

# A Rising Tide: Exploring the Viability of Pursuing Climate Change Accountability Through Securities Fraud Litigation

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## ABSTRACT

The globe is feeling the intensifying detrimental impacts of climate change, and with these impacts comes increasing public consciousness of the urgent need to mitigate or slow climate change processes. However, as this need has become clearer and more widespread, so has the reality that prior attempts to combat climate change through international treaties, domestic government action, and instances of climate change litigation have largely fallen flat.

Importantly, the energy sector is the largest contributor to greenhouse gas (“GHG”) emissions both across the globe and in the United States. In 2018, this sector contributed 91% of the United States’ GHG emissions. While the energy sector is critical to the functioning of our global society and economy, further progress toward widespread adoption of sustainable, non-carbon intensive energy resources is necessary to combat the climate crisis. This Comment centers on an emerging trend in combatting climate change: filing securities fraud claims against Carbon Majors to motivate climate action.

This Comment argues for the viability and validity of pursuing climate change securities fraud litigation to hold Carbon Majors—GHG-emitting energy corporations like ExxonMobil, BP, Shell, and Chevron—accountable for their outsized role in climate change. Two recent cases have attempted, or are attempting, to accomplish just that: *People v. ExxonMobil* and *Commonwealth v. ExxonMobil*. These cases highlight the missteps and merits of climate change securities fraud litigation, thus informing future successful claims.

Ultimately, this Comment sets forth climate change securities fraud litigation against Carbon Majors—both by State Attorneys General and by non-state, apolitical shareholders—as one strategy that will finally

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move the needle on climate action by financially encouraging the renewable energy transition.

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#### I. INTRODUCTION

Earth’s climate is rapidly and drastically changing, and a growing body of scientific evidence points to human causation.<sup>1</sup> As public attention to the issue of climate change mounts, the Intergovernmental Panel on Climate Change’s 6th Assessment Report (“IPCC 6th Assessment Report”), published in August 2021, concluded that human

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1. See Richard P. Allan et al., *Summary for Policymakers, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* (forthcoming 2022) (manuscript at 4–7) (available at <https://bit.ly/3HRvvXv>).

influence has unequivocally caused Earth's atmosphere, land, and water to warm.<sup>2</sup>

Earth's warming climate has ushered in drastic variations in precipitation levels, intensifying weather events, and steadily rising temperatures.<sup>3</sup> In 2021 alone, climate change played a role in two particularly devastating events in the United States: first, winter storm Uri in Texas,<sup>4</sup> and then Category Four Hurricane Ida in Louisiana and across the east coast.<sup>5</sup>

On February 10, 2021, arctic air arrived in Texas and stagnated over the region for more than a week.<sup>6</sup> During this span, each of the state's climate sites recorded record-breaking cold temperatures for at least five consecutive days, and snowfall totals in some areas topped eight inches.<sup>7</sup> This unprecedented weather event crashed the state's power grid, disrupted access to water, harmed native ecosystems and agricultural lands, and cost upwards of \$195 billion.<sup>8</sup> As the snowstorm raged on, over two thirds of Texans lost electrical power, and 49% of Texans lost access to running water.<sup>9</sup>

When Hurricane Ida hit 60 miles south of New Orleans on August 29, 2021, it became the fifth-strongest hurricane to make landfall in the contiguous United States in history.<sup>10</sup> Ida left over one million United States residents without power and resulted in destruction projected to top \$95 billion—a staggering amount that would make it the seventh costliest hurricane in the U.S. since 2000.<sup>11</sup> As Hurricane Ida crept north,

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2. *See id.* at 4.

3. *See Climate Change Impacts*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 12, 2021), <https://bit.ly/3wV0LPU>.

4. *See* Theresa Machemer, *How Winter Storm Uri Impacted the United States*, SMITHSONIAN MAG. (Feb. 19, 2021), <https://bit.ly/3ckOKtE> (explaining, in the aftermath of winter storm Uri, that while strong jet streams typically keep arctic air at the top of the globe, the warming climate weakens the jet stream, allowing such frigid air and weather to reach further south into unusual places, like Texas).

5. *See* Sarah Gibbens, *How Climate Change is Fueling Hurricanes Like Ida*, NAT'L GEOGRAPHIC (Aug. 31, 2021), <https://on.natgeo.com/3n4KBPo>.

6. *See February 2021 Historical Winter Storm Event: South Central Texas*, NAT'L WEATHER SERV. (Feb. 18, 2021), <https://bit.ly/3B1b99v>.

7. *See id.*

8. *See* Irina Ivanova, *Texas Winter Storm Costs Could Top \$200 Billion – More than Hurricanes Harvey and Ike*, CBS NEWS (Feb. 25, 2021, 3:59 PM), <https://cbsn.ws/3aOB2m>.

9. *See* Kirk P. Watson et al., *The Winter Storm of 2021*, UNIV. HOUS. HOBBY SCH. OF PUB. AFFS. 1, 1 (2021), <https://bit.ly/3aLyUrh>.

10. *See* Jeff Masters & Bob Henson, *Catastrophic Hurricane Ida Hits Louisiana with 150 mph Winds*, YALE CLIMATE CONNECTIONS (Aug. 29, 2021), <https://bit.ly/3sOBW6H>.

11. *See* Pippa Stevens, *Hurricane Ida's Damage Tally Could Top \$95 Billion, Making it 7th Costliest Hurricane Since 2000*, CNBC (Sept. 8, 2021, 1:55 PM), <https://cnb.cx/3n0YFTF>.

it inundated the northeast region of the United States with record rainfall, devastating flooding, and destructive tornadoes.<sup>12</sup>

Weather events like winter storm Uri and Hurricane Ida are becoming more extreme, and scientists expect this trend to persist as the Earth continues to warm.<sup>13</sup> Humans play a significant role in warming the Earth by consuming fossil fuels.<sup>14</sup> When humans burn fossil fuels to generate energy, excess greenhouse gases (“GHG”) are released into the atmosphere.<sup>15</sup> As GHGs linger in the atmosphere, they allow solar heat in and then trap it close to the Earth’s surface, thereby creating a warming effect.<sup>16</sup>

