STATE NUISANCE LAW AND THE CLIMATE CHANGE CHALLENGE TO FEDERALISM

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INTRODUCTION

On Sunday, October 7, 2018, meteorologists noticed a tropical storm forming in the warm waters of the Atlantic Ocean. It was expected to make landfall several days later as a Category 1 hurricane, the lowest level on a five-point scale. But just twenty-four hours before arriving on the Florida panhandle, the storm rapidly intensified, ultimately hitting the coast as a Category 4 hurricane. It was one of the strongest to ever strike the United States.[1] While rapid intensification was once rare, six major

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hurricanes in the last year underwent the dangerous process before making landfall.[2] More powerful hurricanes are one of the predicted effects of climate change, which scientists now estimate will cause catastrophic impacts by approximately 2040.[3] The private property damages from this event alone are expected to be between $13 billion and $19 billion.[4] Who will pay for the recovery, or countless others like it, in the years to come? And does the judiciary have a role in addressing one of the gravest threats to our society?

Over the past two decades, as the federal government has struggled to respond to climate change, state and city governments have tried to use federal nuisance law to limit the emissions causing global warming.[5] However, in 2007 the Supreme Court found that the Clean Air Act authorized EPA to regulate carbon dioxide.[6] As a result of this decision, in 2011 the Supreme Court held that plaintiffs could no longer seek to curb greenhouse gas emissions from industry under federal nuisance law in *American Electric Power v. Connecticut*.[7] The unanimous opinion held that the Clean Air Act displaced the federal common law of nuisance and led to a temporary lull in using the court system to address climate change.

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[1] *See* Robinson Meyer, *Hurricane Michael's Remarkable, Terrifying Run*, ATLANTIC (Oct. 11, 2018), https://www.theatlantic.com/science/archive/2018/10/hurricane-michaels-remarkable-run/572734/; Robinson Meyer, *The Sudden, Shocking Growth of Hurricane Michael*, ATLANTIC (Oct. 10, 2018), https://www.theatlantic.com/science/archive/2018/10/hurricane-michael-florida-panhandles-worst-case-scenario/572671/.

[2] *See* Adam Rogers, *How Hurricane Michael Got Super Big, Super Fast*, WIRED (Oct. 11, 2018), https://www.wired.com/story/how-hurricane-michael-got-super-big-super-fast/.

[3] *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C, SUMMARY FOR POLICYMAKERS (Oct. 6, 2018), http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.

[4] *See* Daniel Cusick, *Hurricane Michael Could Do Billions of Dollars of Damage*, SCI. AM. (Oct. 10, 2018), https://www.scientificamerican.com/article/hurricane-michael-could-do-billions-of-dollars-of-damage/.

[5] *See* James Flynn, *Climate of Confusion: Climate Change Litigation in the Wake of* American Electric Power v. Connecticut, 29 GA. ST. U. L. REV. 823, 832–37 (2012).

[6] *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

[7] *See* Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit:* American Electric Power v. Connecticut, *Federalism, Civil Procedure, and the Proper Judicial Role*, 2010-2011 CATO SUP. CT. REV. 295, 295–96 (2011).

After the Supreme Court's decision, however, the political and regulatory processes utterly failed to provide an adequate solution to the problem. Although the Obama administration's EPA began an ambitious plan to control greenhouse gas emissions, lengthy legal challenges and the election of President Donald Trump have put federal regulatory efforts in limbo.[8] Because of this impasse and the lack of Congressional action, in the last two years several cities filed *state*, rather than *federal*, nuisance lawsuits against fossil fuel companies for their role in causing the problem.[9] The first three cases, now all on appeal, are *City of Oakland v. BP p.l.c.* [hereinafter Oakland case], *County of San Mateo v. Chevron Corp.* [hereinafter San Mateo case], and *City of New York v. BP p.l.c* [hereinafter New York case]. In contrast to earlier federal lawsuits that only sought abatement of the nuisance, each of these lawsuits is seeking monetary damages to deal with the costs of adapting to environmental change and coping with disaster events.[10]

The plaintiffs in these climate change lawsuits have advanced two sets of claims. One is rooted in nuisance law; the plaintiffs allege the defendants have created public and private nuisances through sea level rise, flooding, and increased storm-related damage from climate change.[11] Both the New York and Oakland plaintiffs have brought their cases solely under nuisance law.[12] The second set

[8] *See* Brady Dennis & Juliet Eilperin, *EPA Chief Scott Pruitt Tells Coal Miners He Will Repeal Power Plant Rule Tuesday: 'The War Against Coal is Over,'* WASH. POST (Oct. 9, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/10/09/pruitt-tells-coal-miners-he-will-repeal-power-plan-rule-tuesday-the-war-on-coal-is-over/.

[9] *See* Georgina Gustin, *Coastal Communities Sue 37 Fossil Fuel Companies Over Climate Change*, INSIDE CLIMATE NEWS (July 18, 2017), https://insideclimatenews.org/news/18072017/oil-gas-coal-companies-exxon-shell-sued-coastal-california-city-counties-sea-level-rise.

[10] *See* Michael A. Livermore, *Why Cities Are Suing Oil Giants*, U.S. NEWS & WORLD REPORT (June 26, 2018), https://www.usnews.com/news/national-news/articles/2018-06-26/why-cities-are-suing-oil-giants.

[11] *See, e.g.*, Complaint at 58–62, City of New York v. B.P. p.l.c., No. 18 Civ. 182 (JFK) (S.D.N.Y filed Jan. 9, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180109_docket-118-cv-00182_complaint-1.pdf.

[12] *See generally* Complaint, City of New York v. B.P. p.l.c., No. 18 Civ. 182 (JFK) (S.D.N.Y. filed Jan. 9, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180109_docket-118-cv-00182_complaint-1.pdf. First Amended Complaint for Public Nuisance, City of Oakland v. BP p.l.c., No. 3:17-cv-06011-WHA (Cal. Super. Ct. filed Apr. 3,

of claims are based in products liability; the complaints state that the defendants extracted, marketed, and sold their products with the knowledge that they would cause global warming and its attendant harms.[13] The San Mateo plaintiffs have listed causes of action on these grounds, in addition to nuisance. With improved scientific predictions of sea level rise and flooding from warmer temperatures, the coastal cities can now quantify the harms they expect to incur in the years ahead and have detailed these effects in their complaints.[14] They have asserted that since fossil fuel companies had clear knowledge of the dangers of their "products," the companies should pay for the costs of fortifying coastal areas against rising waters.[15]

These lawsuits are enormously important for local communities affected by climate change. The humanitarian harms from increasing natural disasters, rising seas, and heat waves will be astronomical, and the United States. is expected to face the second highest economic losses in the world.[16] But there are also strategic reasons that the plaintiffs may have opted to pursue these cases, despite the bizarreness of addressing a global pollution problem through state nuisance law. If the plaintiffs make it to discovery, it will be possible to unearth a trove of documents showing how fossil fuel companies have tried to undermine scientific and political action on climate change.[17] The materials could further damage the reputation of the defendants and lead to greater public support for Congressional action on the problem, similar to what happened with

2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180403_docket-317-cv-06011_complaint-1.pdf.

[13] *See, e.g.*, Complaint at 75–94, County of San Mateo v. Chevron Corp., No. 17-cv-04929-MEJ (N.D. Cal. filed July 17, 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170717_docket-C17-01227_complaint.pdf.

[14] *See* Chris Mooney & Brady Dennis, *This Could Be the Next Big Strategy for Suing over Climate Change*, WASH. POST (July 20, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/07/20/this-could-be-the-next-big-strategy-for-suing-over-climate-change/.

[15] Historical assessments of oil companies' internal research into climate science have been crucial in making these legal claims. *See* Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communications (1977–2014)*, 12 ENVTL. RES. LETTERS 084019 (2017).

[16] *See* Katharine Ricke et al., *Country-level Social Cost of Carbon*, 8 NATURE CLIMATE CHANGE 895, 898–99 (2018).

[17] *See, e.g.*, Umair Irfan, *The Supreme Court Just Declined to Hear Exxon Mobil's Appeal in a Climate Change Lawsuit*, VOX (Jan. 7, 2019), https://www.vox.com/energy-and-environment/2019/1/7/18172275/supreme-court-exxon-climate-change-massachusetts.

tobacco companies in the wake of lawsuits over cigarettes.[18] The lawsuits could also force the companies to support new national legislation on climate change that would clearly preempt state law and avoid subjecting their businesses to unpredictable legal outcomes.

Yet two legal questions must be answered before the plaintiffs can proceed to the merits of their cases. First, can one bring state nuisance suits for damages caused by interstate pollution? Second, if such claims can be brought, are they nevertheless preempted by federal law? This Note will demonstrate that there is significant legal precedent for allowing state nuisance suits concerning transboundary pollution and no basis for removing the current cases to federal court. It will then argue that courts should not find federal law preempts nuisance lawsuits against these defendants. Section I describes the failure of Congress and the Executive Branch to address climate change and examines the recent decisions of the federal district judges in the three lawsuits. Section II shows that the cases should be allowed to proceed under state common law given legal precedents on interstate pollution nuisance suits. Section III analyzes whether the cases are preempted by federal statutes, with a particular focus on the problem of "obstacle" preemption that complicated previous state nuisance suits over transboundary pollution. It argues that the courts should not find federal statutes implicitly preempt the climate change lawsuits, regardless of whether we treat the source of the harm as from products or emissions.

I. USING THE LEGAL SYSTEM TO ADDRESS GLOBAL WARMING

Before turning to the current state nuisance lawsuits, it is important to understand existing federal regulations on climate change. Part A explains why these regulations have proved inadequate in coping with climate change and have prompted cities to turn to the courts for relief. Parts B and C then discuss three climate change lawsuits—the Oakland case, the San Mateo case, and the New York case—and examine why the judges have come to

[18] *See generally* SETH SHULMAN, UNION OF CONCERNED SCIENTISTS AND CLIMATE ACCOUNTABILITY INSTITUTE, ESTABLISHING ACCOUNTABILITY FOR CLIMATE CHANGE DAMAGES: LESSONS FROM TOBACCO CONTROL. SUMMARY OF THE WORKSHOP ON CLIMATE ACCOUNTABILITY, PUBLIC OPINION, AND LEGAL STRATEGIES (2012).

such different conclusions about whether a state common law cause of action exists.

A. *Background to the Litigation*

EPA has promulgated several regulations under the Clean Air Act to address climate change. Following *Massachusetts v. EPA*, the Obama administration issued an endangerment finding in December of 2009 for six pollutants that contribute to planetary warming.[19] EPA subsequently determined that the endangerment finding triggered several obligations under the Clean Air Act, including new regulations for motor vehicle emissions and for power plant emissions under the "Prevention of Signification Deterioration" section, which were finalized in 2010.[20] With the subsequent failure of Congress to enact climate change legislation during his first term,[21] President Obama sought to use EPA's rulemaking authority under the Clean Air Act to implement the Clean Power Plan following his reelection.[22] This regulation, in combination with new automobile emission standards, was expected to make up the bulk of greenhouse gas reductions achieved through federal policy.[23]

EPA's actions, despite representing progress on climate change, are insufficient to address the financial costs of adaptation and mitigation. They were never expected to fulfill the United

[19] *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

[20] *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, and 600); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70 and 71). Both rules were generally upheld by the Supreme Court 5 years later, although the court determined that EPA could not use the "tailoring rule" to limit the number of sources regulated under the PSD provision. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014). The Court's opinion also suggested a legal challenge to the Clean Power Plan might prove successful. *See* Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9, 14–20 (2015).

[21] *See* Tom Mounteer, *Obama Administration Efforts to Control Stationary Source Greenhouse Gas Emissions Through Rulemaking*, 41 ENVTL. L. REP. 11,127, at 11,127–28 (2011).

