LOCATING LIABILITY FOR CLIMATE CHANGE: A COMPARATIVE ANALYSIS OF RECENT TRENDS IN CLIMATE JURISPRUDENCE

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Throughout the last half decade, plaintiffs across the country, and indeed the world over, have turned to courts in the eleventh hour hoping to hold governments and corporations responsible for causing and exacerbating the climate crisis. Most, but not all, of these cases have been unsuccessful. Notably, the Ninth Circuit recently dismissed Juliana v. United States*, the well-known lawsuit wherein twenty-one young people alleged that the United States federal government violated their substantive due process rights by affirmatively causing climate change. In the wake of the* Juliana *holding, this Paper surveys recent climate-related case law in order to unpack why some cases have proven more successful than others. Specifically, the Paper focuses on two theories of liability for climate change: public nuisance and the public trust doctrine. In the public trust context, young people, the* Juliana *plaintiffs included, have brought a concerted campaign against governments seeking to vindicate alleged constitutional and public trust obligations. Such cases have been raised across the country in both federal and state courts and have led to mixed, albeit mostly negative, results. In the public nuisance context, cities, states, and counties have sued fossil-fuel companies for damages to compensate for these governments' climate-related expenses. In comparing these two burgeoning lines of case law, this Paper focuses on the procedural obstacles holding climate claimants back—standing, political question doctrine, and preemption—and argues that none of these concerns should foreclose relief in either the public nuisance or the public trust contexts.*

I. INTRODUCTION 886
II. A TORT THEORY OF CLIMATE LIABILITY 888
A. The First Wave of Climate Nuisance Suits Crashes 888

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B. A Second Wave of Nuisance Suits Rises 891
III. THE ATMOSPHERIC TRUST LITIGATION CAMPAIGN: FROM THE STATES TO THE FEDERAL GOVERNMENT 895
IV. COMPARING THE PUBLIC NUISANCE SUITS TO ATMOSPHERIC TRUST LITIGATION 903
A. Preemption by the Clean Air Act 903
B. Justiciability 910
V. ATMOSPHERIC RECOVERY LITIGATION: A HYBRID BETWEEN THE TWO THEORIES 913
VI. CONCLUSION 916

I. INTRODUCTION

"It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses."[1] Warming oceans, rising seas, severe storms, and longer droughts threaten the lives of hundreds of millions of people all over the world, mostly those historically on the wrong end of industrial development.[2] Despite the threat, the United States, the country most responsible for causing climate change,[3] has taken precious little action to address the crisis.[4]

In response, citizens, cities, and states have come to courts in search of answers.[5] Yet, courts reviewing these cases continue to turn away from such a global and complex crisis.[6] Instead, courts have

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[1] Juliana v. United States (*Juliana II*), 947 F.3d 1159, 1175 (9th Cir. 2020) (Staton, J., dissenting).

[2] Myles R. Allen et al., *Framing and Context*, *in* GLOBAL WARMING OF 1.5°C, at 49, 53 (Valérie Masson-Delmotte et al. eds., 2018), https://perma.cc/7P7D-SRVB [hereinafter IPCC Special Report].

[3] Justin Gillis & Nadja Popovich, *The U.S. is the Biggest Carbon Polluter in History. It Just Walked Away from the Paris Climate Deal.*, N.Y. TIMES (June 1, 2017), https://perma.cc/CR62-YKLB.

[4] There are no federal statutes specifically aimed at combatting climate change. *Climate Change Laws of the World*, GRANTHAM RES. INST. ON CLIMATE CHANGE & ENVIRONMENT, https://perma.cc/8TNT-VL7H (last visited July 2, 2020). However, the Clean Air Act provides a framework to regulate greenhouse gases. Massachusetts v. U.S. Envtl. Prot. Agency (*Massachusetts v. EPA)*, 549 U.S. 497, 500 (2007).

[5] *See, e.g.*, *Juliana II*, 947 F.3d at 1165 (narrating the story of a major lawsuit brought by twenty-one young people alleging that the federal government, by both failing to address and affirmatively cause climate change, violated young peoples' constitutional rights and the government's restrictive public trust obligations); Am. Elec. Power Co. v. Connecticut, (*Am. Elec. Power Co. II)*, 564 U.S. 410, 424 (2011) (holding in a lawsuit brought by multiple states, a city, and private organization that federal law (Clean Air Act (CAA)) precludes any federal common-law right to "seek abatement of carbon-dioxide emissions").

[6] *See* Douglas Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 28 (2011) (chronicling how and why courts hearing early climate change cases retracted from the scope and severity of the crisis rather than engage in legal questions posed by litigants).

dismissed climate claims for lack of standing,[7] as nonjusticiable political questions,[8] or as precluded by the Clean Air Act[9] (CAA).[10] Indeed, especially in the wake of the Ninth Circuit's recent dismissal of *Juliana v. United States (Juliana II)*,[11] the notorious lawsuit alleging the federal government violated young peoples' constitutional rights by affirmatively causing climate change, many analysts questioned whether the judiciary is a viable outlet for assigning and allocating liability for climate change.[12]

In seeking to unpack courts' apprehension to meaningfully address climate change, this Chapter analyzes two common law legal theories[13] as potential avenues for assigning and mandating liability for climate change—public nuisance and the public trust doctrine. In the public nuisance context, a recent wave of litigants, mostly cities and states, filed lawsuits against fossil-fuel companies alleging that climate change constitutes a public nuisance and asking for both injunctive and compensatory relief.[14] Similarly, in the public trust doctrine context, youth plaintiffs allege that states and the federal government have inalienable duties to protect public trust resources for young people and future generations, and these governments violated those obligations by both failing to address and affirmatively causing climate change.[15] The

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7 *See, e.g.*, *Juliana II*, 947 F.3d at 1175 (dismissing the lawsuit for lack of standing on the grounds that the requested relief was outside the bounds of judicial competence).

8 *See, e.g.*, *id.*

9 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

10 *See, e.g.*, *Am. Elec. Power Co. II*, 564 U.S. at 424 (reversing on the grounds that the Clean Air Act displaced the federal common law cause of action).

11 947 F.3d 1159 (9th Cir. 2020).

12 *See, e.g.*, Dino Grandoni, *The Energy 202: Youth Climate Lawsuit Dismissal Shows Challenge of Using Courts to Tackle Climate Change*, WASH. POST (Jan. 21, 2020), https://perma.cc/Z79G-7N6L.

13 There are other common legal theories regarding liability for climate change not discussed by this Chapter. *See, e.g.*, ExxonMobil Corp. v. Attorney General, 94 N.E. 3d. 786, 797, 800 (Mass. 2018) (alleging that ExxonMobil committed tort fraud by suppressing information and disseminating misinformation regarding the consequences of burning fossil fuels).

14 *See, e.g.*, City of Oakland v. BP P.L.C., 325 F. Supp.3d 1017, 1021 (N.D. Cal. 2018) (alleging climate change constitutes a public nuisance under California common law and asking for damages).

15 *See, e.g.*, Kanuk *ex rel.* Kanuk v. Alaska, 335 P.3d 1088, 1090 (Alaska 2014); Amended Complaint for Declaratory & Injunctive Relief at 2, Svitak *ex rel.* Svitak v. Washington, No. 11-2-160008-4 SEA, 2011 WL 13160171 (Wash. Super. 2011) (alleging that the State violated its duties under the constitution and public trust doctrine by failing to take steps to protect the atmosphere in the face of significant and potentially disastrous climate change); Chernaik v. Brown, 436 P.3d 26, 28 (Or. App. 2019); Sanders-Reed *ex rel.* Sanders-Reed v. Martinez, 350 P.3d 1221, 1222 (N.M. App. 2015) ("seeking judgment declaring that public trust doctrine imposed duty on state to regulate greenhouse gas emissions"); Juliana v. United States, 339 F. Supp.3d 1062, 1070–71 (D. Or. 2018) (alleging a substantive due process violation and seeking declaratory and injunctive relief against the President and executive branch agencies, based on allegations that greenhouse gas emissions from carbon dioxide, produced by burning fossil fuels, were destabilizing the climate system).

litigants in atmospheric trust cases request injunctive and declaratory remedies, calling on governments to create binding plans to mitigate the climate crisis commensurate with what the leading science demands.[16]

In order to analyze these divergent and still-burgeoning theories of liability for climate change, this Chapter is divided into parts. Part II focuses on public nuisance suits, providing an update regarding the recent explosion of litigation and explaining the hurdles these suits face and how litigants may be able to overcome them. Part III turns to public trust doctrine litigation, again providing an update to readers regarding the ongoing lawsuits and addressing the principle obstacles facing those claims. Part IV then compares these two lines of case law and identifies some of the advantages and disadvantages of each approach. The Chapter concludes by briefly analyzing the potential role of an untested legal theory—atmospheric recovery litigation[17]—as a potential hybrid between the two theories.

II. A TORT THEORY OF CLIMATE LIABILITY

Part II proceeds in two subparts. The first subpart tells the story of the first set of climate nuisance cases. The second subpart examines the more recent cases brought under the public nuisance theory.

A. The First Wave of Climate Nuisance Suits Crashes

Suits alleging that climate change constitutes a public nuisance started to spring up in the mid-2000s.[18] This first wave of climate nuisance suits[19] failed to catalyze the outcomes that first-wave plaintiffs intended.[20] Reviewing courts, like many others hearing early climate change cases, cowered in the face of such a massive and complicated problem.[21] As a result, judges overseeing these cases were inclined to

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[16] *See, e.g.*, *Kanuk*, 335 P.3d at 1091 (requesting declaratory and equitable relief); *Brown*, 436 P.3d at 28 (requesting declaratory judgment with regards to the scope of Oregon's public trust doctrine); *Juliana*, 339 F. Supp. 3d at 1071 (requesting declaratory and equitable relief). Specifically, they request a remedy that would bring atmospheric carbon dioxide back down to 350 parts per million by 2100. *Government Climate and Energy Actions, Plans, and Policies Must Be Based on a Maximum Target of 350 ppm Atmospheric CO_2 and 1°C by 2100 to Protect Young People and Future Generations*, OUR CHILDREN'S TRUST, https://perma.cc/HJ66-9XJU (last visited May 27, 2020).

[17] *See* Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENVTL. L. 259, 262–63 (2015).

[18] *Am. Elec. Power Co. II*, 564 U.S. 410, 418 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012); Comer v. Murphy Oil USA, Inc., 718 F.3d 460, 465 (5th Cir. 2013).

[19] Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENVTL. L. REV. 49, 58 (2018) (identifying these early cases as the first wave of climate nuisance litigation).

[20] *Am. Elec. Power Co. II*, 564 U.S. at 429.

[21] *See* Douglas Kysar, *supra* note 6, at 28.

avoid judicial intervention in the climate crisis.[22] Courts held that first-wave cases were displaced by the Clean Air Act.[23] In telling the story of these early cases, this subpart speaks to the obstacles faced by first-wave nuisance suits, focusing on the applicability of federal preemption and displacement doctrines, and examines where modern science can overcome outdated, fear-induced arguments.

The initial, and most influential, of the first-wave of cases is *American Electric Power Co. v. Connecticut*.[24] In that case, two sets of plaintiffs, including eight states, New York City, and three land trusts, sued five major emitters and alleged that, by contributing to climate change, these companies substantially and unreasonably interfered with public rights in violation of federal common law and state public nuisance law.[25] The plaintiffs asked for injunctive relief capping the defendants' carbon dioxide emissions.[26] Although the district court dismissed these claims as political questions, the Second Circuit reversed, relying on *Illinois v. Milwaukee* (*Milwaukee I*),[27] which provided a federal common law right of action for states to sue in order to abate pollution originating in other states.[28] The court further asserted that the Clean Air Act did not displace the plaintiffs' claims because the Act did not require, but rather authorized, regulation of greenhouse gases.[29] Because the Environmental Protection Agency (EPA) had not yet promulgated regulations for greenhouse gases, no displacement concerns existed at the time.[30] As a result, the court permitted the case to proceed.[31]

The Supreme Court disagreed and reversed the Second Circuit, holding that the Clean Air Act displaces federal common law public nuisance claims.[32] In the Court's view, the Act's concern was not

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[22] *See, e.g.*, *Am. Elec. Power Co. II*, 564 U.S. at 428 ("The expert agency [EPA] is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions"); *Native Vill. of Kivalina*, 696 F.3d at 854 (the district court held the "matters were more appropriately left for determination by the executive or legislative branch").

