STATE OF MICHIGAN
COURT OF CLAIMS

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, a Wyoming nonprofit corporation,

Plaintiff,

v

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant.
/

Case No. 24-000060-MZ

Hon. Brock A. Swartzle

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PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S JUNE 03, 2024 MOTION FOR SUMMARY DISPOSITION

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Built on the wisdom that "sunlight is . . . the best of disinfectants,"[1] Michigan's Freedom of Information Act, MCL 15.231 *et seq.*, ("FOIA") enshrines the public policy that "all persons . . . are entitled to *full and complete information* regarding the affairs of government and the official acts of those who represent them as public officials and public employees . . . ." MCL 15.231(2) (emphasis added). Contrary to that embodied policy of open government, Defendant the University of Michigan ("the University") here seeks to use FOIA to shield the work of one of its faculty from public scrutiny. It does so even though her work: (1) relates to a writing published using her official title; (2) addresses topics the University advertises as her core area of scholarship and expertise; and (3) has been actively promoted by the University's law school on numerous occasions through various media. In response to Plaintiff Government Accountability & Oversight, P.C.'s ("GAO") requests, the University stonewalled GAO here—categorically refusing even *to search* for any potentially responsive documents.

Now, the University moves for summary disposition under MCR 2.116(C)(8) and (10) out of the gate. In doing so, it raises privilege claims it never identified in response to these FOIA requests. And it relies exclusively on *factual* issues concerning the nature of Professor Rothschild's work and of these records when no discovery has occurred, and the University has not even attempted to provide a *Vaughn* Index of responsive documents for review or discussion. Because the University has not demonstrated that further factual development could not "possibly justify" GAO's recovery, *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), nor that "discovery does not stand a reasonable chance of uncovering factual support" for GAO's

[1] Brandeis, *Other People's Money And How The Bankers Use It* (New York: Frederick A. Stokes Co., 1914), p. 92.

position, *Oliver v Smith*, 269 Mich App 560, 568; 15 NW2d 314 (2006), its motion for summary disposition is unfounded and premature. This Court should deny the University's motion.

STATEMENT OF FACTS AND BACKGROUND

In February and March 2024, GAO made three FOIA requests for electronic correspondence sent to or from Rachel Rothschild, an Assistant Professor at the University of Michigan Law School. (See Ver. Compl., ¶¶ 12, 19, 20 & Ex. A, C, G.) Specifically, GAO's February 9, 2024 request sought all email correspondence sent to or from Professor Rothschild dated at any time from January 1, 2023, through July 31, 2023, and which were sent to or from named organizations engaged in and/or behind lobbying campaigns to impose particular policy agendas targeting certain other outside parties. (Ex. A.) The request was thus related to a topic of inherent and obvious public interest. (*Id*.)[2]

The University took nearly a month to respond. When it did respond on March 1, 2024, the University denied GAO's request with a blanket denial stating, in pertinent part: "Your request is denied because we have no responsive records. ***Any records*** that meet the description you provided, ***if they were to exist,*** would not be public records of the University of Michigan pursuant to Section 2 (i) of the Michigan Freedom of Information Act, which defines a 'public record' as 'a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function . . . .'" (Ex. B) (emphasis added). In other words, the University's response suggests it did not even attempt to conduct a search and an attendant review of individual records. Rather, notwithstanding that the records pertained to work of Professor

[2] Indeed, the issue of public employees or officials lobbying for or promoting climate-change related litigation against the oil and gas industry has only undertaken greater public significance deserving of transparency and public scrutiny in light of a recent Request for Proposals ("RFP") by Michigan Attorney General Dana Nessel soliciting private attorneys to sue oil and gas companies and their industry associations. (See Ex. I, RFP; Ex. J, Industry Response Letter.)

Rothschild that the University promotes on its website as within her scholarship, teaching duties, and expertise, (see, e.g., Ex. E, "Bob Needham, "5Qs: Rothschild on Fighting Climate Change with State "Superfunds," Michigan Law, July 5, 2023, https://michigan.law.umich.edu/news/5qs-rothschild-fighting-climate-change-state-superfunds (accessed June 10, 2024) (hereinafter "5Qs: Rothschild") & Ex. K, Faculty Profile), the University *assumed* that "if [such records] were to exist" that they were nonetheless categorically outside of the definition of "public record." (Ex. B.)

On March 6, 2024, GAO submitted another FOIA request. (Ex. C.) This time, GAO sought copies of all correspondence sent to or from Professor Rothschild, dated from January 1, 2023, through July 31, 2023, which included the terms "American Petroleum Institute Opposition to a Climate Superfund Act," and which were sent to or from any educational entity email address, *i.e.*, any email address ending in ".edu." (Ex. C.) This request pertained to a memorandum released to GAO by another governmental entity (the California Department of Justice)—and using Professor Rothschild's official university title—entitled: "TO: Interested Persons FROM: Rachel Rothschild, *Assistant Professor, University of Michigan Law School*, Affiliated Scholar, Institute for Policy Integrity, NYU School of Law DATE: 3/29/2023 RE: American Petroleum Institute Opposition to a Climate Superfund Act." (Ex. C & D) (emphasis added) (hereinafter, the "Climate Superfund Act Memorandum").

As alleged in GAO's Verified Complaint, the correspondence requested in the March 6, 2024 request seeking correspondence pertaining to Professor Rothschild's "Climate Superfund Act Memorandum" relates directly to her work at the University of Michigan and thus constituted "public records." (See Plf.'s Ver. Compl., ¶ 20 & Ex. C.) For example, last year, the University's website advertised Professor Rothschild's Climate Superfund Act Memorandum through the 5Q:

Rothschild news alert, explaining:

> ***Professor Rothschild is helping to advance a new tool in the fight against climate change. The idea***, based on the 'polluters pay' concept, ***would impose financial liability on major fossil fuel companies*** for the effects of the greenhouse gas emissions. ***That would create 'climate superfunds'*** that could be used for mitigation adaptation programs. [Ex. E.]

Professor Rothschild likewise affirmed in this interview with the University that:

> ***A major part of my current work has been answering legislators' questions*** about the constitutionality of these bills. ***For example, the American Petroleum Institute recently released a memo laying out their opposition to New York's bill***, including several reasons they believe the bill is unconstitutional. ***So I drafted a response memo for state legislators*** explaining why I don't think their arguments have merit and how they're misreading certain cases. [*Id*.]

The University has elsewhere promoted her climate change litigation and regulation efforts in connection with her professorial duties and scholarship, as Professor Rothschild explains in general:

> ***So my scholarship is interested in thinking about how do we move from scientific research*** and understanding an environmental pollution problem ***to putting in place appropriate regulatory solutions*** or other types of ways to address environmental pollution problems.[3]

More directly addressing climate regulation like that at issue in the Climate Superfund Act Memorandum, she explains in this video:

> ***So, I've been really interested in a number of efforts to try to address climate change at the state level, both through litigation against fossil fuel companies for their part in causing the problem and through passing legislation that could put in place something like a Climate Superfund Act to try to help with adaptation and mitigation efforts*** for the environmental changes that we know are already baked in due to rising greenhouse gas emissions, and in both of those efforts, the courts are going to play an important role in deciding how much, for example, fossil fuel companies should be held responsible financially for trying to help communities adapt to climate change and to whether states are going to be free to take action and act, perhaps in a more progressive way than the federal government. ***And so my work in this area is trying to think through some of the legal challenges that could be raised and how to best successfully bring these efforts at***

[3] "Better Know a Professor: Rachel Rothschild," Michigan Law, https://www.youtube.com /watch?v=zsg7mIkZ1A0 (accessed June 10, 2024), 2:03.

the state level.[4]

Other examples of the relationship between her University duties and the documents at issue here abound. (See, e.g., Ex. K, Faculty Profile (explaining "***Rothschild's scholarship*** sits at the intersection of law, history and policy . . . Her recent research ***examines climate change litigation*** . . . ."); Ex. L, Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 NYU ENV'T. L. J. (forthcoming 2024)); Ex. M, Curriculum Vitae (identifying various other climate change related legal talks, essays, and publications)). Notwithstanding the obvious connection between the documents sought and her professorship and teaching duties at the University, and otherwise for which she is being paid the public institution—as has been promoted repeatedly by the University itself—after taking an extension of time to respond, the University again denied GAO's second request with the same boilerplate and blanket denial supplied in its first response. (Ex. F.)

Based on the University's categorical denial and its apparent refusal to even search for any potentially responsive communications, GAO then attempted a third request on March 26, 2024. (Ex. G.) GAO's March 26 request was broken into three separate parts, each seeking the same correspondence sought in the March 6, 2024 request, except this time seeking those which were: 1) sent to or from any email address ending in ".org"; 2) sent to or from any email address ending in ".gov"; and/or 3) sent to or from any email address ending in ".com." (*Id.*) The University denied this request as well, with the same boilerplate language. (Ex. H.) Its position was clear, unwavering, and contrary to law: it simply would not consider GAO's requests.

This suit followed, seeking a declaratory judgment that the FOIA requests identified above are "public records" as defined by MCL 15.232(i) subject to release under the Michigan FOIA.

[4] *Id*. at 6:03.

(See Plf.'s Ver. Compl., ¶¶ 9, 31(a).) GAO also requested injunctive relief compelling the University to produce the requested communications in its possession and to order any withheld communications to be submitted to the Court for *in camera* review. (*Id.* at ¶¶ 34–37.) In the alternative, GAO requested injunctive relief ordering any withheld communications to be reviewed by parties under seal. (*Id.* at ¶ 36.) GAO additionally sought costs and fees pursuant to MCL 15.240(6). (*Id*. at ¶¶ 38–42.)

As its first response to the Verified Complaint, the University moved for summary disposition under MCR 2.116(C)(8) and (10).

STANDARD OF REVIEW

The University's motion for summary disposition is brought under both MCR 2.116(C)(8) and (10). Summary disposition may be granted under MCR 2.116(C)(8) only when the opposing party has failed to state a claim upon which relief can be granted. *Beaudrie v Henderson*, 465 Mich 124, 129–130; 631 NW2d 308 (2001). "Only the pleadings may be considered when the motion is based on subrule (C)(8)," MCR 2.116(G)(5); "affidavits, depositions, admissions, or other documentary evidence" may not be considered. MCR 2.116(G)(2). Further, when evaluating a motion under subsection (C)(8), courts must accept all well-plead factual allegations as true and interpreted in the light most favorable to the non-movant. *Maiden*, 461 Mich at 119. And motions under MCR 2.116(C)(8) "may be granted <u>only</u> where the claims alleged are "so clearly unenforceable as a matter of law that *no factual development could possibly justify recovery*." *Id.* (emphasis added) (citing *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992)).

In contrast, a motion under MCR 2.116(C)(10) "tests whether there is factual support for a claim." *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 547; 619 NW2d 66 (2000). The Court "must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt." *Id*., citing *Atlas Valley Golf &*

Country Club, Inc v Vill of Goodrich, 227 Mich App 14, 25 (1997). The Court may not grant a motion unless it determines there is "no genuine issue as to *any* material fact." MCR 2.116(G)(4) (emphasis added); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997); *Quinto*, 451 Mich at 369. Particularly applicable here, summary disposition under MCR 2.116(C)(10) is generally "premature if granted *before discovery on a disputed issue is complete*." *Oliver*, 269 Mich App 567 (emphasis added). Only when "further discovery *does not stand a reasonable chance* of uncovering factual support for the opposing party's position" may summary disposition be granted before the close of discovery. *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1; 672 NW2d 351 (2003) (emphasis added).

LAW AND ARGUMENT

I. The University makes no argument that the records are excluded from the definition of "public record" as a matter of law—without relying on facts outside the pleadings.

Summary disposition under MCR 2.116(C)(8) is inappropriate for a fundamental reason: the University's arguments rely on facts outside the pleadings. MCR 2.116(G)(2) & (G)(5). "When deciding a motion brought under [MCR 2.116(C)(8)] a court considers only the pleadings." *Maiden*, 461 Mich at 119–20. GAO's Verified Complaint asserts that the records sought "pertai[n] to the University's involvement with outside pressure groups and ideological lobbies to promote certain legislation across the United States . . . ." (Ver. Compl., ¶ 1.) GAO also alleges that these documents "pertai[n] to Professor Rothschild's work at the University," noting—among other things—that the document at root of any records responsive to its requests invokes Professor Rothschild's official title and that her work on this precise subject has been

actively promoted by the University. (*Id*., ¶¶ 20–21.) And, based on those and other alleged facts, GAO asserts that these are "public records." (*Id*., ¶ 31(a).)

Rather than assuming the allegations of the Verified Complaint to be true—as it must—the University contests these assertions with *factual* argument. Relying on Professor Rothschild's affidavit, the University claims that: (1) these are "personal records maintained" "solely" on a "personal Gmail email account"; (2) they "relate to activities she undertakes in her personal capacity and not as a University professor"; and (3) they involve "*pro bono* legal advice" that "is not part of her duties as a law professor." (Defs. Br., pp. 10–11.)[5] Those facts outside the pleading, although they run counter to the University's and Professor Rothschild's own statements in the public domain, are immaterial here.