[22] *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,832 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

[23] *See* JUSTIN GUNDLACH, SABIN CTR. FOR CLIMATE CHANGE LAW, COLUMBIA UNIV., HOW MUCH DOES THE EXISTING REGULATORY PATCHWORK REDUCE U.S. GREENHOUSE GAS EMISSIONS? 2 (Nov. 2015).

States' obligations in preventing the planet's temperatures from rising more than 2ºC, which climate scientists have identified as the threshold point for dangerous impacts from global warming.[24] Nor does the federal government appear to be moving to strengthen its approach. To the contrary, the Trump administration has sought to repeal and replace the Clean Power Plan with weaker limitations on greenhouse gas emissions as well as rollback automobile emission standards. [25]

The current federal regulatory apparatus for greenhouse gases and Congressional inaction has left states with little recourse for coping with climate change impacts. Coastal areas are already experiencing some effects, particularly from sea level rise. California, for instance, has seen a sea level rise of eight inches in the past century and will likely experience an additional twenty to fifty-five inches by 2100. The economic costs of these environmental disruptions will be enormous. Problems from rising temperatures will not only include increased flooding and infrastructure damage, but losses to water supply, increases in natural disasters like forest fires, and public health harms ranging from higher asthma rates to heart disease and death.[26]

Faced with a stagnant federal response, coastal municipalities in California and New York have determined that the best way to prevent taxpayers from footing the bill for adaptation costs is to sue fossil fuel companies. As inland states begin grappling with some of their own environmental damages from climate change, nuisance lawsuits may quickly multiply. In just the last year, cities in Colorado have filed their own state law claims to recoup financial

[24] *See* David Bello, *How Far Does Obama's Clean Power Plan Go in Slowing Climate Change?*, SCI. AM. (Aug. 6, 2015), https://www.scientificamerican.com/article/how-far-does-obama-s-clean-power-plan-go-in-slowing-climate-change/.

[25] *See* Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,094 (Mar. 31, 2017). *See also* Juliet Eilperin & Brady Dennis, *White House Presses Automakers to Back Fuel-Efficiency Rollback*, WASH. POST (Mar. 7, 2019), https://www.washingtonpost.com/climate-environment/2019/03/07/white-house-presses-automakers-back-fuel-efficiency-rollback/?utm_term=.91fde2eca30b. The United States may nevertheless achieve equivalent reductions thanks to the economic competitiveness of natural gas compared to coal, but this assumes that only the Clean Power Plan is reversed while other regulations stay in place. *See* Jeffrey J. Anderson et al., *Will We Always Have Paris? CO2 Reduction without the Clean Power Plan*, 52 ENVTL. SCI. TECH. 2432, 2432–33 (2018).

[26] *See* CARMEN MILANES ET AL., OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, CAL. ENVTL. PROT. AGENCY, INDICATORS OF CLIMATE CHANGE IN CALIFORNIA, at S-4, S-8 (May 2018).

losses from fossil fuel companies.[27] These cases will put increasing pressure on the judicial system to determine if courts can provide some relief to plaintiffs.

B. *Removal to Federal Court and Preemption Issues Raised in the Cases*

In each of the three lawsuits, the defendants have offered two key reasons for immediate removal to federal court and dismissal of the complaints.[28] First, the defendants argued that the claims must proceed under federal nuisance law because of their transboundary nature. Under this logic, the lawsuit should be dismissed because "any such federal common law claim has been displaced by the Clean Air Act" given the Supreme Court's ruling in *American Electric Power*.[29] Displacement applies to situations where a federal statute or regulation directly concerns a matter of federal common law.[30] Once Congress has spoken to the issue, federal common law is no longer available to plaintiffs, because the legislature has primary authority "to prescribe national policy in areas of special federal interest."[31]

In addition to the Supreme Court decision of *American Electric Power,* the defendants have relied on the recent decision in *Kivalina*

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[27] *See* John Schwartz, *Climate Lawsuits, Once Limited to the Coasts, Jump Inland*, N.Y. TIMES (Apr. 20, 2018), https://www.nytimes.com/2018/04/18/climate/exxon-climate-lawsuit-colorado.html.

[28] The argument that preemption should require removal to federal court is extremely tenuous since this is only applicable in situations where there is "complete" preemption by federal statute, though this was not addressed in two of the district judges' opinions. *See infra* Part II.B. There are only a handful of federal statutes that have been found to warrant removal to federal court under this doctrine. *See* Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 549-55 (2007).

[29] *See* Notice of Removal at 3-6, California v. B.P. p.l.c., No. 17-cv-06011-JCS (N.D. Cal. filed Sept. 19, 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171020_docket-317-cv-06012-EMC_notice.pdf; Memorandum of Law of Chevron Corporation, Conocophillips, and Exxon Mobil Corporation Addressing Common Grounds in Support of Their Motions to Dismiss at 8, 26, City of New York v. B.P. p.l.c., No. 18 Civ. 182 (JFK) (S.D.N.Y. filed Feb. 23, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180223_docket-118-cv-00182_motion-to-dismiss-1.pdf.

[30] *See* Sandra Zellmer, *Federal Pre-emption and Displacement of Environmental Statutes and Common Law Claims*, *in* ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW, 96-97 (Michael Faure ed., 2016).

[31] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011).

v. Exxon Mobil for their assertion that the cases must proceed under federal common law.[32] In that case, the Ninth Circuit Court of Appeals held that federal common law nuisance suits seeking monetary damages for global warming were also displaced by the Clean Air Act, building on the holding in *American Electric Power* that suits for injunctive relief were displaced.[33] However, the Ninth Circuit did not explicitly determine that transboundary air pollution cases must only be adjudicated under the federal common law.[34]

Second, the defendants argued that even if viable as state common law claims, the cases are nevertheless preempted by the Clean Air Act.[35] It provides "an exclusive federal remedy for plaintiffs seeking stricter regulation of the nationwide and worldwide greenhouse gas emissions."[36] Preemption, in contrast to displacement, only occurs when a federal statute overrides state law. It requires Congress to clearly *intend* to supersede either a state statute or state common law, so as not to disrupt "the federal-state balance" and intrude on state authority.[37]

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[32] *See* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 855 (9th Cir. 2012).

[33] *See* Quin M. Sorenson, Native Village of Kivalina v. ExxonMobil Corp.*: The End of "Climate Change" Tort Litigation?*, 44 TRENDS: ABA SEC. ENV'T, ENERGY, & RESOURCES 1 (2013). The inability to sever injunctive and monetary claims is potentially supported by precedent concerning the Clean Water Act. *See id*. at 4.

[34] *See* Native Vill. of Kivalina, 696 F.3d at 858 ("The Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief. . . [w]e need not, and do not, reach any other issue urged by the parties.").

[35] *See* Notice of Removal by Defendants Chevron Corporation and Chevron U.S.A., Inc. at 4, County of San Mateo v. Chevron Corp., No. 17-cv-04929-MEJ (N.D. Cal. filed July 17, 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170824_docket-317-cv-04929-MEJ_notice-1.pdf.

[36] Notice of Removal at 5, California v. B.P. p.l.c., No. 17-cv-06011-JCS (N.D. Cal. filed Sept. 19, 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171020_docket-317-cv-06012-EMC_notice.pdf.

[37] United States v. Bass, 404 U.S. 336, 349 (1971). *See also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Milwaukee v. Illinois, 451 U.S. 304, 316 (1981); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011).

C. The District Courts Split

Each of the federal district court judges in the three lawsuits came to a different conclusion about whether the cases had to proceed under federal common law, and if so, whether there was displacement of the claims. Judge Alsup, in the Oakland case, denied plaintiffs' motion to remand the case to state court, holding that the plaintiffs' nuisance claims are "necessarily governed by federal common law" because of their transboundary nature. In making this determination, he emphasized the importance of uniformity in any judicial relief concerning climate change impacts and did not extend his discussion beyond that one issue. Yet surprisingly, he also concluded that the claims were not displaced by the Clean Air Act because the plaintiffs were not concerned with emissions per se but rather brought their claims "against defendants for having put fossil fuels into the flow of international commerce."[38] This worldwide scope led Judge Alsup to conclude that the Clean Air Act did not apply, since it only addresses domestic emissions.[39] He later dismissed the suit on other grounds, which the plaintiffs are currently appealing.[40]

Judge Keenan in the New York case agreed with Judge Alsup that the plaintiffs' claims must be pleaded as federal common law claims, but in contrast to Judge Alsup, he concluded that they were displaced by the Clean Air Act. Judge Keenan similarly reasoned that the suits could not be brought under state nuisance law because transboundary pollution was solely a matter of federal law.[41] Yet he

[38] Order Denying Motions to Remand, California v. B.P. p.l.c., No. C 17-06011 WHA and No. C 17-06012 WHA (N.D. Cal. filed Feb. 27, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180227_docket-317-cv-06011_order-1.pdf.

[39] *See id.* Judge Alsup dismissed the complaints at a later date on grounds that the claims were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems" and interfered with federal foreign policy. *See* Order Granting Motion to Dismiss Amended Complaints at 9–10, California v. B.P. p.l.c., No. C 17-06011 WHA and No. C 17-06012 WHA (N.D. Cal. filed June 25, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180625_docket-317-cv-06011_order-1.pdf.

[40] *See* Karen Savage, *San Francisco, Oakland Appeal Dismissal of Climate Lawsuits*, CLIMATE LIABILITY NEWS (Mar. 13, 2019), https://www.climateliabilitynews.org/2019/03/13/san-francisco-oakland-climate-lawsuit-appeal/.

[41] Judge Keenan directly cited Judge Alsup's opinion on this matter. *See* Opinion and Order at 11, City of New York v. B.P. p.l.c., No. 18 Civ. 182 (JFK) (S.D.N.Y. filed July 19, 2018), http://blogs2.law.columbia.edu/climate-change-

found Judge Alsup's distinction between emissions and the production of fossil fuels to be largely semantic and concluded that the Clean Air Act displaced all federal global warming claims.[42] He agreed with the reasoning of the *Kivalina* opinion in the Ninth Circuit that this should be true regardless of whether the plaintiffs are seeking injunctive relief, as they did under *American Electric Power*, or monetary damages.[43] New York officials are appealing his ruling.[44]

In contrast, Judge Chhabria remanded the San Mateo case back to state court. He believed the state nuisance claims were viable, reasoning that they could not be "superseded by the previously-operative federal common law."[45] He also rejected the defendants' invocation of a rarely-used doctrine known as "complete preemption." It requires removal to federal court and dismissal when a specific federal statute completely preempts state law.[46] However, Judge Chhabria did not cite any prior judicial rulings that have examined whether transboundary pollution claims belong

litigation/wp-content/uploads/sites/16/case-documents/2018/20180719_docket-118-cv-00182_opinion-and-order-1.pdf. He did not address the issue of complete preemption, as it was not raised by the defendants.

[42] For Judge Alsup's discussion of the distinction, see Order Granting Motion to Dismiss Amended Complaints at 9, California v. B.P. p.l.c., No. C 17-06011 WHA and No. C 17-06012 WHA (N.D. Cal. filed June 25, 2018).

[43] *See* Opinion and Order at 16, City of New York v. B.P. p.l.c., No. 18 Civ. 182 (JFK) (S.D.N.Y. filed July 19, 2018). He also found the claims would be an interference with foreign policy. *See id.* at 20.

[44] *See* Karen Savage, *NYC Files Appeal, Challenges Dismissal of Climate Liability Suit,* CLIMATE LIABILITY NEWS (Nov. 12, 2018), https://www.climateliabilitynews.org/2018/11/12/nyc-climate-liability-suit-appeal/.

