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CASE NOTE

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THE ULTIMATE NUISANCE: CLIMATE CHANGE COMES TO FEDERAL COURT IN *CITY OF NEW YORK V. CHEVRON CORP.*

INTRODUCTION

States and municipalities are incurring massive and increasing costs caused by global climate change.[1] In *City of New York v. Chevron Corp.*[2] the City of New York (City) sued Chevron and other producers of fossil fuels (Producers) in federal court to recover a portion of its past and present costs created by climate change. The City asserted causes of action for public nuisance, private nuisance, and trespass, all arising under New York state law.[3] The City claimed that the Producers' "production, promotion, and sale of fossil fuels" contributed to climate change, thereby causing the City's damages.[4] In the alternative, the City sought injunctive relief ordering the Producers to cease their activities purportedly contributing to climate change.[5]

The trial court dismissed the City's claims with prejudice, finding first that the City's state law claims were preempted by federal common law and must be dismissed.[6] The court further held that the City had no viable claims based on federal statutory law and was therefore left without redress. The Second Circuit affirmed the holding and reasoning of the trial court in *City of New York*.[7]

City of New York was significant for several reasons. First, the Second Circuit held that the costs of climate change, at least those claimed by the City, could not be passed to the Producers based on their production and marketing activities.[8] The court's holding is binding on federal courts in the Second Circuit and may

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1. *See* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 798 (10th Cir. 2020), *cert. granted, judgment vacated on other grounds*, 141 S. Ct. 2667 (2021); City of Hoboken v. Chevron Corp., 45 F.4th 699, 706 (3d Cir. 2022).

2. City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).

3. *Id.* at 88.

4. *Id*.

5. *Id*.

6. City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 471–472 (S.D.N.Y. 2018). The trial court granted the Producers' motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6), a failure to state a claim upon which relief could be granted.

7. City of New York, 993 F.3d at 85.

8. *See id.* at 103.

discourage plaintiffs from filing similar cases in state court. Potential plaintiffs may fear that their cases will be removed to federal court and summarily dismissed. Second, because *City of New York* was the first case in which a court fully analyzed the issues raised, the Second Circuit suggested one possible outcome for similar suits being litigated in state and federal courts in several circuits. Third, the court may have created a circuit split on the issue of whether state law claims for the costs of climate change are preempted by federal law. Perhaps most importantly, the court showed that the allocation of the costs of climate change will be critical for both public sector plaintiffs and the producer defendants and will likely require the Supreme Court of the United States to create a common rule of decision.[9]

I. BACKGROUND

The estimated costs of global climate change are staggering.[10] In 2010, the accumulated costs, including public and private damage, were estimated to be $700 billion, of which the United States had borne $45 billion.[11] Those costs are almost certain to increase substantially throughout the 21st century.[12] A consensus has developed among environmental scientists that human activity, particularly the emission of greenhouse gases, is the dominant cause of climate change.[13] Surveys have shown that 97–98% of published environmental scientists agree with the theory of anthropogenic global warming, the theory that climate change is caused primarily by human activity.[14] *Whose* human activity is causing climate change and *who* should bear its costs are issues only beginning to be litigated.[15]

New York City has already been "forced to take proactive steps" in response to climate change.[16] For example, in response to Hurricane Sandy the City undertook a "$20 billion-plus multilayered investment program in climate

9. *Id.* at 92.

10. Robert Hart, *Heat Waves Driven By Climate Change Have Cost The World $16 Trillion Since The 90s*, FORBES (Oct. 28, 2022, 2:00 PM), https://perma.cc/WU6N-NTUE.

11. See Michael Byers et. al., *The Internationalization of Climate Damages Litigation*, 7 WASH. J. ENV'T L. & POL'Y 264, 266 (2017); Hart, *supra* note 10. *See also* Lydia DePillis, *Pace of Climate Change Sends Economists Back to Drawing Board*, N.Y. TIMES (Aug. 25, 2022), https://www.nytimes.com/2022/08/25/business/economy/economy-climate-change.html (discussing methods of estimating the costs of global emissions and climate change).

12. Breyers, *supra* note 11; Emma Newburger, *Climate change could cost U.S. $2 trillion each year by the end of the century, White House says*, CNBC, https://perma.cc/SN4E-YB8K (Apr. 4, 2022, 5:27 PM). *See The United States' Turning Point on Climate Change*, DELOITTE, https://perma.cc/L9TB-DW4B (last visited Apr. 3, 2023, 9:39 AM) (analyzing the costs of climate change to the U.S. economy over the next 50 years).

13. Brief of Amici Curiae Natural Resources Defense Council, New York City Environmental Justice Alliance, the Point, and Uprose in Support of Plaintiff-Appellant at 6, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (No. 18-2188) (citing John Cook, et al., *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, 8 ENVIRON. RES. LETT. 1 (2013)).

14. John Cook et al., *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, 8 ENVIRON. RES. LETTERS 1, 2 (2013) (citing Peter T. Doran & Maggie Kendall Zimmerman, Examining the Scientific Consensus on Climate Change, 90 EOS TRANS. AM. GEOPHYS. UNION 22, 22–23 (2011).

15. *See* City of New York v. Chevron Corp., 993 F.3d 81, 93 (2d Cir. 2021) (collecting cases).

16. City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 469 (S.D.N.Y. 2018).

resiliency."[17] Other costly efforts have also been undertaken, such as "constructing seawalls and other coastal armaments, enlarging and augmenting the City's storm and wastewater infrastructure, and implementing public-health programs designed to tackle the effects of heatwaves."[18] Pointing to the havoc wreaked by Hurricane Sandy as a demonstration of the need for strong action, the City claimed that it took these steps because it is particularly vulnerable to climate change. The City also highlighted its lengthy coastline and location on an island as vulnerabilities.[19] Officials anticipated future climate change impacts that will result in significant expense.[20]

In 2018 the City brought suit in the Southern District of New York against several multi-national oil and gas producers.[21] The suit was based on three New York state law causes of action: (1) public nuisance, (2) private nuisance, and (3) trespass.[22] The plaintiff City sought compensatory damages for its past and future injuries allegedly caused by the Producers, or alternatively, injunctive relief halting the Producers' ongoing activities causing the nuisances and trespass alleged by the City.[23] The City chose to file this case in federal court, claiming diversity jurisdiction, though all of the claims were based on state law.[24] This decision simplified the litigation by preventing a fight over removal, but also eliminated the chance of a more positive outcome for the City in state court.[25]

The City claimed that the Producers caused climate change, not by their own fossil fuel emissions, but by their production and sale of fossil fuels.[26] The amended complaint alleged that the Producers had early knowledge of the damage that would be caused by fossil fuel emissions, yet continued to aggressively market fossil fuels to unknowing consumers over several decades.[27] The City made other assertions, including that the Producers sought to discredit climate science despite believing in its accuracy, tried to show that climate change was not happening, and downplayed climate change risks.[28]

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17. *Id*.

