

LAW AND CLIMATE DISINFORMATION

BY

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Documents, testimony, research, and analysis from a variety of disciplines and organizations reveal that some fossil fuel companies lied to the public about the climate harms of fossil fuels. Increased clarity about the conduct of the climate disinformation effort stands in contrast to decided haziness about its legal significance and consequences. The seminal climate case Massachusetts v. EPA is, to some, an early and powerful rejection of the importation of approaches and science rooted in the climate disinformation effort into agency decision making. It remains unclear, however, whether there are viable legal avenues to confront the core of the climate disinformation effort—its influence on the public (as consumers and voters) and, in turn, its influence on the sale of fossil fuels, fossil fuel companies’ social license to operate, policies to mitigate climate change, and, ultimately, climate change itself. Lawsuits seeking compensation from fossil fuel defendants for climate harms under state tort law center the climate disinformation effort. Doing so may help to render the controversies justiciable; it could also require courts to confront difficult questions about whether the climate disinformation effort was protected First Amendment speech. The “success” of the climate disinformation effort, the challenge of imposing ex-post-legal accountability for its harms, and the recognition that the climate disinformation effort is just one iteration of a recurring phenomenon—corporate public deception schemes—suggests the need for ex-ante-corporate law reform.

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I. INTRODUCTION

Some fossil fuel companies appear to have lied about the reality, causes, and harms of climate change and sought to persuade others to accept, repeat, and act on those lies.¹ Evidence of this emerges from documents, testimony, and analysis from myriad sources, including, most importantly, a joint staff report of the House Committee on Oversight and Accountability and Senate Committee on the Budget;²

¹ Merriam Webster defines “lie” as “to make an untrue statement with intent to deceive” or “to create a false or misleading impression.” *Lie*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/lie> [https://perma.cc/PDS9-W5UC] (last visited Mar. 12, 2026). This Article uses the colloquial term “lie” to describe the actions by some fossil fuel companies to obscure the causes and harms of climate change and refers to those actions collectively as the “climate disinformation effort.” As an alternative to “lie,” another appropriate term would be “bullshit.” Bennett L. Gershman, *Rudolph Giuliani and the Ethics of Bullshit*, 57 DUQ. L. REV. 293, 294 (2019) (“Bullshit in one sense involves a biased interpretation of facts in order to persuade someone to support the speaker’s position. Bullshit involves fakery and bluffing—claims of excuse, mistake, and accident—in order to deceive and mislead The bullshitter’s purpose is to persuade someone in a manner that appears to be more morally acceptable than telling a lie.”). This Article refers to the climate disinformation effort in the past tense although there are indications that the climate disinformation effort has not ended and has instead evolved, continuing in new forms. Complaint at 72, *People v. BP P.L.C.*, No. 1:26-cv-00254 (W.D. Mich. Jan. 23, 2026) (describing ongoing greenwashing and alleging that “Defendants have shifted their strategies throughout the decades, adapting their messaging in response to growing public understanding of climate science—not based on scientific developments, but polling data and reputational risks. While Defendants initially sought to deny and discredit climate science, Defendants later evolved their messaging to other sophisticated forms of deception: touting their own companies as part of the climate solution; promoting nonexistent or inadequate ‘low-carbon’ solutions to entrench fossil fuel use and distract from renewable energy alternatives; shifting blame to the public and other actors while refusing to acknowledge their own part in contributing to the climate crisis; and promoting fossil fuels as inevitable and irreplaceable”). See also Vincent Nolette, *Climate Preemption and Fossil Fuel Entrenchment*, 43 PACE ENV’T L. REV. 220, 248 (2026) (“Early denial has gradually given way to more sophisticated, ‘subtler’ messaging tactics that rely on obfuscating climate change impacts and attempting to delay action. More recently, these actors have honed in on culture wars, reframing climate action as a threat to personal autonomy and economic growth.”).

² See generally HOUSE COMM. ON OVERSIGHT & ACCOUNTABILITY DEMOCRATS & SENATE COMM. ON THE BUDGET, 118TH CONG., DENIAL, DISINFORMATION, AND

investigative journalism;³ reports prepared by the Union of Concerned Scientists;⁴ social science analyses;⁵ as well as the work of legal

DOUBLESPEAK: BIG OIL'S EVOLVING EFFORTS TO AVOID ACCOUNTABILITY FOR CLIMATE CHANGE (2024), https://www.budget.senate.gov/imo/media/doc/denial_disinformation_and_doublespeak_big_oils_evolving_efforts_to_avoid_accountability_for_climate_change.pdf [<https://perma.cc/ALT7-H7DR>] (rigorously documenting the decades-long climate deception campaign on the American public orchestrated by Big Oil).

³ See, e.g., DRILLED: *The Bell Labs of Energy* (Spotify, Aug. 28, 2018); Sara Jerving et al., *What Exxon Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), <https://graphics.latimes.com/exxon-arctic/> [<https://perma.cc/2Y4G-CS6T>] (explaining that Exxon's scientists internally used climate projections to plan drilling while peddling climate uncertainty to the public); see also David Hasemyer, *Documents Reveal Fossil Fuel Fingerprints on Contrarian Climate Research*, INSIDE CLIMATE NEWS (Feb. 21, 2015), <https://insideclimatenews.org/news/21022015/documents-reveal-fossil-fuel-fingerprints-contrarian-climate-research-willie-soon-harvard-smithsonian-koch-exxon-southern-company/> [<https://perma.cc/26Z7-5D2Q>] (documenting evidence that peer-reviewed research articles have been covertly paid for and subject to review by fossil fuel companies); Neela Banerjee, *How Big Oil Lost Control of Its Climate Misinformation Machine*, INSIDE CLIMATE NEWS (Dec. 22, 2017), <https://insideclimatenews.org/news/22122017/big-oil-heartland-climate-science-misinformation-campaign-koch-api-trump-infographic/> [<https://perma.cc/BR73-J7MG>] (describing the fossil fuel industry's conduct against climate science as "one of the largest, longest and most consequential misinformation efforts mounted against mainstream science by an industry"); Amy Westervelt, *How the Fossil Fuel Industry got the Media to Think Climate Change was Debatable*, WASH. POST (Jan. 10, 2019), https://www.washingtonpost.com/outlook/2019/01/10/how-fossil-fuel-industry-got-media-think-climate-change-was-debatable/?_pml=1 [<https://perma.cc/4TWJ-U5RQ>] (describing how the fossil fuel industry pushed back against science and shifted public opinion about climate change).

⁴ See UNION OF CONCERNED SCIENTISTS, SMOKE, MIRRORS, & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO'S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE 1 (2007) [hereinafter SMOKE, MIRRORS, & HOT AIR] (comparing ExxonMobil's global warming disinformation campaign to the tobacco industry's efforts to mislead the public on the scientific link between smoking and lung cancer and heart disease); UNION OF CONCERNED SCIENTISTS, THE CLIMATE DECEPTION DOSSIERS: INTERNAL FOSSIL FUEL INDUSTRY MEMOS REVEAL DECADES OF CORPORATE DISINFORMATION (2015) (discussing fossil fuel industry deception campaigns with special attention paid to internal fossil fuel companies' documents that demonstrate the intent to deceive); UNION OF CONCERNED SCIENTISTS, DECADES OF DECEIT: THE CASE AGAINST MAJOR FOSSIL FUEL COMPANIES FOR CLIMATE FRAUD AND DAMAGES (2025) (showcasing the evidence used in cases against major fossil fuel companies and how the lies from those companies go back decades).

⁵ See, e.g., JOHN COOK ET AL., AMERICA MISLEAD: HOW THE FOSSIL FUEL INDUSTRY DELIBERATELY MISLEAD AMERICANS ABOUT CLIMATE CHANGE (2019); Geoffrey Supran & Naomi Oreskes, *Addendum to 'Assessing ExxonMobil's Climate Change Communications (1977-2014)'*, ENV'T RSCH. LETTERS, Nov. 2020, at 1, 1-2 (cataloguing 1448 advertisements that reinforce prior conclusions that multiple fossil fuel companies misled the public about the effects of anthropogenic climate change between 1989 and 2004); Aaron M. McCright & Riley E. Dunlap, *Defeating Kyoto: The Conservative Movement's Impact on U.S. Climate Change Policy*, 50 SOC. PROBS. 348, 352-53, 367-68 (2003) [hereinafter McCright & Dunlap, *Defeating Kyoto*] (arguing the American conservative movement contributed to the United States' failure to ratify the Kyoto Protocol and highlighting the movement's affiliations with the fossil fuel industry); Riley E. Dunlap & Aaron M. McCright, *Challenging Climate Change: The Denial Countermovement*, in CLIMATE CHANGE AND SOCIETY: SOCIOLOGICAL PERSPECTIVES 300, 309-11 (Riley E. Dunlap & Robert J. Brulle

scholars⁶ and environmental historians.⁷ While there is room to debate the precise involvement and motivations of different companies, and exactly how far specific assertions diverged from the science as known to the companies, that some fossil fuel companies espoused and promoted climate lies is clear.

Scholars have done much work to reveal and document the occurrence and mechanics of the fossil fuel companies' purposeful climate disinformation effort.⁸ At this point, the climate disinformation effort has been investigated by Congress, shouted in headlines and scrutinized in podcasts, detailed in numerous reports by non-government organizations, and studied by scholars in disciplines from law to social science. In the words of legal scholars, "the evidentiary foundation for the claims regarding [fossil fuel companies'] conduct and knowledge appears quite robust."⁹ Increased clarity about what happened has not, however, produced corresponding clarity about the legal consequences (if any) of the climate disinformation effort. Now the question is: yes, it happened, but so what?

In one sense, the question might mean: "so what" happened on-the-ground. How, if at all, did the climate disinformation effort affect individuals and public understanding, science and scientists, politics, and public policy?¹⁰ While there is no way to know the answer to the

eds., 2015) [hereinafter Dunlap & McCright, *Challenging Climate Change*]; Riley E. Dunlap & Aaron M. McCright, *Organized Climate Change Denial*, in OXFORD CLIMATE CHANGE HANDBOOK ON CLIMATE AND SOCIETY 144, 146–148 (John S. Dryzek, Richard B. Norgaard & David Schlosberg eds., 2011).

⁶ See generally Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 460–63, 498 (2018) (arguing that, "[a]t a minimum, courts should consider whether corporate speech about science deliberately exploits well-understood cognitive biases to distort scientific information about risk" in response to a decades-long strategy of amplifying any shred of climate science uncertainty); Vanessa Casado-Pérez et al., *Climate Lies & Unjust Profits*, 75 EMORY L.J. (forthcoming 2026) (suggesting litigants "target the fossil fuel industry's decades of deceit . . . [b]y grounding legal claims in unjust enrichment—focusing on profits gained through systematic fraud . . ."); Joseph Manning, *Climate Torts: It's a Conspiracy!*, 62 B.C. L. REV. 941, 951–953, 963–965 (2021) (detailing the history of the fossil fuel industry's climate disinformation campaign and arguing it is actionable civil conspiracy).

⁷ Benjamin Andrew Franta, *Big Carbon's Strategic Response to Global Warming, 1950–2020* (Aug. 2022) (Ph.D. dissertation, Stanford University) (on file with Stanford Digital Repository, Stanford University).

⁸ The term "disinformation" denotes intentionally spreading information known to be incorrect, while misinformation can include mistakenly spreading misleading or false information. See Stephan Lewandowsky, *Climate Change Disinformation and How to Combat It*, 42 ANN. REV. PUB. HEALTH 1, 5–8 (2021) (discussing how the climate disinformation effort was purposeful).

⁹ Jessica Wentz & Benjamin Franta, *Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages*, 52 ENV'T L. REP. 10995, 10997 (2022).

¹⁰ For an overview of research on the impacts of the climate disinformation effort, see *id.* at 11018–19 ("[T]here is a strong basis for concluding that the partisan divide and prevalence of climate skepticism in the United States has been manufactured, at least in part, through climate disinformation efforts. . . . [R]esearchers have found that

counterfactual inquiry—for example, what would the U.S. climate policy landscape look like if fossil fuel companies had not engaged the climate disinformation effort—the impact of the climate disinformation effort has been significant, perhaps central. Consider the things that we know *did* happen. Baseless attacks on the personal and professional credibility of climate scientists were followed by declining public “belief” in climate change.¹¹ So many climate scientists were targeted with expensive, time-consuming, and anxiety-inducing lawsuits that a nonprofit group, the Climate Science Legal Defense Fund, now provides climate scientists with pro bono legal representation.¹² Meanwhile, fossil fuel companies gave a small group of “contrarian” scientists a megaphone, millions of dollars in research support, and funded a sophisticated public relations campaign to discredit mainstream climate science, creating the appearance of deep scientific “debate” where there was, in fact, consensus.¹³

Consider also this timeline. In 1992, the U.S. Senate ratified the United Nations Framework Convention on Climate Change.¹⁴ In 1995, the Intergovernmental Panel on Climate Change reported that human-caused climate change was “discernible,”¹⁵ and, since 2021, it has characterized the evidence of human-caused climate change as

misinformation and disinformation have distorted public perception of climate issues in a manner that has almost certainly contributed to climate inaction.”)

¹¹ See Lydia Saad, *One in Four in U.S. Are Solidly Skeptical of Global Warming*, GALLUP (Apr. 22, 2014), <http://www.gallup.com/poll/168620/one-four-solidly-skeptical-global-warming.aspx> [<https://perma.cc/JSS3-73ZU>] (presenting detailed polling results of Americans’ attitudes toward and beliefs about climate change); Anthony A. Leiserowitz et al., *Climategate, Public Opinion, and the Loss of Trust*, 57 AM. BEHAV. SCIENTISTS 819, 823–29 (2012); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1220, 1262 (D.C. 2016) (allowing well-known climate scientist Michael Mann’s defamation lawsuit to proceed). Professor Mann’s case eventually went to trial where a jury awarded him over \$1 million in damages. Delger Erdenesanna, *Michael Mann, a Leading Climate Scientist, Wins His Defamation Suit* (Feb. 8, 2024), <https://www.nytimes.com/2024/02/08/climate/michael-mann-defamation-lawsuit.html> [<https://perma.cc/F89Y-Q8GE>].

¹² See *About*, CLIMATE SCI. LEGAL DEF. FUND, <https://www.csldf.org/about/> [<https://perma.cc/4WPJ-3WZZ>] (last visited Mar. 9, 2026) (providing a range of free legal services, including legal aid clinics at scientific conferences, giving educational workshops and webinars, and publishing free resources).

¹³ Dunlap & McCright, *Challenging Climate Change*, *supra* note 5, at 307–08.

¹⁴ See *United Nations Framework on Climate Change*, CONGRESS.GOV, <https://www.congress.gov/treaty-document/102nd-congress/38/resolution-text> [<https://perma.cc/FT8A-9UAZ>] (last visited Mar. 15, 2026) (recording that the treaty was adopted on May 9, 1992, by the resumed fifth session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change).

¹⁵ U.N. Framework Convention on Climate Change, Subsidiary Body for Sci. & Tech. Advice, Scientific Assessments: Consideration of the Second Assessment Report of the Intergovernmental Panel on Climate Change, Note by the Secretariat, ¶ 13, U.N. Doc. FCCC/SBSTA/1996/7 (Feb. 22, 1996).

“unequivocal.”¹⁶ Yet as science produced clarity, the climate disinformation effort sowed doubt. In 1997, a memorandum authored by political strategist Frank Luntz advised republican candidates:

The scientific debate remains open. Voters believe there is ***no consensus*** about global warming within the scientific community. Should the public come to believe that the scientific issues are settled, their views about global warming will change accordingly. Therefore, ***you need to continue to make the lack of scientific certainty a primary issue in the debate***, and defer to scientists and other experts in the field.¹⁷

In 2026, the government is purging climate scientists: the government is scrubbing the phrase “climate change” from official discourse, blaming climate-exacerbated disasters on anything *but* climate change, clawing back funds appropriated to address climate change, and repealing or neutering federal laws meant to mitigate climate change through administrative interpretation that rests on climate disinformation.¹⁸ Can we imagine this reality *without* the well-funded, sophisticated attack on climate science, climate scientists, and public climate literacy?¹⁹

¹⁶ Richard P. Allan et al., *Summary for Policymakers*, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS: CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 3, 4 (2021).

¹⁷ Memorandum from Frank Luntz to the Bush White House (2002), <https://goodtimesweb.org/industrial-policy/2014/02-6.pdf> [<https://perma.cc/3ZU4-G5ZE>].

¹⁸ See Tracy J. Wholf, *Trump Administration Dismisses Nearly 400 Scientists Working on Congressionally Mandated National Climate Report*, CBS NEWS: POLITICS (Apr. 29, 2025, at 21:43 ET), <https://www.cbsnews.com/news/national-climate-assessment-report-scientists-fired/> [<https://perma.cc/DG3F-9P84>] (highlighting how the Trump Administration let go of nearly 400 employees by stating that they were no longer needed to develop the national climate change report); see also Oliver Milman, *Scientists Brace 'For the Worst' as Trump Purges Climate Mentions From Websites*, THE GUARDIAN (Feb. 4, 2025, at 06:00 ET), <https://www.theguardian.com/us-news/2025/feb/04/trump-climate-change-federal-websites> [<https://perma.cc/EQ4M-2QVD>] (explaining how federal government websites removed mentions of climate change and sustainability); Lois Parshley, *When Disaster Strikes, Is Climate Change to Blame?*, SCI. AM. (June 1, 2023), <https://www.scientificamerican.com/article/when-disaster-strikes-is-climate-change-to-blame/> [<https://perma.cc/8KS3-GE3F>] (describing the lag time between the present state of climate attribution science and its acknowledgement in political and judicial discourse); Dinah Voyles Pulver, *Trump Budget Targets Satellites, 'Energy Star' and Sea Turtles in Climate-Related Cuts*, USA TODAY: NATION (May 9, 2025, at 05:05 ET), <https://www.usatoday.com/story/news/nation/2025/05/09/trump-budget-cuts-environmental-programs/83441472007/> [<https://perma.cc/M39Y-DPRY>] (detailing how the Trump Administration proposed budget cuts to agencies charged with environmental reporting and management, which will set back the nation's efforts to combat climate change); *infra* notes 92–94 and accompanying text (describing the alternate science rationale for the proposed repeal of the endangerment finding under the Clean Air Act).

¹⁹ On the other side of the coin, it seems fair to venture that revelations about the fact and extent of the climate disinformation effort coupled with the climate tort suits' highly public drumbeat alleging that this corporate misconduct is harming communities “prod[ded]” legislative action in the form of the state climate superfund laws imposing

In many respects, society has yet to determine the significance and consequences of the climate disinformation effort. Some scholars argue that culpable fossil fuel companies can and should be prosecuted for criminal fraud²⁰ or criminal homicide.²¹ Others, disturbed by the death and destruction caused by climate disinformation and other corporate lying campaigns, and skeptical that companies can be held to account under existing laws, propose that legislatures “pass a comprehensive set of laws aimed at prohibiting [public deception schemes to conceal product dangers] and punishing those who carry them out.”²² Concern about the climate disinformation campaign undergirds calls for corporate law reform. Convinced that “[c]limate change denial is . . . a special kind of adverse corporate behavior that needs to be robustly deterred with an appropriate and suitable regulatory tool,” and that its “profound implications warrant the use of methods not found in the regulatory toolkit commonly employed to enforce compliance with rules and regulations,” one scholar proposes using “regulatory shaming” against fossil fuel companies engaged in climate deception.²³ The State of Michigan cites to the climate disinformation effort as evidence that fossil fuel companies violated antitrust laws in a complaint filed in January 2026.²⁴ At the time of this writing, plaintiffs have filed at least eighteen lawsuits—mostly in state court, though many have involved federal removal or appellate proceedings—against fossil fuel companies alleging that the climate-disinformation effort violated (or contributed to violations of) common law tort doctrines and/or consumer protection

strict liability on some carbon majors. *See generally* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 375–76 (2011) (explaining how tort suits can influence legislative action); Braden Leach, *Litigating Catastrophe*, 110 CALIF. L. REV. 2149, 2168–69 (2022) (“Litigation can influence legislators and executive branch officials, which can result in new laws and regulations When litigating in the realm of catastrophic risks, even a dismissal on justiciability grounds may serve as a ‘plead’—catalyzing legislative or executive action.”).

