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CASE NOTE

Serafina I. Seluja*

MIND THE (FEDERAL) GAP: NUISANCE CLAIMS IN THE TENTH CIRCUIT TO ADDRESS CLIMATE CHANGE

INTRODUCTION

While nuisance law is seen by many as an obscure area taught in first-year property, public nuisance has emerged as a useful tool in litigating issues involving climate change.[1] Using nuisance claims in this way aims to resolve a tension between two separate bodies of pollution law.[2] It is widely regarded that oil and gas companies are playing a direct role in climate change.[3] Historically, when a state brought claims against petroleum companies they would do so under federal law and these cases would be tried in federal court. However, since greenhouse gases are not directly regulated under federal law, an alternative litigation strategy is to bring public nuisance claims in state court.[4]

In the past, when states attempted to apply state law to climate change cases, they would largely be dismissed due to the political question doctrine or federal question jurisdiction.[5] However, there are now many state courts that are accepting public nuisance arguments.[6] This paper evaluates the Tenth Circuit's recent holding in *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*[7] This paper also analyzes potential issues state courts will face in assigning liability if Plaintiffs' claims are successful. To be clear, nuisance claims are not the definitive solution in addressing climate change.[8] However, if Congress does not initiate

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1. Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L. J., 412, 427 (2019).

2. *Id.*

3. Josh Gabbatiss, *Oil majors 'not walking the talk' on climate action, study confirms*, CARBON BRIEF (Mar. 16, 2022, 7:00 PM), https://perma.cc/LXP7-BGEG.

4. *Congress and Climate Change*, CTR. FOR CLIMATE ENERGY SOLUTIONS, https://perma.cc/EKG4-UQ95 (last visited Mar. 20, 2023).

5. *See e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

6. *See* City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020); BP P.L.C. v. Mayor and City Council of Baltimore, 593 U.S. (2021); City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022).

7. Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022) (holding that state public nuisance claim should not be removed to federal court).

8. Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change*, 155 UNIV. PA. L. REV. 1563,1564 (2007) ("Commentators generally agree that state-by-state regulation is not a substitute for a comprehensive federal program. Nevertheless, the question remains whether state-level

legislation to address climate change, state courts are left with the task of navigating these claims.

I. PUBLIC NUISANCE IN GENERAL

The doctrine of nuisance presented itself in the United States early in the country's history, carried over from English common law. Nuisance can be characterized as public or private. A public nuisance is an unreasonable interference with rights held in common by the general public.[9] Private nuisance is a substantial non-trespassory invasion of another's interest in the private use and enjoyment of land.[10] In 1907, the Supreme Court acknowledged public nuisance,[11] holding that pollution can constitute nuisance.[12] Oil and gas law is also no stranger to private nuisance claims, with claims found as early as 1892.[13]

Both government officials and private individuals may bring public nuisance claims. To bring a successful public nuisance claim, the plaintiff must show that the defendant's conduct was unreasonable.[14] The Restatement identifies three factors that are relevant to the issue of whether an interference is "unreasonable" and therefore a nuisance.[15]

Public nuisance claims address public interest problems.[16] This can include handgun litigation, which has been successful in holding handgun producers liable for public nuisance.[17] Public nuisance can be a state or federal cause of action, but pollution that crosses interstate boundaries does not automatically indicate federal jurisdiction.[18]

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actions to address climate change can help bring us closer to the development of a mandatory federal climate change program.").

9. Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMPLE L. REV. 825, 870 (2004).

10. RESTATEMENT (SECOND) OF TORTS § 822 (Am. L. Inst. 1977).

11. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

12. *Id.* Justice Holmes said, "[i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted…[and] should not be further destroyed or threatened by the act of persons beyond its control . . . . "

13. People's Gas Co. v. Tyner, 31 N.E. 59 (Ind. 1892). The Indiana Supreme Court held that a landowner may not erect and maintain a nuisance on his land in order to extract minerals from the land.

14. *Id*.

15. *See* RESTATEMENT, *supra* note 10, at § 821C. The first factor is whether the conduct significantly interferes with the public health, safety, peace, comfort, or convenience. The second is whether a statute, ordinance, or administrative regulation prohibits the defendant's conduct. Lastly, a court may consider, "whether the conduct is of a continuing nature or has produced a permanent long-lasting effect, and, as the actor knows or has reason to know, has a significant effect on the public right.

16. Ausness, *supra* note 9.

17. Ausness, *supra* note 9, at 872; *Cincinnati v. Beretta U.S.A. Corp.*, No. 2000-1705, 419 (Ohio 2002) ("[A] public-nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public.").

18. Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L. J. 412, 427 (2019) ("The Supreme Court explicitly held in *Ouellette* that pollution across state boundaries does not necessitate adjudication under federal nuisance law so long as the court applies the nuisance law of the state where the pollution originated.").