18. City of New York, 993 F.3d at 86.

19. *Id.* at 6; Brief for Appellant at 7, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (No. 18-2188).

20. Amended Complaint ¶ 10, City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 469 (S.D.N.Y. 2018) (No. 1:18-cv-00182-JFK).

21. The named defendants are BP P.L.C., Chevron, ConocoPhillips, Exxon, and Royal Dutch Shell.

22. City of New York v. BP, 325 F. Supp. 3d at 468.

23. *Id.* at 470.

24. City of New York, 993 F.3d at 94.

25. *Id*.

26. City of New York v. BP, 325 F. Supp. 3d at 468.

27. *Id*. *See* Shannon Hall, *Exxon Knew About Climate Change Almost 40 years Ago*, SCI. AM. (Oct. 26, 2015), https://perma.cc/6R6G-N5W6; Geoffrey Supran & Naomi Oreskes, *Climate Crimes: The Forgotten Oil Ads that Told Us Climate Change Was Nothing*, THE GUARDIAN (Nov. 18, 2021), https://perma.cc/6M4N-G884. *See also* Hiroko Tabuchi, *Oil Executives Privately Contradicted Public Statements on Climate, Files Show*, NY TIMES (Sept. 14, 2022), https://www.nytimes.com/2022/09/14/climate/oil-industry-documents-disinformation.html.

28. City of New York v. BP, 325 F. Supp. 3d at 468.

The Producers sought to dismiss the City's complaint, alleging that the City had failed to state a claim upon which relief could be granted.[29] The Producers made several arguments to support their motion, including that the City's claims arose under federal common law and were therefore preempted and that the City's claims were barred by other federal statutes and doctrines.[30] The trial court granted the Producers' Motion to Dismiss in its entirety, holding that the City's claims were preempted by federal common law, federal common law was partially preempted by the Clean Air Act (CAA), and that the claims "interfere[d] with separation of powers and foreign policy."[31]

The City timely appealed to the Second Circuit, which affirmed the trial court's judgment.[32] The Second Circuit panel first found that federal common law "displaced" state common law and governed the City's claims.[33] The court next held that federal common law was in turn partially displaced by the CAA, although the CAA governed only domestic and not foreign emissions.[34] The Court then considered whether some of the City's claims, based on foreign emissions, were revived because they were not preempted by the CAA, but determined that the claims would not be revived because the state law claims would still be preempted by federal common law.[35] Finally, the court held that any claims of the City based on foreign emissions must be dismissed because federal common law does not have "extraterritorial reach."[36] Because the Second Circuit was the first circuit court to consider these issues on their merits, its analysis is likely to influence the adjudication of many future cases and merits careful analysis.

II. ANALYSIS

A. General Themes

The Second Circuit's opinion was structured as a systematic walk through several federal legal frameworks that, operating together, fully box out any application of state law in litigation over the Producers' responsibility for climate change. The court began by framing the basic issue and facts, and in doing so introduced two themes that pervaded the entire analysis. From the first sentence of the opinion, one senses that although these two themes were not essential to any step in the court's analysis, taken together they created an inevitability that federal law must govern this case and others like it.

The first theme was that climate change is a problem too complicated and wide-ranging to be litigated under the diverse laws of the various states.[37] From the very beginning the court framed the issue as "whether municipalities may utilize

29. *Id.* at 470 (citing Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6)).
30. *Id.*
31. *Id.* at 468.
32. City of New York v. Chevron Corp., 993 F.3d 81, 89, 103 (2d Cir. 2021).
33. *Id.* at 89.
34. *Id.* at 95.
35. *Id.* at 98.
36. *Id.* at 100.
37. *Id.* at 92 ("Such a sprawling case is simply beyond the limits of state law.").

state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions."[38] The superfluous insertion of the words "multinational" and "global" set up the contrast with state law, which is inherently limited to more local cases and controversies. In the opinion's introduction, the court not only rejected the City's state law claims but foreshadowed its bald criticism of the City's motivations for adopting its legal strategy. The court characterized the City's suit as having "sidestepped [federal] procedures" to create a legal path via state law to recover damages purportedly caused by the Producers' "admittedly legal commercial conduct." The "federal procedures" to which the court referred are the regulatory framework available under the CAA and other federal regulatory law.[39] The Second Circuit panel declared "we cannot condone such an action."[40] The court reasoned that a state court damages award of the magnitude requested by the City would "effectively regulate the Producers' behavior far beyond New York's borders."[41] No branch of a state government may regulate an area of commerce already regulated by federal law, such as production of fossil fuels.[42] Because all the worldwide emissions from the burning of fossil fuels mix in the atmosphere, "emissions in New York or New Jersey may contribute no more to flooding in New York than emissions in China."[43] Therefore, any remedial actions taken by the Producers must be taken everywhere in the world to mitigate their liability.[44] This notion that the City's claims are simply too broad and complex to be managed in state courts appeared at several steps in the court's analysis.[45]

The opinion's second broad theme was that the City's theory of the case was unsound because tort law claims require proof of causation and the City would never be able to prove that the Producers caused its damages.[46] The court accused the City of glossing over the fact that greenhouse gas emissions, like fossil fuels, are commodities, meaning that each unit is indistinguishable from any other and the City will ultimately be unable to prove who caused its injuries.[47] The court telegraphed its view that even if fossil fuel producers could be held accountable in tort law for producing and marketing fossil fuels, the City would not be able to prove who produced and marketed the particular fuel that led to the emissions that caused its damages because everyone's emissions mix together in the atmosphere.[48] Although the City's ability to prove causation was irrelevant to the questions the court was required to decide, the court's view that the City's claims were logically flawed was sprinkled throughout the opinion.[49]

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38. *Id.* at 85.
39. *Id.* at 86.
40. *Id.*
41. *Id.* at 92.
42. *Id.*
43. *Id.*
44. *Id.*
45. *E.g., Id.* at 100 ("[The City] wishes to impose New York nuisance standards on emissions emanating simultaneously from all 50 states and the nations of the world.").
46. *Id.* at 86.
47. *See id.* at 91.
48. *See id.*
49. *E.g., id*. at 97 ("The City's case hinges on the link between the release of greenhouse gases and the effect those emissions have on the environment generally (and on the City in particular).").