²⁰ See William C. Tucker, *Deceitful Tongues: Is Climate Change Denial a Crime?*, 39 ECOLOGY L.Q. 831, 851–53 (2012).

²¹ David Arkush & Donald Braman, *Climate Homicide: Prosecuting Big Oil for Climate Deaths*, 48 HARV. ENV'T L. REV. 45, 51 (2024) (“Although some of the harmful externalities that FFCs generate may be suitable for tort or regulatory suits, the lethality of FFCs’ conduct, their awareness of the risks they are generating, and their efforts to obscure those risks make criminal prosecution for homicide particularly appropriate.”).

²² Wes Henricksen, *Deceive, Profit, Repeat: Public Deception Schemes to Conceal Product Dangers*, 42 CARDOZO L. REV. 2395, 2405 (2021) [hereinafter Henricksen, *Deceive, Profit, Repeat*]; see also James Parker-Flynn, *The Fraudulent Misrepresentation of Climate Science*, 43 ENV'T L. REP. 11098, 11111 (2013) (proposing the creation of a new federal civil action for fraudulent misrepresentation of climate science).

²³ Sharon Yadin, *Regulatory Shaming and the Problem of Corporate Climate Obstruction*, 60 HARV. J. ON LEGIS. 337, 367–68 (2023) (defining “regulatory shaming” as the publishing of details of corporate misdeeds in a manner that conveys a negative message to the public about misbehaving corporations).

²⁴ Complaint at 66–69, *People v. BP P.L.C.*, No. 1:26-cv-00254 (W.D. Mich. Jan. 23, 2026).

laws; these are known as the state climate tort cases.²⁵ The daughter of Julie Leon, who died from hyperthermia during the 2021 Pacific Northwest heat dome, filed a wrongful death lawsuit against fossil fuel companies, alleging in part that they “launched a campaign of deception

²⁵ See *Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc.*, No. 2018CV30349, 2024 WL 3204275, at *10, *20 (Colo. Dist. Ct. June 21, 2024) (order granting in part and denying in part Defendants’ motion to dismiss on various grounds); *Delaware ex rel. Jennings v. BP Am. Inc.*, No. N20C-09-097, 2024 WL 98888, at *1 (Del. Super. Ct. Jan. 9, 2024) (alleging negligent failure to warn, trespass, common law nuisance, and violation of the Delaware Consumer Fraud Act); *City & Cnty. of Honolulu v. Sunoco LP (Honolulu III)*, 537 P.3d 1173, 1180–81 (Haw. 2023) (alleging a deceptive promotion campaign that misled the public); *Complaint at 4, 6, Maine v. BP P.L.C.*, No. PORSC-CV24-442 (Me. Super. Ct. Nov. 26, 2024), 2024 WL 758860 (alleging that if not for defendant’s actions, the consequences of climate change in Maine would be far less damaging); *Complaint at 4, City of Chicago v. BP P.L.C. (Chicago I)*, No. 2024CH01024 (Ill. Cir. Ct. Feb. 20, 2024) (alleging the misrepresentation and concealment of hazards by fossil fuel companies); *City of Annapolis v. BP P.L.C. (Annapolis I)*, No. ELH-21-772 (D. Md. May 19, 2021), 2021 WL 2000469 (granting defendant’s motion to stay in a tort case alleging adverse effects from the extraction, production, and consumption of oil, coal, and natural gas); *Anne Arundel Cnty. v. BP P.L.C. (Anne Arundel I)*, 94 F.4th 343, 346–347 (4th Cir. 2024) (alleging public deception and a failure to pursue less hazardous alternatives); *Minnesota v. Am. Petroleum Inst. (Minnesota II)*, Nos. A25-0419, A25-0421 (Minn. Ct. App. Apr. 22, 2025), 2025 WL 1203047 (challenging the district court’s denial of their motions to dismiss claims); *Complaint at 6, City of Hoboken v. Exxon Mobil Corp.*, No. HUD-L-3179-20 (N.J. Super. Ct. Sep. 2, 2020) (alleging public and private nuisance, trespass, negligence, and a violation of the state’s consumer protection laws); *Complaint at 5, Town of Carrboro v. Duke Energy Corp.*, No. 24CV003385-670 (N.C. Super. Ct. Dec. 4, 2024) (alleging defendant’s emissions in the state directly and proximately caused injuries); *Cnty. of Multnomah v. Exxon Mobil Corp.*, No. 3:23-cv-01213-YY, 2024 WL 2938473, at *3 (D. Or. June 10, 2024) (alleging negligent production, consumption, promotion, and refinement of fossil fuels); *Mun. of San Juan v. Exxon Mobil Corp.*, No. 23-1608, 2025 WL 1065101 (D. P.R. Apr. 9, 2025) (ordering plaintiff’s counsel to show cause why they should not be monetarily sanctioned for plagiarism in climate case); *State v. Exxon Mobil Corp.*, No. HHDCV206132568S, 2025 WL 3459468 (Conn. Super. Ct. Nov. 26, 2025) (alleging Exxon violated the Connecticut Unfair Trade Practices Act through climate deception). In addition to those cases cited above, there are more cases that courts have dismissed. See *Platkin v. Exxon Mobil Corp.*, No. MER-L-001797-22, 2025 WL 604846 (N.J. Super. Ct. Law Div. Feb. 5, 2025) (agreeing with defendants that plaintiffs’ claims are preempted by federal common law); *City of Annapolis v. BP P.L.C. (Annapolis II)*, No. C-02-CV-21-000250 (Md. Cir. Ct. Jan. 23, 2025), *cert. granted*, Apr. 24, 2025 (Md. Sup. Ct.) (holding that the United States Constitution’s federal structure does not allow the claims presented); *Anne Arundel Cnty. v. BP P.L.C. (Anne Arundel II)*, No. C-02-CV-21-000565 (Md. Cir. Ct. Jan. 23, 2025) (dismissing the case based on federal preemption); *City of Charleston v. Barbham Oil Co.*, No. 2020-CP-10-03975, 2025 WL 2269770, at *3 (S.C.C.P. Aug. 6, 2025) (dismissing plaintiff’s claims on federal preemption grounds); *Bucks Cnty. v. BP P.L.C.*, No. 2024-01836, 2025 WL 1484203, at *21 (Pa. C.P. May 16, 2025) (finding that the CAA and subsequent EPA regulations preempt state law). An appeal has since been filed in the *Bucks County* case. See *Bucks County v. BP P.L.C.*, COLUM. L. SCH.: CLIMATE LITIG. DATABASE, https://www.climatecasechart.com/collections/bucks-county-v-bp-p-l-c-_a0cd57 [<https://perma.cc/MVR8-TK96>] (last visited Apr. 22, 2026).

to downplay and discredit the risks of climate change and ensure growing demand for their fossil fuel product.”²⁶

Prior experience and a wealth of legal scholarship reveal the difficulties of imposing legal consequences for corporate public deception that, like the climate disinformation effort, intersects with complex science and aims to obscure product harms in part to obfuscate public policy—what scholar Douglas Kysar refers to as a “fraud on democracy.”²⁷ Corporate public deception efforts in this vein recur regularly (tobacco, lead paint, opioids, sugar,²⁸ perfluorinated chemicals,²⁹ plastics³⁰), causing widespread loss of life, among other societal harms, and the legal consequences for companies are often uncertain, delayed, convoluted, incomplete, and/or nonexistent.³¹ Even when it proves possible to impose some legal consequence—fines³² or settlements with state governments³³—there is often no meaningful recourse for many of the individuals killed, maimed, or sickened.³⁴

²⁶ Complaint at 1, 4, 34, *Leon v. Exxon Mobil Corp.*, No. 25-2-15986-8 (King Cnty. Super. Ct. May 29, 2025).

²⁷ Douglas A. Kysar, *The Duty of Climate Care*, 73 DEPAUL L. REV. 487, 511–12 (2024).

²⁸ Henricksen, *Deceive, Profit, Repeat*, *supra* note 22, at 2402.

²⁹ *The Devil They Knew: PFAS Contamination and the Need for Corporate Accountability: Hearing Before the H. Subcomm. on Env't of the Comm. On Oversight and Reform*, 116th Cong. 1–2 (2019).

³⁰ DAVIS ALLEN ET AL., THE FRAUD OF PLASTIC RECYCLING 1 (2024), <https://climateintegrity.org/projects/plastics-fraud> [<https://perma.cc/S7GG-9CLB>].

³¹ *See generally* Roy Shapira & Luigi Zingales, *Is Pollution Value-Maximizing? The DuPont Case* 8, 16–17, 20–23 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23866, 2017) (discussing how the low likelihood of detection and the fact that lawsuits imposing damages, even if they succeed, will tend to come much later in time may make it economically rational—and thus consistent with corporate law imperatives to maximize shareholder value—to pollute). Looking at the case of DuPont, the company knew the harms and risks from PFAS. *Id.* at 8–9. However, DuPont made the economically rational decision to manufacture and pollute in light of the relatively low probability of detection and attenuated potential for consequences, including legal liability, regulation, and damage to reputation. *Id.* at 20–23.

³² Amber Polk, *Toxic Battery: Pollution as a Dignitary Tort*, 65 B.C. L. REV. 2801, 2825 (2024) (describing the fines issued to companies that manufactured perfluorinated chemicals and lamenting that “fines for violations are nowhere near sufficient to deter companies from choosing to behave the same way repeatedly”).

³³ *See, e.g.*, PUB. HEALTH L. CTR., MASTER SETTLEMENT AGREEMENT, <https://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> [<https://perma.cc/74ZN-4T9N>] (last visited Mar. 9, 2026) (settlement agreement between over 40 states and tobacco product manufacturers).

³⁴ Aneri Pattani, *For Opioid Victims, Payouts Fall Short While Governments Reap Millions*, LA. ILLUMINATOR (Apr. 8, 2025, at 15:03 CT), <https://lailuminator.com/2025/04/08/opioid-payout/> [<https://perma.cc/GH8M-YWSQ>] (explaining that the actual victims of the opioid marketing scheme are receiving little to no compensation despite large government settlements with manufacturers and distributors); *see generally* Henricksen, *Deceive, Profit, Repeat*, *supra* note 22, at 2425 (“We now know about these massive deceptive schemes to defraud the public by which numerous corporations have profited greatly off of deceptions that have correspondingly caused great harm to millions of

The legal response to the climate disinformation effort reveals the challenges of disciplining corporate public deception under existing law, as well as how the push to impose accountability for conduct that many view as deeply wrongful—*malum in se*—is straining and shaping existing legal doctrine. This Article seeks to better understand the legal significance and consequences of the climate disinformation effort. It considers the claims in state climate tort cases while also adopting a broader lens to identify other potential legal consequences. In addition to sketching the broad contours of why and how the climate disinformation effort matters (in the legal sense—for law and through law), the Article also considers normatively how the law should respond to the climate disinformation effort and corporate public deception more broadly.

Part II begins by drawing a connection between the climate disinformation effort and the Supreme Court's decision in *Massachusetts v. EPA*.³⁵ In *Massachusetts v. EPA*, EPA adopted a climate-disinformation approach—asserting that it denied a petition for rulemaking because of (disingenuously exaggerated) “uncertainty” in climate science when, on this account, the decision instead reflected a different presidential policy preference—which the Supreme Court ferreted out and rejected.³⁶ This reveals how climate disinformation shaped key precedent and highlights an important role for courts in resisting the distortion of administrative law by climate disinformation. Part III explains how and why the climate disinformation effort is now central to the state climate tort suits—to frame the disputes as justiciable in state court and intertwined with the merits—and identifies the First Amendment issues this implicates. The treatment of the climate disinformation effort in these suits could decide whether the perpetrators of the climate disinformation effort are required to pay for climate harms and drive significant doctrinal developments in areas ranging from tort to the First Amendment. Part IV concludes by reflecting on the harm and difficulty corporate public deception, and arguing that using the law's response to climate disinformation may suggest some paths forward.

II. LEGAL CONSEQUENCES FOR AGENCIES: *MASSACHUSETTS v. EPA*

In *Massachusetts v. EPA*, the Supreme Court drew an important line in the sand: it signaled that it would not allow agencies to shroud climate change policy choices behind disingenuous characterizations of climate change science and that it was prepared to aggressively police

people, and yet the laws now in force to deal with deceptions for gain do not touch these . . . schemes.”)

³⁵ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

³⁶ *Id.* at 513, 534.

agency attempts to do so.³⁷ As explained *infra*, the jury is still out (or at least there's still a possibility of getting to a jury) about whether the carbon majors will face legal consequences under tort or consumer protection law for the climate disinformation effort. The Constitution protects the right of politicians to embrace, largely without legal constraint, the carbon majors' climate-disinformation playbook, and to shroud a policy preference not to constrain fossil fuels in manufactured uncertainty about the causes and harms of climate change.³⁸ One can understand *Massachusetts v. EPA* as an important early rejection of the parroting of climate disinformation by agencies (specifically) and the treatment of climate disinformation in courtrooms (generally). Starting with a description of how the opinion in *Massachusetts v. EPA* intersected with and treated climate disinformation, this Part interprets the case as having set a purposeful and largely successful tone-setting not-quite-precedent that has anchored subsequent treatment of climate disinformation in judicial fora by litigants and courts and helped to keep climate disinformation out of courtrooms.

When the Supreme Court issued its decision in *Massachusetts v. EPA*, attorneys greeted it as a highly significant decision on standing, environmental law, and administrative law.³⁹ The Supreme Court recognized standing for plaintiffs alleging harms from climate change,⁴⁰ interpreted the term "air pollutant" in the general definitions section of the Clean Air Act⁴¹ ("CAA") to include greenhouse gases,⁴² and subjected

³⁷ See *id.* at 533–34.

³⁸ See generally Harvey Gilmore, *When We Lie to the Government, It's A Crime, but When the Government Lies to Us, It's . . . Constitutional?*, 30 BUFF. PUB. INT. L.J. 61, 74–88 (2012) (describing First Amendment protections for false statements by politicians).

³⁹ On standing, see Randall S. Abate, *Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond*, 33 WM. & MARY ENV'T L. & POLY REV. 121, 124–25 (2008) ("The Supreme Court's decision in *Massachusetts v. EPA* is one of the most significant cases in the history of federal environmental litigation. The case could usher in a new era of environmental standing . . ."). For its significance in environmental law, see Lauren E. Schmidt & Geoffrey M. Williamson, *Recent Developments in Climate Change Law*, COLO. LAW., Nov. 2008, at 63, 67 ("The most significant development in federal climate change case law is the U.S. Supreme Court's decision in April 2007 in *Massachusetts v. EPA*."). On its impact in administrative law, see Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 367–72 (2016).

⁴⁰ See *Massachusetts v. EPA*, 549 U.S. at 526. ("In sum—at least according to petitioners' uncontested affidavits—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge EPA's denial of their rulemaking petition.")

⁴¹ 42 U.S.C. §§ 7401–7671q (2018).

⁴² See *Massachusetts v. EPA*, 549 U.S. at 528–29. ("On the merits, the first question is whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change. We have little trouble concluding that it does.")

an agency's denial of a petition for rulemaking to surprisingly searching review.⁴³ Nearly twenty years on, litigants and judges regularly cite to the decision's standing analysis when evaluating plaintiff standing in climate change suits,⁴⁴ its interpretation of the statutory term "air pollutant" undergirds the regulation of greenhouse gases from mobile and some stationary sources under the CAA,⁴⁵ and the case now appears in many administrative law casebooks.⁴⁶ Subsequent events have, however, significantly muted the decision's significance in each of these domains—standing, the regulation of greenhouse gases under the CAA, and as administrative law precedent.

With respect to standing, just four years after *Massachusetts v. EPA*, the Supreme Court split evenly over whether plaintiffs had standing to bring a federal common law nuisance action against large greenhouse gas emitters in *American Electric Power Co. v. Connecticut (AEP v. Connecticut)*:⁴⁷ "Four members of the Court, adhering to a dissenting opinion in [*Massachusetts v. EPA*] or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing."⁴⁸ Conventional wisdom holds, therefore, that Justice Roberts' dissent in *Massachusetts v. EPA* better represents the views of the current Court.⁴⁹

With respect to the regulation of greenhouse gases under the CAA, the Supreme Court significantly curtailed the scope of the authority that *Massachusetts v. EPA* opened up to EPA in two subsequent cases, *Utility Air Regulatory Group v. EPA (UARG v. EPA)*⁵⁰ and *West Virginia v. EPA*.⁵¹ The majority in *Massachusetts v. EPA* held that the term "air

⁴³ See *id.* at 560 (Scalia, J., dissenting).

⁴⁴ See, e.g., *Held v. State*, 560 P.3d 1235, 1251 (Mont. 2024) (citing *Massachusetts v. EPA* when ruling on standing); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011) ("Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts . . .*"); *Clean Wis. v. Env't Prot. Agency*, 964 F.3d 1145, 1158 (D.C. Cir. 2020) (citing *Massachusetts v. EPA* to support a finding of injury in the court's standing analysis).

⁴⁵ See 40 C.F.R. § 85.525(b) (2024) (regulating the standard for greenhouse gas emissions from vehicles/engines that have been converted to operate on a different fuel); *id.* § 60.45(a) (including carbon dioxide as part of emissions to monitor for new fossil-fuel-fired steam generators).

⁴⁶ See, e.g., ALFRED C. AMAN JR., LANDYN WILLIAM ROOKARD & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 60 (4th ed. 2023); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 281 (9th ed. 2022); KRISTIN E. HICKMAN, RICHARD J. PIERCE, JR. & CHRISTOPHER J. WALKER, *FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS* 1160 (4th ed. 2023).

⁴⁷ *Am. Elec. Power Co.*, 564 U.S. at 420.

⁴⁸ *Id.*

⁴⁹ See Jordan C. Budd & Margaret Sova McCabe, *Standing to Enforce the Future: Citizen Suits and Climate Change*, 66 B.C. L. REV. 423, 443 (2025) (discussing the Court's recent endorsement of Justice Roberts' standing analysis from his dissent in *Massachusetts v. EPA*).

⁵⁰ *Util. Air Regul. Grp. v. EPA (UARG v. EPA)*, 573 U.S. 302 (2014).

⁵¹ *West Virginia v. EPA*, 597 U.S. 697 (2022).

pollutant” in the Act’s general definitions provision *must* be interpreted to include greenhouse gases;⁵² in *UARG v. EPA*, the Court held that the term “air pollutant” in a different section of the CAA *could not* be interpreted to include greenhouse gases.⁵³ And, in *West Virginia v. EPA*, the Supreme Court put constraints on EPA’s interpretation of what constitutes the “best system of emission reduction” that will make it difficult for EPA to require meaningful reductions of greenhouse gases from existing coal-fired plants, a key source of emissions.⁵⁴ These decisions diminished the potential greenhouse gas emission reductions possible under the CAA after *Massachusetts v. EPA* and distinguished the case so as to likewise diminish its precedential force.

Finally, despite the suggestion by some administrative law scholars that *Massachusetts v. EPA* could enter the administrative law canon—“*MA v EPA* could be *State Farm* for a new generation”—the decision increasingly appears to be an administrative law outlier redolent of a now-discarded administrative law jurisprudence.⁵⁵ Though this case is oft-cited and required reading for administrative law students, it has not fundamentally changed administrative law doctrine.⁵⁶

There is, however, one (largely unremarked upon) way in which *Massachusetts v. EPA* has significant and enduring influence—as a warning to agencies and other litigants not to peddle climate disinformation in court. Distilled to their essence, here are the facts animating the dispute: the agency, under political pressure from a president opposed to regulating greenhouse gas emissions (as a matter of policy preference), cherry-picked information from a National Research Council report to disingenuously inflate uncertainty in climate science and justify its failure to consider whether the agency met statutory prerequisites for regulating greenhouse gases.⁵⁷ The Supreme

⁵² 42 U.S.C. § 7602(g); *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

⁵³ See *UARG v. EPA*, 573 U.S. at 316–17.

⁵⁴ See *West Virginia v. EPA*, 597 U.S. at 720–35.

⁵⁵ Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, SUP. CT. REV., 2007, at 51, 53–54 (citation omitted); see also Richardson, *supra* note 39, at 367–71 (discussing the impact of *Massachusetts v. EPA* on administrative law).