[23] *See, e.g.*, *Am. Elec. Power Co. II*, 564 U.S. at 419 (dismissing federal common law public nuisance claim seeking injunction as preempted by the CAA); *Native Vill. of Kivalina*, 696 F.3d at 858 (federal common law public nuisance suits are preempted by the CAA).

[24] 564 U.S. 410 (2011).

[25] *Id.* at 415, 418.

[26] *Id.* at 415.

[27] 406 U.S. 91 (1972) (*Milwaukee I*).

[28] Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 315, 392–93 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

[29] *Id.* at 379. For context, a federal law displaces federal common law where a federal legislative scheme addresses the same legal issue as the federal common law cause of action. William R. Gignilliat, *The Gulf Oil Spill: OPA, State Law, and Maritime Preemption*, 13 VT. J. ENVTL. L. 385, 396 (2011).

[30] *Am. Elec. Power Co. II*, 582 F.3d at 380.

[31] *Id.* at 392.

[32] *Am. Elec. Power Co. II*, 564 U.S. 410, 415, 429 (2011). However, the Court split on the issue of whether the plaintiffs' claims constituted political questions. Lin & Burger, *supra* note 19, at 67–68.

necessarily whether EPA promulgated regulations pursuant to the Clean Air Act.[33] Rather, the relevant question was whether the field of law at issue—greenhouse gas regulation—had been occupied by federal legislation and "not whether it ha[d] been occupied in a particular manner."[34] According to the Court, by delegating to the Environmental Protection Agency the authority to regulate greenhouse gases,[35] Congress occupied the field the plaintiffs were trying to occupy with federal common law nuisance and, consequently, displaced their claims.[36] Federal judges, the Court opined, lacked the scientific and technical expertise of Congress and implementing agencies to discern the proper amount and method of greenhouse gas legislation and therefore should not meddle where Congress had already acted.[37] The Court relied on *Illinois v. Milwaukee* (*Milwaukee II*),[38] the follow-up case to the one relied upon by the Second Circuit.[39] In that case, the Court held that Congress displaced the federal common law right of action recognized in *Milwaukee I* by passing the Clean Water Act.[40] Jumping off of that the *American Electric Power* Court held that the Clean Air Act likewise displaced the plaintiffs' claims.[41] Under *American Electric Power*, therefore, the Clean Air Act displaces federal common law suits that allege climate change constitutes a public nuisance and that seek injunctive remedies. Still, in the wake of the decision, the door seemed open for federal common law claims seeking damages.

However, courts quickly determined that the Clean Air Act also displaces federal common law nuisance actions seeking compensatory damages.[42] In *Native Village of Kivalina v. ExxonMobil Corp*., the Ninth Circuit affirmed a decision by the District of Northern California dismissing a federal common law public nuisance case brought by a village in Alaska facing displacement as a result of sea level rise.[43] Despite the differences between the village's claims and those alleged in *American Electric Power* (for example, that the *Native Village of Kivalina* plaintiffs requested compensatory damages instead of injunctive relief), the court held that the Clean Air Act displaced the plaintiffs' claim.[44] The Ninth Circuit reasoned that the village was attempting to regulate greenhouse gas emissions by way of

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[33] *Am. Elec. Power Co. II*, 564 U.S. at 415, 423.

[34] *Id.* at 426 (quoting Illinois v. Milwaukee (*Milwaukee II*), 451 U.S. 304, 324 (1981)).

[35] *Id.* Note that the Court had only recently decided *Massachusetts v. EPA*, where it held that the Act authorized the regulation of carbon dioxide as an air pollutant. 549 U.S. 497, 532 (2007).

[36] *Am. Elec. Power Co. II*, 564 U.S. at 415.

[37] *Id.* at 428.

[38] 451 U.S. 304 (1981).

[39] *Am. Elec. Power Co. II*, 564 U.S. at 423 (citing *Milwaukee II*, 451 U.S. at 314).

[40] Clean Water Act, 33 U.S.C. §§1251–1387 (2012).

[41] *Am. Elec. Power Co. II*, 564 U.S. at 423 (citing *Milwaukee II*, 451 U.S. at 314).

[42] *Native Vill. of Kivalina*, 696 F.3d 849, 853, 858 (9th Cir. 2012) (decided one year after *Am. Elec. Power Co. II*, 564 U.S. 410).

[43] *Id.*

[44] *Id.* at 858.

compensatory damages, something Congress envisaged as a purpose of the Act.[45] It followed, therefore, that the holding from *American Electric Power* should extend to the village's claim.[46] As a result of the Supreme Court's decision to deny certiorari, *Native Village of Kivalina* closed the door to federal common law public nuisance claims seeking damages, at least in the Ninth Circuit.[47]

Importantly, neither *American Electric Power* nor *Native Village of Kivalina* foreclosed public nuisance claims raised under state law. The Supreme Court in *American Electric Power* remanded the plaintiffs' state-law-based claims, though the parties never litigated them further.[48] The Court's decision to remand suggests the justices believed state-law-based claims may not be preempted by the Clean Air Act.[49] Similarly, the Ninth Circuit in *Native Village of Kivalina* refused to exercise supplemental jurisdiction over the plaintiffs' state-law-based claims, a hint that it too doubted federal courts had original jurisdiction over such claims.[50] Consequently, first-wave suits left open the potential for state-law-based public nuisance cases.

B. A Second Wave of Nuisance Suits Rises

In recent years, states, cities, and municipalities have filed a number of state-law-based public nuisance suits seeking compensation for the effects of the climate crisis.[51] Learning from the first-wave cases, second-wave nuisance litigation consistently asks for damages under state, as opposed to federal, common law.[52] In California for example, Oakland, San Francisco, Marin County, San Mateo County, Santa Cruz County, the City of Imperial Beach, the City of Santa Cruz, and the City

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45 *Id.* at 857–58.

46 *Id.* (citing *Am. Elec. Power Co. II*, 564 U.S. 410, 423 (2011)).

47 Native Vill. of Kivalina v. ExxonMobil Corp., 569 U.S. 1000 (2013).

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

49 *Id.*

50 *Native Vill. of* Kivalina, 696 F.3d at 854–55. Notably, plaintiffs did not appeal the district court's dismissal of their state-law nuisance claim which was raised in the alternative to their federal common law claim. *See id.* If the Clean Air Act completely preempted plaintiffs' state-law claims, federal courts would have original jurisdiction. Therefore, the Ninth Circuit's holding signals the circuit's opinion that the Act does not preempt state-law nuisance suits, at least not completely. Lehmann v. Brown, 230 F.3d 916, 919 (7th Cir. 2000). For a full discussion of federal preemption, *see infra* Part IV.

51 *See, e.g.*, California v. BP P.L.C., No. C 16-06011 WHA, No. C 17-06012 WHA, 2018 WL 1064293, at *1, *2 (N.D. Cal. Feb. 27, 2018) (featuring consolidated litigation brought by the cities of Oakland and San Francisco; each filed separate California-based public nuisance suits seeking compensation for climate adaptation costs); Cty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (holding removal was not necessary in public nuisance suit brought by San Mateo county against a number of oil companies).

52 *See, e.g.*, *California*, 2018 WL 1064293, at *1 (alleging public nuisance under California law and seeking damages to be put into an abatement fund for climate adaptation costs); *Cty. of San Mateo*, 294 F. Supp. 3d at 937 (same).

of Richmond have each filed suit against carbon majors[53] alleging state-law-based public nuisance and asking for damages to be put into and disbursed by an abatement fund.[54] Similar suits have been filed in New York City,[55] Baltimore,[56] Boulder,[57] the state of Rhode Island,[58] and King County, Washington.[59]

Second-wave nuisance cases hinge on federal removal.[60] Thus far, the majority of district courts hearing the issue have ruled that second-

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[53] Carbon majors are entities that contribute significantly to the historic emissions of greenhouse gases which cause and contribute to climate change. *See Carbon Majors*, CLIMATE ACCOUNTABILITY INST. (Oct. 8, 2019), https://perma.cc/8TU2-26UB.

[54] Lin & Burger, *supra* note 19, at 53 (describing these second-wave suits).

[55] City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 471, 472 (S.D.N.Y. 2019) (dismissing plaintiff's claim alleging public and private nuisance and trespass on the grounds that federal common law governed and the Clean Air Act preempted the federal common law claims). New York City appealed this decision to the Second Circuit, though that circuit has yet to rule on the case. *Climate Case Chart—City of New York v. BP P.L.C.*, SABIN CTR. FOR CLIMATE CHANGE LAW, https://perma.cc/HH7M-M6FR (last visited May 14, 2020).

[56] Mayor & City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 574 (D. Md. 2019) (remanding to state court Baltimore's case alleging climate change constitutes a public nuisance under Maryland law). The defendants appealed to the Fourth Circuit and asked the District of Maryland to stay the remand pending that appeal, but the District of Maryland refused. Mayor & City Council of Balt. v. BP P.L.C., 952 F.3d 452, 457 (4th Cir. 2020). Though the Fourth Circuit is still considering whether the case can proceed in state court, on October 2, 2019, it ruled against the defendants' motion for a stay of the remand, allowing discovery to continue. Kevin Rector, *Fight Over Which Court Will Hear Baltimore's Global Warming Lawsuit Against Oil and Gas Companies Reaches Supreme Court*, BALTIMORE SUN (Oct. 2, 2019), https://perma.cc/9KLH-S7SQ. The defendants have appealed this decision to the Supreme Court. *Id.*

[57] Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.), 405 F. Supp. 3d 947, 954 (D. Colo. 2019) (remanding to state court Boulder's public nuisance claim alleging climate change constitutes a public nuisance under Colorado law). The defendants then appealed to the Tenth Circuit, though that court has not ruled on the matter. *See Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, SABIN CTR. FOR CLIMATE CHANGE L., https://perma.cc/JKK4-6W6W (last visited May 14, 2020). The plaintiffs, in turn, filed a motion to dismiss all parts of the defendants' appeal except for its appeal of the court's determination with regard to federal officer removal. *Id.*

[58] Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 152 (D.R.I. 2019) (remanding to state court Rhode Island's suit alleging climate change constituted a public nuisance). The defendants then appealed to the First Circuit, which has yet to rule on the matter. *Rhode Island v. Chevron Corp.*, SABIN CTR. FOR CLIMATE CHANGE L., https://perma.cc/C5EY-KXQZ (last visited May 14, 2020). However, the remand was delayed until October 10, 2019, pursuant to a consent decree. *Id.* Defendants filed a motion to stay the remand until the First Circuit ruled, but that was denied. *Id.*

[59] Order Granting Partially Unopposed Motion to Stay Proceedings at 1–3, King Cty v. BP P.L.C., No. C18-758-RSL, 2018 WL 9440497 (W.D. Wash. 2018) (granting stay of removal proceeding at King County's request until Ninth Circuit rules on San Francisco and Oakland's suits).

[60] *See, e.g.*, Order Denying Motions to Remand, at 3–4, 8, *California*, No. C 16-06011 WHA, No. C 17-06012 WHA, 2018 WL 1064293, (N.D. Cal. Feb. 27, 2018) (affirming removal of public nuisance suits based in California law on the basis that federal common law governed and then dismissing on the grounds that the Clean Air Act preempted climate change claims based in federal common law public nuisance); *Cty. of San Mateo*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (remanding county's public nuisance suit back to

wave nuisance claims can proceed in state court.[61] However, federal removal remains a contentious issue.[62] This subpart analyzes the arguments for and against those determinations.

Second-wave defendants rely on a number of arguments in favor of removal jurisdiction. They argue, for example, that because *American Electric Power* and *Native Village of Kivalina* recognized the existence of a federal common law cause of action for public nuisance for climate change, a cause of action under state law for public nuisance for climate change cannot coexist.[63] However, until *California v. BP P.L.C.*,[64] San Francisco and Oakland's consolidated second-wave nuisance case, no court held the existence of a preempted federal common law right of action for public nuisance for climate change precluded an analogous claim under state common law.[65] This makes sense given that the Supreme Court in *American Electric Power* stated the existence of a federal common law cause of action did not erase the possibility of analogous state common law claims but rather converted the availability of such claims into a question of federal preemption.[66] Consequently, federal courts are right to reject the contention that a

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state court after the case was removed to federal district court). San Mateo's remand, like Marin County and the City of Imperial Beach, is stayed pending review by the Ninth Circuit. *See* Lin & Burger, *supra* note 19, at 53.