The court's focus on these two themes was evident even in the opinion's "facts" section.[50] To introduce the first theme, that the City's claims were too complex to be managed by state law, the court emphasized the complexity of the relevant web of federal law and regulation.[51] The court's exposition of facts contained six full paragraphs outlining the history of the federal law and regulation that the court would hold to be applicable, although none of that law was implicated by the City's complaint.[52] Introducing the second theme, the court's view that the City would ultimately be unable to prove causation, the exposition of facts contained two paragraphs discussing whether the City's claims of causation were even logically plausible.[53] The exposition of facts contained only one paragraph describing the City's claims of injury, causation, and damages.[54] The court described decades of environmental legislation and regulation, particularly regulation resulting from the CAA, which it describes as "an intricate regulatory regime."[55] Describing "global warming" as "a global problem that the United States cannot confront alone," the court listed international treaties to which the United States is a party. Characterizing global warming as "one of the greatest challenges facing humanity today,"[56] the court did not seriously entertain the possibility that this type of suit could be managed under state law.

Throughout its brief the City addressed the court's theme that state tort law could not properly address its injury because its claim was too far-reaching and complex.[57] The City never disputed the fact that climate change was a global problem, but argued that its "case presents no greater conflict between a uniquely federal interest and the application of state law than any claim against a manufacturer that makes and sells its products worldwide."[58] The fact that a plaintiff's tortfeasor might have many other victims around the globe ordinarily does not preclude her from bringing a state tort action.[59] Although state nuisance and trespass actions are often battles over purely local matters like smelly chicken coops and annoying

50. *Id.* at 86-87.
51. *Id.* at 87.
52. *Id.*
53. *Id.*
54. *Id.* at 86.
55. *Id.* at 87.
56. *Id.* at 86.
57. Reply Brief at 9–10, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (No. 18-2188) ("The City's suit is far more modest: it seeks to recover tangible costs imposed by Defendants' products. Like other suits asserting that a product manufactured elsewhere caused local harms, this case should be resolved under state, not federal, common law.").
58. *Id.* at 2.
59. *See Id.* at 4, 28 (outlining the standards under which state tort law is, in fact, preempted by federal common law) ("Nor does the possibility that Defendants will face other lawsuits justify dismissing this one.").

neighbors,[60] the City pointed to cases involving disputes with international implications.[61]

Throughout the entire "facts" section, the court continued to question the City's theory of causation and took strong exception to the City's representation of the facts. This overt criticism of the plaintiff's characterization of a dispute was surprising in this phase of litigation given that, when considering a motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6), a court must assume the plaintiff's factual allegations are true and draw all reasonable inferences in the plaintiff's favor.[62] The Second Circuit panel's incredulous attitude shone through in several statements, such as "[e]ven though every single person who uses gas and electricity—whether in travelling by bus, cab, Uber, or jitney, or in receiving home deliveries via FedEx, Amazon, or UPS—contributes to global warming, the City asserts that its taxpayers should not have to shoulder the burden of financing the City's preparations to mitigate the effects of global warming."[63] This statement was hardly an objective statement of fact; it accurately reflected the City's position, but the inference implied in the statement, that because everyone contributed to global warming the City's taxpayers *should* pay for the City's mitigation efforts, appeared to be resolved against the City. The court expressed from the very beginning that it was unwilling to accept as reasonable the inference that the production and sales activities of the Producers caused the damages claimed by the City. The court went even further in re-characterizing the suit, implying that although the City asked first for compensatory damages, its true objective was to interrupt the business operations of the producers.[64] It is impossible to know how the court would have held had it considered the City's complaint on its own terms.

In its briefing to the Second Circuit, the City sought to emphasize the narrow scope of its suit. The City explained that "this suit does not seek to 'solve' the worldwide crisis of climate change," nor does it "have the purpose or effect of regulating greenhouse-gas emissions."[65] Rather, the intent of the suit was far more humble, "to shift some of the cost of addressing local harms arising from Defendants' production, promotion, and sale of fossil fuels."[66] In the City's view the case involved purely local activity. The Producers marketed and sold fossil fuels in New York City, and now were being held accountable for the costs that their activity has

60. *See, e.g.*, Matteliano v. Skitkzi, 85 A.D.3d 1552, 1552, 925 N.Y.S.2d 276, 277 (2011) (Plaintiff claims defendant's open garage door denies him the benefit of his property); Weinberg v. Lombardi, 217 A.D.2d 579, 579, 629 N.Y.S.2d 280, 281 (1995) (Trial court orders defendant to fully roll up the shades on his balcony except when he is using them.); Zimmerman v. Carmack, 292 A.D.2d 601, 602, 739 N.Y.S.2d 430, 432 (2002) ("[P]laintiffs alleged . . . that the defendants removed lawn ornaments from the plaintiffs' backyard, damaged their barbecue grill, and diverted rainwater onto the plaintiffs' yard causing flooding.").

61. *See, e.g.*, *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 123 (2d Cir. 2013) (public nuisance suit addressing pollution of New York's water supply from gasoline containing MTBE produced by Exxon, an international corporation).

62. Litwin v. Blackstone Grp., L.P., 634 F.3d 706, 715 (2d Cir. 2011).

63. City of New York, 993 F.3d at 86.

64. *Id.* at 87 ("The City freely admits that it is not able to halt the Producers' conduct under any federal statute or international agreement . . .").

