NOTES

City of New York v. Chevron Corp.: The Second Circuit Takes a Ride on the Second Wave of Climate Nuisance Litigation

I. OVERVIEW

Burdened with the present and looming harms resulting from climate change, the City of New York (the City) decided to take legal action against some of those allegedly most responsible: five of the ten largest cumulative producers of fossil fuels worldwide since the mid-nineteenth century.[1] Although the City was fully aware that every single person and private or governmental entity that uses gas or electricity contributes to global warming, it contended that it was not fair for its taxpayers to shoulder the burden of its efforts to mitigate climate damages.[2] Instead, the City proposed that the defendant fossil fuel producers long knew that their products accelerated the harms from climate change while continuing to sell them in large quantities.[3] The City further argued that the defendant producers instead of the City's taxpayers should bear the brunt of the damages associated with the sale of fossil fuels, a practice which contributes to devastating changes to the City's climate and landscape.[4] The City brought suit in federal court in diversity on state law claims of (1) public nuisance, (2) private nuisance, and (3) trespass for the defendants' production, promotion, and sale of fossil fuels.[5]

The United States District Court for the Southern District of New York dismissed the City's claim on three grounds.[6] First, the court held

1. City of New York v. Chevron Corp., 993 F.3d 81, 86 (2d Cir. 2021) (listing Chevron Corporation, ConocoPhillips, ExxonMobil Corporation, BP P.L.C., and Royal Dutch Shell P.L.C. as five of the ten largest producers of fossil fuels).
2. *Id.*
3. *Id.* at 86-87.
4. *Id.* at 87.
5. *Id.* at 88; Amended Complaint, City of New York v. BP P.L.C. et al., 2018 WL 8064051 (No. 1:18-cv-00182-JFK) at ¶ 48 (S.D.N.Y. March 16, 2018) (noting that the court had subject matter jurisdiction over the City's action through diversity jurisdiction).
6. City of New York v. BP P.L.C., 325 F.Supp.3d 466, 476 (S.D.N.Y. 2018).

that federal common law displaced the City's state law nuisance claims because transboundary gas emissions are an international problem that must be governed by a uniform federal standard.[7] Second, the court concluded the Clean Air Act (CAA) displaced the City's federal common law claims with respect to domestic greenhouse gas emissions because it speaks directly to the question of those emissions.[8] Third, the court determined that while the CAA did not displace the City's claims targeting foreign emissions, judicial caution dictated that it not recognize those claims in light of concerns that they would interfere with the political branches of the U.S. government.[9] The City appealed.[10] The United States Court of Appeals for the Second Circuit *held* that (1) federal common law instead of New York law applied to the City's claims; (2) the CAA displaced any federal common law claims by the City and only applied to domestic emissions; and (3) separation of powers concerns precluded recognizing a federal common law claim against the defendants' foreign emissions. *City of New York v. Chevron Corp.*, 993 F.3d 81, 93-103 (2d Cir. 2021).

II. BACKGROUND

Federal common law exists in a few restricted areas that fall into two categories: (1) where a federal rule or decision is "necessary to protect uniquely federal interests," and (2) where Congress has "given the courts the power to develop substantive law."[11] Interstate pollution disputes may invoke federal common law because such disputes often implicate two federal interests that are incompatible with the application of state law: (1) the need for a uniform rule of decision on national energy and environmental issues and (2) the "basic interests of federalism."[12] The Supreme Court of the United States crafted the legal framework for adjudicating federal common law nuisance claims based on greenhouse gas emissions in *American Electric Power Company v. Connecticut* (*AEP*).[13] There, a federal common law suit brought by multiple states, cities (including New York City), and non-profit groups sought to abate

7. *Id.* at 472.
8. *Id.* at 474.
9. *Id.* at 476.
10. *Chevron Corp.*, 993 F.3d at 89.
11. *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).
12. *See Chevron Corp.*, 993 F.3d at 91-92 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972)) (superseded on other grounds).
13. 564 U.S. 410 (2011).