Whether or not the University ultimately prevails on these claims, factual arguments relying on documents outside the pleadings are inappropriate at this stage of the proceeding. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 705; 532 NW2d 186 (1995), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999) ("[D]efendant and the trial court relied on documentary evidence beyond the pleadings in support of defendant's motion for summary disposition. Therefore, we must construe defendant's motion as being brought pursuant to MCR 2.116(C)(10)."). At the pleading stage, this Court must accept all well-pleaded factual allegations as true and interpret them in the light most favorable to the non-movant. *Maiden*, 461 Mich at 119.

The University's motion "may be granted <u>only</u> where the claims alleged are 'so clearly unenforceable as a matter of law that *no factual development could possibly justify recovery*.'" *Id.*

[5] Notwithstanding Professor Rothschild's assertion of privilege on these documents, it is unclear whether the University itself has even reviewed these records under FOIA. And no University FOIA coordinator or reviewer has proffered evidence to support such claims of privilege.

(emphasis added) (citing *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992)). The University makes no purely legal argument. Thus, its motion under MCR 2.116(C)(8) is unfounded and must be denied.

II. The University's factually based arguments that the records sought are not "public records" or are attorney-client privileged are premature.

When viewed under the correct, alternative standard of MCR 2.116(C)(10), the University's factually based arguments are premature. Whether these documents are "public records" or, if so, are exempt from withholding as privileged are questions as to which discovery is necessary before this Court renders a decision. No discovery has taken place. Nor does the University make any effort of satisfying the relevant standard that must be met when moving for summary disposition under (C)(10) before the close of discovery—*i.e.*, whether "discovery does not stand a reasonable chance of uncovering factual support" for GAO's position. *Oliver*, 269 Mich App at 568. That is because it cannot meet that standard here.

A. Whether the records sought are "public records" depends on their relationship to Professor Rothschild's professorial duties—a fact-based question that requires development through discovery.

FOIA broadly promises that "all persons . . . *are entitled to full and complete information* regarding the affairs of government and the official acts of those who represent them as public officials and public employees . . . ." MCL 15.231(2) (emphasis added). That access is intended to "allow [citizens] to 'fully participat[e] in the democratic process,'" through debate and discussion on questions of public importance. *Amberg v City of Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014). Furthering that promise, FOIA provides that "a person has a right to inspect, copy, or receive copies" of any "requested public record of a public body," MCL 15.233(1), with very few "specifically delineated exceptions." *Amberg*, 497 Mich at 30; see MCL 15.243 (listing FOIA exemptions).

"FOIA is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties." *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116, 123–24 (2014), quoting *Manning v City of East Tawas*, 234 Mich App 244; 593 NW2d 649 (1999), overruled on other grounds. "On its express terms, *the FOIA is a pro-disclosure statute* . . . ." *Herald Co v City of Bay City*, 463 Mich 111, 119; 614 NW2d 873, 877 (2000) (emphasis added), holding mod by *Michigan Fedn of Teachers & Sch Related Pers, AFT, AFL-CIO v Univ of Michigan*, 481 Mich 657; 753 NW2d 28 (2008) (emphasis added). Accordingly, FOIA must be interpreted "broadly to allow public access," *Practical Political Consulting v Sec'y of State*, 287 Mich App 434, 465; 789 NW2d 178, 194 (2010), and "a public body must disclose all public records that are not specifically exempt under the act." *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011).

Here, whether the records at issue are "public records of a public body" hinges on factual disputes concerning whether they relate to Professor Rothschild's "official function" with the University. Discovery is necessary to vet and resolve those disputes.

i. *It is undisputed that the University is a "public body." And an "employee" can also be a "public body" under FOIA.*

A "public body" means "*any* of the following" including "a state officer, employee, agency, department, division, bureau, board, commission council, authority, or other body in the executive office of the state government" as well as "*[a]ny other body* that is created by state or local authority" (with certain exceptions). MCL 15.232(h)(*i*) & (h)(*iv*) (emphasis added). The statute's chosen definition of this term is "somewhat unorthodox," *Bisio v City of Village of Clarkston*, 506 Mich 37, 47; 954 NW2d 95 (2020), and it is exceptionally broad. In contrast to

"the ordinary definition of 'body,' [which] includes definitions such as 'a group of individuals regarded as an entity,' and 'a number of persons, concepts, or things regarded collectively,'" the definition of "public body" under MCL 15.232(h) "provides that *a single officer or individual* may, in particular circumstances, be considered a 'public body' for purposes of FOIA." *Id*. Thus, in *Bisio*, documents in the possession of the city attorney were held to be in the possession of a "public body"—the office of city attorney. *Id*. at 53–54.

Here, there is no question the University itself is a "public body." By law, the Regents of the University of Michigan is a body corporate, which forms the governing body of the University. Const 1963, art 8, § 5. In turn, the University has long been held to be a "public body" as defined in MCL 15.232(h)(*i*) and/or (h)(*iv*), which creates and maintains "public records" as defined in MCL 15.232(i). See, e.g., *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 225; 507 NW2d 422 (1993) (observing it is "beyond question" that the University is a "public body" under OMA and FOIA). The University does not appear to dispute this point.

More than that, however, a "state . . . employee" also *individually* qualifies as a "public body" under the "unorthodox" definition FOIA invokes. See MCL 15.232(h)(*iv*); *Bisio*, 506 Mich at 53–54. And, as an employee of a public university, Professor Rothschild qualifies. See *Garner v Michigan State Univ*, 185 Mich App 750, 759; 462 NW2d 832 (1990) (a "tenured professor" at a state university is a "public employee"); see also *Rideaux v Winter*, 155 NE3d 1120, 1124 (Ill App Ct, 2020) ("As a professor employed by the University, Winter was a state employee."). Thus, both the University and Professor Rothschild are "public bodies" under MCL 15.232(i).

ii. ***At a minimum, discovery stands a "reasonable chance" of supporting the claim that the documents were "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function."***

Whether these documents are "public records" as defined by MCL 24.232(i) depends on

disputed factual question. A "public record" is any "writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i). In other words, records "prepared, owned, used, in the possession of, or retained" by a "public body"—here, either the University *or* Professor Rothschild, see Section II.A.*i*, *supra*—qualify if they relate to "the performance of an official function." See also *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 730; 415 NW2d 292 (1987) (emphasizing the connection between the record and "the body's . . . official affairs"). FOIA does not define "official function." *Ahmad v Univ of Michigan*, unpublished *per curiam* opinion of the Court of Appeals issued June 20, 2019 (Docket No 341299) (Ex. N), aff'd by equally divided Court in *Ahmad v Univ of Michigan*, 507 Mich 917; 956 NWd 507 (2021). But "official" means "authoritative, authorized." *Id*., slip op. at 2. And "function" means "the acts or operations expected of a person or thing." *Id*. In other words, if used for "authorized" "acts or operations," then the record relates to "the performance of an official function." *Id*. Further, even when a public body itself does not "create" or "retain" the records, they are nonetheless "public records" if "*used* . . . by a public body in the performance of an official function . . . ." MCL 15.232(i).

Thus, as is well-established at the federal level and across the states, it does not matter—assuming for sake of argument that her affidavit is accurate—whether Professor Rothschild conducted official business "solely" on a "personal email" account. Indeed, states who have considered this question have uniformly held that conducting official business on private email accounts does not shield such documents from production under FOIA-like statutes. In other words, "private" emails that conduct public business are still "public records." See, e.g., *City of San Jose v Superior Court*, 2 Cal5th 608, 629; 389 P3d 848 (2017) (holding that a public

"employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account"); *Toensing v Atty General*, 206 Vt 1, 8–9; 178 A3d 1000 (2017) ("The definition of 'public record' in the PRA does not exclude otherwise qualifying records on the basis that they are located in private accounts"); *Better Gov't Ass'n v City of Chicago*, 169 NE3d 1066 (Ill App Ct, 2020) ("[T]he e-mails and text messages from those officials' personal accounts are 'in the possession of' a public body within the meaning of FOIA"); *PETA v Bd of Supervisors of Louisiana State Univ*, 376 So 3d 178, 190–91 (La Ct App, 2023) ("The definition of a "public record" includes an email, if that email is used in the performance of any work, duty, or function of a public body . . . Otherwise, a public official could evade the law simply by communicating about sensitive public matters through a personal device and routinely escaping public scrutiny."); *Comstock Residents Ass'n v Lyon Co Bd of Comm'rs*, 134 Nev 142, 146; 414 P3d 318 (2018). Michigan's definition of "public body," as explained above, is substantially consistent with these states' definitions. See MCL 15.232(i). Thus, the heavy weight of this persuasive authority from other states demonstrates that hiding official conduct behind private email accounts is no excuse. See *People v Walker*, 328 Mich App 429, 444–45; 938 NW2d 31, 39–40 (2019) ("While the decisions of . . . other state courts are not binding on this Court, they may be considered as persuasive authority.").[6]

The University points to *Howell Education Assocation, MEA/NEA v Howell Board of Education*, 287 Mich App 228; 789 NW2d 495 (2010), suggesting that the case forecloses GAO's

[6] Michigan has debated this question *politically* and decidedly agreed with the weight of state-court authority. See, e.g., *Whitmer bans use of private email for state business* (https://apnews.com/whitmer-bans-use-of-private-email-for-state-business-3bfd9942699044c3bf9fbfe320b90de8) (accessed June 11, 2024); see also Executive Directive 2019-05. But, to counsel's knowledge, other than *Howell Ed Ass'n*–which is consistent with these conclusions—no Michigan court has directly addressed the question.

claims here because the case concerned personal emails and Professor Rothschild asserts that the records sought are "personal emails." The case does no such thing. Actually, it affirms that:

> [T]he caselaw is clear that *purely personal documents* <u>*can become public documents*</u> based on how they are utilized by public bodies. However, it is their subsequent use or retention 'in the performance of an official function' that rendered them so. [*Id*. at 243 (emphasis added).]

In other words, it is the content and not the location that determines a record's character; if a "personal" document is put to an "official use" it is no longer a personal document. *Id*. at 243–45; *Walloon Lake Water Sys, Inc*, 163 Mich App at 730. Likewise, whether a document is a "public record" or instead a "personal email" hinges on its relationship to the "official function." *Howell Ed Ass'n*, at 243.

But whether Professor Rothschild's correspondence concerning a Memorandum that she signed using her official University title and that was repeatedly promoted by the University on its website—not only relating to but directly addressing a subject about which she and the University both have insisted is a key subject of her work at the University (*infra*)—relates to her "official function" is exactly the point in factual dispute. With no discovery having taken place yet here, summary disposition is premature. That is especially true in light of the "inherent problems" of procedure that place a thumb on the scale in favor of governmental bodies in FOIA matters—in contrast to typical adversarial proceedings. *Evening News Ass'n v City of Troy*, 417 Mich 481, 503; 339 NW2d 421 (1983).

Applied here, though no discovery has been conducted, the publicly available facts concerning Professor Rothschild's work at the University by themselves demonstrate the obvious connection between the records sought and Professor Rothschild's "official functions." The "official functions" of a professor at the University—those "authorized" "acts or operations expected of" a law school professor—plainly extend beyond mere classroom teaching or

examination grading. See, e.g., *Roby v Conn Gen Life Ins Co*, 166 Conn 395, 404; 349 A2d 838 (1974) (noting the "regular duties' of a tenured professor" included "scholarship and research activities"); *Allworth v Howard Univ*, 890 A2d 194, 201 (DC, 2006) (observing under the applicable faculty guidelines that "the 'basic criteria' for tenure include 'research and other scholarly achievements'"). Undoubtedly, they encompass activities like engaging in research, conducting written scholarship, participating in talks and conferences, and otherwise contributing "thought leadership" to topics of public concern. Though discovery has not yet occurred, the University's policies, tenure guidelines, and other documents that GAO can request in discovery will likely affirm that this general proposition is true for the University and its law school. Professor Rothschild's "Climate Change Superfund Memorandum" and her related research—which she has promoted using her official University title, (Ex. D)—thus falls within the scope of those authorized duties. The University cannot disclaim any relationship between her teaching post and this research now after vociferously promoting it on its website. (See, e.g., Ex. E, 5Qs: Rothschild; Ex. K, Faculty Profile; and "Better Know a Professor: Rachel Rothschild," Michigan Law, https://www.youtube.com/watch?v=zsg7mIkZ1A0 (accessed June 10, 2024).)