65. Reply Brief at 1, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (No. 18-2188).

66. *Id.*

wrought locally. The City argued that its claim was a clear-cut example of one theory of nuisance found in the Restatement: that the defendants' conduct was intentional and had caused environmental harm that was "severe and greater than [the City] should be required to bear without compensation."[67]

The City made plausible arguments to support its view that the Producers caused its harm, though the Second Circuit seemed simply to ignore them.[68] The City argued that although the Producer's actions were not the singular cause of the harm, "a defendant's contribution need not be enough, standing alone, to have caused the nuisance."[69] The City also pointed out that while "but-for causation" is a rule of thumb in tort cases, "it simply will not work in certain [cases] involving multiple tortfeasors."[70] Certainly under Rule 12(b)(6) the court could have found these arguments unavailing and dismissed the suit as a matter of law for lack of causation, but the court did not do that. Instead, it weaved throughout its opinion that causation was implausible, which colored its analysis of the core issue in the case: whether federal law displaces state law.[71]

B. Preemption by Federal Common Law

Having explained the basic facts of the case and the issues raised in the Producers' motion to dismiss, the court began its analysis with the issue of whether the City's state tort claims were preempted by federal common law.[72] Cases involving federal common law are rare, and the court provided a discussion of the nature of federal common law and when it applies.[73] Analogizing federal common law to "legal duct tape,"[74] the court explained that it is operational only in "few and restricted situations" where a federal court is "compelled to consider federal questions [that] cannot be answered from federal statutes alone."[75] Federal common law, unlike its state counterpart, applies only in narrow situations, one being where "a federal rule of decision is necessary to protect uniquely federal interests" but Congress has not directly spoken to the issue.[76] The presence of a federal interest in a state law case does not alone require a federal rule of decision; rather, a "conflict

67. RESTATEMENT (SECOND) OF TORTS § 829A (AM. L. INST. 1977) ("Restatement").

68. City of New York, 993 F.3d at 87.

69. Reply Brief at 18, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (No. 18-2188) (citing Warren v. Parkhurst, 45 Misc. 466, 469 (N.Y. Sup. Ct. 1904), *aff'd*, 105 A.D. 239 (3d Dep't 1905), *aff'd*, 186 N.Y. 45 (1906)).

70. *Id.* at 20 (citing Basko v. Sterling Drug, Inc., 416 F.2d 417, 429 (2d Cir. 1969)).

71. *E.g.*, City of New York, 993 F.3d at 92 (In its discussion of whether of federal common law displaces state law, the court wrote "[T]he City requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet" and "[i]t is precisely *because* fossil fuels emit greenhouse gases – which collectively "exacerbate global warming" – that the City is seeking damages.).

72. City of New York, 993 F.3d at 89.

73. *See* Wheeldin v. Wheeler, 373 U.S. 647, 651, 83 S. Ct. 1441, 10 L. Ed. 2d 605 (1963).

74. *Id.* at 90.

75. *Id.* at 89 (citing City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 314, 101 S. Ct. 1784, 1791, 68 L. Ed. 2d 114 (1981) ("*Milwaukee II*")).

76. *Id.* The other situation is where Congress has expressly given federal courts statutory authority to make legal rules.

between state law and federal interests must be intractably severe before federal common law may spring into action."[77]

One might expect the court to immediately apply the test it had stated for federal common law preemption, that being whether the suit implicated federal interests and whether the conflict between those interests and the relevant state law was "intractably severe." Instead, the court briefly diverted to its view that the City mischaracterized the facts of the case to obscure its inability to prove causation, which was one of the opinion's pervasive themes. To shed light on whether this suit "implicated federal interests," the court took a step back and asked "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 . . . ?"[78] Not surprisingly, the court believed it was the former.[79] Although one of the first statements in the City's brief was "nor does th[is] suit have the purpose or effect of regulating greenhouse-gas emissions," the court caustically dismissed that assertion.[80] Accusing the City of artful pleading, the court directly rejected the notion that the case was "a local spat about the City's eroding shoreline, which will have no appreciable effect on national energy or environmental policy."[81] The court seemed to assume its own conclusion, answering the question by repeating its initial articulation of the issue, that "the 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."[82]

A reader might be confused by the court's use of the phrase "artful pleading" in this situation. Ordinarily this doctrine is applied in the removal context when the issue is whether a case should be heard in state court or removed to federal court. The Second Circuit has explained that the artful pleading doctrine "rests on the principle that 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."[83] Here, although the procedural context was different, the inquiries were similar and the use of the phrase "artful pleading" helped explain the court's point. The court was accusing the City of delicately dancing around the issue, avoiding the common-sense cause of its injuries, global emissions, and focusing instead on a more distant cause, the Producer's "production, promotion, and sale of fossil fuels" solely to avoid the maze of federal laws and regulations regulating emissions.[84]

As its analysis continued, the court went even further in re-characterizing the suit, asserting that "the goal of [the City's] lawsuit is perhaps even more ambitious: to effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who

77. City of New York, 993 F.3d at 90.

78. *Id.* at 91.

79. *Id*.

80. *Id.*; Corrected Reply Brief at 1, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) (No. 18-2188).

81. City of New York, 993 F.3d at 91.

82. *Id*.

83. Grievance Comm. for Tenth Jud. Dist. v. Pollack, 669 F. Supp. 2d 454, 458 (S.D.N.Y. 2009).

84. City of New York, 993 F.3d at 91.

released them)."[85] The City's briefing said nothing like that, so the court's statements were based merely on its own inferences.

Following its re-articulation of the broad issue of the case, the court returned to the legal question it framed earlier: whether this suit implicated federal interests and whether the conflict between those interests and the relevant state law is "intractably severe."[86] Citing a "mostly unbroken line of cases" applying federal law to disputes over emissions and other pollution, the court identified two federal interests drawn from an earlier United States Supreme Court case, *Illinois v. City of Milwaukee, Wis.*, that considered whether state nuisance law could be used to adjudicate a case about river water pollution.[87] The two federal interests the court identified were the "overriding . . . need for a uniform rule of decision" on matters influencing national energy and environmental policy, and the "basic interests of federalism."[88]

The court explored the federalism issue first, raising again its recurring causation theme. The court reasoned that the City sought damages for conduct that could have occurred anywhere worldwide, not necessarily within the jurisdiction of New York state law.[89] Because the damages in New York could have been the result of business activities anywhere in the world, any remedial actions would have to be applied worldwide. The court concluded therefore that even if the City were to receive damages only for the conduct associated with the Producers' New York activities those damages would have the effect of regulating the Producers everywhere.[90] That regulation would risk upsetting the "careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other," which the court reasoned was purely a federal enterprise.[91] The court also relied again on its first general theme, which was that state tort law was not capable of handling a dispute with such a broad scale, which was not necessarily relevant to the issue of whether a federal interest in the dispute exists.[92]

The court then analyzed the second federal interest it had identified, which was the need for common federal rules of decision.[93] The court emphasized the importance of cohesive federal-level energy policy.[94] Suits over emissions surely implicate federal energy policy, and the court named concerns such as "achiev[ing] national economic and energy policy goals, assur[ing] national security, reduc[ing]

85. *Id.* at 93.