[45] Order Granting Motions to Remand at 2, County of San Mateo v. Chevron Corp., No. 17-cv-04929-VC, No. 17-cv-04934-VC, and No. 17-cv-04935-VC (N.D. Cal. Mar. 16, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180316_docket-317-cv-04929-MEJ_order.pdf. The judge also went on to find that federal jurisdiction was not warranted under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g &Mfg., 545 U.S. 308 (2005)*, since there was not a sufficient federal issue. *See id.*

[46] *Id.* at 3. It's worth noting that Judge Chhabria directly disagreed with Judge Alsup about the existence of a federal claim, stating that the decisions of *American Electric Power* and *Kivalina* bar federal common law nuisance suits concerning global warming.

under federal versus state common law.[47] The defendants are appealing his decision.[48]

Table: District Court Decisions

	Federal or State Common Law?	Displaced or Preempted by the Clean Air Act?	Outcome and Current Status
Oakland	Federal common law	Not displaced	Dismissed on other grounds; Plaintiffs are appealing
New York	Federal common law	Displaced	Dismissed; Plaintiffs are appealing
San Mateo	State common law	No "complete" preemption warranting removal	Remanded to state court; Defendants are appealing

II. STATE VERSUS FEDERAL COMMON LAW

This Section explores the first key issue raised by the climate change lawsuits: whether they can proceed under state, rather than federal, nuisance law. The question is important because if the lawsuits must proceed under federal law, it is extraordinarily likely a court will find that the claims have been displaced by the Clean Air Act and grant dismissal given the Supreme Court's decision in *American Electric Power*.[49] Part A discusses the existing doctrine on whether plaintiffs can bring transboundary pollution cases under state nuisance law. These precedents make it clear that state nuisance law is available for pollution that crosses national or international boundaries. Part B examines a rare exception to the "well-pleaded complaint" rule, known as complete preemption, which some defendants have suggested should require removal to federal court and adjudication of these cases under federal common

[47] *Id.* There was no citation in his opinion to the landmark case of *Ouellette* on this question, discussed *infra* Part II.A.

[48] *See* Defendants' Motion to Stay Pending Appeal of Remand Order, County of San Mateo v. Chevron Corp., No. 17-cv-04929-VC, No. 17-cv-04934-VC, and No. 17-cv-04935-VC (N.D. Cal. Mar. 26, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180326_docket-317-cv-04929-MEJ_motion-1.pdf.

[49] See discussion on *American Electric Power* and displacement *supra* Part I.

law. This unusual doctrine should not apply to the current cases, allowing state courts to ultimately decide the issue of preemption.

A. *Transboundary Pollution Under State Common Law*

For nearly a century before the passage of federal statutes governing air and water pollution in the early 1970s, the judiciary struggled to determine whether federal or state common law should govern interstate pollution disputes.[50] Then, in several decisions between 1972 and 1987, the Supreme Court concluded that although these environmental statutes displaced *federal* common law nuisance litigation over transboundary pollution, *state* common law was still available.

Prior to the passage of federal environmental legislation, interstate pollution disputes had been brought under both federal and state law,[51] and the Supreme Court had allowed these cases to proceed under both bodies of law.[52] There were periodic discussions in judicial opinions about whether federal common law might be better suited to adjudicate nuisance claims between states, but no court had held that one or the other was the sole avenue available to plaintiffs in these cases. The most confusing, and potentially problematic, dicta on this question came in a 1972 Supreme Court decision in *Illinois v. Milwaukee (Milwaukee I)*. The Court held that

[50] *See* Freeman v. Grain Processing Corp., 848 N.W.2d 58, 76 (Iowa 2014) ("[I]n the early 1970s, it was uncertain whether plaintiffs seeking to attack pollution in the waterways could bring their claims under federal common law or state common law."). *See generally* Robert J. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 718–54 (describing the conflicted decisions of the Supreme Court and federal appeals courts on whether federal or state nuisance law should govern interstate pollution before the 1970s).

[51] However, federal common law seems to have been the more commonly chosen route, historically, for plaintiffs seeking abatement of pollution originating outside their borders. *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 487 (1987), citing as examples Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) and Missouri v. Illinois, 200 U.S. 496 (1906) (water pollution).

[52] *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) (declining to exercise jurisdiction over a nuisance claim filed in Ohio state court against out-of-state polluters and affirming the Ohio state court's ability to adjudicate the case); Illinois v. Milwaukee, 406 U.S. 91 (1972) (affirming that federal courts could exercise jurisdiction over interstate pollution disputes). The court, however, certainly wrestled heavily with the question of which should govern. For early Supreme Court opinions that claimed interstate disputes over natural resources should be litigated solely under federal common law, see *Kansas v. Colorado*, 206 U.S. 46 (1907) (concerning use of a waterway) and *Missouri v. Illinois*, 200 U.S. 496 (1906) (concerning discharge of sewage into a shared waterway).

interstate pollution claims could be brought under federal common law, finding that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law."[53] The opinion seemed to suggest that these claims had to be brought under federal common law, but the Court never stated this directly.[54]

Then, in 1981, the Supreme Court held for the first time that the Clean Water Act displaced federal common law for interstate pollution disputes in *Milwaukee v. Illinois (Milwaukee II)*. Because Congress had directly addressed the issue, "the need for such an unusual exercise of law-making by federal courts" was gone.[55] The recent Supreme Court case of *American Electric Power* cites to this statement in finding that the Clean Air Act displaced federal common claims concerning greenhouse gas emissions.[56] However, *Milwaukee II* did not address the question of whether state nuisance law was still available for transboundary pollution.

Six years later, the Supreme Court held that these disputes could be resolved under state law in the case of *International Paper Co. v. Ouellette*.[57] The litigation arose when property owners in Vermont sued a New York paper mill operator for water pollution across state lines. Before turning to the issue of statutory preemption, which will be discussed in Section III of this Note, the Court unanimously found that state common law was available to plaintiffs injured by interstate pollution, though it did not provide a

[53] *Milwaukee I*, 406 U.S. at 103. The court concurrently held that federal district courts had jurisdiction over interstate pollution cases brought under federal common law and declined to exercise its original jurisdiction to resolve the case. *See id.* at 108.

[54] As one example, the court mused that "[t]he question of apportionment of interstate waters is a question of 'federal common law' upon which state statutes or decisions are not conclusive." *Id.* at 105.

[55] Milwaukee v. Illinois, 451 U.S. 304, 307 (1981).

[56] *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 411 (2011) (quoting *Milwaukee II* for the proposition that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears.").

[57] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987). The judges in that case were concerned about polluters having to comply with multiple state nuisance laws, holding that in a transboundary case a state law claim could proceed but only if the court applied the law of the source state (not the recipient state). *See* Randolph L. Hill, *Preemption of State Common Law Remedies by Federal Environmental Statutes:* International Paper Co. v. Ouellette, 14 ECOLOGY L. Q. 541–42 (1987).

detailed analysis of why this might be so.[58] Since the *Ouellette* decision, the Supreme Court has reaffirmed that a nuisance claim concerning interstate pollution can proceed under state common law in the only other similar case to come before it.[59] Although these two cases concerned water pollution, they have been interpreted to apply in the same way to air pollution disputes.[60]

While affirming the availability of state nuisance law for transboundary pollution, *Ouellette* contained an important caveat. In a five-four split, a majority of the justices ruled that these claims could only be brought under the law of the state where the pollution sources were located. The Court reasoned that the Clean Water Act preempted nuisance suits under the common law of states receiving pollution because such cases would obstruct the implementation of the legislation, whereas nuisance lawsuits brought under the state common law of polluting sources posed no such obstacles to the act.[61]

The availability of state common law for interstate pollution disputes, so long as the claims are brought under source state law, has been reflected in numerous decisions in federal and state court on transboundary air and water pollution since *Ouellette*.[62] The Second Circuit Court of Appeals, for example, held just last year that nuisance suits for transboundary water pollution can proceed as

[58] *Ouellette*, 479 U.S. at 489 (noting that the Court had previously left open the question of whether injured parties still had a cause of action under *state* law in prior decisions about the Clean Water Act).

[59] Arkansas v. Oklahoma, 503 U.S. 91, 100 (1992) (holding that that the Clean Water Act preempts federal and "affected state" common law actions over transboundary water pollution if the discharges are permitted under the Clean Water Act, but that interstate pollution disputes can still proceed under source state nuisance law).

[60] *See, e.g.*, Bell v. Cheswick Generating Station, 734 F.3d 188, 194 (3d Cir. 2013); People *ex rel.* Madigan v. PSI Energy, Inc., 364 Ill. App. 3d 1041, 1044 (2006).

[61] As discussed *infra* Part III.B, the legislation specifically included a "savings" clause that preserved state common law remedies for pollution. *See Ouellette*, 479 U.S. at 497 ("The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State.").

[62] However, it is worth mentioning that some courts seem to have misinterpreted *Ouellette* as stating that the Clean Water Act preempted all state common law claims, when it instead held that state nuisance suits must be brought under the laws of the source state. For a discussion of this issue in New York cases, see *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1141 (E.D.N.Y. 1992).

state law claims under the source state common law.[63] In another recent case, the Fourth Circuit Court of Appeals also reaffirmed the possibility of pursuing a state nuisance lawsuit over transboundary air pollution.[64] And state courts have continued to apply state common law to transboundary pollution claims even as the federal government has played a greater role in pollution regulation.[65]

Given this precedent, any judicial analysis of a state nuisance suit over transboundary pollution must begin by recognizing that state law has long been held to govern these claims. It is simply not the case that only federal common law is available to plaintiffs. Both Judge Keenan and Judge Alsup thus erred in finding that the transboundary nature of climate change required these cases to proceed under federal nuisance law. The Supreme Court explicitly held in *Ouellette* that pollution across state boundaries does not necessitate adjudication under federal nuisance law so long as the court applies the nuisance law of the state where the pollution originated. Judge Keenan's opinion demonstrates a particularly striking misinterpretation of *Ouellette*, citing it to support the proposition that interstate pollution should be a matter of federal law[66] even though the holding of that case preserved a state law remedy. That the federal common law has been available for nuisance claims, as noted in the cases cited by Judges Keenan and Alsup, does not mean it is the only option available.[67] Only Judge Chhabria correctly recognized that state nuisance law is available for transboundary pollution disputes.[68]

To successfully contest the claim that climate change suits can be brought under state law, defendants might try to argue that climate change does not constitute a nuisance. But because the

[63] *See* Catskill Mts. Chptr. of Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 517 (2d Cir. 2017).

[64] *See* N.C. *ex rel.* Cooper v. TVA, 615 F.3d 291, 309 (4th Cir. 2010).

[65] *See* Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280 (W.D. Tex. 1992).

[66] *See* City of New York v. BP p.l.c., 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018).

[67] *See id.* Both Judges Keenan and Alsup at times seem to conflate the mere availability of federal common law with plaintiffs only having the option of proceeding under federal law, and they cite cases decided before *Ouellette* as support for this proposition. See, for example, Judge Keenan's citations to Tex. Indus. Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).

[68] *See* Order Granting Motions to Remand, County of San Mateo v. Chevron Corp., No. 17-cv-04929-VC, No. 17-cv-04934-VC, and No. 17-cv-04935-VC (N.D. Cal. Mar. 16, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180316_docket-317-cv-04929-MEJ_order.pdf.

courts have long held that transboundary pollution does, in fact, constitute a nuisance, this assertion would depend upon distinguishing climate change from other types of pollution that cross state boundaries.[69] Otherwise, though they might nevertheless be preempted,[70] these cases should be allowed to proceed under state nuisance law in state courts.

B. *Complete Preemption and Removal to Federal Court*

The doctrine of "complete preemption," which has been raised by several defendants in the climate change lawsuits, provides an alternative pathway to prevent these cases from proceeding under state nuisance law.[71] The doctrine is distinct from ordinary preemption.[72] Complete preemption grants defendants the ability first to remove any type of state law case to federal court, on the grounds that there is "complete" federal preemption of the state law by a federal statute, and second, to request dismissal.[73] The exception to the "well-pleaded complaint" rule has been slowly developed through a long and tortured process, with lower courts unclear about its scope for decades.[74]

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[69] In their most recent brief in the Second Circuit Court of Appeals, the defendants have tried to distinguish multi-state pollution from traditional interstate pollution; it is unclear how successful they will be, since there is no precedent directly on point. *See* Brief of Defendants-Appellees Chevron Corporation, Exxon Mobil Corporation, and Conocophillips at 14–23, City of New York v. BP p.l.c., No. 18 Civ. 182 (2d Cir. filed Feb. 7, 2019), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190207docket-18-2188_brief.pdf.