61 *See, e.g.*, *Cty. of San Mateo*, 294 F. Supp. 3d at 937–38; *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 563, 574; *Bd. of Cty. Comm'rs of Boulder Cty.*, 405 F. Supp. 3d at 968; *Rhode Island*, 393 F. Supp. 3d at 146. However, some courts have not agreed. *See, e.g.*, *California*, 2018 WL 1064293, at *2–3, *8 (affirming removal of public nuisance suits based in California law on the basis that federal common law governed and then dismissing on the grounds that the Clean Air Act preempted climate change claims based in federal common law public nuisance); *City of New York*, 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2019) (affirming removal and dismissing plaintiff's claim on the grounds that federal common law governed and the Clean Air Act preempted federal common law).

62 *See, e.g.*, *Rhode Island v. Chevron Corp.*, SABIN CTR. FOR CLIMATE CHANGE LAW, https://perma.cc/M7AW-4767 (last visited May 14, 2020) (chronicling the saga of the Rhode Island suit through removal proceedings).

63 *See, e.g.*, Order Denying Motions to Remand, at 3–4, *California*, No. C 16-06011 WHA, No. C 17-06012 WHA, 2018 WL 1064293 (analyzing the arguments for and against the notion that the existence of a displaced federal common law cause of action for public nuisance forecloses the existence of analogous state law actions).

64 California v. BP P.L.C., No. C 16-06011 WHA, No. C 17-06012 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018).

65 *See* Lin & Burger, *supra* note 19, at 64. In *City of New York v. BP P.L.C.*, the district court endorsed this line of reasoning as well. 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2019).

66 *Am. Elec. Power Co.*, 564 U.S. 410, 429 (2011). For context, while a federal legislative cause of action displaces analogous federal common law claims, federal legislation preempts analogous state law claims. United States v. Am. Commercial Lines, L.L.C., 759 F.3d 420, 422 n.1 (5th Cir. 2013) (asserting that "preemption refers to whether federal statutory law supersedes state law, while 'displacement' applies when . . . a federal statute governs a question previously governed by federal common law."). While displacement analyses do not emphasize federalism concerns, preemption analyses do. *Id.* For that reason, courts "assume that 'the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Milwaukee II*, 451 U.S. 304, 316–17 (1981)). For a full discussion of the myriad subcategories and applications of the preemption doctrine, *see infra* Part IV.

federal common law cause of action for public nuisance for climate change precludes the existence of analogous state law claims.[67]

Second-wave defendants also argue for removal on complete preemption grounds.[68] Complete preemption exists where federal law provides the exclusive cause of action in a particular area, and plaintiffs nevertheless allege alternative theories of relief.[69] Unlike ordinary preemption, which is merely a defense available to defendants and does not warrant federal jurisdiction in and of itself, complete preemption provides for federal jurisdiction.[70] Carbon major defendants argue that second-wave plaintiffs, through damages suits, are indirectly regulating greenhouse gas emissions, an area, they argue, Congress has completely preempted with the Clean Air Act.[71] However, a number of courts have correctly held that the Clean Air Act does not completely preempt second-wave nuisance suits because the Act does not provide for the relief sought by second-wave litigants and because the Act's savings clause, which expressly preserves state common law actions, undermines such a contention.[72] Nothing in the applicable provisions of the Act provides for complete preemption.[73] Rather, the inclusion of the savings clause exhibits Congress's intent to avoid making the statute "exclusive."[74]

For the aforementioned reasons, as well as a number of arguments not addressed above,[75] the decisions to remand *San Mateo*,[76] *Rhode*

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[67] *See, e.g.*, *Mayor & City Council of Balt.*, 388 F. Supp. 3d 538, 556–57 (D. Md. 2019) (holding that state law public nuisance claims were not muted by analogous federal common law claims); *Bd. of Cty. Comm'rs of Boulder Cty.*, 405 F. Supp. 3d 947, 957 (D. Colo. 2019) (same).

[68] *Rhode Island*, 393 F. Supp. 3d 142, 147 (D.R.I. 2019)

[69] *Lehmann*, 230 F.3d 916, 918–19 (7th Cir. 2000).

[70] *Id.* at 919–920.

[71] *Bd. of Cty. Comm'rs of Boulder Cty.*, 405 F. Supp. 3d at 958–59.

[72] *See, e.g.*, *id.* at 971*; Cty. of San Mateo*, 294 F. Supp. 3d 934, 937–938 (N.D. Cal. 2018). Additionally, the Clean Air Act's savings clause, presented in the citizen suit provision, provides that nothing "in this section" is to be interpreted to

> prohibit, exclude, or restrict any State, local, or interstate authority from . . . bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or . . . bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality.

Clean Air Act, 42 U.S.C. § 7604(e) (2012).

[73] *Cty. of San Mateo*, 294 F. Supp. 3d at 938.

[74] *Id.*

[75] Second-wave defendants argue for removal on a number of grounds not addressed in the body of this Part but which are worth addressing here. For example, carbon major defendants argue that federal question jurisdiction, pursuant to *Grable & Sons Metal Products v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), demands removal to federal court. *See, e.g.*, *Bd. of Cty. Comm'rs of Boulder Cty.*, 405 F. Supp. 3d at 964–65. *Grable* jurisdiction "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." *Grable & Sons Metal Products*, 545 U.S. at 312. It is a necessarily narrow doctrine. *Id.* at 313. Nevertheless, carbon major defendants allege that second wave claims "'intrude upon

Island,[77] *Boulder County*,[78] and *Mayor and City Council of Baltimore*[79] are in line with both long-standing doctrine regarding federal common law and with the holdings of first-wave cases like *American Electric Power* and *Native Village of Kivalina*. It is no surprise, then, that a coalition of thirteen states, led by California and Massachusetts, called on the First Circuit to remand the Rhode Island suit back to state court.[80] Courts of appeals would be prudent to rule that way in reviewing these decisions moving forward.

III. THE ATMOSPHERIC TRUST LITIGATION CAMPAIGN: FROM THE STATES TO THE FEDERAL GOVERNMENT

For over 1,000 years, the public trust doctrine has served as a check on government authority.[81] The public trust doctrine characterizes

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both foreign policy and carefully balanced regulatory considerations at the national level' . . . [and] 'have a significant impact on foreign affairs.'" *Mayor & City Council of Balt.*, 388 F. Supp. 3d 538, 558 (D. Md. 2019). Courts reject the application of *Grable* jurisdiction, however, on the ground that second-wave cases do not raise any specific foreign policy or hinge on federal law. *See, e.g.*, *id.* at 559. In *Grable*, "the meaning of the federal statute . . . appear[ed] to be the only legal or factual issue contested in the case." *Grable & Sons Metal Prods., Inc.*, 545 U.S. at 315. However, second-wave suits implicate myriad non-federal issues of law and fact (for example, whether the conduct of the defendant carbon majors impairs public rights as defined by state law). *Bd. of Cty. Comm'rs of Boulder Cty.*, 405 F. Supp. 3d at 970. Likewise, carbon majors argue that the uniquely federal interest doctrine demands application of federal common law. *See, e.g.*, *California*, No. C 16-06011 WHA, No. C 17-06012 WHA, 2018 WL 1064293, at *1, *2 (N.D. Cal. Feb. 27, 2018). However, the uniquely federal interest doctrine applies only in narrow circumstances where the United States is a party, and when cases involve international law, the Act of State doctrine, or competing interests of states in their sovereign capacity. Boyle v. United Tech. Corp., 487 U.S. 500, 519 (1988) (Brennan J., dissenting); Diane P. Wood, *Back to the Basics of Erie*, 18 LEWIS & CLARK L. REV. 673, 687–89, 692–95 (2014). Since neither the United States nor any foreign nations are parties to second-wave suits, and any international agreements pertaining to climate change encourage rather than preclude actions to address climate change, courts reject that argument as well. *See, e.g.*, *Bd. of Cty. Comm'rs of Boulder Cty.*, 405 F. Supp. 3d at 958. Carbon major defendants also argue for removal based on the federal enclave doctrine and the Outer Continental Shelf Lands Act; courts have held these schemes inapplicable because most of the conduct complained of occurred outside of these areas. *See, e.g.*, *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 566. Courts have similarly rejected second-wave defendants' argument that because their conduct was undertaken with the permission and guidance of federal officers, federal officer removal implicates federal question jurisdiction because federal officers do not oversee the marketing or sale of fossil fuels, conduct at issue in second-wave cases. *Bd. of Cty. Comm'rs of Boulder Cty.*, 405 F. Supp. 3d at 975–77.

[76] *Cty. of San Mateo*, 294 F. Supp. 3d at 937.

[77] *Rhode Island*, 393 F. Supp. 3d 142, 146 (D.R.I. 2019).

[78] *Bd. of Cty. Comm'rs of Boulder Cty.*, 405 F. Supp. 3d at 969.

[79] *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 548.

[80] Amanda Bronstad, *13 States Side with Rhode Island's Climate Change Case Against Oil Companies*, LAW.COM (Jan. 3, 2020), https://perma.cc/EPM9-CHEA.

[81] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970) (outlining the history of the public trust doctrine in Roman and English law).

essential natural resources as part of a trust *res* and designates government as the trustee.[82] The doctrine obligates governments to protect trust resources for "both present and future generations."[83] This obligation is an active, as opposed to passive, duty of protection: the trustee may not sit idly by while trust resources "fall into ruin on his watch."[84] The doctrine exists in almost every state.[85] Public trust obligations are inherent in sovereignty and therefore prohibit government trustees from abdicating their obligations to protect trust assets.[86] Nevertheless, the doctrine has changed over time to meet the needs of the day.[87]

In 2011, a non-profit, Our Children's Trust, launched a wave of lawsuits on behalf of youth plaintiffs across the country in state and federal courts.[88] These suits argue that the public trust doctrine limits government decision-making in response to the climate crisis both because of, and irrespective of, the doctrine's applicability to the climate as a trust resource.[89] These cases are collectively characterized as Atmospheric Trust Litigation (ATL).[90]

Although ATL has succeeded in instigating action on climate change[91] and demonstrably improved public awareness of the climate crisis and courts' potential role therein,[92] many ATL cases have been

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82 *See* Mary Christina Wood & Charles W. Woodward IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL'Y 634, 648–49 (2016) (discussing the public trust framework).

83 *Id.* at 648.

84 United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003).

85 *See* LORENA WISEHART ET AL., THE PUBLIC TRUST DOCTRINE IN 45 STATES (Michael C. Blumm ed., 2014), https://perma.cc/6KAW-ACM6 (surveying the public trust doctrine across United States jurisdictions).

86 *See, e.g.*, Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) (asserting that "[t]he State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government . . . .").

87 *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 369 (N.J. 1984) (extending the doctrine upland from its traditional roots in navigable waters); *In re* Water Use Permit Applications, 9 P.3d 409, 449 (Haw. 2000) (extending the doctrine to Hawaii's groundwater).

88 *See generally State Legal Actions*, OUR CHILDREN'S TRUST, https://perma.cc/X96A-T7R8 (last visited May 14, 2020). S*ee* Juliana v. United States (*Juliana I*), 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).

89 *See, e.g.*, *Kanuk*, 335 P.3d 1088, 1090 (Alaska 2014); *Brown*, 436 P.3d 26, 29 (Or. App. 2019); *Sanders-Reed*, 350 P.3d at 1222; *Juliana I*, 217 F. Supp. 3d at 1250.

90 *See, e.g.*, Wood & Woodward, *supra* note 82, at 648–55 (referring to these cases as part of a concerted atmospheric trust litigation campaign).

91 *See, e.g.*, Kain v. Dep't of Envt'l Prot., 49 N.E.3d 1124, 1127–28 (Mass. 2016) (leading to enhanced climate action in Massachusetts); Foster *ex rel.* Foster v. Wash. Dep't of Ecology, No. 14-2-25295-1 SEA, 2015 WL 7721362, at *3–4 (Wash. Super. Ct. Nov. 19, 2015) (leading to promulgation of climate legislation in Washington); *Juliana*, 217 F. Supp. 3d at 1250 (declaring a fundamental right to a climate system capable of sustaining human life inherent in longstanding due process rights).