⁵⁶ See Lisa Heinzerling, *The Rule of Five Guys*, 119 MICH. L. REV. 1137, 1147–49 (2021) (arguing generally that the majority opinion in *Massachusetts v. EPA* was aligned with past administrative law doctrine).

⁵⁷ Compare NAT’L RSCH. COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 3 (2001) (“The IPCC’s conclusion that most of the observed warming of the last 50 years is likely to have been due to the increase in greenhouse gas concentrations accurately reflects the current thinking of the scientific community on this issue.”), with CONTROL OF EMISSIONS FROM NEW HIGHWAY VEHICLES AND ENGINES, 68 Fed. Reg. 52922-02, 52930–31 (Sep. 8, 2003) (emphasizing repeatedly that climate change remained far too uncertain to justify regulation of GHGs). See also *infra* notes 69–85 and accompanying text (commenting that the Supreme Court was intolerant of EPA’s overreliance on scientific uncertainty in the *Massachusetts v. EPA* decision); *Climate Change Research Distorted and Suppressed*, UNION OF CONCERNED SCIENTISTS (June 30, 2005), <https://www.ucs.org/resources/climate-change-research-distorted-and-suppressed> [<https://perma.cc/J7B9-VT39>] (last visited Mar. 9, 2026) (highlighting how the

Court granted *certiorari*; bypassed numerous off-ramps that would have allowed it to resolve the dispute without engaging the issue of the agency's characterization of climate science (standing, justiciability, deference); communicated its awareness of the agency's sleight of hand; and declined to credit the agency's disingenuous posturing about uncertainty in climate science.⁵⁸

The judicial rejection of climate disinformation in *Massachusetts v. EPA* was not a proper holding—it was not even explicit. Scholars and lower courts might perhaps best characterize it as a subtextual shot across the bow. To appreciate the shot across the bow, it is necessary to explain with some more granularity why and how climate change science intersected with the legal issues in the case.

The dispute in *Massachusetts v. EPA* began when a group of private organizations petitioned EPA to regulate greenhouse gases as air pollutants under the mobile source provisions of the CAA applicable to emissions from motor vehicles.⁵⁹ Those provisions provide in relevant part that:

“The [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁶⁰

Before responding to the petition for rulemaking, the White House asked the National Research Council for a report “identifying the areas in the science of climate change where there are the greatest certainties and uncertainties” and the National Research Council prepared a report, *Climate Change Science: An Analysis of Some Key Questions* (“NRC Report”).⁶¹

EPA then denied the petition for rulemaking, offering two rationales for doing so.⁶² First, it argued that the agency could not interpret the term “air pollutant” in the CAA to include greenhouse gases.⁶³ Second, it explained that it “would decline the petitioners’ request to regulate motor vehicle GHG emissions even if it had

Bush administration strategically upheld and promoted distrust in climate change science).

⁵⁸ See also *infra* notes 83–85 and accompanying notes (highlighting the Supreme Court's language in *Massachusetts v. EPA* to show the Court's unwillingness to entertain the climate change uncertainty argument in the face of EPA's statutory avoidance).

⁵⁹ *Massachusetts v. EPA*, 549 U.S. 497, 497 (2007).

⁶⁰ 42 U.S.C. § 7521(a)(1).

⁶¹ *Massachusetts v. EPA*, 549 U.S. at 511.

⁶² Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52925 (Sep. 8, 2003) (explaining that the EPA does not believe that the CAA authorizes its regulation and that even if it did, Congress has not authorized the EPA to regulate CO₂ emissions from vehicles).

⁶³ *Id.* at 52929–31.

authority to promulgate such regulations” because “[u]ntil more is understood about the causes, extent and significance of climate change and the potential options for addressing it, EPA believes it is inappropriate to regulate GHG emissions from motor vehicles.”⁶⁴ In essence, EPA declined to regulate because it said that climate science was too uncertain:

The science of climate change is extraordinarily complex and still evolving. Although there have been substantial advances in climate change science, there continue to be important uncertainties in our understanding of the factors that may affect future climate change and how it should be addressed. As the NRC explained, predicting future climate change necessarily involves a complex web of economic and physical factors including: Our ability to predict future global anthropogenic emissions of GHGs and aerosols; the fate of these emissions once they enter the atmosphere (e.g., what percentage are absorbed by vegetation or are taken up by the oceans); the impact of those emissions that remain in the atmosphere on the radiative properties of the atmosphere; changes in critically important climate feedbacks (e.g., changes in cloud cover and ocean circulation); changes in temperature characteristics (e.g., average temperatures, shifts in daytime and evening temperatures); changes in other climatic parameters (e.g., shifts in precipitation, storms); and ultimately the impact of such changes on human health and welfare (e.g., increases or decreases in agricultural productivity, human health impacts). The NRC noted, in particular, that “[t]he understanding of the relationships between weather/climate and human health is in its infancy and therefore the health consequences of climate change are poorly understood.” Substantial scientific uncertainties limit our ability to assess each of these factors and to separate out those changes resulting from natural variability from those that are directly the result of increases in anthropogenic GHGs.⁶⁵

EPA’s policy approach would accordingly be to “reduce key uncertainties that exist in our understanding of global climate change.”⁶⁶

Although EPA purported to rely “on NRC’s objective and independent assessment of the relevant science,” its citations to the NRC report in the denial of the petition for rulemaking cherry-picked phrases and assertions to highlight uncertainty.⁶⁷ Read as a whole, the NRC report clearly described the scientific consensus that climate change was occurring, human-caused, and harmful.⁶⁸ The majority in

⁶⁴ *Id.* at 52931.

⁶⁵ *Id.* at 52930 (internal citations omitted).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See generally NAT’L RSCH. COUNCIL, *supra* note 57 (analyzing several scientific reports and models to reach the conclusion that human activities are causing climate change which has the potential to harm humans).

Massachusetts v. EPA pointedly cited to the NRC report in Part I of its decision: “[D]rawing heavily on the 1995 IPCC report, [the NRC] concluded that ‘[g]reenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise. Temperatures are, in fact, rising.’”⁶⁹

The majority then went on to hold that EPA could not “avoid its statutory obligation by noting the uncertainty surrounding various features of climate change If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so.”⁷⁰ Although it did not say so explicitly, the majority signaled—through its characterization of the NRC report and its insistence that EPA directly confront the statutory question—that it understood EPA to be masking a policy choice not to regulate behind a mischaracterization of climate science, and that it would not accept the sleight of hand. The *Massachusetts v. EPA* majority rejected EPA’s effort to use the standard move in the climate disinformation playbook—disingenuously highlight climate science uncertainty as an excuse not to apply or adopt measures to address climate change. EPA had “offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change” and “[i]ts action was therefore” arbitrary and capricious.⁷¹ In short: climate disinformation? Not in our house.

The social and political context leading up to the decision, the lengths to which the majority went to create an opportunity to discuss the agency’s treatment of climate science, and the decision’s laudatory exposition of the history and development of climate science all support the interpretation that the majority was motivated, at least in part, to rebuke an agency dabbling in climate science truthiness. These factors also help to explain why and how this non-holding sent a clear and powerful message.

In their article *Massachusetts v. EPA: From Politics to Expertise*, Jody Freeman and Adrian Vermeule offer the following description of context leading up to the decision:

Every administration exerts some degree of political influence over agency decision making Yet the accounts circulating about the Bush administration as *MA v EPA* moved through the courts were of a different scope and scale than in the past: the administration had been altering scientific reports, silencing its own experts, and suppressing scientific information that was politically inconvenient. And this was being done so systematically, critics said, as to leave no doubt that the White House authorized it.

⁶⁹ *Massachusetts v. EPA*, 549 U.S. 497, 511 (2007) (quoting the NRC report).

⁷⁰ *Id.* at 534.

⁷¹ *Id.*

Most relevant to *MA v EPA*, there were suggestions of widespread tampering by the Bush administration with the global warming data reported by numerous federal agencies, including EPA. In September 2002, under Administrator Christine Whitman, EPA staff chose to delete a section on global warming from an annual report on the state of air pollution rather than accept major revisions demanded by the White House. White House officials, it was said, had objected to the discussion of scientific research in the report indicating a significant rise in global temperatures and linking the rise to human activity, and referring to a National Academy of Sciences Report that the White House had earlier endorsed. White House officials replaced these sections with reference to a study funded by the American Petroleum Institute that questioned climate change science. After considering its options, EPA staff concluded in an internal memorandum that the edited section ‘no longer accurately represents the scientific consensus on climate change’ and dropped it entirely. . . .

During 2002 and 2003, Philip Cooney, the Chief of Staff to President Bush’s Council on Environmental Quality (and a former lobbyist for the American Petroleum Institute with no scientific training), rewrote or altered reports by federal agencies on various aspects of climate change, with the effect of introducing greater doubt and uncertainty into these reports than the science warranted. Scores of scientists in agencies such as the National Oceanic and Atmospheric Administration (NOAA) and EPA reported being pressured to delete references to climate change and global warming from official documents, including their communications with Congress. James Hansen, the top climate scientist at the National Aeronautics and Space Administration (NASA), reported that the administration had tried to stop him from publicly calling for prompt reductions in greenhouse gases linked to global warming, and that officials from NASA headquarters had ordered the agency’s public affairs staff to review his upcoming lectures, web postings, and interviews out of concern for ‘coordination.’ . . .

[A]ccusations of political interference with expert agency decisions were being made frequently during this time, and attracted significant media attention. . . . [T]hese accusations were well known, and certainly no secret to the Supreme Court Justices.⁷²

Freeman and Vermeule cite to this context as evidence that the decision reflects “the Court majority’s increasing worries about the politicization of administrative expertise, particularly under the Bush administration,” concluding that:

“*MA v EPA* is best understood not so much as an environmental law case, not primarily anyway; rather it is a companion case to *Gonzales v Oregon*, *Hamdan v Rumsfeld*, and other episodes in which Justice Stevens and Justice Kennedy have joined forces to override executive positions that

⁷² Freeman & Vermeule, *supra* note 55, at 54–57 (internal citations omitted).

they found untrustworthy, in the sense that executive expertise had been subordinated to politics.”⁷³

The social and political context also, however, supports the more granular claim offered herein: that a central concern of the majority was EPA’s attempt to hide the fact that its decision reflected the political policy preference behind disingenuous characterization of climate science (that adopted or at minimum mimicked the chief feint of the climate disinformation effort).⁷⁴ On this reading, the concern was not just or necessarily the fact that EPA’s expertise as a whole—including its application of facts (scientific and others) to the relevant legal standard—reflected presidential policy preferences. The concern was, at least in part, that the agency attempted to shroud that politicization in disingenuous, pseudo-scientific hand-waving.⁷⁵

The content, structure and language of the decision reveal the majority’s concern about the agency’s treatment of climate science. To reach the agency’s treatment of climate science (in addition to granting *certiorari* in the first instance), the majority had to and did resolve a series of knotty questions in the petitioner’s favor: that they had standing;⁷⁶ that the denial of a petition for rulemaking could be judicially reviewed;⁷⁷ that the statutory term “air pollutant” includes greenhouse gases;⁷⁸ and that EPA was required to make a judgment about whether vehicle emissions endanger public health or welfare in response to the petition for rulemaking.⁷⁹

The first two lines in the decision evince confidence in established climate science: “A *well-documented* rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. *Respected* scientists believe the two trends are related.”⁸⁰ Part I of the decision concludes with a lengthy description of the development of scientific knowledge about climate change beginning in 1959.⁸¹ The majority explains in detail how “the scientific understanding of climate change progressed,” describing the Intergovernmental Panel on Climate Change as “a multinational

⁷³ *Id.* at 52 (internal citations omitted).

⁷⁴ *Id.* at 64 (recognizing the centrality of questions about the agency’s treatment of science, although their interpretation of the case’s expertise-forcing thrust is broader).

⁷⁵ If Freeman and Vermeule are right, and the case was about reinforcing a normative view that agencies should exercise expertise largely insulated from political interference, then arguably the precedent has even less salience as the Supreme Court now clearly views democratic accountability as more important than expertise.

⁷⁶ See *Massachusetts v. EPA*, 549 U.S. at 526.

⁷⁷ *Id.* at 516.

⁷⁸ *Id.* at 528–29.

⁷⁹ *Id.* at 534–35.

⁸⁰ *Id.* at 504–05 (emphasis added).

⁸¹ *Id.* at 507–11.

scientific body” that “[d]raw[s] on expert opinions from across the globe,” and referencing the “comprehensive report” it has issued.⁸²

In Part III and as noted above, the majority pointedly offers its own summary of the NRC report (the same report that EPA’s denial of the petition for rulemaking referenced for its assertion that climate science was so uncertain as to preclude regulation), observing that the report—on its very first page—“concluded that ‘[g]reenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise. Temperatures are, in fact, rising.’”⁸³ The majority then goes to demonstrate its awareness of the agency’s disingenuous characterization of the NRC report. First, it describes the agency’s treatment of the NRC report as:

“The Agency began by recognizing that the concentration of greenhouse gases has dramatically increased as a result of human activities, and acknowledged the attendant increase in global surface air temperatures. . . . EPA nevertheless gave controlling importance to the NRC Report’s statement that a causal link between the two ‘cannot be unequivocally established.’”⁸⁴

Additionally, the Supreme Court’s instruction to the agency—“If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so”⁸⁵—demonstrates the majority’s appreciation that the agency would be unlikely to even attempt, in a context subject to more fulsome examination, to question the well-settled connection between emissions, climate change, and significant societal harms. The majority appears to have recognized that even “[a] person who is willing to refrain from pointing out that the emperor is wearing no clothes may balk at saying out loud that the clothes exist.”⁸⁶

The lengths that the majority went to address the agency’s treatment of climate science are telling, as is the decision’s laudatory exposition of the history and development of climate science and its challenge to the agency to plainly state and support the assertion that climate science was too uncertain if it wished to rest on that premise to avoid regulating. Considered within the context in which the case came before the Court, these observations support the view that the majority was motivated, at least in part, to rebuke an agency dabbling in climate science truthiness.

⁸² *Id.* at 508.

⁸³ *Id.* at 511.

⁸⁴ *Id.* at 513 (internal citations omitted).

⁸⁵ *Id.* at 534.

⁸⁶ Freeman & Vermeule, *supra* note 55, at 98.

This aspect of *Massachusetts v. EPA* was not a proper holding and, while some scholars remarked on the Supreme Court's treatment of climate science in the case,⁸⁷ that aspect of the decision was largely subsumed by the holdings on standing, the availability of review for an agency's denial of a petition for rulemaking, and the interpretation of Clean Air Act. There are, however, reasons to think that the Supreme Court's stern response to climate disinformation had impact. Efforts to dismantle federal climate policy by the first Trump administration—such as the Affordable Clean Energy Rule,⁸⁸ revocation of California's waiver to set more stringent tailpipe emission standards,⁸⁹ and disputes over the social cost of carbon⁹⁰—centered on legal arguments grounded in statutory interpretation and the scope of agency authority largely divorced from scientific questions about the facts and harms of climate change. The public and political posture may have been to deny the science,⁹¹ but the legal maneuvers largely did not attack it.

Any disciplining effect on the responsible treatment of climate science from *Massachusetts v. EPA* appears, however, to have ebbed. EPA's proposal to reconsider the endangerment finding offers an alternative rationale for the rescission that is based on a far more audacious politicization of climate science.⁹² In *Massachusetts v. EPA*, the Supreme Court wrapped EPA's knuckles for cherry-picking one passage from an otherwise reputable report to over-emphasize uncertainty in climate science.⁹³ In its August 2025 proposal to

⁸⁷ See Susan Johns, *The Role of Climate Change Science and Standing in Climate Change Cases: Analysis and Implications*, 26 U. FLA. J.L. & PUB. POL'Y 243, 250–51 (2015).

⁸⁸ Affordable Clean Energy Rule, 84 Fed. Reg. 32520 (Sep. 6, 2019). *But see* Am. Lung Ass'n v. EPA, 985 F.3d 914, 937–938, 999, 1013 (2021) (holding the EPA acted unlawfully in adopting the 2019 Affordable Clean Energy Rule).

⁸⁹ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Nov. 26, 2019).

⁹⁰ U.S. ENV'T PROT. AGENCY, EPA-452/R-18-006, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS; REVISIONS TO EMISSION GUIDELINE IMPLEMENTING REGULATIONS; REVISIONS TO NEW SOURCE REVIEW PROGRAM (2018).

⁹¹ See Michael Vitiello, *Trump's Legacy: The Long-Term Risks to American Democracy*, 26 LEWIS & CLARK L. REV. 467, 495–99 (2022) (describing how prominent republican members of Congress have demonstrated a willingness to flout science and adhere to extremist views of right-wing organizations).

⁹² Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, 90 Fed. Reg. 36288, 36307–11 (Aug. 1, 2025) (to be codified at 40 CFR pts. 85, 86, 600, 1036, 1037 and 1039).

⁹³ See *supra* notes 83–85 and accompanying notes (analyzing the Supreme Court's holding in *Massachusetts v. EPA* to show how the majority criticizes the agency for relying on uncertainty); see also *Massachusetts v. E.P.A.*, 549 U.S. 497, 513 (2007) (observing that “[t]he Agency began by recognizing that the concentration of greenhouse gases has dramatically increased as a result of human activities, and acknowledged the attendant increase in global surface air temperatures” but “nevertheless gave controlling importance to the NRC Report's statement that a causal link between the two ‘cannot be unequivocally established’”) (internal citation omitted) (quoting NRC report). *Id.* at 534 (“If the scientific uncertainty is so profound that it precludes EPA from making a reasoned

reconsider the endangerment finding, EPA went much further. The proposal's alternate science rationale repeatedly cites to the draft report of the U.S. Department of Energy Climate Working Group "Impacts of Carbon Dioxide Emissions on the U.S. Climate" (the 2025 CWG Draft Report).⁹⁴ The Department of Energy prepared the 2025 CWG Draft Report with public input by a small group of known climate skeptics⁹⁵ in violation of the Federal Advisory Committee Act,⁹⁶ and, as explained in a response prepared by a group of climate scientists, is rife with oversights and errors:

Our review reveals that the DOE report's key assertions—including claims of no trends in extreme weather and the supposed broad benefits of carbon dioxide—are either misleading or fundamentally incorrect. The authors reached these flawed conclusions through selective filtering of evidence ('cherry picking'), overemphasis of uncertainties, misquoting peer-reviewed research, and a general dismissal of the vast majority of decades of peer-reviewed research. . . . It should also be clear that the DOE report's approach to undermining scientific evidence mirrors tactics previously employed by the tobacco industry to create artificial doubt. . . .⁹⁷

judgment as to whether greenhouse gases contribute to global warming, EPA must say so.”).

⁹⁴ Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, 90 Fed. Reg. 36288, 36292 (proposed Aug. 1, 2025) (to be codified at 40 CFR pts. 85, 86, 600, 1036, 1037 and 1039) (“The 2025 CWG Draft Report was provided to the EPA on May 27, 2025, and was reviewed and relied upon in formulating this proposal.”). Though the initial CWG Draft Report was circulated internally within DOE in May of 2025, it was later updated and publicly released in July 2025; see JOHN CHRISTY ET AL., U.S. DEP’T OF ENERGY, A CRITICAL REVIEW OF IMPACTS OF GREENHOUSE GAS EMISSIONS ON THE U.S. CLIMATE (2025), <https://www.energy.gov/topics/climate> [<https://perma.cc/8Q7E-J426>]. The climate science community widely criticized the factual assertions of the updated report. See, e.g., Comment Letter on EPA’s Proposed Rule—Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards (Sep. 22, 2025), <https://www.regulations.gov/comment/EPA-HQ-OAR-2025-0194-3084> [<https://perma.cc/YQQ6-8RAZ>]. A federal court held that the process used to produce the report violated the Federal Advisory Committee Act. See *Env’t Def. Fund, Inc. v. Wright*, No. CV 25-12249-WGY, 2026 WL 183484, at *1 (D. Mass. Jan. 23, 2026).

⁹⁵ Jeff Brady & Julia Simon, *Trump’s Energy Department Disbands Group That Sowed Doubt About Climate Change*, NPR (Sep. 13, 2025), <https://www.npr.org/2025/09/13/nx-s1-5539294/climate-change-pollution-report> [<https://perma.cc/9MG3-TN35>] (discussing how the Climate Working Group, made up of four scientists and one economist who “questioned the scientific consensus that climate change poses huge threats to people and ecosystems . . . was convened in secrecy”).