[70] *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 412 (2011) ("In light of the holding here 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.").

[71] Notice of Removal by Defendants Chevron Corporation and Chevron U.S.A., Inc. at 1, County of San Mateo v. Chevron Corp., No. 17-cv-04929-MEJ (N.D. Cal. filed July 17, 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170824_docket-317-cv-04929-MEJ_notice-1.pdf. *See also* Appellants Opening Brief at 56, County of San Mateo v. Chevron Corp., No. 18-15499 (9th Cir. filed Nov. 21, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181121_docket-18-15499-18-15502-18-15503_brief-1.pdf.

[72] *See* Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 272–73 (2d Cir. 2005)

[73] *See* Richard E. Levy, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 635 (1984).

[74] *See* Seinfeld, *supra* note 28 at 537, 551. For example, some state courts seem to have conflated complete preemption with occupation of the field, though

Clarity eventually came in 2003, when the Supreme Court held state law claims could be removed to federal court and completely preempted only in situations where "federal law provides the exclusive cause of action for plaintiffs who seek relief for the harm alleged."[75] The court must ask whether the state law claim exists at all; if the claim arises only under federal law, it can be removed. To make this determination, the court looks to the federal statute at issue to see if it provides the sole cause of action as well as whether it sets forth procedures and remedies governing that cause of action.[76] In total, the Supreme Court has found a federal statute completely preempts a state law claim in just three instances, none of which involved environmental statutes.[77] They were "section 301 of the Labor Management Relations Act, section 502 of the Employment Retirement Income Security Act, or sections 85 and 86 of the National Bank Act."[78] Although some legal scholars believe there may be a strong case for maintaining the exception for reasons of federal uniformity, others have continued to criticize the incoherence of complete preemption.[79]

In the few prior nuisance cases where defendants have raised this exception, the courts have found that complete preemption did not apply, including for transboundary pollution suits. For example, in a 2013 nuisance case in San Antonio, Texas concerning oilfield operations near a family's home, the defendant, Marathon Oil, sought removal to federal court under the doctrine of complete preemption. It asserted that the Clean Air Act completely preempted

the Supreme Court has treated the two doctrines as distinct. *See, e.g.*, Lehmann v. Brown, 230 F.3d 916, 919 (7th Cir. 2000) (asserting that "'complete preemption' is a misnomer, having nothing to do with preemption and everything to do with federal occupation of a field").

[75] Trevor Morrison, *Complete Preemption and the Separation of Powers*, 155 U. PA. L. REV. 186, 188 (2007) (responding to Seinfeld, *supra* note 28.). The case is *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003).

[76] *See Beneficial Nat'l Bank*, 539 U.S. at 8 (noting the Court has only found two federal statutes completely preempt state law).

[77] *See* Lontz v. Tharp, 413 F.3d 435, 441 (4th Cir. 2005); *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 342 F. Supp. 2d 147, 152 (S.D.N.Y. 2004).

[78] Order Granting Motions to Remand at 3, County of San Mateo v. Chevron Corp., No. 17-cv-04929-VC, No. 17-cv-04934-VC, and No. 17-cv-04935-VC (N.D. Cal. Mar. 16, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180316_docket-317-cv-04929-MEJ_order.pdf.

[79] *See* Morrison, *supra* note 75, at 192. Justice Scalia also criticized the incoherence of complete preemption in his dissenting opinion to the 2003 *Beneficial Nat'l Bank v. Anderson* case.

the plaintiffs' state law claims, granting federal courts exclusive jurisdiction.[80] The court affirmed that plaintiffs "are the masters of their complaint," and have the right to "allege only state-law claims even where federal remedies exist."[81] To achieve federal jurisdiction through the narrow exception of complete preemption, the defendants needed to do more than mount an ordinary federal preemption defense.[82] Because *Ouellette* had explicitly preserved state common law nuisance suits, even for transboundary pollution, and the Supreme Court cited to this decision in *American Electric Power*, the district court found the claims were not completely preempted.[83]

Similarly, the Sixth Circuit Court of Appeals recently addressed this issue in a transboundary pollution case involving emissions from a waste incinerator that crossed into the Canadian province of Ontario, which sued the utility in Michigan state court. In seeking removal to federal court, the defendants tried to argue that the doctrine of complete preemption barred litigation of the nuisance claim under state law.[84] The Sixth Circuit pointed out that this exception had been invoked only in rare instances where the intent of Congress was clearly to convert "an ordinary state common-law complaint into one stating a federal claim."[85] Like the Texas district court, the Sixth Circuit found *Ouellette* dispositive on this matter, noting that the fact that a preemption defense can be raised in general is not enough for removal.[86] In another case concerning transboundary water pollution in West Virginia, the district court came to the same conclusion.[87]

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[80] *See* Cerny v. Marathon Oil Corp., No. SA-13-CA-562-XR, 2013 U.S. Dist. LEXIS 144831, at *1–2 (W.D. Tex. Oct. 7, 2013).

[81] *See id.* at *2–4 ("Even an obvious federal preemption defense does not, in most cases, create removal jurisdiction.").

[82] *See id.* at *4.

[83] *See id.* at *22–25. The district court also found the Clean Air Act's savings clause persuasive on this count. For similar reasoning in another nuisance case concerning state nuisance law, but not interstate pollution specifically, see Tech. Rubber Co. v. Buckeye Egg Farm, L.P., No. 2:99-CV-1413, 2000 U.S. Dist. LEXIS 8602, at *8–16 (S.D. Ohio June 16, 2000).

[84] *See* Her Majesty the Queen in Right of Ontario v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989).

[85] *Id.* at 342.

[86] *See id.* at 343–44.

[87] *See* Pennsylvania v. Consol Energy, Inc., No. 1:11CV161, 2012 U.S. Dist. LEXIS 124763 (N.D.W. Va. Sept. 4, 2012) ("[T]he CWA [Clean Water Act] specifically preserves the availability of state law rights of action brought by any

There is thus no precedent to suggest that the doctrine of complete preemption applies to interstate pollution disputes litigated under state law. Nor are there statutory grounds for deploying it, because the Clean Air Act does not provide for an exclusive federal remedy in situations of interstate pollution.[88] Judge Keenan and Judge Alsup, though not invoking the doctrine of complete preemption explicitly, seemed to channel its reasoning when they asserted that issues of uniformity should compel plaintiffs to plead their cases in federal court.[89] The judges both seem to have been persuaded by the defendants' arguments that the need to balance the costs and benefits of regulating greenhouse gas emissions makes these claims "inherently federal questions."[90] But there is nothing in the Clean Air Act or other federal statutes that would suggest Congress sought to create solely a federal cause of action for transboundary pollution nuisance cases.[91] No provisions

'person' as defined by the Act, under the law of the source state…Accordingly, the Commonwealth's West Virginia common law claims are not completely preempted by the CWA.").

[88] *See* Brief of Plaintiffs-Appellees at 35, County of San Mateo v. Chevron Corp., No. 18-15499, No. 18-15502, No. 18-15503, and No. 18-16376 (9th Cir. filed Jan. 22, 2019), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190122_docket-18-15499-18-15502-18-15503_brief.pdf (arguing that the defendants' motion for removal is precluded by the well-pleaded complaint rule and that the case only implicates ordinary preemption).

[89] *See id.* at 44. *See also* Order Granting Motion to Dismiss Amended Complaints at 4–5, City of Oakland v. B.P. p.l.c., 325 F.Supp.3d 1017 (N.D. Cal. 2018) (No. C 17-06011 WHA and No. C 17-06012 WHA). *See also* City of New York v. B.P. p.l.c., No. 18 Civ. 182 (JFK), slip. op. at 10-13, 19 (S.D.N.Y. July 19, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180719_docket-118-cv-00182_opinion-and-order-1.pdf

[90] Defendants' Motion to Dismiss First Amended Complaints at 25, City of Oakland v. BP p.l.c., 325 F.Supp.3d 1017 (N.D. Cal. 2018) (No. 3:17-cv-6011-WHA), http://blogs2.law.columbia.edu/climate-change-litigation/wp content/uploads/sites/16/case-documents/2018/20180419_docket-317-cv-06011_motion-to-dismiss-3.pdf. *See also* Memorandum of Law of Chevron Corp., ConocoPhillips, and Exxon Mobil Corp. Addressing Common Grounds in Support of Their Motions to Dismiss at 7–11, City of New York v. B.P. p.l.c., No. 18 Civ. 182 (JFK) (S.D.N.Y. filed Feb. 23, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp content/uploads/sites/16/casedocuments/2018/20180223_docket-118-cv-00182_motion-to-dismiss-1.pdf.

[91] *See* Order Granting Motions to Remand at 3, County of San Mateo v. Chevron Corp., No. 17-cv-04929-VC, No. 17-cv-04934-VC, and No. 17-cv-04935-VC (N.D. Cal. Mar. 16, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180316_docket-317-cv-04929-MEJ_order.pdf. While courts might believe it is preferable

in the Act are similar to the three statutes where the Supreme Court has applied the doctrine.[92] Furthermore, the Clean Air Act contains a "savings clause" that specifically preserves state law remedies for pollution. This suggests that "Congress did not intend the federal causes of action under those statutes to be exclusive."[93] The cases therefore present issues of ordinary preemption that should be adjudicated in state court.[94]

III. FEDERAL PREEMPTION OF STATE CLIMATE CHANGE LAWSUITS

The next hurdle for plaintiffs to clear before proceeding under state nuisance law is the issue of federal preemption. Federal preemption of state law can occur in two general ways: (1) express preemption, where Congress clearly overrides state law; and (2) implied preemption, where the court concludes that state law is preempted even though there is no statutory language directly on point.[95] Cases of express preemption typically involve statutes that prohibit states from establishing standards different from those at the federal level, such as safety requirements for motor vehicles.[96] Because there are no such statutes pertaining to these cases, courts will need to analyze whether there is implicit preemption of the

to adjudicate climate change nuisance cases in a federal forum for certain policy reasons, it is ultimately up to Congress to specify that state law claims are removable to federal court. *See* Margaret Tarkington, *Rejecting the Touchstone: Complete Preemption and Congressional Intent after* Beneficial National Bank v. Anderson, 59 S.C. L. REV. 225, 245 (2008).

[92] *See* Order Granting Motions to Remand at 3, County of San Mateo v. Chevron Corp., No. 17-cv-04929-VC, No. 17-cv-04934-VC, and No. 17-cv-04935-VC (N.D. Cal. Mar. 16, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180316_docket-317-cv-04929-MEJ_order.pdf.

[93] *Id.* For the Clean Air Act's savings clause, *see* 42 U.S.C. § 7604(e) (2012).

[94] *See id.*

[95] *See* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 455–56 (2008).

[96] *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 867 (2000). However, even express preemption clauses are not always dispositive. For example, there is an express preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act that prohibits states from imposing their own labeling requirements on pesticides. In two cases about a decade apart, the D.C. Circuit held that this language did not preempt a common law tort claim while the Fifth Circuit found that it did. *See* Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 253 (2000).

plaintiffs' claims.[97] Implied preemption can occur: (1) when the federal regulatory apparatus is so pervasive the court concludes it was intended to "occupy the field" in that area; (2) when there is a direct conflict between state and federal laws; or (3) when a state law would prove an obstacle to implementing a federal law, known as "obstacle preemption."[98]

This Section analyzes whether the current climate change lawsuits are implicitly preempted under the above frameworks. Part A lays out the general approach a court will use in assessing all three types of implied preemption and discusses the relevant statutes. Part B demonstrates that the federal government has not sufficiently occupied the regulatory field to preempt the cases, either through environmental or oil and gas regulations, and that the lawsuits do not pose direct conflicts with any federal legislation. The thornier question is whether these suits present an obstacle to implementation of any federal statute, particularly if the court analyzes preemption under the Clean Air Act. Part C shows how treating the harmful act as *sale of a product* versus *emissions* impacts the analysis of this issue. Although the plaintiffs will have a much greater likelihood of avoiding preemption under a products approach, courts should not find obstacle preemption even if they treat emissions as the cause of the harm.