92 *See, e.g.*, *Our Actions*, ZERO HOUR, https://perma.cc/J9XG-YESA (last visited May 29, 2020) (highlighting actions undertaken by organization founded by a plaintiff in the Wash-

dismissed on justiciability grounds and others have fallen short on the merits.[93] Indeed, since the ATL campaign began, much has occurred and much has changed. In searching for reasons for these disparities, a number of patterns stand out. This Part identifies the explanations for these trends. It points out why courts dismiss common law ATL cases on justiciability grounds more often than cases brought as administrative rulemaking petitions or constitutional challenges,[94] why ATL plaintiffs now raise claims grounded in allegations of affirmative conduct on the part of governmental trustees,[95] why courts have been confused regarding the scope of the federal public trust,[96] and why it is unnecessary for courts to include the atmosphere into the trust *res* for plaintiffs to prevail.[97]

Especially in the initial ATL cases, courts dismissed ATL claims on justiciability grounds early and often.[98] In so doing, courts placed undue confidence in legislatures to adequately address climate change.[99] They

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ington case); Rachael McDonald, *Kid Climate Lawsuit Featured on "60 Minutes"*, KLCC (Mar. 3, 2019), https://perma.cc/RWV3-7MYN (discussing 60 Minutes' feature of the *Juliana* cases); *Video and Radio Coverage*, OUR CHILDREN'S TRUST, https://perma.cc/CZ2G-JGTT (last visited May 29, 2020) (cataloging the video and radio coverage of atmospheric trust litigation).

93 *See, e.g.*, *Juliana II*, 947 F.3d 1159, 1175 (9th Cir. 2020) (dismissing for lack of standing); Svitak *ex rel.* Svitak v. Washington, 178 Wash. App. 1020, 2013 WL 6632124, at *1 (Wash. App. Div. 1, 2013) (dismissing on justiciability grounds because the Washington legislature was better suited, in that court's view, than the judiciary to address the plaintiffs' concerns); *Sanders-Reed*, 350 P.3d 1221, 1227 (N.M. App. 2015) (dismissing on the merits).

94 *Compare Foster*, 2015 WL 7721362, at *3–4 (finding standing in rulemaking petition case), *and Juliana I*, 217 F. Supp. 3d at 1250 (asserting standing exists where plaintiffs allege constitutional due process violations resulting from the federal government's affirmative conduct in creating the climate crisis).

95 *Compare Svitak*, 2013 WL 6632124, at *2 (holding that the injunctive relief sought by plaintiffs was inapplicable to the governmental inaction complained of), *and Juliana I*, 217 F. Supp. 3d at 1248 (emphasizing the affirmative conduct complained of by youth plaintiffs constituted substantive due process violations).

96 *Compare Brown*, 436 P.3d 26, 27–28 (Or. App. 2019) (recognizing the existence of Oregon's long-standing public trust doctrine), *and* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x. 7, 8 (D.C. Cir. 2014) (dismissing on justiciability grounds because, according to that court, there was no federal public trust doctrine).

97 *See, e.g.*, *Kanuk*, 335 P.3d 1088, 1101–02 (Alaska 2014) (saying that the plaintiffs made "a good case" that the atmosphere is within the public trust); Butler *ex rel.* Peshlakai v. Brewer, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *6 (Ariz. App. Mar. 14, 2013) (assuming, though not ruling, that the atmosphere is within Arizona's public trust); *Juliana I*, 217 F. Supp. 3d 1224, 1255 (D. Or. 2016) (holding it unnecessary to rule on whether the federal public trust doctrine included the atmosphere because plaintiffs could seek the same relief based on impairment of established trust resources like the territorial seas); *Sanders-Reed*, 350 P.3d at 1227 (concluding that "the courts [could] not independently intervene to impose a common law public trust duty upon the State to regulate greenhouse gases in the atmosphere").

98 *See, e.g.*, Aronow v. Minnesota, A12-0585, 2012 WL 4476642, at *3 (Minn. App. Oct. 1, 2012) (dismissing on justiciability grounds in a single paragraph).

99 *See, e.g.*, *Svitak*, 178 Wash. App. 1020, 2013 WL 6632124, at *1 (Wash. App. Div. 1, 2013) (dismissing on justiciability grounds because the Washington legislature was better

succumbed, like their counterparts in first-wave nuisance cases, to nihilism in the wake of such a wicked problem.[100] However, as awareness of the severity of the climate crisis has become more common, courts have been less willing to dismiss ATL cases.[101]

Perhaps because establishing procedural rights is more abstract in these situations, courts dismiss common law public trust claims more readily than those appealing the denial of rulemaking petitions.[102] For example, in *Aronow v. Minnesota*, the reviewing court dismissed the youth plaintiffs' common law public trust claim in a single paragraph.[103] Whereas, in cases where youth plaintiffs brought rulemaking petitions founded in public trust obligations, courts seldom dismiss before trial.[104] Rulemaking cases' success seems to stem, at least in part, from the fact that plaintiffs appealing the denial of rulemaking petitions seek more defined and comprehensible reform than plaintiffs alleging purely public trust claims.[105] This should be no surprise, as the remedies requested in many common law ATL cases are overly complex and may last decades, if not even longer.[106] Consequently, courts' holdings in rulemaking

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suited, in that court's view, than the judiciary to address the plaintiffs' concerns). Note that even recent courts, like the Ninth Circuit in *Juliana II*, leave climate action up to the political branches, though they are more reluctant to do so now in light of governments' repeated failures to meaningfully address climate change. *Juliana II*, 947 F.3d 1159, 1175 (9th Cir. 2020) (reluctantly leaving the plaintiffs' fate up to the whims of Congress while acknowledging that Congress both affirmatively caused and failed to fix the climate crisis).

100 *See generally* R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 319–29 (2017) (examining the approach courts took to early climate cases). *See also Am. Elec. Power Co.*, 564 U.S. 410, 429 (2011) (dismissing first-wave nuisance suit).

101 *See, e.g.*, Chernaik v. Kitzhaber, 328 P.3d 799, 805 (Or. App. June 11, 2014) (reversing dismissal on justiciability grounds while highlighting plaintiffs' myriad factual allegations regarding the urgency and gravity of the climate crisis); *Juliana*, 217 F. Supp. 3d 1062, 1276 (D. Or. 2018) (denying federal defendants' motion for summary judgment while emphasizing the severity and immediacy of the climate crisis); *Kanuk*, 335 P.3d at 1099–1100 (deciding that political question doctrine did not foreclose plaintiffs' suit but rejecting the method of relief plaintiffs sought).

102 *See infra*, note 108 and accompanying text.

103 *Aronow,* 2012 WL 4476642 at *3.

104 *See, e.g.*, *Foster*, No. 14-2-25292-1 SEA, 2015 WL 7721362, at *4 (Wash. Super. Ct. Nov. 19, 2015) (ruling on plaintiffs' appeal of a denial of a rulemaking petition on the merits); *Kain*, 49 N.E.3d 1124, 1128 (Mass. 2016) (ruling on plaintiffs' appeal of a denial of a rulemaking petition on the merits); Colo. Oil & Gas Conservation Comm'n v. Martinez, 433 P.3d 22, 33 (Colo. 2019) (ruling on plaintiffs' appeal of a denial of a rulemaking petition on the merits).

105 *Compare Foster*, 2015 WL 7721362, at *3 (petitioning for a rule to limit GHG emissions in Washington), *with Juliana II*, 947 F.3d at 1175 (dismissing plaintiffs' claims because the binding plan the plaintiffs requested as injunctive relief was outside of the courts' competence), *and* Chernaik v. Kitzhaber, No. 16-11-09273, 2012 WL 10205018, at *2 (Or. Cir. 2012) (requesting the court order the Oregon government to promulgate a comprehensive and binding plan to address climate change commensurate with what leading scientists' demand is necessary).

106 *See, e.g.*, Wood & Woodward, *supra* note 82, at 667–68 (discussing ATL plaintiffs' requested relief as a binding remedial plan, to be overseen by the judiciary, to bring atmospheric carbon dioxide back down to 350 parts per million by 2100).

petition cases seldom lament the overbreadth of plaintiffs' suggested remedies.[107] In contrast, courts hearing common law public trust claims paradoxically struggle with what they have seen as both the overbreadth[108] and insufficiency[109] of plaintiffs' requested relief. This same analysis applies too in the context of ATL cases brought as constitutional due process claims.[110]

With the aforementioned shortcomings in mind, ATL plaintiffs now allege that governments' affirmative action, as opposed to neglectful inaction, violates their constitutional rights and governments' trust obligations.[111] Indeed, courts hearing early ATL cases refused to declare violations based on trustees' inaction in addressing climate change.[112] The very existence of climate-related legislation, even if obviously insufficient to meaningfully address the climate crisis on a local scale, undermined claims of unlawful government inaction.[113] In *Svitak*, for example, the Washington Court of Appeals stated the youth plaintiffs' claim failed as a matter of law because the youth, alleging only governmental inaction, could not point to any constitutional provision violated by state inaction and did not challenge any state statute as unconstitutional.[114] In more recent cases like *Juliana*, in contrast, youth

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107 *See, e.g.*, *Kain*, 49 N.E.3d at 1135, 1136 (speaking at length about the competence of the Massachusetts Department of Environmental Protection to promulgate the rules petitioned for and of the court to order the Department to do so); *Martinez*, 433 P.3d at 29 (discussing the Commission's and the plaintiffs' interpretation of the statute at issue at length and without hinting that the plaintiffs' interpretation or rule petition were wholly outside of the realm of possible interpretations of the Act).

108 *See, e.g.*, *Kitzhaber*, 2012 WL 10205018 at *6 (dismissing because the court doubted its ability to redress the plaintiffs' alleged injuries given separation of powers concerns); Chernaik v. Brown, No. 16-11-09273, 2015 WL 12591229, at *11–12 (Or. Cir. May 11, 2015) (asserting that the plaintiffs were clearly asking the court to substitute its judgment for that of the legislature and lamenting that granting the requested relief would require the court to step far outside its established role).

109 *See, e.g.*, *Kanuk*, 335 P.3d 1088, 1091 (Alaska 2014) (dismissing plaintiffs' case because, in the court's view, the remedy sought— declaratory judgment—was insufficient to adequately redress plaintiffs' injury-in-fact).

110 *Compare Aronow*, A12-0585, 2012 WL 4476642, at *1 (Minn. App. Oct. 1, 2012) (dismissing common law public trust claim in short order), *with Juliana I*, 217 F. Supp. 3d at 1225 (denying summary judgment in a case brought to vindicate alleged constitutional due process violations).

111 *See, e.g.*, *Juliana I*, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016).

112 *See, e.g.*, *Butler*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *7 (Ariz. App. Mar. 14, 2013) (asserting that, "even assuming without deciding that the atmosphere is part of the public trust," the court could not "hold that the atmosphere is protected by the Doctrine and that state inaction is a breach of trust merely because it violates the Doctrine without pointing to a specific constitutional provision or other law that has been violated"); *Kanuk*, 355 P.3d at 1102 (noting that "application of public trust principles has been as a restraint on the State's ability to restrict public access to public resources, not as a theory for compelling regulation of those resources").

113 *See, e.g.*, *Sanders-Reed*, 350 P.3d 1221, 1226 (N.M. App. 2015) (holding that an existing (albeit narrow and unambitious) greenhouse gas regulatory regime undermined ATL plaintiffs' inaction allegations).

114 *Svitak*, 178 Wash. App. 1020, 2013 WL 6632124, at *1 (Wash. App. Div. 1 2013).

plaintiffs allege affirmative conduct by governmental defendants violates not only the governments' public trust obligations but also the youth plaintiffs' substantive due process rights.[115] These arguments are likely to prove more successful as they will not suffer from the same deficiencies as the earlier inaction arguments.[116]

Beyond justiciability, ATL cases against the federal government are burdened by a judicial misunderstanding regarding the very existence of a federal public trust doctrine.[117] Although many of the ATL cases target *state* governments,[118] the most potentially impactful cases target the *federal* government.[119] Cases like *Juliana*, for example, would apply to the entire nation and implicate the energy infrastructure of one of the planet's largest emitters.[120] Given the scale and potential ramifications of the case, the press and public followed it closely, often referring to the case as the "biggest trial of the century."[121] However, despite the fact that it was filed in 2015, the case never went to trial.[122] The defendants relied on *Alec L. v. Jackson*,[123] a previous ATL case where the D.C. Circuit held that there was no federal public trust doctrine at all,[124] to support their argument that there is no federally enforceable public trust doctrine.[125]

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115 *See, e.g.*, Brief for Appellants at 3, 5, Sinnok v. Alaska, No. S-17297 (Alaska, filed Nov. 11, 2018) (alleging affirmative conduct by the defendants in permitting, subsidizing, and leasing fossil fuel projects in violation of both state public trust obligations and constitutional due process rights); *Juliana I*, 217 F. Supp. 3d at 1248, 1252–54 (alleging federal defendants' affirmative conduct in leasing, subsidizing, permitting, and paying for fossil fuel projects violated federal public trust obligations and plaintiffs' constitutional due process rights).