While the IPCC’s 6th Assessment Report offers extensive scientific data indicating widespread anthropogenic climate change over the past 170 years,<sup>17</sup> the challenge of effectively solving this potentially existential global threat remains. This Comment argues for the merits of pursuing climate change litigation through securities law causes of action as a strategy for holding large, fossil-fuel-producing energy corporations, termed “Carbon Majors,” to account for their outsized role in global climate change.<sup>18</sup>

This Comment provides an overview of the main strategies upon which the United States relies to both limit and combat climate change—including actions taken and not taken by the executive branch—along with the two main waves of climate change litigation.<sup>19</sup> This Comment also explores historical litigation strategies including common-law and tort claims filed by private actors against the federal government and Carbon Majors.<sup>20</sup>

Next, this Comment gives an overview of securities law in the United States, focusing on the Securities and Exchange Commission’s (SEC) role in regulating the U.S. securities market, as well as common securities fraud claims relied upon in past climate change lawsuits.<sup>21</sup>

This Comment then discusses the intersection between climate change litigation and securities law, analyzing the merits and missteps of

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12. See Joe Hernandez et al., *Stunned by Ida, The Northeast Begins to Recover and Worry About the Next Storm*, NPR (Sept. 4, 2021, 1:32 PM), <https://n.pr/3CIE713>.

13. See Sarah Gibbens, *How Climate Change is Fueling Hurricanes Like Ida*, NAT’L GEOGRAPHIC (Aug. 31, 2021), <https://on.natgeo.com/3n4KBPo>.

14. See Melissa Denchak, *Greenhouse Effect 101*, NAT. RES. DEF. COUNCIL (July 16, 2019), <https://on.nrdc.org/2YTND0A>.

15. See *id.* These GHGs include carbon dioxide, methane, nitrous oxide, and artificial fluorinated gases. See *id.*

16. See *id.*

17. See ALLAN ET AL., *supra* note 1, at 6.

18. See *infra* Part III.

19. See *infra* Sections II.A.1–2.

20. See *infra* Section II.A.3.

21. See *infra* Section II.B.

two recent climate change securities fraud lawsuits in the United States.<sup>22</sup> Finally, this Comment argues for the strengths of advancing climate change securities fraud lawsuits to hold Carbon Majors accountable for their contributions to climate change, outlining three critical considerations for plaintiffs in improving their chances of success.<sup>23</sup>

## II. BACKGROUND

The energy sector is the largest single contributor of global GHG emissions.<sup>24</sup> In 2019, the energy sector contributed a staggering 91% of the total GHG emissions in the United States.<sup>25</sup> Even as citizens and shareholders have urged Carbon Majors and other large, industrial GHG contributors to pursue net-zero initiatives,<sup>26</sup> the United States continues to contribute almost 15% of global GHG emissions,<sup>27</sup> while comprising just 4.25% of the global population.<sup>28</sup>

GHG emissions generated by the energy sector are categorized by specific end-uses, including transportation, electricity generation, building, manufacturing, and several other smaller consumer categories.<sup>29</sup> However, this categorization partially obscures the true source of these fossil fuels: the Carbon Majors that drill for them, refine them, market them, and finally, sell them, to consumers.<sup>30</sup>

The fossil fuels these Carbon Majors sell are, of course, deeply foundational to the functioning of our global society and economy.<sup>31</sup> However, evidence shows that Carbon Majors, including ExxonMobil, Chevron, and Shell, have known the detrimental global impacts of their products for decades and yet have failed to share this information with

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22. See *infra* Section II.C.

23. See *infra* Part III.

24. See Johannes Friedrich et al., *This Interactive Chart Shows Changes in the World's Top 10 Emitters*, WORLD RES. INST. (Dec. 10, 2020), <https://bit.ly/3nZR8go>.

25. See *id.*

26. See generally *What is Net Zero?*, OXFORD NET ZERO, <https://bit.ly/3AN3Rpv> (last visited Feb. 26, 2022) (providing an overview of the net-zero concept). In the net-zero concept, GHGs released into the atmosphere are balanced by a coinciding removal of GHGs from the atmosphere. See *id.* The international community agrees that net-zero goals are a strategy for mitigating continued global warming. See *id.*

27. See Hannah Ritchie & Max Roser, *United States: CO2 Country Profile*, OUR WORLD IN DATA (2020), <https://bit.ly/2YXEd4K>.

28. See *United States Population (Live)*, WORLDMETER, <https://bit.ly/2Z7hMd8> (last visited Oct. 17, 2021).

29. See Friedrich et al., *supra* note 24.

30. See Ian Palmer, *Fossil Fuel Production – Dilemma – to Cut-back or Top-Up*, FORBES (Oct. 25, 2021, 9:08 PM), <https://bit.ly/3Cl44kE>.

31. See *id.*

shareholders, customers, and the public at large.<sup>32</sup> Herein lies the critical juncture between climate change litigation and securities law at which climate change securities fraud lawsuits, alleging material misrepresentations by Carbon Majors who failed to disclose the climate risks their operations pose to shareholders and to the planet, may finally hold Carbon Majors accountable for their role in climate change.<sup>33</sup>

A. *Strategies for Combatting Climate Change in the United States:  
An Overview*

Although scientists began recognizing the mechanisms and early signs of climate change as early as 1859,<sup>34</sup> and the modern environmental movement took shape in the United States by the 1960s, the United States still lacks a cohesive federal legal regime that can withstand political party shifts and address the existential threat of climate change.<sup>35</sup> Policy statements from the executive branch have informed the passing and nullification of several federal environmental statutes and regulations.<sup>36</sup> Beyond the executive and legislative branches, climate change litigation by state, local, and private parties has played a role in establishing a basic framework for combatting the impacts of climate change.<sup>37</sup> Yet the subject of climate change law in the United States remains unsettled, presenting an opportunity for creative and innovative solutions.<sup>38</sup>

1. Climate Change Law at the Federal Level

Advocates for a sustained and cohesive federal climate change policy regime confront a unique political difficulty: the two major political parties in the United States do not agree on climate change.<sup>39</sup> While the Republican party generally denies the threat of climate change and refutes climate change science,<sup>40</sup> the Democratic party heeds advice

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32. See CTR. FOR INT'L ENV'T L., SMOKE AND FUMES: THE LEGAL AND EVIDENTIARY BASIS FOR HOLDING BIG OIL ACCOUNTABLE FOR THE CLIMATE CRISIS 8 (2017) [hereinafter *Smoke and Fumes*].