greenhouse gas emissions stemming from five of the major power companies in the country.[14]

The *AEP* Court held the federal common law claims were displaced by the CAA because the statute spoke directly to the issue of carbon dioxide emissions from the defendants' fossil fuel powered plants.[15] Further, through the CAA, Congress delegated to the Environmental Protection Agency (EPA) the power to regulate emissions standards for power plants, and the EPA was in a better position to issue injunctions through its experts than the Court.[16] The fact that the Court could review agency action to ensure compliance with the CAA further supported its decision to "resist setting emissions standards by judicial decree under federal tort law."[17] Notably, the Court refused to speak on whether the CAA displaced federal common law claims for damages nor whether state law nuisance claims against the defendants could be viable.[18]

In a decision consistent with Supreme Court precedent on displacement, the United States Court of Appeals for the Ninth Circuit held that displacement of federal common law claims does not turn on the remedy sought, but on the cause of action asserted.[19] *Native Village of Kivalina v. ExxonMobil Corporation* extended the doctrine of displacement as it relates to climate change litigation as the plaintiffs' claim for monetary damages was also displaced by the CAA.[20] Hence, the Ninth Circuit crafted another predictable limitation on federal common law claims seeking relief for damages from climate change.[21] The court also made sure to emphasize that despite the immediate and continuing threat of damages to the coast of the Village of Kivalina, the solution to its inherent danger must come from either the executive or legislative branches rather than a federal common law action.[22] In a concurrence, Judge Pro noted that the Village of Kivalina could pursue other remedies

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14. *Id.* at 418
15. *Id.* at 424.
16. *Id.* at 426.
17. *Id.* at 427.
18. *See id.* at 429 (stating that the availability of a state lawsuit depends on the preemptive effect of the federal act).
19. *Native Village of Kivalina v. ExxonMobil Corporation*, 696 F.3d 849, 857 (9th Cir. 2012) (citing Middlesex Cnty. Sewage Authority v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 4 (1981)).
20. *Id.* The Village of Kivalina argued that the defendant energy producers' emissions led to rising sea levels, which were melting ice caps and glaciers while also damaging the coast of the Village. *Id.*
21. *See id.* at 857.
22. *Id.* at 858.

through state nuisance law to the extent that such claims were not preempted.[23]

Supreme Court precedent also stands for the principle that state law nuisance claims should not regulate the conduct of out-of-state sources of pollution.[24] In *International Paper Company v. Ouellette*, the Court refused to recognize a Vermont nuisance claim against a New York paper company on the grounds that the claim was preempted by the Clean Water Act (CWA).[25] The plaintiff sought to hold the paper company liable for a discharge of effluents into New York water that crossed into Vermont water and allegedly diminished the plaintiffs' property values.[26] While the CWA did not directly speak to the issue of the ability of a state to impose its own standards on out-of-state pollution sources, the Court concluded that the state law claim was preempted because recognizing it would upset the "full purposes and objectives of Congress."[27] The Court deferred to elaborate statutory and regulatory schemes set out in the CWA rather than the vague standards of nuisance law.[28] Justice Powell stated that Congress allowing nuisance claims to undermine the regulatory structure of the CWA would be "extraordinary" in light of its elaborate permit system that sets clear standards.[29]

As the above precedent establishes, climate change litigation based on nuisance has largely been unsuccessful. This lack of success garners significant scholarly debate on the proper way to hold energy companies accountable for the effects of climate change.[30] While a complex debate, it can be most aptly summarized by two views: (1) climate change is a global threat that requires a strong response but the judicial branch is not the proper branch to set emissions standards; and (2) fossil fuel companies should be held accountable for past harms caused by climate change via a combination of tort liability and legislative and executive action.[31] For the

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23. *See id.* at 866 (Pro, J., concurring).

24. *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 495 (1987) (stating that if a New York source was liable for violations of Vermont law, that law could essentially override both the policy choices and the permit requirements of the source state).

25. *Id.* at 494.