Indeed, in Professor Rothschild's own words, her research and any correspondence pertaining to the "Climate Change Superfund Memorandum" falls within the core of her research and scholarship functions, which she describes as: "***thinking about how do we move from scientific research*** . . . ***to putting in place appropriate regulatory solutions***." (Better Know a Professor: Rachel Rothschild," 2:03.) She explained further her focus on "***passing legislation that could put in place something like a Climate Change Superfund Act,***" (*Id*. at 6:03), and that "my work in this area is trying to think through some of the legal challenges that could be raised and how to best successfully bring these efforts at the state level . . . ." (*Id*. at 6:55)—this being

precisely the focus of the "Superfund Act" memo at the root of the records responsive to the requests at issue here. And her University profile further details that "Rothschild's scholarship sits at the intersection of law, history and policy," and "***[h]er recent research examines climate change litigation*** . . . ." (Ex. K.) Her CV reflects the same research focus, as evidenced in her book, her law-review publications, her conference talks, and her other scholarly engagement. (Ex. M) (mentioning book "Poisonous Skies: Acid Rain and the Globalization of Pollution," publications such as "State Nuisance Law and the Climate Change Challenge to Federalism" "The Jurisprudence of Justice Gorsuch and Future Efforts to Address Climate Change," and "Will Cities Get Their Day in Court to Litigate Climate Change Harms?" and talks like "Juristrocracy and Administrative Governance: From Benzene to Climate.").

So, just on the basis of these few publicly available representations and Professor Rothschild's own admissions, the University cannot seriously contend that "discovery does not stand a reasonable chance of uncovering factual support" for GAO's position, *Oliver*, 269 Mich App at 568. The opposite is true—discovery is likely to further demonstrate that Professor Rothschild's public statements were in fact true and her scholarship on this topic is "in the performance of an official function." MCL 15.232(i). But, for now, it suffices that summary disposition is both premature and inappropriate. This Court should deny the University's motion.

B. Whether the records are "attorney-client privileged" depends upon the relationship between Professor Rothschild and the entities and third-party waiver issues. Those are likewise fact-based questions.

To pile on, the University adds an exemption claim it never made in response to GAO's requests,[7] baldly asserting that *all* correspondence related to Professor Rothschild's "Climate

[7] MCL 15.235(5)(a) requires that a public body's denial of any FOIA request asserting "that the public record, or a [portion of that public record, is exempt from disclosure" to provide "[a]n explanation of the basis for the determination" of an exemption. Likewise, MCL 15.240(4) places "the burden . . . on the public body *to sustain its denial*." There is therefore a serious question

Superfund Act Memorandum" is attorney-client privileged—without any *Vaughn* index or other verified support, see, e.g., *Vaughn v Rosen*, 484 F2d 820, 827; 157 US App DC 340 (CADC, 1973) (requiring "adequate specificity . . . to assur[e] a proper justification by the governmental agency" on claimed exemptions via "formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with actual portions of the document"); and *Evening News*, 417 Mich at 385 ("[W]e generally adopt the procedures set forth in *Vaughn v Rosen*"). This claim is inherently fact-based, and summary disposition is therefore premature.

"The attorney-client privilege attaches to communications made by a client to an attorney acting as a legal adviser and made for the purpose of obtaining legal advice." *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 279; 568 NW2d 411 (1997). "The purpose of the attorney-client privilege is to permit a client to confide in the client's counselor, knowing that such communications are safe from disclosure." *Fruehauf Trailer Corp v Hagelthorn,* 208 Mich App 447, 449; 528 NW2d 778 (1995). And "[*t]he scope of the attorney-client privilege is narrow*" such that "[i]t attaches only to confidential communications by the client to his adviser which are made for the purpose of obtaining legal advice." *Yates v Keane*, 184 Mich App 80, 83; 457 NW2d 693 (1990) (emphasis added). Moreover, the privilege can be waived by, for example, the voluntary disclosure of information to parties outside of that privilege. See *Liebel v Gen Motors Corp*, 250 Mich App 229, 240–41; 646 NW2 179 (2002).

To establish that a particular document is attorney-client privileged and therefore FOIA-exempt, a public body must demonstrate all the elements of the "narrow" privilege related to that document. And, even when the attorney-client privilege facially applies to a particular document,

whether the University may claim a FOIA exemption not asserted in its serial, blanket denials that the records responsive to these requests are even records subject to FOIA.

that privilege may be waived by including non-client third parties on the communication or later disclosing such communications. *Liebel*, 250 Mich App at 240–41; see also *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 658; 564 NW2d 922 (1997). These are fact-based determinations that would need to be examined under an *in camera* review. *Evening News Ass'n*, 417 Mich at 516. Moreover, GAO's requests, as drafted (which, among other things, seek communications with third parties), suggest that most—if not all—records responsive should reflect a waiver. Thus, the University cannot hide behind a generic, categorical claim of privilege (having first asserted blanket denials of the records' status) before any discovery has occurred.

Rather, the University must first establish the existence of an attorney-client relationship. Professor Rothschild's testimony counts. But it is not the end of the inquiry. Instead, discovery on this point would require the parties and the Court to evaluate objective evidence of the terms and scope of any relevant attorney-client relationship. As any private attorney knows, that is spelled out in an engagement letter—and the scope of such relationships matters given the "narrow" scope of the privilege. *Herald Co*, 224 Mich App at 279. Further, individually assessing claims of privilege generally requires, at a minimum, that a public body create a *Vaughn* index setting forth the basics: who sent and who received the communication, the topic, the date, and the basis for asserting privilege. *Evening News Ass'n*, 417 Mich at 423; *Vaughn*, 484 F2d at 827. The University's blanket assertion of privilege here lacks any of these basic facts. Nor has the University even confirmed whether it has now searched for and reviewed records—as its new claims of privilege suggest—and, if so, who conducted those searches and reviews and what is their testimony?

Thus, once again, the University cannot claim with a straight face that discovery stands no "reasonable chance" of uncovering further support for GAO's position that some (or all) of the

documents sought will not be privileged. *Oliver*, 269 Much App 567. This Court needs to allow this action to proceed to test the validity of these claims.

III. Determining whether the University engaged in "arbitrary and capricious" denials can only be decided *after* discovery further illuminates the University's response to GAO's FOIA requests.

Finally, that the University made serial arbitrary and capricious denials by categorically claiming that "[a]ny records that meet the description you provided, if they were to exist, would not be public records of the University of Michigan" seems self-evident to GAO in light of the above. See MCL 15.240(6). The University rejected offhand any relationship between Professor Rothschild's communications and her "official function"—contrary to its active promotion of the very same work and its repeated description of this work as her core research focus. (See, e.g., Ex. E p. 4 (discussing her drafting of a "response memo," *i.e.*, the "Climate Change Superfund Memorandum"); Ex. L; Better Know a Prof., 6:03). Moreover, the University wrongly stonewalled GAO, conducting no real search and providing only boilerplate assertions of the basis of its denials, contrary to its statutory duties. See, e.g., MCL 15.235(2)(c).

At a minimum, however, whether the University acted in an "arbitrary and capricious" manner hinges first on the substantive merits of its denials. Deciding those merits now, as argued above, is premature when no discovery has occurred. See Sections II.A.i. & A.ii.; *Oliver*, 269 Much App 567. Accordingly, any ruling on this point is equally premature.

CONCLUSION AND REQUEST FOR RELIEF

The University's motion fails to show it is entitled to summary disposition. The University makes no argument that GAO's claims are "so unenforceable as a matter of law that *no factual development* could justify a right of recovery." See MCR 2.116(C)(8) (emphasis added). Nor does it establish that "discovery does not stand a reasonable chance of uncovering factual support" for

GAO's position. Exactly the opposite is true. Taking Professor Rothschild at her word, the records requested relate to subjects within her core scholarship concerns, which the University advertises on its webpage. Additionally, any claim of privilege cannot be adjudicated without the University establishing the existence and nature of the attorney-client privilege and this Court individually analyzing the privilege asserted as well as any waiver of that privilege.

Accordingly, this Court should deny Defendant the University of Michigan's Motion for Summary Disposition.

Respectfully submitted,

CLARK HILL PLC

/s/ Zachary C. Larsen
Zachary C. Larsen (P72189)
James J. Fleming (P84490)
Clifford (Gary) G. Cooper II (P85606)
Attorneys for Plaintiff
215 South Washington Square, Ste. 200
Lansing, MI 48933
(517) 318-3100

Dated: June 17, 2024

EXHIBIT A

GAO GOVERNMENT ACCOUNTABILITY & OVERSIGHT

MICHIGAN PUBLIC RECORDS REQUEST

February 9, 2024

University of Michigan FOIA Office
3300 Ruthven Building
1109 Geddes Avenue
Ann Arbor, MI 48109-1079

By Email: foia-email@umich.edu

On behalf of Government Accountability & Oversight (GAO), a non-profit public policy organization dedicated to transparency in government and with an active public dissemination and media program, and pursuant to the Michigan Freedom of Information Act, MCL §15.231, *et seq*., please provide us copies of **all correspondence** sent to or from (including as cc: and/or bcc:) **Rachel Rothschild, Assistant Professor, University of Michigan Law School,** which is **dated at any time from January 1, 2023 through July 31, 2023**, inclusive, that was sent to, from or which copies **any email address ending in a) @rffund.org, b) @michiganlcv.org, c) @climateintegrity.org, d) @michiganlcv.org, e) @biologicaldiversity.org, and/or e) @pirgim.org.**

We request entire "threads" of which any responsive electronic correspondence is a part, regardless of whether any portion falls outside of the above time parameter.

In the event that the Office´s custodian of public records determines that a release of a given record would contain confidential or private information or otherwise seek to withhold information, we request to state the reasons for any such withholdings.

We understand that in some instances a public body may charge a fee for the cost of the search, examination, review, copying, separation of confidential from nonconfidential information, and mailing costs. If your Office expects to seek a charge associated with the searching, copying or production of these records, please provide an estimate of anticipated costs.

As noted earlier in this request, GAO is a non-profit public policy organization dedicated to informing the public of developments in the area of energy and environmental issues and relationships between governmental and non-governmental entities as they relate to those issues. GAO's ability to obtain fee waivers is essential to this work. GAO intends to use any responsive information to continue its work highlighting the nexus between interested non-governmental entities and government agency decision-making. The public is both interested in and entitled to know how regulatory, policy and enforcement decisions are reached. GAO ensures the public is made aware of its work and findings via media, its websites govoversight.org and climatelitigationwatch.org dedicated to broadly disseminating energy and environmental policy

news and developments. The public information obtained by GAO have been relied upon by established media outlets, including the Washington Times, Fox News and the Wall Street Journal editorial page.

GAO requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee's own machine or account.

GAO looks forward to your response. In the event you have any questions, please feel free contact me at the below email address.

Thank you for your prompt attention, time and consideration to this matter.

Respectfully submitted,

Joe Thomas
Joe@govoversight.org

Government Accountability & Oversight
30 N. Gould Street
#12848
Sheridan, WY 82801
(434) 882-4217

EXHIBIT B

GAO

FOIA THO 0144-24

1 message

Shannon Hill <hillsr@umich.edu> Fri, Mar 1, 2024 at 1:06 PM
To: info@govoversight.org, joe@govoversight.org
Cc: Freedom of Information Act Office <foia-email@umich.edu>

Dear Joe Thomas,

I am writing in response to your Freedom of Information Act request dated February 9, 2024, which was received on February 12, 2024.

You requested:

> On behalf of Government Accountability & Oversight (GAO), a non-profit public policy organization dedicated to transparency in government and with an active public dissemination and media program, and pursuant to the Michigan Freedom of Information Act, MCL §15.231, et seq., please provide us copies of all correspondence sent to or from (including as cc: and/or bcc:) Rachel Rothschild, Assistant Professor, University of Michigan Law School, which is dated at any time from January 1, 2023 through July 31, 2023, inclusive, that was sent to, from or which copies any email address ending in a) @rffund.org, b) @michiganlcv.org, c) @climateintegrity.org, d) @michiganlcv.org, e) @biologicaldiversity.org, and/or e) @pirgim.org.
>
> We request entire "threads" of which any responsive electronic correspondence is a part, regardless of whether any portion falls outside of the above time parameter.

Your request is denied because we have no responsive records. Any records that meet the description you provided, if they were to exist, would not be public records of the University of Michigan pursuant to Section 2 (i) of the Michigan Freedom of Information Act, which defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function…"

Please note that within 180 days from the date of this letter, you have the right to appeal the denial of information to the President of the University or seek judicial review in the court of claims to try to compel disclosure. If you elect to appeal and the President upholds the denial, you may still seek judicial review within the 180-day period.

An appeal to the President must be submitted in writing to: President's Office, c/o Steve Yaros, The University of Michigan, Ruthven Bldg. Suite 3190, 1109 Geddes Ave., Ann Arbor, Michigan 48109-1079 (or by email to: FOIAappeals@umich.edu). The statement must (1) identify the request and the final determination by the FOIA office that is being appealed, (2) specifically state the word "appeal," and (3) identify the reason or reasons why the final determination should be reversed.