86. *See id.* at 91–92.

87. *Id.* (citing Illinois v. City of Milwaukee, Wis., 406 U.S. 91, 105, 92 S. Ct. 1385, 1393, 31 L. Ed. 2d 712 (1972), *disapproved in later proceedings sub nom,* 451 U.S. 304 (1981) ("*Milwaukee I*")).

88. *Id*.

89. *Id.* at 92.

90. *Id.* (citing Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 637, 132 S.Ct. 1261, 182 L.Ed.2d 116 (2012) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)) (holding that where federal law "occupies the entire field," state law cannot operate).

91. *Id.* at 93.

92. *Id.* ("Such a sprawling case is simply beyond the limits of state law.").

93. *Id*.

94. *Id*.

dependence on foreign sources, and maintain[ing] a favorable balance of payments in world trade."[95] The court highlighted the risk created by a hodgepodge of state law rules of decision, concluding that forcing the Producers' to submit to these diverse rules "could undermine important federal policy choices."[96]

The court never explicitly analyzed whether the conflict between the federal interests and the state law at issue was "severely intractable" as required by the court's articulated test, but the court's view was clear.[97] The court concluded that because "the states will invariably differ in their assessment of the proper balance between these national and international objectives, there is a real risk that subjecting the Producers' global operations to a welter of different states' laws could undermine important federal policy choices."[98] Because the court established that federal interests are implicated by the suit and that a sufficient conflict exists between those federal interests and state law, the court concluded that federal common law must govern this case, displacing New York state law.

C. Preemption by Federal Statutory Law

Establishing that federal common law applied to this dispute did not necessarily mean that the City's case had to be dismissed.[99] Federal common law would itself be preempted and therefore have no application if Congress had enacted legislation governing the City's claim.[100] The court had cited a rule earlier in its opinion, drawn from *Milwaukee II*, that federal common law applies only "where a federal court is compelled to consider federal questions [that] cannot be answered from federal statutes alone."[101] *Milwaukee II* went on to explain that where a federal statute does address an area of law, "the need for such an unusual exercise of lawmaking by federal courts disappears."[102] If federal statutory law applies to a dispute, the statute displaces federal common law.[103] At first blush, the issue of whether a claim is preempted by federal common law or federal statutory law may seem like a distinction without a difference. A plaintiff's state law claims would usually be dismissed whether they are displaced by federal common law or federal statutory law. But, in *City of New York* the court was required to decide this question because the distinction could have been significant if the relevant federal statute, in this case the CAA, left room for state law to operate in particular instances.[104]

The CAA is an act that broadly regulates emissions in the United States but allows for the application of state law within certain "gaps" in the regulatory

95. *Id.* (citing Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 427, 131 S. Ct. 2527, 2539, 180 L. Ed. 2d 435 (2011) ("*AEP*")).

96. *Id*.

97. *Id*.

98. *Id*.

99. *See id.* at 95.

100. *Id*.

101. City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 314, 101 S. Ct. 1784, 1791, 68 L. Ed. 2d 114 (1981) (*"Milwaukee II*").

102. *Id*.

103. *Id*.

104. *See* City of New York, 993 F.3d at 96.

scheme.[105] The CAA has been described as "an intricate regulatory regime intended to 'protect and enhance the quality of the [n]ation's air resources so as to promote the public health and welfare and the productive capacity of its population.'"[106] The CAA gave broad rulemaking authority to the EPA to regulate greenhouse gas emissions and those who produce and consume fossil fuels.[107] The Producers had been highly regulated by the EPA and the City acknowledged that the Producers' production and marketing activities were "lawful commercial activities."[108]

The CAA was not intended to make the regulations of emissions purely the province of federal law.[109] The statute expressly left some areas of regulation to the states, including at times allowing the states to create stricter regulations than those of the EPA.[110] The question for the court was whether the CAA "speaks directly to the question" in this case.[111]

To answer that question the court drew reasoning from two cases considering the common law's limits in redressing emissions claims in the shadow of the CAA.[112] In the first case, *American Electric Power Company v. Connecticut*,[113] [hereinafter *AEP*], several plaintiffs, including the City, sued the five largest emitters of carbon dioxide in the United States under the federal common law of public nuisance.[114] The Court held unanimously that EPA regulations and the provisions of the CAA fully displaced any federal common law nuisance claims.[115] In *AEP* the plaintiffs did not seek money damages but rather injunctive relief requiring the defendants to cease their greenhouse gas emissions.[116]

In the second case, the Ninth Circuit addressed the question of money damages for greenhouse gas emissions in *Native Village of Kivalina v. ExxonMobil Corp.*[117] The court extended the holding of *AEP* to the case of an Alaskan village that sought damages from past emitters under the federal common law of public nuisance. The court held that Kivalina's federal common law claims were fully preempted by the CAA, which granted comprehensive authority to the EPA to set emission standards.[118]

The Second Circuit chose to adopt the reasoning of *Kivalina* and hold that the City's claims are preempted by the CAA in *City of New York*.[119] In doing so, the court returned to the theme of causation, again rejecting the City's theory that the

105. *Id.* at 87, 96.

106. *Id.* (citing N.Y. Pub. Int. Rsch. Grp., 321 F.3d at 319–20 (quoting 42 U.S.C. § 7401(b)(1)).

107. City of New York, 993 F.3d at 87.

108. *Id.*

109. *See* 42 U.S.C. §§ 7401, 7411(c)(1), (d)(1)–(2).

110. 42 U.S.C. § 7401(a)(3).