26. *Id.* at 484

27. *Id.* at 493-94 (citing Hillsborough Cnty. v. Automated Med. Laboratories, Inc., 471 U.S. 707, 713 (1985)).

28. *See id.* at 497.

29. *Id.*

30. *See e.g.,* Bridget Pals, *Taxes vs. Torts, Which Will Make Fossil Fuel Producers Share Climate Change Burdens?,* 29 N.Y.U. ENV'T L.J. 235 (2021); Matthew Miller, *The Right Issue, The Wrong Branch, Arguments Against Adjudicating Climate Change Nuisance Claims,* 109 MICH. L. REV. 257 (2010).

31. *See* Pals, *supra* note 30 at 283; *see also* Miller, *supra* note 30, at 289.

former view, a large focus is on the impracticality of using nuisance suits as the proper vehicle for enacting climate reform.[32] In this scenario, plaintiffs could join as many emitters who operate in their state as possible and get the forum court to act as a "quasi-EPA" in promulgating emissions standards for as many oil companies, power plants, and coal plants necessary to grant the relief desired.[33] Further, assigning certain emissions to each potential defendant would be difficult and impracticable given the nature of greenhouse gas emissions.[34] The logical extreme of such climate nuisance lawsuits could be stretched to the absurd result of suing one single driver for their emissions.[35] Finally, there is the significant policy concern of interfering with the legislative and executive branches on a matter that such branches are supposedly best equipped to handle.[36]

In contrast, other scholars propose that climate change is so urgent and the damage so impending that the judiciary can and must work within the nuisance framework to hold major emitters accountable for the harms resulting from climate change.[37] This combination of legislative, executive, and judicial action can best respond to the adaptation and mitigation costs of climate change.[38] Adaptation costs refer to the costs of living with climate change, while mitigation costs refer to costs incurred by cutting greenhouse gas emissions to reduce the future burden of climate change.[39] Accordingly, holding fossil fuel producers liable in tort for adaption costs associated with climate change will help deal with both the past and present consequences of the climate crisis.[40] Further, regulatory and legislative solutions are best geared toward mitigation costs because they can be designed to create incentives to reduce emissions to a "socially

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32. *See* Miller, *supra* note 30, at 283-85 (noting the challenges of establishing causation and pinning responsibility on any one emitter for harms flowing from climate change).

33. *See id.*

34. *See id.* at 284.

35. *See id.* ("At one logical extreme, it would allow a single person to be sued under public nuisance, even if that person's emissions contributed 0.0001% to climate change. After all, an injunction halting John Doe from driving his car to work 'would slow the pace of global emissions increases.'").

36. *See id.* at 289.

37. *See* Pals, *supra* note 30, at 283; *see also* Steven Kahn, *Displacing an Incomplete Displacement and Preemption Analysis: Doctrinal Errors and Misconceptions in the Second Wave of State Climate Tort Litigation*, 35 J. LAND USE & ENV'T L. 169, 171 ("the status quo has left the state common law of public nuisance as one of the few remaining vehicles for bringing green-house gas emissions to the attention of the courts.").

38. *See* Pals, *supra* note 30, at 283.

39. *Id.* at 239-41.

40. *Id.* at 283 ("Recognizing the imperative to hold fossil fuel producers accountable for their morally reprehensible behavior, adaption costs should be paid for in part or in whole, through tort liability").

optimal level."[41] Hence, the "status quo" is not enough and nuisance claims may not be the most ideal vehicle for climate accountability, but should be viable at least on the state level.[42]

III. COURT'S DECISION

In the noted case, the Second Circuit determined that federal common law applied to the City's state law claims and followed the guidance of the Supreme Court in *AEP* to conclude that the CAA displaced the City's federal common law claims.[43] The court also held that while the CAA only regulates US emissions and so did not displace the City's claims targeting the defendants' emissions abroad, "foreign policy concerns" foreclosed any federal common law cause of action concerning such emissions.[44]