II. FEDERAL JURISDICTION IN GENERAL

Federal courts generally have exclusive jurisdiction in cases regarding violations of federal laws.[19] Under federal-question jurisdiction, a plaintiff's statement must show that the original cause of action arises under the Constitution or federal law.[20] The Supreme Court has shown caution in establishing federal jurisdiction, for fear of opening the flood gates to federal courts.[21] If a federal court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.[22]

While a federal law cause of action must be litigated in federal court, a state law cause of action may be removed to federal court. This involves a careful balancing of state and federal interests, to ensure removing an action to federal jurisdiction will not "flood the federal courts" in future actions.[23] Under *Grable*, a state-law cause of action may give rise to federal-question jurisdiction if the case relies on the application and analysis of a federal law.[24] The *Grable* court created a three-part test to determine if there is a state law cause of action: does the cause of action necessarily raise a federal issue; is the issue actually disputed and substantial; and which federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.[25]

A. Plaintiff's Choice of Federal or State Subject-Matter Jurisdiction

The well-pleaded complaint rule recognizes plaintiffs as the masters of their complaint.[26] If plaintiffs choose state-law as the basis for their claims, state-law should be applied to analyze the complaint. Put another way, federal jurisdiction exists if on the face of the complaint, the plaintiff is seeking relief under a federal cause of action.[27] The well-pleaded complaint rule generally permits the plaintiff to "avoid federal jurisdiction by exclusive reliance on state law."[28] There are two exceptions to the well-pleaded complaint rule: (1) the state law claims are artfully pleaded or completely preempted by federal law; and (2) the state law claims

19. *See Federal Courts & the Public*, U.S. COURTS, https://perma.cc/4JWU-PJHJr, (last visited Mar. 20, 2023); 28 U.S.C. §1446 and 28 U.S.C. § 1441(a).

20. Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908).

21. *See* 28 U.S.C. § 1441(a).

22. FED. R. CIV. P. 12(h)(3).

23. *See* Grable & Sons Metal Products, Inc. v. Darue Engr. & Mfg., 545 U.S. 308 (2005). The Supreme Court was careful in their analysis to not upset the balance between state and federal courts: Their reasoning was twofold: first that there are federal laws that can be applied, and that the right to relief is based on federal law.

24. *Id*.

25. *Id*.

26. Caterpillar v. Williams, 482 U.S. 386, 392 (1987); 28 U.S.C.A. §1331. The well-pleaded complaint rule was established in *Louisville & Nashville R. Co. v. Mottley* and is often referred to as the Mottley Rule. Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908).

27. Matthew J. Aaronson, et al., *The 'Well-Pleaded Complaint Rule' and Pushing the Bounds Post-'McCulloch'*, N.Y. L. J. (Mar. 9, 2018), https://perma.cc/8HH5-5TSR.

28. Caterpillar v. Williams, 482 U.S. 386, 392 (1987).

necessarily raise a substantial, disputed federal question.[29] Finally, even if a plaintiff pleads only under state law causes of action, the complaint can still be removed to federal court if federal preemption takes precedent over the state claim, thus making the claim federal.[30]

B. Defendants Can Shift a Complaint from State to Federal Jurisdiction

If a complaint does not specifically plead federal law, defendants have the burden to show a federal cause of action exists.[31] Defendants have narrow methods in shifting a complaint, mainly by the use of the artful pleading doctrine or complete preemption. The artful pleading doctrine is designed to prevent plaintiffs from avoiding federal jurisdiction. "[A] plaintiff may not defeat federal subject-matter jurisdiction by 'artfully pleading' his complaint as if it arises under state law where the plaintiff's suit is, in essence, based on federal law."[32] Even if defendants argue the artful pleading doctrine, courts are still required to balance it against the well-pleaded complaint rule.[33] Defendants thus face challenges in successfully arguing the artful pleading doctrine, especially since, "it appears the scales are starting to tip in the favor of the well-pleaded complaint rule."[34]

An even narrower exception to the well-pleaded complaint rule is complete preemption. Complete preemption is rare and has only been found a limited number of times.[35] Complete preemption rests on the idea that federal laws completely preempt any state law.[36] In 2003, the Supreme Court held that state law claims could be removed to federal court and completely preempted only when "federal law provides the exclusive cause of action for plaintiffs who seek relief for the harm alleged."[37] Complete preemption has been upheld in different circuits, including the Sixth Circuit.[38]

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29. Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

30. 28 U.S.C.A § 1441(a) (2012).

31. *See Suncor Energy*, 25 F.4th at 1238; 28 U.S.C. § 1441(a) (2012).

32. Sullivan v. Am. Airlines, 424 F.3d 267, 271 (2d Cir. 2005) (citing Rivet v. Regions Bank of La., 522 U.S. 470, 475–76 (1998)).

33. McCulloch Orthopaedic Surgical Servs. v. Aetna, 857 F.3d 141, 145 (2d Cir. 2017).

34. Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

35. Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc., 693 F.3d 1195, 1204–05 (10th Cir. 2012). The opinion states, "[t]he circumstances are so rare in fact that the Supreme Court has recognized complete preemption in only three areas: § 301 of the Labor Management Relations Act of 1947 (LMRA), § 502 of the Employee Retirement Income Security Act of 1974 (ERISA), and actions for usury against national banks under the National Bank Act."

36. Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L. J. 412, 428 (2019).

37. Beneficial Nat. Bank v. Anderson, 539 U.S. 1 (2003).

38. Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015). In 2015, the Sixth Circuit held that ethanol emissions are not preempted by the Clean Air Act even though Environmental Protection Agency regulated these emissions.