⁹⁶ See *Env’t Def. Fund, Inc. v. Wright*, No. CV 25-12249-WGY, 2026 WL 183484, at *1 (D. Mass. Jan. 23, 2026) (holding that the report’s preparation violated the Federal Advisory Committee Act).

⁹⁷ *Climate Experts’ Review of the DOE Climate Working Group Report*, DOERESPONSESITE, <https://sites.google.com/tamu.edu/doeresponse/home> [<https://perma.cc/H9ZU-K4LQ>] (last visited Mar. 9, 2026). Notably, an extensive study prepared by the National Academies concluded that the “EPA’s 2009 finding that the human-caused emissions of greenhouse gases threaten human health and welfare was accurate, has stood

Although EPA's final repeal jettisons the alternate science rationale and does not (at least explicitly) rely on the CWG Report, its initial intention to rest policymaking squarely on climate disinformation is worrisome.⁹⁸

Now seems an opportune time to surface how *Massachusetts v. EPA* supported agency accountability by preventing EPA from using a pseudo-science fig leaf to obscure the Bush administration's policy choice. The conservative majority on the Supreme Court—though possessed of far different sensibilities than the majority in *Massachusetts v. EPA*—may be sympathetic to efforts to prevent agencies from obscuring policy preferences behind disingenuous claims about science. Allowing agencies to shroud a policy choice in politically distorted scientific “fact” undercuts the accountability of agencies:

There is no social benefit, and real social cost, when an agency claims that a species is numerous when it is actually extinct, or claims that the science surrounding climate change is uncertain when it is not. If Congress and the president do not think that species loss or climate change are problems worth addressing, agencies may so decide, subject to the constraints of existing law. But agencies may not disguise their policy preferences in the language of fact, a course of action that hampers political accountability by making it more difficult for legislative and executive principals to monitor the agencies.⁹⁹

And the current Supreme Court appears committed to reducing agency power and increasing agency accountability.¹⁰⁰

In addition to concerns about effects on judicial review and democratic accountability, scholars can make a robust, positive case for

the test of time, and is now reinforced by even stronger evidence. Today, many of EPA's conclusions are further supported by longer observational records and multiple new lines of evidence. Moreover, research has uncovered additional risks that were not apparent in 2009.” NAT'L ACADEMIES, EFFECTS OF HUMAN-CAUSED GREENHOUSE GAS EMISSIONS ON U.S. CLIMATE, HEALTH, AND WELFARE 1 (2025), <https://www.nationalacademies.org/read/29239/chapter/1> [<https://doi.org/10.17226/29239>].

⁹⁸ Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7686, 7691 n.8 (Feb. 18, 2026) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037 and 1039) (“[T]he EPA is not relying on the May 27, 2025, CWG draft report entitled ‘Impact of Carbon Dioxide Emissions on the U.S. Climate’ or the July 23, 2025[,] CWG report entitled ‘A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate’ for any aspect of this final action.”); *Id.* at 7734 (“Although the Administrator continues to harbor concerns regarding the scientific determinations underlying the Endangerment Finding, the EPA has decided not to finalize this scientific alternative rationale at this time.”).

⁹⁹ Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2237 (2009).

¹⁰⁰ See, e.g., *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024) (“Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.”); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 225 (2020) (holding that Congress could not insulate the Director of the Consumer Financial Protection Bureau from at-will Presidential removal).

courts to prevent agency reliance on politicized pseudo-science. Courts support democracy when they translate the science informing policy by “provid[ing] accessible information about the relevant science to a generalist audience, enabling informed participation.”¹⁰¹ Similarly, “the accuracy of agency-made facts is particularly important to promote democratic engagement, participation, and legitimacy.”¹⁰²

Perhaps, then, the line in the sand that the majority drew on climate disinformation in *Massachusetts v. EPA* will endure. Regardless, litigants can understand *Massachusetts v. EPA* as a Supreme Court rebuke of an effort by an agency to use a familiar feint of the climate disinformation effort—hide a policy preference behind disingenuous exaggeration of climate uncertainty. In the absence of a climate disinformation gloss on the dispute, it seems less likely that the Supreme Court would have granted *certiorari* or structured its decision in the same manner.

III. LEGAL CONSEQUENCES FOR FOSSIL FUEL COMPANIES? CLIMATE TORTS SUITS

In twenty-two cases pending in state courts, plaintiffs, mostly state and local governments, seek to hold fossil fuel producers accountable for climate harms under state tort and consumer protection laws.¹⁰³ The same core facts and theory underlie these lawsuits: defendants sold fossil fuels, misrepresented the risks and harms from their combustion, and contributed to climate change that harms the plaintiffs.

The climate disinformation effort constitutes an important factual and legal component of these cases. Plaintiffs’ allegations related to the climate disinformation effort support or satisfy elements of claims under doctrines including product liability, nuisance, and consumer protection statutes.¹⁰⁴ Perhaps more importantly, however, plaintiffs use the misrepresentations at the core of the climate disinformation effort to frame their cases in ways that invite judges to understand the claims as

¹⁰¹ Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 749–50, 781 (2011) (arguing that “while a court may not substitute its judgment for an agency’s, it ought to ensure the agency has acted reasonably. If courts fall prey to the science obsession and give too shallow a look at agency science, they risk missing not just the rare mistake of positive science, but the failures of reasoned decision-making Congress has entrusted courts with identifying”).

¹⁰² Haiyun Damon-Feng, *Agency Fact-Making*, 135 YALE L.J. (forthcoming 2026) (manuscript at 35) (on file with Environment Law).

¹⁰³ See cases cited *supra* note 25.

¹⁰⁴ See, e.g., *Bd. of Cnty. Comm’rs of Boulder Cnty.*, No. 2018CV30349, 2024 WL 3204275, at *6–7 (Colo. Dist. Ct. June 21, 2024) (nuisance and state consumer protection statute); *Jennings*, N20C-09-097, 2024 WL 98888, at *1 (Del. Super. Ct. Jan. 9, 2024) (nuisance, product liability, and state consumer protection statute); Complaint at 1–2, *Maine v. BP P.L.C.*, No. PORS-CV24-442 (Me. Super. Ct. Nov. 26, 2024), 2024 WL 758860 (nuisance and product liability).

residing within the competence of courts (for example, as not presenting non-justiciable political questions) and state law (for example, not displaced or preempted by federal law). For the cases to survive motions to dismiss and reach the merits phase, plaintiffs must state a claim under substantive law and persuade judges more generally that these cases do not exceed the institutional competence and constitutional purview of (state) courts. Those inquiries are potentially dispositive of the plaintiffs' claims and the climate disinformation effort is central to both. Incorporation of the climate disinformation effort into the climate tort cases could also, however, result in their dismissal. Fossil fuel company defendants argue that liability cannot attach to the climate disinformation effort without violating the companies' First Amendment rights.

This Part explains how and why the climate disinformation effort is now central to the climate tort suits and identifies the First Amendment issues that this implicates. The climate disinformation effort provides the best opportunity for plaintiffs to persuade state courts to hear these cases; it also, however, implicates ticklish questions at the edges of First Amendment doctrine that could invite Supreme Court scrutiny. This analysis reveals significant uncertainty and tension about whether and how the law can or should respond to corporate disinformation generally and climate disinformation specifically. The courts' treatment of climate disinformation in these cases could have far-reaching consequences for the climate liability of fossil fuel companies, common law and First Amendment doctrine, and how we understand and respond to corporate disinformation more broadly.

A. How and Why the Climate Disinformation Effort Is Central to the State Climate Tort Suits

The climate disinformation effort is central to the state climate tort suits in three respects. First, plaintiffs use the climate disinformation effort to frame these disputes as justiciable in state court. A focus on climate disinformation invites courts to understand the suits as an attempt to hold companies responsible for duping consumers—a type of dispute that is regularly adjudicated in state courts. Defendants, meanwhile, encourage courts to see the suits as an effort to use the common law to regulate greenhouse gas emissions with significant extraterritorial effects and interference with federal laws and policy that render the suits nonjusticiable. Second, the climate disinformation effort is also a factual allegation that, if proven, can support or satisfy elements of plaintiffs' claims including those sounding in product liability, nuisance, and state consumer protection.¹⁰⁵ Finally, the climate

¹⁰⁵ The plaintiffs in *Board of County Commissioners of Boulder County* also raised a claim for unjust enrichment. Complaint at 99–100, *Bd. of Cnty. Comm'rs of Boulder Cnty.*

disinformation effort is at the center of a key defense: the defendant fossil fuel companies argue that using the common law to punish climate disinformation would violate the First Amendment. Each of the ways in which the climate disinformation effort intersects with the state court suits is explored *infra*.

1. Climate disinformation, framing and justiciability

Almost without exception,¹⁰⁶ judges allow the state climate tort suits to proceed when they understand the cases as an effort to hold companies liable for harms resulting from misrepresentations of their products and dismiss the suits on justiciability grounds (usually through some combination of displacement, preemption, political question, and general hand-waving about constitutional structure and federalism) when they understand them as an effort to use the common law to regulate interstate greenhouse gas emissions.¹⁰⁷ According to plaintiffs, the state climate tort suits are “about Defendants’ deceptive promotion of products in Delaware that they knew would cause harm in Delaware.”¹⁰⁸ Fossil fuel defendants emphasize that plaintiffs’ harms ultimately stem from climate change caused by interstate emissions and

No. 2018CV30349 (Colo. Dist. Ct. June 21, 2024), 2024 WL 3204275. Although nuisance, product liability, and consumer protection statutes are presently the focus of pending climate suits, some scholars argue that claims grounded in the climate disinformation effort and unjust enrichment may provide the most feasible path to plaintiff recovery. See Casado-Pérez et al., *supra* note 6; Maytal Gilboa, Yotam Kaplan & Roe Sarel, *Climate Change as Unjust Enrichment*, 112 GEO. L.J. 1039, 1077 (2024).

¹⁰⁶ One case that is hard to categorize is *Jennings*, where the court held that state tort claims are limited to addressing only air pollution sources located in Delaware and on land the State directly owns, excluding land held in the public trust. 2024 WL 98888, at *24.

¹⁰⁷ See *Honolulu III*, 537 P.3d 1173, 1181 (Haw. 2023) (“This suit does not seek to regulate emissions and does not seek damages for interstate emissions. Rather, Plaintiffs’ complaint ‘clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign.’”); *Bd. of Cnty. Comm’rs of Boulder Cnty.*, 2024 WL 3204275, at *21 (“[T]he Local Governments’ claims do not seek to regulate emissions. The federal common law relied on by the Energy Companies formerly governed transboundary pollution and damages suits, which are distinguishable from the claims brought . . . in this litigation.”); *City of New York v. Chevron Corp.*, 993 F.3d 81, 90–91 (2d Cir. 2021) (“[T]he question before us is whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law. Our answer is simple: no.”); *Platkin*, No. MER-L-001797-22, 2025 WL 604846, at *2, *5 (N.J. Super Ct. Law Div. Feb. 5, 2025) (granting motion to dismiss after observing that “Defendants’ highlight that Plaintiffs’ claims, based on misrepresentations, still relate to interstate and international emissions,” and concluding that “only federal law can govern Plaintiffs’ interstate and international emissions claims”); *Annapolis II*, No. C-02-CV-21-000250 (Md. Cir. Ct. Jan. 23, 2025); *Mayor & City Council of Baltimore v. BP P.L.C. (Mayor & City Council of Baltimore I)*, No. 24-C-18-004219 (Md. Cir. Ct. Jul. 10, 2024) *cert. granted*, 490 Md. 278 (Apr. 24, 2025) (dismissing Plaintiffs’ deceptive marketing claim for failure to state a claim).

¹⁰⁸ Plaintiff’s Answering Brief in Opposition to Defendants’ Joint Motion to Dismiss for Failure to State a Claim at 1, *Jennings*, No. N20C-09-097 (Del. Sup. Ct. Jul. 3, 2023).

argue that plaintiffs' claims can only be brought under the federal common law (which the Court in *AEP v. Connecticut* held was displaced by the Clean Air Act) or, alternatively, that the claims are preempted by the Clean Air Act.¹⁰⁹ Defendants characterize the plaintiffs' allegations relating to misrepresentation as artful pleading, a strategic maneuver to avoid federalism constraints: "Plaintiffs cannot evade the preemption of state law by arguing that their claims are based solely on misrepresentations. The question whether Plaintiffs' claims are based on misrepresentations as opposed to production does not change preemption analysis, because Plaintiffs admit that their alleged injuries stem from interstate and international emissions."¹¹⁰ The framing of the cases—as centrally about misrepresentations of harmful products or interstate emissions—greatly influences how courts resolve whether the cases are displaced or preempted by federal law; present nonjusticiable political questions; and/or otherwise violate constitutional requirements grounded in separation of powers or federalism.

The legal consequences attendant in the choice of framing are apparent from a myriad of decisions and parties' briefing. The Second Circuit prefaced its analysis in *City of New York v. Chevron Corporation*¹¹¹ by stating that resolving the dispute "demands at the outset that we clarify the nature of the City's lawsuit. Is this a clash over regulating worldwide greenhouse gas emissions and slowing global climate change, or is it a more modest litigation akin to a product liability suit . . . ?"¹¹² The Colorado district court in *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*,¹¹³ dedicated a section in its decision on the defendants' motion to dismiss to "Framing the Issues in this Litigation" and explained:

As a threshold matter, . . . the Court must determine and clarify the claims made by, and the relief sought, by the Local Governments. The Energy Companies frame the issue as the Local Governments' 'attempt to use this state's tort law to control the worldwide activity of companies that play a crucial role in virtually every sector of the global economy.' They further posit that the claims 'raise federal statutory, regulatory, and constitutional

¹⁰⁹ See, e.g., Defendants' Joint Opening Brief in Support of Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim at 12–13, *Jennings*, No. N20C-09-097 (Del. Super. Ct. May 18, 2023), 2024 WL 98888 ("Because Plaintiff seeks damages for alleged harms caused by *interstate* emissions and *global* warming, its claims cannot be governed by state law." (emphasis in original)).

¹¹⁰ Joint Opening Brief in Support of Defendants' Motion to Dismiss for Failure to State a Claim at 17, *Platkin*, No. MER-L-1797-22 (N.J. Super Ct. Law Div. Oct. 16, 2023); see also *id.* at 24 ("Plaintiffs cannot evade the dispositive force of *Ouellette* by casting their claims as based solely on Defendants' alleged deception, rather than on greenhouse gas emissions.").

¹¹¹ 993 F.3d 81 (2d Cir. 2021).

¹¹² *Id.* at 91.

¹¹³ No. 2018CV30349, 2024 WL 3204275 (Colo. Dist. Ct. June 21, 2024) (order granting in part and denying in part Defendants' motion to dismiss on various grounds).

concerns; threaten to upset bedrock federal-state divisions of responsibility; and have profound implications for the global economy, international relations, and America's national security.' The Energy Companies characterize the Local Governments' claims as asking the court 'to disregard well-established boundaries of tort law, hold select Defendants liable for the actions of billions of third parties, and adjudicate whether Plaintiffs' alleged harms outweigh the massive and undeniable social utility of fossil fuels—not just in Colorado, but around the world.'

Conversely, the Local Governments frame the issue as seeking compensation for harms caused in their jurisdictions. They represent that they are not asking the Court to weigh the costs and benefits of fossil fuels nor revisit federal government decisions. Rather, the Local Governments allege that the Energy Companies have altered the climate by producing, selling, and promoting fossil fuels at levels they knew would bring catastrophic harm to Colorado. They further allege that the Energy Companies accelerated the pace and exacerbated the harm by concealing and misrepresenting the dangers of unchecked fossil fuel consumption to increase their sales. The consequences of these actions have led to an altered climate with concomitant costs in the Local Governments' jurisdictions. Therefore, at issue in the motion to dismiss for failure to state a claim is whether, under established Colorado law, a jury can consider whether the Energy Companies bear any liability for the Local Governments' damages.

Resolution of this framing issue is important as it significantly impacts the federal preemption analysis, and to a lesser extent, the analysis pertaining to the viability of the state law claims.¹¹⁴

And in *Mayor and City Council of Baltimore v. BP P.L.C.*,¹¹⁵ Judge Videtta Brown explained, in reviewing prior cases reaching different results, that "[t]he divergent opinions rested on how each court characterized the complaint"; "it is clear that the characterization of the plaintiff's complaint guided the court's analysis," leading to differing outcomes depending on whether courts understood the claims as "concern[ing] the production, promotion and sale of fossil fuels" or as "a suit over global greenhouse emissions," where the "allegations of deceptive promotion and marketing of Defendants' products is simply artful pleading."¹¹⁶ Judge Brown then explicitly adopted the latter framing before dismissing Baltimore's claims:

Baltimore's arguments that it does not seek to directly penalize emitters; that it seeks damages rather than abatement; and that its claims will not result in the regulation of global emissions are not accepted by this court as the goal of its complaint. . . . [T]his court finds that Baltimore's

¹¹⁴ *Id.* at *18–19 (internal citations omitted).

¹¹⁵ No. 24-C-18-004219 (Md. Cir. Ct. Jul. 10, 2024).

¹¹⁶ *Id.* at 6–7.

complaint is entirely about addressing the injuries of global climate change and seeking damages for such alleged injuries. The explanation by Baltimore that it only seeks to address and hold Defendants accountable for a deceptive misinformation campaign is simply a way to get in the back door what they cannot get in the front door.¹¹⁷

The court's transparent reliance on its chosen framing of the plaintiffs' complaint prompted Baltimore to argue on appeal that the "contrary readings" of its complaint (and those in the consolidated cases filed by Annapolis and Anne Arundel County) constitute a legal error because a court in a motion to dismiss must construe facts and allegations in the light most favorable to the plaintiff.¹¹⁸

One way to understand what is happening is to imagine the cases as a Rorschach blot—"inscrutable and open to interpretation."¹¹⁹ The application of individual justiciability doctrines (discussed below) in some sense simply provides the mechanism for arriving at the result that matches the Gestalt assessment (informed by the parties' pleadings and briefing and a judge's predilections) of the nature of the dispute.

Doctrinal consequences follow from how judges frame the disputes. One doctrinal consequence of how judges frame these disputes is how they then apply displacement and preemption analyses.¹²⁰ In *City of New York v. Chevron Corporation*, the Second Circuit understood the dispute as at its core being about the regulation of interstate emissions. Observing that "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution," and citing to federalism concerns (extraterritorial impacts and the need for national uniformity), the Second Circuit held that New York City's suit could *only* arise under federal common law and was displaced under the Clean Air Act as interpreted in *AEP v. Connecticut*.¹²¹ Numerous state court judges have since followed the Second Circuit, dismissing similarly styled actions filed in state courts

¹¹⁷ *Id.* at 10–11.

¹¹⁸ Appellants' Opening Brief at 17, *Mayor & City Council of Baltimore v. B.P. P.L.C. (Mayor & City Council of Baltimore II)*, 490 Md. 278 (June 3, 2025).

¹¹⁹ Chris Stokel-Walker, *We Gave an AI a Rorschach Test. What It Saw in the Inkblots Offers a Window into the Human Mind*, BBC (Feb. 24, 2025), <https://www.bbc.com/future/article/20250224-what-happens-when-you-give-an-ai-a-rorschach-inkblot-test> [https://perma.cc/6ANK-Y3VV].

¹²⁰ Of note, there are strong arguments that even if these cases are understood to involve interstate emissions, they do not sound in federal common law and are not displaced by federal common law or preempted by the Clean Air Act. Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J.L., ECON. & POL'Y 217, 261 (2022) ("Unless and until the Supreme Court or Congress approves such an approach, and precludes further state-law-based litigation, there is no warrant for lower courts to dismiss cases on the grounds that they must be displaced or preempted by federal environmental statutes that have never been understood to displace or preempt properly pled state common law claims.").