If you seek judicial review in the Michigan court of claims and prevail, you will be awarded reasonable attorney's fees, costs and disbursements incurred in maintaining the action. If you prevail in part, you may still be awarded complete or partial reimbursement for those expenses. In addition to actual and compensatory damages, you will be awarded punitive damages in the amount of $1,000.00 if the court finds that the University was arbitrary and capricious in its denial.

A copy of Section 10 of the Michigan FOIA is available for your reference and review online at http://foia.vpcomm.umich.edu/foia-right-to-appeal/.

Sincerely,

Shannon Hill
FOIA Coordinator
Freedom of Information Act Office | University of Michigan
http://foia.vpcomm.umich.edu | hillsr@umich.edu | (734) 763-4167

EXHIBIT C

GAO GOVERNMENT ACCOUNTABILITY & OVERSIGHT

MICHIGAN PUBLIC RECORDS REQUEST

March 6, 2024

University of Michigan FOIA Office
3300 Ruthven Building
1109 Geddes Avenue
Ann Arbor, MI 48109-1079

By Email: foia-email@umich.edu

On behalf of Government Accountability & Oversight (GAO), a non-profit public policy organization dedicated to transparency in government and with an active public dissemination and media program, and pursuant to the Michigan Freedom of Information Act, MCL §15.231, *et seq*., please provide us copies of **all email correspondence** sent to or from (including as cc: and/or bcc:) **Rachel Rothschild, Assistant Professor, University of Michigan Law School,** which is **dated at any time from January 1, 2023 through July 31, 2023**, inclusive, that includes, anywhere, whether in an email or an attachment thereto, "**American Petroleum Institute Opposition to a Climate Superfund Act**"[1] and was sent to or from or includes as a copied party any email address ending in "**.edu**".[2]

We request entire "threads" of which any responsive electronic correspondence is a part, regardless of whether any portion falls outside of the above time parameter.

We understand there may be some overlap in records responsive to the above due, and do not request duplicates however we do request duplicate listing in any index or log you provide.

In the event that the Office´s custodian of public records determines that a release of a given record would contain confidential or private information or otherwise seek to withhold information, we request to state the reasons for any such withholdings.

We understand that in some instances a public body may charge a fee for the cost of the search, examination, review, copying, separation of confidential from nonconfidential information, and mailing costs. If your Office expects to seek a charge associated with the searching, copying or production of these records, please provide an estimate of anticipated costs.

As noted earlier in this request, GAO is a non-profit public policy organization dedicated to

[1] Quotation marks are not part of a search term, but only delineate it. This is the title of a March 29, 2023, Memorandum "FROM: Rachel Rothschild, Assistant Professor, University of Michigan Law School".
[2] Quotation marks are not part of a search term, but only delineate it.

informing the public of developments in the area of energy and environmental issues and relationships between governmental and non-governmental entities as they relate to those issues. GAO's ability to obtain fee waivers is essential to this work. GAO intends to use any responsive information to continue its work highlighting the nexus between interested non-governmental entities and government agency decision-making. The public is both interested in and entitled to know how regulatory, policy and enforcement decisions are reached. GAO ensures the public is made aware of its work and findings via media, its websites govoversight.org and climatelitigationwatch.org dedicated to broadly disseminating energy and environmental policy news and developments. The public information obtained by GAO have been relied upon by established media outlets, including the Washington Times, Fox News and the Wall Street Journal editorial page.

GAO requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee's own machine or account.

GAO looks forward to your response. In the event you have any questions, please feel free contact me at the below email address.

Thank you for your prompt attention, time and consideration to this matter.

Respectfully submitted,

Joe Thomas
Joe@govoversight.org

Government Accountability & Oversight
30 N. Gould Street
#12848
Sheridan, WY 82801
(434) 882-4217

EXHIBIT D

M E M O R A N D U M

TO: Interested Persons
FROM: Rachel Rothschild, Assistant Professor, University of Michigan Law School
Affiliated Scholar, Institute for Policy Integrity, NYU School of Law
DATE: 3/29/2023
RE: American Petroleum Institute Opposition to a Climate Superfund Act

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I. Introduction

This memorandum responds to the American Petroleum Institute (API)'s statement in opposition to the "Climate Change Superfund Act." As detailed below, API's claim that the bill may be unconstitutional is not supported by case law on similar types of environmental legislation. Nor is there support for API's claim that the state climate superfund is preempted by the Clean Air Act.

Response: Retroactive Law Making and Due Process

There are numerous examples of retroactive liability laws that have withstood constitutional challenges under the due process clause.[1] These include environmental laws that impose retroactive liability on polluters just like the New York state climate superfund.[2] The appropriate inquiry under due process is not the "amount of potential liability," but whether the application of retroactive liability is based on a "legitimate legislative purpose furthered by rational means."[3] Courts have unanimously found that environmental improvements are a legitimate government purpose, and that it is rational to impose retroactive liability for environmental harms upon parties who "created and profited" from activities that caused the pollution.[4] Nor is the liability imposed in the state climate superfund bill "severely disproportionate" to the parties' contributions to the problem or the harm incurred.[5] Furthermore, the potentially responsible parties should have expected that they would be subject to regulation

[1] *See e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).
[2] *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 174 (4th Cir. 1988) (upholding retroactive application of liability for hazardous waste pollution).
[3] *See* Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 729 (1984) ("Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."); *see also* United States v. Alcan Aluminum Corp., 49 F. Supp. 2d 96, 101 (N.D.N.Y. 1999) (explaining that "economic legislation enjoys a 'presumption of constitutionality' that can be overcome only if the challenger establishes that the legislature acted in an arbitrary and irrational way").
[4] *See, e.g.*, United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986); O'Neil v. Picillo, 883 F.2d 176, 183 n.12 (1st Cir. 1989).
[5] *See, e.g.*, Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1347 (Fed. Cir. 2001) (rejecting a due process challenge to the 1992 Energy Policy Act and noting that the responsible parties were only liable for a portion of the cleanup costs from uranium processing).

and/or liability for their greenhouse gas emissions after the year 2000. The companies knew that climate change was a serious global problem and were operating in a highly regulated industry at that time.[6] All of these factors indicate that a state climate superfund would not infringe on these companies due process rights.[7]

Response: The State Climate Superfund May Constitute a Taking

The state climate superfund's imposition of liability on responsible parties for the environmental harms that result from their activities is not a taking.[8] In evaluating a "regulatory" taking, courts examine several factors, including "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."[9] Under this framework, courts have repeatedly upheld environmental laws and regulations that impose financial costs on polluters for environmental harms.[10] The responsible parties under a state climate superfund reap significant private profits from their activities while the public bears the broader health and environmental costs; these profits dwarf the financial liabilities imposed by the bill. And as noted above, it is unreasonable for companies to have expected no government regulation of fossil fuels after the year 2000.[11]

[6] On the relevance of operating in a highly regulated industry with clear potential for environmental harm, see Monsanto Co., 858 F.2d at 174 ("While the generator defendants profited from inexpensive waste disposal methods that may have been technically 'legal' prior to CERCLA's enactment, it was certainly foreseeable at the time that improper disposal could cause enormous damage to the environment.").

[7] *See* United States v. Alcan Aluminum Corp., 315 F.3d 179, 190 (2d Cir. 2003) ("We are in accord with this consistent authority that both pre- and post-dates Eastern Enterprises. As a consequence, holding Alcan jointly and severally liable under CERCLA for the cleanup costs incurred at PAS and Fulton does not result in an unconstitutional taking adverse to Alcan, or a deprivation of its right to due process.");

[8] *See* United States v. Conservation Chem. Co., 619 F. Supp. 162, 217 (W.D. Mo. 1985) ("What defendants have loosely referred to as a 'taking' is, in reality, nothing more than an attempt to transform a substantive due process challenge of an economic regulation (which is subject only to the 'rational purpose' and 'arbitrary and capricious' standards), into a confiscation of defendants' property rights. This characterization is, however, inappropriate and the claim lacks merit.").

[9] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978).

[10] *See, e.g.*, Alcan Aluminum Corp., 315 F.3d at 190; United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986) ("Appellants also summarily argue retroactive application of CERCLA constitutes an unconstitutional taking of property. We disagree."); United States v. Alcan Aluminum Corp., 49 F. Supp. 2d 96, 100 (N.D.N.Y. 1999) (distinguishing Eastern Enterprises v. Apfel from environmental liability in the context of a hazardous waste superfund because in the latter case the liability was connected to an environmental harm, rather than imposed for "no reason"); United States v. Dico, Inc., 189 F.R.D. 536, 543 (S.D. Iowa 1999) ("[T]he only rationale embraced by at least five judges in Eastern Enterprises is that retroactive application of the Coal Act to Eastern did not violate the Takings Clause. It therefore remains settled in this circuit that retroactive application of CERCLA does not violate either the Due Process or Takings Clauses.").

[11] *See* Peter H. Howard and Minhong Xu, *Enacting the "Polluter Pays" Principle: New York's Climate Change Superfund Act and Its Impact on Gasoline Prices*, INST. POL'Y INTEGRITY 14 (2022), https://policyintegrity.org/files/publications/Polluter_Pays_Policy_Brief_v2.pdf (discussing reasons firms should expect liability for greenhouse gas emissions and noting that potentially responsible parties like Exxon, BP, Shell, and Chevron already put a price on carbon internally to account for this expected liability).

Response: The State Climate Superfund Imposes Arbitrary, Excessive Fines that May Violate Due Process

The financial liability imposed under the state climate superfund is not arbitrary or excessive. Responsible parties must contribute funds in proportion to the amount of greenhouse gas emissions that result from their products;[12] an overwhelming number of scientific studies have connected greenhouse gas emissions to climate change and its attendant effects. Nor are the fines excessive given oil company revenue, market capitalization, and profits,[13] as well as the expected environmental damage to New York.

Courts have repeatedly found that the imposition of financial liability on parties that caused past environmental harm does not violate due process.[14] No court has suggested that the state needs precision in calculating liability in order to satisfy due process requirements.[15]

Response: Use of Strict Liability Standard and the Nexus between Fine and Liability

Legislatures and the courts have historically imposed strict liability on parties engaging in a variety of harmful activities, including those that injure the environment, under the reasoning that the party who engaged in the activity for a specific purpose or profit is in the best position to absorb the cost of those harms.[16] In the environmental context, the requirement that companies who engaged in the polluting activity pay the costs of any resulting damage is known as the "polluter pays" principle, a longstanding legal doctrine.[17] Here, the responsible parties are not

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[12] *See* Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 553 (6th Cir. 2001) (upholding CERCLA's constitutionality from due process and takings challenges, noting that "[a]lthough the economic impact on [the party] of retroactive CERCLA application is potentially significant, it is also directly proportional to [the party's] prior acts of pollution).

[13] *See* Howard and Xu, *supra* note 11, at 16.

[14] *See* Alcan Aluminum Corp., 315 F.3d at 190; Dico, Inc., 189 F.R.D. at 543; Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d at 552 (finding no due process violation for imposing liability on hazardous waste polluters because "Congress acted rationally by spreading the cost of cleaning hazardous waste sites to those who were responsible for creating the sites. Cleaning abandoned and inactive hazardous waste disposal sites is a legitimate legislative purpose which is furthered by imposing liability for response costs upon those parties who created and profited from those sites."); United States v. Newmont USA Ltd., No. CV-05-020-JLQ, 2007 U.S. Dist. LEXIS 63726, at *14 (E.D. Wash. Aug. 28, 2007) ("[C]ourts that have been asked to reconsider whether CERCLA's retroactive liability scheme is constitutional in light of Eastern Enterprises have "uniformly held that CERCLA continues to pass constitutional muster.'");

[15] *See* United States v. Hardage, Case No. CIV-86-1401-P, 1989 U.S. Dist. LEXIS 17878, at *14 (W.D. Okla. Nov. 28, 1989) (finding that the imposition of joint and several liability for parties who caused environmental harms that were "indivisible" did not violate due process); United States v. Conservation Chem. Co., 619 F. Supp. 162, 214 (W.D. Mo. 1985) ("there is no support for the underlying premise . . . that imposition of joint and several liability creates a constitutional question. . . The application of the principle of joint and several liability where there is indivisible injury resulting from multiple causes has been applied in many contexts, without constitutional challenge"); *see also Monsanto Co.*, 858 F.2d at 174.

[16] *See* Alexandra Klaas, *From Reservoirs to Remediation: The Impact of CECLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 907 (2004) (noting that "strict liability has been historically applied through common law and statutory developments in a wide range of areas," including environmental pollution).