C. Common Federal Laws that Displace State Environmental Claims

Two venues for federal climate change litigation are the Clean Air Act (CAA) and the Clean Water Act (CWA).[39] The amendments that created the modern CAA and CWA were established by Congress in the 1970's to protect the public health of communities as well as minimize pollution.[40] The driving force to create these Acts was dense pollution in cities, as well as rising concerns of the effects of pollution by environmental groups.[41] The CAA was revised in 1977 and 1990 to address additional air pollution issues (such as acid rain) as well as ozone damage.[42] There have been no sweeping revisions since these were instituted.

The regulatory agency that enforces the CAA and CWA is the Environmental Protection Agency (EPA).[43] The EPA has attempted to regulate greenhouse gases under these acts, with varying degrees of success. Previous case law stated the EPA can regulate greenhouse gases under the Clean Air Act.[44] The EPA has since attempted to add sections to the CAA to regulate emissions reductions, including the Clean Power Plan, which proposed to shift our nation from coal energy to wind and solar. However, in 2022 the Supreme Court held that the EPA lacks the authority to require coal-based power plants to shift to cleaner energies via the Clean Power Plan.[45]

Federal district courts have consistently been split on whether the Clean Air Act displaces a nuisance claim.[46] For example, in *Connecticut v. Am. Elec. Power Co.*, plaintiffs attempted to bring a public nuisance claim under federal law against power companies, seeking the regulation of greenhouse gases. The federal district court in New York held that federal law governed the case, and they did not decide the issue on whether the Clean Air Act preempted the federal claims.[47] However, even if federal law is barred, state law can still apply. In the landmark interstate pollution case *International Paper v. Oullette*, the Supreme Court held that a nuisance claim brought under state law is an available litigation avenue.[48] Some authors contend, "[a]n alternative litigation response when federal avenues prove ineffective is reliance on state common law doctrines, especially public and private

39. *See generally* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970); Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 101, 86 Stat. 816 (1972).

40. *Clean Air Act Requirements and History*, EPA, https://perma.cc/C8BK-XGCZ (Aug. 10, 2022).

41. *Id.*

42. *Id*.

43. *Enforcement*, EPA, https://perma.cc/8W9S-WFBE, (last visited Mar. 20, 2023).

44. *See* Massachusetts v. E.P.A., 549 U.S. 497 (2007); Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

45. West Virginia v. EPA 597, 600 U.S. (2022). *See also* Jeff Turretine, *The Supreme Court's EPA Ruling, Explained*, NRDC (July 7, 2022), https://perma.cc/NF6M-USC9.

46. *See* County of San Mateo v. Chevron Corp., No. 17-cv-04929-VC, No. 17-cv-04934-VC, and No. 17-cv-04935-VC (N.D. Cal. Mar. 16, 2018); and City of New York v. B.P. p.l.c., No. 18 Civ. 182 (JFK) (S.D.N.Y. filed July 19, 2018).

47. Connecticut v. Am. Elect. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005). The Second Circuit eventually stated that "We express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA, if and when such regulation should come to pass, would displace Plaintiffs' cause of action under the federal common law." Connecticut v. American Electric Power, 582 F.3d 309, 381 (2d Cir. 2009).

48. International Paper v. Oullette, 479 U.S. 481 (1987).

nuisance."[49] They further state, "the question remains whether state-level actions to address climate change can help bring us closer to the development of a mandatory federal climate change program."[50]

III. BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY V. SUNCOR ENERGY, INC., USA.

On April 17, 2018, the Counties of Boulder and San Miguel, as well as the City of Boulder (Municipalities) filed a nuisance lawsuit in Colorado state court against Suncor Energy.[51] Suncor Energy is a Canadian oil sands developer that "brings some of the world's dirtiest oil to market . . . by way of its Colorado refinery."[52] The oil refinery, located in Commerce City, is the only oil refinery in Colorado.[53] "Suncor's oil refinery is the second-largest contributor to Colorado's greenhouse gas and toxic air pollutant emissions."[54] Plaintiffs sought monetary damages, requiring the oil and gas companies to pay their pro rata share of the cost of abating the impact of climate change, so that the costs do not fall onto taxpayers.[55] Perhaps most importantly, the Plaintiffs did not request injunctive relief or ask the Court to regulate greenhouse gas emissions.[56] This is important because a state court is more likely to grant abatement, rather than step into a regulatory role.[57] The strategy of pleading only monetary damages could increase the chance of the Municipalities being able to litigate this claim in state court.

Concerns about climate change in their community drove the Municipalities to file this complaint. They face substantial and rising costs to protect people and property within their jurisdictions from the dangers of climate change.[58] The Municipalities also allege that the defendants ("Energy Companies") substantially

49. Jason Czarnezki & Mark l. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 BC ENV'T AFF. L. REV. 2 (2007). *See generally* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENV'T L. 1 (2003); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENV'T L. 293 (2005).

50. Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change*, 155 UNIV. P.A. L. REV. 1563, 1564 (2007).

51. Complaint at ¶¶ 1–4, 11, 221–320, Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), No. 2018CV030349 (District Court, County of Boulder, April 17, 2018), https://perma.cc/Q9YT-Y44F.

52. Brandy Doyle, *Boulder v. Suncor and the Case for Judicial Climate Adaptation*, 48 ECOLOGY L. QUARTERLY 719 (2022).

53. Jillian Vallance, *Suncor oil refinery poses a dangerous threat to front range residents; Boulder County counters with a lawsuit capable of leaving a lasting impact on climate change laws*, BOLD (Dec. 3, 2022), https://perma.cc/8XXA-ERDA.