111. City of New York, 993 F.3d at 95.

112. *Id.*

113. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, S. Ct. 2527, 180 L. Ed. 2d 435 (2011) ("*AEP*").

114. *Id.* at 418.

115. *Id.* at 429.

116. City of New York, 993 F.3d at 96.

117. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012).

118. *Id.*

119. City of New York, 993 F.3d at 96.

Producers could be held liable for their production and marketing activities rather than for their emissions.[120] The City had argued that the CAA does not concern itself with the "production and sale" of fossil fuels unrelated to emissions, but the court retorted "neither does the City's complaint."[121] The court concluded that the CAA displaced the City's federal common law claims because the City made no claims that were not based on emissions and "[i]f an oil producer cannot be sued under the federal common law for [its] own emissions, *a fortiori* [it] cannot be sued for someone else's."[122]

D. The City's State Law Claims Were Not Permitted by Gaps in Federal Law

But what if the Clean Air Act displaced the federal common law in this area but did not expressly preempt a particular state law claim? The Ninth Circuit left this possibility open in *Kivalina*.[123] "Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law . . . Kivalina may pursue whatever remedies it may have under state law to the extent their claims are not preempted."[124] The City argued that if the CAA did not address an issue or left ambiguous whether state law and federal law could operate concomitantly, the City's common law claim might "spring back into action."[125] The court rejected this notion, reasoning that if federal common law was displaced by a statute, state law could only operate in areas expressly authorized by that statute.[126] The court relied on one of its recurring themes: that state law would not be capable of handling a dispute of this magnitude and complexity.[127] The court noted that just because a federal statute does not plug every hole in which state law might apply, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard."[128] The court also returned to its recurring theme that the City's claims are logically unsound because the City will never be able to prove causation.[129] The court reasoned that the City's obfuscation on the causation issue served the purpose of broadening the suit's implications.[130] The City did not merely intend to take advantage of a narrow opening in the statute, but rather "wishe[d] to impose New York nuisance standards on emissions emanating simultaneously from all 50 states and the nations of the world."[131] The court concluded that because the CAA displaces the federal common law and does not

120. *Id*.

121. *Id.* at 97.

122. *Id.* (citing City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018), *vacated on other grounds*, 969 F.3d 895 (9th Cir. 2020)).

123. Kivalina, 696 F.3d at 866.

124. *Id*.

125. City of New York, 993 F.3d at 98.

126. *Id.* at 99.

127. *Id.* at 98.

128. *Id*.

129. *Id.* at 99.

130. *See id.* at 96–97.

131. *Id.* at 100.

expressly authorize New York law to regulate emissions, the City's suit must be dismissed.[132]

E. Federal Common Law Could Not Apply to Extraterritorial Emissions

The court's final blow to the City was its holding that the City had no claims based on the Producers' actions outside the United States under state or federal law.[133] The court held that the CAA had no extraterritorial application, meaning that actions under the Act can be based only on domestic harms.[134] If the CAA did not preempt the City's claims under federal common law, the question remained whether the City's common law claims could move forward based on the Producers' activities outside the United States.[135]

The relevant precedents did not provide a clear answer, leaving "unsettled whether the presumption against extraterritoriality—a canon of statutory interpretation—applied to common law rules."[136] The precedential cases seemed to instruct that "federal courts must proceed cautiously when venturing into the international arena so as to avoid unintentionally stepping on the toes of the political branches.[137] The court believed that granting the City damages based on the Producers' extraterritorial activities would represent a broad exercise of judicial lawmaking that would infringe on the powers of the other branches of government.[138] The court also expressed concerns that such suits might interfere with international treaties and trade agreements.[139] Stated more directly, to "hold the Producers accountable for purely foreign activity . . . would require them to internalize the costs of climate change and would presumably affect the price and production of fossil fuels abroad."[140]

The court's holding on this final question effectively slammed the door on the City's suit. The court not only dismissed the City's state law tort claims, but it concluded that the City also had no cause of action under federal law. The City was allowed no relief under the CAA, but "any federal common law claim against the Producers . . . nonetheless still fail[ed]."[141] This broad holding left the City without redress beyond the federal political process.

III. IMPLICATIONS

For plaintiffs in the Second Circuit, the implications of *City of New York* are clear. The decision left the City and similarly situated plaintiffs without legal redress for their damages caused by the Producers' production and marketing

132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 101.
136. *Id.* at 100.
137. *Id.* at 102.
138. *See id.* at 102–103.
139. *Id.*
140. *Id.*
141. *Id.* at 103.

activities.[142] Even if a plaintiff were to bring suit in state court the Producers could remove the case to federal district court and the district court would be bound by *City of New York* to dismiss the case.[143] But what significance does the case have for plaintiffs in other circuits? At first glance the Second Circuit's holding appears to conflict with the holdings of other circuits in similar cases.[144] Several circuits have considered the question of whether a plaintiff can bring a nuisance suit against fossil fuel producers *in state court* under state law to recover damages purportedly caused by the Producers' production and marketing activities. These cases presented plaintiffs similar to the City, defendants similar to the Producers (or often the Producers themselves), similar injuries, and similar state law frameworks. Each circuit has held for the plaintiffs. The crucial difference between *City of New York* and the other cases was that the others were filed in state court rather than in federal court. In each case the defendants sought removal to federal court and in each case the federal court remanded the case to state court and allowed it to proceed.[145] Is the holding for the defendants in *City of New York* just an outlier?

City of New York was an anomaly only in the sense that it was the first case to directly analyze the merits of this type of claim.[146] The case may have offered clues to the ultimate disposition of the ongoing cases in the other circuits. Though *City of New York* and the cases in other circuits may have appeared to analyze the same issues, the different procedural postures called for entirely different standards of review. In *City of New York*, the Second Circuit considered a motion to dismiss alleging failure to state a claim upon which relief can be granted.[147] The primary issue the court confronted was preemption, whether the City's common law claims were preempted by federal common law and the CAA.[148] The other circuits were considering an entirely different issue, whether the plaintiffs' claims should be heard in federal rather than state court. Those circuits were applying the standard of "complete preemption,"[149] and despite the similar nomenclature, "complete preemption is not the same as preemption."[150]

The cases filed in state court required an analysis of complete preemption because "[n]ot all claims belong in federal court," and removal is not proper unless

142. *Id.* at 85.