33. See *infra* Part III.

34. See *Smoke and Fumes*, *supra* note 32, at 7.

35. See generally Cinnamon P. Carlarne, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 AM. U.L. REV. 387 (2019) (providing an overview of climate change law and policy in the 2010s).

36. See *infra* Section II.A.1.

37. See Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE & THE ENV'T & CTR. FOR CLIMATE CHANGE ECON. & POL'Y 12 (July 2021), <https://bit.ly/3He431S>.

38. See *infra* Section II.A.3.b.

39. See Carlarne, *supra* note 35, at 396.

40. See *id.* at 400.

from climate scientists in approaching climate change as an existential threat worth addressing.<sup>41</sup>

This dichotomy results in a strained flip-flop in climate change policy between United States presidential administrations.<sup>42</sup> The Democratic administrations under Presidents Barack Obama and Joseph R. Biden Jr. have prioritized climate change action.<sup>43</sup> By contrast, the Republican administrations under Presidents George W. Bush and Donald J. Trump did not support climate action and instead championed deregulating GHG-emitting industry players.<sup>44</sup>

Thus, the issue of climate change law has become a highly politicized battleground.<sup>45</sup> At the heart of the divide is a difference in perspective regarding the role of industry regulation, particularly when costly tools such as pollution controls are concerned.<sup>46</sup> Those who generally oppose government regulation of the private sector have thus come to approach climate change science as something in which they may choose not to believe so as to preserve their financial standing.<sup>47</sup>

When President Bush assumed office in 2001, he asserted that “[c]limate change, with its potential to impact every corner of the world, is an issue that must be addressed by the world.”<sup>48</sup> Despite this statement, the Bush administration routinely questioned the validity of climate science, including the IPCC’s 3rd Assessment Report from 2001, and repudiated the Kyoto Protocol.<sup>49</sup> Despite the rapid advance of climate science during the eight years of the Bush administration, the government took no decisive action, and federal environmental policy stagnated.<sup>50</sup> Rather than take decisive action to address the threat of climate change, the Bush administration eroded federal environmental

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41. *See id.* at 403–04.

42. *See id.* at 398–99.

43. *See id.* at 399, 403–20; *see also* Elizabeth Gore, *Biden’s First Year: A Robust Record of Climate Action*, EDF (Jan. 20, 2022), <https://bit.ly/3bsQwMd>.

44. *See* Carlarne, *supra* note 35, at 398–99, 403.

45. *See id.* at 396–97.

46. *See* Cori Brosnahan, *When Did the Environment Become a Partisan Issue?*, AM. EXPERIENCE PBS (Jan. 26, 2017), <https://bit.ly/2Z0kZe4> (chronicling the history of environmentalism beginning as a bipartisan issue and descending into partisanship as economic impacts of environmental regulation became realized).

47. *See id.*

48. President George W. Bush, Remarks on Global Climate Change, 37 WKLY. COMPILATION OF PRESIDENTIAL DOCS. 24, 876 (June 11, 2001), <https://bit.ly/3GAi8dh>.

49. *See* Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENV’T L. & POL’Y F. 363, 365–66 (2004). The Kyoto Protocol is a commitment by 192 parties, consisting of both industrialized countries and economies in transition, to limit and reduce their GHG emissions in line with stipulated targets. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 230 U.N.T.S. 148.

50. *See* Carlarne, *supra* note 35, at 398–99.

policy for eight crucial years while both climate science and climate change advanced rapidly.<sup>51</sup>

Directly on President Bush's heels, President Obama took office in 2009 eager to tackle the global challenge posed by climate change, calling it the "greate[st] threat to future generations."<sup>52</sup> Yet, the throes of the 2008 financial crisis and senatorial opposition to key climate change legislation thwarted President Obama's first-term attempts at enacting politically durable climate change policies in the United States.<sup>53</sup> While the Obama administration tightened its focus on climate change policy during its second term, by that point, the Democratic party had lost its majority in both the House of Representatives and the Senate, leading to legislative gridlock on proposed climate change rules.<sup>54</sup>

Notable among the Obama administration's failed attempts at regulation was the Clean Power Plan ("CPP"), an Environmental Protection Agency (EPA) rule proposed in 2015 which sought to address climate change by reducing carbon pollution emitted from power plants, the largest single source of GHG emissions in the United States.<sup>55</sup> The CPP set out to establish new carbon emission performance rates for electricity-generating units powered by both fossil fuels and natural gas, thereby easing the transition into cleaner energy generation.<sup>56</sup> However, because of a partisan deadlock in Congress, the CPP was never implemented.<sup>57</sup>

Following several failed attempts at a lasting legislative solution, President Obama shifted his sights to executive action.<sup>58</sup> During his second term, President Obama signed executive orders aimed at reducing GHG emissions and promulgating climate change preparedness and resiliency plans at the state, local, and tribal levels.<sup>59</sup> President Obama also championed<sup>60</sup> the Paris Climate Agreement,<sup>61</sup> an international

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51. *See id.* at 397–99.

52. President Barack Obama, Address Before a Joint Session of the Congress on the State of the Union, 2015 DAILY COMPILATION OF PRESIDENTIAL DOC. 201600027 (Jan. 20, 2015), <https://bit.ly/3CuOGmH>.

53. *See* Marianne Lavelle, *2016: Obama's Climate Legacy Marked by Triumphs and Lost Opportunities*, INSIDE CLIMATE NEWS (Dec. 26, 2016), <https://bit.ly/3aMtjku>.

54. *See Under Obama, Democrats Suffer Largest Loss in Power Since Eisenhower*, QUOROM, <https://bit.ly/3mZPSI9> (last visited Oct. 17, 2021).

55. *See* U.S. ENV'T PROT. AGENCY, FACTSHEET: THE CLEAN POWER PLAN, 1–2 (2015), <https://bit.ly/3mZKvsA>.

56. *See id.* at 3–4.

57. *See* Carlarne, *supra* note 35, at 419–20.

58. *See id.* at 414.

59. *See* Ori Gutin & Brendan Ingargiola, *Fact Sheet: Timeline of Progress Made in President Obama's Climate Action Plan*, ENV'T & ENERGY STUDY INST. (Aug. 5, 2015), <https://bit.ly/2YVzvUL>.