A. *Preemption Doctrine in Suits Involving Fossil Fuels*

In any analysis of preemption, courts follow a doctrine known as the "presumption against preemption" of state laws, which has been consistently applied in cases of federal statutes dealing with environmental pollution.[99] Preemption of state common law is

[97] The Clean Air Act only expressly preempts state emission standards for motor vehicles, with an exception for California and states that opt to follow its regulations. Those are the only expressly preemptive provisions in the statute. *See* Kyle A. Piasecki, Comment, *Surviving Preemption in a World of Comprehensive Regulations*, 49 U. MICH. J. L. REFORM CAVEAT 32, 34 (2015). *See also* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) (examining the extent of Clean Air Act preemption of California's vehicle emissions standards).

[98] Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1366 n.40 (2006). The Supreme Court has noted that these categories are not "rigidly distinct." *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 n.6 (2000) (quoting another source).

[99] *See, e.g.*, Envtl. Encapsulating Corp. v. New York, 855 F.2d 48, 58, 60 (2d Cir. 1988) (noting that "[i]nference and implication will only rarely lead to the conclusion that it was the clear and manifest purpose of the federal government to

subject to much stricter scrutiny than displacement of federal common law, requiring "clear and manifest [congressional] purpose."[100] Traditionally, the presumption against preemption doctrine has served as a bulwark against implied preemption given the potential intrusion into states' police powers over "the life, health, and safety of the general public."[101] Although there are some indications that the presumption against preemption may be waning in certain areas,[102] state involvement in nuisance injuries has long been recognized as a classic exercise of state police power.[103] Therefore, courts evaluating whether federal law preempts state nuisance suits must carefully examine the relevant statutes to determine if Congress intended to override the state's role.

Before analyzing the preemption question in these cases, the courts must first determine whether the source of the harm is the sale of the defendants' products or the emissions themselves. This determination is crucial because fossil fuel products are generally regulated by different federal statutes than pollution emissions, with the potential for different preemptive effects. In the current climate change lawsuits, the plaintiffs have asked the courts to treat the placement of fossil fuel products into the stream of commerce as the

supersede the states' historic power to regulate health and safety" and holding that all but two state provisions concerning asbestos were not preempted by OSHA). *See also* Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 8–11 (2007) (finding that there are very narrow situations where courts have held federal environmental statutes, such as the Clean Water Act, Clean Air Act, and Comprehensive Environmental Response, Compensation, and Liability Act, preempt state nuisance claims). *See generally* George L. Blum, Annotation, *Preemption by Clean Air Act of State Common-Law Claims*, 18 A.L.R.7th Art. 5 (2016).

[100] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[101] Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002).

[102] *See* Sharkey, *supra* note 95, at 458–59.

[103] *See* Emily Sangi, *The Gap-Filling Role of Nuisance in Interstate Air Pollution*, 38 ECOLOGY L.Q. 479, 514 (2011) (explaining that nuisance lawsuits represent a classic exercise of the state's police power). *See also* Czarnezki & Thomsen, *supra* note 99, at 8–11. *See* Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1686 (2008) ("Despite the increasing federalization of environmental law in general and air pollution control law in particular, courts continue to consider air pollution regulation an area of traditional state concern, falling under 'the broad police powers of the states, which include the power to protect the health of citizens in the state.'"). *See generally* Blum, *supra* note 99.

source of the harm,[104] while the defendants want the courts to view emissions as the source of the harm.[105] Two of the district court judges in the current climate change cases have treated the complaints as implicating emissions, not the sale of oil and natural gas, despite the plaintiffs' insistence that their injuries result from the latter.[106] As a result, it is worth examining federal statutes and cases bearing upon both fossil fuel emissions and product sales.

The most pertinent federal statute is the Clean Air Act, which governs air pollution emissions. Because the Supreme Court has found the Act displaces federal common law nuisance claims concerning climate change, it is likely the defendants will argue the legislation also preempts state nuisance suits.

However, a provision of the Clean Air Act known as the "savings clause" will make it difficult for a court to find implicit preemption of any type.[107] The savings clause preserves the right of plaintiffs to seek remedies under state common law for their injuries.[108] As scholar Richard Epstein has explained, "[i]f Congress makes it clear that a private right of action survives, then the debate

[104] *See* Complaint for Public Nuisance at 5, California v. B.P. p.l.c., No. CGC-17-561370 (Cal. Super. Ct. filed Sept. 19, 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170919_docket-CGC-17-561370_complaint.pdf. The Oakland complaint initially limited its discussion of this issue, and in an amended complaint simply argued that the companies' production and misleading promotion of a product they knew could be harmful was the basis for their nuisance claim. *See* First Amended Complaint for Public Nuisance at 7, 51–53, City of Oakland v. BP p.l.c., No. 3:17-cv-06011-WHA (Cal. Super. Ct. filed Apr. 3, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180403_docket-317-cv-06011_complaint-1.pdf. The plaintiffs conceded, however, that this would extend the scope of federal nuisance law. *See* Defendants' Motion to Dismiss First Amended Complaints at 3, City of Oakland v. B.P. p.l.c., No. 3:17-cv-6011-WHA (N.D. Cal. filed Apr. 19, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180419_docket-317-cv-06011_motion-to-dismiss-3.pdf.

[105] *See, e.g.*, Brief of Defendants-Appellees Chevron Corporation, Exxon Mobil Corporation, and ConocoPhillips, *supra* note 69, at 10, 14-23.

[106] Judge Keenan, for instance, dispensed with any further discussion of this matter for the purposes of assessing the displacement question. *See* City of New York v. B.P. p.l.c., 325 F. Supp. 3d 466, 471-72 (S.D.N.Y. 2018). The third judge, Judge Chhabria, did not discuss this issue in his opinion since he remanded the case back to state court.

[107] *See* Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After* AEP v. Connecticut, 99 VA. L. REV. 131 (2013).

[108] *See id.* at 141. *See also* Piasecki, *supra* note 97 at 33.

over the federal preemption of state law is over."[109] The language of the Act is nearly identical to that in the Clean Water Act, which the Supreme Court relied on heavily in *Ouellette* to find there was no federal preemption of nuisance suits brought in a source state.[110] The majority opinion explained that although a savings clause alone does not preclude preemption, the presence of one "negates the inference that Congress 'left no room' for state causes of action" even if "Congress intended to dominate the field of pollution regulation."[111] In the years since the decision, most courts have concluded that the savings clause indicates Congress did not seek to override traditional tort remedies in nuisance suits. These interpretations of the savings clause are consistent with the purpose of the Clean Air and Water Acts, which are designed to serve as a "regulatory floor, not a ceiling," leaving states the option to set stricter standards on pollution either through regulation or tort law.[112]

Other federal statutes that might preempt the lawsuits, should a court choose to treat the harm as from the sale of fossil fuel products, are those that govern the extraction of oil and gas. Most of the country's oil and natural gas reserves are located on federally owned land, and the federal government oversees a program to lease rights to extract oil and gas on these lands through the Bureau of Land Management in the Department of the Interior.[113] However, a state

[109] Richard Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NW. U. L. REV. 551, 553 (2008) (discussing the role of the savings clause in nuisance suits).

[110] The only difference between the language of the two clauses concerns language in the Clean Water Act that refers to boundary waters between states, which obviously does not apply to cases of air pollution that involve "no such jurisdictional boundaries or rights." Bell v. Cheswick Generating Station, 734 F.3d 188, 195 (3d Cir. 2013). *See* 42 U.S.C. § 7604(e) (2012) ("Nothing in this Section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this Section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from— (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court").

[111] Int'l Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987).

[112] *Bell*, 734 F.3d at 197–98.

[113] The Bureau of Land Management cooperates with other federal agencies, such as the Forest Service, in carrying out its leasing obligations. *See* BUREAU OF LAND MGMT., GOLD BOOK 1 (4th ed. 2007), https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/operations-and-production/the-gold-book.

has the right to refuse to honor a federal permit if it determines the project will violate its own environmental standards, similarly to the cooperative federalism regime envisioned under the Clean Air and Water Acts.[114]

Yet none of these oil and natural gas statutes grants federal regulatory authority over the harm alleged in the climate change lawsuits: the companies' sale of a product.[115] At present, there are no statutory provisions or regulations governing the marketing and sale of oil. These companies are subject to the same general rules as other industrial businesses.[116] The Federal Energy Regulatory Commission does have the power to regulate certain interstate transactions involving natural gas and oil, but its purview largely concerns setting rates, siting natural gas pipelines, and overseeing electricity transmission.[117] While it conducts environmental impact assessments for certain natural gas projects, it has "consistently maintained that it has no obligation to consider greenhouse emissions or any other environmental effects associated with upstream and downstream activities in the natural gas production and supply chain."[118]

The absence of federal law on point, combined with the presumption against preemption, will thus make it very difficult for defendants to demonstrate that federal law preempts state tort law claims for the sale of fossil fuel products should the court view

Congress delegated the agency authority to manage extraction operations in a series of bills over the course of the twentieth century. For an overview of federal statutes concerning oil and gas leasing, see Jayni Foley Hein, *Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing*, 42 HARV. ENVTL. L. REV. 1, 10–19 (2018).

[114] *See* Ann E. Carlson & Andrew Mayer, *Reverse Preemption*, 40 ECOLOGY L. Q. 583, 585 (2013).

[115] *See, e.g.*, Complaint at 75–94, County of San Mateo v. Chevron Corp., No. 17-cv-04929-MEJ (N.D. Cal. filed July 17, 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170717_docket-C17-01227_complaint.pdf.

[116] *See* ROBERT A. JAMES ET AL., ELECTRICITY, OIL AND GAS REGULATION IN THE UNITED STATES 155, https://www.ourenergypolicy.org/wp-content/uploads/2013/08/ElectricityOilandGasRegulationintheUnitedStates.pdf. The lack of federal involvement is especially striking in comparison to products such as drugs or cigarettes. *See, e.g.*, 21 U.S.C. § 825 (2012) (granting the Food and Drug Administration authority over labeling and packing of controlled substances).

[117] *See* 15 U.S.C § 717–§ 717z (2012).

[118] Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, 41 HARV. ENVTL. L. REV. 109, 137 (2017).

products as the source of the harm. To make their case, the defendants will likely have to rely on federal authority regarding leasing, extraction, and production. The possibility of using these statutes as well as the Clean Air Act to argue for implied preemption of the current cases is analyzed below.

B. *Implied Preemption in the Climate Change Lawsuits: Field Occupation and Direct Conflict*

Of the three potential avenues for implicit preemption—occupation of the field, direct conflict, and obstruction of purpose—the first two are highly unlikely to prove successful defenses for the current climate change lawsuits. This is true regardless of whether the court analyzes preemption using the Clean Air Act or other federal statutes.

Field preemption of state law has generally arisen when Congress implements a "pervasive" system of complex regulations or where "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,"[119] such as in "immigration, air safety, labor disputes, and pension disputes."[120] It is rare for a court to conclude field preemption has occurred outside these areas.[121]

No courts appear to have held that state nuisance lawsuits are preempted because EPA has so extensively regulated in the environmental arena, leaving no room for state action.[122] For one thing, the Clean Air Act was based on a model of "cooperative federalism" that created a partnership between the federal government and states in regulating pollution.[123] Its legislative history explains that federal standards were intended to prevent a potential "race to the bottom" among states competing for industry.[124] Most crucially, the savings clause was included to

[119] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[120] *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig., 295 F. Supp. 3d 927, 1001 (N.D. Cal. 2018).