143. *See id*.

144. *See, e.g.*, City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022); Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44 (1st Cir. 2022); Mayor & City Council of Balt. v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022); City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101 (9th Cir. 2022); Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

145. City of Hoboken v. Chevron Corp., 45 F.4th 699, 706 (3d Cir. 2022). *See, e.g.*, Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44, 50–51 (1st Cir. 2022); Mayor & City Council of Balt. v. BP P.L.C., 31 F.4th 178, 238 (4th Cir. 2022); City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101, 1106–07 (9th Cir. 2022); Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733, 744 (9th Cir. 2022); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1246 (10th Cir. 2022).

146. *See* City of New York, 993 F.3d at 94.

147. The Producers' Motion to Dismiss was based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

148. *See* City of New York, 993 F.3d at 85.

149. *City of Hoboken*, 45 F.4th at 707.

150. *See* Felix v. Lucent Techs., Inc., 387 F.3d 1146, 1158 (10th Cir.2004).

state law is completely superseded.[151] The jurisdiction of federal courts is limited by the Constitution to cases "arising under" the Constitution's provisions, federal laws, or other uniquely federal matters.[152] In the Tenth Circuit, as one example, complete preemption requires a two-part analysis; the first question is "whether the federal question at issue preempts the state law relied on by the plaintiff;" and the second is "whether Congress intended to allow removal in such a case, as manifested by the provision of a federal cause of action."[153] Other circuits apply similar rules with slightly different articulations.[154] In the Third Circuit, complete preemption requires "(1) a federal statute that (2) authorizes federal claims vindicating the same interest as the state claim . . . Only statutes that check both boxes can transform state-law claims into federal ones."[155]

The Tenth Circuit "usually address[es] the second prong of this analysis first," because the second question is often easier and, if answered in the negative, renders the first question moot.[156] Whether or not a state law claim is ultimately preempted by federal law, it only passes the test of complete preemption "if federal law provides its own cause of action . . . that can be heard in federal court."[157] If federal law does not provide an alternative cause of action to replace the plaintiff's state cause of action, a court would not need to even consider the issue of preemption.[158] In *City of New York*, the court held that the City did not have a federal cause of action, which would mean that had that court been considering complete preemption it may not have even reached the issue of ordinary preemption, the basis on which the court dismissed the City's claims.[159]

It is not mere speculation that the difference between ordinary preemption and complete preemption affected the courts' dispositions in these cases.[160] In *City of New York*, the court addressed whether its holding created a split with other circuits. The court explained that the case did not conflict with the "parade of recent opinions" in several circuits and outlined the crucial procedural difference between *City of New York* and the other cases.[161] In state court, federal preemption must be raised as an affirmative defense and therefore is not truly an issue in a case until it is raised in the defendant's answer to the complaint.[162] Because a motion to remove a case to federal court is usually brought before the defendant even answers the complaint, the defendants in the state cases had not even formally raised the defense of federal preemption when their removal motions were adjudicated.[163] In those cases, "[t]he single issue [was] whether the defendants' anticipated defenses could

151. City of Hoboken, 45 F.4th at 707.
152. U.S. Const. art. III, § 2, cl. 1.
153. Dutcher v. Matheson, 733 F.3d 980, 985 (10th Cir. 2013).
154. *E.g.*, City of Hoboken, 45 F.4th at 707.
155. *Id*.
156. *See Dutcher*, 733 F.3d at 968.
157. *Id*.
158. *See id*.
159. City of New York v. Chevron Corp., 993 F.3d 81, 86 (2d Cir. 2021).
160. *See id.* at 92.
161. *Id*.
162. *Id.* at 94.
163. *Id*.

singlehandedly create federal-question jurisdiction."[164] Because *City of New York* was filed in federal court in the first place, the Second Circuit was "free to consider the Producers' preemption defense on its own terms, not under the heightened standard unique to the removability inquiry."[165]

One can only guess whether the case might have proceeded differently had the City's counsel elected to file the case in state court rather than federal court. Filing the case in federal court led to a shorter litigation which may have saved the parties money in comparison to similar cases filed in state court.[166] Had the case been filed in state court initially the Producers likely would have sought removal to federal court, which would have added a long and expensive legislative skirmish.[167] If the case were remanded to state court, a long and costly trial might have ended with the case dismissed on the same preemption grounds found by the Second Circuit in *City of New York*.[168] However, filing in state court might have been worth a try. Even if a plaintiff ultimately prevails in a similar case in another circuit, this type of action will remain unavailable in the Second Circuit because of *City of New York*.[169]

The analytical contrast between a case filed in state court and federal court could be seen clearly in the Tenth Circuit's opinion in *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc*.[170] In that case, the County of Boulder and other plaintiffs brought suit against producers of fossil fuels, alleging they had "contributed significantly to the changing climate in Colorado by producing, marketing, and selling fossil fuels."[171] Like the *City*, the plaintiffs in *County of Boulder* brought claims under state law including public nuisance, private nuisance, and trespass.[172] Unlike *City of New York*, the plaintiffs in *County of Boulder* brought their action in Colorado state court.[173] Yet where the court in *City of New York* found ordinary preemption and dismissed the case, the Tenth Circuit failed to find complete preemption and remanded the case for continuing proceedings in state court.[174] The court analyzed the same two cases as were analyzed in *City of New York, AEP* and *Kavalina*, in considering whether complete preemption of the County of Boulder's state law claims was created by the CAA.[175] The Second Circuit's preemption analysis found the CAA left no room for the operation of federal or state common law.[176] The Tenth Circuit did not find complete preemption.[177] The Tenth Circuit explained that the CAA did not meet the test for complete preemption because the

164. *Id*.
165. *Id*.
166. *See id.* at 94.
167. *See id*.
168. *See id.*
169. *See id.* at 85.
170. Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1262 (10th Cir. 2022).
171. *Id.* at 1247.
172. *Id.* at 1248.
173. *Id*.
174. *Id.* at 1246.
175. *Id*.
176. *Id.* at 1261.
177. *Id*.