¹²¹ *City of New York v. Chevron Corp.*, 993 F.3d 81, 91–92 (2d Cir. 2021).

under state law as necessarily sounding in federal common law (and therefore displaced) and/or as attempting to regulate emissions and therefore preempted by the Clean Air Act.¹²²

If, however (as other courts interpret them), the disputes are about manufacturers lying to customers, and not the regulation of interstate emissions, then they are not interstate pollution cases and do not implicate the federal common law of interstate pollution.¹²³ Nor do they (directly) regulate emissions so as to invite preemption under the Clean Air Act.¹²⁴ To the contrary, plaintiffs can (and do) point out that “[r]emedying deceptive and misleading commercial conduct . . . is within the core of state police powers.”¹²⁵ Focusing on deceptive marketing, including through the climate disinformation effort, as opposed to emissions of greenhouse gases, allows plaintiffs to engage with

¹²² See *Platkin*, No. MER-L-1797-22 (N.J. Super. Ct. Law Div. Feb. 5, 2025) (order granting motion to dismiss after observing that “Defendants’ highlight that Plaintiffs’ claims, based on misrepresentations, still relate to interstate and international emissions,” and concluding that “only federal law can govern Plaintiffs’ interstate and international emissions claims”); *City of Annapolis II*, No. C-02-CV-21-000250 (Md. Cir. Ct. Jan. 23, 2025) (order granting defendants’ motion to dismiss and reasoning that “the preemption is operable possibly by federal common law but surely by the Federal Clean Air Act”); *Mayor & City Council of Baltimore I*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024) (order adopting and endorsing the Second Circuit’s approach including by referencing concerns about extraterritoriality); *Bucks Cnty. v. BP P.L.C.*, No. 2024-01836, 2025 WL 1484203, at *21 (Pa. C.P. May 16, 2025) (order granting Defendants’ motion to dismiss on subject matter jurisdiction because “there is no question that emissions are the sole province of the federal government through the CAA and EPA regulations that flow from it”); *City of Charleston v. Barbham Oil Co.*, No. 2020-CP-10-03975, 2025 WL 2269770, at *3 (S.C.C.P. Aug. 6, 2025) (order dismissing Plaintiffs claims on federal preemption grounds and stating that “[a]ny resolution to the climate-change issues Plaintiff seeks to remedy must rest with the federal political branches that are legally and substantively equipped to address them”).

¹²³ *Cnty. Comm’rs of Boulder Cnty. & City of Boulder v. Suncor Energy USA, Inc.*, 2025 CO 21, ¶ 50 (“Boulder . . . has not brought an action against a pollution emitter to abate pollution. Rather, it seeks damages from upstream producers for harms stemming from the production and sale of fossil fuels. Defendants cite no Supreme Court case in which the Court applied the federal common law in this setting. Accordingly, even if the federal common law in this area still existed, it would not appear to apply here.”).

¹²⁴ See *id.* ¶ 58 (“[W]e reject defendants’ contention that Boulder’s action is, in essence, an attempt to regulate GHG emissions and is therefore preempted. As a factual matter, Boulder’s claims do not seek to regulate GHG emissions (the claims do not seek compensation for any GHG emissions by defendants themselves but rather focus on defendants’ upstream production activities). Rather, they seek compensation for allegedly tortious conduct that the CAA does not address.”); Appellants’ Opening Brief at 32, *Mayor & City Council of Baltimore II*, 490 Md. 278 (June 3, 2025) (“There is no actual conflict between Appellants’ claims and the CAA because the CAA says nothing about the tortious deceptive conduct alleged in the complaints.”).

¹²⁵ Appellants’ Opening Brief at 10, *Mayor & City Council of Baltimore II*, 490 Md. 278 (June 3, 2025); *id.* at 19 (“Appellants allege liability based on deceptive marketing, which has never been a subject of federal common law and involves no uniquely federal interests. To the contrary, advertising, consumer protection, and public safety are within core state police powers.”); *Honolulu III*, 537 P.3d 1173, 1202 (Haw. 2023).

questions about displacement and preemption in an area (consumer protection) with generally recognized state primacy.¹²⁶ This further avoids trickier questions about displacement and preemption of state law by federal common law or statutes relating to interstate pollution.¹²⁷

Another doctrinal consequence of how judges frame these disputes relates to the application of the political question doctrine.¹²⁸ The political question doctrine, rooted in the separation of powers, instructs courts to decline to hear cases that fall outside of their constitutional and/or institutional competence, instead deferring resolution to the legislative and/or executive branches of government.¹²⁹ In *Baker v. Carr*,¹³⁰ the Supreme Court identified factors which signal that a case presents a nonjusticiable political question; the factors most relevant to the climate change tort suits are whether there is “a lack of judicially discoverable and manageable standards for resolving” the cases and whether resolution of the cases demands a political judgment (“the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”).¹³¹ As discussed in more detail *infra*, courts may evaluate whether conduct is unreasonable to support a finding that it constitutes a public nuisance by weighing the utility of the conduct against the risk of harm that it creates.¹³² In some early climate tort suits brought in federal court, courts dismissed the claims in whole or in part because they concluded that using risk-utility balancing to evaluate climate nuisance would raise a nonjusticiable

¹²⁶ Plaintiffs’ Answering Brief in Opposition to Defendants’ Joint Motion to Dismiss for Failure to State a Claim at 2, *Jennings*, No. N20C-09-097 (Del. Super. Ct. July 3, 2023), 2024 WL 98888 (“No federal common law preempts the State’s claims . . . because there has never been a federal common law concerning consumer deception.”); *id.* at 12 (“Federal law preserves and promotes the use of state law to protect consumers and the public from dangerous products and deceptive commercial activity.”).

¹²⁷ *Id.* at 22–23 (“The State’s claims will not and could not stand in the way of Congress’s regulation of point source air pollution control because the acts that trigger liability under the Complaint involve the use of deception to promote fossil fuels.”).

¹²⁸ Of note, the legal argument that the climate tort suits present nonjusticiable political questions is viewed by many legal scholars as rather weak and unlikely to prevail, even if the cases are viewed through the lens of interstate emissions, global climate change, and energy policy. See Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. LAND USE & ENV’T L. 79, 86 (2008); see also Michael Burger, Jessica Wentz & Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV’T L. 57, 228–29 (2020) (providing a background on how judges dismiss science in favor of legal doctrine); Katherine A. Guarino, *The Power of One: Citizen Suits in the Fight Against Global Warming*, 38 B.C. ENV’T AFFS. L. REV. 125, 128–31 (2011) (reasoning that Supreme Court jurisprudence suggests the political questions doctrine will not bar climate lawsuits).

¹²⁹ See generally RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S: THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 258–66 (7th ed. 2015) (discussing areas where the legislative body is better suited for resolution and where the courts should not interfere).

¹³⁰ 369 U.S. 186 (1962).

¹³¹ *Id.* at 217.

¹³² See *infra* Part III.A.2.

political question.¹³³ As explained by one district court judge dismissing a climate nuisance suit as presenting a political question, applying risk-utility balancing to evaluate reasonableness in this context:

[T]he factfinder will have to weigh, inter alia, the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level. . . . The factfinder would then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast of a remote Alaskan locale.¹³⁴

Climate suits are significantly less vulnerable to unfavorable analysis under the political question doctrine when framed as claims involving deception and harmful products.¹³⁵ Courts that have rejected political question arguments in the state climate tort suits observed that product liability cases are regularly adjudicated without raising political question concerns.¹³⁶ And risk-utility balancing does not present a complex, or arguably political, inquiry when courts need only weigh the utility of *lying* about the harms of fossil fuels products against the utility of fossil fuels writ large.

Courts that have held that the climate suits can proceed have thus characterized the disputes as centrally about the climate disinformation effort and misrepresentations of fossil fuel products. With the Supreme Court's grant of *certiorari* in *Suncor Energy (U.S.A.) Inc. v. Boulder*¹³⁷ to consider "[w]hether federal law precludes state-law claims seeking relief for injuries allegedly caused by the effects of interstate emissions on the

¹³³ *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 864 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013) ("It is unclear how this Court or any jury, regardless of its level of sophistication, could determine whether the defendants' emissions unreasonably endanger the environment or the public without making policy determinations that weigh the harm caused by the defendants' actions against the benefits of the products they produce."); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874–75 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *10 (N.D. Cal. Sep. 17, 2007).

¹³⁴ *Native Vill. of Kivalina*, 663 F. Supp. 2d at 874–75.

¹³⁵ They are also less vulnerable to what might be termed federalism hand-waving. Cases dismissing the climate suits discuss extraterritoriality and the need for national uniformity while invoking broad concerns about constitutional structure and "federalism concerns." *City of New York v. Chevron Corp.*, 993 F.3d 81, 92 (2d Cir. 2021).

¹³⁶ *Jennings*, N20C-09-097, 2024 WL 98888, at *12 (Del. Super. Ct. Jan. 9, 2024) ("Delaware courts have considered similar cases in the environmental context, or involving public nuisance product claims, without the necessity of deferring on the basis of a nonjusticiable political question.").

¹³⁷ *Suncor Energy, Inc. v. Comm'rs Boulder Cnty.*, No. 24SA206, WL 1363355 (Colo. May 12, 2025), *cert. granted*, No. 25-170, 2026 WL 490537 (U.S. Feb. 23, 2026) (asking the parties to brief statutory and Article III jurisdiction).

global climate,”¹³⁸ questions about the justiciability of the suits are poised to take center stage. Unsurprisingly, in its opposition to *certiorari*, Boulder emphasized the deceptive marketing aspects of its claim, arguing that this “false-marketing claims . . . address conduct never subject to the federal rule of decision created for interstate pollution.”¹³⁹

2. *Climate disinformation and the merits*

The climate disinformation effort will continue to take center stage if courts are ultimately permitted to reach the merits in these suits. In numerous state climate tort suits, plaintiffs allege that the defendants’ fossil fuel products were defective because the defendants failed to inform consumers of, or affirmatively misrepresented, the harms of climate change produced by the combustion of their products.¹⁴⁰ Though products liability doctrine varies across jurisdictions with respect to what constitutes an informational defect, some generalizations are possible.¹⁴¹ It is not necessary for a plaintiff to show that the defendant obscured or misrepresented the risks posed by a product—rather, it is sufficient for a plaintiff to show that a product did not include an adequate warning.¹⁴² The climate disinformation effort, while technically not necessary to the claims, may nonetheless support plaintiffs’ failure to warn claims in a number of ways.

Many jurisdictions require that a plaintiff show that the product was not reasonably safe without the warning.¹⁴³ Discerning whether a product is reasonably safe, however, is often ascertained by looking to consumer expectations and asking whether the product was “dangerous to an extent beyond that which would be contemplated by the ordinary

¹³⁸ Petition for Writ of Certiorari, *Suncor Energy, Inc. v. Comm’rs Boulder Cnty.*, No. 25-170, 2025 WL 2367748 (U.S. Aug. 8, 2025).

¹³⁹ Brief in Opposition at 25–26, *Suncor Energy, Inc. v. Comm’rs Boulder Cnty.*, No. 25-170, 2025 WL 3189616 (U.S. Nov. 10, 2025).

¹⁴⁰ See, e.g., Complaint at 176–83, *Chicago I*, 2024-CH-01024 (Ill. Cir. Ct. Feb. 20, 2024); *Minnesota v. Am. Petroleum Inst. (Minnesota I)*, No. 20-1636, 2021 WL 1215656, at *2 (D. Minn. 2021); *Bucks Cnty. v. BP P.L.C.*, No. 2024-01836, 2025 WL 1484203 at *2 (Pa. C.P. May 16, 2025) (order dismissing plaintiff’s complaint with prejudice).

¹⁴¹ Restatement Third and Second capture the core approaches. The Restatement (Third) of Torts provides that “[a] product is defective . . . because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . . and the omission of the instructions or warnings renders the product not reasonably safe.” RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(c) (A.L.I. 1998). The Restatement (Second) of Torts provides that “[o]ne engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation . . .” RESTATEMENT (SECOND) OF TORTS § 402B (A.L.I. 1965).

¹⁴² RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(c) (A.L.I. 1998).

¹⁴³ *Id.*

consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”¹⁴⁴ One way to do this in climate suits is for plaintiffs to point to climate disinformation efforts to demonstrate that defendants themselves understood consumer expectations to be malleable and went to great lengths to reassure consumers that using fossil fuels was not harmful.¹⁴⁵ Failure to warn doctrine often straddles strict liability and negligence.¹⁴⁶ A plaintiff’s allegations of affirmative misrepresentation can sometimes strengthen their arguments for the imposition of strict liability.¹⁴⁷ Further, an affirmative misrepresentation claim can help plaintiffs show that the defendants’ conduct was negligent because the defendants knew about the risks of fossil fuel combustion and breached the duty of care by working to affirmatively obscure those risks.¹⁴⁸

Climate disinformation efforts may also help plaintiffs defeat a key defense. In response to claims of informational defect, the fossil fuel defendants turn into the torpedo: they argue that it has been so widely known for so long that climate change is harmful and caused by the combustion of fossil fuels that they cannot be liable for failing to warn of that danger, relying on well-established tort doctrine that a product is not defective for failing to warn about dangers that are apparent or

¹⁴⁴ RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (A.L.I. 1965); see also *Ontai v. Straub Clinic & Hosp. Inc.*, 659 P.2d 734, 739 (Haw. 1983) (explaining that although Hawai‘i’s strict liability standard is based on the Restatement Second’s articulation, it instead requires that a product be dangerous as opposed to *unreasonably* dangerous).

¹⁴⁵ Indeed, Baltimore made precisely this argument in opposition to a motion to dismiss its product liability claims; the Circuit Court noted the argument but deemed it irrelevant in a rather confused application of Maryland product liability doctrine. *Mayor & City Council of Baltimore I*, No. 24-C-18-004219 (Md. Cir. Ct. Jul. 10, 2024).

¹⁴⁶ See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 464 (2d ed. 2011) (“[W]arning claims gravitated toward a negligence approach even while courts were using the language of strict liability.”).

¹⁴⁷ RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) (suggesting that knowledge is required for strict failure-to-warn product liability by explaining that “the seller is required to give warning . . . if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, or of the presence of the . . . danger”). See generally David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 503 (1993) (arguing that “liability should be strict for cases in which a manufacturer’s misrepresentations . . . cause product accidents” because “[c]onsumers . . . have come to rely on manufacturers for such truth and quality, and expect to pay fair value for such guarantees. Both freedom and equality, therefore, require that consumer autonomy be protected in such cases”).

¹⁴⁸ The plaintiffs in *Honolulu I* brought claims for both strict and negligent failure to warn. Complaint at 106–11, *Honolulu I*, No. 1CCV-20-0000380 (C.C. Haw., Mar. 9, 2020); see also *Johnson v. Raybestos-Manhattan, Inc.*, 740 P.2d 548, 549 (Haw. 1987) (explaining that “in a strict products liability action, the issue of whether the seller knew or reasonably should have known of the dangers inherent in his or her product is irrelevant to the issue of liability. Although highly relevant to a *negligence* action, it has absolutely no bearing on the elements of a strict products liability claim” (emphasis in original) (citations omitted)).

widely known.¹⁴⁹ Thus, the fossil fuel defendants posit that they cannot be liable because the public knew that climate change was harmful and caused by their products: “Because Plaintiff’s own allegations make clear that the potential dangers of fossil fuel use on the climate have been ‘open and obvious’ for decades, Defendants had no duty to warn about these dangers, and Plaintiffs’ negligent failure to warn claim fails as a matter of law.”¹⁵⁰

Here, the climate disinformation effort is, again, potentially useful to plaintiffs. Even where there is widespread public knowledge about the danger of a product, when defendants run negating advertisements that affirmatively undermine or contravene that prevailing knowledge they can still be liable on a theory of informational defect.¹⁵¹ For example, the Third Circuit rejected a beer company’s argument that, where the beer company’s own advertisements promoted moderate beer drinking as healthy, the court could not hold it liable for failing to warn of health risks from drinking because health risks from drinking were widely known.¹⁵² In a climate suit, even if people generally recognize the dangers of fossil fuel combustion, a court could conclude that a defendant’s disinformation efforts negated this prevailing knowledge. While there are doctrinal difficulties for the plaintiffs to succeed on informational defect theories (for example, causation),¹⁵³ the climate

¹⁴⁹ DOBBS, HAYDEN & BUBLICK, *supra* note 146 (“One reason a warning may not be required is that the risks involved are either generally known or are obvious to a purchaser or user.”); *Josue v. Isuzu Motors Am. Inc.*, 958 P.2d 535, 538 (Haw. 1998).

¹⁵⁰ Defendants’ Joint Opening Brief in Support of Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim at 57–58, *Jennings*, No. N20C-09-097 (Del. Super. Ct. May 18, 2023), 2024 WL 98888; *see also* Joint Opening Brief in Support of Defendants’ Motion to Dismiss for Failure to State a Claim at 40–41, *Platkin*, No. MER-L-1797-22 (“Under a straightforward application of New Jersey law, Plaintiffs’ failure to warn and negligent failure to warn claims fail from the very start because the alleged dangers of using oil and gas were well known to the Plaintiffs and the public.”). Some courts have held that this question cannot be resolved procedurally on a motion to dismiss. *Jennings*, 2024 WL 98888, at *18 (“[The question of whether the danger was open and obvious is not appropriate for resolution at the dismissal stage.”), *cert. denied sub nom.*, No. N20C-09-097 (Del. Super. Ct. Feb. 12, 2024).

¹⁵¹ *See Hon v. Stroh Brewery Co.*, 835 F.2d 510, 514 (3d Cir. 1987) (upholding a failure to warn claim against Stroh beer, despite concluding that dangers from prolonged and excessive alcohol use were generally known, because the danger of pancreatitis from moderate use was perhaps not generally known and Stroh ran commercials communicating that moderate alcohol consumption was safe).

¹⁵² *See id.* (holding that a jury could conclude that the general public is unaware of the hazards of drinking).

¹⁵³ For an excellent analysis of establishing causation for torts involving climate disinformation, *see Wentz & Franta, supra* note 9. Courts typically require that plaintiffs connect the harm suffered to the defendant’s omission or misrepresentation. *Rachlin v. Libby-Owens-Ford Glass Co.*, 96 F.2d 597, 599–600 (2d Cir. 1938) (dismissing an informational defect claim because the “danger was not increased by [plaintiff’s] reliance upon the defendant’s representations as to the quality of the article she bought. Her injuries were only a remote result of the contemplated use of the defendant’s product”). The climate disinformation effort could also help plaintiffs show causation, as the

disinformation effort provides a helpful fact to establish informational defect.

The climate disinformation effort may also undergird plaintiffs' public nuisance claims. One key threshold question will be whether different jurisdictions will recognize the climate suits' blending of product misrepresentation and atmospheric harm as falling within the scope of nuisance doctrine.¹⁵⁴ Another key inquiry will be whether the defendants' conduct was unreasonable. Although jurisdictions vary in how they assess nuisance, the Restatement (Second) of Torts' approach is broadly representative. A public nuisance is an "unreasonable interference with a right common to the general public."¹⁵⁵ The Restatement provides a non-exhaustive list of conduct that is unreasonable in a section specific to public nuisance:

Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.¹⁵⁶

Commentary to the Restatement notes that courts may sometimes also evaluate whether conduct is unreasonable and use a nuisance

defendants' efforts to persuade the public and consumers that their products do not cause climate change (or that climate change is not harmful) would seem to reveal that the defendants, at least, believed that acceptance of those facts could impact their business (presumably in part by reducing sales of fossil fuels and, by extension, emissions). Plaintiffs might also argue that information about how fossil fuel contributes to climate change was material to the consumers' decisions, and that showing that consumers would have chosen to purchase less gas should be sufficient without further showing a connection between reduced purchases and truncation of climate harms. This argument resonates with the concept that "[w]hen a product is unavoidably dangerous, a warning permits the consumer to make informed choices whether to accept the product," but "[t]he Products Restatement's formulation rules out any responsibility for warnings that would be material and might lead the consumer to forgo using the product." DOBBS, HAYDEN & BUBLICK, *supra* note 146, § 464.

¹⁵⁴ Wentz & Franta, *supra* note 9, at 10998–99 (noting that some jurisdictions decline to recognize product misrepresentation as falling within the scope of nuisance and/or require that the defendant have control over the instrument of harm).

¹⁵⁵ See Margaret Rosso Grossman, *Climate Change and the Individual*, 66 AM. J. COMP. L. 345, 350 (Supp. 2018) (quoting the RESTATEMENT (SECOND) OF TORTS § 821B (A.L.I. 1979)).