[121] *See id.*

[122] *See* Gallisdorfer, *supra* note 107, at 151–59.

[123] *See* Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 817 (2008) ("The Clean Air Act was the first modern federal environmental statute to employ a 'cooperative federalism framework,' assigning responsibilities for air pollution control to both federal and state authorities.").

[124] H.R. REP. NO. 91-1146, at 2–3 (1970).

maintain access to common law remedies for plaintiffs who might be left unprotected by federal regulations, as Congress understood that the Clean Air Act would not prevent all harms from pollution. As the legislative record of the 1970 Clean Air Act states, "[c]ompliance with standards under this Act would not be a defense to a common law action for pollution damages."[125] The clause was initially enacted in the 1970 Clean Air Act and preserved with each successive amendment of the Act.[126] Later amendments in 1977 added language that extended citizen suit rights to state, local, or interstate authorities who sought to obtain "any judicial remedy or sanction in any state or local court."[127] Congress's carefully drawn efforts to preserve state common law remedies strongly cut against a finding that it intended to occupy the field, as do recent court rulings that have found portions of the Clean Air Act do not apply to greenhouse gas pollutants.[128]

After the Supreme Court's decision in *American Electric Power* in 2011, polluters have occasionally tried to argue that its reasoning should lead courts to conclude the Clean Air Act implicitly preempts state nuisance law through field occupation.[129] In all but one of these cases, the courts have held that the Clean Air Act did not preempt state nuisance law. Furthermore, the judge's opinion in the sole outlier case did not employ an appropriate preemption analysis and the complaint was dismissed largely on other grounds.[130]

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[125] S. REP. NO. 91-1196, at 38, *reprinted in* 1 S. COMM. ON PUB. WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 438 (1974).

[126] *See* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1706.

[127] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 304(e), 91 Stat. 772.

[128] *See* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014).

[129] *See* Cerny v. Marathon Oil Corp., Civil Action No. SA-13-CA-562-XR, 2013 U.S. Dist. LEXIS 144831, at *9 (W.D. Tex. Oct. 7, 2013); *see also* Merrick v. Diageo Ams. Supply, Inc., 5 F. Supp. 3d 865, 876 (W.D. Ky. 2014).

[130] The court asserted that the state law claims were preempted simply because it required the court to determine what amount of carbon dioxide emissions were reasonable, which Congress had given EPA the power to do. *See* Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013). But see the *Cerny* decision:

> The *Comer* district court did not conduct a complete preemption analysis. Further, the *Comer* district court relied on *AEP*'s displacement analysis to hold that state common-law claims were "displaced." However, "[t]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is

In two of these rulings, the Third and Sixth Circuit Courts of Appeals emphasized that state nuisance law remains an important remedy for those injured by pollution irrespective of federal action.[131] For example, in 2013 the Third Circuit Court of Appeals held that a nuisance case concerning ethanol emissions was not preempted by the Clean Air Act even though EPA regulated such emissions under the statute.[132] It determined"[t]here is no basis in the Clean Air Act on which to hold that the source state common law claims of plaintiffs are preempted," as the act specifically contemplates a role for state regulation.[133] Courts have reached a similar conclusion in state cases about transboundary pollution. In a recent lawsuit concerning a mining spill on Navajo lands, the district court also affirmed that Congress intended for state law remedies to be preserved for interstate pollution disputes, so long as the source state law was applied, and found the plaintiff's claims were not preempted.[134]

Defendants might try to argue that EPA's recent efforts to combat climate change should preempt the lawsuits through field occupation, notwithstanding Congressional intent. Yet EPA regulations on climate change do not constitute a comprehensive scheme that will provide a remedy for the plaintiffs' injuries.[135] When the federal government has minimal regulations, "it is difficult to characterize its regulatory presence as 'pervasive' in any normal sense of that term."[136] Even if there were robust federal action on climate change, the Clean Air Act does not grant EPA exclusive jurisdiction over air pollution control.[137] Given Congress'

> not the same as that employed in deciding if federal law pre-empts state law."

Cerny, 2013 U.S. Dist. LEXIS 144831, at *20–21.

131 *See* Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685 (6th Cir. 2015); Bell v. Cheswick Generating Station, 734 F.3d 188, 197–98 (3d Cir. 2013); Little v. Louisville Gas & Elec. Co., 33 F. Supp. 3d 791, 817 (W.D. Ky. 2014).

132 *See* Diageo Ams. Supply, Inc., 805 F.3d at 695.

133 *Id.*

134 *See* New Mexico v. EPA, 310 F. Supp. 3d 1230, 1254 (D.N.M. 2018).

135 *See supra* Part I.A.

136 Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5, 35 (2008).

137 Courts have, in general, only rarely concluded that state law is preempted through field occupation. However, the Supreme Court has found field occupation in situations where federal agencies have *exclusive* jurisdiction over the matter at issue. *See, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988) (finding field occupation preemption in the control of rates and facilities of natural

clear desire to preserve common law remedies through the savings clause, it seems unlikely—and illogical—that a court will find field preemption based on any EPA actions.

Legislation on federal oil and gas development also does not suggest Congress intended these statutes to prevent tort suits through field occupation. The original Mineral Leasing Act of 1920 and its subsequent amendments were meant to enable federal oversight of coal, oil, and gas development on federal lands, with little regard for any potential injuries to the public.[138] Although some additions to the legislation have included references to environmental protection, such as a stipulation that the Department of the Interior should examine how to "lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities," there are no specific requirements that could be said to apply to climate change.[139] The Department of the Interior has also not issued any regulations concerning fossil fuel development that could provide grounds for claiming it has established a pervasive system of rules to "occupy the field."[140] The Trump administration has instead rescinded internal agency guidance that sought to provide a first step towards mitigating climate change through the federal government's leasing program, replacing it with policies to facilitate increased development of oil and gas resources on federally owned lands.[141]

Nor does the relevant case law provide support for the argument that the federal government has sufficiently occupied the field of fossil fuel products to preempt state tort suits. One of the

gas companies because the Federal Energy Regulatory Commission had comprehensive authority over these areas).

[138] There were, however, provisions to provide for miners' safety even in the 1920 legislation. *See* 59 CONG. REC. S2,709-15 (daily ed. Feb. 10, 1920) (consideration of oil leasing bill, H. Rep. 600).

[139] *See* 30 U.S.C. § 21a (2012).

[140] To the contrary, the Department has recently scrubbed climate change from its five-year strategic plan. *See* Center for Science and Democracy, *Department of Interior Scrubs Climate Change from its Strategic Plan*, UNION OF CONCERNED SCIENTISTS (Jan. 5, 2018), https://www.ucsusa.org/center-science-and-democracy/attacks-on-science/department-interior-scrubs-climate-change-from-strategic-plan#.XF9OFVxKjIU.

[141] *See* Elizabeth Shogren, *Interior Revokes Climate Change and Mitigation Policies*, HIGH COUNTRY NEWS (Jan. 4, 2018), https://www.hcn.org/articles/climate-change-interior-department-revokes-climate-change-and-mitigation-policies.

most applicable examples comes from litigation over the gasoline additive Methyl Tertiary Butyl Ether (MTBE), which spawned numerous lawsuits alleging the product was unreasonably dangerous and had contaminated groundwater.[142] The district court in the consolidated federal class action lawsuit found the claims were not preempted by federal law, noting that the Clean Air Act had not occupied the field of fuel content regulation.[143] Similar to allegations in the climate change lawsuits, the plaintiffs in the MTBE case had evidence that the defendants had lobbied Congress to be able to use more of the chemical despite knowing its risks.[144] Several defendants later settled with municipalities across the country;[145] companies like Exxon Mobil that went to trial were found liable for failure to warn and public nuisance, along with other causes of action.[146]

In contrast to field occupation, which involves the breadth of federal action, conflict preemption examines whether it would be impossible for a defendant to comply with federal and state laws concerning the same conduct.[147] The burden for establishing

[142] *See generally* Jad Mouawad, *Oil Giants to Settle Lawsuit Over Water Contaminated by MTBE*, N.Y. TIMES (May 8, 2008), https://www.nytimes.com/2008/05/08/business/worldbusiness/08iht-08oil.12683042.html.

[143] *See, e.g.*, *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 457 F. Supp. 2d 324, 342 (S.D.N.Y. 2006). For a discussion of preemption decisions among earlier state cases, *see* Carrie L. Williamson, *But You Said We Could Do It: Oil Companies' Liability for the Unintended Consequence of MTBE Water Contamination*, 29 ECOLOGY L. Q. 315, 329–36 (2002).

[144] *See* California v. Atl. Richfield Co. (*In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.), 488 F.3d 112, 128 (2d Cir. 2007) ("[S]tatements made during the floor debate, if credited, support the premise that many of the defendants actually lobbied Congress for a lower oxygen-content requirement that would make it possible for them to use more MTBE."). *See also* Richard Ausness, *Conspiracy Theories: Is There A Place for Civil Conspiracy in Products Liability Litigation?*, 74 TENN. L. REV. 383, 389 (2007) (describing the plaintiffs' allegations that MTBE manufacturers deceived the government and the public about the dangers of the chemical).

[145] Janet Wilson, *$423-million MTBE Settlement is Offered*, L.A. TIMES (May 8, 2008), http://articles.latimes.com/2008/may/08/local/me-mtbe08.

[146] *See In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 725 F.3d 65 (2d Cir. 2013).

[147] *See* Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. PITT. L. REV. 181, 199 (2004) (explaining that direct conflict preemption occurs when "it is impossible for a party to comply with both federal and state regulation").

"impossibility" is extremely high.[148] If there is any avenue for compliance with both laws, courts are reluctant to find there is a direct conflict.[149]

Using such a stringent approach, a court will be hard pressed to locate any direct conflicts between the Clean Air Act or federal leasing laws and the current climate change lawsuits. Because EPA regulations set under the Clean Air Act are meant to be a minimum standard, with states free to set more stringent limits, courts have found that this type of implied preemption is inconsistent with structure of the Acts.[150] In the case of the climate change lawsuits, it would similarly not be impossible to comply with both a judicial remedy as well as controls set at the federal level.[151]

Moreover, the Department of the Interior's leasing requirements do not deal at all with climate change pollution; they primarily stipulate minimum bids and royalty rates.[152] Although there are environmental safeguards in place to prevent spills or other hazards, these do not conflict with tort remedies.[153] Courts have never questioned the ability of those who are harmed by oil and gas development to sue for tort remedies absent explicit federal exemption, which is not present in the climate change context.[154] And relevant case law on conflict preemption for fossil fuel products suggests that Congress would have needed to require defendants to

[148] *See* Wyeth v. Levine, 555 U.S. 555, 589–90 (2008) (Thomas, J., concurring) (noting the Supreme Court has "articulated a very narrow 'impossibility standard'").

[149] *See In re* MTBE Prods. Liab. Litig., 725 F.3d at 99 ("[I]f there [is] *any* available alternative for complying with both federal and state law—even if that alternative was not the most practical and cost-effective—there is no impossibility preemption.").

[150] *See* Bell v. Cheswick Generating Station, 734 F.3d 188, 197-98 (3d Cir. 2013).

[151] *See* J.J. England, *Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without a Remedy*, 43 ENVTL. L. 701, 733 (2013).

[152] *See* Hein, *supra* note 113, at 19.

[153] *See* Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1679 (2009) (explaining Congress's careful attempts to ensure that legislation governing oil spills would not preempt tort remedies and courts respect for that determination in subsequent litigation).

