Climate Change Litigation Trends
2015–2020

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According to the National Oceanic and Atmospheric Administration (NOAA), the 10-year period from 2009 to 2019 marked the warmest decade on record, with five of the hottest years over the 1880 to 2019 period occurring since 2015. NOAA Nat'l Ctrs. for Env't Info., *State of the Climate: Global Climate Report—Annual 2019* (Jan. 2020). The average global temperature was not the only thing increasing: In addition to the record-breaking temperatures and storm events widely covered by the media, the last decade also saw a sharp increase in litigation related to climate change, especially between 2015 and 2020.

As of February 16, 2021, the Sabin Center for Climate Change's database of U.S. litigation (the Database) identifies 1,337 climate change–related lawsuits filed since 1986. Sabin Ctr. for Climate Change, *Climate Change Litigation Databases* (2021). The United States leads globally by volume with approximately three-quarters of all climate change cases filed here since 1986. Furthermore, of approximately 40 ongoing climate change lawsuits against carbon-intensive companies worldwide, 33 are in U.S. courts. Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2020 Snapshot* 19 (July 2020). From 2015 to 2020, plaintiffs filed 736 climate change cases, accounting for over half of all such cases filed in the United States since 1986. The last two years, 2019 and 2020, saw the most such cases filed in back-to-back years (138 and 136 cases, respectively).

The recent influx of climate change cases has seen a shift in the legal strategies employed by plaintiffs. Before 2015, most climate change lawsuits focused on administrative law challenges claiming statutes require an agency to act, or not act, on climate issues, or challenges seeking to force state and federal governments to regulate greenhouse gas emissions to protect the atmosphere as a public resource. *Global Climate Change and U.S. Law* 58 (Michael B. Gerard & Jody Freeman eds., 2d ed. 2014). While some cases filed after 2015 are consistent with this approach, many involve innovative new legal arguments and issues of first impression. This article discusses these important new trends in climate change litigation over the 2015 to 2020 time period.

A brief overview of precedent-setting climate change cases decided prior to 2015 provides useful context for evaluating these new trends. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that the U.S. Environmental Protection Agency (EPA) had the authority to regulate greenhouse gas emissions (mainly carbon dioxide) from motor vehicles as an air pollutant under the Clean Air Act (CAA), and affirmed Massachusetts' standing based on its climate change–related claims. Four years later, in *American Electric Power Company v. Connecticut*, 564 U.S. 410 (2011), the Supreme Court held that because the CAA delegated management of carbon dioxide to the EPA, public nuisance actions seeking injunctive relief under federal common law were barred because federal common law was displaced by the CAA. In a related case, *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013), the Ninth Circuit applied *American Electric Power* to plaintiffs' claims for monetary damages (as opposed to injunctive relief), finding that federal common law was displaced in climate change tort claims regardless of the relief sought. With these key cases in mind, the next sections address the litigation trends from 2015 to 2020, some of which involve the precedent set forth by these older decisions.

Public Trust Cases and a Constitutional Right to a Stable Climate

State courts have adjudicated climate change public trust cases seeking to require state action on greenhouse gases since 2011. These cases typically sought declaratory relief that the atmosphere is a public trust resource, requiring the state to

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protect it for present and future citizens. This case type continued through 2015–2020 with subtle nuances from the largely unsuccessful 2011 wave.

Juliana et al. v. United States, 947 F.3d 1159 (9th Cir. 2020), is a public trust–styled case filed by 21 young people and minors that is unlike its predecessors. Not only is it the first public trust climate lawsuit filed in *federal* court, it argues that the plaintiffs have a fundamental constitutional right to a "stable climate" under the Due Process Clause of the Fifth Amendment, protecting life, liberty, and property. It also seeks an order requiring the federal government to prepare and implement an enforceable remedial plan to phase out fossil fuels and reduce atmospheric carbon dioxide. An Oregon district court declined to dismiss the lawsuit in 2016, holding the public trust and Fifth Amendment claims could advance, but on appeal, a split Ninth Circuit held that plaintiffs lacked standing because the requested relief—a national remedial program—involved a "political question," that is, it required complex policy and technological decision-making entrusted solely to the executive and legislative branches. Plaintiffs petitioned the Ninth Circuit for a rehearing, which was denied on February 10, 2021, and now plan to appeal the case to the Supreme Court.