CAA did not allow the plaintiffs a federal cause of action, and whether the CAA preempted state law in the ordinary sense did not matter.[178] "Because *ordinary* preemption can never serve as a basis for removal, a state lawsuit brought under state law in the transboundary pollution context could be removed by means of a federal question only through the doctrine of *complete* preemption."[179] The court held that federal common law could never meet the test for complete preemption because it expresses no intent of Congress, and "because the federal common law does not *completely* preempt state law, removal is not warranted under the artful pleading or complete preemption exception to the well-pleaded complaint rule."[180] Whereas the court in *City of New York* could directly analyze the Producers' preemption defense, the Tenth Circuit was bound to remand *County of Boulder* to Colorado state court.[181]

Though *City of New York* binds only the courts in the Second Circuit, the case may give caution to plaintiffs in the other circuits, none of which have directly considered the issues in the case. However, some other circuits have hinted at disagreement with the Second Circuit's analysis.[182] For example, in *Rhode Island* the First Circuit seemed to call into question key elements of the federal common law analysis in *City of New York*.[183] The First Circuit referred to *Milwaukee I* and *Milwaukee II*, cases upon which the Second Circuit heavily relied in *City of New York*, as "some old Supreme Court cases that once (or possibly) recognized federal common law in the context of interstate pollution and greenhouse-gas emissions."[184] The *Rhode Island* court also cast doubt on the reasoning in *City of New York* that applying state tort law would create intolerable federalism problems.[185] Unlike the Second Circuit, the court in *Rhode Island* refused to recast its case as a dispute over emissions rather than production and marketing, a central theme of *City of New York*.[186] These statements in *Rhode Island* are not conclusive evidence of disagreement with *City of New York*, but they do show that the First Circuit did not find their plaintiff's state law claims as implausible as did the court in *City of New York*.

The Fourth Circuit expressed both direct and implied disagreement with key reasoning of *City of New York* in the *Baltimore* case.[187] Like the First Circuit, the Fourth Circuit declined to recharacterize the suit in *Baltimore* as a suit over emissions rather than production and marketing, as the *City of New York Court* had done.[188]

178. *Id.*

179. *Id.*

180. *Id.* at 1262.

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

182. *E.g.*, Rhode Island v. Shell Oil Prod. Co., 35 F.4th 44 (1st Cir. 2022).

183. *Id.* at 55.

184. *Id.*

185. Rhode Island, 35 F.4th at 55 ("And from there, [the defendants] intimate that applying state law in this area would upset our constitutional scheme.").

186. *Id.* at 55 ("Put aside how the federal common law they bring up does not address the type of acts Rhode Island seeks judicial redress for . . . Even accepting the Energy Companies' description of Rhode Island's claims as being "transboundary pollution" claims (again, just for argument's sake)…").

187. Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022).

188. *Id.* at 200.

The *Baltimore* court explained that "the Second Circuit affirmed the dismissal [of the City's suit] after characterizing the complaint as seeking liability for 'global greenhouse gas emissions' and *'the effects of emissions made around the globe over the past several hundred years' . . . City of New York* does not pertain to the issues before us."[189] The court distinguished the two cases, though the cases' complaints stated nearly identical claims.[190] The cases were distinguished based only on the *New York* court's recharacterization of its case.[191] The court in *Baltimore* also directly criticized the reasoning of *City of New York* on the issue of applying federal common law.[192] The court reasoned that "*City of New York* suffers from the same legal flaw as Defendants' arguments: [i]t fails to explain a significant conflict between the state-law claims before it and the federal interests at stake *before* arriving at its conclusions."[193] The *Baltimore* court further noted that "[b]esides referencing statutes acknowledging policy goals, the [*New York*] decision does not mention any obligatory statutes or regulations explaining the specifics of energy production, economic growth, foreign policy, or national security, and how New York law conflicts therewith."[194]

The reasoning in *Rhode Island* and *Baltimore* offered plaintiffs outside the Second Circuit a ray of hope, but also left the law unsettled. Cases similar to *New York* are weaving their way through the state courts in several circuits.[195] Several possibilities exist for future development in the law. One possibility is that the U.S. Supreme Court will grant certiorari in one or more cases and resolve these issues, saving the parties from further uncertainty and litigation costs. This outcome is made less likely by the lack of a direct circuit split, which is often a catalyst for a grant of certiorari. A second possibility is that the cases against fossil fuel producers outside of the Second Circuit will be allowed to run their course in state court and a patchwork of common law will exist from state to state redressing these claims. The price of losing will be staggeringly high for both the public sector plaintiffs and the corporate fossil fuel producers because someone will have to bear the massive costs for which these plaintiffs seek redress. Forcing the corporations to bear the costs in some states while in other states the costs are borne by the public sector will probably be untenable. Tremendous political pressure will be created within the jurisdictions in which the Producers have no liability and the taxpayers are forced to bear the cost. Eventually the United States Supreme Court will probably need to decide whether these state law tort claims are preempted.

189. *Id.* at 202–03 (citing City of New York v. Chevron Corp., 993 F.3d 81, 89, 91–92, 103 (2d Cir. 2021)).

190. *See id*.

191. *Id*.

192. *Id*.

193. *Id.* at 203.

194. *Id*.

195. *See, e.g.*, Rhode Island v. Shell Oil Prod. Co., 35 F.4th 44 (1st Cir. 2022).

CONCLUSION

The Second Circuit is the only court that has fully analyzed the issues raised in *City of New York*, and the court's analysis was persuasive.[196] The Producers' production and marketing activities contributing to the City's injuries have been heavily federally regulated for decades.[197] If state courts are allowed to create common law rules that effectively regulate the Producers, those rules could conflict with federal energy and environmental policy.[198] Because climate change is a worldwide problem, state common law rules could also create problems of federalism because energy policy necessarily involves international diplomacy, a Constitutional power granted exclusively to the federal government.[199] However, only the Second Circuit has directly considered these issues and some other circuits have suggested disagreement with its analysis.

Ultimately a common rule of decision will be necessary. The costs of global climate change will be astounding. Over the coming decades courts will be called upon to allocate these costs between parties. *City of New York v. Chevron Corp.* and similar cases were merely the opening skirmishes in what is sure to be a protracted battle. The Second Circuit has held that because of the worldwide scope and massive costs of these cases, federal law must supplant state law in deciding the issues.[200] Only time will tell whether that view prevails as more courts consider the issue.

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

197. *Id.* at 87.

198. *See id.* at 87–88.

199. *See id.* at 88.

200. *See id.* at 86.