[154] For instance, there are some liability limits under the Clean Water Act for oil spills. *See, e.g.*, United States v. M/V Big Sam, 693 F.2d 451 (5th Cir. 1982).

use oil and natural gas for a successful conflict preemption defense.[155]

In sum, Congressional intent in passing environmental and energy legislation, as well as the applicable agency regulations, do not suggest the federal government has occupied the climate change field. Nor would the language of the relevant statutes lead to conflicts with traditional state tort remedies.

C. *Obstacle Preemption and the Source State Issue*

Whether the climate change cases would obstruct the purpose or implementation of a federal law is much more complex than the other possible avenues of implied preemption. On one hand, there has not been any legislation to implement a carbon tax or cap-and-trade program. It would therefore be difficult to argue that states are disrupting a particular scheme laid out by Congress.[156] On the other hand, there are federal regulations concerning greenhouse gases and oil and gas development; defendants will almost certainly try to argue that the climate change suits will unreasonably interfere with these programs. This Part will first evaluate the potential for obstacle preemption based on federal statutes and regulations governing the exploitation of oil and gas before turning to the possibility of obstacle preemption under the Clean Air Act.

Though there is no precise case law on the matter, defendants could claim that tort suits over the sale of their products would pose an obstacle to implementing federal leasing programs for oil and gas extraction. Congress has tasked the Department of the Interior with fostering the use of oil and natural gas, and should the suits be allowed to go forward, they might reduce the economic viability of fossil fuels. However, the Bureau of Land Management's key

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[155] *See In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 457 F. Supp. 2d 324, 342 (S.D.N.Y. 2006) (finding no conflict preemption since the defendants were not compelled to use a gasoline additive by federal legislation).

[156] This occurred after Congress amended the Clean Air Act in 1990 to combat acid rain through a cap-and-trade program. *See, e.g.*, Clean Air Mkts. Grp. v. Pataki, 338 F.3d 82 (2d Cir. 2003) (finding a New York law restricting permit trading with upwind states was preempted by the Clean Air Act because it "interfered with the method selected by Congress for regulating sulfur dioxide emissions"). *See also* All. for Clean Coal v. Miller, 44 F.3d 591, 599 (7th Cir. 1995) (Cudahy, J. concurring) (noting an Illinois law that prevented power plants from complying with sulfur dioxide controls through fuel switching might be preempted by the Clean Air Act's market-based approach to acid rain, though the majority ultimately struck down the law on the grounds that it violated the dormant Commerce Clause).

authorizing statute, the Federal Land Policy and Management Act of 1976, did not mandate unobstructed exploitation of oil and natural gas on public lands.[157] To the contrary, Congress recognized that the agency should manage these resources in accordance with a variety of natural resource values, including recreation and preservation for the future.[158] Under President Obama, the Department of the Interior placed a moratorium on the issuance of new coal leases and began a reevaluation of how fossil fuel resources were managed on federal lands.[159] No one suggested this was somehow inconsistent with the statutes on federal leasing.[160] Nor would lawsuits over oil and natural gas pose an obstacle to EPA regulations concerning fossil fuel use. Congress did not intend to preempt state regulations unrelated to vehicle emissions control, and EPA standards are not intended to override state authority regarding injuries from fuel usage.[161] When it comes to statutes and regulations concerning oil and gas activities, the plaintiffs would thus seem to have a very strong case that their claims would not frustrate the purpose of federal law.

There may be a problem, however, when the courts evaluate the potential for the suits to obstruct implementation of the Clean Air Act. All of the current lawsuits have been filed in the courts of affected states, in potential violation of the *Ouellette* majority's

[157] Amendments since the 1976 Act, notably the Federal Oil and Gas Royalty Management Act of 1982 and the Federal Onshore Oil and Gas Leasing Reform Act of 1987, have not altered the general structure of the 1976 legislation. The former concerned enforcement of royalty payments, and the latter concerned prevention of fraud, anticompetitive leasing practices, and drilling before a formal permit application had been received. *See* Jan Stevens, *Minerals Management in the Western States: The New Federalism and Old Colonialism*, 6 PUB. LAND L. REV. 49, 57 (1985). *See also* LYLE K. RISING, U.S. DEP'T OF THE INTERIOR, THE FEDERAL ONSHORE OIL AND GAS LEASING AND REFORM ACT OF 1987 (1988).

[158] *See* DEP'T OF THE INTERIOR, FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 AS AMENDED 60, 64 (2001), https://www.blm.gov/or/regulations/files/FLPMA.pdf. Even the earliest legislation on federal leasing acknowledged the need for conservation. *See* 59 CONG. REC. 2709 (daily ed. Feb. 10, 1920) (letter from Gifford Pinchot).

[159] *See* Hein, *supra* note 113, at 1.

[160] *See* Joby Warrick & Juliet Eilperin, *Obama Announces Moratorium on New Federal Coal Leases*, WASH. POST (Jan. 14, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/01/14/obama-administration-set-to-announce-moratorium-on-some-new-federal-coal-leases/.

[161] *See* California v. Atl. Richfield Co. (*In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.), 488 F.3d 112, 135 (2d Cir. 2007) ("Congress did not intend to preempt state regulations unrelated to emissions control.").

"source state" requirement.[162] Indeed, it seems likely that one of the reasons the plaintiffs have sought to characterize their suits as over products rather than emissions is to avoid implicating the source state issue. No scholar or court seems to have grappled with the problem of identifying what counts as a source state when suing over climate change impacts, or whether this would mean the cases are implicitly preempted by the Clean Air Act. This is the most serious challenge to the plaintiffs' current claims, and one that calls for a close examination of the rationale behind *Ouellette*'s source state requirement.

The Court found nuisance suits in affected states would pose an obstacle for implementation of the Clean Water Act because they would undermine the statute's permitting scheme by subjecting industries to vague and indeterminate nuisance standards.[163] The majority noted that the Clean Water Act struck a delicate "balance of public and private interests" considering costs, technological feasibility, and environmental impacts of effluent discharges.[164] The Act also delineated specific, limited ways for states to object to water pollution from their neighbors, so allowing nuisance suits under the common law of states impacted by transboundary pollution would let these states do what they could not accomplish under the statute. *Ouellette* consequently established that even if the goals of the federal statute and affected state nuisance law are broadly the same—limiting water pollution—obstacle preemption may exist if the methods of achieving these ends are sufficiently different. Conversely, source state nuisance suits did not obstruct the goals of the Act because it explicitly allowed states to impose stricter pollution requirements on their own sources.[165] As a result, these claims were not implicitly preempted.[166]

The *Ouellette* majority's mandate that courts must apply the law of the "source state" in a transboundary nuisance suit departed from traditional conflict of law rules, which allow a state to apply

[162] For another example where a court similarly found implied preemption under the Clean Air Act, *see* Clean Air Mkts. Grp. v. Pataki, 338 F.3d 82 (2d Cir. 2003).

[163] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987).

[164] *See id.* at 494.

[165] *See id.*

[166] *See id.*

its own tort laws for any injury that occurs within its borders.[167] The justices believed that the Clean Water Act compelled this result since only the federal government and source states participated in the permitting process for the pollutants at issue. Allowing an affected state to impose controls or fines on out-of-state sources would thus disrupt the regulatory scheme Congress envisioned and potentially subject industry to numerous common law standards.[168] According to the majority, this would render any permit issued under the act "meaningless."[169] Although the lawsuits could proceed in the affected state's courts, as the preemption issue did not alter jurisdiction over the claim, these courts would have to apply the law where the source was located.[170]

The source state requirement has posed few practical problems in typical nuisance cases since it is usually simple to identify the point source of pollution. But it raises serious issues for any transboundary pollution case where multiple sources from various locations contribute to the nuisance.[171] Climate change is the most extreme example of this conundrum, with sources not only throughout the United States but the entire world. Any climate change lawsuit will either have to identify an appropriate source state for greenhouse gas pollution from this diverse array of options or justify departing from *Ouellette*'s holding in order to avoid obstacle preemption.

There is precedent to suggest that if the plaintiffs cannot find an appropriate source state, they will not be able to proceed under state nuisance law. In a recent case involving the Deepwater Horizon oil spill, plaintiffs Louisiana and Alabama tried to get around the *Ouellette* requirement and proceed under their own state nuisance laws. They argued that since the spill was unlawful *Ouellette* did not apply, as the Supreme Court had only addressed

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[167] *See* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 724–25 (2009); *Ouellette*, 479 U.S. at 502 (Brennan, J. dissenting).

[168] *See Ouellette*, 479 U.S. at 483, 490–91.

[169] *See id.* at 497.

[170] *See id.* at 499–500.

[171] The defendants, while not invoking the source state requirement directly, have tried to use the multi-state, global nature of the problem to argue that it is ill-suited to resolution under state nuisance law. *See* Brief of Defendants-Appellees at 23, City of New York v. B.P. p.l.c., No. 18 Civ. 2188 (2d Cir. Feb. 7, 2019), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190207_docket-18-2188_brief.pdf.

lawfully permitted pollution. However, the Louisiana district court believed that this distinction was irrelevant, and the source state law had to govern. Since the explosion occurred in federal waters, the court deemed that location the "source" and held only federal law was available to the plaintiffs.[172] One can easily imagine a similar line of reasoning preventing the current climate change lawsuits from going forward. If no "source state" can be identified, then the only common law available is federal; as this law has been displaced by the Clean Air Act, the plaintiffs would have no judicial remedy for their injuries.

There are two potential ways the plaintiffs can avoid the source state problem and obstacle preemption. The first is to argue that because fossil fuel products caused the harm alleged, rather than emissions, the Clean Air Act is simply not implicated in the lawsuits. The second option, should the court choose to treat the distinction between products and emissions as one without real meaning, is to argue that that suits would not pose an obstacle to the Clean Air Act because they would not disrupt any permitting scheme for greenhouse gases. I will address each potential response in turn.

No provisions of the Clean Air Act deal specifically with the sale of fossil fuel products—only their byproducts, specific pollutants, are regulated under the legislation.[173] In addition, it defines the stationary "sources" subject to regulation of these pollutants as "any building, structure, facility, or installation which emits or may emit any air pollutant."[174] Under the plain language of the act, corporate entities such as Exxon Mobil, Shell Oil, and Marathon Oil would not qualify as a "source" since they do not actually emit pollution. In contrast, nuisance law applies to the conduct of a party and its effects on the victim. A defendant is subject to liability if the plaintiff can prove the defendant caused "an invasion of another's interest in the private use and enjoyment of land" or "an unreasonable interference with a right common to the

[172] *See In re* Oil Spill, No. 2179, 2011 U.S. Dist. LEXIS 131069, at *22 (E.D. La. Nov. 14, 2011).

[173] *See* 42 U.S.C. § 7401 (2012) (declaring the purpose of the legislation is to control and prevent air pollution). Pollutants are defined under the act as substances emitted into the air; although leaks of natural gas might qualify, since the plaintiffs are suing over sales of the products this would not seem to be a major concern. *See* 42 U.S.C. § 7602(g) (2012). *See also* Massachusetts v. EPA, 549 U.S. 497 (2007).

[174] 42 U.S.C. § 7411(a)(3) (2012).

general public."[175] The development and sale of fossil fuels, along with many other activities, could thus cause a nuisance while falling outside the purview of the Clean Air Act.[176]

In fact, there is legal precedent suggesting that tort suits over products, rather than emissions, are not preempted by the Clean Air Act since it regulates only the latter. Recently, plaintiffs from multiple jurisdictions brought several products liability claims against a diesel engine manufacturer who tried to argue that state tort law was preempted by EPA automobile regulations. The court held some of the plaintiffs' allegations were not preempted because they were based on problems with the product, rather than violations of an emissions standard.[177] In comparison, the claims which would have required showing a failure to conform with EPA standards were preempted because they implicated "EPA's extensive vehicle emissions enforcement regime."[178] A similar claim involving fraudulent concealment of excessive emissions in automobiles was also found not to be preempted by the Clean Air Act for the same reasons.[179] The court determined that Congress did not intend the legislation "to displace traditional tort law simply because it might implicate air pollution control."[180] Because the climate change lawsuits are pursuing litigation over the sale of oil and natural gas, not emissions, they may be similarly exempt from implied preemption. A lawsuit can hardly be said to pose an obstacle to federal law when the cause of the harm is not covered by the statute.