¹⁵⁶ *Id.*

balancing test to evaluate private nuisance that weighs “whether the gravity of the harm outweighs the utility of the actor’s conduct.”¹⁵⁷

The climate disinformation effort could prove helpful for satisfying both the standard specific to public nuisance claims and the more general balancing test. With respect to the standard specific to public nuisance claims, the climate disinformation effort arguably helps to bring the defendants’ conduct within the scope of Restatement clause (c) because it shows that the defendants knew or had reason to know not only that unabated sale and use of their products would have “a significant effect upon the public right,” but that the effect would be so harmful that it would cause consumers and governments to eschew their product (hence occasioning the need for the disinformation effort).¹⁵⁸ Proving what fossil fuel defendants knew when about climate can also help to establish when a tort duty arose.¹⁵⁹ Regarding the balancing test, the climate disinformation effort allows plaintiffs to argue that the conduct the court should weigh is not the sale and use of fossil fuels generally but, instead *dishonesty* in the sale of fossil fuels—hiding and misrepresenting the harms that they cause. If courts accept this argument, this approach would prevent defendants from arguing that their conduct was, more broadly, the sale of fossil fuels, and that the conduct had high social utility because it provided a cheap form of energy. When framed as a question of weighing the utility of misrepresenting the harms of fossil fuel products against the extraordinary harms of climate change, though, the outcome of the balancing test is easy to resolve—and, importantly, readily resolvable by a court.

Some suits also seek to use the climate disinformation effort to impose liability on the fossil fuel defendants under state consumer protection laws.¹⁶⁰ State consumer protection laws generally prohibit

¹⁵⁷ *Id.* § 826; *id.* § 821B cmt. e (“If a defendant’s conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard. The analysis set forth in §§ 826–831 then becomes more significant.”).

¹⁵⁸ *Id.* § 821B(2)(c).

¹⁵⁹ See Aisha I. Saad, *Attribution for Climate Torts*, 64 B.C. L. REV. 867, 895 (2023) (explaining that plaintiffs must show when a duty arose and arguing that attribution science can help do this: “This distinction between emissions predating and postdating emitters’ duty can be accounted for using existing modeling methods. Attribution models can disaggregate a source’s emissions based on the period of emission and simulate the contribution of those emissions for which a duty attaches apart from those for which no duty attaches”).

¹⁶⁰ See *Bd. of Cnty Comm’rs of Boulder Cnty.*, No. 2018CV30349, 2024 WL 3204275, at *1 (Colo. Dist. Ct., 2024) (using the Colorado Consumer Protection Act to mitigate the impact of climate change); see also *Jennings*, No. N20C-09-097, 2024 WL 98888, at *1 (Del. Super. Ct. May 18, 2023) (using the Delaware Consumer Fraud Act to assert that defendants misrepresented their products which drove greenhouse gas pollution); *City of Chicago v. BP P.L.C. (Chicago II)*, No. 24-cv-02496, 2025 WL 1426163, at *1 (N.D. Ill. May

businesses from engaging in deceptive trade practices, including by misleading consumers,¹⁶¹ and plaintiffs in these suits characterize defendants' climate deception effort as misrepresentation about defendants' fossil fuel products.¹⁶²

One difficulty that these claims face is that the statutes of limitations are typically less than ten years (often three to four years)¹⁶³ and the most concerted and clearest conduct of the climate disinformation effort occurred in the late 1980s through the 1990s (and was exposed by Inside Climate News and the Union of Concerned

16, 2025) (using Chicago Municipal Code to allege consumer fraud and that defendants misled consumers about climate change); Complaint at 1–2, *State v. BP P.L.C.*, No. PORSC-CV24-442 (Me. Super. Ct. 2024) (claiming fossil fuel companies mounted a disinformation claim to discredit consensus on climate change and failed to warn consumers); *Annapolis I*, No. ELH-21-772 (D. Md. May 19, 2021), 2021 WL 2000469 (alleging defendants concealed known environmental consequences in violation of Maryland law); *Anne Arundel I*, 94 F.4th 343, 346 (4th Cir. 2024) (using Maryland's Consumer Protection Act to allege that defendants promoted fossil-fuel products while concealing the connection between fossil fuels and climate change); *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703 (8th Cir. 2023) (using Minnesota's consumer protection statutes for misrepresentation about the effects fossil fuels have on the environment); Amended Complaint at 6, *City of Hoboken v. Exxon Mobil Corp.*, No. HUD-L-3179-20 (N.J. Super. Ct. Law Div. Apr. 21, 2023) (using the New Jersey Consumer Fraud Act to recover damages related to harm to the environment); *Mun. of San Juan, Puerto Rico v. Exxon Mobil Corp.*, Civ. No. 23-1608, 2025 WL 2848565, at *1 (D. P.R. Sep. 30, 2025) (filing a class action for damages from climate change-related events caused by defendants); *City of Charleston v. Brabham Oil Co.*, No. 2020-CP-10-03975 (S.C.C.P. Aug. 6, 2025) (seeking compensation under South Carolina Unfair Trade Practices Act to allege conduct inflated consumers' demand for fossil fuels).

¹⁶¹ *E.g.*, MD. CODE ANN., COM. L. § 13–301 (West 2026) (prohibiting businesses from engaging in “any unfair . . . or deceptive trade practices,” including making any “[f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers”).

¹⁶² One interesting dispute about the application of consumer protection laws centers on whether the communications involved in the climate disinformation effort fall within the scope of the statutes. Defendants have argued that the climate disinformation effort is related to climate change and climate change science as opposed to a product (thus falling outside of the scope of the coverage of consumer protection statutes). In *Jennings*, Plaintiffs argued in response that “Defendants have not shown (and cannot show) as a matter of law that all their statements about climate change were not ‘attempt[s]’ to ‘indirectly’ ‘induce’ consumers to buy their fossil fuel products—i.e., advertisements under the CFA [Delaware Consumer Fraud Act] Here, a jury could reasonably conclude that CFA Defendants’ misrepresentations about climate change were attempts to indirectly induce Delaware consumers to buy their fossil fuel products.” Plaintiffs’ Answering Brief in Opposition to Defendants’ Joint Motion to Dismiss for Failure to State a Claim at 53, *Jennings*, No. N20C-09-097 (Del. Super. Ct. July 3, 2023) (internal citations omitted).

¹⁶³ *E.g.*, COLO. REV. STAT. § 6-1-115 (noting the statute of limitations for CCPA claims is “three years after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred or within three years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice,” and may be extended for one year if certain elements are proven).

Scientists in the early to mid-2000s).¹⁶⁴ Some courts have dismissed plaintiffs' claims under consumer protection laws as time-barred.¹⁶⁵ In Colorado, a court dismissed plaintiffs' consumer protection claims as time-barred without prejudice, inviting the plaintiffs to amend their complaint to identify conduct occurring within the limitations period.¹⁶⁶

In response to objections based on timeliness, plaintiffs could try to ground violations of consumer protection laws in more recent examples of greenwashing by defendants.¹⁶⁷ In some complaints, plaintiffs include allegations of greenwashing by defendants in recent advertisements. In addition to being more recent, these advertisements are often more directly and explicitly tied to fossil fuel products, and are in formats and media more traditionally recognized as advertisements intended to communicate with consumers; these factors may avoid some of the issues underlying dismissals. In their brief in support of their motion to dismiss, the defendants in the Delaware case worked to separate and distinguish the climate deception effort from more recent advertisements, arguing that the plaintiffs alleged "two forms of deception under the [Delaware Consumer Fraud Act]," one grounded in deception about the harms from the use of fossil fuels and the other a greenwashing effort involving allegedly false and misleading

¹⁶⁴ David Klepper, *Climate Disinformation Continues to Leave a Mark as World Gets Hotter*, PBS NEWS (July 26, 2022, at 20:33 ET), <https://www.pbs.org/newshour/world/climate-disinformation-continues-to-leave-a-mark-as-world-gets-hotter> [<https://perma.cc/D8EV-CLN9>]; SMOKE, MIRRORS, & HOT AIR, *supra* note 4, at 9; Banerjee, *supra* note 3.

¹⁶⁵ *Jennings*, 2024 WL 98888, at *19 (noting "the general public had knowledge of or had access to information about the disputes, regarding the existence of climate change and effects, decades prior to the expiration of the five-year limitations period," therefore, "[t]his Court finds that the DCFA claims are barred by the five-year statute of limitations" and "tolling does not apply"); *City of Charleston v. Brabham Oil Co.*, No. 2020-CP-10-03975 (S.C.C.P. Aug. 6, 2025) ("Plaintiff alleges no actionable conduct related to the purported 'campaign of deception' in the three years before it filed suit."); *Mayor & City Council of Baltimore I*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024) (holding that plaintiff's claims were time-barred where "[i]nformation as to [d]efendants' alleged misleading statements and false representations, true or not, was admittedly known by Baltimore years before 2015").

¹⁶⁶ *See Bd. of Cnty. Comm'rs of Boulder Cnty.*, No. 2018CV30349, 2024 WL 3204275, at *33 (Colo. Dist. Ct. June 21, 2024) (stating that "[t]he motion to dismiss the CCPA claim [in the amended complaint] as time-barred by [the Colorado Consumer Protection Act] is granted").

¹⁶⁷ More recent greenwashing—advertisements extolling companies' commitment to renewable energy while they busily lobby against renewable energy policies, for example—constitutes a troubling evolution of the climate disinformation effort. Much current greenwashing is not as squarely focused on undermining understanding of climate science in the same way as the initial climate disinformation effort. One notable exception may be disingenuous characterizations of climate harms as minimal, distant, or unconnected to climate change, offered in an effort to paint mitigation efforts as unnecessary climate alarmism. *See* A. Wren Montgomery, Thomas P. Lyon & Julian Barg, *No End in Sight? A Greenwash Review and Research Agenda*, 37 *ORG. & ENV'T* 221, 241–42 (2024) (discussing the new issues of corporate greenwashing and concurrent political lobbying).

advertisements.¹⁶⁸ Even claims based on more recent and more traditional advertisements face challenges. In a decision that New York City is appealing, the New York Supreme Court dismissed a suit under New York City's Consumer Protection Law based on recent and allegedly misleading fossil fuel advertisements, in part on the grounds that New York consumers are aware that fossil fuels contribute to climate change and because it found that fossil fuels companies did not offer messages relating to renewable and other forms of energy in connection with the sale of a consumer good.¹⁶⁹ Of note, even if courts allow claims stemming from more recent and more traditional advertisements to proceed, the most damaging and troubling corporate deception—the disinformation effort—would remain legally untouched.

Plaintiffs could also argue that the nature of the climate disinformation effort supports fixing a more recent date as the point at which the limitations period began, or tolling the running of statutes of limitations.¹⁷⁰ Many jurisdictions have discovery rules pursuant to which statutes of limitations do not begin to run until the plaintiff could reasonably ascertain the harmful act or injury.¹⁷¹ The climate disinformation effort purposefully obfuscated awareness of the harms of climate change and their connection to defendants' products. And, for purposes of ascertaining when plaintiffs should have reasonably known they had been injured, what is perhaps most relevant is not when it was reasonable to become aware of the fact that the disinformation effort occurred and/or of on-the-ground injuries from climate change, but instead when it was reasonable to connect them—to recognize that the climate disinformation effort had *succeeded* in promoting fossil fuel use past the point of climate harm prevention.¹⁷²

¹⁶⁸ Defendants' Joint Opening Brief in Support of Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim at 58–59, *Jennings*, No. N20C-09-097 (Del. Super. Ct. May 18, 2023).

¹⁶⁹ *City of New York v. Exxon Mobil Corp.*, 226 N.Y.S.3d 863, 878–79 (N.Y. Sup. Ct. 2025), *appeal filed* No. 2025-01687 (Feb. 13, 2025) (“[P]laintiff cannot succeed on this theory where plaintiff’s own allegations concede that the connection between fossil fuels and climate change is public information.”); *id.* at 882 (“Plaintiff provides no legal authority for the notion that statements about unrelated product (e.g., alternative fuels such as natural gas) or technologies (e.g., wind and solar energy) are actionable as related to the sale of a different product (fossil fuels).”).

¹⁷⁰ See generally L.S. Tellier, Annotation, *Comment Note.—What Constitutes Concealment Which Will Prevent Running of Statute of Limitations*, 173 A.L.R. 576 (1948) (providing an overview of concealment as a basis for tolling statutes of limitations).

¹⁷¹ See *Romano v. Westinghouse Elec. Co.*, 336 A.2d 555, 560 (R.I. 1975) (“Many jurisdictions have come to the conclusion that the noncontractual counts of a products liability case should be governed by a statute of limitations running from the time of injury or from the time the plaintiff discovered or reasonably should have discovered his injury.” (citations omitted)).

¹⁷² Numerous evidentiary and tort doctrines (such as spoliation, *res ipsa loquitur*, and burden shifting on causation) prevent defendants from benefiting from concealing information, and the rationales for not rewarding concealment in those other contexts resonate with respect to thinking about the timeliness of climate disinformation consumer

Apart from these distinct doctrinal contexts, noted scholar Doug Kysar posits that the climate tort plaintiffs use fossil fuel defendants' climate deception to try and get around a more fundamental objection about holding the defendants liable for climate harms, namely whether those defendants are "more causally responsible for climate change than the governments that authorize and subsidize their activities, the manufacturers of vehicles, plants, and other machinery that utilize their products, or the consumers and other end users who benefit from those products[.]"¹⁷³ And, as he explains, the focus on deception may founder on judicial reluctance to impose legal consequences for the climate disinformation effort because its features depart in salient respects from customary frauds and torts:

Misrepresentations about climate change work more diffusely to influence public opinion and lower pressure for political representatives to address greenhouse gas emissions. The challenge for plaintiffs is that this pathway of deceit begins to look more like a fraud on democracy than the kind of discrete, relational fraud that tort and consumer protection law customarily address. To be sure, by arguing that industry defendants 'concealed and/or misrepresented the dangers associated with the burning of fossil fuels despite having been aware of those dangers for decades,' plaintiffs in carbon majors suits have identified arguably the most damaging misrepresentation campaign by any industry in history. But courts may be reluctant to find liability under circumstances that necessarily imply their sister branches have been duped or corrupted for the better part of six decades.¹⁷⁴

On this view, though climate deception is necessary to the climate tort plaintiffs' cases to establish causal responsibility, it is fatal to successfully stating traditional doctrinal claims.

There is, however, another lens through which to view the relationship of the climate disinformation effort to tort and consumer protection law. Some attributes of the climate disinformation campaign could cut the other direction and cajole courts to common law courage. There is increasing awareness of both 1) the extent to which this pattern of conduct recurs and produces great harm (tobacco, opioids, sugar, PFAS), and 2) the struggle of legal and political systems to respond effectively.¹⁷⁵

protection claims. See Megan Edwards, Katrina Fischer Kuh & Frederick A. McDonald, *Scientific Gerrymandering & Bifurcation*, 29 N.Y.U. ENV'T L.J. 171, 211–13, 217 (2021) (discussing spoliation, *res ipsa loquitur*, and burden-shifting on causation).

¹⁷³ Kysar, *supra* note 27, at 511.

¹⁷⁴ *Id.* at 512 (citations omitted).

¹⁷⁵ See Henricksen, *Deceive, Profit, Repeat*, *supra* note 22, at 2403–04 (identifying various public deception schemes through examination of industry disinformation and analyzing industries' deceptive practices of broadcasting scientific doubt or silence on the causal connection between their products and harms while contending with "the mix of commercial and political components").

Moreover, although the mechanisms of the fraud (on democracy, per Kysar) place this in a category of corporate conduct in which courts have had historical difficulty imposing legal responsibility, fossil fuel defendants have allegedly conducted the climate disinformation effort for a common and banal purpose: knowingly shilling a harmful product to make a buck. This seems like something that jurors will readily discern and is, in fact, a persuasive and meaningful reason why fossil fuel defendants are “more causally responsible” for climate harms than the rest of us.¹⁷⁶ If courts adopt this lens on the climate disinformation effort, it may well cajole them to common law courage and permit the application of doctrine to allow claims to succeed.

The climate disinformation effort thus connects in significant ways to the justiciability and merits of the climate tort suits. Framing the cases around climate disinformation may help persuade courts to reach the merits by concluding that the suits can be heard in state court under state law—that they do not present a political question, are not displaced by federal common law, are not preempted by federal statutory law, and do not otherwise contravene constitutional doctrines policing the boundaries of courts and legislatures (separation of powers) or federal and state governments (federalism). It is in this respect (supporting justiciability) that the climate disinformation effort is presently most important. The climate disinformation effort is also intertwined with the merits of the climate tort suits. Resolution of the merits of the claims in the suits will raise difficult factual and legal questions. This is primarily because of the attenuated causal chain between the defendants’ conduct and the plaintiffs’ harms,¹⁷⁷ but is also because of the difficulty of holding companies accountable for disinformation under existing law generally (doctrinal fit).¹⁷⁸ There are, however, plausible doctrinal paths for courts and juries to hold the fossil fuel defendants liable. Judges and jurors presented with the climate disinformation effort and fossil fuel defendants’ calculated prioritization of profit over life and well-being—for current and future generations, species, and ecosystems—may well be inclined to be generous and flexible in their application of doctrine. It is not hard to imagine that the factual backdrop of the climate disinformation effort could shape how jurists approach the cases in their entirety, rendering the climate disinformation effort broadly salient beyond simply helping to directly

¹⁷⁶ Kysar, *supra* note 27, at 511.

¹⁷⁷ *See id.* at 506–14 (examining modern causation issues in establishing liability through anthropogenic climate change). Other significant issues include the scope of public nuisance. That is, whether the sale of a product can constitute a nuisance. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 746 (2003).

¹⁷⁸ *See generally* Ben Clements, *The Big Tech Accountability Act: Reforming How the Biggest Corporations Control and Exploit Online Communications*, 44 W. NEW ENG. L. REV. 5, 5 (2022) (discussing, in part, the failure by lawmakers to address corporate disinformation).

satisfy specific doctrinal elements. As discussed below, however, reliance on the climate disinformation effort also raises questions about whether courts can constitutionally sanction that speech.

B. Climate Disinformation and the First Amendment

Should they be deemed justiciable and allowed to proceed, the climate tort suits will present knotty questions about whether the First Amendment permits the imposition of state tort liability to the climate disinformation effort.¹⁷⁹ Resolution of defendants' First Amendment defenses will require courts to navigate gray areas at the borders of First Amendment doctrine. The First Amendment issues represent a countervailing strategic risk of the climate suits' pivot to center on climate disinformation, while also situating the suits as a potential site for the development of First Amendment doctrine and illustrating an important constraint on options to limit the harm of corporate public deception more broadly.

Efforts to impose liability for the climate disinformation effort fall in the interstices of First Amendment jurisprudence.¹⁸⁰ The First Amendment most clearly constrains direct government regulation of speech (limitations on advertising, for example), and many cases and

¹⁷⁹ See, e.g., James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 341, 373–74 (2018) (characterizing the climate disinformation effort as intended to influence public opinion on climate change policy and concluding that it “raises the very difficult First Amendment question of whether ExxonMobil can be held liable for an unintended though reasonably foreseeable consequence of its alleged disinformation campaign”—namely, possible defrauding of investors who purchased its stock). Professor Weinstein’s article does not consider the application of the First Amendment in the context of the climate tort suits, including product liability, but rather considers the application in the context of investors. *Id.*; see also Katherine G. Horner, *Does the First Amendment Protect Fossil Fuel Companies’ Public Speech?*, 53 ENV’T L. REP. 10036, 10055–60 (2023) (undertaking a careful analysis of possible First Amendment defenses to tort actions seeking recovery for climate disinformation); Wentz & Franta, *supra* note 9, at 11002–03 (“This focus on commercial speech may affect the causation analysis in these cases by limiting the types of arguments and evidence that can be used to demonstrate the effect of fossil fuel disinformation campaigns.”).

¹⁸⁰ See generally David S. Han, *Managing Constitutional Boundaries in Speech-Tort Jurisprudence*, 69 DEPAUL L. REV. 495, 517 (2020) (“[T]he Court’s speech-tort jurisprudence has been relatively sparse, and it may be difficult to draw any clear conclusions as to how it might approach future speech-tort cases”); Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2075 (2022) (“Courts addressing speech rights at the nexus of science, politics, and market—on issues from climate change to public health and large-scale financial risk to the use of consumer data—have, to date, produced notoriously confusing First Amendment case law. The root of that confusion is that speech at that nexus also sits at the intersection of three distinct First Amendment doctrines—namely, the First Amendment principles that apply to speech in public discourse (applicable in politics), the commercial speech doctrine and related doctrines that generally apply to expression in economic life (markets), and free speech doctrines around expertise and knowledge production (science).”).

