

*BOARD OF COUNTY COMMISSIONERS OF BOULDER
COUNTY V. SUNCOR ENERGY (U.S.A.) INC.: A FUTURE
FOR CLIMATE CHANGE LITIGATION?*

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INTRODUCTION

Tired of waiting for federal action on climate change, states and municipalities have started taking the lead on climate change policy.¹ As part of this effort, states and municipalities have begun bringing state common law claims against major emitters of greenhouse gases.² Recently, in *Board of County Com-*

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1. Wilson Fong & Braedon Larson, *State Climate Policy Trends: Action Amidst Inaction*, CLIMECo (July 28, 2022), <https://perma.cc/5QT4-F5Y>. *But see* Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022) (demonstrating federal action on climate change, though the action was passed through budget reconciliation, limiting the comprehensiveness of the climate change action).

2. *See* Mayor & City Council of Balt. v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) (appeal consolidating six actions);

missioners of Boulder County v. Suncor Energy (U.S.A.) Inc.,³ the Tenth Circuit held that climate change-related claims for public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado Consumer Protection Act,⁴ and civil conspiracy should be heard in state court.⁵ If successful, the litigation would not enjoin major emitters' actions but could force emitters to internalize costs by holding them accountable for past, present, and future harms caused.⁶ While the Tenth Circuit reached a decision in line with precedent and most of its sister circuits, it chose not to directly grapple with arguments advanced by the Second Circuit in *City of New York v. Chevron Corp.*,⁷ which kept similar claims in federal court and then dismissed the claims. The Supreme Court recently, rightly, denied a writ of certiorari in this case.⁸ Meanwhile, the Second Circuit could defeat the appearance of a circuit split by siding with its sister circuits in *Connecticut v. Exxon Mobil Corp.*⁹

The debate over whether these claims can proceed in state court will have major implications for climate change litigation. In the absence of federal leadership, the states are best equipped to deal with these claims and can rely on the experimentation and innovation that federalism enables. State courts' deep understanding of the common law will empower states to adapt to new legal needs created by climate change. Further, in response to a federal judiciary actively hostile to environmental protection,¹⁰ an executive branch with its lead environ-

Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44 (1st Cir. 2022); City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101 (9th Cir. 2022) (consolidating two actions); City of Hoboken v. Exxon Mobil Corp., 45 F.4th 699 (3d Cir. 2022); Minnesota v. Am. Petroleum Inst., 63 F.4th 703 (8th Cir. 2023); Delaware v. BP Am. Inc., 578 F. Supp. 3d 618 (D. Del.), *aff'd sub nom.* City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022); Connecticut v. Exxon Mobil Corp., No. 3:20-CV-1555, 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal docketed*, No. 21-1446 (2d Cir. June 9, 2021); City of Annapolis v. BP P.L.C., No. 21-00772, 2022 WL 4548226 (D. Md. Sept. 29, 2022), *appeal docketed*, No. 22-02082 (4th Cir. Oct. 14, 2022) (consolidating two actions); City of New York v. Exxon Mobil Corp., No. 21-CV-04807 (S.D.N.Y. filed May 28, 2021); City of Oakland v. BP P.L.C., No. 17-06011, 2022 WL 14151421 (N.D. Cal. Oct. 24, 2022), *appeal docketed*, No. 22-16810 (9th Cir. Nov. 25, 2022) (consolidating two actions); Cnty. of Charleston v. Brabham Oil Co., No. 20-3579 (D.S.C. filed Oct. 9, 2020); District of Columbia v. Exxon Mobil Corp., No. 20-1932, 2022 WL 16901988 (D.D.C. Nov. 12, 2022), *appeal docketed*, No. 22-07163 (D.C. Cir. Nov. 30, 2022); Pacific Coast Fed'n of Fishermen's Ass'ns v. Chevron Corp., No. 18-CV-7477 (N.D. Cal. filed Dec. 12, 2018); Vermont v. Exxon Mobil Corp., No. 21-CV-00260 (D. Vt. filed Oct. 22, 2021).

3. 25 F.4th 1238 (10th Cir. 2022).

4. Col. Rev. Stat. § 6-1-105 *et seq.*

5. *Suncor*, 25 F.4th at 1246.

6. *Id.* at 1259–65.

7. 993 F.3d 81 (2d Cir. 2021).

8. Petition for a Writ of Certiorari, *Suncor*, 25 F.4th 1238 (No. 19-1330).

9. Civ. No. 21-1446 (D. Conn. June 2, 2021).

10. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (limiting the methods EPA can use to address climate change).

mental agency limited in the fight against climate change,¹¹ and an ineffective federal legislature,¹² state governments and courts may be the only avenue for the United States to save itself from climate disaster.

I. *BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY V. SUNCOR ENERGY (U.S.A.) INC.*

A. *History of the Litigation*

Three Colorado municipal bodies—the Board of County Commissioners of Boulder County, the Board of County Commissioners of San Miguel County, and the City of Boulder (together, “the Municipalities”)—sued Suncor Energy (U.S.A.) Inc., Suncor Energy Sales, Inc., Suncor Energy, Inc., and ExxonMobil Corporation (collectively, the “Energy Companies”) in state court, arguing that the companies “contributed significantly to the changing climate in Colorado by producing, marketing, and selling fossil fuels.”¹³ In their complaint, the Municipalities accused the Energy Companies of conducting fossil fuel activities that intensified human greenhouse gas emissions and altered the climate.¹⁴ The Municipalities contend that the Energy Companies’ fossil fuel activities have contributed to Colorado’s rising temperatures and extreme heat, shifted precipitation patterns and water availability, increased the likelihood of drought and wildfires, and amplified the risk to forest health and public health.¹⁵ The Municipalities are seeking compensatory damages, remediation, abatement, treble damages, and costs and attorney’s fees.¹⁶ The Municipalities are not seeking to enjoin any operations or stop or regulate emissions in Colorado or elsewhere.¹⁷

11. See Alice C. Hill, *What Does the Supreme Court’s Decision in West Virginia v. EPA Mean for U.S. Action on Climate?*, COUNCIL ON FOREIGN RELS. (July 19, 2022), <https://perma.cc/TSM3-FFZG> (detailing how EPA, among other agencies such as DOT, SEC, and NRC’s, current or future climate-focused policies may be endangered by the Court’s ruling in *West Virginia v. EPA*); Lisa Friedman, *Depleted Under Trump, a ‘Traumatized’ E.P.A. Struggles With Its Mission*, N.Y. TIMES (Jan. 23, 2023) (explaining the EPA’s struggles after 1,200 scientists and policy experts left EPA during the Trump Administration), <https://perma.cc/286K-QRRY>.