Following *Juliana*, a new wave of lawsuits was filed in state courts with an increasing reliance on allegations of violations of state constitutional provisions, beginning with *Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. 2016), *affirmed*, 158 A.3d 642 (Pa. 2017). In *Funk*, plaintiffs sought a declaration that the atmosphere is a public resource under Article I § 27 of the Pennsylvania Constitution (the Environmental Rights Amendment (ERA)) and to compel the executive branch to regulate greenhouse gases and achieve safe levels as, they argued, the ERA required. While the state court held that the plaintiffs had standing, it dismissed the lawsuit because the ERA does not authorize the executive branch to disturb the state's legislative scheme for regulating carbon dioxide emissions, and the executive government had no mandatory duty to conduct studies, promulgate regulations, or issue executive orders regarding greenhouse gases. Conversely, a recent decision by the Supreme Court of Hawaii held that the state Public Utility Commission's approval of a ratepayer increase to pay for two liquid natural gas projects failed to consider out-of-state impacts from the projects in violation of plaintiff's "protected property interest in a clean and healthful environment." Haw. Const. art. XI, § 9; *In re Gas Co., LLC*, 465 P.3d 633, 651 (Haw. 2020). Elsewhere, in 2018 the Circuit Court for the Second Judicial Circuit of Florida dismissed a case seeking to require the state to devise and implement a plan to reduce greenhouse gas emissions, rejecting the plaintiff's argument that the Florida Constitution guaranteed the right to a stable climate. *Reynolds v. Florida*, No. 2018-CA-819 (Fla. Cir. Ct. June 6, 2020). Alaska, Washington, and Minnesota are litigating similar lawsuits with state constitutional issues brought by private plaintiffs in 2017, 2018, and 2020, respectively.

These new cases signify a renewed effort to seek greenhouse gas emissions reductions in state courts. Plaintiffs are increasingly attempting to base this effort on state constitutional provisions. The traction and success of these lawsuits will ultimately depend on the relevant state's constitutional provisions and body of interpretive case law, meaning cases in some states could see different results than others, despite the similarity among legal claims.

Climate Torts: Nuisance and Adaptation Cases

Perhaps the most significant climate litigation trend from 2015 to 2020 is the effort by states and municipalities seeking compensation from large energy companies for damages caused by climate change or for costs to adapt to a changing climate. While earlier cases like *Kivalina* and *American Electric Power* raised similar climate tort claims, the displacement of federal common law by the CAA tempered any chance of success in these cases. In contrast to these earlier cases, all but one of the new wave of climate tort cases were filed in state court to avoid this outcome. As could be expected, the case filed in federal court under federal common law was dismissed. *City of New York v. Chevron et al.*, 993 F.3d 81 (2d Cir. 2021). There are over a dozen cases in this category pending across the United States. The current major battle in the courts is one of jurisdiction. Defendant companies seek to remove these cases to federal court and avail themselves of the displacement precedent. So far, however, federal appellate courts have returned the cases to state court.

This trend began with several California municipalities suing large energy companies in 2017. Defendants removed these cases to federal court, but the Ninth Circuit returned the cases to state court, finding either that the complaint did not present a federal question under 28 U.S.C. § 1331 or that the defendants did not meet the criteria for federal-officer removal under 28 U.S.C § 1442(a)(1). *See Cnty. of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020); *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020). The City of Baltimore joined this trend less than a year later in 2018 by suing 26 large energy companies alleging eight causes of action including, among others, public and private nuisance, trespass, design defects, failure to warn, and an action under state consumer protection law. *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020). In March 2020, the Fourth Circuit became the first circuit court to rule on this wave of cases, finding that grounds for removal to federal court were lacking in the Baltimore case because the defendants did not satisfy grounds for federal officer removal based on certain contractual relationships between the companies and the federal government. *Id.* Defendants appealed this case to the Supreme Court, which held oral arguments on January 19, 2021. The Ninth Circuit opinions were also appealed to the Supreme Court, but the petitions were requested to be held pending the outcome of the Baltimore case. An opinion from the Supreme Court could come prior to its summer recess beginning in late June.

In July 2020, the Tenth and First Circuits issued rulings in line with the Fourth and Ninth Circuits, affirming remand of similar suits by the County of Boulder, Colorado, and the state of Rhode Island, the first state to file this type of lawsuit. *See Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020); *Rhode Island v. Shell Oil Prods.*

Co., L.L.C., 979 F.3d 50 (1st Cir. 2020). Yet more cases were brought in 2020 by municipal plaintiffs, motivated, perhaps, by the success on the jurisdictional question at the federal appellate level, with the Counties of Maui and Honolulu; the Cities of Charleston, South Carolina, and Hoboken, New Jersey; and the states of Connecticut and Delaware all filing similar complaints in state court alleging combinations of climate change–related torts.