Yet should a court decide that emissions are the true culprit, the plaintiffs will need to show that suits within affected states will not pose an obstacle to the Clean Air Act's implementation. The Clean Air Act does regulate greenhouse gas pollutants through several provisions, including the prevention of significant deterioration

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175 RESTATEMENT (SECOND) OF TORTS §§ 821–22 (1979).

176 On the legal precedent demonstrating nuisance law can encompass climate change, *see* Brief of Professor Catherine M. Sharkey as Amicus Curiae Supporting Plaintiff-Appellant, *City of New York v. B.P. p.l.c.*, No. 18-2188-CV (2d. Cir. filed Nov. 15, 2018).

177 *See In re* Caterpillar, Inc., No. MDL No. 2540, 2015 U.S. Dist. LEXIS 98784, at *47 (D.N.J. July 29, 2015) ("This is not a case about the ability of Caterpillar's Engines to comply with EPA emissions standards, and as such, the remedies Plaintiffs seek are not preempted due to the breadth of the federal regulatory scheme or conflict with same.").

178 *Id.* at *7.

179 *See* In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig., 295 F. Supp. 3d 927, 990–1003 (N.D. Cal. 2018).

180 *Id.* at 998.

section[181] and new source performance standards.[182] However, the federal government has only implemented a greenhouse gas permitting program that covers all facilities for the electric utility industry.[183] While new oil and gas sources are currently required to obtain permits for methane emissions under a 2016 EPA regulation,[184] this represents an extremely small portion of the industries' total greenhouse gas contributions.[185] The Trump administration is also seeking to repeal the 2016 methane rule,[186] and has declined to develop a comparable permitting program for existing oil and gas sources under the Clean Air Act.[187] Because the oil and gas companies subject to the current lawsuits are not participating in a comprehensive permitting process for greenhouse gas emissions, the lawsuits would not cause the same disruption as occurred in *Ouellette*.[188]

Nuisance suits under an affected state's law can interfere with permitting decisions primarily because the sued facilities are

[181] *See* 42 U.S.C. § 7470 (2012).

[182] *See id.* at § 7411.

[183] *See* Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 83 Fed. Reg. 44,746, 44,773–76 (Aug. 31, 2018) (to be codified at 40 C.F.R. pts. 51, 52, and 60).

[184] *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824, 35,840 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60).

[185] *See* STATE ENERGY & ENVTL. IMPACT CTR., CLIMATE AND HEALTH SHOWDOWN IN THE COURTS 29 (Mar. 2019), https://www.law.nyu.edu/sites/default/files/climate-and-health-showdown-in-the-courts.pdf (noting that existing sources constitute 90% of the industries' methane emissions).

[186] There is a regulation targeting methane emission leaks from existing oil and natural gas companies that was initially promulgated under the Obama administration. However, it does not institute a permitting process. The Trump administration is seeking to reverse the 2016 methane rule, but it is unclear if or when it will do so. *See* LINDA TSANG, CONG. RESEARCH SERV., R44615, EPA's Methane Regulations: Legal Overview 8 (Jan. 24, 2018), https://fas.org/sgp/crs/misc/R44615.pdf. *See generally* Press Release, State Energy & Environmental Impact Center, 13 AGs Oppose EPA's Indefensible Rollback of New Source Performance Standards for Methane for the Oil and Gas Industry (Dec. 18, 2018), https://www.law.nyu.edu/centers/state-impact/press-publications/press-releases/ags-comment-letter-nsps-standards.

[187] *See* CLIMATE AND HEALTH SHOWDOWN IN THE COURTS, *supra* note 185, at 27.

[188] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) ("In this case the application of Vermont law against IPC [the defendant] would allow respondents to circumvent the NPDES [National Pollutant Discharge Elimination System] permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act.").

physically located outside the state's jurisdiction.[189] This allows affected states to avoid incurring any costs themselves while reaping substantial benefits from regulation, which the *Ouellette* Court saw as at odds with the balancing of costs and benefits in the Act.[190] There was also a lack of predictability for industries in terms of compliance, as their risk of being dragged into another state's court depended on whichever way the wind blew or water flowed.[191]

The climate change lawsuits are different in several respects. Here, states are seeking to impose costs on companies that do business in their state. They are therefore exercising their authority over out-of-state defendants consistently with traditional specific jurisdiction requirements over tort suits.[192] The oil and gas companies are actively choosing to distribute fossil fuels within the states[193] unlike a power plant at the mercy of wind trajectories. Concerns over unpredictability are presumably lessened since these companies knew beforehand where they were engaging in commerce, had "early knowledge" of their products dangers[194] and could have adjusted their behavior according to their expected liability.[195] Of course, this does not completely negate the argument

189 *See id.* at 483, 493–96.

190 *See id.* at 494–96.

191 *See id*. at 497.

192 *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (affirming a state's specific jurisdiction over an activity or occurrence that takes place within the state and is "therefore subject to a state's regulation"). *See also id*. at 923-25 (providing a general discussion of the traditional requirements for specific jurisdiction in tort suits).

193 *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1781 (2017) (noting that the state of California did have jurisdiction over resident plaintiffs injured by the sale of Plavix within the state, though it did not have jurisdiction over out-of-state claims).

194 There is extensive historical evidence that the defendants knew burning fossil fuels could cause global warming no later than 1968 and even moved to protect their own assets over the last few decades as a result. *See* Brief of Amici Curiae Robert Brule, Center for Climate Integrity et al. in Support of Appellees and Affirmance at 3-9, County of San Mateo v. Chevron Corp., No. 18-15499, No. 18-15502, No. 18-15503, and No. 18-16376 (9th Cir. filed Jan. 29, 2019), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190129_docket-18-15499-18-15502-18-15503_amicus-brief-1.pdf.

195 *See generally* Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (explaining how liability systems can lead parties to take into account the harmful effects of their actions). The problem of different state rules for national corporations is a familiar one in the tort system. *See* Russell Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 132 (1989) (arguing that in the case of conflict of laws problems for

that affected states would be regulating sources outside their borders,[196] but this is a problem that exists for all tort cases where defendants are corporations from out of state.[197] These features of the climate change suits arguably warrant an exception to the source state requirement, should a court find that the Clean Air Act applies to the conduct about which the plaintiffs are suing.

Though there are ways in which a court could allow a climate change nuisance suit to proceed without questioning *Ouellette*'s "source state" reasoning, the complications and contradictions these cases present should lead to a broader reassessment of the *Ouellette* majority's preemption analysis. As noted in Section II.A, although the Supreme Court was unanimous in finding that state nuisance law was available for transboundary pollution, there was substantial disagreement over whether source state law had to be utilized. Justice Brennan, joined by Justices Marshall and Blackmun, objected to the majority's conclusion for several reasons. The nuisance laws of the states involved in the *Ouellette* dispute did not actually conflict, so the finding was not necessary to resolve the preemption issue in the case.[198] In fact, it is unclear the extent to which there are extensive conflicts of nuisance law among U. S. states, so the issue of what is a "source" state may have little practical import. Justice Brennan also believed that even if there

mass torts, "[t]he sky would not fall if United States courts went back to sticking pins in maps to choose law, any more than disaster would strike if mechanical rules were substituted for current policy analysis in any other field of law. Once the rule is established, persons could adjust their expectations and bargains accordingly and the only inefficiency would be the transaction costs of avoiding a silly rule.") (internal citation omitted).

[196] There is not sufficient economic research on the economic effects of the tort system to adequately judge how much liability in affected states would impose costs on other state economies. *See* Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28, 47 (2011) (noting the limited research on the economic effects of tort law).

[197] *See* Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE L. & POL'Y REV. 429, 451-56 (1996) (discussing the problems products liability cases create for federalism). *See generally* Betsy J. Gray, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 509 (2002) (discussing the tension between the traditional state role in providing remedies to injured persons through tort law and the expansion of company markets to "a national and even global scale").

[198] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 501 (1987) (Brennan, J., dissenting).

were a conflict, traditional conflict of law rules could have determined which state's law should apply.[199]

Yet the dissent's most powerful argument was that the majority's requirement could undercut the ability of nuisance law to "ensure compensation of tort victims."[200] It may make sense to prevent nuisance suits when there is a permitting process specifying when and how affected states can intervene, such as the "good neighbor" provisions of the Clean Air Act for criteria pollutants.[201] There is no such procedure, however, for many types of transboundary pollution that could be subject to EPA oversight.[202] Climate change is the most obvious example of how industry could cause a nuisance while eliding federal oversight of interstate disputes through the permitting process, but it is certainly not the only such problem. For instance, there are numerous toxic chemical compounds with long range atmospheric transport potential that are likely to come from multiple sources of emission, and strict adherence to a source state requirement could set an unfortunate precedent that might bar such nuisance cases at the state level.[203] In light of these unintended effects, it would be wise to limit

[199] *See id.* at 501–02.

[200] *Id.* at 502, 503-504 (noting that the citizen-suit provisions did not distinguish interstate and intrastate nuisance suits and citing substantial legislative history suggesting that Congress did not seek to override state nuisance law).

[201] *See* 42 U.S.C. § 7410(a)(2)(D) (2012). *See also* Arkansas v. Oklahoma, 503 U.S. 91, 102 (1992) ("Among the requirements the state program must satisfy are the procedural protections for downstream States discussed in *Ouellette* and *Milwaukee II*.") (emphasis removed). *See also Interstate Pollution Transport*, EPA, https://www.epa.gov/airmarkets/interstate-air-pollution-transport (last visited June 30, 2019) (explaining that the Clean Air Act's "good neighbor" provisions require consideration of downwind states' ability to meet ambient air quality standards).

[202] *See* Brief for Appellant at 37–38, 43–47, City of New York v. B.P. p.l.c., No. 18-2188-CV (2d Cir. filed Nov. 8, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181109_docket-18-2188_brief.pdf. The Supreme Court has recently affirmed that in tort cases where Congress did not intend federal oversight to be the exclusive means of providing safe and effective products, agency regulations do not preempt state tort law. *See* Wyeth v. Levine, 555 U.S. 555, 555, 575 (2009). *But see id.* at 609 (Alito, J., dissenting) ("[A]fter the Environmental Protection Agency has struck 'the balance of public and private interests so carefully addressed by' the federal permitting regime for water pollution, a State may not use nuisance law to 'upse[t]' it.") (quoting *Ouellette*, 479 U.S. at 494).

[203] *See generally* Derek C. G. Muir & Philip H. Howard, *Are There Other Persistent Organic Pollutants? A Challenge for Environmental Chemists*, 40 ENVT'L SCI. TECH. 7157 (2006).

Ouellette's reach only to suits against individual out-of-state sources that obtain a permit from EPA.

CONCLUSION

There are good reasons to mount a federal response to injuries caused by the malfeasance of fossil fuel companies. A national fund that allowed affected cities and states to receive financial assistance to cope with climate change impacts, perhaps paid for through a tax on the companies responsible for the problem, is one potential option that has been tried successfully for prior pollution injuries.[204] But this note is not about whether a national policy response is better or worse than allowing the tort system to compensate climate change victims. It has demonstrated simply that existing legal precedent allows these suits to proceed in state court and avoid a finding of federal preemption. Until Congress acts on climate change, preemption should not bar municipalities from suing fossil fuel companies under state nuisance law.

[204] *See* CONG. RESEARCH SERV., R45261, THE BLACK LUNG PROGRAM, THE BLACK LUNG DISABILITY TRUST FUND, AND THE EXCISE TAX ON COAL: BACKGROUND AND POLICY OPTIONS 1 (2019), https://fas.org/sgp/crs/misc/R45261.pdf.