116 Note, however, that despite the Ninth Circuit's recognition of, and finding that, the United States federal government's affirmative conduct caused and contributed to the climate crisis and that such conduct may have violated the youth plaintiffs' due process rights, the court dismissed the plaintiffs' case because the plaintiffs' requested relief was too broad to survive political question review. *Juliana II*, 947 F.3d 1159, 1175 (9th Cir. 2020). Nevertheless, had the *Juliana* plaintiffs requested more narrow, modest relief, their case may not have been dismissed.

117 *Compare Brown*, 436 P.3d 26, 31–32 (Or. App. 2019) (recognizing the existence of Oregon's long-standing public trust doctrine), *with* Alec L. v. McCarthy, 561 F. App'x 7, 7–8 (D.C. Cir. 2014) (dismissing on justiciability grounds because, according to that court, there was no federal public trust doctrine).

118 *See State Legal Actions*, OUR CHILDREN'S TRUST, https://perma.cc/D768-JFYA (last visited May 29, 2020) (chronicling and cataloguing the American ATL campaign).

119 *See Juliana*, 217 F. Supp. 3d 1224, 1224 (D. Or. 2016) (listing the United States of America as the only named defendant).

120 *Id.*

121 *See, e.g.*, Chelsea Harvey, *Trump Could Face the 'Biggest Trial of the Century' – Over Climate Change*, WASHINGTON POST (Dec. 1, 2016), https://perma.cc/4WFD-Z8TZ.

122 *See Juliana II*, 947 F.3d 1159, 1175 (9th Cir. 2020) (remanding the case in 2020 to the district court with instructions to dismiss for lack of standing).

123 863 F. Supp. 2d 11 (D.D.C. 2012).

124 *See id.* at 13, 15 (finding Supreme Court precedent binding and persuasive to the effect that public trust duties exist at the state level, but not the federal level).

125 Federal Defendant's Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 28, *Juliana I*, 217 F. Supp. 3d 1224 (D. Or. 2016) (Case No. 6:15–cv–01517–TC), (2016 U.S. Dist. LEXIS 156014). The Ninth Circuit ultimately dismissed the

Courts' determinations that no federally enforceable public trust doctrine exists, however, rests on a mischaracterization of long-standing precedent.[126] The court in *Alec L.* and the federal defendants in *Juliana I* each relied on statements made by Justice Kennedy in *PPL Montana, LLC v. Montana*[127] mischaracterizing the holding of *Illinois Central Railroad Co. v. Illinois*,[128] the lodestar public trust case.[129] This confusion began in 1926 when the Supreme Court in *Appleby v. City of New York*[130] misconstrued, albeit in dicta, *Illinois Central*'s holding.[131] The *Appleby* Court wrongly stated that the holding in *Illinois Central* was a "statement of Illinois law"[132] despite the fact that the Court in *Illinois Central* never relied on state law in holding that the public trust doctrine prevented the title transfer at issue.[133] The *Illinois Central* court, therefore, must have been applying federal law.[134] In *PPL Montana*, Justice Kennedy cited to the *Appleby* Court's misunderstanding, stating that *Illinois Central* was a state law-based holding.[135] In turn, the *Alec L.* court and the defendants in *Juliana* relied on this citation from Kennedy from *PPL Montana*.[136]

The district court in *Juliana*, however, distinguished *PPL Montana* from *Juliana* on the ground that *PPL Montana* was "not a public trust

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case, reasoning that the binding remedial plan requested by the plaintiffs would require the federal judiciary to supplant its own judgment for the discretion of the political branches. *Juliana II*, 947 F.3d at 1172.

126 *See* United States v. 1.58 Acres of Land Situated in the City of Boston, 523 F. Supp. 120, 125 (D. Mass. 1981) (holding that there is a federal public trust obligation that burdens even the federal government).

127 PPL Mont., LLC v. Montana (*PPL Montana*), 565 U.S. 576 (2012).

128 146 U.S. 387 (1892).

129 *See Alec L.*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012) (citing *PPL Montana*, 565 U.S. at 603–04); Federal Defendant's Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 28, *Juliana I*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15–cv–01517–TC), 2015 WL 13850596 (citing *PPL Montana* for the concept that the public trust doctrine does not apply to the federal government).

130 271 U.S. 364 (1926).

131 Michael C. Blumm & Lynn S. Schaffer, *Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399, 416 (2015) (arguing that Justice Kennedy mischaracterized the holding from *Illinois Central*).

132 *Appleby*, 271 U.S. at 395.

133 Blumm & Schaffer, *supra* note 131, at 411; *see also* Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 113, 137–43 (2010) (explaining that the Court's decision in *Illinois Central* relied on federal common law, the equal footing doctrine, and the notion that states are subject to the same trust limitations as those held by the English Crown).

134 Blumm & Schaffer, *supra* note 131, at 411.

135 *PPL Montana*, 565 U.S. at 603–04.

136 *Alec L.*, 863 F. Supp. 2d 11, 15 (D.D.C. 1012) (citing *PPL. Montana*, 565 U.S.at 603–04); Federal Defendant's Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 28, *Juliana I*, 217 F. Supp. 3d 1224 (D. Or. 2016) (Case No. 6:15–cv–01517–TC), 2015 WL 13850596 (citing *PPL Montana* for the concept that the public trust doctrine does not apply to the federal government).

case."[137] Untangling the mess *Appleby* made, the *Juliana I* court stated that because "[p]ublic trust obligations are inherent aspects of sovereignty; it follows that any case applying the public trust doctrine to a particular state is necessarily a statement of that state's law rather than a statement of the law of another sovereign."[138] According to the *Juliana I* court, Justice Field, in writing the majority opinion in *Illinois Central*, merely determined that once a state holds title to the bed of a given navigable waterbody, a determination based on federal law, the public trust doctrine of that state determines the scope of the state's trust obligations.[139] In doing so, Justice Field ruled without relying on state public trust law, an iconic example of the Supreme Court implementing federal public trust obligations. That said, this distinction may prove inconsequential in the ATL context as youth plaintiffs' emerging propensity to raise substantive due process issues and petition for rulemaking provide more viable alternative causes of action.

In addition to judicial reluctance to apply the public trust doctrine to the federal government, judges overseeing ATL cases must often decide whether to expand the trust to the atmosphere, an equally tall order considering how stern many courts have been in limiting the doctrine to submerged lands and waters.[140] While some courts have been amenable to youth plaintiffs' argument the public trust doctrine includes the atmosphere,[141] others, like the District of Oregon in *Juliana*, astutely assert such determinations are not necessary for youth plaintiffs to prevail.[142] These courts argue such determinations are unnecessary because already-established trust assets are demonstrably impaired by climate change.[143] Given the scale and scope

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137 *Juliana I*, 217 F. Supp. 3d at 1256. On appeal, the Ninth Circuit did not speak to and, consequently, impliedly approved this reasoning. *See generally Juliana II*, 947 F.3d 1159, 1175 (9th Cir. 2020) (dismissing the case for lack of standing, without addressing the merits of the public trust argument).

138 *Juliana I*, 217 F. Supp. 3d at 1257.

139 *Id.*

140 *See, e.g.*, James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 ENVTL. L. 337, 343–348 (2015) (discussing the history of state courts limiting the doctrine to submerged lands and waters).

141 *See, e.g.*, *Kanuk*, 335 P.3d 1088, 1102 (Alaska 2014) (court acknowledging that plaintiffs made a good case that the atmosphere is within the public trust); *Butler*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *6 (Ariz. App. March 14, 2013) (assuming, though not ruling, that the atmosphere is within Arizona's public trust); *Foster*, (No. 14-2-25295-1 SEA), 2015 WL 7721362, at *8 (Wash. Super. Ct. Nov. 19, 2015) (holding that the atmosphere and established trust resources are so interconnected that discerning between the two is nonsensical); Sanders-Reed *ex rel.* Sanders-Reed v. Martinez, 350 P.3d 1221, 1222 (N.M. App. 2015). However, other courts have declared that the atmosphere is not a trust asset. *See, e.g.*, Chernaik v. Brown, No. 16-11-09273, 2015 WL 12591229, at *11 (Or. Cir. May 11, 2015) (declaring that the atmosphere is not within Oregon's public trust).

142 *Juliana I*, 217 F. Supp. 3d at 1255.

143 *See, e.g.*, *id.* at 1255 (holding that it was not necessary to determine whether the federal public trust doctrine included the atmosphere because established public trust resources like the oceans and seas were clearly impacted by climate change); *Foster*, 2015 WL 7721362, at *8 (holding that plaintiffs could prevail without alleging the atmosphere

of the remedies sought by ATL plaintiffs,[144] the abnegation with which courts have dealt with climate change cases,[145] and courts' preference for claims providing more familiar judicial standards,[146] this distinction is meaningful because it allows courts hearing ATL claims to proceed without breaking new doctrinal ground.

The above trends demonstrate both courts' shifting attitudes towards ATL claims and ATL plaintiffs' changing strategies. Each of these patterns, though distinct, play into the application the preemption and justiciability doctrines which thus far have prevented climate litigation from attaining the results climate plaintiffs seek. Part IV delves into the application of these doctrines in greater detail, comparing the application of preemption and justiciability to atmospheric trust and second-wave litigation.

IV. COMPARING THE PUBLIC NUISANCE SUITS TO ATMOSPHERIC TRUST LITIGATION

In comparing public nuisance suits to ATL cases, Part IV explores some of the advantages of each theory. Subpart A discusses ATL cases' advantages over second-wave nuisance suits in terms of preemption by the Clean Air Act. Subpart B focuses on second-wave suits' advantage over ATL claims in terms of standing and political question concerns.

A. Preemption by the Clean Air Act

In both the second-wave nuisance and ATL contexts, preemption concerns are paramount.[147] As has been discussed already, complete preemption by the Clean Air Act, which would warrant federal jurisdiction, is unfounded in the second-wave nuisance context.[148] The same is true in the ATL context since nothing in the Act provides for the kind of relief sought by ATL plaintiffs nor accounts for government trustees' public trust doctrine obligations outside and irrespective of the

is a trust resources because of the interconnectedness of the atmosphere to established trust resources); *Kanuk*, 335 P.3d at 1103 (asserting that the trust could already include climate change because of its "detrimental impact on already-recognized trust resources such as water, shorelines, wildlife, and fish.").

144 *See, e.g.*, *Brown*, 436 P.3d 26, 28–29 (Or. App. 2019) (praying for injunctive relief binding Oregon government to climate action).

145 *See generally* Douglas Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 4 (2011) (analyzing courts' reluctance to give climate plaintiffs a fair shake in court).

146 *See supra*, Part III.

147 *See, e.g.*, City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2019) (dismissing plaintiff's claim alleging public and private nuisance and trespass on the grounds that federal common law governed and the Clean Air Act preempted the federal common law claims); Defendants' Motion for Summary Judgment at 23, *Juliana I*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-CV-01517-TC), 2018 WL 2441145 (arguing for preemption based on the reasoning of the Court in *American Electric Power*).

148 *See supra*, Part II.B.

Clean Air Act. However, ordinary preemption arguments have yet to be litigated in second-wave or ATL cases. This subpart, in comparing second-wave nuisance and ATL suits, seeks to explain why courts should not rule that second-wave suits are preempted by the Clean Air Act under the doctrine of ordinary preemption and to argue why ATL cases are better positioned to withstand preemption arguments in general. It begins with a discussion of its application to second-wave cases and then turns to its application in the ATL context.