[17] Boris N. Mamlyuk, *Analyzing the Polluter Pays Principle through Law and Economics*, 18 SOUTHEASTERN ENV'T L.J. 39, 41-42 (2009) ("In domestic law, the polluter pays principle states that polluting entities are legally and financially responsible for the harmful consequences of their pollution.").

just "one segment of the economy" but those who engaged in the activity and profited from it. API's statements here are thus policy critiques of the bill rather than arguments about its legal validity. API may wish that the doctrine of strict liability didn't exist, or believe that New York should add a causation requirement to the bill, but the legislature is legally allowed to impose strict liability on responsible parties and determine financial contributions based on greenhouse gas contributions.

Response: Disproportionate Penalties

It is reasonable for the New York state legislature to impose joint and several liability on responsible parties for the harms resulting from climate change, thus requiring some companies to pay more to help with adaptation and mitigation efforts. This is the approach taken in other environmental laws where the harms cannot be specifically attributed to individual polluters as well as situations where some responsible parties are insolvent or otherwise unable to contribute to remedying the environmental damages resulting from their activities.[18]

Response: Federal Preemption

The state climate superfund is not preempted by the Clean Air Act. Under the Clean Air Act, states do not need permission from the federal government to enact environmental laws, on climate change or any other air pollution problem. The Clean Air Act takes what is known as a "cooperative federalist" approach to air pollution problems, preserving state authority to regulate more stringently than the federal government through a savings clause,[19] with a few specific exceptions like setting new motor vehicle emission standards.[20] The Clean Air Act's savings clause would apply to a state climate superfund in the same way it does to state laws concerning other types of pollution problems.[21]

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[18] *See* United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988) (noting that under CERCLA the uniform federal rule is that if parties "cause a single and indivisible harm [], they are held liable jointly and severally for the entire harm").

[19] S*ee* 42 U.S.C. § 7416 (2022) ("Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution."); *see also* 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.").

[20] *See* 42 U.S.C.S. § 7543(a) (2022) ("No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines . . ."). Another exception concerns the Acid Rain trading provisions. *See* Clean Air Mkts. Group v. Pataki, 338 F.3d 82 (2d Cir. 2003).

[21] Indeed, many states have programs to address greenhouse gas emissions; though different in form than a state climate superfund, the same principles of federalism and preemption analysis apply. *See, e.g.*, William Funk, *Constitutional Implications of Regional CO2 Cap-and-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 J. ENV'T L. 353, 357 (2009) (explaining that the regional greenhouse gas initiative should not be preempted by federal law, at least until a federal cap-and-trade program passes Congress).

The decision of the U.S. Court of Appeals for the Second Circuit in *City of New York v. Chevron Corp* does not suggest that the Clean Air Act preempts legislation like a climate superfund.[22] The *Chevron* case solely concerned whether nuisance lawsuits against fossil fuel companies could be brought under state law or whether they had to be brought under federal common law.[23] Musings from the Second Circuit about whether the federal government is better positioned to address climate change are immaterial to a legal analysis of preemption. Only Congress – not the Second Circuit – has the power to amend the Clean Air Act and preempt state action; under the Act's current framework, states have the authority to create a climate superfund.

[22] *See*, *e.g.*, Jonathan Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J. L., ECON. & POL'Y 217, 221 (2022) (criticizing the 2nd circuit decision for holding "that state law claims against fossil fuel companies are preempted, despite the lack of any preemptive legislative action, implicit or otherwise . . . [w]hether state law nuisance actions are to be preempted is a choice for Congress to make, and is a choice Congress has not yet made").
[23] City of N.Y. v. Chevron Corp., 993 F.3d 81, 91 (2d Cir. 2021)

EXHIBIT E

5Qs: Rothschild on Fighting Climate Change with State “Superfunds”

News | July 05, 2023 | Author(s): Bob Needham

CONSTITUTIONAL LAW (/ACADEMICS/AREAS-INTEREST/CONSTITUTIONAL-LAW) |
ENVIRONMENTAL AND ENERGY LAW (/ACADEMICS/AREAS-INTEREST/ENVIRONMENTAL-AND-ENERGY-LAW)

Professor Rachel Rothschild is helping to advance a new tool in the fight against climate change.

The idea, based on the “polluters pay” concept, would impose financial liability on major fossil fuel companies for the effects of greenhouse gas emissions. That would create “climate superfunds” that could be used for mitigation and adaptation programs.

Bills to establish these superfunds have been introduced in New York, Massachusetts, and Maryland. The New York bill, for example, would require polluting entities—large oil and gas companies like Exxon Mobil and Chevron—that emitted more than one billion tons of greenhouse gasses between 2000 and 2018 to pay a collective $75 billion over 25 years.

Rothschild, an assistant professor of law, has been doing extensive pro bono work to support the new approach, including researching the constitutionality of the concept, helping to draft legislation, and publicly testifying on the bills. She recently answered some questions about the issue:

1. How did this concept of climate superfunds arise?

There has long been interest in trying to hold fossil fuel companies accountable for not only the fact that they've contributed to climate change but also the fact that they have engaged in a widespread misinformation campaign about the problem. We've had the tobacco settlement with the tobacco companies. We've had legislation to deal with black lung disease caused by coal mining. We've created the federal hazardous waste superfund to address damages from toxic chemicals. I'm interested in the ways we can use those earlier efforts as precedent to try to get some financial support from companies that profited from greenhouse gas pollution.

This issue spurred the climate litigation that we've seen coming out of a lot of cities and states since 2017. These are lawsuits that have been filed as torts, as nuisance suits, frauds, consumer protection suits. Unfortunately, however, those cases have been mired in procedural disputes for years. So that, in part, has led to a push to try to do something similar legislatively by creating state climate superfunds.

2. What do you like about this approach to fighting climate change?

It deals with the environmental loss and damage that we're going to suffer from climate change given the warming that's already baked in, despite other efforts to reduce emissions. Even if we had a national carbon tax or carbon trade regime put in place tomorrow, we're still going to need to spend a lot of money to protect our infrastructure, natural resources, and human life from the effects of climate change. This type of bill is unique in helping to fund projects that are desperately needed and going to be very expensive.

3. Why is this tactic being pursued at the level of

individual states?

(/)

There was an attempt to create a climate superfund in the Inflation Reduction Act, which Congress passed last year. It had the support of a number of Democratic senators and representatives, but unfortunately they could not get the 50 votes they needed in the Senate to include a climate superfund in the bill. The environmental groups that have been pressing for this type of fund decided that their best hope was to try to do something in individual states where there is pretty solid Democratic control.

I would be in favor of a national bill if it was possible. But we are running out of time to address climate change, and given the political polarization in this country on environmental issues, we would need a filibuster-proof Democratic majority in Congress to pass a national bill. I don't think that's likely to happen in the near term. So I think this is the next best option, and it is consistent with the cooperative federalist approach we've taken to many environmental problems since the 1970s. Congress could decide to preempt state efforts to address climate change, but they haven't yet. Until then, I think states can and should press ahead with these bills.

4. You've spent a lot of your time and effort anticipating possible constitutional challenges to this concept. Does your research indicate that climate superfunds could ultimately withstand the various challenges they are likely to face?

If they are designed in the right way, I believe they should withstand constitutional challenges. That comes with a caveat that it might not be possible to hold every major fossil fuel company liable in every state.

In addition, I don't think it would be wise for the states to just pick a number out of the air that they are going to demand as part of their cost recovery from these companies. The amount of money sought has to be connected to the harm and the loss that are actually suffered in the states.

All to say, what I hope to do in this work is to help states design their bills in such a way that they can be best positioned to withstand what are likely to be the most serious constitutional challenges.

5. What comes next? What are you working on, and are other states likely to join this effort?

Right now the strategy has been to try to see if we can get one of these bills through a state legislature and then try to expand to others.

A major part of my current work has been answering legislators' questions about the constitutionality of these bills. For example, the American Petroleum Institute recently released a memo laying out their opposition to New York's bill, including several reasons they believe the bill is unconstitutional. So I drafted a response memo for state legislators explaining why I don't think their arguments have merit and how they're misreading certain cases.

I also recently testified on the Massachusetts bill, and I've previously assisted the counsel in the New York State Senate on drafting the language of that bill. One of my law students, Katherine Welty, '23, helped me throughout the past year with legal research for these bills, and she did amazing work. In addition, I'm hoping to publish a paper related to this topic, though I'm not yet sure what form that will take.

There are potentially difficult legal issues, but I do think that these are promising pieces of legislation, and I hope to see one passed in the next few years.

Also of Interest

Rachel Rothschild Faculty Bio (https://michigan.law.umich.edu/faculty-and-scholarship/our-faculty/rachel-rothschild)

Better Know a Professor: Rachel Rothschild

Environmen Law and Policy Program (https://michigan.law.umich.edu/academics/and-programs/environmental-law-and-policy-program)

(/)

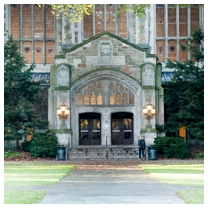
News and Events

NEWS // June 07, 2024

Arthur Etter Is ACS Next Generation Leader (/news/arthur-etter-acs-next-generation-leader)

NEWS // June 07, 2024

Michigan Student Chapter Wins National Award from the American Constitution Society (/news/michigan-student-chapter-wins-national-award-american-constitution-society)



NEWS // June 03, 2024

Michigan Law Hosts Annual Conference of American Law and Economics Association (/news/michigan-law-hosts-annual-conference-american-law-and-economics-association)

NEWS // May 30, 2024

5Qs: Ratner Explores Questions of Ethics and Espionage (/news/5qs-ratner-explores-questions-ethics-and-espionage)

NEWS // May 28, 2024

Michigan Law Externs Learn the Law While Living Abroad (/news/michigan-law-externs-learn-law-while-living-abroad)

NEWS // May 22, 2024

Advisory Committee Named for Law School Dean Search (https://record.umich.edu/articles/advisory-committee-named-for-law-school-dean-search-2/)

› See All(/news)

June
20

NYC Student and Alumni Summer Reception (/events/nyc-student-and-alumni-summer-reception)

2024

(/)

June 28 2024 — **Ann Arbor Summer Gathering** (/events/ann-arbor-summer-gathering)

August 20 2024 — **New Student Orientation- Movie Night on the Quad** (/events/new-student-orientation-movie-night-quad)

See All(/events-calendar)

625 South State Street, Ann Arbor, Michigan 48109-1215 USA

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Student Life and Community (/student-life-and-community)

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Accessibility (/accessibility-statement)

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Visit (/about-michigan-law/visit-michigan-law)

Apply (/admissions)

Give (/alumni/support-michigan-law)

EXHIBIT F

GAO

FOIA THO 0239-24

1 message

Shannon Hill <hillsr@umich.edu> Tue, Mar 26, 2024 at 3:50 PM
To: joe@govoversight.org, info@govoversight.org
Cc: Freedom of Information Act Office <foia-email@umich.edu>

Dear Joe Thomas,

I am writing in response to your Freedom of Information Act request dated March March 6, 2024, which was received on March 7, 2024.

You requested:

> [P]lease provide us copies of all email correspondence sent to or from (including as cc: and/or bcc:) Rachel Rothschild, Assistant Professor, University of Michigan Law School, which is dated at any time from January 1, 2023 through July 31, 2023, inclusive, that includes, anywhere, whether in an email or an attachment thereto, “American Petroleum Institute Opposition to a Climate Superfund Act” and was sent to or from or includes as a copied party any email address ending in “.edu”.

Your request is denied because we have no responsive records. Any records that meet the description you provided, if they were to exist, would not be public records of the University of Michigan pursuant to Section 2 (i) of the Michigan Freedom of Information Act, which defines a “public record” as “a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function…”

Please note that within 180 days from the date of this letter, you have the right to appeal the denial of information to the President of the University or seek judicial review in the court of claims to try to compel disclosure. If you elect to appeal and the President upholds the denial, you may still seek judicial review within the 180-day period.

An appeal to the President must be submitted in writing to: President’s Office, c/o Steve Yaros, The University of Michigan, Ruthven Bldg. Suite 3190, 1109 Geddes Ave., Ann Arbor, Michigan 48109-1079 (or by email to: FOIAappeals@umich.edu). The statement must (1) identify the request and the final determination by the FOIA office that is being appealed, (2) specifically state the word “appeal,” and (3) identify the reason or reasons why the final determination should be reversed.

If you seek judicial review in the Michigan court of claims and prevail, you will be awarded reasonable attorney's fees, costs and disbursements incurred in maintaining the action. If you prevail in part, you may still be awarded complete or partial reimbursement for those expenses. In addition to actual and compensatory damages, you will be awarded punitive damages in the amount of $1,000.00 if the court finds that the University was arbitrary and capricious in its denial.

A copy of Section 10 of the Michigan FOIA is available for your reference and review online at http://foia.vpcomm.umich.edu/foia-right-to-appeal/.