12. Fong & Larson, *supra* note 1 (detailing how states are taking the lead in the fight against climate change amidst congressional inaction).

13. *Suncor*, 25 F.4th at 1247.

14. Amended Complaint and Jury Demand at 30, Bd. of Comm’rs v. Suncor Energy, 405 F. Supp. 3d 947 (D. Colo. 2019) (No. 1:18-cv-01672) [hereinafter *Suncor* Complaint].

15. *Id.* at 35–46.

16. *Suncor*, 25 F.4th at 1248.

17. *Id.*

Thus far, the litigation has focused on the appropriate forum for the case. In 2018, after the Municipalities filed an amended complaint in state court,¹⁸ the Energy Companies filed a Notice of Removal in the United States District Court for the District of Colorado, citing seven separate grounds for removal,¹⁹ including one under the federal officer removal statute.²⁰ The Municipalities filed a Motion for Remand to return the case to state court.²¹ The district court granted the remand after finding the Energy Companies' arguments for removal insufficient on all grounds.²² The Energy Companies appealed the district court's decision, maintaining six of the seven grounds from their initial removal request.²³ The Tenth Circuit concluded it could review only one of the six claims, the one arising under the federal officer removal statute, and affirmed the lower court's decision on that basis while dismissing the rest of the appeal.²⁴ This decision would have allowed the case to proceed in state court. However, in *BP P.L.C. v. Mayor & City Council of Baltimore*,²⁵ a case dealing with similar removal issues, the energy companies involved appealed to the Supreme Court, which ruled that the Fourth Circuit had erred and that it did have the power to review the entire appeal.²⁶ In light of the *BP P.L.C.* decision, the Supreme Court remanded the *Suncor* case to the Tenth Circuit to review all six arguments in the appeal.²⁷

B. *The 2022 Tenth Circuit Ruling*

In its second review of the case, the Tenth Circuit affirmed the district court's decision on all grounds.²⁸ In their appeal of the district court's decision, the Energy Companies had raised six grounds for federal jurisdiction.²⁹ Five grounds fall under both 28 U.S.C. § 1441,³⁰ the general removal statute, and 28 U.S.C. § 1331,³¹ the federal question statute, and one falls under 28 U.S.C.

18. See *Suncor* Complaint, *supra* note 14.

19. Notice of Removal at 2–5, *Suncor*, 405 F. Supp. 3d 947 (No. 1:18-CV-06172).

20. See *id.* at 30–33; 28 U.S.C. § 1442(a)(1).

21. Plaintiff's Notice of Motion and Motion to Remand, *Suncor*, 405 F. Supp. 3d 947 (No. 1:18-cv-01672).

22. *Suncor*, 405 F. Supp. 3d at 954.

23. Bd. of Cnty. Comm'rs v. *Suncor* Energy (U.S.A.), 965 F.3d 792, 798 (10th Cir. 2020).

24. *Id.*

25. 141 S. Ct. 1532 (2021).

26. *Id.* at 1543.

27. *Suncor* Energy (U.S.A.) Inc., v. Bd. of Cnty. Comm'rs, 141 S. Ct. 2667, 2667 (2021) (mem.).

28. Bd. of Cnty. Comm'rs v. *Suncor* Energy (U.S.A.), 25 F.4th 1238, 1246 (10th Cir. 2022).

29. *Id.* at 1249.

30. 28 U.S.C. § 1441.

31. *Id.* § 1331. Despite similar language, § 1331 is more restrictive than Article III's jurisdictional grant. *Suncor*, 25 F.4th at 1255. Therefore, Congress has the power to expand or

§ 1442,³² the federal officer removal statute.³³ The five claims under §§ 1441 and 1331 were that (1) the claims arise under federal common law, (2) the Clean Air Act (“CAA”)³⁴ completely preempted the Municipalities’ state law claims, (3) the claims necessarily raised substantial federal issues, (4) that there was federal enclave jurisdiction,³⁵ and (5) that the Outer Continental Shelf Lands Act (“OCSLA”)³⁶ established original federal jurisdiction over the claims.³⁷ The claim under § 1442 was that Exxon, one of the Energy Companies, acted under a federal officer.³⁸

1. *Standard of Review*

Writing for a unanimous panel, Judge McHugh detailed the standard of review before turning to the six grounds for removal.³⁹ For the standard of review, Judge McHugh noted that federal courts “are courts of limited jurisdiction”⁴⁰ and, given the statutes before the court, Judge McHugh pointed to the Supreme Court’s “deeply felt and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes.”⁴¹ Additionally, “only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.”⁴² The Tenth Circuit reviewed the case *de novo*.⁴³

narrow the statute to exclude or encompass the case at hand. *See* BENJAMIN M. BARCZEWKI, CONG. RSCH. SERV., LSB10805, CLIMATE LIABILITY SUITS: IS THERE A PATH TO FEDERAL COURT? (Aug. 12, 2022), <https://perma.cc/YMH9-YVZW>.

32. 28 U.S.C. § 1442.

33. *Suncor*, 25 F.4th at 1249.