54. *Id*.

55. *See* Doyle, *supra* note 52; Kate Fried et. al., *Biden Administration Agrees Landmark Climate Case Against Suncor and Exxon Should Stay in Local Court*, CITY OF BOULDER (Mar. 16, 2023), https://perma.cc/NN32-5LSM.

56. Complaint at ¶¶ 1–4, 11, 221–320.

57. Tracy D. Hester, *A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENV'T L. J. 49 (2012).

58. Complaint at ¶¶ 1–4, 11, 221–320.

contributed to the harm within their community through selling fossil fuels while concealing and misrepresenting their dangers.[59]

On September 5, 2019, a Colorado district court denied the Energy Companies' motion to transfer the case to federal court and held that the case should be remanded to state court.[60] The district court concluded that because of the well-pleaded complaint rule, removal to federal court was not appropriate.[61] In November 2019 the case was argued in a brief to the Tenth Circuit. At that time, the Tenth Circuit did not address all of Energy Companies' claims for removal.[62] The case was then granted a writ of certiorari by the Supreme Court, with the Supreme Court of the United States holding that the Tenth Circuit must review all claims made by the Energy Companies before concluding that the case need not be litigated in federal court.[63]

IV. THE DECISION AND ANALYSIS OF THE COURT

Defendants included numerous claims for removal to federal court including federal removal jurisdiction, the well-pleaded complaint, substantial federal-question jurisdiction, and complete preemption. Per the Supreme Court, the Tenth Circuit had to consider and analyze each of the Defendants' claims in turn, however, it ultimately held that all claims for removal were inadequate and the case should be remanded to state court.[64]

A. Federal Removal Jurisdiction Under U.S.C. Section 1442(a)

A federal oil lease does not form a relationship that requires removal to federal court. The federal officer statute was designed to allow any federal officer or any person working under that officer to remove a state-based claim to federal court.[65] The Energy Companies argued that they are federal officers because they were awarded a governmental lease to drill oil.[66] However, to trigger federal officer removal there must be a showing of a "special relationship" between the energy company and the government.[67] Just because Exxon won a bid to lease oil on federal land was not enough to establish a special relationship. Specifically, the lease does

59. Id. ¶¶ 2, 5, 13–18, 321–435. *See* Fried, *supra* note 55 ("The heavily populated area surrounding the refinery feels the effects of the pollution, reporting an increase in physical consequences ranging from migraines and nosebleeds to asthma, chronic obstructive pulmonary disease, diabetes or heart disease.").

60. *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, SCOTUSBLOG, https://perma.cc/4GAK-WLWW/, (last visited Mar. 21, 2023).

61. *Id.*

62. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 798 (10th Cir. 2020), vacated, Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs, 141 S. Ct. 2667 (2021).

63. *Climate Change Litigation Databases,* SABIN CTR. FOR CLIMATE CHANGE L., https://perma.cc/2JJQ-UW64, (last visited Nov. 30, 2022).

64. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1247, 1249 ("The Supreme Court has clarified that in circumstances such as the present, where federal officer removal is one of multiple grounds for removal, the entire order of remand is reviewable on appeal.").

65. U.S.C. §1442(a)(1).

66. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1250.

67. Isaacson v. Dow Chemical Co., 517 F.3d 129, 137 (2d Cir. 2008).

not have federal requirements, "aimed at satisfying pressing federal needs."[68] Thus there was not enough basis for the Energy Companies' argument that federal removal jurisdiction had been established and the Tenth Circuit dismissed these claims.[69]

B. Well-Pleaded Complaint

Preempting state law under the well-pleaded complaint rule requires showing the issue is "an area of uniquely federal interest."[70] Here, the Energy Companies argued that although the Municipalities pled state law, they are concealing federal claims within their complaint.[71] As part of the analysis, the Court evaluated whether the well-pleaded complaint rule was satisfied. This involved examining whether a federal common law created the cause of action.[72] The Court ultimately reasoned that because the complaint only involved state law, removal to federal court would not be appropriate.[73]

The Tenth Circuit took a different analytical approach here than other courts. For instance, in *American Electric Power Co. (AEP)*, plaintiffs brought suit in federal court alleging that defendants (emitters of CO2) violated the federal common law of interstate nuisance, as well as state tort law.[74] The *AEP* court analyzed whether federal courts could fill the interstate emissions gap where there is no explicit statutory structure. This only holds true if Congress has not addressed the issue. However, since Congress had addressed emissions through the CAA—albeit in a roundabout way—the federal courts cannot fill this gap.[75] The *AEP* court did not address the state law claims.

The Tenth Circuit rejected *AEP* because the Court held that the Clean Air Act did not displace the Municipalities claims.[76] The difference between *Suncor* and *AEP* is that *AEP* was asserting federal claims and removal was not an issue. Also, *AEP* aimed to resolve interstate emissions which is not the case in Colorado. Plaintiffs in *Suncor* pled state-based claims for oil and gas producers and did not plead regulation or resolving of emissions. *Suncor* is the opposite from *AEP*; therefore, the Tenth Circuit declined the analysis of the *AEP* court.