The Supremacy Clause of the Constitution mandates that federal law be the "Supreme law of the Land," ensuring that federal law takes precedence over and supersedes (or preempts) any contrary state law.[149] Federal preemption is divided into two types: express preemption, where a federal law explicitly states that it preempts state law, and implied preemption, where a federal law does not expressly provide for preemption of state law but nevertheless acts to preempt state law.[150] Implied preemption is likewise divisible into two subspecies: field preemption, where Congress has so occupied a field with a regulatory regime as to nullify any state law in the area (the subspecies at issue in *American Electric Power*),[151] and conflict preemption, where there are issues for actors to comply with both the federal and state laws.[152] Conflict preemption, in turn, comes in three categories: 1) impossibility preemption, where it is impossible for an actor to comply with both a state and a federal law; 2) conflict preemption, where state and federal laws demand incompatible or opposite responses; and 3) obstacle preemption, where state law stands as an impediment to compliance with federal law.[153] For the following reasons, though, ordinary preemption, in any of its mutations, does not and should not preempt second-wave nuisance or ATL suits.

Express preemption does not apply to second-wave or ATL cases because nothing in the Clean Air Act expressly provides for preemption of common law claims. While the Act contains an express preemption provision which addresses mobile source compliance with emissions controls,[154] nothing in the Act expressly preempts common lawsuits. To the contrary, the Act contains a savings clause preserving common law causes of action.[155] The existence of this savings clause undermines any

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149 Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 254 (2000).

150 *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, 724 (2013) (discussing the difference between conflict preemption and obstacle preemption).

151 *Am. Elec. Power Co. II*, 564 U.S. 410, 429 (2011) (holding that the Clean Air Act preempts federal common law public nuisance claims regarding climate change seeking injunctions).

152 *Id.*

153 JAY B. SYKES & NICOLE VANATKO, CONG. RESEARCH SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER (2009).

154 Clean Air Act, 42 U.S.C. § 7543(a) (2012).

155 *Id.* § 7604(e) (preserving the right under common law to seek "any other relief" even against the Administrator or state implementing agency).

reasoned argument for express preemption in the second-wave nuisance and ATL contexts.

Application of implied preemption doctrines to second-wave suits, however, is more complicated. The case of *International Paper Co. v. Ouellette*,[156] though specific to the preemptive effect of the Clean Water Act, is instructive at this murky juncture in the law and is, consequently, worth unpacking.[157] There, residents of Vermont brought a nuisance action under Vermont law against a New York discharger for its pollution into Lake Champlain, a waterbody on the border between the two states.[158] The defendant argued that the Clean Water Act preempted the claim.[159] The Supreme Court disagreed, holding that the citizen suit portion of the Clean Water Act's savings clause[160] preserves citizens' right to bring suits under the affected state's law against polluters for the consequences of their discharges within that state but that the savings clause preempted suits brought in response to out-of-state discharges raised under the affected state's law.[161] To hold otherwise, the Court warned, would interfere with the purposes of the Act insofar as it would undermine the Act's permitting scheme and cooperative federalism dynamics.[162] Given the similarities between the Clean Water Act and the Clean Air Act[163] and between the two laws' savings clauses,[164] some courts have applied *Ouellette*'s holding in the Clean Air Act arena.[165]

Indeed, courts applying *Ouellette*'s reasoning to the Clean Air Act have been resolute in its application, consistently holding that the Act preempts nuisance actions against out-of-state emitters under affected-state law. For example, in *Her Majesty The Queen in Right of the Province of Ontario v. City of Detroit*,[166] the Sixth Circuit rejected a suit brought by the Canadian government against the city under Michigan law seeking to abate the city's proposed emissions of ash residue because "nothing in the [Clean Air] Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state."[167] Likewise, in *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, the Fourth Circuit held that the Clean Air Act, under

156 479 U.S. 481 (1987).

157 *Id.* at 490.

158 *Id.* at 483–84.

159 *Id.*

160 Clean Water Act, 33 U.S.C. § 1370 (2012).

161 *Ouellette*, 479 U.S. at 494–98, n.18.

162 *Id.* at 492–94.

163 Both federal acts utilize cooperative federalism and permitting to abate pollution. *See* England, *supra* note 150, at 740–41 (discussing the similarities between the two laws).

164 Courts have noted that "the citizen suit savings clause of the Clean Water Act is 'virtually identical' to its counterpart in the Clean Air Act." Bell v. Cheswick Generating Station, 734 F.3d 188, 195 (3d Cir. 2013) (quoting *Milwaukee II*, 451 U.S. 304, 328 (1981)).

165 *See, e.g.*, North Carolina, *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 306 (4th Cir. 2010).

166 874 F.2d 332 (6th Cir. 1989).

167 *Id.* at 343 (quoting *Ouellette*, 497 U.S. at 492, 497).

Ouellette, preempted a nuisance suit brought by North Carolina against out-of-state emitters under North Carolina law, emphasizing the "potential mischief" of allowing nuisance actions to establish de facto emissions standards contrary to those provided by the Clean Air Act.[168] More recently, in *Merrick v. Diageo Americans Supply, Inc.*,[169] the Sixth Circuit, relying on *Ouellette*, rejected the notion that the Clean Air Act preempted all state common law actions and stated that the holding from *American Electric Power* did not extend to state common law actions.[170] These cases demonstrate one consistent rule of law: The Clean Air Act does not preempt *all* state common law actions and only does so where litigants seek to abate out-of-state pollution by way of affected state law.

Although it must be acknowledged that the vast majority of emissions at issue in second-wave claims occur and occurred outside of the states where the cases have been filed—which would imply that *Ouellette* would control and mandate preemption—this fact does not and should not foreclose second-wave suits.[171] Unlike the discrete, localized water pollution at issue in *Ouellette*[172] or the ash residue emissions at issue in *Her Majesty The Queen in Right of the Province of Ontario*,[173] the climate-related emissions at issue in second-wave suits are not the result of second-wave defendants' emissions today or even last year, but rather, are the result of historical emissions emitted decades before second-wave cases reached American courts.[174] Congress never contemplated how these emissions should be regulated, because it never gave sufficient consideration to the climate crisis.[175] Given the scale, scope, and historical nature of the climate crisis, therefore, the Court's analysis from *Ouellette* does not appear to be directly on point and should not be construed as the only means by which courts could or should analyze second-wave claims.

Further, *Ouellette* is distinguishable from second wave claims for other substantive reasons. Unlike in *Ouellette* and its progeny, for example, second-wave cases are not brought against polluters *per se*, but

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168 *Tenn. Valley Auth.*, 615 F.3d at 296, 303.

169 805 F.3d 685 (6th Cir. 2015).

170 *Id.* at 686, 692–94.

171 *Ouellette*, 479 U.S. at 500. At least one commentator argues that this fact mandates preemption by the Clean Air Act under *Ouellette*. *See* Damien M. Schiff & Paul Beard II, *Preemption at Midfield: Why the Current Generation of State-Law-Based Climate Change Litigation Violates the Supremacy Clause*, 49 ENVTL. L. 853, 853 (2019).

172 479 U.S. at 492.

173 874 F.2d 332, 335 (6th Cir. 1989).

174 *See, e.g.*, *Mayor & City Council of Balt.*, 388 F. Supp. 3d 538, 548 (D. Md. 2019); IPCC Special Report, *supra* note 2, at 76 (discussing the delayed impact of greenhouse gases on global warming and emphasizing that greenhouse gas emissions can take centuries to tangibly affect the climate).

175 *See, e.g.*, *Juliana II*, 947 F.3d 1159, 1165 (9th Cir. 2020) (discussing how long the United States government has known about the climate crisis).

rather target the extractors, refiners, and sellers of fossil-fuels.[176] Critics of second-wave suits argue there is no meaningful distinction between going after the producers of fossil fuels and the emitters of greenhouse gases because in either circumstance it is the "emission-aspect" of their conduct that is at issue.[177] However, their argument is misguided. For one, this distinction is meaningful as it further divorces second-wave cases from *Ouellette*'s concerns regarding undermining the Act's cooperative federalism dynamics.[178] Moreover, there is good reason why Congress would want to preempt suits against the polluters of air pollutants, as doing so is necessary to effectuate the Clean Air Act's goal of protecting the public health and welfare of Americans[179] while not allowing for immunization of the corporations most responsible for the most expensive, most far-reaching crisis yet faced by the country. By these critics' reasoning, one might conclude that that the Clean Water Act preempts chemical companies,[180] being manufacturers of one kind of pollutant under that Act, from liability for the carcinogenic effects of those products on human health when used in manufacturing or in the home. Contrary to this notion, the tort system is expressly intended and used for reallocating the costs of business-related externalities to those responsible and better suited to pay for those externalities.[181] This is precisely what second-wave claimants seek to do.

While the plaintiffs in *Ouellette* sought injunctive relief against an out-of-state defendant, second-wave cases request compensatory damages.[182] While it is true that the Ninth Circuit in *Native Village of Kivalina* held that such a distinction is meaningless in this context, reasoning that holding otherwise would ascribe to Congress the "incongruous" intent to displace a federal common law cause of action but then "to allow it to be revived in another form,"[183] *Native Village of Kivalina* is distinguishable from second-wave suits. Unlike in *Native Village of Kivalina*, second-wave defendants do not sue particular

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176 *Compare Ouellette*, 479 U.S. at 484 (suing New York dischargers of pollutants), *with Mayor & City Council of Balt.*, 388 F. Supp. 3d at 548 (naming a list of defendants including ExxonMobil, Chevron, BP, and other sources, as opposed to burners, of fossil-fuels).

177 Damien M. Schiff & Paul Beard II, *Preemption at Midfield: Why the Current Generation of State-Law-Based Climate Change Litigation Violates the Supremacy Clause*, 49 ENVTL. L. 853, 880 (2019).

178 *Ouellette*, 479 U.S. at 494.

179 *See* Clean Air Act, 42 U.S.C. § 7401(a)(2) (2006) (stating as a goal of the Act reducing the impact of air pollution on "the public health and welfare").

180 *Compare* United States v. Canal Barge Co., 4:07CR-12-JHM, 2008 WL 533878, at *1 (W.D. Ky. 2008) (involving a Clean Water Act violation regarding the discharge of benzene, a carcinogenic chemical), *with* LeBlanc Estate *ex rel.* LeBlanc v. Chevron USA, 396 F. App'x. 94, 95 (5th Cir. 2010) (involving a toxic tort case resultant from benzene exposure in the workplace).

181 *See generally* O.W. Holmes, *The Common Law* 93 (American Bar Association 2009) (1881).

182 *Compare Ouellette*, 479 U.S. at 481, *with* California v. BP P.L.C., (No. C 16-06011 WHA, No. C 17-06012 WHA), 2018 WL 1064293, at *1, 3 (N.D. Cal. Feb. 27, 2018).

183 *Native Vill. of Kivalina*, 696 F.3d 849, 857 (9th Cir. 2012).

emitters for injuries resultant from their emissions, but rather bring actions against the full gamut of carbon major corporations.[184] Further, unlike in *Native Village of Kivalina*, which was raised under federal common law and consequently involved a displacement analysis, second-wave cases are grounded in state law and therefore implicate preemption analyses.[185] Because displacement does not implicate the federalism dynamics at play in preemption analyses, courts are more willing to hold that federal statutes displace federal common law than they are to hold that those same statutes preempt state law.[186] Extending *Native Village of Kivalina*'s reasoning to second-wave cases would not only leave second-wave plaintiffs without alternative theories of relief, but would also contradict Congress' demonstrated intent in including the savings clause in the Clean Air Act.[187]

In sum, application of the myriad forms of implied preemption to second-wave cases remains untenable even with *Ouellette* in mind. Although there is no question that a common law claim asserting a source does not comply with air-related regulatory emissions limitations would be preempted by the Clean Air Act, as was the case in *American Electric Power*,[188] there is nothing in the Act which provides for a cause of action remotely reminiscent of those raised by second-wave plaintiffs. Given that reality, the inclusion of the savings clause expressly preserving state common law suits,[189] and the assertion of *Ouellette* and its progeny that the Clean Air Act does not preempt every state law cause of action,[190] it is clear that the Act does not regulate the causes and impacts of the climate crisis so comprehensively as to impliedly preempt the field. Likewise, because the emissions at issue in second-wave cases were neither emitted by second-wave defendants nor permitted by the Clean Air Act, as they occurred before the Act included climate-related regulations,[191] allowing second-wave cases to proceed to trial does not and would not conflict or impede with the effectuation of the Act.