First, the court concluded that federal common law applied to the City's state nuisance claims because such claims were an interstate matter that raised significant federal interests and federalism concerns.[45] The court noted that federal common law applies to two categories: (1) where "a federal rule of decision is necessary to protect uniquely federal interests" and (2) where "Congress has given the courts power to develop substantive law."[46] Here, the combination of the need for a uniform rule of decision on national energy matters and basic interests of federalism implicated two federal interests that made applicable state law incompatible.[47]

While the City brought its claims under New York law, the claims were expansive because they sought damages for the cumulative impact of the defendants' emissions around the world.[48] Hence, if the City were to recover damages from the defendants for their emissions, the damage award would essentially regulate the defendants' behavior beyond New York's borders.[49] Any mitigation measure the defendants would take in New York would also have to take place in any jurisdiction in which they operate because once emitted, greenhouse gases are well-mixed into the

41. *See id.*
42. *See* Kahn, *supra* note 37, at 189.
43. City of New York v. Chevron Corp., 993 F.3d 81, 91-95 (2d Cir. 2021).
44. *Id.* at 101-03.
45. *See id.* at 91.
46. *Id.* at 90 (citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).
47. *See Chevron Corp.*, 993 F.3d at 91 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972)) (superseded on other grounds).
48. *Id.* at 92.
49. *Id.*

atmosphere and it is difficult to trace their origin.[50] The case therefore implicated "the conflicting rights of states and our relations with foreign nations," which each have their own laws.[51] Thus, the court reasoned, federal common law applied to the City's suit because it implicated national concerns like foreign policy, national security, climate change, and energy production.[52]

Second, the court concluded that the CAA displaced the City's federal common law claim because the Act spoke "directly to the question" that the common law was designed to answer.[53] Following guidance from the Supreme Court in *AEP*, the court reasoned the CAA displaced nuisance claims that sought abatement of transboundary emissions of greenhouse gases.[54] Next, the court concluded that under *Kivalina*, the CAA displaced the City's federal common law claims regardless of whether the City sought abatement or damages.[55] Hence, displacement of federal common law is "an all-or-nothing proposition, which does not depend on the remedy sought."[56] The court further elaborated that Congress's displacement of federal common law with the detailed statutory scheme in the CAA was unsurprising due to the vague standards associated with nuisance law.[57]

While the CAA displaced the City's domestic emissions claims, the City's claims regarding the defendants' foreign emissions still remained.[58] The court disposed of these claims on two grounds.[59] First, the court exercised judicial caution in light of the Supreme Court's rulings in *Jesner v. Arab Bank, PLC* and *Kiobel v. Royal Dutch Petroleum Company*, which cautioned that federal courts must be careful when venturing into the international arena.[60] Second, the court reasoned that holding the defendants liable for emissions abroad would interfere with the nation's political branches by undermining its foreign policy.[61] The court further

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50. *See id.* (citing Am. Elec. Power Co. v. Conn., 564 U.S. 410, 422 (2011)).
51. *Id.* (citing *Tex. Indus.*, 451 U.S. at 641).
52. *Chevron Corp.*, 993 F.3d at 93. (citing *AEP*, 564 U.S. at 427).
53. *Id.* at 95 (quoting *AEP*, 564 U.S. at 424).
54. *Id.* (citing *AEP*, 564 U.S. at 429).
55. *Id.* at 96.
56. *Id.* (citing Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012)).
57. *Id.* at 97 (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 496 (1987)).
58. *See Chevron Corp.*, 993 F.3d at 100.
59. *Id.* at 103.
60. *See id.* at 102 (citing Jesner v. Arab Bank, P.L.C., 138 S.Ct. 1386, 1408 (2018)); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013)).
61. *Id.* at 103.

explained that holding the defendants liable for foreign emissions would bypass various diplomatic efforts the United States undertook, such as the Paris Agreement and the United Nations Framework.[62] Thus, for the above reasons, the court upheld the district court's dismissal of the City's claims.[63]