While the Tenth Circuit rejected the *AEP* analysis, concern about uniformity in regulation can factor in a court's decision for removal. In *California v. BP* (CA I), municipalities in California asserted state law public nuisance claims against ExxonMobil.[77] Plaintiffs did not plead injunctive relief and instead "sought

68. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1253 (10th Cir. 2020).

69. *Id.* at 1254.

70. Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988).

71. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1258.

72. *Id.*

73. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1262.

74. Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410 (2011).

75. *Id.* at 426.

76. *See infra* Section D.

77. California v. BP p.l.c., C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), vacated and remanded sub nom. City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), opinion amended and superseded on denial of reh'g, 969 F.3d 895 (9th Cir. 2020), and vacated and remanded sub nom. City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020).

an abatement fund to pay for infrastructure necessary to address rising sea levels."[78] The California court held that plaintiffs' claims were governed by federal common law and thus should be removed.[79] Although they acknowledged that climate change needs to be addressed, there was a concern that if climate change is left to States to decide this will lead to a non-uniform solution.[80] *CA I* differentiates itself from *AEP*, because California did not find the CAA preempted the claim but rather the plaintiffs' claims "attack behavior worldwide."[81]

In comparison with *Suncor*, the Tenth Circuit viewed *CA I* as looking beyond the face of plaintiffs' complaint to a global issue instead.[82] Although the Energy Companies in *Suncor* argued there was justification here to examine the Municipalities complaint beyond what they are pleading, the Tenth Circuit rejected this.[83] The Court concluded that Plaintiffs based their claim on state law; therefore it is improper to remove the case to federal court.

C. Substantial Federal-Question Jurisdiction: Applying *Grable*

To establish federal-question jurisdiction, defendants must point to a specific federal law. If a complaint alleges substantial federal claims or substantially relates to the federal government's foreign affairs, a substantial federal-question jurisdiction analysis occurs.[84] The burden of proof to establish substantial federal-question jurisdiction is on defendants.[85] Substantial federal-question jurisdiction requires applying the *Grable* test.[86]

The Tenth Circuit in *Suncor* focused on the first and third prong of the *Grable* analysis: whether the federal issue is necessarily raised and if there is a substantial federal issue.[87]

The first element, necessarily raised, requires that a federal issue is an "essential element" of the claim.[88] The Energy Companies argued that the Municipalities' claims implicated both foreign policy and upset the balance in the federal government's administrative law regarding fossil-fuel production.[89] From a comprehensive legal lens, the Energy Companies made an analogous argument to

78. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1245 (10th Cir. 2020).

79. California v. BP P.L.C., 2018 WL 1064293, at *3.

80. *Id.* ("[I]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints . . . A patchwork of fifty different answers to the same fundamental global issue would be unworkable.").

81. *Id*., at 4.

82. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1262.

83. *Id*.

84. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1265 (10th Cir. 2020).

85. *Id*.

86. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1265.

87. *Id.* at 1266, 1268.

88. Grable & Sons Metal Products, Inc. v. Darue Engr. & Mfg., 545 U.S. 308, 315 (2005). In *Grable*, the court enforced federal-question jurisdiction because a federal issue was, "the only legal or factual issue contested."

89. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1266.

the defendants in *CA I*—essentially that Plaintiffs' complaint is too broad and would disrupt national and worldwide policies.[90]

The Tenth Circuit rejected both of these arguments and held that a federal issue was not necessarily raised. Defendants could not point to any *specific* foreign policy, only that climate change is a foreign issue.[91] The Municipalities' claims do not rest on determining federal policies or regulations—the basis of their claims is state-law.[92] If there are any federal issues in the claim, they exist solely as a defense that the Defendants can use, not as a part of the Municipalities' complaint.[93] Moreover, even if Defendants could meet their burden of proof in showing that the Municipalities raised a federal issue, Defendants would still need to prove that there is a substantial federal issue to the claim.[94]

Substantiality requires a court to analyze how important the issue is to the federal system and whether a federal law preempts the state cause of action or provides a private right of action.[95] An issue is substantial based on how important it is to the federal system as a whole, "it is not enough that the federal issue be significant to the particular parties in the immediate suit."[96] Here, the Tenth Circuit held that Defendants failed to satisfy substantiality.[97]

In holding that Defendants failed to satisfy substantiality, the Tenth Circuit reasoned that that there was not a "concrete" federal regulation or law to ground the Defendants' claim.[98] Another flaw in Defendants' argument was that there would be no "controlling [federal] effect" if a state court adjudicated this issue.[99] Here, the Municipalities complaint is "fact-bound" and "situation-specific" to state-law and state-law would be controlling.[100] Finally, there was no specific federal law or congressional remedy that the Energy Companies could point to that would cause preemption of the Municipalities claim.[101]

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90. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1266.

91. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1266 (10th Cir. 2020) ("Foreign policy interpretation is not essential to Plaintiff's claims.").

92. *Id.* at 1267. "Plaintiffs' state law claims do not have as an element any aspect of federal law or regulations. Plaintiffs do not allege that any federal regulation or decision is unlawful, or a factor in their claims, nor are they asking the Court to consider whether the government's decisions to permit fossil fuel use and sale are appropriate."

93. *Id.*

94. *Id.* Again, the Tenth Circuit deviated from *CA I and AEP*, where both cases successfully argued foreign policy issues. The Tenth Circuit reconciled this difference by stating that they are not deciding if the case should be dismissed, rather they are only evaluating whether the case should be removed to federal court under *Grable* jurisdiction.