First Amendment doctrines develop from and are oriented toward that paradigm—explicit government laws that bar, limit, or compel speech.¹⁸¹ The First Amendment also, however, applies to civil tort suits (even suits between private parties) on the reasoning that the “imposition of tort liability constitutes state action that may be subject to the strictures of the First Amendment.”¹⁸² Notably, the plaintiffs in the climate tort suits are mostly state or local governments, so the climate tort suits actually look a little more like direct government regulation of speech than some other civil litigation. Accordingly, even though the climate tort suits do not involve direct government regulation of speech (a law prohibiting climate disinformation, for example), the First Amendment applies and could bar the claims (at least to the extent that the claims implicate the defendants’ speech). One challenge for understanding how the First Amendment applies to these cases is that there is relatively little precedent applying the First Amendment to civil tort lawsuits. This is a first interstice—the present situation requires applying precedents and doctrines typically applied to assess the constitutionality of statutes or ordinances to a civil tort suit.¹⁸³

Another challenge to understanding how the First Amendment applies to the climate disinformation effort arises from the breadth of the climate disinformation effort and the diverse mechanisms through which fossil fuel defendants allegedly conducted it. In their complaints, plaintiffs allege that defendants’ climate disinformation efforts included a wide swath of actions, such as:

1) “fund[ing] deceptive advertising campaigns and distribut[ing] misleading material to generate public uncertainty around the climate debate”;¹⁸⁴

2) paying to run “a series of ‘advertorials,’ advertisements located in the editorial section of the New York Times and meant to look like editorials rather than paid ads . . . [that] discussed various aspects of the public discussion of climate change and sought to undermine the

¹⁸¹ Han, *supra* note 180, at 517–18.

¹⁸² *Id.* (“[A] court’s mere application of state rules of law represents state action triggering First Amendment protections”); *see also* *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (“Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only[.] . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.” (internal citations omitted)).

¹⁸³ *See generally* Han, *supra* note 180, at 510–11 (analyzing the fundamental differences between state actions involving speech-tort cases and typical First Amendment cases, and finding requisite state action in tort cases comes from state developed common law).

¹⁸⁴ Complaint at 71, *Honolulu I*, No. 1CCV-20-00003801 (C.C. Haw. Mar. 9, 2020).

justifications for tackling greenhouse gas emissions as unsettled science”;¹⁸⁵ and

3) “fund[ing] of dozens of think tanks, front groups, and dark money foundations pushing climate change denial.”¹⁸⁶

Their allegations draw on the work of sociologists and public interest groups whose investigations document a sprawling climate disinformation effort encompassing diverse content across diverse fora (and even included tarnishing the reputation of climate scientists in an effort to discredit their findings).¹⁸⁷ Yet key questions central to First Amendment review—for example, is the speech commercial, political, false or misleading, or petitioning the government—are fact-specific and may apply differently to distinct mechanisms of the climate disinformation effort. The most thorough scholarly analysis to date of the First Amendment’s application to the climate disinformation effort has attempted to deal with this by grouping the climate disinformation speech into three categories and considering each separately: 1) “traditional advertising” promoting “specific products as renewable and the company itself as environmentally friendly”; 2) “statements in editorial-style ads that downplay the role of fossil fuels in contributing to climate change”; and 3) “statements that deny the threat of climate change, argue that climate science is unsettled, and question legislation or policies that seek to mitigate climate change.”¹⁸⁸

Applying the First Amendment to the climate disinformation effort in the state climate tort suits context thus requires courts to adapt precedent oriented toward the distinct context of direct government regulation of speech to wide-ranging content across a variety of forums. To further complicate matters, courts must also navigate gray areas in First Amendment doctrine, including understanding what speech is commercial and the treatment of speech that combines commercial and noncommercial aspects; judicial assessment of what constitutes scientific “fact”; and the scope of protection to petition the government under the *Noerr-Pennington Doctrine*, developed in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.* (*E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*)¹⁸⁹ and *United Mine Workers of America v. Pennington*.¹⁹⁰

Does the climate disinformation effort constitute commercial speech? The answer is potentially dispositive. Corporations and

¹⁸⁵ *Id.* at 68.

¹⁸⁶ *Id.* at 74.

¹⁸⁷ *E.g.*, McCright & Dunlap, *Defeating Kyoto*, *supra* note 5, at 349–50.

¹⁸⁸ Horner, *supra* note 179, at 10055.

¹⁸⁹ *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961).

¹⁹⁰ *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965).

corporate speech enjoy First Amendment protection.¹⁹¹ When corporations engage in noncommercial or political speech, courts would generally subject that noncommercial speech—even if false or misleading—to strict scrutiny, regulatable only through “(i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.”¹⁹² Government typically has much more leeway to regulate commercial speech without offending the First Amendment. Courts use a four-part test to assess the constitutionality of government restrictions on commercial speech: “(1) does the challenged law regulate speech, does the proposed speech concern lawful activity and is it non-misleading? (2) is the governmental interest substantial? (3) does the regulation directly advance the governmental interest? and (4) is the regulation more extensive than necessary to serve that interest?”¹⁹³ And, as discussed *infra*, parties can make strong arguments that the climate disinformation effort is misleading speech. If commercial speech “is false or misleading, it receives zero protection.”¹⁹⁴ The Supreme Court has “consistently held [false or even misleading commercial speech] to be *categorically* without First Amendment protection.”¹⁹⁵

¹⁹¹ Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 760–62 (1976).

¹⁹² Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 530, 534–35 (1980).

¹⁹³ BellSouth Telecomm., Inc. v. Farris, 542 F.3d 499, 505 (6th Cir. 2008) (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980)). Commercial speech was long understood to be less protected (and hence regulated more readily) than other types of speech. The “level of constitutional protection for commercial speech . . . is now very close to the high levels of protection long granted to noncommercial expression,” but the precise level of protection afforded to commercial speech remains somewhat amorphous. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 20:1 (2025).

¹⁹⁴ SMOLLA, *supra* note 193, § 20:10.

¹⁹⁵ James Weinstein, *What Lies Ahead?: The Marketplace of Ideas*, Alvarez v. United States, and *First Amendment Protection of Knowing Falsehoods*, 51 SETON HALL L. REV. 135, 143 (2020) (emphasis in original); *see also* United States v. Alvarez, 567 U.S. 709, 723 (2012) (holding that the government may not outlaw all types of false statements but continuing to recognize a carve out permitting government regulation of “speech . . . used to gain a material advantage,” and that “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment”); *In re R. M. J.*, 455 U.S. 191, 203 (1982) (“Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely.”); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”).

The communication at issue in the climate disinformation effort typically involves climate change, a matter of public concern, and defendants' commercial product, oil, because combustion of oil contributes to climate change. Suggesting that climate change is not occurring, human-caused, or harmful necessarily functions to obscure or minimize a danger occasioned by defendants' product. It is also, in some sense, inextricable from commercial goals, whether to encourage continued purchase and use of oil products, and/or to discourage the adoption of policies that could constrain the production and sale of oil. Yet manifestations of the climate disinformation effort often did not state this explicitly or even appear in traditional advertising forms. To ascertain the category of speech where a communication includes both commercial and noncommercial aspects, courts typically undertake a fact-specific inquiry that balances multiple factors: "(1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech."¹⁹⁶ Some communications implicated in the climate disinformation explicitly discuss the defendants' product and have the appearance of a traditional advertisement;¹⁹⁷ others (including the advertorial included in the plaintiffs' complaint in *City and County of Honolulu v. Sunoco*¹⁹⁸) discuss climate change policy without explicitly mentioning climate change science or oil.¹⁹⁹

The doctrinal contours around commercial speech are muddy in existing doctrine, and First Amendment scholars offer a range of perspectives on how commercial speech doctrine should be understood and/or redefined, both generally and in the specific context of the climate disinformation effort.²⁰⁰ One scholar predicts that some climate disinformation communications may be deemed commercial and others noncommercial (those that reference only climate policy or climate science without explicitly referencing the defendants' product).²⁰¹ Another scholar reasons that the fossil fuel companies "spread [] disinformation for the purpose of making a profit," and that the climate

¹⁹⁶ *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983)); SMOLLA, *supra* note 193 ("All discussion of the First Amendment standards governing regulation of commercial speech necessarily presupposes some understanding of what is or is not 'commercial speech' in the first place. Cases contesting that boundary line are multitudinous and no consensus definition has emerged.").

¹⁹⁷ Horner, *supra* note 179, at 10055 (providing examples of "statements that promote—in traditional advertising formats—their specific products as renewable and the company itself as environmentally friendly").

¹⁹⁸ *Honolulu III*, 537 P.3d 1173 (Haw. 2023).

¹⁹⁹ Complaint at 69 fig. 5, *Honolulu I*, No. 1CCV-20-0000380 (C.C. Haw. Mar. 9, 2020).

²⁰⁰ Shanor & Light, *supra* note 180, at 2079 (concluding that "the gravamen of the commercial speech doctrine is consumer reliance and information asymmetries," and surveying the perspectives of other scholars).

²⁰¹ Horner, *supra* note 179, at 10056–57 ("[C]ourts have found commercial speech based on the *Bolger* test only when the product was at least generally referred to in the speech.").

disinformation effort constitutes “harmful disinformation to conceal dangers posed by a product” and argues that it should not be protected by the First Amendment.²⁰²

“Of course, an issue like climate change denial involves a mix of both commercial and political components. But, because the genesis of the public deception campaign by the fossil fuel industry is profit-seeking, this makes the political component of the issue a byproduct of the public deception campaign—a purposefully created byproduct, but a byproduct, nonetheless.”²⁰³

Another scholar reasons that “all speech by a for-profit corporation is commercial since, by virtue of rules governing for-profit corporations a for-profit corporation has no legitimate purpose other than commerce,” such that “even when ExxonMobil talks about global warming its purpose always and inherently commercial,” but concedes that is not current doctrine.²⁰⁴

The Sixth Circuit suggests that where it is hard to discern whether speech is commercial or political, the speech may be considered a “hybrid, one that implicates commercial and political speech, that implicates the interests of consumers and voters and that draws its heritage as much from protests over the Townshend Acts as from the *Wealth of Nations*,” in which case it would “presumably” be subject to “more rigorous scrutiny.”²⁰⁵ Notably, in one of the climate tort suits, a circuit court in Hawai‘i held that it could not rule on whether a commercial speech exception to California’s anti-SLAPP law applied to the climate disinformation effort without further factual development.²⁰⁶ Taken together, this reveals murkiness as to whether the climate disinformation effort constitutes commercial speech.

Another uncertainty arises with respect to whether the climate disinformation effort was false or misleading for purposes of First Amendment analysis.²⁰⁷ This is significant because false or misleading

²⁰² Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, 96 ST. JOHN’S L. REV. 543, 565 (2022) (arguing that speech that qualifies as fraud on the public should not be afforded First Amendment protection).

²⁰³ Henricksen, *Deceive, Profit, Repeat*, *supra* note 22, at 2404.

²⁰⁴ Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2645 (2008).

²⁰⁵ *BellSouth Telecomm., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008).

²⁰⁶ *City & Cnty. of Honolulu v. Sunoco LP (Honolulu II)*, 577 P.3d 82, 88 (Haw. Ct. App. 2025); *see generally* SMOLLA, *supra* note 193 (“[L]itigation over commercial speech regulation will often be deeply fact-intensive and fact-driven, with results turning on the nature of the record developed.”).

²⁰⁷ Of note, states can regulate commercial speech that is not false or misleading, but the state must assert a substantial interest, and restrictions must be narrowly drawn. *Cent’l Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 565–66 (1980).

commercial speech enjoys little or no First Amendment protection.²⁰⁸ As explained *supra*, significant research and analysis demonstrates that the climate disinformation effort involved the purposeful dissemination of misleading information about climate change.²⁰⁹ Most notably, social scientists show that ExxonMobil knew and accepted settled climate change science, as evidenced by its internal and peer-reviewed communications, yet continued to attack that science and characterize it as uncertain in external communications.²¹⁰ Legal scholars have explained why and how, despite the presence of residual uncertainty in science, the climate disinformation effort meets relevant legal standards courts have deemed false or misleading.²¹¹

But courts may be wary of evaluating climate change science, particularly to ascertain the state of climate change science at different points in time as necessary to show that defendants' public representations were disingenuous. Reticence to parse climate change science may arise from concerns about institutional competence (judges are not scientists). Reticence may also be grounded in concerns specific to the First Amendment context, namely the dangers attendant in empowering the government to declare what constitutes scientific fact:

[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.²¹²

It may also prove difficult to demonstrate that individual communications deployed as part of the climate disinformation effort are statements of fact (as opposed to opinion²¹³) and are false or

²⁰⁸ Meanwhile, political speech, even by corporations, is typically protected by strict scrutiny. Shanor & Light, *supra* note 180, at 2084 (“[T]he First Amendment robustly protects false statements of fact in public discourse.”).

²⁰⁹ See *supra* Part I.

²¹⁰ Supran & Oreskes, *supra* note 5, at 1, 14.

²¹¹ See Shannon M. Roesler, *Evaluating Corporate Speech About Science*, 106 GEO. L.J. 447, 471–73 (2018). See generally Shanor & Light, *supra* note 180, at 2091 (asserting that First Amendment scientific truth can be ascertained by “pursuing verification within currently accepted approaches to how facts can be found and substantiated,” and explaining that “because prevailing scientific methods do not expect or require certainties, it is inappropriate to require 100% certainty on many issues of scientific fact for a related statement to be considered a true (or false) statement for First Amendment purposes”).

²¹² *Alvarez*, 567 U.S. 709, 751–52 (2012).

²¹³ See generally Shanor & Light, *supra* note 180, at 2104 (“A second category of speech by commercial speakers that is protected under the principles applicable to public discourse, and should not be considered commercial speech, is the expression of opinion.”).

misleading, particularly when viewed in isolation. The advertorial singled out in the *City and County of Honolulu* complaint, for example, makes few factual assertions, instead questioning government assessment of the economic impacts of emission controls.²¹⁴ It will be of central importance to application of the First Amendment for courts to determine whether the climate disinformation effort is false or misleading, yet making that determination may prove challenging.

A final variable complicating application of the First Amendment to the climate disinformation effort is whether it constitutes petitioning of the government protected under the *Noerr-Pennington* doctrine.²¹⁵ In *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, truckers and trucking interests alleged that railroads engaged in a misleading “publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers.”²¹⁶ The Supreme Court held that the misleading publicity campaign effort did not violate the Sherman Act.²¹⁷ In *Pennington*, the Supreme Court held that the Sherman Act did not prohibit a union’s efforts to influence (lobby) public officials “regardless of intent or purpose.”²¹⁸ Although the Supreme Court did not render a holding under the First Amendment in either case,²¹⁹ in *Noerr*, it invoked the canon of constitutional avoidance, reasoning that because interpreting the Sherman Act to prohibit these lobbying efforts could contravene the petition clause of the First Amendment (the “right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws”²²⁰), the Act should not be so interpreted: “The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”²²¹ The climate disinformation effort was, at least in part, a publicity campaign to forestall public and political will to adopt laws

²¹⁴ Complaint at 69 fig. 6, *Honolulu I*, No. 1CCV-20-0000380 (C.C. Haw., Mar. 9, 2020).

²¹⁵ *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *Pennington*, 381 U.S. 657, 669–70 (1965).

²¹⁶ *Noerr Motor Freight, Inc.*, 365 U.S. at 129.

²¹⁷ *Id.* at 138.

²¹⁸ *Pennington*, 381 U.S. at 670.

²¹⁹ *Noerr Motor Freight, Inc.*, 365 U.S. at 132 n. 6 (“The answer to the truckers’ complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses.”); see *Pennington*, 381 U.S. at 661, 669–70 (assigning the legal question presented as whether the defendants violated provisions of antitrust laws, and discussing *Noerr Motor Freight, Inc.*’s holding only regarding the Sherman Anti-Trust Act).

²²⁰ *Noerr Motor Freight, Inc.*, 365 U.S. at 139.

²²¹ *Id.* at 138.

and policies to mitigate climate change, suggesting the possibility that courts may apply the *Noerr-Pennington* doctrine to protect at least some climate disinformation speech.²²²

As with other aspects of the First Amendment inquiry, the contours of the doctrine and its applicability to the climate disinformation effort are blurry. The Supreme Court has only applied the *Noerr-Pennington* doctrine to antitrust disputes (raising some question about its salience in other contexts).²²³ Lower court application of the doctrine is messy and conflicted,²²⁴ and the doctrine attracts significant scholarly criticism.²²⁵ Some courts—most notably, in the context of tobacco’s damaging misinformation campaign which is similar in many respects to the climate disinformation effort—limit the doctrine to communications directly addressed to government (such as letters to a politician or testimony before Congress).²²⁶ Some courts hold that the doctrine does not apply to deliberately false or misleading statements, suggesting the doctrine may have limited application to the climate disinformation effort.²²⁷ Scholars who have considered the question predict courts would protect that fossil fuel companies’ lobbying

²²² Some of the plaintiffs’ complaints refer specifically to defendants’ lobbying against the adoption of climate laws. *See, e.g.*, Complaint at ¶ 134, *Cnty. of San Mateo v. Chevron Corp.*, No. 17CIV03222 (Ca. Sup. Ct. July 17, 2017) (“Defendants by and through their trade association memberships, worked directly, and often in a deliberately obscured manner, to evade regulation of the emissions resulting from use of their fossil fuel products. For instance, the American Coalition for Clean Coal Electricity (ACCCE), on behalf of Defendants, hired a lobbying firm, which posed as various nonprofits and sent letters to persuade members of Congress to vote against the American Clean Energy and Security Act of 2009, which would have imposed a carbon cap and trade program in the U.S.”).

²²³ In *McDonald v. Smith*, 472 U.S. 479, 483 (1985), the Supreme Court held that the Petition Clause did not bar a libel suit in a dispute involving letters sent to political figures about a potential political nominee but did not discuss the *Noerr-Pennington* doctrine. *Id.* (“Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel”); *see also* Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of A Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 107–08 (1996) (lamenting the Supreme Court’s failure to clarify the application of the *Noerr-Pennington* doctrine outside of the antitrust context).

²²⁴ Wentz & Franta, *supra* note 9, at 11003.

²²⁵ *See generally* Nicholas E. Hakun, *Strategic Litigation and Antitrust Petitioning Immunity*, 12 U.C. IRVINE L. REV. 867 (2022) (criticizing the *Noerr-Pennington* doctrine for being too broad and thwarting antitrust goals); Karen Roche, *Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines*, 45 LOY. L.A. L. REV. 1295 (2012) (arguing that the doctrine is too broad and should be limited).

²²⁶ *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 886 (D.D.C. 2006) (“The Court finds that only those statements Defendants made directly to legislative bodies merit *Noerr-Pennington* immunity [T]he vast majority of Defendants’ statements were made with the primary purpose of influencing smokers, potential smokers, and the general public and are, therefore, not protected by the *Noerr-Pennington* doctrine.”).

²²⁷ *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009); *Whelan v. Abell*, 48 F.3d 1247, 1253–54 (D.C. Cir. 1995).

activities as petitioning activity under the doctrine, and that courts may even protect some public advertisements focusing on the merits of proposed climate policy.²²⁸

The defendants in the climate tort suits regularly argue that the climate disinformation effort falls within the scope of the *Noerr-Pennington* doctrine, and an early skirmish over the doctrine's applicability before a district court in the Northern District of California suggests that at least some courts may be inclined to agree. In granting a motion to dismiss in *City of Oakland v. B.P. PLC*,²²⁹ the district court, describing the plaintiffs' claims, observed that “[a]t one point, counsel seemed to limit liability to those who had promoted allegedly phony science to deny climate change. But at oral argument, plaintiffs’ counsel clarified that any such promotion remained merely a ‘plus factor.’”²³⁰ The court then explained in a footnote: “This clarification seems to have been aimed at avoiding the *Noerr-Pennington* doctrine and other free speech issues inherent in predicated liability on publications designed to influence public policy.”²³¹

Procedurally, the fossil fuel defendants often also move to dismiss the state climate lawsuits under anti-SLAPP laws.²³² Anti-SLAPP laws provide for expeditious dismissal of strategic lawsuits against public participation (“SLAPPs”), or private lawsuits that target public participation and speech.²³³ Many states have adopted anti-SLAPP

²²⁸ Wentz & Franta, *supra* note 9, at 11003; Horner, *supra* note 179, at 10060–62 (concluding that some aspects of the climate disinformation effort might be considered protected petitioning activity).