34. 42 U.S.C. §§ 7401 *et seq.*

35. Federal enclave jurisdiction is derived from the idea that “[t]he United States has power and exclusive authority ‘in all Cases whatsoever . . . over all places purchased’ by the government ‘for the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings’ Such places are ‘federal enclaves’ within which the United States has exclusive jurisdiction.” *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998) (citing U.S. Const. art. I, § 8, cl. 17).

36. 43 U.S.C. §§ 1331 *et seq.*

37. *Suncor*, 25 F.4th at 1249.

38. *Id.* at 1250. While Exxon was the only party that argued it acted under a federal officer, the entire claim could have been removed to federal court if Exxon had proven successful. *Id.* at 1250 n.2 (citation omitted).

39. *Id.* at 1249–50.

40. *Id.* at 1250 (citing *Gunn v. Minton*, 568 U.S. 251, 256 (2013)).

41. *Id.* (citation omitted).

42. *Id.* (citation omitted).

43. *Id.*

2. Federal Common Law and Complete Preemption Jurisdiction

The first two claimed grounds for removal—that the claims arise under federal common law and that the CAA completely preempts the state law claims—are interconnected and provide insight into why the Energy Companies wanted to remove this case to federal court. In *Erie Railroad Co. v. Tompkins*,⁴⁴ the Supreme Court held that “there is no federal general common law.”⁴⁵ After *Erie*, in *Illinois v. City of Milwaukee* (“*Milwaukee I*”),⁴⁶ the Court explicitly acknowledged the continued existence of federal common law, stating “[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.”⁴⁷ The *Erie* decision gave way to a new form of federal common law, which addresses “subjects within national legislative power where Congress has so directed.”⁴⁸ However, in the follow-up case to *Milwaukee I*,⁴⁹ the Court held the passage of the Clean Water Act⁵⁰ displaced federal common law concerning state claims against another party for water pollution.⁵¹ Similarly, in *American Electric Power Co. v. Connecticut* (“*AEP*”),⁵² the Court held that, in the aftermath of *Massachusetts v. EPA*,⁵³ the CAA displaced “any federal common-law right to seek abatement of carbon dioxide emissions from fossil-fuel fired powerplants.”⁵⁴ Therefore, if the Energy Companies could remove this case to federal court and have federal common law apply in lieu of state common law, they could then argue that the CAA displaced these claims.⁵⁵

This outcome is plausible, especially considering *City of New York v. Chevron Corp.*,⁵⁶ where the Second Circuit dismissed claims similar to those in *Suncor*. The facts and claims of *City of New York* were similar to those in *Suncor*, but the procedural posture was different since the *City of New York* was filed in federal court under diversity jurisdiction.⁵⁷ In *City of New York*, the Second

44. 304 U.S. 64 (1938).

45. *Id.* at 78.

46. 406 U.S. 91 (1972).

47. *Id.* at 103.

48. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) (citing Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.119 (1964)).

49. 451 U.S. 304 (1981).

50. 33 U.S.C. § 1251 *et seq.*

51. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

52. 564 U.S. 410 (2011).

53. 549 U.S. 497 (2007).

54. *Am. Elec. Power Co.*, 564 U.S. at 424.

55. *See City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) (holding the CAA displaced claims similar to those in *Suncor*).

56. 993 F.3d 81 (2d Cir. 2021).

57. *Id.* at 94.

Circuit held that federal common law, rather than New York law applied.⁵⁸ The Second Circuit then held that the CAA displaced federal common law dealing with damages relating to climate change and affirmed the lower court's dismissal of the claims.⁵⁹

With these principles in the background, Judge McHugh held that the claims brought by the Municipalities did not arise under the federal common law.⁶⁰ Judge McHugh reasoned that the federal common law of nuisance, which would have governed transboundary pollution prior to the CAA, no longer exists in this area of the law.⁶¹ She then cited Ninth Circuit precedent, contending that “[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law.”⁶² Judge McHugh then determined that federal common law could not have preempted state common law because complete preemption of state common law requires Congressional intent, which is inherently absent from judge-made common law.⁶³

Subsequently, Judge McHugh held that the CAA also does not completely preempt state-law claims.⁶⁴ She stated that for the CAA to completely preempt these claims, it must provide the “exclusive cause of action for the claim asserted.”⁶⁵ She noted that the CAA explicitly preserves some state common law causes of action⁶⁶ and that the claims at issue in the litigation before the court pertain to rights not addressed under the CAA.⁶⁷ Therefore, the Tenth Circuit determined, the CAA does not completely preempt these claims.⁶⁸

58. *Id.* at 89–95.

59. *Id.* at 95–98.

60. *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1261–62 (10th Cir. 2022).

61. *Id.* at 1260.

62. *Id.* at 1261 (citing *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 854 (9th Cir. 2012)).

63. *Id.* at 1261–62.

64. *Suncor*, 25 F.4th at 1263.

65. *Id.*

66. *See id.* The CAA provides: “Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief.” 42 U.S.C. § 7604(e).

67. Rather, the Municipalities strategically selected their claims to avoid this issue: “[t]he Municipalities’ claims do not concern CAA emissions standards or limitations, government orders regarding those standards or limitations, or federal air pollution permits. Indeed, their suit is not brought against emitters. Rather, the Municipalities’ claims are premised on the Energy Companies’ activities of ‘knowingly producing, promoting, refining, marketing, and selling a substantial amount of fossil fuels used at levels sufficient to alter the climate, and misrepresenting the dangers.’” *Suncor*, 25 F.4th at 1264 (citing Brief of Appellants at 173, *Suncor*, 25 F.4th 1238 (No. 19-01330)).

68. *Id.* at 1263–65.