60. *See* Remarks by the President on the Paris Agreement, 2016 DAILY COMP. PRES. DOC. 201600666 (Oct. 5, 2016).



pledge by more than 190 countries to limit total warming of the planet to no more than two degrees Celsius above pre-industrial levels.<sup>62</sup>

When President Trump assumed office in early 2017, his administration quickly rolled back Obama-era climate change policies and rules.<sup>63</sup> An avid skeptic of climate change science, President Trump deregulated the fossil fuel industry, removed the United States from the Paris Climate Agreement, and relaxed the rules aimed at reducing GHG emissions.<sup>64</sup> In a clear illustration of his views on climate change, President Trump appointed Scott Pruitt as the EPA's 14th Administrator.<sup>65</sup> The result: a climate-change-skeptic<sup>66</sup> EPA leader who, just two years prior, led Oklahoma as its Attorney General in a lawsuit challenging the Obama-era CPP.<sup>67</sup>

Under Pruitt, the EPA implemented a rule empowering individual states to regulate power plant emissions, called the Affordable Clean Energy ("ACE") rule.<sup>68</sup> ACE established no national emissions-reduction goals,<sup>69</sup> and ultimately amounted to a four-year gap in climate action under the Trump administration.<sup>70</sup>

When President Biden took office in 2021, he signed an executive order to rejoin the Paris Climate Agreement and started the process of reversing several environmental policies enacted under the Trump administration.<sup>71</sup> President Biden also assembled a National Climate Task Force tasked with establishing the policy implementation and

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61. See United Nations Framework Convention on Climate Change, Dec. 12, 2015, 1171 U.N.T.S. 107.

62. See *id.*; see also Melissa Denchak, *Paris Climate Agreement: Everything You Need to Know*, NAT. RES. DEF. COUNCIL (Feb. 19, 2021), <https://on.nrdc.org/2Z1sdz3>.

63. See Carlarne, *supra* note 35, at 421.

64. See *id.*; see also Alejandra Borunda, *The Most Consequential Impact of Trump's Climate Policies? Wasted Time*, NAT'L GEOGRAPHIC (Dec. 11, 2020), <https://on.natgeo.com/3IKxNyh> (remarking on the Trump administration's weakening of a host of rules aimed at GHG emissions reductions, including lowering vehicle fuel efficiency standards).

65. See David Malakoff, *Trump Picks Prominent Climate Skeptic as EPA Chief*, AM. ASS'N FOR THE ADVANCEMENT OF SCI. (Dec. 7, 2016), <https://bit.ly/3FTABRR>.

66. See *id.*

67. See *Scott Pruitt*, BALLOTPEdia, <https://bit.ly/2Z2lfcU> (last visited Oct. 15, 2021).

68. See Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44746 (proposed Aug. 31, 2018).

69. See Borunda, *supra* note 64.

70. See *id.* ("[W]hat *hasn't* happened over the last four years is much more important than what has happened . . . . The more you delay, . . . the more costly those policies will become to implement . . . . That's the impact of the Trump years." (quoting Noah Kaufman, a climate policy expert from Columbia University)).

71. See William Thomas & Adria Schwarber, *Biden Completing Opening Moves in Climate Strategy*, AM. INST. OF PHYSICS (May 25, 2021), <https://bit.ly/3n8zDbY>.

achievement of a 50–52% reduction in GHG emissions from 2005 levels by the year 2030.<sup>72</sup>

While President Biden’s enduring climate change legacy is yet to be realized, history has made clear the impediments posed by political shifts.<sup>73</sup> In the absence of a nonpartisan consensus on the existence of climate change as a threat to public health and the economy, federal climate change laws will likely continue to face steep barriers to enactment.<sup>74</sup>

## 2. Emergence of Subnational Climate Change Law

Political gridlock at the federal level has necessitated action from subnational parties formally detached from the federal government.<sup>75</sup> Thus, state and local governments, private citizens, and other interested parties have stepped up to begin forming their own framework for addressing climate change.<sup>76</sup>

At the state government level, California and New York have worked to complement federal climate change policies under Presidents Obama and Biden.<sup>77</sup> For their part, after President Trump’s move to abandon the Paris Climate Agreement, California and New York both committed to reach near-zero levels of GHG emissions by 2050, largely in line with the Paris Climate Agreement.<sup>78</sup> Hawaii also announced plans to become carbon neutral by 2045,<sup>79</sup> while another 2,500 non-federal groups, representative of over half of the United States economy, also pledged to support the Paris Climate Agreement’s goals.<sup>80</sup>

Furthermore, a significant band of private businesses in the United States have voluntarily adopted targets for reducing GHG emissions, in line with broader climate change mitigation goals.<sup>81</sup> These businesses represent a significant sector of both the United States economy and emissions, with over \$25 trillion in market capitalization and, perhaps

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72. See *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, WHITE HOUSE (Apr. 22, 2021), <https://bit.ly/3j6e5vh>.

73. See discussion *supra* pp. 12–17.

74. See discussion *supra* pp. 12–17.

75. See Carlarne, *supra* note 35, at 454–59.

76. See *id.*

77. See *id.* at 455–459.

78. See *id.* at 459.

79. See Robert Walton, *Hawaii First State to Enact 100% Carbon Neutral Goal*, UTILITY DIVE (June 5, 2018), <https://bit.ly/3zZSOg1>.

80. See Kristin Igusky & Kevin Kennedy, *By the Numbers: America’s Pledge Shows How US is Taking Climate Action Without Trump*, WORLD RES. INST. (Nov. 11, 2017), <https://bit.ly/3CsC3IR>.

81. See Carlarne, *supra* note 35, at 472.

more staggering, almost a gigaton of combined carbon dioxide (CO<sub>2</sub>) emitted annually.<sup>82</sup>

Cities also play a powerful role in advancing United States climate change law and policy, bolstered by the ongoing trend toward urbanization combined with the sheer density and volume of energy they consume and pollution they produce.<sup>83</sup> As of 2021, an estimated 83% of the United States population lives in the 300 urban areas across the nation, and this number is expected to reach 89% by 2050.<sup>84</sup> Grappling with concerns ranging from the destructive impacts of sea-level rise in coastal cities to the public health impacts of poor air quality in densely populated urban areas, mayors across the United States have taken action in the interest of protecting their cities.<sup>85</sup>

Of course, even as subnational actors strive to enact meaningful change, influences at the federal level remain foundational to the staying power of their success.<sup>86</sup> During the Bush and Trump administrations, subnational actors faced pushback on their environmental policies through constitutional challenges and deep cuts to funding resources.<sup>87</sup> In addition, just as private groups organize with the aim of tackling climate change, so too do financially and politically powerful organizations and lobbyists for the fossil fuel industry, like Koch Industries<sup>88</sup> and the American Petroleum Institute (API).<sup>89</sup> These forces hamper progress on climate policy, underscoring the criticality of coherent, federal-level policy and action.<sup>90</sup>

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82. See BLOOMBERG PHILANTHROPIES, AMERICA'S PLEDGE PHASE 1 REPORT: STATES, CITIES, AND BUSINESSES IN THE UNITED STATES ARE STEPPING UP ON CLIMATE ACTION 14–15 (2017).