²²⁹ *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018).

²³⁰ *Id.* at 1022.

²³¹ *Id.* at 1022 n. 6.

²³² See *Jennings*, No. N20C-09-097, 2024 WL 98888, at *22 (Del. Super. Ct. May 18, 2023) (declining to decide the issue of the anti-SLAPP claim); *Minnesota II*, No. 62-CV-20-3837, 2025 WL 1203047 (Minn. Ct. App. Jan. 26, 2026) (explaining that because the suit did not seek damages for an alleged injury it was not a judicial claim within the meaning of the SLAPP statute); Defendant American Petroleum Institute’s Brief in Support of its Motion to Dismiss the Amended Complaint Under the District of Columbia’s Anti-SLAPP Statute, *City of Hoboken v. Exxon Mobil Corp.*, No. HUD-L-3179-20 (N.J. Super. Ct. Law Div. July 7, 2023).

²³³ For an early definition, see George W. Pring & Penelope Canan, “*Strategic Lawsuits Against Public Participation*” (“SLAPPs”): *An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 946–47 (1992). *Id.* (“To qualify as a SLAPP, a lawsuit must be: 1. A civil complaint or counterclaim, 2. filed against nongovernment individuals or organizations, 3. because of their communications to government (government bodies, officials, or the electorate), 4. on a substantive issue of some public interest or concern.”). In the prefatory note to the adoption of a uniform anti-SLAPP act (the Uniform Public Expression Protection Act) in 2020, the Uniform Law Commission explained:

SLAPPs defy simple definition. They can be brought by and against individuals, corporate entities, or government officials across all points of the political or social spectrum. They can address a wide variety of issues—from zoning, to the environment, to politics, to education. They are often cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference, nuisance, and invasion

statutes to protect the ability of citizens to participate in debate about matters of public interest without having to endure expensive and meritless litigation designed to intimidate them into silence.²³⁴ Seemingly at odds with this core purpose, corporate defendants have taken to invoking anti-SLAPP laws to dismiss lawsuits (such as deceptive marketing claims) brought against them by consumers where they can argue that their representations about their product relate to matters of public importance.²³⁵ Fossil fuel defendants submit that their climate disinformation constitutes “core protected speech on subjects of obvious public importance,” and that the lawsuits against them “target[] [their] participation in the public debate on climate change—one of the most pressing policy issues of the day.”²³⁶ To date, no court has dismissed a climate suit under an anti-SLAPP law, although numerous motions to strike or dismiss remain pending.²³⁷

Some states have refined the scope of their anti-SLAPP laws to include exceptions for commercial speech, public-interest litigation and

of privacy, just to name a few. But for all the ways in which SLAPPs may clothe themselves, their unifying features make them a dangerous force: Their purpose is to ensnare their targets in costly litigation that chills society from engaging in constitutionally protected activity.

NAT'L CONF. OF COMM'RS ON UNIF. STATE LS., UNIFORM PUBLIC EXPRESSION PROTECTION ACT: WITH PREFATORY NOTE AND COMMENTS 1 (2020).

²³⁴ See, e.g., *Anti-SLAPP (Strategic Lawsuit Against Public Participation) Motions: Restrictions On Use: Hearing on S.B. 1651 Before the S. Judiciary Comm.*, 2001–2002 Leg. Reg. Sess. 5–6 (Cal. 2002) (statement of Dr. Penelope Canan, Professor, Univ. of Denver). For a list of states with anti-SLAPP laws as of 2020, see NAT'L CONF. OF COMM'RS ON UNIF. STATE LS., *supra* note 233, at 1–2.

²³⁵ This particularly occurs where anti-SLAPP laws are drafted broadly. See Tanvi Valsangkar, *The Need for Uniform Exemptions in State Anti-SLAPP Statutes*, 49 RUTGERS L. REV. 1, 15 (2021) (“Though anti-SLAPP statutes with broad definitions of protected activity provide some of the strongest First Amendment protections for speakers, these broad definitions sometimes increase the potential for misuse of the anti-SLAPP motions as defendants may easily claim their challenged activities fall within the parameters of a ‘furtherance of free speech.’”).

²³⁶ Defendants Chevron Corp. and Chevron U.S.A. Inc.’s Special Motion to Strike (Cal. Civ. Proc. Code § 425.16) at 9, 15, *Fuel Industry Climate Cases*, No. CJC-24-005310 (S.F. Super. Ct. July 31, 2024).

²³⁷ See *Jennings*, 2024 WL 98888, at *7 (denying defendants’ motion to dismiss under the anti-SLAPP statute); see also *Honolulu III*, 537 P.3d 1173, 1182, 1208 (Haw. 2023) (affirming the circuit court’s decision to deny defendant’s motion to dismiss for failure to state a claim and for lack of personal jurisdiction); *Minnesota II*, No. A25-0419, 2025 WL 1203047, at *1, *3 (Minn. Ct. App. Apr. 22, 2025) (denying defendant’s petitions for review of their denied motions to dismiss based on federal preemption and on First Amendment grounds); *City of Hoboken v. Exxon Mobil Corp.*, No. HUD-L-3179-20 (N.J. Super. Ct. Law Div., Oct. 25, 2023) (denying defendant’s motion to dismiss for failure to state a claim); *Duke Energy’s Brief in Support of its Motion to Dismiss under N.C. Rule 12(b)(6)*, 24CV003385-670, 2024 WL 2938473, at *3, *28 (N.C. Sup. Ct., May 5, 2025) (pending motion to dismiss for failure to state a claim).

landlord-tenant litigation.²³⁸ Fossil fuel defendants' anti-SLAPP motions in the climate tort suits may provide force and urgency to calls to design anti-SLAPP laws to prevent their "turn[ing] their use . . . on their head" when "corporations . . . us[e] meritless anti-SLAPP motions as a litigation weapon."²³⁹ Resolution of the motions will also raise difficult questions about whether the primary mechanism used to limit corporate invocation of anti-SLAPP laws—the amendment of anti-SLAPP laws to create exemptions for commercial speech—can in fact prevent dismissal of suits brought by citizens seeking redress for harms occasioned by a broad range of corporate conduct. Courts will need to define the scope of commercial speech exemptions in a relatively novel context. If the fossil fuel defendants succeed in using anti-SLAPP laws to dismiss the climate suits, it seems possible that climate disinformation may precipitate widespread changes to, or even abandonment of, efforts to legislate and apply anti-SLAPP protections.

In an important early decision in California's *Fossil Fuel Industry Climate Cases*,²⁴⁰ the Superior Court denied the fossil fuel defendants' motion to strike under California's Anti-SLAPP law, reasoning that allegations relating to the climate disinformation effort involved alleged misrepresentations about a product and thus fell within a commercial speech exemption to the law.²⁴¹ California adopted the commercial speech exemption to address the problem of corporations invoking the law's broad language as a defense against suits brought by citizens and public interest groups.²⁴² The commercial speech exemption to California's Anti-SLAPP law provides that the law "does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services" where the statements involve representations of fact relating to a business for the purpose of promoting sales and the intended audience is a customer (or the

²³⁸ *Fossil Fuel Industry Climate Cases*, No. CJC-24-005310 (S.F. Super. Ct. Dec. 27, 2024) (order denying Defendants' special motion to strike on commercial speech exemption grounds and not deciding whether the public interest exemption applies); Valsangikar, *supra* note 235, at 22.

²³⁹ Cal. Sen. Jud. Comm., *Analysis of SB 515*, 2003-04 Reg. Sess. 6 (May 6, 2003), <http://www.leginfo.ca.gov/bilinfo.html> [<https://perma.cc/5TP8-RM3M>] (Penelope Canan, one of the law professors whose work first generated California's anti-SLAPP statute, wrote to the Legislature in support of the statute).

²⁴⁰ This includes the nine coordinated climate actions in California brought by the people of California and local governmental entities, including the City and County of San Francisco and the Cities of Oakland, Imperial Beach, Richmond, and Santa Cruz; the Counties of San Mateo, Marin, and Santa Cruz; and the San Mateo County Flood and Sea Level Rise Resiliency District. *Fossil Fuel Industry Climate Cases*, No. CJC-24-005310 (S.F. Super. Ct. Dec. 27, 2024).

²⁴¹ *Id.*

²⁴² See Sharon J. Arkin, *Bringing California's Anti-SLAPP Statute Full Circle: To Commercial Speech and Back Again*, 31 W. ST. U.L. REV. 1, 21–24 (2003) (describing the abuses of the anti-SLAPP statute that led to its amendment).

statement is made within a regulatory approval process).²⁴³ The statutory text explicitly states that the commercial speech exemption can apply “notwithstanding that the conduct or statement concerns an important public issue.”²⁴⁴

It remains to be seen how courts will ultimately resolve the fossil fuel defendants’ anti-SLAPP defenses. While it might seem preposterous on its face for large fossil fuel companies to invoke anti-SLAPP protection for the climate disinformation effort, at least some aspects of the climate disinformation effort (for example, “advertorials” with text about climate change science and policy that include ExxonMobil’s logo but do not explicitly reference oil as a product²⁴⁵) are quite different from the types of corporate representations regularly categorized as falling within commercial speech exemptions. For example, Section 2(c)(3) of the Uniform Public Expression Protection Act includes a commercial speech exemption, which the Uniform Law Commission explains as follows:

By way of illustration, if a mattress store is sued for false statements made in its advertising of mattresses—whether by an aggrieved consumer or a competitor—the mattress store would not be able to avail itself of the Act. But if the same mattress store were sued for tortious interference for organizing a petition campaign to oppose the building of a new school, its activity would not be related to the sale or lease of goods or services, and it could use the Act for protection of its First Amendment conduct. But the ‘commercial-speech exemption’ does not apply to the creation, dissemination, exhibition, or advertisement of a dramatic, literary, musical, political, journalistic, or artistic work.²⁴⁶

Is lying about the climate harms caused by a product (oil) at least in part to avoid regulation of the product more like a mattress advertisement, a petition campaign, or political work?

As now presently oriented to center the climate disinformation effort, the climate tort suits present First Amendment questions that are not readily resolved through the application of well-established and on-point precedent. The defendants are aggressively pressing their First Amendment defenses and are represented by experts in the First Amendment.²⁴⁷ And the First Amendment issues are likely to attract close judicial attention because features of the cases raise red flags

²⁴³ CAL. CIV. PROC. CODE § 425.17(c) (2026).

²⁴⁴ *Id.* § 425.17(c)(2).

²⁴⁵ See Geoffrey Supran & Naomi Oreskes, *The Forgotten Oil Ads That Told Us Climate Change Was Nothing*, THE GUARDIAN (Nov. 18, 2021, at 05:00 ET), <https://www.theguardian.com/environment/2021/nov/18/the-forgotten-oil-ads-that-told-us-climate-change-was-nothing> [<https://perma.cc/6YW6-CDFV>].

²⁴⁶ NAT’L CONF. OF COMM’RS ON UNIF. STATE LS., *supra* note 233, at 9–10.

²⁴⁷ Karen Zraick & Sachi Kitajima Mulkey, *Oil Companies Fight Climate Lawsuits by Citing Free Speech*, N.Y. TIMES (June 23, 2025), <https://www.nytimes.com/2025/06/22/climate/oil-industry-anti-slapp-climate-lawsuits.html> [<https://perma.cc/G7HM-VXF5>].

about the potential for First Amendment concerns. The plaintiffs in many of the cases are state or local governments, and “greater constitutional concerns arise in cases where the government or a public official is the plaintiff in the suit” because “[w]hen the government—or someone closely associated with the government—initiates the suit in a speech-tort case, it starts to resemble a traditional First Amendment context involving direct regulation” such that the “potential for abuse is greatly multiplied and more aggressive constitutional intervention may be justified.”²⁴⁸ The speech in question relates to climate change and “[s]peech on matters of public concern . . . resides at the very core of First Amendment protection, and it is, by its very nature, the type of speech most likely to be targeted by a government seeking to manipulate the marketplace of ideas for its own ends.”²⁴⁹ Finally, a judgment against the defendants would likely be understood to rest on an expansive or novel application of (sometimes amorphous in the case of public nuisance²⁵⁰) common law doctrine, and “[o]ne indicia [of animus or bias] may be the extent to which the liability judgment seems to represent a substantial stretch or departure from preexisting common law boundaries and principles.”²⁵¹

The First Amendment issues lurking in the climate tort suits are thus significant, and their resolution could be important to whether the plaintiffs will recover, to the development of First Amendment doctrine, and for understanding the potential utility of the common law to police corporate public deception. Resolution of motions to dismiss under anti-SLAPP lawsuits could, moreover, be salient to ongoing debates about the utility and design of anti-SLAPP legislation.²⁵²

Courts may dismiss the state climate tort suits on other grounds before it becomes necessary to resolve the First Amendment questions. However, as discussed *supra*, climate disinformation is now embedded in plaintiffs’ arguments that their cases are justiciable as well as intertwined with their substantive claims. If cases proceed to trial, then, leading up to and at trial, judges will have to rule on what evidence of the climate disinformation effort is admissible.²⁵³ After a verdict, the

²⁴⁸ Han, *supra* note 180, at 533.

²⁴⁹ *Id.* at 534.

²⁵⁰ *Alvarez*, 567 U.S. 709, 736 (2012) (Breyer, J., concurring) (emphasizing the importance of “limiting features” to narrow the application of laws that sanction false statements).

²⁵¹ Han, *supra* note 180, at 534; *see also* *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (emphasizing the concern that courts and juries can exercise bias against unpalatable speech when invited to apply a “highly malleable standard”).

²⁵² *See generally* Brooke White, *The SLAPP Happy State: Now Is the Time for Ohio to Pass Anti-SLAPP Legislation*, 74 CASE W. RES. L. REV. 559 (2023) (recommending that Ohio adopt an anti-SLAPP law and discussing previously introduced anti-SLAPP legislation in Ohio).

²⁵³ And at trial, the law would require judges to navigate evidentiary arguments about admissibility (particularly about whether evidence of the climate disinformation campaign is unduly prejudicial under Rule 403). Defendants might even attempt to bifurcate trials

First Amendment defenses provide a backstop opportunity for the Supreme Court to scrutinize any final judgment against the fossil fuel defendants. While state courts will have the last word on the boundaries of state common law claims (the scope of public nuisance, etc.), the Supreme Court will have final say on whether liability premised on climate disinformation violates the defendants' rights under the First Amendment. And if the Supreme Court does grant *certiorari* on the First Amendment issues in the climate tort suits, the resulting decision will likely chart new territory in commercial speech doctrine and engage with complex debates about the role of corporations in society.²⁵⁴

IV. CONCLUSION

The climate disinformation effort straddles two phenomena that vex our legal system, climate change and corporate public deception. Climate change presses at law's boundaries with its scientific complexity, long time scales, atmospheric geography, and widespread contributors and harms, making it difficult to address under existing doctrine and inviting (and sometimes driving) doctrinal evolution.²⁵⁵ Corporate public deception—where companies exploit complex science to obscure harms and obfuscate policy in part by lying to the public—festers in a legal netherworld, not quite a traditional fraud or tort and perhaps protected speech. As a result, even with relative clarity about the occurrence and mechanisms of the climate disinformation effort, the resulting legal significance and consequences (if any) remain hazy.

One value in looking back at how *Massachusetts v. EPA* responded to climate disinformation is that doing so reveals a valuable plumb line for administrative law amidst the haze: courts can and should prevent agencies from relying on climate disinformation to justify decision making. Up to now, administrative law safeguards—most notably, as this Article argues, in *Massachusetts v. EPA*—have largely prevented federal agencies from parroting climate disinformation, at least in the context of decisions subject to judicial review. These administrative law

to focus in a first phase on causation in the hopes of avoiding introduction at all—should a jury hold that causation is not satisfied. As I have argued elsewhere, judges should resist bifurcation, which functions to reward bad corporate conduct. *Cf.* Edwards, Kuh & McDonald, *supra* note 172, at 178–93 (arguing that proving causation in toxic tort litigation is already difficult, and bifurcation further shields defendants by preventing the jury from hearing evidence of corporate misconduct).

²⁵⁴ See, e.g., Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2585–86 (2008) (“[A] review of the theoretical and political justifications for extending constitutional protection to speech by commercial, non-human entities, and the structural imperatives of corporate governance law, suggests that for-profit entities are not appropriate rights holders under the First Amendment and that arguments for an expansion of existing protection to commercial entities should be rejected.”).

²⁵⁵ Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 42 ENV'T L. REP. 10739, 10739–40 (2012).

safeguards are important and are likely to be tested. Confronted with the complex science surrounding climate change, courts may be tempted to be overly deferential to agencies.²⁵⁶ Courts should, instead, take care to require that the science on which agencies rely meets accepted standards of reliability, and that agencies accurately characterize that science when invoking it to satisfy the demands of reasoned decision making.

Administrative law safeguards, while an important legal limitation on the influence of the climate disinformation effort (and corporate public deception more generally), are also narrow. At best, they prevent agencies from relying on climate disinformation to justify decisions subject to judicial review. It remains unclear whether there are viable legal avenues to confront the core of the climate disinformation effort—its influence on the public (as consumers and voters) and, in turn, its influence on the sale of fossil fuels, fossil fuel companies' social license to operate, policies to mitigate climate change, and, ultimately, climate change itself.

Climate tort plaintiffs increasingly anchor their claims in the climate disinformation effort. In doing so, they navigate a perilous strait between the Charybdis of the Supremacy Clause and the Scylla of the First Amendment. They may succeed in convincing courts that their claims are justiciable, that their harms are caused by the climate disinformation effort, and that courts can sanction the climate disinformation effort without offending the First Amendment. It is also possible that tort law will have no answer to “the most damaging misrepresentation campaign by any industry in history.”²⁵⁷

Even if the climate tort plaintiffs prevail, redress in the form of money damages will be breathtakingly inadequate when held up against the death and destruction wrought by the delay in mitigating climate change. And while a judgment for the plaintiffs could deter corporate public deception in other contexts, the tobacco settlements certainly did not deter the climate disinformation effort. Existing corporate law enables, maybe even encourages, corporate public deception and fraud on democracy.²⁵⁸ Perhaps the most enduring legal significance of the

²⁵⁶ See generally Meazell, *supra* note 101, at 781 (noting the tendency of courts to afford super deference to agency science and exhorting courts to provide deeper review in part because courts support democracy when they translate the science informing policy by “provid[ing] accessible information about the relevant science to a generalist audience, enabling informed participation”).

²⁵⁷ Kysar, *supra* note 27, at 511 (describing how plaintiffs characterize the climate disinformation effort).

²⁵⁸ See generally, e.g., Sergio Alberto Gramitto Ricci & Daniel Greenwood, *Total Governance*, 50 J. CORP. L. 353, 370 (2025) (critiquing and offering alternatives to the current corporate governance paradigm and observing that “the profit motive, at least sometimes, will prevail over patriotism: the powerful incentives of private enterprise may overcome the softer ones of public service. Rather than relying purely on outside regulators, we need corporate insiders to act appropriately even when they are not

climate disinformation effort will be a reckoning with and reforms to the very structure of corporate law.

required to. Profit at the expense of all else is a choice, not an inevitability; corporate management necessarily includes moral and political choices, not mere technocratic tactics"); Daniel J.H. Greenwood, *Corporations Are Organizations and Footnote 4, Too*, 54 NEW ENG. L. REV. 49, 58, 63 (2019) (observing that "for any given business, cheating, or better yet convincing politicians or regulators to change the rules to allow the business to legally avoid its costs, is likely to be the simplest way to short-term profit," and that "our corporate law is specifically designed to lack any form of democracy, granting most corporate participants no vote at all. Moreover, the doctrine of fiduciary duty is often understood to negate any corporate interest beyond profit—thus requiring managers to ignore most of the pressing issues of human communal existence."); Piety, *supra* note 254, at 2585–86 (2008) (describing the issues with the commercial speech doctrine).