3. Substantial Federal Question Jurisdiction

The court held the Municipalities' claims did not raise a substantial federal question.⁶⁹ To warrant substantial federal question jurisdiction, the "federal issue" must be "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."⁷⁰ The court determined that the claims were neither "necessarily raised" nor "substantial."⁷¹ To decide whether a substantial federal question is "necessarily raised," the court determined whether "the issue is an 'essential element' of a plaintiff's claim."⁷² Finding the Municipalities' claims grounded in traditional state-law causes of action that do not rely on any federal policy or regulation, the court determined the case did not necessarily raise a federal issue.⁷³

Despite failing the "necessarily raised" element, the court continued its analysis and determined the Energy Companies' arguments failed both substantiality tests laid out by the Supreme Court—the *Gunn*⁷⁴ and *Merrell Dow*⁷⁵ tests. The *Gunn* substantiality test instructs courts to "look to the importance of the issue to the federal system to determine whether it is substantial."⁷⁶ The court reasoned that this case was not "a nearly 'pure issue of [federal] law,'" and that, therefore, the issue did not rise to the requisite substantiality levels necessary under *Gunn* substantiality.⁷⁷

The second substantiality test is the *Merrell Dow* test, which instructs courts to "consider whether the relevant federal law provides a private right of action or preempts state causes of action."⁷⁸ The court held the Energy Companies' appeal failed this test too, pointing, in part, to the absence of a congressionally crafted remedy.⁷⁹ Continuing the *Merrell Dow* analysis, the court held "whatever federal issues exist 'd[o] not fundamentally change the state tort nature of the action."⁸⁰ Determining the claims failed the "necessarily raised" and both substantiality tests, the court held substantial federal question jurisdiction was an insufficient basis for removal.⁸¹

69. *Id.* at 1265–71.

70. *Id.* at 1265 (citing *Gunn v. Minton*, 568 U.S. 251, 258 (2013)).

71. *Id.* at 1266.

72. *Id.* (citation omitted).

73. *Id.* at 1267.

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

75. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 812 (1986).

76. *Suncor*, 25 F.4th at 1267 (citing *Gunn*, 568 U.S. at 260). *See also* *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 310 (2005) (applying a similar test).

77. *Suncor*, 25 F.4th at 1268 (citation omitted).

78. *Id.* at 1267–68 (citing *Merrell Dow*, 478 U.S. at 812).

79. *Id.* at 1270.

80. *Id.* (citation omitted).

81. *Id.* at 1271.

4. *Federal Enclave Jurisdiction*

The Tenth Circuit also held that federal enclave jurisdiction was insufficient grounds for removal in this case.⁸² Under Tenth Circuit precedent, “[s]tate-law ‘actions which arise from incidents occurring in federal enclaves may be removed to federal district court as a part of federal question jurisdiction.’”⁸³ Federal enclaves are “land over which the federal government exercises legislative jurisdiction.”⁸⁴ This doctrine typically requires “that *all* pertinent events [take] place on a federal enclave.”⁸⁵ The Energy Companies argued that alleged injuries in Rocky Mountain National Park and the San Miguel River in Uncompahgre National Forest justified removal under federal enclave jurisdiction.⁸⁶ However, Judge McHugh dismissed this portion of the appeal because Rocky Mountain National Park is mentioned only in passing in the Municipalities’ complaint, Uncompahgre National Forest is not mentioned at all, and San Miguel River is not a federal enclave.⁸⁷

5. *Outer Continental Shelf Lands Act Jurisdiction*

Judge McHugh affirmed the district court’s decision that the OCSLA did not provide a basis for subject matter jurisdiction in this case.⁸⁸ Exxon, one of the Energy Companies, contended that its “decades-long [Outer Continental Shelf (“OCS”)] fossil-fuel operations pursuant to federal leases” required this case to be heard in federal court.⁸⁹ The OCSLA grants federal courts jurisdiction for “cases and controversies arising out of, or in connection with . . . any operation conducted on the [OCS] which involves exploration, development, or production of [OCS] minerals.”⁹⁰ To determine if the OCSLA applied in this case, Judge McHugh used the Fifth Circuit’s two-part test.⁹¹ The second part of the test, “whether the case ‘arises out of or in connection with the OCS operation,’” was in dispute in this case.⁹² This test requires only a “but-for” connection⁹³ and is intended to cover a “wide range of activity occurring beyond

82. *Id.* at 1250–54, 1271–75.

83. *Id.* at 1271 (citation omitted).

84. *Lockhart v. MVM, Inc.*, 97 Cal. Rptr. 3d 206, 210 (Cal. Ct. App. 2009).

85. *Suncor*, 25 F.4th at 1271 (citation omitted).

86. Brief of Appellants at 44, *Suncor*, 25 F.4th (No. 19-1330).

87. *Suncor*, 25 F.4th at 1271.

88. *Id.* at 1275.

89. *Id.* at 1272.

90. 43 U.S.C. § 1349(b)(1).

91. *Suncor*, 25 F.4th at 1272 (citation omitted).

92. *Id.* at 1272. The first part of the test is whether “the activities that caused the injury constituted an ‘operation’ ‘conducted on the [OCS]’ that involved the exploration and production of minerals.” *Id.*

93. *Id.* at 1272 (citation omitted).

the territorial waters of the states.”⁹⁴ However, despite the broad test, Judge McHugh found that injuries in Colorado, a landlocked state, were too far removed from the OCS to establish a sufficient nexus under OCSLA.⁹⁵

6. *Federal Officer Removal Jurisdiction*

Finally, as it did when first reviewing the case, the Tenth Circuit held that Exxon’s OCS leases did not make this case removable under federal officer removal jurisdiction.⁹⁶ Under the federal officer removal statute, a state court civil action is removable if it “is against or directed to . . . any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office.”⁹⁷ The basic purpose of the statute is “to protect against the interference with federal operations that would ensue if a state were able to arrest federal officers and agents acting within the scope of their authority and bring them to trial in a state court for an alleged state-law offense.”⁹⁸ Unlike § 1441, this removal statute is meant to be construed liberally to achieve its purpose.⁹⁹ The statute was designed to protect federal officers but can be used for private defendants, provided that “(1) they acted under the direction of a federal officer, (2) the claim has a connection or association with government-directed conduct, and (3) they have a colorable federal defense to the claim or claims.”¹⁰⁰ Judge McHugh held that Exxon’s contractual relationship with the U.S. Department of the Interior did not rise to its agreeing to help carry out the duties or tasks of a federal superior.¹⁰¹

Having rejected each of the Energy Companies’ argued grounds for removal, the court affirmed the lower court’s decision to remand the Municipalities’ claims to be heard in state court.¹⁰²

94. *Id.* (citation omitted).

