts in *City of New York* and *City of Oakland* correctly decided that federal courts ruling on cases about domestic injuries from foreign greenhouse gas emissions made those cases nonjusticiable, political questions given the significant foreign policy implications by such rulings.¹¹⁶

Even in the absence of *Jesner*, the political question doctrine still bars these climate cases as adjudication would be inextricable from several *Baker* factors.¹¹⁷ While the Constitution does not expressly delegate authority for addressing climate change to either the Legislative or Executive Branches, it would likely disrespect those governmental branches who have either taken the lead or failed to address the problem.¹¹⁸ Additionally, judicial action would contravene the Executive's decision to withdraw from the Paris Agreement, and potentially embarrass the U.S. if a court awarded damages for greenhouse gas emissions while the executive branch simultaneously tried to promote domestic energy production.¹¹⁹ President Trump has made increasing domestic energy production a main priority for his administration.¹²⁰ As a result, if a court were to order one of those domestic producers to pay damages for the effects of greenhouse gas emissions linked to the sale of its fossil fuels, such an order would directly interfere with and contradict the president's initiatives, demonstrate a

¹¹⁴ See *City of New York*, 325 F. Supp. 3d at 476 (emphasizing *AEP* claim against foreign companies); *City of Oakland*, 325 F. Supp. 3d at 1024 (acknowledging that in *AEP*, conduct and emissions arose outside United States).

¹¹⁵ See *City of New York*, 325 F. Supp. 3d at 475–76 (reiterating importance of separation of powers in regard to global warming related claims by states); *City of Oakland*, 325 F. Supp. 3d at 1025–29 (discussing “sound reasons” why regulation of global warming is best left to political branches).

¹¹⁶ See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018) (discussing political question doctrine and potential for diplomatic disruptions); *City of New York*, 325 F. Supp. 3d at 475–76 (discussing separation of powers); *City of Oakland*, 325 F. Supp. 3d at 1025–27 (balancing policy concerns of harmful effects of greenhouse gas emissions with national security priorities).

¹¹⁷ See *Jesner*, 138 S. Ct. at 1407 (noting judicial difficulty in asserting jurisdiction over foreign corporate defendants); *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

¹¹⁸ See Gifford, *supra* note 92 (analyzing why climate cases would be barred by *Baker* factors under political question doctrine).

¹¹⁹ See *Baker*, 369 U.S. at 210–11 (discussing implications of judicial involvement in matters delegated to Congress and executive).

¹²⁰ See *President Donald J. Trump is Unleashing American Energy Dominance*, *supra* note 92 (describing President Trump's plan to increase energy independence).

profound disrespect towards the Executive Branch, and embarrass the nation.¹²¹

The courts also correctly applied *AEP* and *Kivalina* in deciding that the CAA displaced the plaintiffs' claims.¹²² In the wake of the *AEP* and *Kivalina* decisions, a new wave of climate suits permeated the federal judiciary seeking relief for damages caused by climate change—not based on the defendants emissions of greenhouse gases—but their knowledge of climate change's adverse effects and their active efforts to discredit the science establishing combustion of fossil fuels as a significant contributor to greenhouse gas emissions and climate change.¹²³ The lower courts were initially split on whether these new claims avoided *AEP*'s displacement analysis.¹²⁴

Until recently, the lower courts were split on whether complaints based on energy producers' knowledge of the adverse effects of climate change and their efforts to discredit existing scientific research are displaced by existing jurisprudence.¹²⁵ The courts in *City of New York*, *City of Oakland*, and *County of San Mateo* held that the Clean Air Act displaced the plaintiffs' claims even though they were not suing greenhouse gas

¹²¹ See *Baker*, 369 U.S. at 210–17 (cautioning against judicial intrusion and its domestic and foreign implications).

¹²² See *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 472–73 (S.D.N.Y. 2018) (referencing *AEP* and *Kivalina* holdings); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024–25 (N.D. Cal. 2018) (addressing EPA's authority to set emission standards); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (stating that *AEP* and *Kivalina* did not confine holdings on displacement to particular emission sources); see also *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012) (characterizing federal common law displaced where legislative action has been taken); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 315 (2d Cir. 2009) (describing displacement claims).