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184 *Compare id.* at 857 (suing a limited number of fossil-fuel companies and electric utilities), *with Mayor & City Council of Balt.*, 388 F. Supp. 3d 538, 548 (D. Md. 2019) (suing dozens of carbon major corporations).

185 *Compare Native Vill. of Kivalina*, 696 F.3d at 857 (discussing displacement), *with Mayor & City Council of Balt.*, 388 F. Supp. 3d at 553–54 (discussing preemption).

186 *See* England, *supra* note 150, at 739–40.

187 Clean Air Act, 42 U.S.C. § 7604(e) (2012).

188 564 U.S. 410, 415 (2011) (holding that a suit against major emitters calling for a cap on their emissions was preempted by the Clean Air Act's regulatory regime). Note that displacement of federal common law is much easier to achieve than preemption of state common law as it does not implicate issues of federalism. *Id.* at 423.

189 42 U.S.C. § 7604(e) (preserving the right under common law to seek "any other relief" even against the Administrator or state implementing agency).

190 *See, e.g.*, Bell v. Cheswick Generating Station, 734 F.3d 188, 189–90 (3d Cir. 2013); *Tenn. Valley Auth.*, 615 F.3d 291, 303 (4th Cir. 2010); *Ouellette*, 479 U.S. 481, 497 (1987).

191 *See generally* England, *supra* note 150, at 706–13 (discussing the history of the Clean Air Act's climate-related regulatory regimes).

The application of implied preemption doctrines to ATL suits, however, is equally complex. Compliance with public trust obligations is different from compliance with the Clean Air Act because public trust doctrine compliance in the ATL context requires courts to consider whether governments' actions in passing and implementing statutes like the Clean Air Act satisfy the trust obligations of government defendants regarding the trust assets at issue.[192] This is wholly different from an analysis inquiring into whether a particular emitter complies with an applicable regulatory program within the Clean Air Act. Unlike public nuisance doctrines, public trust obligations are inherent in sovereignty and, consequently, cannot be preempted or displaced by regulatory regimes where those regimes prove insufficient to protect trust resources for future generations.[193] Though a government may be able to fulfill its trust obligations by enacting and enforcing regulatory regimes protecting or restoring trust assets, such actions do not absolve that government of its duties as a trustee.

Arguing for preemption by the Clean Air Act in the ATL context (or displacement in the federal ATL suits), therefore, requires defendants demonstrate that existing greenhouse gas regulatory regimes adequately protect trust resources for young people and *future generations*. Even where statutes fulfill some portion of a state's public trust obligations, "mere compliance . . . with [the statutes] is not sufficient to determine if their actions comport with the requirements of the public trust doctrine."[194] A given government's effort to enforce greenhouse gas regulations, be it through the Clean Air Act or a local statute, cannot end a court's inquiry into whether that government had fulfilled its public trust obligations.[195] This dynamic is mirrored by the structure of the Clean Air Act itself, which provides a federal "floor, not a ceiling, for the protection of air quality," and thereby allows governments leeway to fulfill their trust obligations beyond the

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192 *See, e.g.*, Sanders-Reed *ex rel.* Sanders-Reed v. Martinez, 350 P.3d 1221, 1225–26 (N.M. App. 2015) (analyzing New Mexico's compliance with its public trust doctrine obligations by analyzing its passage and implementation of relevant statutes).

193 Kootenai Envtl. All. v. Panhandle Yacht Club, 671 P.2d 1085, 1095 (Idaho 1983) ("[I]t must again be emphasized that mere compliance by [government] bodies with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.").

194 *Id.* However, some early courts hearing ATL cases found obviously inadequate climate legislation sufficient to satisfy states' public trust doctrine obligations. *See, e.g.*, *Sanders-Reed*, 350 P.3d at 1227 (holding that, despite minimal regulation, existing state law regulating greenhouse gas emissions sufficiently undermined plaintiffs' inaction claim).

195 Bonser-Lain v. Texas Comm'n on Envtl. Quality, (No. D-1-GN-11-002194), 2012 WL 3164561, at *2 (Tex. Dist. Ct. Aug. 2, 2012), *vacated*, 438 S.W.3d 887 (Tex. App. 2014) (holding that the existence of a greenhouse gas regulatory regime was insufficient to demonstrate that Texas had fulfilled its trust obligations).

requirements of the Act.[196] ATL plaintiffs' continued use of affirmative-conduct arguments even further increases the burden on government trustees to demonstrate compliance with trust obligations through more than the mere passage or implementation of relevant statutes.[197] After all, no amount of existing climate legislation compensates for the issuance of permits for pipelines and fracked gas drills, the promulgation of tax breaks and regulatory exemptions for the oil and gas industries, or other affirmative actions that ATL plaintiffs allege contributed to the impairment of trust resources and the violation of constitutional due process rights.[198] Proving the Clean Air Act preempts ATL cases, therefore, is a tall order, as it demands defendant governments show that the Act adequately protects trust resources from climate change for present and future generations, a contention wholly unsupported by the scientific consensus.[199]

Nevertheless, given the Court's shifting jurisprudence around preemption analyses[200] and the apprehension with which courts address climate change cases,[201] even ordinary preemption will remain a concern for both second-wave nuisance and ATL plaintiffs. As this subpart suggests, however, courts should be reluctant to rule the Clean Air Act, or any other existing regulatory program, displaces or preempts second-wave nuisance or ATL claims.

B. Justiciability

Although common law ATL claims struggle to avoid dismissal based on standing and political question,[202] second-wave suits do not.[203] Indeed, ATL cases are frequently and vigorously challenged at every

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196 *Id.*

197 *See supra*, Part III.

198 *See, e.g.*, *Juliana I*, 217 F. Supp. 3d 1224, 1246 (D. Or. 2016) (describing the affirmative conduct of the federal government in causing climate change).

199 *See generally* IPCC Special Report *supra* note 2, at 53.

200 *See* England *supra* note 150, at 729 (chronicling the confusion in the Court's jurisprudence around preemption in the wake of *American Electric Power*).

201 *See generally* Weaver & Kysar, *supra* note 100, at 322–29 (examining the approach courts took to early climate cases).

202 *See, e.g.*, Svitak *ex rel.* Svitak v. State, 178 Wash. App. 1020, 2013 WL 6632124, at *1 (Wash. App. Div. 1 2013) (dismissing on justiciability grounds); Aji P. v. Washington, No. 18-2-04448-1 SEA, slip op. at 3 (Wash. August, 14, 2018) (dismissing on justiciability grounds); Aronow v. State, A12-0585, 2012 WL 4476642, at *1 (Minn. App. Oct. 1, 2012) (dismissing on justiciability grounds in a single paragraph).

203 *See, e.g.*, *Cty. of San Mateo*, 294 F. Supp. 3d 934, 937–39 (N.D. Cal. 2018) (analyzing plaintiffs' claims without even mentioning any standing or political question concerns); *Mayor & City Council of Balt.*, 388 F. Supp. 3d 538, 549 (D. Md. 2019) (analyzing plaintiffs' claims without even mentioning standing or political question concerns). Some first and second-wave nuisance suits struggled with political question arguments. *See, e.g.*, *City of New York*, 325 F. Supp. 3d 466, 468 (S.D.N.Y. 2019) (dismissing on justiciability grounds).

stage of standing analyses: injury-in-fact,[204] causation,[205] and redressability.[206] Although a number of courts have rejected these arguments, they remain a threat to ATL cases.[207] The *Juliana* case is illustrative. Despite the fact that the magistrate and district court judges each found standing for plaintiffs' claims, the case spent years in limbo awaiting trial as appellate courts deliberated about the justiciability concerns raised by the federal defendants and, after multiple applications for interlocutory appeal, was dismissed for lack of standing.[208]

In contrast, second-wave suits have a number of advantages in standing analyses. On a procedural level, second-wave suits are brought by governments rather than private individuals, and are therefore subject to deferential standing review.[209] Further, by suing many carbon majors at once, second-wave claimants allow for the application of lax standards of liability.[210] Modern research lays bare each carbon major's historic role in causing contemporary climate change.[211] Consequently, courts hearing second-wave cases can allocate liability proportionally to each defendant based on its share of historic greenhouse gas emissions.[212]

Moreover, second-wave suits have substantive advantages in standing analyses. Where standing analyses significantly overlap with merits analyses, courts dismiss cases based on standing concerns only when the case at bar is either "entirely frivolous" or has "no foundation

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[204] *See, e.g.*, Defendants' Motion for Summary Judgment at 7–9, *Juliana I*, 217 F. Supp. 3d 1224 (D. Or. 2016) (Case No. 6:15–cv–01517–TC), 2018 WL 2441145 (emphasizing that plaintiffs' alleged injuries were generalized grievances shared by large swaths of the populace also affected by climate change).

[205] *See, e.g.*, *id.* at 9–12 (arguing that plaintiffs' harms could not be traced to defendants' conduct with the directness required for standing analyses).

[206] *See, e.g.*, *id.* at 12–14 (emphasizing that even if plaintiffs' relief was granted, climate change would persist and get worse as a result of increased foreign emissions outside of judicial control). Ultimately, the Ninth Circuit dismissed Juliana on standing, holding that the redressability the youth sought was not within the court's competence since it would lead to separation of powers concerns. *Juliana II*, 947 F.3d 1159, 1173 (9th Cir. 2020).

[207] *See, e.g.*, *Juliana II*, 947 F.3d at 1168–69, 1173 (holding that plaintiffs had demonstrated injury-in-fact, causation, and redressability, but because the kind of redressability requested impinged on separation of powers concerns, the plaintiffs' redressability allegations failed as a matter of law).

[208] *Id.* at 1175.

[209] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (holding that Massachusetts, because it is a sovereign, was subject to deferential standing review).

[210] *See* Lin & Burger, *supra* note 19, at 55 (positing that because greenhouse gas emissions are fungible and second-wave plaintiffs sue so many carbon-majors at once, market-share and substantial factor liability apply to second-wave suits).

[211] *See* Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATE CHANGE LETTERS 229, 230 (2014) (analyzing the historic emissions of carbon).

[212] *See* Lin & Burger, *supra* note 19, at 55–56 (analyzing the application of market-share and substantial factor liability to second-wave suits).

in law."[213] To adequately demonstrate standing, second-wave plaintiffs must sufficiently allege a public nuisance by showing that defendants' conduct interfered with public rights.[214] This inquiry overlaps with the merits of second-wave plaintiffs' claims; thus, the standing inquiry is whether the defendants' conduct in extracting, refining, marketing, selling, distributing, and burning fossil fuels causes climate change *and* whether climate change interferes with established public rights.[215] Second-wave cases may only be dismissed for lack of standing, therefore, where "entirely frivolous" or where they have "no foundation in law."[216] Establishing standing in ATL cases, however, requires youth plaintiffs to specifically allege injuries showing that the alleged impairment of public trust resources affects them uniquely, a query wholly unrelated to the substantive legal issues in ATL cases—whether defendant governments violated their public trust obligations.[217]

Similarly, courts dismiss ATL cases on political question grounds more often than second-wave nuisance suits.[218] Because ATL cases call on courts to demand governments take affirmative actions, these cases raise concerns over the proper separation of government powers.[219] To mitigate that concern, youth plaintiffs ask courts to order governments to create binding remedial plans meeting minimum levels of emissions abatement sufficient to protect plaintiffs' constitutional due process rights and fulfill governments' public trust obligations.[220] Again, the *Juliana* case is representative. Although the District Court for the District of Oregon held that such a remedy leaves enough room for government discretion to avoid political question dismissal,[221] the Ninth Circuit disagreed and dismissed the case despite the fact that it

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213 La. Energy & Power Auth. v. Fed. Energy Regulatory Comm'n, 141 F.3d 364, 367–68 (D.C. Cir. 1998) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 n.2 (1998); Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1997)).

214 *See* Memorandum of Points and Authorities in Support of Motion to Remand at 4, 21–22, *Cty. of San Mateo*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) (No. 17-cv-04929-VC), 2017 WL 7716267 (discussing standards for public nuisance under California law).

215 *See, e.g.*, *Mayor & City Council of Balt.*, 388 F. Supp. 3d 538, 559 (D. Md. 2019) (discussing public nuisance claims against fossil fuel companies based on allegations of substantial interference with the use and enjoyment of property).

216 *See supra* note 213 and accompanying text.