95. *Id.* at 1273–74. While acknowledging that the Fifth Circuit allowed removal for disputes “one step removed from the actual transfer of minerals to shore,” the Tenth Circuit held this case was too many steps removed. *Id.* at 1274. Due to the jurisdictions within the Tenth Circuit’s landlocked nature, the court could not find any instance of a Tenth Circuit opinion citing to 43 U.S.C. § 1349(b)(1). *Id.*

96. *Id.* at 1250.

97. 28 U.S.C. § 1442(a)(1).

98. *Suncor*, 25 F.4th at 1251 (citing *Mayor & City Council of Balt. v. BP P.L.C.*, 952 F.3d 452, 461 (4th Cir. 2020)).

99. *Id.* (citation omitted).

100. *Id.*

101. *Id.* at 1253.

102. *Id.* at 1275.

II. STATE COMMON LAW, FEDERALISM, AND CLIMATE CHANGE

A. *The Landscape of Climate Change-Related State Common Law Claims*

In response to the Tenth Circuit's second decision in this case, the Energy Companies filed a petition for another writ of certiorari before the Supreme Court.¹⁰³ In this petition for certiorari, the Energy Companies proposed two questions presented.¹⁰⁴ The first continues their federal common law argument, and the second advances their argument that the Municipalities were merely artfully pleading what was really a federal common law claim as a state common law claim to avoid federal court.¹⁰⁵ The Energy Companies argued the Court should grant certiorari because the Tenth Circuit decision is incorrect, implicates a circuit conflict, avoids recusal issues,¹⁰⁶ and is the timeliest case the Court can hear on this dispute.¹⁰⁷

The Court called for the views of the Solicitor General.¹⁰⁸ Although this request had indicated an increased likelihood of granting certiorari because empirical research suggests that when the Supreme Court calls for the Solicitor General's views in a paid case like *Suncor*, it is at least forty-six times more likely to grant certiorari, the Court did not grant the petition.¹⁰⁹ The Solicitor General's amicus brief argued that the Court should not grant certiorari and

103. Petition for Writ of Certiorari, *Suncor*, 25 F.4th 1238 (No. 19-1330).

104. *Id.* at I.

105. *See id.* The precise questions presented are (1) “[w]hether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate” and (2) “[w]hether a federal district court has jurisdiction under 28 U.S.C. § 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law.” *Id.* The Energy Companies concede that they must prevail on both questions to obtain a reversal on the Tenth Circuit's judgment. Reply Brief for the Petitioners for a Writ of Certiorari at 11, *Suncor*, 25 F.4th 1238 (No. 19-01330).

106. Justice Alito recused himself in the *BP* case. *See* 141 S. Ct. 1532 (2021). The *BP* case is parallel to *Suncor*, with similar outcomes and a pending petition for certiorari. *See Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022). The Energy Companies' rationale is that Justice Alito may again recuse himself in the *BP* case but may not need to in *Suncor*, as *Suncor* implicates a different and smaller group of defendants. *See* Reply Brief for the Petitioners at 1–2, *Suncor*, 25 F.4th (No. 19-1330).

107. Reply Brief for Petitioners at 1–10, *Suncor*, 25 F.4th (No. 19-1330).

108. *Suncor Energy (U.S.A.) Inc., v. Bd. of Cnty. Comm'rs*, 143 S. Ct. 78 (2022) (mem.).

109. David C. Thompson and Melanie F. Wachtel, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the View of the Solicitor General*, 16.2 GEO. MASON L. REV. 237, 273–74 (2009). Paid cases are “those in which the filing party paid the Court's docketing fee instead of filing in forma pauperis.” *Id.* at 241.

that neither federal common law nor a federal statute overrides state common law in climate change-related nuisance suits.¹¹⁰

This Court has shown an aversion to deferring to the executive branch on when environmental issues should be heard. For example, in *Sackett v. EPA*,¹¹¹ the Court allowed judicial review of a wetland determination despite EPA's argument that "final action" had yet to occur.¹¹² Further, in *West Virginia v. EPA*,¹¹³ the Court stayed the Clean Power Plan before hearing the case on its merits, despite the fact that the Court "had never before granted a request to halt a regulation before review by a federal appeals court."¹¹⁴ Subsequently, when deciding *West Virginia v. EPA*¹¹⁵ on the merits, the Court disagreed with the Government's characterization that the dispute over the Clean Power Plan was moot and that the case no longer needed to be heard.¹¹⁶ The Court's reluctance to defer to the executive branch on when or whether to hear environmental cases matches the denial as the Solicitor General's recommendation did not dictate the Court's certiorari decision in *Suncor*.

Had the Supreme Court granted certiorari it would have had significant implications, as nearly two dozen similar cases are currently pending in federal courts.¹¹⁷ Almost all the appellate courts that have ruled on this issue have sided with the Tenth Circuit in *Suncor*.¹¹⁸ However, the Second Circuit in *City of New York*, due to a difference in procedural posture, came out against allowing state common law claims to proceed.¹¹⁹ The Energy Companies' main argument had been that, despite the difference in procedural posture, the holding in *Suncor* creates a circuit split with *City of New York*, thus justifying grant of certiorari.¹²⁰

The Second and Tenth Circuits acknowledged the disparate outcomes of the two cases but attributed the difference to the procedural posture of the two

110. Brief for the United States as Amicus Curiae at 6–7, *Suncor Energy (U.S.A.), Inc. v. Bd. of Cnty. Comm'rs*, 141 S. Ct. 2667 (2021) (No. 21-1550).

111. 566 U.S. 120 (2012).

112. *Id.* at 129.

113. 577 U.S. 1126 (2016).

114. Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), <https://perma.cc/JFC7-FHXF>.

115. 142 S. Ct. 2587 (2022).

116. *Id.* at 2606–07.

117. *See supra* note 2.

118. *See, e.g.*, *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 194 (4th Cir. 2022) (remanding the case back to state court); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 744 (9th Cir. 2022) (same); *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 51 (1st Cir. 2022) (same); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 706 (3d Cir. 2022) (same).

119. *City of New York v. Chevron Corp.*, 993 F.3d 81, 100 (2d Cir. 2021).

120. Petition for a Writ of Certiorari at 12–17, *Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022) (No. 19-1330).

cases.¹²¹ The *Suncor* case, along with most of the other similar cases, started in state court,¹²² whereas the City of New York filed its case in federal court under diversity jurisdiction.¹²³ Thus, the argument for the disparate outcomes was that the Second Circuit was not limited by “the heightened standard unique to the removability inquiry.”¹²⁴

The Tenth Circuit, through the procedural posture of the *Suncor* case,¹²⁵ avoided direct conflict with the Second Circuit’s decision in *City of New York*.¹²⁶ However, by using procedural posture to distinguish the cases, the courts glossed over critical disagreements between the two opinions. Both the Second and Tenth Circuits agreed that the CAA displaced federal common law.¹²⁷ However, the Second Circuit ruled the CAA’s displacement of federal common law did not resuscitate state-law claims.¹²⁸ The Tenth Circuit disagreed, agreeing with the Ninth Circuit’s logic that “[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law.”¹²⁹ The Second Circuit in *City of New York* argued that its ruling was reconcilable with that of the other circuits based on its different procedural posture since the City brought the case in federal court.¹³⁰ The answer to whether state common law applies after the CAA displaces federal common law is important to the future of climate change-related state common law claims.

Both the Supreme Court and the Second Circuit could resolve a potential circuit split. The Supreme Court could grant certiorari in a comparable case. Meanwhile, the Second Circuit could side with its sister circuits in the *Connect-*

121. *Suncor*, 25 F.4th at 1262; *City of New York*, 993 F.3d at 93–94.

122. See, e.g., *Mayor & City Council of Balt.*, 31 F.4th 178; *Cnty. of San Mateo*, 32 F.4th 733; *Shell Oil Prods.*, 35 F.4th 44; *City of Hoboken*, 45 F.4th 699.

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

124. *Id.* While the Tenth Circuit essentially limits its commentary on *City of New York* to distinguishing it on procedural posture, *Suncor*, 25 F.4th at 1262, the Fourth Circuit in *Baltimore* goes further, *Mayor & City Council of Balt.*, 31 F.4th at 203. The Fourth Circuit, while starting with the difference in procedural posture, critiques *City of New York*, arguing “[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.” *Id.*

125. *Suncor*, 25 F.4th at 1262.

126. 993 F.3d 81. The Second Circuit may soon address this question, as the United States District Court for the District of Connecticut agreed with the Tenth Circuit in a case with the same procedural posture as that in *Suncor*. *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555, 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal docketed*, No. 21-1446 (2d Cir. June 9, 2021).

127. *City of New York*, 993 F.3d at 98; *Suncor*, 25 F.4th at 1260.

128. *City of New York*, 993 F.3d at 98–99.

129. *Suncor*, 25 F.4th at 1261 (citing *Native Vill. of Kivalina v. Exxon Mobil Corp.*, 696 F.3d 849, 866 (9th Cir. 2012)).

130. *City of New York*, 993 F.3d at 94–95.

icut litigation pending before it, which, unlike *City of New York*, has the same procedural posture as *Suncor*.¹³¹

The Supreme Court correctly denied certiorari since there is no direct conflict between *Suncor* and *City of New York*, as they are distinguishable on procedural posture. Further, the Second Circuit should follow the lead of its sister circuits and allow claims brought in state court to remain in state court.

B. Federalism and State Common Law

Leaving this decision to state courts is essential to the American system of federalism and the efficacy of state common law. Further, state courts determining that climate change-related state common law claims may proceed is critical to our chances of defending the planet from climate change.

Traditional federalism dates back to the founding of the United States, with James Madison describing the federalist system as limiting the federal government to powers that were “few and defined,” while the states would control “all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”¹³² The federalist balance has shifted since the country was founded, generally concentrating more power within the federal government.¹³³ However, the balance still favors states in certain ways, since states retain plenary powers¹³⁴ and possess overall larger workforces.¹³⁵

Both the Second Circuit and the Tenth Circuit invoked principles of federalism in their decisions.¹³⁶ The Second Circuit stated that the CAA “employs a ‘cooperative federalis[m]’ approach, which places ‘primary responsibility for enforcement on state and local governments.’”¹³⁷ The CAA’s cooperative feder-

131. See *Connecticut*, 2021 WL 2389739.

132. THE FEDERALIST NO. 45 (James Madison). I refer to traditional federalism to distinguish it from the structure of cooperative federalism that defines the CAA. While they both allocate some authority to the states, cooperative federalism concentrates significantly more power in the hands of the federal government. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 205–06 (1st ed. 2004).

133. See Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 629–36 (1978) (describing how states in the eighteenth and nineteenth centuries had relatively more power than states do today); Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC’Y REV. 663, 679–81 (1980) (detailing five periods of federalism which led to “many areas of policy for which state and local government were responsible . . . becom[ing] strongly centralized”).

134. RICHARD BRIFFAULT ET AL., *STATE AND LOCAL GOVERNMENT LAW* 61 (9th ed. 2021).

135. See *id.* at 6. For example, in 2020, the federal government had a workforce of about 2.2 million, compared to the 16.9 million employees of the states. *Id.*

136. *City of New York v. Chevron Corp.*, 993 F.3d 81, 99 (2d Cir. 2021); *Bd. of Cnty. Comm’rs v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1267 (10th Cir. 2022).