¹²³ See *City of New York*, 325 F. Supp. 3d at 468 (“Climate science clearly demonstrates that burning of fossil fuels is primary cause of climate change.”); *County of San Mateo*, 294 F. Supp. 3d at 937 (interpreting *AEP* and *Kivalina* to warrant displacement in substantially similar circumstances); *California v. BP P.L.C.*, No. C 17-06011, 2018 U.S. Dist. LEXIS 32990, at *5–6 (N.D. Cal. 2018) (stating that plaintiff's claims were governed by federal common law).

¹²⁴ See *City of New York*, 325 F. Supp. 3d at 472 (holding plaintiff's claims were displaced); *City of Oakland*, 325 F. Supp. 3d at 1024 (declining to reach novel displacement issue where judicial action would implicate political question doctrine); *County of San Mateo*, 294 F. Supp. 3d at 937 (holding removal based on federal common law was not warranted); *California*, 2018 U.S. Dist. LEXIS 32990, at *12–15 (concluding that there was no displacement of plaintiffs' claims under circumstances).

¹²⁵ See *City of New York*, 325 F. Supp. 3d at 472–74 (holding plaintiffs' claims were displaced by CAA); *County of San Mateo*, 294 F. Supp. 3d at 937 (rejecting court's analysis in *California* and holding that plaintiffs' claims were displaced); *California*, 2018 U.S. Dist. LEXIS 32990, at *12–15 (holding that plaintiffs' novel claims were not displaced under CAA).

emitters.¹²⁶ These courts reasoned that *Kivalina*, in addition to displacing plaintiffs' claims against domestic greenhouse gas emitters, plaintiffs' also displaced federal common law claims against energy producers' contributions to manifestations of climate change, such as rising sea levels, were also displaced.¹²⁷ While the local governments' new approach to seek relief for greenhouse gas emissions in federal court was innovative, the lower courts correctly relied upon the Supreme Court and Ninth Circuit jurisprudence in holding that—regardless of whether a plaintiff sought damages for greenhouse gas emissions directly or indirectly—such claims are nonetheless displaced by the Clean Air Act.¹²⁸ In other words, when plaintiffs bring nuisance and trespass claims against defendants for domestic greenhouse gas emissions, the Clean Air Act displaces those federal common law claims under *AEP* and *Kivalina*—even though the plaintiffs might not explicitly state that they are seeking liability for direct emissions of carbon dioxide.¹²⁹ Since the Clean Air Act displaces claims seeking relief for the effects of greenhouse emissions, plaintiffs should instead dedicate their energy and resources to pursuing climate suits based on nuisance claims in state court rather than federal court.¹³⁰

¹²⁶ See *City of New York*, 325 F. Supp. 3d at 472–74 (noting plaintiff seeks damages for combustion of defendant's fossil fuels); *City of Oakland*, 325 F. Supp. 3d at 1026 (“[P]laintiffs seek to impose liability . . . for . . . production and sale of fossil fuels worldwide.”); *County of San Mateo*, 294 F. Supp. 3d at 937 (“[*AEP*] did not confine its holding about the displacement of federal common law to particular sources of emissions.”).

¹²⁷ See *County of San Mateo*, 294 F. Supp. 3d at 937 (discussing extent of Supreme Court's holding in *AEP*); see also *City of New York*, 325 F. Supp. 3d at 472–74 (reasoning that Clean Air Act displaces City's claims “seeking damages for past and future domestic greenhouse gas emissions brought under federal common law.”).