95. Grable & Sons Metal Products, Inc. v. Darue Engr. & Mfg., 545 U.S. 308, 310 (2005); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 812 (1986).

96. Gunn v. Minton, 568 U.S. 251, 260 (2013).

97. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1268 (10th Cir. 2020).

98. *Id*. at 1268.

99. *Id.*

100. *Id.*

101. *Id*., at 1270; *see also* Moore v. Chesapeake & Ohio Railway Co., 291 U.S. 205, 216-17 (stating that just because a federal law exists as an element of a claim it doesn't cause preemption because state-law provided recovery).

Because Defendants did not meet two of the four *Grable* criteria, the Court did not address the remaining prongs.

D. Complete Preemption: The Clean Air Act

Complete preemption asks if Congress intended for the "statute to provide the exclusive cause of action."[102] The Energy Companies attempted to argue that the Clean Air Act provides the exclusive means for suits against private emitters—evidenced by the CAA allowing private citizen suits and the EPA allowing private citizens to undertake new rulemaking.[103] If the CAA dictates this claim, Defendants argue complete preemption applies and the case should be removed to federal court.

However, the Court disagreed. Specifically, the Court held that Congress never intended the Clean Air Act (CAA) to be only federal in nature because the CAA provides avenues for states and federal entities to regulate together.[104] The Court also denied the Defendants' argument about private citizen suit exceptions in the CAA converting a state-based claim to a federal one.[105] Citizen suit exceptions only apply in a narrow set of circumstances, including private individuals suing emitters.[106] Here, the Municipalities are not suing an emitter but rather targeting the refinement/selling/production of fossil fuels.[107] Plaintiffs were not using a federal statute as the basis of their complaint, therefore complete preemption cannot be found.[108]

E. Summary of the Tenth Circuit's Holdings

As stated above, the Tenth Circuit denied all of Defendants' grounds for removal to federal court.[109] First, the Court surmised that the Energy Companies could not be defined as a federal official that would require the removal to federal court under U.S.C. section 1442(a). Second, the Plaintiffs successfully employed the well-pleaded complaint by pleading only state law. Third, under *Grable*, the Court rejected whether the federal issue is necessarily raised and if there is a substantial federal issue, concluding that this is an area of state interest. Finally, complete preemption could not be found under the CAA because congressional intent did not

102. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1263 (10th Cir. 2020).

103. *Id.*

104. *See* 43 U.S.C. § 7416 (stating nothing in the CAA "shall preclude or deny the right of any State or political subdivision thereof to adopt an emission standard or limitation more stringent than the federal version").

105. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 7604 (a), 84 Stat. 1676 (1970).

106. *Id.* at § 7604 (a)(1), (2) and (3).

107. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1264 (10th Cir. 2020).

108. The Tenth Circuit continued its analysis into many subparts of preemption and statutory law. They concluded on all issues that there was no preemption and that the case should be remanded to state court.

109. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc. (Boulder), 965 F.3d 792, 1275. This included denial of federal jurisdiction under the Outer Continental Shelf Lands Act (OCSLA).

require only federal causes of action. The Tenth Circuit thus held that the action should be remanded to state court.[110]

F. The Impact of *Suncor*

Suncor represents a changing tide in climate change litigation, with plaintiffs pushing the courts towards climate adaptation.[111] While climate change may be seen by many as a future phenomenon, *Suncor* demonstrates the ability of plaintiffs to point to present-day consequences, including "the millions of dollars in expenses that plaintiffs have already incurred in managing [climate impacts]."[112] Colorado is also unique in filing this claim since it is an inland plaintiff.[113] Coastal cities who filed public nuisance suits would allege sea level rise issues, however Colorado has brought concerns of wildfires, drought, and reduced snow into the narrative.[114] By demonstrating the monetary consequences of climate change, *Suncor* provide judges the incentive to institute judicial change.[115]

V. FUTURE RAMIFICATIONS: ESTABLISHING LIABILITY IN STATE COURT

Assuming the Municipalities are successful in transferring their claim to state court, there will still be a large barrier to overcome in establishing liability. Although the Municipalities somewhat circumvented the establishment of liability by targeting fossil-fuel producers rather than emitters, a state court will still have to conduct a liability analysis in order to calculate damages. This can be a difficult task as there can be multiple actors contributing to greenhouse gas emissions and production.[116] There are numerous theories of assigning liability,[117] but market share theory is likely the best avenue for climate change litigation, since it does not require the plaintiff to identify every tort-feasor contributing to greenhouse gases.[118]

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110. *Id*.

111. *See* Doyle, *supra* note 52, at 722. As part of a legal mobilization for climate action, second-wave plaintiffs make "social and political as well as scientific judgments" that not only reflect the current context of litigation, but also help to shape it by "critiqu[ing] existing structural arrangements and institutional practices." (quoting Lisa Vanhala, *Coproducing the Endangered Polar Bear Science, Climate Change, and Legal Mobilization*, 42 L. & POL'Y 105, 109 (2020)).

112. *Id*. at 723.

113. *Id*.

114. *Id*. at 724.

115. *Id*.