Sincerely,

Shannon Hill
Acting Chief Freedom of Information Act Officer
Freedom of Information Act Office | University of Michigan
http://foia.vpcomm.umich.edu | hillsr@umich.edu | (734) 763-4167

EXHIBIT G

GAO GOVERNMENT ACCOUNTABILITY & OVERSIGHT

MICHIGAN PUBLIC RECORDS REQUEST

March 26, 2024

University of Michigan FOIA Office
3300 Ruthven Building
1109 Geddes Avenue
Ann Arbor, MI 48109-1079

By Email: foia-email@umich.edu

On behalf of Government Accountability & Oversight (GAO), a non-profit public policy organization dedicated to transparency in government and with an active public dissemination and media program, and pursuant to the Michigan Freedom of Information Act, MCL §15.231, *et seq*., please provide us copies of **all email correspondence** sent to or from (including as cc: and/or bcc:) **Rachel Rothschild, Assistant Professor, University of Michigan Law School,** which is **dated at any time from January 1, 2023 through July 31, 2023**, inclusive, that includes, anywhere, whether in an email or an attachment thereto, "**American Petroleum Institute Opposition to a Climate Superfund Act**"[1] and:

1) was sent to or from or includes as a copied party any email address ending in "**.org**".[2]
2) was sent to or from or includes as a copied party any email address ending in "**.gov**", and/or
3) was sent to or from or includes as a copied party any email address ending in "**.com**".

We request entire "threads" of which any responsive electronic correspondence is a part, regardless of whether any portion falls outside of the above time parameter.

We understand there may be some overlap in records responsive to the above due, and do not request duplicates however we do request duplicate listing in any index or log you provide.

In the event that the Office´s custodian of public records determines that a release of a given record would contain confidential or private information or otherwise seek to withhold information, we request to state the reasons for any such withholdings.

We understand that in some instances a public body may charge a fee for the cost of the search, examination, review, copying, separation of confidential from nonconfidential information, and

[1] Quotation marks are not part of a search term, but only delineate it. This is the title of a March 29, 2023, Memorandum "FROM: Rachel Rothschild, Assistant Professor, University of Michigan Law School".
[2] Quotation marks are not part of a search term, but only delineate it.

mailing costs. If your Office expects to seek a charge associated with the searching, copying or production of these records, please provide an estimate of anticipated costs.

As noted earlier in this request, GAO is a non-profit public policy organization dedicated to informing the public of developments in the area of energy and environmental issues and relationships between governmental and non-governmental entities as they relate to those issues. GAO's ability to obtain fee waivers is essential to this work. GAO intends to use any responsive information to continue its work highlighting the nexus between interested non-governmental entities and government agency decision-making. The public is both interested in and entitled to know how regulatory, policy and enforcement decisions are reached. GAO ensures the public is made aware of its work and findings via media, its websites govoversight.org and climatelitigationwatch.org dedicated to broadly disseminating energy and environmental policy news and developments. The public information obtained by GAO have been relied upon by established media outlets, including the Washington Times, Fox News and the Wall Street Journal editorial page.

GAO requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee's own machine or account.

GAO looks forward to your response. In the event you have any questions, please feel free contact me at the below email address.

Thank you for your prompt attention, time and consideration to this matter.

Respectfully submitted,
Joe Thomas
Joe@govoversight.org

Government Accountability & Oversight
30 N. Gould Street
#12848
Sheridan, WY 82801
(434) 882-4217

EXHIBIT H

GAO

FOIA THO 0308-24

1 message

Shannon Hill <hillsr@umich.edu> Wed, Apr 3, 2024 at 4:49 PM
To: joe@govoversight.org, info@govoversight.org
Cc: Freedom of Information Act Office <foia-email@umich.edu>

Dear Joe Thomas,

I am writing in response to your Freedom of Information Act request dated March March 26, 2024, which was received on March 27, 2024.

You requested:

> [P]lease provide us copies of all email correspondence sent to or from (including as cc: and/or bcc:) Rachel Rothschild, Assistant Professor, University of Michigan Law School, which is dated at any time from January 1, 2023 through July 31, 2023, inclusive, that includes, anywhere, whether in an email or an attachment thereto, "American Petroleum Institute Opposition to a Climate Superfund Act" and:
>
> 1) was sent to or from or includes as a copied party any email address ending in ".org".
> 2) was sent to or from or includes as a copied party any email address ending in ".gov",
> and/or
> 3) was sent to or from or includes as a copied party any email address ending in ".com".

Your request is denied because we have no responsive records. Any records that meet the description you provided, if they were to exist, would not be public records of the University of Michigan pursuant to Section 2 (i) of the Michigan Freedom of Information Act, which defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function…"

Please note that within 180 days from the date of this letter, you have the right to appeal the denial of information to the President of the University or seek judicial review in the court of claims to try to compel disclosure. If you elect to appeal and the President upholds the denial, you may still seek judicial review within the 180-day period.

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A copy of Section 10 of the Michigan FOIA is available for your reference and review online at http://foia.vpcomm.umich.edu/foia-right-to-appeal/.

Sincerely,

Shannon Hill

Acting Chief Freedom of Information Act Officer
Freedom of Information Act Office | University of Michigan
http://foia.vpcomm.umich.edu | hillsr@umich.edu | (734) 763-4167

EXHIBIT I

AG Attorney General

Climate Change

Requests for Proposals for Climate Change Litigation

Project Statement

This request for proposals (RFP) is to solicit proposals from attorneys and law firms to serve as Special Assistant Attorneys General (SAAGs) to pursue litigation related to the climate change impacts caused by the fossil fuel industry on behalf of the State of Michigan through the Department of Attorney General (DAG) (together, the State) on a contingency fee basis.

Email Your RFP Question(s) to the Solicitation Managers

This RFP is divided into the following parts:

Proposal Instructions

Statement of Work (SOW)

Proposal Contents

PDF **SAAG Contract**

Timeline
Table 2

Event	Time	Date
RFP issue date	N/A	Thursday, May 9, 2024
Deadline for bidders to submit questions about this RFP	5:00 p.m. Eastern	Friday, May 17, 2024
Anticipated date State will answer bidder questions *No questions regarding the Climate Change RFP process were received.*	5:00 p.m. Eastern	Friday, May 24, 2024

Proposals due	5:00 p.m. Eastern	Wednesday, June 5, 2024
Anticipated timeframe oral presentations will be scheduled, if any *The anticipated timeframe for oral presentations has been pushed back to provide more time to review proposal materials.*	N/A	Monday, June 17–Friday June 21, 2024
Anticipated date State will make decision	N/A	Prior to Friday, August 2, 2024

Climate Change

AG Attorney General

Statement of Work (SOW)

1. Introduction.

This RFP is to solicit proposals from attorneys and law firms with experience and interest in pursuing constitutional, statutory, tort and other applicable common law claims against the fossil fuel industry for knowingly causing adverse impacts on climate, for deceiving the public about the climate changes that they knew their products would cause, and for the costs the State of Michigan has spent and will continue to spend to address and recover from the impacts of climate change. The Attorney General of the State of Michigan seeks to hold fossil fuel companies [and the industry's trade association] that profited from their actions for the damage they have caused and are causing. This RFP is for representation of the State of Michigan as duly-appointed Special Assistant Attorneys General on a contingency fee basis.

2. Background and Purpose.

The State of Michigan, its departments and agencies, and the State's businesses, residents, infrastructure, public and private lands, and natural resources suffer from the negative impacts of climate change. Climate change negatively impacts the State's economy by, among other things, decreasing tourism, harming agriculture, and depleting our tax base. The fossil fuel industry has known for decades that the use of fossil fuel products creates greenhouse gas pollution that warms the planet and leads to climate change. The impacts of climate change, in turn, have catastrophic and [potentially] irreversible consequences ranging from harmful algal blooms, uptick in invasive species and disease-bearing pests, atmospheric and ocean warming, melting polar ice caps and glaciers, more extreme and volatile weather, drought, and sea level rise. The fossil fuel industry was aware of the negative impacts of extraction and use of fossil fuels, but continued to knowingly engage in business practices and conduct that harmed the public's health, safety, and welfare and the environment. The fossil fuel industry also hid information and deceived the public and consumers, both in and outside of Michigan, about the role of their products in causing the global climate crisis.

The environment in and around Michigan, including the precious Great Lakes, is changing as a result of fossil fuel product use and emissions, leading to increased costs and losses to the State related to damaging severe weather, damage to State property and resources held and managed for the public, losses to property and business and associated loss of tax revenue, injury or destruction of State-owned and State-operated property and facilities, increased costs to maintain infrastructure, increased costs of providing public services, and increased health care and public health costs, among other costs.

The Department of Attorney General (DAG) has long enforced Michigan's environmental statutes and rules to protect the environment, natural resources, and public health and to require compliance with standards and limits on discharges into our environment. The regulatory framework alone may not fully account for the damage caused by fossil fuel product use and emissions, however, due to, among other things, the concealment of the known true hazards of the use of fossil fuels by the industry. Therefore, the State seeks to build on Michigan's longstanding history of environmental and resource protection to address the climate change crisis by retaining Special Assistant Attorneys General (SAAGs) to pursue constitutional, statutory, tort and other applicable common-law claims extending to the deception and other wrongful actions by the fossil fuel industry to require the parties who profited from hiding the consequences of fossil fuel use to bear the costs of climate change on Michigan, rather than the State, taxpayers, or residents of Michigan.

The work to be performed consists of assisting the DAG in gathering needed information, determining what claims will be brought, drafting the complaints (as appropriate), conducting affirmative and defensive discovery, taking and defending depositions, motion practice, and preparing for and conducting any trials that may proceed. Without limitation to the above, the DAG will direct the role of Local Counsel. The DAG, at all times, will direct the litigation in all respects, including but not limited to, whether and when to initiate litigation, against whom actions will be taken, the claims to be brought in said litigation, approval and rejection of all settlement offers, and the amount and type of damages and injunctive relief to be sought.

3. In Scope.

The scope of work includes providing all necessary personnel, labor, materials, services, equipment, supplies, time, travel, effort, skill, and supervision required to examine, investigate, recommend, and litigate the State's possible constitutional, statutory, tort and other applicable common law claims against fossil fuel industry defendants including but not limited to extractors, producers, transporters, refiners, manufacturers, distributors, promoters, marketers, and/or sellers of fossil fuel products.

SAAGs will be appointed to represent the State in litigation against fossil fuel industry defendants. SAAGs will develop and propose a litigation strategy to the Attorney General or her designees, including:

- Identifying viable claims and causes of action against fossil fuel industry defendants.
- Identifying possible defendants.
- Pursuing all claims and actions in connection with an approved litigation strategy against defendants approved by the Attorney General.
- Handling all appeals that may arise out of the litigation, subject to prior approval by the Attorney General.

Prior to providing any legal services on behalf of the State, an attorney must be appointed by the Attorney General as a SAAG. SAAGs must consult in advance with and advise the Attorney General's designated representatives regarding all substantive issues affecting the litigation, as set forth in more detail in the SAAG Contract.

4. Out of Scope.

The work does not include regulatory enforcement or claims under State or federal environmental laws not specifically and expressly agreed to by the Attorney General.

EXHIBIT J

MICHIGAN BUSINESS ORGANIZATIONS BAND TOGETHER IN OPPOSITION TO MI ATTORNEY GENERAL FOSSIL FUELS LAWSUIT

We the undersigned organizations representing thousands of businesses from every industry, sector, and corner of the state of Michigan write to share our collective disappointment and strong opposition to the announced intent by Attorney General Dana Nessel to sue the fossil fuels industry.

This dangerous and inappropriate use of a state office to attack and demonize Michigan businesses would have a negative and chilling effect on the state's entire economy. Every business and household in this state relies upon access to affordable and reliable energy. Our healthcare system, building and construction sector, and manufacturing supply chains all succeed or fail based on this fundamental truth. The actions by the Attorney General are not in line with those realities, nor are they in line with our state's goals of growing our population, increasing access to affordable housing and childcare, or growing high-income and knowledge-based jobs.

This approach by the Attorney General to leverage taxpayer resources for the sole purpose of what amounts to nothing more than jumping on a partisan bandwagon to inappropriately single out one industry for political gain. Courts from across the country have questioned the logic and standing of lawsuits that attempt to specify and discriminate against certain businesses or business sectors surrounding global climate change. Indeed, the overarching question from many of these courts seems to be whether such ill-posited attempts to seek damages against private companies based on little or no legal backing in any way serves the public interest.

It is additionally problematic the Attorney General is attempting to pursue this litigation by the way of a request for proposal to private trial attorneys, who stand to benefit in the form of massive financial awards through this contingency-fee structure. This is money that will provide no benefit taxpayers but only enrich a select few who curry the favor of the Attorney General herself.

It is troubling that the Attorney General would attack Michigan's ability to retain and grow jobs on a global scale. We call on the Attorney General to end this frivolous effort to target and stigmatize an industry critical to our state's ability to thrive and compete both nationally and globally.