83. See, e.g., *Cities and Climate Change*, U.N. ENV'T PROGRAMME, <https://bit.ly/30Dvkhq> (last visited Nov. 17, 2021); *Hot Cities: Battle-Ground for Climate Change*, U.N. HABITAT (2011), <https://bit.ly/3lRcCuk>.

84. UNIV. OF MI. CTR. FOR SUSTAINABLE SYS., U.S. CITIES FACTSHEET (Sept. 2021), <https://bit.ly/3Qan5y8>.

85. See Carlarne, *supra* note 35, at 423–24 (discussing the role of United States mayors in furthering climate change law and highlighting “We are Still In,” a bipartisan coalition of mayors, governors, and other community leaders who organized to announce their continued support of the Paris Climate Agreement during the Trump presidency).

86. See *id.* at 400.

87. See *id.*

88. See GREENPEACE USA, KOCH INDUSTRIES: STILL FUELING CLIMATE DENIAL - 2011 UPDATE 1–2 (2011), <https://bit.ly/3lNe8Oj>.

89. See ANALYSIS OF THE FOSSIL FUEL INDUSTRY'S LEGISLATIVE LOBBYING AND CAPITAL EXPENDITURES RELATED TO CLIMATE CHANGE, H. COMM. ON OVERSIGHT AND REFORM, 117TH CONG. (2021) <https://bit.ly/3kNi4gV> (detailing the more than \$77 million API has spent on lobbying the federal government since 2011). While API publicly stated support for climate action strategies like the Paris Climate Agreement and related legislation, 0.17% of its federal lobbying efforts since 2011 have been dedicated to these causes. See *id.*

90. See *id.*

In October 2021, spurred on by increasing public attention on climate change impacts caused by fossil-fuel emissions, the House Committee on Oversight and Reform held a hearing focused on allegations that a campaign by Carbon Majors was spreading disinformation on the climate impacts of their fossil-fuel emissions.<sup>91</sup>

Representatives on both sides of the aisle questioned the witnesses, including executives of four Carbon Majors—Exxon, BP, Shell, and Chevron—as well as the President of the API.<sup>92</sup> During the hearing, particular attention was paid to the mounting evidence that these organizations have been on notice of their role in climate change while actively deceiving the public by contradicting or omitting the scientific evidence they possessed.<sup>93</sup>

For example, an internal memo at Exxon from 1977 showed that the company was aware that CO<sub>2</sub> was contributing to “inadvertent climate modification,” and that the company’s fossil fuels were the likely cause.<sup>94</sup> Despite possessing this knowledge, Exxon attempted to “cast doubt” on climate science by emphasizing scientific uncertainties and consistently denying climate change.<sup>95</sup>

Across the board, the witnesses at the hearing affirmatively agreed that GHG emissions are a cause of the changing climate and espoused their organizations’ efforts to limit climate impacts through “net-zero” and carbon sequestration projects.<sup>96</sup> However, the Carbon Major executives promised little in the way of specific commitments to curbing future oil exploration or meaningfully pivoting their businesses away from fossil fuels.<sup>97</sup> Instead, the executives denied allegations of misleading statements and disinformation schemes within their organizations, and refused to halt their organizations’ funding of climate change opposition campaigns.<sup>98</sup> As a result, the hearing served

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91. See *Fueling the Climate Crisis: Exposing Big Oil’s Disinformation Campaign to Prevent Climate Action: Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. 1 (2021) (statement of Carolyn B. Maloney, Chairwoman, H. Comm. on Oversight and Reform) [hereinafter *Exposing Big Oil’s Disinformation Campaign Hearing*].

92. See *id.* at 7–14.

93. See *id.* at 1–2 (statement of Carolyn B. Maloney, Chairwoman, H. Comm. on Oversight and Reform).

94. John Cook et al., *America Misled: How the Fossil Fuel Industry Deliberately Misled American About Climate Change*, GEO. MASON UNIV. CTR. FOR CLIMATE CHANGE COMM’N 6 (Oct. 2019), <https://bit.ly/3rdKhkN>.

95. *Id.* at 7–10.

96. *Exposing Big Oil’s Disinformation Campaign Hearing*, *supra* note 91, at 8–14, 18 (statements of Darren Woods, Chief Executive Officer, ExxonMobil; Michael Wirth, Chief Executive Officer, Chevron; David Lawler, Chief Executive Officer, BP America; Gretchen Watkins, President, Shell Oil; and Mike Sommers, President, API).

97. See *id.*

98. See *id.* at 20–22.

principally as a starting point for the Oversight Committee's continued investigation into the alleged disinformation tactics propagated by these Carbon Majors.<sup>99</sup>

### 3. Climate Change Litigation

Against the backdrop of inconsistent federal policies, climate change litigation continues to build momentum as a method of climate action in the United States.<sup>100</sup> Failure to compellingly act on climate change at the federal level has left resolution of this existential challenge to subnational and nongovernmental actors, including the judiciary.<sup>101</sup>

Historically, climate change litigation was relatively rare in the United States until cases picked up drastically in 2006.<sup>102</sup> Before that year, only 18 climate change cases had been filed,<sup>103</sup> whereas more than 1,500 such cases have been filed in the 15 years since.<sup>104</sup>

Defining climate change litigation can be an onerous task as there is a broad range of claims that may deserve categorization as climate change litigation and that carry differing levels of proximity to climate change impacts.<sup>105</sup> Climate change cases have been filed on several grounds, including federal and state law, constitutional law, common law, public trust, and securities and financial law.<sup>106</sup>

For the purposes of this Comment, climate change litigation means “any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts.”<sup>107</sup> This construction allows for

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99. See *id.* at 99–100. (statement of Carolyn B. Maloney, Chairwoman, H. Comm. on Oversight and Reform).