116. *U.S. Greenhouse Gas Inventory Report: 1990-2014*, EPA, https://perma.cc/WWC7-SZDN, (last visited March 21, 2023).

117. *See* Doyle, *supra* note 52, at 722. This includes enterprise liability theory, the author states, "[e]nterprise liability theory is not well suited for climate change litigation. The basis of enterprise liability theory is industry-wide control over the risk of injury. The largest emitters of GHGs do not have industry-wide control over the total level of emission, since many different industries emit substantial amounts of GHGs."

118. *Id*.

A. Background on Market-Share Liability

Market share liability is a doctrine that assigns liability due to respective market shares of a product.[119] Readers should note, "[t]he concept of market share liability stands in contrast to the traditional and paradigmatic tort principle that assigns liability only with respect to harm that was directly and identifiably caused by a single defendant or multiple defendants."[120] Market share theory has its roots in alternative liability.[121] The leading cases in market share liability is *Sindell v. Abbott Laboratories,* in which plaintiffs sued due to a defective drug—DES—causing cancer in the children of mothers who took the drug during pregnancy as a way to reduce miscarriage.[122] There were multiple manufacturers of the drug, therefore it was, "generally impossible for any affected claimant to identify the manufacturer of the drug ingested by her mother."[123] If standard tort law principles had been applied, the plaintiffs would not have been eligible for a remedy. Under market share liability, however, the burden of identification shifts to the defendants if the plaintiff establishes a *prima facie* case on every element of the claim except for identification of the actual tortfeasors.[124] Once these elements are established, "each defendant is severally liable for the portion of the judgment that represents its share of the market at the time of the injury . . . ."[125]

B. Market Share Theory Applied to Public Nuisance

Market share theory has been used successfully in other public nuisance suits, including lead paint litigation, because public nuisance does not require a specific causal identification.[126] In *Rhode Island v. Lead Industries Assn, Inc.*,[127] plaintiffs claimed public nuisance due to lead pigment found in common paints used in housing. The core issue was the inability of plaintiffs to identify one manufacturer of lead paint that caused the harm. However, the trial court reasoned that the national market shares of several defendants provided proof that their lead paint was present in Rhode Island buildings. This was held to be sufficient to constitute nuisance.

C. Market Share Theory Applied to Climate Change

Market share theory is a reasonable solution in climate change litigation because it holds defendants liable for their environmental wrongs. "[T]he policy behind market share theory is important in the climate change context because there

119. George L. Priest, Market Share Liability in Personal Injury and Public Nuisance Litigation: An Economic Analysis, 18 SUP. CT. ECON. REV. 109 (2010).

120. *Id*.

121. Sindell v. Abbott Laboratories, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

122. *Id.*

123. PRIEST, *supra* note 119.

124. Sindell v. Abbott Laboratories, 607 P.2d 924, 936–37.

125. *Id.*

126. *See* City of Milwaukee v. NL Industries, 315 Wis. 2d 443, 453 (Wis. Ct. App. 2008) ("Were it otherwise, the concept of public nuisance would have no distinction from the theories underlying class action litigation, which serves to provide individual remedies for similar harms to large numbers of identifiable individuals.") *Id*. at 893.

127. State v. Lead Industries, Ass'n, Inc., 951 A.2d 428 (R.I. 2008).

are innocent plaintiffs and guilty defendants who require incentives to change."[128] Since market share theory could allow for plaintiffs to recover damages, it also holds an incentive for oil and energy producers to regulate and be mindful of their emissions.[129] Market-share theory applied to climate change litigation is an equitable solution, "because defendants will be held severally liable for only the percentage of the judgment that represents each defendant's share of the market at the time of the injury."[130] A potential problem to this notion, addressed below, is what an environmental plaintiff does when a defendant is responsible for a small portion of GHG emissions.

The largest issue in climate change litigation is that no single defendant is liable for the entirety of climate change. Even in lead or asbestos litigation, there was an identifiable number of manufacturers. The same cannot be said of GHG emitters. Greenhouse gases have long lifespans, and therefore past emissions exist for a lengthy time. "To avoid such inequity, courts may require apportionment even where harms seem indivisible."[131] This could include reducing damages to account for past emissions, and courts will, "have to balance equitable apportionment with adequately compensatory damages."[132]

V. ECONOMIC ANALYSIS OF PUBLIC NUISANCE CLIMATE CHANGE CASES

Despite the attention that climate change public nuisance cases are receiving, there is very little information on how money damages and economics would be calculated in a market-share setting. From a social perspective, holding manufacturers of harmful substances liable results in advancing societal welfare and righting long-term wrongs. While it is commendable that there is a desire for environmental justice, there needs to be a closer look at how manufacturers of GHGs will be held liable in a fair manner when it comes to damage calculations. Specifically, two points need to be resolved: (1) determining market shares and (2) the passage of time.

Determining market shares when there are a handful of lead-paint manufacturers or only a few named defendants is a relatively simple task. Liability will likely be evenly distributed, and the total amount of monetary damages split between defendants. The task becomes complicated when there are endless contributors to GHGs (not just oil and gas producers) as well as varying degrees of contribution within oil and gas producers themselves. "If some of the products within an industry are relatively more harmful than other products, assigning liability by market share alone will lead to market signals that are incorrect in terms of relative harm."[133] A way to address incorrect market signals could be to assign liability in large lump sums or to the largest producers.