IV. ANALYSIS

The Second Circuit found itself in an unenviable position: fail to take judicial action on a climate change suit or extend federal common law and state nuisance law in a very dramatic manner to hold fossil fuel producers liable for their commercial activity worldwide.[64] In staying consistent with precedent on displacement of federal common law, the court heeded Justice Ginsburg's warning in *AEP* of courts essentially setting "emissions standards by judicial decree."[65] Three inferences immediately arise from this case: first, by staying consistent with precedent, the court did not interfere with the statutory scheme Congress crafted in the CAA.[66] Second, the City's theory of liability was perhaps better suited for adjudication in state court as the *AEP* Court did not expressly strike down the possibility of the plaintiffs pursuing a state nuisance suit.[67] Third, the difficulty of crafting a judicial remedy for climate change nuisance suits underscores the notion that the legislative and executive branches are better equipped to take further and immediate action to address climate change.[68]

The Second Circuit's holding is consistent with the principles the Supreme Court and the Ninth Circuit outlined in *AEP* and *Kivalina*.[69] First, the City brought a claim centered on the very emissions that the CAA is designed to regulate.[70] Second, displacement of federal common law claims is an "all or nothing proposition."[71] Holding otherwise would

62. *Id.*
63. *Chevron Corp.*, 993 F.3d at 103.
64. *See id.* at 92.
65. *AEP*, 564 U.S. at 427.
66. *See Chevron Corp.*, 993 F.3d at 97.
67. *See AEP*, 564 U.S. at 429.
68. *See Chevron Corp.*, 993 F.3d at 97 ("Numerous courts have bemoaned the 'often vague and indeterminate' standards attached to nuisance law.") (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 496 (1987)).
69. *See id.* at 95 ("Whether the Clean Air Act speaks directly to the domestic transboundary emissions claims here is easily referenced by two prior decisions, *AEP* and *Kivalina*.").
70. *Id.* at 96 (citing Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857-58 (9th Cir. 2012)).
71. *Id.*

clearly upset the statutory scheme carefully crafted by Congress, as the City's claims would operate as a "*de facto* regulation on greenhouse gas emissions."[72] Furthermore, the Second Circuit would be taking the place of EPA by allowing the City to recover damages from the defendants under state nuisance law.[73] The deference to expert agencies emphasized in *AEP* also underscored the court's opinion, as expert agencies are better equipped to address damages from emissions because "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize."[74] The court refused to "condone" the City effectively replacing the CAA, which was a product of the political process, with New York nuisance law.[75]

The City's claims were better suited for adjudication in state court because they were state law claims that faced having a better chance of reaching their merits in state court.[76] There are two ways that the large climate nuisance suits akin to the City's in the noted case can be adjudicated in state court regardless of diversity: (1) an Act from Congress barring removal of climate nuisance suits even when the parties are diverse, or (2) cities destroying complete diversity by suing emitters in the same state where a larger fossil fuel company such as Chevron is headquartered. The first option is less probable, but Congress very likely has the power to alter the contours of diversity jurisdiction as it has done so before in the form of amending diversity requirements for class actions via the Class Action Fairness Act.[77] For example, Congress may bar removal of climate nuisance suits if the parties are diverse and the amount in controversy exceeds a certain dollar number. Cities such as New York may also simply use a crafty civil procedure tactic by suing an emitter in the same state in which a major fossil fuel company such as Chevron or ExxonMobil is headquartered in order to destroy complete diversity.[78] Given the expansive nature of the City's claims, such a strategy would not be out of the question, as an emitter headquartered in the same state as a major fossil fuel company likely contributes to essentially the same harm

72. *See id.* at 96.
73. *See Chevron Corp.*, 993 F.3d at 95 (citing *AEP*, 564 U.S. at 429).
74. *See AEP*, 564 U.S. at 428.
75. *See Chevron Corp.*, 993 F.3d at 86.
76. *See* Kahn, *supra* note 37, at 176 (arguing that state climate litigants who first file in state court should have the chance to have state courts adjudicate the merits of such claims).
77. *See* 28 U.S.C. § 1332(d)(2) (2018) (class actions where the amount in controversy exceeds $5,000,000 only require minimal diversity between plaintiffs and defendants).
78. *See id.* at § 1332(a) (complete diversity requirement).