¹²⁸ See *City of New York*, 325 F. Supp. 3d at 472–74 (“[T]he Supreme Court has instructed that the type of remedy asserted is not relevant to . . . the doctrine of displacement.”) (quoting *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012)); *City of Oakland*, 325 F. Supp. 3d at 1025–29 (“[Displacement] claims are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems.”); see also *County of San Mateo*, 294 F. Supp. 3d at 937 (“*Kivalina* stands for the proposition that federal common law is not just displaced when it comes to claims against domestic sources of emissions but also when it comes to claims against energy producers' contributions to global warming and rising sea levels.”). In *Kivalina*, the Ninth Circuit noted that “the Supreme Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement . . . if a cause of action is displaced, displacement is extended to all remedies.” *Kivalina*, 696 F.3d at 857.

¹²⁹ See *City of New York*, 325 F. Supp. 3d at 472–76 (highlighting “transboundary” complexities related to carbon dioxide and greenhouse gases).

¹³⁰ See *County of San Mateo*, 294 F. Supp. 3d at 937–38 (clarifying that Clean Air Act preserves state causes of action); see also 42 U.S.C. § 7604(c) (2018) (allowing state action to be exempt from preemption).

In *City of New York* and *City of Oakland*, the court found that the plaintiffs' claims were displaced by the Clean Air Act and presented non-justiciable political questions.¹³¹ In *County of San Mateo*, the court also found that the plaintiffs' claims could not be adjudicated by the court because they presented non-justiciable political questions.¹³² Consequently, the lower courts did not reach the issue of Article III standing.¹³³ If any of the courts evaluated prudential standing, they would have likely found that the plaintiffs in *California*, *New York*, and *San Mateo* had Article III standing to bring their claims.¹³⁴ The plaintiffs demonstrated injury in fact because they face both current and future injuries stemming from the energy producer actions, such as sea level rise.¹³⁵ The plaintiffs also satisfied the causation requirement because they satisfactorily alleged that the defendant's public deception campaign and the sale of fossil fuels contributed to their injuries.¹³⁶ Finally, the plaintiffs satisfied the redressability requirement because they alleged that ordering energy producers to pay for climate resiliency projects would help alleviate the burden on local governments to implement such projects.¹³⁷

¹³¹ See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) ("[T]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns."); *City of New York*, 325 F. Supp. 3d at 475 (referencing *Jesner* holding and court rationale); *City of Oakland*, 325 F. Supp. 3d at 1025–29 (referencing *Jesner* holding and rationale to conclude that Congress or diplomacy must address global warming).

¹³² See *County of San Mateo*, 294 F. Supp. 3d at 937–38 (addressing state law claims were superseded by federal common law "but . . . such state law claims survive depend[ing] on whether they are preempted by [a] federal statute.").

¹³³ See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)) ("There is no federal general common law.").

¹³⁴ See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 341–49 (2d Cir. 2009) (detailing states' claims presented attributable injuries from greenhouse gases).

¹³⁵ See *id.* at 341–42 (stating rising sea levels resulting of global warming will cause more frequent and severe flooding).

¹³⁶ See *id.* at 347 (reviewing defendant's argument that many others contribute to global warming).

Plaintiffs have sufficiently alleged that their current and future injuries are "fairly traceable" to Defendants' conduct. For purposes of Article III standing they are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants' emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries.

Id.

¹³⁷ See *id.* at 348–49 (highlighting that courts' ability to provide some measure of relief satisfies redressability requirement). This was an appropriate remedy because the defendants were found to be responsible for a considerable amount of the greenhouse gas emissions that caused the plaintiffs harm. *Id.*

IV. CONCLUSION

While this new wave of lower court rulings is sure to disappoint many climate advocates and state and local governments seeking relief for the adverse effects of climate change, it is important to note that, under *AEP*, the Clean Air Act allows any individual to sue the EPA in federal court not only for failing to enforce their emissions limits, but also for failing to set emissions limits for particular pollutants. Thus, all is not completely lost for plaintiffs in federal court. Court holdings from the new wave of climate litigation cases have merely eliminated the ability of plaintiffs to sue greenhouse gas producers and emitters in federal court. These cases have not affected a plaintiff's right to sue the EPA and demand it set and enforce emissions standards. Consequently, state and local governments seeking judicial relief for the effects of climate change should focus their time and energy in the state court system.

Thomas Stirrat