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128. Lauren Case, Comment, *Climate Change: A New Realm of Tort Litigation, and How to Recover When the Litigation Heats Up*, 51 SANTA CLARA L. REV. 265, 294 (2011).

129. *Id*.

130. *Id*.

131. *Id*.

132. *Id*. at 228.

133. *See* PRIEST, *supra* note 119.

Plaintiffs in public nuisance climate change cases can address the varying market shares of GHGs by targeting large oil and gas producers, such as Exxon or B.P., that are operating in their state. This was the method employed by Plaintiffs in *Suncor*. There are some indications that this could be successful. Applying the *Rhode Island* trial courts analysis, the court figured that a total of six large companies of lead-paint contributed to their houses.[134] It was likely true however, that there were smaller companies contributing to the lead paint epidemic in Rhode Island as well. Similarly, plaintiffs in climate change litigation could hold large oil and gas producers liable because they have the largest market shares in GHG emissions.[135]

Another central issue that plaintiffs will have to confront is the passage of time. Plaintiffs are presumably suing for money damages due to past, present, and future emissions and oil and gas production, which created and will continue to create a public nuisance. Also inherent within the passage of time is new technology regarding emissions and production. It can be argued that emissions from an oil and gas producer today are lower than they were many years ago due to improvements in technology and stricter monitoring requirements. Defendants could also argue that it is unfair to hold them accountable monetarily for both hypothetical future and past greenhouse gases.

However, even if time has passed, liability and damages can still be allocated. The passage of time argument was confronted in *Sindell*[136]—by the time litigation was occurring, DES had been removed from the market for about nine years. The *Sindell* court used *Escola v. Coca-Cola Bottling Co.*,[137] as the basis of their analysis, holding liability (and therefore damages) could be apportioned. The court reasoned that as long as the DES manufacturers had a "substantial share" of the market, this was enough to satisfy market-share liability.[138] "It is probably impossible, with the passage of time, to determine market share with mathematical exactitude."[139] Nevertheless, the Court held that "the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt."[140] As previously discussed, the rule adopted was the creation of market-share liability.

Environmental plaintiffs could apply the reasoning of the *Sindell* court to rebut a defendant's argument of the passage of time. As long as plaintiffs are suing oil and gas producers that have a substantial share of the market, plaintiffs can argue that an exact mathematical certainty of emissions is not required under market-share liability. This will also bolster plaintiffs' argument for the use of market-share liability since exact mathematical certainty is not required.

Thus, market-share theory can find applicability in environmental public nuisance suits. It is equitable to both sides, allowing courts to balance the societal

134. *See supra* note 47.

135. There is still no guidance on how market shares are determined whether it be on a nationwide, state-by-state or city basis. For a deeper analysis of market share liability as applied to public nuisance litigation, see PRIEST, *supra* note 119.

136. *See* PRIEST, *supra* note 119.

137. Escola v. Coca- Cola Bottling Co., 150 P2d 436 (Cal. 1944).

138. *See* PRIEST *supra* note 40, at 937.

139. *Id.*

140. *Id.* at 936.

harm against defendant's market-shares. By targeting the largest oil and gas producers, plaintiffs have an increased chance of success. Finally, even though time has passed, market-share theory does not require an exact mathematical pinpoint to be successful.

CONCLUSION

The need for federal regulation of greenhouse gases is one of the largest legislative issues this generation faces. While waiting for legislative action, private actors, cities, and municipalities will likely continue to litigate public nuisance claims through the assertion of state laws. *Suncor* demonstrates the urgency of addressing these issues and shows Plaintiffs' creativity in attempting to litigate these claims. Important to Plaintiffs' claim is first, they only pleaded money damages against oil and gas producers. Plaintiffs are not trying to regulate, rather they are attempting to correct a societal wrong. Secondly, Plaintiffs have successfully demonstrated the gap in federal regulation and posed an interesting question for state courts to resolve. However, if Plaintiffs are successful in their litigation, state courts and environmental plaintiffs will be faced with damage recovery methods.

If Plaintiffs were to assert market-share liability, their claim for damages would be the most likely to succeed. Within market-share liability, there is no need to definitively identify every possible tort-feasor with mathematical certainty. Thus, environmental plaintiffs could strategize to bring suit against the largest oil and gas producers since these are the producers who have the largest market shares. Plaintiffs and state courts can consider multiple factors when determining money damages, such as looking to other jurisdictions or bolstering information available to the court through the use of an expert in economics.

Even though state courts can likely hear public nuisance claims related to climate change and determine money damages from those claims, this should not be the final solution for GHG regulation. Passing state and federal legislation will lead to more consistent results and a better outcome for all parties involved.

Finally, *Suncor* is by no means settled and the landscape for its litigation is unclear. As of October 2022, the Supreme Court of the United States has requested that the Solicitor General file a brief reviewing the Tenth Circuit's opinion.[141] In March 2023, the Biden administration filed an amicus brief in support of the Colorado municipalities.[142] The case is waiting for proceedings to be continued in Colorado state court.

141. *See* SCOTUSBLOG, *supra* note 60.

142. Luke Watkins, *Biden administration urges US Supreme Court to reject oil companies' removal request in climate change case*, JURIST (Mar. 17, 2023), https://perma.cc/RCU6-86M6.