the city complained of: emissions released through the production and sale of fossil fuels.[79]

While climate nuisance suits akin to that of New York City's raise important questions, the judiciary is not best equipped to handle such suits without more tools from Congress to enforce stringent environmental standards.[80] A judge lacking technical expertise in the complexities of greenhouse gas emissions understandably would have a hard time calculating damages based on the vague principles of nuisance law.[81] After all, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China."[82] Further, crafting an equitable remedy would be nearly impossible, as many emissions resulting from the defendants' sales come from third parties and it is difficult to trace greenhouse gas molecules to their source.[83] However, Congress carrying the burden to address climate change carries significant risk as well, because Congress is often divided and slow to legislate.[84] Further, with the exception of the 2016 amendments to the Toxic Substances Control Act (TCSA), recent attempts to pass major environmental laws have largely failed, such as the 2009 Waxman-Markey Bill to implement a nation-wide carbon trading program.[85] The concerns about the efficacy of Congress are well founded, but the political process should be the vehicle for sweeping environmental change just as it was for the creation of the CAA and EPA.[86] Now, the important questions raised by climate nuisance suits should be

79. *See Chevron Corp.*, 993 F.3d 81, 91 (citing Plaintiffs' Brief at 40).

80. *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 866 (9th Cir. 2012) (mentioning that Congress could add a federal damages cause of action to the CAA) (Pro, J. concurring); *see also* Albert Lin, *The Second Wave of Climate Change Public Nuisance Litigation*, ABA, (Sept. 1, 2019) https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2019-2020/september-october-2019/the-second-wave/ (stating that the second wave of climate nuisance litigation could influence political understandings of climate change and put pressure on fossil fuel companies to support a strong legislative response such as some form of a carbon tax).

81. *See AEP*, 546 U.S. at 428.

82. *See id.* at 422 (citing Brief for Petitioners at 18-19).

83. *See Chevron Corp.*, 993 F.3d at 97.

84. *See* Kimberly Strawbridge Robinson & Courtney Rozen, *Supreme Court Vaccine Decision Signals Trouble for Climate Rule*, BLOOMBERG LAW, (Jan. 14, 2022), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X5RGEUB0000000?bna_news_filter=us-law-week#jcite (critics of the decision overturning the workplace vaccine mandate note that Congress is often too slow and too fractured to respond fast enough to emergencies).

85. *See* 15 U.S.C. §§ 2601-2629 (2018) (amendments to the TCSA); Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, ATLANTIC, (Mar. 29, 2017), https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/.

86. *See Chevron Corp.*, 993 F.3d at 87.

the trigger for the next round of environmental protection laws and regulations.

Judicial action on the City's claim may also lead to frustrating the creation of more comprehensive climate change legislation if lawmakers became complacent due to continued judicial action on climate change nuisance suits.[87] Additionally, legislative and regulatory solutions are best geared toward paying the mitigating costs of climate change, as such solutions can both deter further emissions and incentivize a shift towards cleaner energy.[88]

V. CONCLUSION

In conclusion, the Second Circuit crafted its opinion with clear consideration of how both the Supreme Court and Congress spoke on the issue.[89] The court adhered to the principles of precedent by displacing the City's claims with federal common law, and then displacing those federal common law claims with the CAA.[90] A fair question to ask is: if not climate nuisance suits, what recourse is left for cities and states trying to protect their coastlines and infrastructure from climate change? The tough answer is that such recourse should come from the nation's elected officials whose job it is to tackle climate change. Increasing damage from the existential threat of climate change should be the catalyst for the legislative and executive branches to craft remedies that are proportional to the gravity of the climate crisis.

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87. *See* Miller, *supra* note 30, at 288.

88. *See* Pals, *supra* note 30, at 275-76, 283. However, Pals also argues that tort law should be used to hold energy producers liable for the costs of past damages stemming from emissions *Id.*

89. *Chevron Corp.*, 993 F.3d at 91-95.

90. *See id.*

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