137. *City of New York*, 993 F.3d at 99.

alism model empowers EPA to set national standards and delegate power to the states to achieve those standards.¹³⁸ The Second Circuit said New York City's claims, which the court characterized as an effort to bind all fifty states and the world to New York standards, does not fit in the "slim reservoir" of state law claims still available after the CAA.¹³⁹

The Tenth Circuit relied on traditional federalism to rebut the Energy Companies' claims that the Municipalities "aim[ed] to achieve through state tort law what they could not achieve in the federal legislative and regulatory process."¹⁴⁰ The court hinted that while this goal might be what the Municipalities had in mind, it adhered to the design of the American federalist system.¹⁴¹

The Tenth Circuit has the better read, for several reasons.

First, while climate change is a global issue, the focus of these cases is local. Contrary to the Second Circuit's characterization, New York City's claim does not seek to bind the world to its claims but rather recover compensation for damages that occurred in New York,¹⁴² a deeply local issue. The Municipalities in *Suncor* requested similar relief.¹⁴³ State and local governments are the most knowledgeable and best equipped to tailor local solutions to their local problems.¹⁴⁴

Second, in the absence of federal action on climate change, leaving these decisions to states empowers them to innovate ideas on how best to combat climate change.¹⁴⁵ Leaving this experimentation to individual states could also allow environmental policy to avoid the environmental regulatory whiplash commonplace in the federal government.¹⁴⁶ Of course, national efforts are important and implicate the federal courts, but the law should not hamper state courts' ability to experiment and vindicate claims under state law in the effort to

138. David M. Konisky & Neal D. Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 PUBLIUS: J. FEDERALISM 346, 348 (2018).

139. *City of New York*, 993 F.3d at 100.

140. *Suncor*, 25 F.4th at 1267.

141. *See id.*

142. Amended Complaint at 73–74, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 1:18-cv-00182).

143. *Suncor* Complaint, *supra* note 14, at 103.

144. HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 3–4 (1996).

145. *See* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 182–83 (2006); *see also* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (describing the federal system as one that provides states the opportunity to serve as laboratories and experiment with new policies) (Brandeis, J., dissenting).

146. Richard J. Lazarus & Libby Dimenstein, *Stewart's Paradoxes of Liberty, Integrity, and Fraternity: Sobering Lessons from Covid-19 for Environmental Law*, 29 N.Y.U. ENV'T L. J. 543, 556 (2021) (discussing the abrupt shifts in federal environmental policy over the last several decades: "[w]hat one presidential administration would accomplish, the next would spend most of its time undoing.").

combat climate change. Amidst federal policy whiplash, states have been leading on environmental issues since the 1990s¹⁴⁷ and should continue to do so. Further, allowing state courts to handle these claims provides for more opportunities for innovation in developing strategies to combat climate change. Deferring to states on climate change-related common law claims is also in line with the Court's emphasis on federalism over the last several decades.¹⁴⁸ The Tenth Circuit's decision allowing climate change-related nuisance claims to proceed in state court fits within the Court's jurisprudence and permits the benefits of federalism to percolate and combat climate change.

Third, these claims are also better left to the states because common law is traditionally the territory of the states.¹⁴⁹ While federal common law has played a minimal role since the 1930s¹⁵⁰ and statutes came to dominate federal decision-making, the common law remained an essential element of state decision-making.¹⁵¹ In the words of former Chief Judge Kaye, who sat on the New York Court of Appeals for fifteen years, "[t]hat state courts—not federal courts—are keepers of the common law has long been American orthodoxy."¹⁵² As such, "state courts regularly, openly, and legitimately speak the language of the common law whereas federal courts do not."¹⁵³

Finally, state courts are well-equipped to elucidate and develop common law related to climate change. They have dealt with world-altering circumstances before, as evidenced by state courts' long history of adapting nuisance law to changes in industry.¹⁵⁴ Additionally, state judges are typically elected¹⁵⁵

147. *Id.*

148. *See, e.g.,* *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (acknowledging that the Army Corps' interpretation of the Clean Water Act to cover a local sand and gravel pit may raise questions of federalism by giving the federal government too much power over states); *United States v. Morrison*, 529 U.S. 598, 617–19 (2000) (using principles of federalism to strike down the federal civil remedy in the Violence Against Women Act); *Shelby Cnty. v. Holder*, 570 U.S. 529, 534 (characterizing the Voting Rights Act of 1965's requirement that certain states and localities must get federal approval for changes to their voting policy as "a drastic departure from basic principles of federalism"). The Court's emphasis on federalism has taken a decidedly conservative bent but should apply equally in cases where more liberal outcomes are possible.

149. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 6 (1995).

150. *Supra* notes 45–47 and accompanying text.

151. Kaye, *supra* note 149, at 5–11.

152. *Id.* at 6.

153. *Id.* at 20.

154. *See* MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 74–78 (detailing how state courts adapted nuisance doctrine throughout the nineteenth and twentieth centuries to accommodate industrialization).

155. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), <https://perma.cc/PYE2-LBCG> (noting that thirty-eight states use some form of election to select judges to their high court).

and in open dialogue with state legislatures,¹⁵⁶ putting them in position to consider the needs of society in adjusting the common law. Given the federal judiciary's aversion to reinterpreting settled statutes, federal courts' preemption of state courts is likely forever.¹⁵⁷ Congress could of course also address the issue, though that will likely take a similarly long time.¹⁵⁸ Therefore, the federal judiciary should defer to state courts' relationships with the common law and the people, which puts state courts in an ideal situation to make decisions on topics as pressing as climate change.

Given this understanding of common law, the Second Circuit's decision is concerning. Whether the federal courts or state courts decide a common law claim matters. The Second Circuit detailed this issue as a relatively innocuous one, hinting that its decision hardly affected the overall outcome, as the other circuits were simply allowing state courts to make the determination, which may well come out the same.¹⁵⁹ However, even if the ultimate decisions are the same, and there is no guarantee they will be, the decision should be left to the party more capable of making the decision. The common law is meant to grow and adapt as society's concept of justice changes. Chief Judge Kaye puts this idea another way, saying, "[the common law] proceeds and grows incrementally, in a restrained and principled fashion, to fit into a changing society."¹⁶⁰ Climate change is changing society. The courts need the parties most adept at adapting to change to make decisions in response.