100. See Grace Nosek, *Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 733, 737–40 (2018) (citing the fast-growing body of climate change case law and arguing that federal climate change policy failure accounts for some of this recent uptick).

101. See *id.*; see also Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation*, ANN. REV. L. & SOC. SCI. 21, 29 (2020), <https://bit.ly/3DnioKJ> (analyzing scholarly attention to climate change litigation as the number of these cases expands).

102. See David Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENV'T L. REP. 10644, 10650 (2010).

103. See *id.*

104. See *U.S. Climate Change Litigation*, COLUM. L. SCH. SABIN CTR. FOR CLIMATE CHANGE L., <https://bit.ly/30BiFvi> (last visited June 1, 2022). Note that within this database, the term “cases” is inclusive of judicial and quasi-judicial administrative actions and proceedings, as well as “rulemaking petitions, requests for reconsideration of regulations, notices of intent to sue (in situations where lawsuits were not subsequently filed), and subpoenas.” *U.S. About*, COLUM. L. SCH. SABIN CTR. FOR CLIMATE CHANGE L., <https://bit.ly/3uJ555a> (last visited July 13, 2022).

105. See *U.S. Climate Change Litigation*, *supra* note 104.

106. See *id.*

107. Markell & Ruhl, *supra* note 102, at 10647.

clear identification of the merits and downfalls of specific climate change claims, which may not rest on explicit environmental statutes, but rather on private organizational actions which resulted in negative climate impacts.<sup>108</sup>

When surveying climate change litigation in the United States, two distinct “waves” of cases emerge.<sup>109</sup> The first wave consisted mainly of federal common-law claims, including tort claims and claims based in existing statutes.<sup>110</sup> Within this wave, litigants most commonly aimed either to bring about federal-level, government-imposed limitations on GHG emissions, or to force large, carbon-intensive corporations to decrease their GHG emissions over time.<sup>111</sup>

The second wave of climate change litigation began in 2011, after the modern framework of federal common-law displacement in climate change cases emerged from the emblematic case *American Electric Power Co. v. Connecticut (AEP)*.<sup>112</sup> In the wake of this litigation hurdle, the ongoing second wave has focused primarily on holding Carbon Majors accountable for their outsized role in climate change.<sup>113</sup> The second wave has utilized various causes of action between private, nongovernmental parties, including those based in state common-law nuisance, corporate law, and state constitutional claims.<sup>114</sup>

#### a. Wave One

The first wave of climate change litigation in the United States centered around claimants looking to combat ongoing federal inaction on climate change.<sup>115</sup> Several noteworthy cases shaped this initial wave. First, the *Milwaukee* cases, two foundational environmental proceedings not specifically premised on climate change causes of action, were decided in 1972 and 1981.<sup>116</sup> Then, *Massachusetts v. EPA*<sup>117</sup> and *AEP*,<sup>118</sup>

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108. *See id.* at 10647–48.

109. Carlarne, *supra* note 35, at 440–44; *see also* Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors’ Duties*, 2020 UTAH L. REV. 313, 317–320 (2020).

110. *See* Carlarne, *supra* note 35, at 441.

111. *See, e.g.*, *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 93 (1972); *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 307 (1981); *American Electric Power v. Connecticut (AEP)*, 564 U.S. 410, 415 (2011); *Massachusetts v. EPA*, 549 U.S. 497, 504 (2007).

112. *See* *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 415 (2011); *see also* Carlarne, *supra* note 35, at 443.

113. *See* Carlarne, *supra* note 35, at 444.

114. *See id.* at 444; *see also* Benjamin, *supra* note 109, at 334.

115. *See* Carlarne, *supra* note 35, at 441.

116. *See Milwaukee I*, 406 U.S. at 93; *see also Milwaukee II*, 451 U.S. at 307.

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

118. *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 415 (2011).

two of the earliest climate change cases in the United States,<sup>119</sup> were decided in 2007 and 2011, respectively.

In *Illinois v. Milwaukee (Milwaukee I)*,<sup>120</sup> the Supreme Court held that federal courts could fashion federal common law in alignment with the policies of existing environmental statutes.<sup>121</sup> In so holding, the Court stated that the claimant state of Illinois could validly bring a public nuisance suit in federal district court against a group of defendants for their pollution of an interstate body of water, Lake Michigan.<sup>122</sup>

While *Milwaukee I* stands as a seminal environmental decision by the Supreme Court for its recognition of interstate water pollution as a federal common-law nuisance,<sup>123</sup> its application to eventual climate change cases was restricted by the *Milwaukee II* decision eight years later.<sup>124</sup>

A mere five months after *Milwaukee I* was decided, Congress enacted sweeping amendments to the Federal Water Pollution Control Act (“FWPCA”).<sup>125</sup> Namely, Congress implemented the 1972 Amendments to the FWPCA, recognizing that “the Federal water pollution control program . . . ha[d] been inadequate in every vital aspect” and thus establishing a new system for regulating discharges into waters of the United States.<sup>126</sup> The amendments created the National Pollutant Discharge Elimination System (“NPDES”)<sup>127</sup> under which any discharge of a pollutant into a navigable water of the United States is illegal without a discharge permit from the EPA.<sup>128</sup>

Following the sweeping statutory overhauls enacted by the 1972 Amendments, *Milwaukee*’s case again reached the Supreme Court in 1981.<sup>129</sup> In *Milwaukee II*, the Supreme Court held that Illinois’s claim had been displaced by the significant statutory overhaul enacted by the 1972 Amendments, and was thus no longer available.<sup>130</sup> The Court clarified that federal common-law claims and remedies are “resorted to” only when “Congress has not spoken to a particular issue” in a federal

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119. See Carlarne, *supra* note 35, at 441.

120. See *Milwaukee I*, 406 U.S. at 93.

121. See *id.* at 99.

122. See *id.* at 106.

123. See *id.* at 105–06.

124. See *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 332 (1981).

125. See Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251–1389.

126. *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 310–11 (1981) (quoting S. Rep. No. 92-414, at 7 (1971)).