217 *See, e.g.*, *Juliana I*, 217 F. Supp. 3d 1224, 1242–43 (D. Or. 2016) (recounting plaintiffs' injuries resulting from climate change), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

218 *Juliana II*, 947 F.3d 1159, 1173 (9th Cir. 2020) (dismissing case on the grounds that plaintiffs' requested relief created separation of powers and political question concerns).

219 *See, e.g.*, *Juliana I*, 217 F. Supp. 3d at 1241 (concluding that were the ATL plaintiffs to succeed on the merits, the court would "be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy").

220 *See, e.g.*, Brief for Respondents in Opposition to Petition for Writ of Mandamus at 2, *In re* United States (2018) (No. 18-505), 2018 WL 6134241 at *2 (describing the "remedial plan" pled for by plaintiffs in the *Juliana* suit), *mandamus denied*, 140 S. Ct. 16 (2019) (mem.).

221 *See, e.g.*, *Juliana I*, 217 F. Supp. 3d at 1241–42 (holding that the plaintiffs' prayed-for relief left enough leeway for the court to fashion a remedy that would avoid separation-of-powers concerns).

determined the plaintiffs had satisfied every other element of justiciability.[222]

Conversely, because second-wave nuisance plaintiffs ask only for compensatory relief to be paid for by private parties, arguments that second-wave suits trigger the political question doctrine are less persuasive than in ATL cases calling for injunctive relief against the political branches of government. While first-wave nuisance cases, namely *American Electric Power*, barely survived political question concerns since they demanded injunctive relief,[223] second-wave suits were tailored to avoid justiciability issues.[224] As a result, second-wave nuisance suits have, for the most part,[225] proceeded without political question roadblocks.[226] ATL plaintiffs would be wise to learn from their second-wave nuisance counterparts in fashioning their requested relief as narrowing the scope of remedies seems to alleviate judicial hesitancy in the face of climate liability claims.

V. ATMOSPHERIC RECOVERY LITIGATION: A HYBRID BETWEEN THE TWO THEORIES

Part V addresses a burgeoning, yet untested legal theory—atmospheric recovery litigation (ARL)—and suggests that the litigants behind second-wave public nuisance suits could additionally raise atmospheric recovery claims within the same proceedings. As governmental entities, second-wave nuisance plaintiffs are positioned to raise natural resource damages (NRD) claims as sovereign trustees under the public trust doctrine. Not only would this open up a second pool of potential damages to these litigants, but such an arrangement

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[222] *Juliana II*, 947 F.3d at 1167, 1175 (dismissing on the grounds that plaintiffs' requested relief created separation of powers concerns). Note, however, that the Ninth Circuit was empowered to provide redress different and less extensive than that requested by the plaintiffs in their initial briefing, such as the ban on new federal fossil-fuel leases the *Juliana* plaintiffs requested by way of a motion for a preliminary injunction. Urgent Motion Under Circuit Rule 27-3(b) for Preliminary Injunction at 2, *Juliana I*, 217 F. Supp. 3d 1224 (2016) (No. 18-36082), 2019 WL 580829.

[223] In *Connecticut v. American Electric. Power Co., Inc.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005), the district court dismissed the plaintiffs' public nuisance claim against owners of fossil-fuel-fired power plants as a non-justiciable political question, but the Second Circuit vacated, finding the nuisance claims justiciable. Connecticut v. Am. Elec. Power Co., Inc, 582 F.3d 309, 315, 321–32 (2nd Cir. 2009). An equally divided Supreme Court affirmed the Second Circuit's exercise of jurisdiction (but reversed on other grounds*). Am. Elec. Power Co. II*, 564 U.S. 410, 420, 429 (2011).

[224] *See supra*, Part II.B (emphasizing that second-wave cases intentionally plead state-law-based public nuisance and request compensatory damages to avoid the political question concerns faced by first-wave suits).

[225] Not all second-wave cases have avoided the political question doctrine. *See, e.g.*, *City of New York*, 325 F. Supp. 3d 466, 471, 475–76 (S.D.N.Y. 2019) (holding that the plaintiff's global-warming tort claims could be pursued only under federal law, not under state common law, and dismissing plaintiff's claims on justiciability grounds).

[226] *See, e.g.*, *Cty. of San Mateo*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (remanding to state court a second-wave nuisance suit and thus not reaching political question concerns).

could also benefit plaintiffs in overcoming the removal and preemption concerns associated with second-wave suits. This part first explains the role of NRDs in the public trust doctrine generally and then goes on to summarize the ARL damages theory[227] and relate the theory to second-wave suits.

Governments may seek damages under the public trust doctrine to compensate for remedial efforts when trust resources are impaired by private actors.[228] NRDs aim to restore the natural wealth lost or damaged as a result of the impairment of a trust resource for the benefit of the public at large, rather than for a specific subset thereof.[229] NRD authority exists within both state and federal common law,[230] though NRDs can only be pursued by sovereign trustees.[231]

Though untested, ARL is a promising hybrid between second-wave nuisance and ATL cases. Under ARL, trustees could seek NRDs to compensate for the costs of reducing carbon content in the atmosphere without having to argue that the atmosphere itself is a trust asset by arguing action is necessary to restore oceans and glacial fed rivers,[232] long-standing and established trust assets.[233] ARL suits are like ATL suits, in that they are grounded in public trust principles, yet resemble second-wave nuisance suits in that they would request money damages and be brought against carbon majors. Pursuing ARL claims could open up a second source of compensatory damages to second-wave plaintiffs as they could seek compensation for the costs of adapting to climate change through public nuisance and seek reimbursement for the costs

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227 Wood & Galpern, *supra* note 17, at 292–93.

228 *See, e.g.*, Washington v. Gillette, 621 P.2d 764, 767 (Wash. App. 1980) (upholding a common law right of action for a State to pursue NRDs under the public trust doctrine).

229 Wood & Galpern, *supra* note 17, at 292.

230 *See* David Hodas, *Natural Resource Damages: A Research Guide*, 9 PACE ENVTL. L. REV. 107, 109 n.6. (1991). *See also In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (holding that the federal government could get natural resource damages without a statutory basis for waterfowl after an oil spill); Ohio v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974) (holding a municipality liable for natural resource damages after a fish kill resulting from a sewage treatment plant's pollution).

231 Lutz v. Chromatex, Inc., 718 F. Supp. 413, 419 (M.D. Pa. 1989); Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769, 772 (9th Cir. 1994).

232 *See* Wood & Galpern, *supra* note 17, at 292 (speaking to the need for carbon to be removed from the atmosphere and the potential of ARL to see that through); IPCC Special Report, *supra* note 2, at 77 (describing the need to draw carbon out of the atmosphere in order to avoid catastrophic, runaway climate change).

233 *See, e.g.*, Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 172 (Mont. 1894) (declaring a snowmelt-fed river in Montana within the public trust doctrine); *Public Engagement*, CALIFORNIA STATE LANDS COMMISSION, https://perma.cc/S8XL-ZMCC (last visited July 2, 2020) (detailing California's public trust doctrine, its relation to climate induced sea level rise, and explicitly including the submerged lands underneath the Pacific for three nautical miles offshore as within the trust).

required to reduce carbon dioxide concentrations in the atmosphere through ARL.[234]

Nevertheless, the ARL framework would not rid second-wave plaintiffs of the displacement and preemption concerns at issue in first and second-wave nuisance claims. Because Congress has already provided comprehensive statutory regimes providing NRDs in certain contexts,[235] defendants may claim that such statutes displace federal common law ARL claims and preempt state common law ARL claims.[236] However, like the Clean Air Act, these statutes include provisions specifically preserving common law claims.[237] Further, the displacement and preemption dynamics in the ARL context would largely mirror such concerns in the ATL and second-wave nuisance contexts as no federal statute provides for the kind of injury for which ARL plaintiffs would seek compensation.

Given their position as sovereign trustees, or agents thereof, second-wave plaintiffs are well situated to raise ARL claims. States and the federal government are better suited than cities and sub-state governments to bring NRD claims as they are entrusted with such authority both by the public trust doctrine and by statute.[238] Therefore, Rhode Island, the only second-wave nuisance plaintiff which is also a state, is ideally situated to raise an atmospheric recovery claim.[239] Nevertheless, the cities and sub-state governments behind the rest of the second-wave nuisance suits are empowered to raise atmospheric recovery claims as well.[240] Still, should second-wave plaintiffs choose to bring ARL claims in the future, it would be prudent of them to request states either get involved as plaintiffs, as they did during the first wave of nuisance litigation,[241] or expressly authorize second-wave plaintiffs (cities and sub-state governments) to sue on their behalf, in order to

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234 *See* IPCC Special Report *supra* note 2, at 53 (discussing at length the need to reduce carbon dioxide concentrations in the atmosphere in order to avoid catastrophic climate change).

235 *See, e.g.*, Oil Pollution Act (OPA) of 1990, 42 U.S.C. § 4331(b)(1) (2012); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§ 9601–9675 (2012).

236 *See* Wood & Galpern, *supra* note 17, at 317 (discussing the possibility of a displacement defense).

237 *See, e.g.*, 42 U.S.C. § 9607(j) ("Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.").

238 *See, e.g.*, Clean Air Act, 42 U.S.C. § 9607(f) (2012) (providing the President and the States a right of action to sue for NRDs); State of Wash., Dept. of Fisheries v. Gillette, 621 P.2d 764, 767 (Wash. App. 1980) (upholding a common law right of action for a State to pursue NRDs under the public trust doctrine).

239 Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146 (D.R.I. 2019).

240 *See, e.g.*, Sax, *supra* note 81, at 531–36 (describing the power of California municipalities to raise public trust doctrine claims).

241 *See, e.g.*, *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005) (dismissing a suit brought on behalf of eight states and the City of New York).

provide the requisite sovereign interest. Given states' growing involvement in second-wave nuisance cases, this proposition does not appear to be outlandish.[242]

The fossil-fuel industry has expected climate-related NRDs, but has not necessarily expected public-trust-based NRD suits.[243] As a result, the industry assumes that causation would prove too substantial an obstacle for climate-related NRD suits to be viable.[244] The ARL framework, however, would eliminate the need to prove specific causation as plaintiffs would only need to demonstrate that trust resources are impaired by climate change and that carbon majors contributed to the impairment.[245] Further, as previously discussed in the second-wave nuisance context, modern research alleviates concerns regarding direct causation for specific harms and opens up alternative theories of liability.[246] Therefore, the presumptive concerns expressed earlier by industry insiders may prove moot in the ARL context.

VI. CONCLUSION

The urgency and severity of climate change demands a hard look at liability. While second-wave nuisance suits argue that the corporations responsible for bankrolling the climate crisis should foot the bill for its remediation, ATL suits call on government trustees to take on that responsibility directly by addressing the crisis with the speed and scope demanded by leading science. Regardless of which argument proves more persuasive, both are needed to address the climate crisis. Judicial action "cannot happen a moment too soon."[247] In the words of Judge Staton, the dissenting judge in *Juliana II*, "[w]hen the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage

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242 Bronstad, *supra* note 80.

243 Wood & Galpern, *supra* note 17, at 264.

244 A leading industry attorney published a two-part set of articles warning fossil fuel companies of the risk they bear from NRDs. The initial article argued that such claims would not prevail because the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the primary statute for NRDs, did not provide for such damages. Ira Gottlieb et al., *Natural Resource Damages for Climate Change—An Idea Whose Time Has Not Yet Come, Part I: NRD Claims Are Not Currently Viable Under CERCLA*, 20 ENVTL. CLAIMS J. 256, 257 (2008). Further, the article asserted that proving causation regarding specific emissions would be difficult, if not impossible, in the climate context. *Id.* Despite the first article's concerns, the sequel to the first article warns companies to acquire insurance to protect against such risks. *See generally* Ira Gottlieb et al., *Natural Resource Damages for Climate Change—An Idea Whose Time Has Not Yet Come, Part II: Climate Change NRDs—Get Coverage*, 21 ENVTL. CLAIMS J. 2, 4 (2009).

245 Wood & Galpern, *supra* note 17, at 290–94.

246 *See supra*, Part IV.B. *See also* Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATE CHANGE LETTERS 229, 230 (2014).

247 Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 87 (2017).

everything between, those remaining will ask: Why did so many do so little?"[248]

[248] *Juliana II*, 947 F.3d 1159, 1191 (9th Cir. 2020) (Staton, J., dissenting).