No decisions on the merits have been reached yet in any of these state cases, and the results are far from certain. Each state court will rely on its state-specific case law when addressing the merits of these tort claims. Furthermore, not all of these cases seek the same remedies. For example, the City of Oakland's complaint seeks an order funding the costs of climate adaptation. Other cases, like the one brought by the City of Charleston, seek more traditional remedies, like compensatory damages, punitive damages, and disgorgement of profits, as well as injunctive relief to abate nuisances. In contrast, Boulder County's complaint seeks only monetary relief, and explicitly states that it does not seek to enjoin any oil and gas operations in Colorado or anywhere else, or to enforce emissions controls. Another issue to watch is the extent to which nongovernmental entities file similar suits against energy companies. At least one such case was filed in 2018, where a fishing association alleged several torts related to energy companies' alleged impacts to Dungeness crab fisheries off the coast of California and Oregon. *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Chevron Corp. et al.*, No. CGC-18-571285 (Cal. Super. Ct. filed Nov. 11, 2018). The parties agreed to a joint resolution staying the proceedings until the final resolution of the C*ity of Oakland v. BP* and *County of San Mateo v. Chevron* cases.

Fraud and Consumer Protection Cases

Beginning in 2018, several states filed cases against energy companies alleging violations of state consumer protection laws. Generally, these lawsuits allege that energy companies fraudulently misrepresented or failed to disclose to consumers and investors the effects their products have on the climate or the companies' assets. At least four states and the District of Columbia (D.C.) have filed such lawsuits: New York (2018); Massachusetts (2019); D.C., Minnesota, and Connecticut (2020). Beyond Pesticides, a nonprofit organization, also filed a suit under D.C.'s consumer protection law.

In contrast to most of the climate litigation filed from 2015–2020, the New York case has been decided on the merits, with the defendant, Exxon Mobil (Exxon), prevailing. The case began in 2018, when New York's attorney general filed a complaint alleging that Exxon violated the state's securities act by making materially false and misleading statements to the public and investors about how the company manages risks of climate change and the cost of carbon in assessing demand for its products. New York presented financial disclosures, risk assessments, reports and modeling to shareholders on demand for its products, testimony, and other evidence in support of its claims. The court held that New York failed to demonstrate by a preponderance of the evidence that Exxon made any material misrepresentations to investors. The state had dropped its common law claims of fraud and equitable fraud after the presentation of the evidence. *People by James v. Exxon Mobil Corp.*, 119 N.Y.S.3d 829 (Table) (N.Y. Sup. Ct. 2019) (slip op.).

Precisely one year after New York filed its complaint, Massachusetts filed a similar complaint in state court against Exxon after a multiyear investigation. The complaint alleged Exxon committed deceptive practices by misrepresenting its business practices related to the use of proxy costs of carbon, creating misleading advertisements of its products, failing to disclose the effect of its products on climate change, and engaging in a "greenwashing" campaign. The Massachusetts lawsuit is further reaching than New York's in that it alleges a consumer protection cause of action, claiming that the company materially misrepresented its products' effects on the climate and engaged in a "greenwashing" campaign that deceived consumers regarding Exxon's role in solving climate change issues, thereby influencing consumers' decisions whether to purchase Exxon's products. Much like the climate change tort cases discussed in the second section, this litigation has focused on jurisdictional issues, with Exxon's attempts to remove the case to federal court being unsuccessful thus far. *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020).

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In the two D.C. lawsuits, the central claims allege that Exxon's media campaign violated D.C.'s consumer protection law by deceiving the public by allegedly understating the role its products play in climate change. While the *Beyond Pesticides* case seeks only injunctive relief, the D.C. lawsuit seeks restitution and damages in addition to injunctive relief for damages allegedly caused by extreme weather events, including disproportionate damage on low-income communities and communities of color. The lawsuits filed by Connecticut and Minnesota allege similar violations of state consumer protection and trade laws, but also request an order that Exxon publish all climate-related research and fund a corrective education campaign regarding greenhouse gas emissions and climate change.

Administrative and Regulatory Challenges and Enforcement Actions

The argument that governmental entities have failed to properly consider the impacts of their activities on the climate has

proven to be a reliable weapon for opponents of various types of projects that require public comment and environmental review, especially energy and infrastructure projects. For example, the Database reports 179 suits filed between 2015 and 2020 alleging that federal agencies violated the National Environmental Policy Act (NEPA) by failing to adequately analyze climate change impacts. Hundreds of additional cases have been filed under other federal and state environmental laws.