127. *National Pollutant Discharge Elimination System (NPDES)*, EPA (last visited June 25, 2022), <https://bit.ly/3OJPzgX>.

128. See *Milwaukee II* at 310–11.

129. See *id.* at 307.

130. See *id.* at 317.

statute.<sup>131</sup> Here, the Court announced, the 1972 Amendments to the FWPCA had created a federal statutory scheme sufficient to address Illinois's claims, thereby displacing the federal common-law nuisance claim.<sup>132</sup>

More contemporarily within the first wave, the foundational climate change case *Massachusetts v. EPA* reached the Supreme Court in 2007.<sup>133</sup> The case was brought by a group of states, cities, and private organizations who together alleged that the EPA had failed to exercise its responsibility under the Clean Air Act (“CAA”) to regulate emissions of CO<sub>2</sub> and other GHGs.<sup>134</sup> Specifically at issue was whether the EPA had authority to regulate the emissions of GHGs, including CO<sub>2</sub> from new automobile tailpipes, under the CAA, and if it did, whether its reasoning for refusing to do so was consistent with the CAA.<sup>135</sup>

The Court first addressed the issue of Article III standing.<sup>136</sup> In its analysis, the Court noted that only one petitioner needed to establish Article III standing for the petition to be eligible for review.<sup>137</sup> The Court thus analyzed whether the Commonwealth of Massachusetts could establish standing, emphasizing Massachusetts's “special position and interest” in the case because the state owns a large portion of coastal land alleged to be impacted by GHG-induced climate change.<sup>138</sup>

The Court concluded that Massachusetts had indeed established Article III standing.<sup>139</sup> The Court reasoned first that per the uncontested affidavits of the petitioners, Massachusetts had been and would continue to be harmed by rising sea levels resulting from anthropogenic climate change.<sup>140</sup> Furthermore, the Court noted that the risk of such harm could be reduced by some margin if the petitioners were to receive the redress they sought from the Court.<sup>141</sup>

With the question of petitioners' standing surmounted, the Court also found in petitioners' favor on the merits.<sup>142</sup> The Court held that the

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131. *Id.* at 313–14.

132. *See id.* at 325–26.

133. *Massachusetts v. EPA*, 549 U.S. 497, 504 (2007).

134. *See id.* at 505.

135. *See id.*

136. *See id.* at 526. This case is a seminal case regarding Article III standing because the Court declared that sovereign States, like the Commonwealth of Massachusetts here, are “entitled to special solicitude in our standing analysis.” *Id.* at 520.

137. *See id.* at 518.

138. *Id.* at 518–19.

139. *See id.* at 526.

140. *See id.* at 526.

141. *Id.* (“The risk of catastrophic harm [from rising sea levels associated with global warming] . . . would be reduced to some extent if petitioners received the relief they seek.”). *Id.*

142. *See id.* at 528.



EPA was indeed authorized by the CAA to regulate emissions of GHGs—including CO<sub>2</sub>—from new motor vehicles.<sup>143</sup> Furthermore, the Court stated that the EPA, in making a decision about whether to regulate GHGs from new motor vehicles, would need to “ground its reasons for action or inaction in the [CAA],” which it had so far failed to do.<sup>144</sup>

Four years after *Massachusetts v. EPA* was decided, the Supreme Court heard *AEP*, in which the plaintiffs alleged a federal common-law nuisance claim against major fossil-fuel-fired electric power companies for their respective roles in contributing to climate change.<sup>145</sup> The Court in *AEP* explicitly held that any federal common-law nuisance claim seeking to abate CO<sub>2</sub> emissions from fossil-fuel-fired power plants was displaced by the existing federal statutory scheme for air quality, namely the CAA, and the EPA’s actions in accordance with it.<sup>146</sup>

The Court further elaborated that federal common-law claims may even be displaced before the EPA explicitly sets any air quality standards pursuant to the statutory mandates it is given through a statute like the CAA.<sup>147</sup> In support of its stance, the Court offered that Congress had intentionally designated regulation of GHG emissions to the EPA, an expert agency, and that the federal judiciary was ill-equipped to fill this complex role, especially on a case-by-case basis.<sup>148</sup>

The Court was careful to point out, however, the potential secondary role of the federal court system in similar proceedings, through judicial review of the EPA’s final agency actions.<sup>149</sup> The Court noted that prospective petitioners may indeed seek administrative remedies by alleging that the EPA has failed to comply with its statutory command under the CAA.<sup>150</sup>

Beyond the issue of displacement of federal common-law nuisance claims, the *AEP* Court did not rule directly on whether the CAA preempted petitioner’s state-law claims.<sup>151</sup> The question of federal

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143. *See id.*

144. *EPA*, 549 U.S. at 534–35.

145. *See Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 418 (2011).

146. *See id.* at 423, 425.

147. *See id.* at 425–26.

148. *See id.* at 428.

149. *See id.* at 427.

150. *See id.* at 426–27.

151. *See id.* at 429. Although the terms “displacement” and “preemption” are often confusingly used interchangeably by courts, an important distinction is warranted here. Federal common-law displacement occurs when a federal statute is enacted which governs an area of law previously governed by a body of federal common law. *See Eric M. Whitehead, Note, Displacement ≠ Preemption: The OPA 90 Damages Conundrum*, 18 LOY. MAR. L.J. 329, 332 (2019). Federal preemption on the other hand refers to situations in which a federal statute supersedes a state statute. *See id.*

preemption of state common-law claims is one that has endured into wave two of climate change litigation.<sup>152</sup>

b. Wave Two

Mired by *AEP*'s declaration that the CAA displaced all federal common-law nuisance claims relating to CO<sub>2</sub> emissions from fossil-fuel powerplants, climate change litigants pivoted away from federal common-law claims and toward other creatively formulated causes of action.<sup>153</sup> While the breadth of this new wave of claims is quite wide, some major themes are emerging.<sup>154</sup> Specifically, private, state-law claims against Carbon Majors seeking to hold them accountable for their scientifically quantifiable climate change contributions, as well as other state-law claims premised on basic human and constitutional rights, currently occupy the forefront.<sup>155</sup>

While state-law claims against Carbon Majors for their role in climate change have attempted to work around the *AEP* federal common law displacement doctrine, they have met a noteworthy hurdle in the process.<sup>156</sup> Climate change claims based in state laws are routinely removed to federal court, and may still be vulnerable to federal common law displacement and federal preemption defenses.<sup>157</sup> Encouragingly, however, many state-law climate change cases that are removed to federal court are subsequently remanded to state court.<sup>158</sup>

While second wave climate change lawsuits have thus far been met with a difficult path toward success, they offer concerned citizens a dynamic blueprint for both continued and novel climate action strategies

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152. See discussion *infra* Section II.A.3.b.