Courts' use of the CAA to preempt state nuisance law, as the Second Circuit did, is inappropriate. The structure of the American federal system places states at the center and acknowledges that the states have plenary power.¹⁶¹ Congress must be clear in preempting a state power.¹⁶² Therefore, part of the analysis to determine preemption requires looking into congressional intent.¹⁶³ The Congress that drafted the CAA did not, and likely could not, envision it as a statute that would combat climate change.¹⁶⁴ When Congress enacted the CAA, "the study of climate change was in its infancy,"¹⁶⁵ suggesting

156. Kaye, *supra* note 149, at 23.

157. *See, e.g.*, Neal v. United States, 516 U.S. 284, 295 (1996) (stating that the Court gives "great weight to stare decisis in the area of statutory construction [because] 'Congress is free to change this Court's interpretation of its legislation'").

158. *See* Fong & Larson, *supra* note 1.

159. *See* City of New York v. Chevron Corp., 993 F.3d 81, 94–95 (2d Cir. 2021).

160. Kaye, *supra* note 149, at 5.

161. *See* BRIFFAULT ET AL., *supra* note 134, at 61.

162. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); Nixon v. Mo. Mun. League, 541 U.S. 125, 141 (2004).

163. Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1256 (10th Cir. 2022).

164. Massachusetts v. EPA, 549 U.S. 497, 507–08 (2007) (detailing the nascency of climate change research at the time Congress passed the relevant CAA provisions).

165. *Id.* at 507.

the majority of Congress could not have anticipated the existence of a climate change-related state common law claim, let alone a cooperative federalist framework that preempted such claims.

Deferring to states on climate change-related common law claims is faithful to the principles of federalism. In the CAA, Congress did not express intent to preempt state approaches to climate law. Leaving the climate change battle to the states until Congress addresses the issue is the model on which our nation was built. Doing so allows states to rely on the flexible yet cautious nature of common law¹⁶⁶ to address climate change until the federal government starts acting on the climate crisis.

CONCLUSION

Countering the climate crisis is possibly the most important fight of our lives and, if unsuccessful, our last. The climate crisis jeopardizes the lives and livelihoods of billions of people and may soon become irreversible.¹⁶⁷ Fully decarbonizing by 2050 could save 74 million people from heat-related deaths alone,¹⁶⁸ and the total number from all climate change-related harms is likely even higher.¹⁶⁹

The United States is historically the world's largest emitter of greenhouse gases¹⁷⁰ and yet has done exceptionally little to counter the effects.¹⁷¹ On the federal level, Congress and the President have not played a meaningful environmental lawmaking role since 1990.¹⁷² Further, the Supreme Court has been actively hostile to federal government measures fighting climate change.¹⁷³ As Justice Kagan described in dissent in *West Virginia v. EPA*, the Court is will[ing] to sacrifice its ideals, such as textualism and judicial modesty, to limit the “bogeyman of environmental regulation.”¹⁷⁴ The federal government has

166. See Kaye, *supra* note 149, at 5.

167. JIM SKEA ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], *Summary for Policymakers* 11–12, in CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE (P.R. Shukla et al. eds., 2022), <https://perma.cc/PQR6-HY4U>.

168. Sigal Samuel, *The Supreme Court just Okayed Biden's "Social Cost of Carbon." It's Still Way Too Low.*, VOX, (May 27, 2022), <https://perma.cc/KEP3-YTQ4>.

169. *Id.*

170. *Global Emissions*, CTR. FOR CLIMATE & ENERGY SOLS., <https://perma.cc/L57Z-2ED7>.

171. Shannon Osaka, *Is the US Uniquely Bad at Tackling Climate Change?*, GRIST (Jan. 6, 2022), <https://perma.cc/23BQ-54P4>.

172. Lazarus & Dimenstein, *supra* note 146, at 556.

173. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2615–16 (2022). Not only did the Court strike down an important mechanism for deterring greenhouse gas emissions, but Justice Gorsuch's concurrence also hinted that Congress might not even be able to delegate such a power to the executive branch. *Id.* at 2617–18 (Gorsuch, J., concurring).

174. *Id.* at 2630 (Kagan, J., dissenting).

sent a clear message: it will not lead the United States, let alone the world, in combatting the climate crisis.

The task of leading the United States through the climate crisis, if it is to happen at all, will be directed by the states. States and municipalities have chosen climate change-related state common law claims as one avenue for holding massive polluters such as Exxon, historically one of the largest corporate emitters of greenhouse gases,¹⁷⁵ accountable. Though unable to enjoin or regulate these companies' emissions on a national or international scale due to Supreme Court interpretations of the CAA, states may be able to hold polluters accountable for past, present, and future damages and force these companies to internalize those costs.¹⁷⁶ In the absence of leadership from the federal government, states should be able to make these decisions for themselves.

The Tenth Circuit's decision faithfully adheres to the American federalist system and puts the United States in a more capable position to combat climate change. In leaving this decision to state courts, the Tenth Circuit ensured that the courts with the most profound understanding of the common law would be able to make these decisions. Further, the court preserved space for state courts to experiment with how best to tackle climate change through the judiciary. In doing so, the Tenth Circuit, and the sister circuits that agreed with its decision, provided the opportunity to combat climate change despite a federal government that has been largely ineffective thus far. To preserve this outcome, and our planet, the Second Circuit should mend the circuit split, and the Supreme Court should continue to deny certiorari in cases like *Suncor*.

175. Matthew Taylor & Jonathan Watts, *Revealed: The 20 Firms Behind a Third of All Carbon Emissions*, GUARDIAN (Oct. 9, 2019), <https://perma.cc/YYS7-BXQF>.

176. *See* Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1259–65 (10th Cir. 2022).