In 2016, for example, in a challenge to the environmental review of a pipeline from Florida to Alabama, the D.C. Circuit remanded the Federal Energy Regulatory Commission's environmental impact statement for the pipeline on the grounds that its analysis of the greenhouse gas emissions that will result from burning the gas that the pipeline will carry (i.e., downstream emissions) was insufficient. *Sierra Club v. Fed. Energy Regul. Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017). Similarly, a federal district for the District of Columbia found a NEPA analysis for an oil and gas lease sale on public land inadequate because it failed to reasonably quantify drilling-related greenhouse gas emissions and needed to strengthen its discussion of downstream emissions, including whether quantifying such emissions was reasonably possible. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019).

Also during this period, citizen suits were brought under the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA) against two energy companies over their fossil fuel marine terminals in Rhode Island and Massachusetts. In the Massachusetts case, the lawsuit alleged that the Exxon terminal's past or present handling of hazardous and solid waste could present an imminent or substantial endangerment to public health or the environment because it knew that the terminal could eventually be submerged due to rising sea level but failed to take any action. The lawsuit alleged that Exxon violated the CWA by failing to disclose climate change information in its National Pollutant Discharge Elimination System permit and failing to address climate change impacts in its Stormwater Pollution Prevention Plan. A Massachusetts district court stayed the lawsuit in March 2020, citing the doctrine of primary jurisdiction and EPA's current work on issuing a new permit. *Conservation L. Found., Inc. v. ExxonMobil Corp.*, 448 F. Supp. 3d 7 (D. Mass. 2020). This decision has been appealed to the First Circuit. Similarly, in Rhode Island, the lawsuit alleged that failure to address the vulnerabilities of the terminal to climate change impacts violated the CWA. This trend is likely to continue as climate science develops and agencies increasingly adopt guidance on analyzing climate change effects that incorporate these considerations into their analyses of environmental impacts.

Climate Change Securities and Financial Cases

The 2015–2020 period also saw the initiation of climate change–related securities litigation filed by company shareholders. Unlike lawsuits where the alleged injury is directly related to the alleged climate change issue, climate change litigation in securities actions allege that climate change harmed the financial interests of a shareholder; the alleged harm to the plaintiff is the loss in value of the shares held by the shareholder as a result of climate change.

Exxon is litigating at least two securities-related lawsuits in federal court in Texas. In *In re Exxon Mobil Corp. Derivate Litigation*, two shareholder derivative complaints alleged claims of breach of fiduciary duty, waste, and unjust enrichment. No. 3:19-cv-01067 (N.D. Tex. filed May 2, 2019). The complaint asserts that Exxon has a history of intentionally misleading the public as to the effects of climate change, and the company's contribution thereto, as well as misrepresenting the effect of climate change on Exxon's reserve values and long-term business. In a related case, an investor filed a securities class action on behalf of purchasers of Exxon's common stock, alleging the stock price was artificially inflated based on positive statements, causing the stock to fall after a quarterly financial report stated that Exxon may have to write down 20 percent of the value of its oil and gas assets. *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-3111 (N.D. Tex. filed Nov. 7, 2016). Elsewhere, class actions have been filed by employees over investments in fossil fuel companies by managers of employee pension plans. In *Roe v. Arch Coal, Inc.*, employees alleged the investment of employees' pension assets in the company's stock was a breach of fiduciary duty because of the known effects of climate change. No. 4:15-cv-00910 (E.D. Mo. filed June 9, 2015). A class action against ExxonMobil in 2016 by employees alleged that investment in Exxon's stock breached a fiduciary duty because those fiduciaries knew or should have known the value of Exxon's stock was inflated, but the case was dismissed. *Fentress v. Exxon Mobil Corp.*, No. 4:16-cv-3484, 2019 WL 426147 (S.D. Tex. 2019).

In sum, 2015–2020 saw an unprecedented deluge of climate change litigation filed across state and federal courts. An analysis of these cases reveals a number of trends demonstrating evolving strategies employed by plaintiffs seeking to force action on climate change through the litigation process. However, a significant, precedent-setting body of decisions on the merits in these cases has not yet developed, as jurisdictional and other preliminary issues continue to wind their way through the courts. Updates could develop rapidly based on precedent-setting decisions after the authors have submitted this article for publication. Ultimately, the outcome of these cases will depend on the law of the jurisdiction in which the lawsuit is filed. To be sure, successful approaches will be duplicated. However, plaintiffs are also likely to continue to adopt novel legal strategies, informed by evolving climate science and public awareness, resulting in the development of a new set of trends in climate change litigation.

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