Sincerely,

Michigan Chamber of Commerce
Michigan Manufacturers Association
Michigan Retailers Association
Michigan Oil & Gas Association MOGA The Voice of Michigan's Petroleum Industry
Detroit Regional Chamber
Grand Rapids Chamber
Michigan Chemistry Council
Michigan Petroleum Association MPAMACS Michigan Association of Convenience Stores

EXHIBIT K

(/)

Rachel Rothschild

Assistant Professor of Law

318 Hutchins Hall

734.763.6361 (tel:734.763.6361)

Email (mailto:rrothsch@umich.edu)

Curriculum Vitae (/sites/default/files/2024-05/Rothschild%20CV%20-%20May%202024.pdf)

Rachel Rothschild is an assistant professor of law at the University of Michigan Law School. Before joining the Michigan Law faculty, she was a legal fellow at the Institute for Policy Integrity, where she remains an affiliated scholar.

Rothschild's scholarship sits at the intersection of law, history, and policy. She is the author of *Poisonous Skies: Acid Rain and the Globalization of Pollution* (University of Chicago Press, 2019) and has written numerous articles and essays on pollution problems for academic journals and media outlets. Her recent research examines climate change litigation, as well as the past and present regulation of toxic substances.

From 2015 to 2017, she was an assistant professor and faculty fellow at New York University's Gallatin School of Individualized Study.

Related Information

Areas of Interest

- Administrative Law (/academics/areas-interest/administrative-law)
- Environmental and Energy Law (/academics/areas-interest/environmental-and-energy-law)
- Legal History (/academics/areas-interest/legal-history)

Education

- Princeton University, BA, *magna cum laude*
- New York University, JD, *cum laude*; Furman Academic Scholars Program
- Yale University, MA, MPhil, and PhD in history, Program in the History of Science and Medicine

Recent Courses

- Environmental Law and Policy (/courses/environmental-law-and-policy)
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EXHIBIT L

STATE NUISANCE LAW AND THE CLIMATE CHANGE CHALLENGE TO FEDERALISM

RACHEL ROTHSCHILD*

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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.

am deeply grateful to Katrina Wyman for her invaluable guidance on earlier drafts. Further thanks to Richard Revesz and Catherine Sharkey for their detailed feedback, Barry Friedman and members of the Furman Scholars program for many valuable discussions and comments, and the editors of the NYU Environmental Law Journal for their thoughtful suggestions.

[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*

[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]

[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]

[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

[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

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

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.

EXHIBIT M

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Employment

University of Michigan School of Law
Assistant Professor — July 2022 – Present

Institute for Policy Integrity
Affiliated Scholar — July 2022 – Present
Legal Fellow — March 2021 – June 2022

New York University Gallatin School — August 2015 – August 2017
Assistant Professor and Faculty Fellow

Education

New York University School of Law, New York, NY — 2020
J.D., cum laude, Furman Academic Scholars Program.

Yale University, New Haven, CT — 2015
Ph.D., History, Program in the History of Science & Medicine. Awarded with Distinction.
M.A. and M.Phil. — 2012

Princeton University, Princeton, NJ — 2008
B.A., magna cum laude, History, Program in the History of Science.
Certificates in Environmental Studies and Creative Writing.

Publications

Book

Poisonous Skies: Acid Rain and the Globalization of Pollution, University of Chicago Press (2019).

Articles and Book Chapters

The Origins of the Major Questions Doctrine, 100 Ind. L. J. (forthcoming 2024).

Physicists as Environmental Experts (*Clifford Symposium, DePaul Law Review, forthcoming 2024).

Unreasonable Risk: The Failure to Ban Asbestos and the Future of Toxic Substances Regulation, 47 HARVARD ENV'T L. REV. 501 (2023).

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Populations on the Brink: Reducing Vulnerability to Climate Change Can Reduce a Population's Vulnerability to Poverty, EARTH (Jan. 2009) (second author).

Reports

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Regulating New Fossil-Fuel Appliances Under Section 111(b) of the Clean Air Act, INST. FOR POL'Y INTEGRITY (with Jack Lienke, Henry Engelstein, and Nardos Girma) (Oct. 15, 2021).

Toward Rationality in Oil and Gas Leasing Building the Toolkit for Programmatic Reforms, INST. FOR POL'Y INTEGRITY (with Max Sarinsky) (Aug. 6, 2021).

Regulating Risk from Toxic Substances: Best Practices for Economic Analysis of Risk Management Options Under the Toxic Substances Control Act, INST. FOR POL'Y INTEGRITY (with Jack Lienke) (July 29, 2021).

Tune Up: Fixing Market Failures to Cut Fuel Costs and Pollution from Cars and Trucks, INST. FOR POL'Y INTEGRITY (with Jason Schwartz) (April 22, 2021).

Teaching Experience

University of Michigan Law School
Environmental Law and Policy
Climate Change Law, History and Policy

New York University Gallatin School
Pollution and Policy
Technology and the Environment

New York University School of Law
Teaching Assistant, Administrative Law
Teaching Assistant, Legislation and Regulation

Yale University
History of Pollution (selected to design and direct the course through competitive process)
Teaching Assistant, Catastrophe and the Earth Sciences
Teaching Assistant, Science and Technology in the United States: From Franklin to Facebook

Fellowships, Awards and Honors

NYU School of Law, Environmental Law Award	2020
Robert McKay Scholar (Top 25% of students at NYU law after four semesters)	2019
Furman Academic Scholarship (Full tuition scholarship to NYU law)	2017 – 2020
Council on Foreign Relations International Affairs Fellowship (Declined)	2017
Hans Gatzke Prize, Yale University (Outstanding Dissertation in European History)	2015
Princeton Society of Fellows Finalist	2015
Science History Institute Rumford Scholarship	2013
Society for the History of Technology (SHOT) Joan Cahalin Robinson Prize	2012
American Meteorological Society Graduate Fellowship in History of Science	2012
American-Scandinavian Foundation Research Grant	2012
Yale MacMillan Center International Dissertation Research Grant	2012
National Science Foundation Graduate Research Fellowship	2010 – 2015
Jonathan Bourne Fellow – Yale Graduate School	2009
The Horace H. Wilson '25 Senior Thesis Prize in the History of Science, Medicine and Technology, Princeton University	2008
Environmental Studies Thesis Prize (Honorable Mention), Princeton University	2008

Selected Talks and Conference Presentations (Invited talks indicated by *)

* Yale Legal History Forum, March 4, 2025.

Foundations of the Modern Administrative State, American Society for Legal History, October 24-26, 2024.

* Clifford Symposium 30: The Legacy of Industrywide Deadly Misconduct, DePaul College of Law, June 6-7, 2024.

"Juristocracy and Administrative Governance: From Benzene to Climate."
AALS Environmental Law Section, January 4-7, 2023.

* Boston College Law School Annual Junior Faculty Roundtable, March 17, 2023.
* Northwestern Public Law Colloquium, April 12, 2023.
  Administrative Law New Scholarship Roundtable, University of Texas Law School, May 15-17, 2023.
* Michigan State University College of Law, Faculty Workshop, September 13, 2023.
* Harvard Public Law Colloquium, February 12, 2024.
* Georgetown Environmental Law Colloquium, February 29, 2024.
* NYU Environmental Law Colloquium, April 23, 2024.

* "The Jurisprudence of Justice Gorsuch and the Future of Environmental, Energy, and Natural Resources Law," American Bar Association Section of Environment, Energy, and Resources Conference on Environment Law, April 28, 2023.

"Unreasonable Risk: The Failure to Ban Asbestos and the Future of Toxic Substances Regulation," Society for Environmental Law and Economics, NYU School of Law, June 9-10, 2022.

* Panelist, "Regulation and the World Economy," Global Legal Histories: A Symposium, Shelby Cullom Davis Center & Fung Global Fellows Program, Princeton University, March 6-7, 2020.

* "Poisonous Skies: Acid Rain and the Globalization of Pollution."
  Natural Resources Defense Council, July 24, 2019
  NYU Uncommon Salon, March 20, 2018.

* "Energy Industry Research and the Politics of Doubt," Harvard Business School, Business, Government and International Economy Unit, Cambridge, MA, January 24, 2017.

Panel Organizer, "Toxic Knowledge in a Global Context: Science and the Regulation of Chemical Risks," and Presenter "Globalizing Toxic Threats to Health," History of Science Society Annual Meeting, Atlanta, Georgia, November 3-6, 2016.

* "Environmental Expertise in a Global Commons." *Futures Past: Experts, Development and Sustainability*. Institute for Advanced Sustainability Studies, Potsdam, Germany, April 28-29, 2016.

* "Environmental Science and International Governance at the United Nations, European Communities, and Organisation for Economic Cooperation and Development," *Organizing Science for Humanity, from the World Brain to the World Bank*, Columbia University Committee on Global Thought, February 12, 2016.

*"History for a Toxic Planet," McMaster University, History Department Colloquium, January 14, 2016.

*"Transnational Air Pollution and Environmental Diplomacy," *Nature Protection, Environmental Policy and Social Movements in Communist and Capitalist Countries*, German Historical Institute, Washington D.C., May 29-30, 2015.

* "Provocations: New Directions in Energy and Environmental History," Joint Center for History and Economics, Harvard University, November 14, 2014.

***** "The European Air Chemistry Network and the Construction of a 'Global' Climate," Science History Institute, Philadelphia, Pennsylvania, October 21, 2014.

"Beyond National Needs: Acid Rain and Environmental Protection in Europe," Panel: The Toxic Century: Discovering & Quantifying Poisons in the Environment, American Society for Environmental History Annual Meeting, San Francisco, CA, March 12-16, 2014.

***** "Modeling without 'Target' Maps: Scientific Cooperation on Atmospheric Pollution in the Cold War," STS Circle, Program on Science, Technology and Society, Harvard University, February 10, 2014.

***** "Scientific Uncertainty and 'Sufficient Knowledge': The Development of a European-wide Research Program on Acid Rain," Cambridge University, Department of History and Philosophy of Science, Twentieth Century Think Tank, February 21, 2013.

***** "Meteorology in the 'New Era' of Environmental Diplomacy," American Meteorological Society Annual Meeting, Austin, Texas, January 8, 2013.

"Détente from the Air: Monitoring Pollution and European Integration in the Cold War," Panel: Airy Curtains, Society for the History of Technology, Annual Meeting, Copenhagen, Denmark, October 4-7, 2012. *Awarded Joan Cahalin Robinson Prize.

Panel Organizer, "Costs and Benefits: Life Scientists and the Assessment of Wartime Technologies, from 1945 to the Vietnam War," Presented Paper "Environmental Consciousness in the Cold War: Radioecologists, Nuclear Technology, and the Atomic Age." History of Science Society Annual Meeting. Cleveland, Ohio, November 3-5, 2011.

"Burning Rain in the Cold War: Transboundary Air Pollution, Atmospheric Science, and the Development of International Law and Policy," *Chemical Weather and Chemical Climate: Body, Place, Planet in Historical Perspective*, Science History Institute, Philadelphia, Pennsylvania, March 31-April 2, 2011.

Academic and Professional Service

External

Reviewer, *Diplomatica*, *Environmental History*, *Isis: Journal of the History of Science Society*, *Journal of the History of Medicine and Allied Sciences*, *Scandinavian Journal of History*, and *The British Journal for the History of Science*.
AALS Legal History Section Board, January 2022 – present.
Pro bono work for the Center for Biological Diversity, Environmental Defense Fund, Rockefeller Family Fund, Massachusetts 350, Better Future Project, New York PIRG, and Vermont PIRG on climate legislation and toxic chemical regulation, July 2022 – present.

University of Michigan Law School

Research Faculty Appointments Committee (Entry Level and Lateral Candidates), 2023-2024.
Committee on Academic Standards and Practices, Curriculum, and Student Recognition, 2022-2023.
Faculty Advisor, Michigan Journal of Environmental and Administrative Law, 2022 – present.

New York University

Executive Editor, NYU Environmental Law Journal, 2019-2020; Staff Editor, 2018-2019.
Coordinator, New York City History of Science Consortium Lecture Series and Workshop, 2015-2017.

Yale University

Organizing Committee Member, Yale University's Environmental History Northeast Regional Conference, "Two Kingdoms: New Perspectives on Flora and Fauna in Environmental History." 2011-2012.
Coordinator, Yale University's Environmental History Colloquium, 2011-2012.
Co-Coordinator, Yale University's History of Science and Medicine Holmes Workshop, 2010-2011.

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EXHIBIT N

2019 WL 2552854
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

Hassan M. AHMAD, Plaintiff-Appellant,
v.
UNIVERSITY OF MICHIGAN, Defendant-Appellee.

No. 341299
|
June 20, 2019

Court of Claims, LC No. 17-000170-MZ

Before: Cameron, P.J., and Ronayne Krause and Tukel, JJ.

Opinion

Per Curiam.

***1** In this action brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, plaintiff, Hassan M. Ahmad, appeals as of right the November 20, 2017 order of the Court of Claims granting summary disposition in favor of defendant, the University of Michigan ("the University"), pursuant to MCR 2.116(C)(8) (failure to state a claim). Because plaintiff alleged sufficient facts to establish a prima facie claim under the FOIA, we reverse the judgment of the Court of Claims and remand.

I. BASIC FACTS

Plaintiff challenges the University's denial of his FOIA request. Dr. John Tanton—"an ophthalmologist and conservationist," according to the University, and "a figure widely regarded as the grandfather of the anti-immigration movements," according to plaintiff—donated his personal writings, correspondence, and research (collectively, "the Tanton papers") to the Bentley Library's collection. His donation included 25 boxes of papers, but boxes 15-25 were to remain closed for 25 years from the date of accession, i.e., until April 2035, purportedly in accordance with the terms of the gift. [1]

Plaintiff filed a FOIA request with the University, seeking all of the Tanton papers, including those found in boxes 15-25 and marked as "closed." The University eventually denied plaintiff's request, asserting that the Tanton papers were closed to research until April 2035 and were therefore not "public records" subject to FOIA disclosure because they were not "utilized, possessed, or retained in the performance of any official University function."

Following plaintiff's unsuccessful administrative appeal, he filed suit in the Court of Claims. The Court of Claims granted the University's motion for summary disposition, concluding that the Tanton papers are not "public records." This appeal followed.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999). Summary disposition under MCR 2.116(C)(8) is appropriately granted if the plaintiff has failed to state a claim on which relief can be granted. "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint.... A motion under MCR 2.116(C)(8) may be granted only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden*, 461 Mich. at 119 (quotations marks and citations omitted). In reviewing the sufficiency of a complaint, a court accepts as true and construes in a light most favorable to the nonmovant all well-pleaded factual allegations. *Id.* And when deciding a motion brought under this subrule, a court considers only the pleadings. *Id*. at 119-120.

***2** The interpretation and application of a statute is a question of law that this Court reviews de novo. *Whitman v. City of Burton*, 493 Mich. 303, 311; 831 N.W.2d 223 (2013).

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we

> begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. [*Id*. at 311-312 (citations omitted).]

Finally, we also review legal determinations under the FOIA de novo. *Herald Co., Inc. v. Eastern Mich. Univ. Bd. of Regents*, 475 Mich. 463, 471-472; 719 N.W.2d 19 (2006).

III. WHAT CONSTITUTES A "PUBLIC RECORD" UNDER THE FOIA

Unless an exception applies, a person who provides a proper written request for a public record is entitled to " 'inspect, copy, or receive copies of the requested public record of the public body.' " *Amberg v. Dearborn*, 497 Mich. 28, 30; 859 N.W.2d 674 (2014), quoting MCL 15.233(1). Defendant argues that the Tanton papers are not subject to disclosure under the FOIA because under the terms of the gift agreement, they never became public records, and only public records are subject to FOIA disclosure. See MCL 15.233(1).

Under the FOIA, a " '[p]ublic record' means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i).[2] Thus, the sole issue before us is whether plaintiff alleged facts sufficient to show that the Tanton papers constitute a public record under the FOIA. Here, there is no doubt that plaintiff adequately alleged that the University had "possession of" or "retained" the documents at issue. Accordingly, the only question remaining is whether said possession or retention was alleged to have been done "in the performance of an official function."

While the FOIA defines what constitutes a "public record," it does not define what constitutes an "official function." When a statute does not define a term, we are to give the term its plain and ordinary meaning. *Williams v. Kennedy*, 316 Mich. App. 612, 616; 891 N.W.2d 907 (2016); see also *Kestenbaum v. Mich. State Univ.*, 414 Mich. 510, 538; 327 N.W.2d 783 (1982) (opinion by RYAN, J.) (noting that because "official function" is not defined in the FOIA, "the term must be construed according to its commonly accepted and generally understood meaning"). We may consult a dictionary in ascertaining plain meanings. *Williams*, 316 Mich. App. at 616. "Official" is defined, in pertinent part, as "AUTHORITATIVE, AUTHORIZED." *Merriam-Webster's Collegiate Dictionary* (11th ed). And "function" is defined as "the acts or operations expected of a person or thing." *Id*. Thus, an "official function" of the Bentley Library, as intended under the FOIA, includes those authorized acts or operations that are expected of the Library as it relates to its position as a public library. In order to help determine whether any given act or operation is authorized, we turn to the University's bylaws.

***3** The University's bylaws provide that the Bentley Library's historical collection is "maintained for the purpose of *collecting*, *preserving*, and *making available to students* manuscripts and other materials pertaining to the state, its institutions, and its social, economic, and intellectual development."[3] Bylaws, § 12.04 (emphasis added). The University does not dispute that it had collected and possessed the Tanton papers but instead argues that because the papers had never been made available to anyone, let alone students, then the papers cannot constitute a public record. In making this argument, the University says that in order to qualify as a "public record" for FOIA purposes, all three aspects of the bylaws' stated purpose are required to have been accomplished. The University primarily relies on the conjunctive "and" in the list, "collecting, preserving, *and* making available to students." (Emphasis added.) However, we believe that the University is reading the conjunctive "and" in this context incorrectly.

We agree with the University that the purpose for the Library's existence is defined as having three distinct aspects, which are indeed provided for in the conjunctive, i.e., collecting, preserving, *and* making available to students the Library's materials. We generally are to read the conjunctive word "and" as a true conjunctive, see *Coalition Protecting Auto No-Fault v. Mich. Catastrophic Claims Ass'n. (On Remand)*, 317 Mich. App. 1, 14; 894 N.W.2d 758 (2016); *People v. Comella*, 296 Mich. App. 643, 649; 823 N.W.2d 138 (2012) (both cases explaining that the words "and" and "or" are not interchangeable and their strict meanings, including the conjunctive meaning of "and," should be followed unless legislative intent shows otherwise); *OfficeMax, Inc. v. United*

States, 428 F3d 583, 589 (CA 6, 2005) ("[T]he Supreme Court has said that 'and' presumptively should be read in its 'ordinary' conjunctive sense unless the 'context' in which the term is used or 'other provisions of the statute' dictate a contrary interpretation."). However, as the cases above show, the meaning of "and" and "or" may be flexible depending on context. *Heckathorn v. Heckathorn*, 284 Mich. 677, 681-682; 280 N.W. 79 (1938). We do not read this list as requiring all three aspects *to have been completed* in order for the Library to have been acting in furtherance of its purpose, as described in the bylaws.

Because the Tanton papers have never been made available to students, if the University's construction of the statute were correct, then none of what it has done to date with respect to the papers has been in the performance of an official function. The flaw with the University's argument is that while all three aspects of the Library's purpose are relevant to the Library's purpose and mission, they do not each have to have been completed in order for the Library's acts to have been in furtherance of its purpose. Instead, from the context of the bylaws, all that is required is that the Library's actions were done *with the intention* that all three aspects of its stated purpose were to be fulfilled. This interpretation gives the conjunction "and" in the bylaws its proper meaning. For example, the act of presently collecting and acquiring papers that the Library intends to preserve and make available to students at a future date would be in the performance of its official function. But the act of acquiring writings or documents that the University has no intention of ever making available to students would not be in the performance of its official function. Therefore, the Library doing any act in furtherance of any single aspect of its stated purpose, while intending to accomplish the other aspects, is doing the act "in the performance of an official function." [4]

***4** Here, plaintiff sufficiently pled that defendant was storing and maintaining the Tanton papers, which is consistent with the stated purposes of the Library's official functions. The fact that those materials were not subject to disclosure to students or research does not detract from the fact that the act of keeping those materials is part of the Library's purpose. Importantly, plaintiff's complaint can be read to allege that the Tanton papers were "closed" to research until April 2035. The clear implication is that the University was holding the papers with the intent to open them to research (and students) at that later time. Thus, the University's acts of collecting and preserving the papers were in furtherance of its official purpose. Accordingly, we read the complaint as alleging that defendant "maintained the records" in the performance of an official function, which, under FOIA's definitions, renders them "public records." Therefore, contrary to the ruling of the Court of Claims, the complaint states a valid claim that the papers are public records.

Further, the Michigan Community Foundation Act (MCFA), MCL 123.901 *et seq*., and its predecessor act, 1921 PA 136, support our conclusion that the Library's act of holding onto the Tanton papers was an official or "authorized" function. MCL 123.905(3) of the MCFA states:

> A public library may receive and accept gifts and donations of real, personal, or intangible personal property, for the library, and shall hold, use, and apply the property received for the purposes, in accordance with the provisions, and subject to the conditions and limitations, if any, set forth in the instrument of gift. [5]

Thus, a public library receiving a gift is authorized by statute to "hold, use, and apply" the gift for the purposes set forth in the donor's agreement, subject to any conditions or limitations expressly made. Therefore, the Bentley Library carries out an "official function" as it relates to its gifts and donations when it holds onto such gifts and donations in accordance with the donation agreement. [6]

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W. Rptr., 2019 WL 2552854

Footnotes

1 The University indicates that the restriction is memorialized in a charitable gift agreement, but that agreement is not contained in the lower court record. Regardless, plaintiff in his complaint has referenced the existence of the agreement and has acknowledged that the records were "marked 'closed for 25 years from the date of accession, or until April 6, 2035.' " Further, attachments to plaintiff's complaint show that the records were "closed to research until April 2035."

2 The definition for "public record" can now be found in MCL 15.232(i), but the definition was located at MCL 15.232(e) prior to the June 17, 2018 effective date of 2018 PA 68.

3 The bylaws of the Board of Regents comprise the rules concerning the more important matters of general University organization and policy rather than administrative details and specific technical requirements of the several fields of instruction. The bylaws are adopted directly by the Board of Regents in the exercise of the Board's legislative powers and thus are binding authority on the University. See University of Michigan Board of Regents, *Bylaws Preface* <http://regents.umich.edu/bylaws/bylaws_pref.html> (accessed June 4, 2019). Chapter XII of the Bylaws pertains the University's libraries, with § 12.04 pertaining specifically to the Bentley Library. University of Michigan Board of Regents, *Chapter XII. The University Libraries* <http://regents.umich.edu/bylaws/bylaws12.html> (accessed June 4, 2019).

4 To the extent the University argues that disclosure "would likely dissuade other similarly situated individuals from donating private papers of historical significance to public institutions," or more generally frustrate public policy, we note that any such public policy consideration is for the Legislature to make. We do no more here than construe the public policy choice which the Legislature has enshrined in current law; it remains free to change that public policy as it sees fit, although we are not free to make such public policy choices. See *Robinson v. Detroit*, 462 Mich. 439, 474; 613 N.W.2d 307 (2000) (CORRIGAN, J., concurring) ("[A] Court exceeds the limit of its constitutional authority when it substitutes its policy choice for that of the Legislature."). Indeed, the Legislature appears to have provided a method that protects such donors through its enactment of MCL 397.381, 1921 PA 136, and, more recently, the Michigan Community Foundation Act (MCFA), MCL 123.901 *et seq*. See discussion, *infra*, in this opinion.

In addition to any protections afforded by the Legislature through its passage of acts such as the MCFA, future donors could ensure the privacy of their papers during their lifetimes, as Dr. Tanton apparently sought to do, by donating them to a public university through a will. Dr. Tanton donated his papers during his lifetime, transferring the title and the copyright at that time. Had he instead maintained ownership and control during his lifetime and only left the papers to the University by way of a will, the papers could not have become public records during his lifetime, as they would not have been "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function," MCL 15.232(i), until after his death.

5 We note that at the time plaintiff made his FOIA request to the University, MCL 397.381(1) was in effect and was substantively the same as the later-enacted MCFA, which became effective before the Court of Claims issued its ruling and which also repealed MCL 397.381(1). See 2017 PA 38.

6 We had asked the parties to file supplemental briefing in regard to the applicability of the MCL 123.905(3) and how its application may support granting defendant's motion for summary disposition under MCR 2.116(C)(8). However, after reviewing the briefing, we have determined that the University cannot rely on MCL 123.905(3), or its predecessor, MCL 397.381(1), to dismiss plaintiff's action under MCR 2.116(C)(8). That is because, assuming the University is required to not disclose the Tanton papers under the terms of the gift instrument, this fact relates to an affirmative defense the University may raise. See MCL 15.243(d); *Messenger v. Consumer & Ind. Serv.*, 238 Mich. App. 524, 536; 606 N.W.2d 38 (1999); *Detroit News, Inc.*

v. Detroit, 185 Mich. App. 296, 300; 460 N.W.2d 312 (1990). And affirmative defenses generally are not implicated in a motion brought under MCR 2.116(C)(8). See *Booth Newspapers, Inc. v. Regents of the Univ. of Mich.*, 93 Mich. App. 100, 109; 286 N.W.2d 55 (1979). We offer no opinion on how either MCL 123.905(3) or its predecessor, MCL 397.381(1), might affect an analysis under MCR 2.116(C)(10) or at trial.

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