153. See Carlarne, *supra* note 35, at 444.

154. See *id.* at 448.

155. See *id.*

156. See *id.* at 446.

157. See *City of New York v. Chevron Corp.*, 993 F.3d 81, 93 (2d Cir. 2021). While this case was filed in federal court in the first instance, it was premised on state common-law claims against five Carbon Majors related to damages caused by their climate change-inducing domestic GHG emissions. *Id.* at 86. The Second Circuit ultimately held that the state common-law claims were preempted by federal common law, and subsequently displaced by the federal Clean Air Act. *Id.* at 95. As a result, the complaints were dismissed. *Id.* at 85. The court was, however, careful to differentiate its conclusion from that of several other recent opinions holding that state common-law claims against Carbon Majors are not preempted by federal common law. *Id.* at 93–94. The court stated that these cases differed because they involved state-law claims filed in state court and then removed to federal court, where the preemption defense must be considered using a heightened standard. *Id.*; see also *Second Circuit Climate Change Ruling Affirms Dismissal of State-Law Claims*, KING & SPALDING (Apr. 7, 2021), <https://bit.ly/3EI4pA6>.

158. See *e.g.*, *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 34 (D. Mass. 2020); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 548 (D. Md. 2019).

in court.<sup>159</sup> Prospective plaintiffs retain the opportunity to pursue increasingly creative causes of action to hold Carbon Majors accountable for their role in climate change, including state-law securities fraud claims.<sup>160</sup>

### B. *Securities Law in the United States: An Overview*

The Securities and Exchange Commission (SEC) is the federal agency charged with protecting investors and regulating the country's securities market.<sup>161</sup> The SEC was founded in 1934 as part of an effort by President Franklin D. Roosevelt to quell the negative impacts of the Great Depression while safeguarding the market from rampant fraud and insider trading.<sup>162</sup>

The SEC fulfills its mission<sup>163</sup> by enforcing federal securities laws through instituting civil proceedings, coordinating with the Department of Justice on criminal proceedings, and proposing and enacting federal regulations in accordance with these laws.<sup>164</sup> While the SEC oversees and enforces a wide range of federal securities laws, the Securities Exchange Act of 1934 ("Exchange Act") is the federal statute which sets forth the broadest anti-fraud cause of action and thus receives a bulk of the SEC's enforcement attention.<sup>165</sup>

In granting the SEC its oversight authority of the securities market, the Exchange Act also vested in the SEC the power to require large companies with publicly traded securities to submit regular reports to the SEC.<sup>166</sup> These reports are available to the public via the SEC's EDGAR database.<sup>167</sup> The Exchange Act is largely concerned with combatting fraudulent activity on the part of market participants.<sup>168</sup> Namely, anti-fraud and insider trading provisions are set forth to protect the investing public from undue financial harm.<sup>169</sup>

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159. See Carlarne, *supra* note 35, at 454.

160. See discussion *infra* Section II.B.

161. See *SEC: Securities and Exchange Commission*, HISTORY.COM (Dec. 6, 2019), <https://bit.ly/3fUGZwn>.

162. See *id.*

163. The SEC's mission is "to protect investors; maintain fair, orderly, and efficient market; and facilitate capital formation. The SEC strives to promote a market environment that is worthy of the public's trust." *About the SEC*, U.S. SEC. & EXCH. COMM'N (Nov. 22, 2016), <https://bit.ly/3FT5BQx>.

164. James Chen, *Securities and Exchange Commission (SEC)*, INVESTOPEDIA (Apr. 27, 2022), <https://bit.ly/3rV9Rdu>.

165. See *Securities Fraud*, CORNELL L. SCH. LEGAL INFO. INST., <https://bit.ly/3o9Fcbs> (last visited Jan. 29, 2022).

166. See *The Laws That Govern the Securities Industry*, INVESTOR.GOV, <https://bit.ly/3rJERNz> (last visited Feb. 26, 2022).

167. See *id.*

168. See *id.*

169. See *id.*

Section 10(b) of the Exchange Act is a broad anti-fraud provision under which shareholders may recover damages for material misstatements or omissions or for other deception connected to the trade of a security.<sup>170</sup>

To give force to § 10(b) of the Exchange Act, the SEC promulgated Rule 10b-5, providing further detail regarding the fraudulent activity covered by the provision.<sup>171</sup> To establish liability under a Rule 10b-5 claim a plaintiff must prove the following six elements:

[1] The defendant made a material misstatement or omission; [2] The misstatement or omission was made with an intent to deceive, manipulate or defraud (that is, with scienter); [3] There is a connection between the misrepresentation or omission and the plaintiff's purchase or sale of a security; [4] The plaintiff relied on the misstatement or omission; [5] The plaintiff suffered economic loss; and [6] There is a causal connection between the material misrepresentation or omission and the plaintiff's loss.<sup>172</sup>

Satisfying each of these elements is highly dependent on the facts of the case at hand.<sup>173</sup>

Numerous defenses can be raised against 10b-5 claims, and several recent Supreme Court decisions further protect defendants against “meritless” 10b-5 claims.<sup>174</sup> Furthermore, Congress enacted the Private Securities Litigation Reform Act (“PSLRA”) in 1995 to shield defendants from “frivolous” or “abusive” securities fraud claims.<sup>175</sup> The PSLRA’s heightened pleading standard resulted in approximately half of cases filed surviving motions to dismiss.<sup>176</sup> Additionally, the Securities Litigation Uniform Standards Act (“SLUSA”) prevents class-action

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170. See 15 U.S.C. § 78j(b).

171. See 17 C.F.R. § 240.10b-5 (2022).

172. *Section 10(b) Litigation: The Current Landscape*, Am. Bar Ass’n (Oct. 20, 2014) (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005)), <https://bit.ly/3G7yMzr>.

173. See *id.*

174. *Id.*

175. Practical Law Securities Litigation & White Collar Crime, *Exchange Act: Section 10(b) Elements and Defenses*, THOMSON REUTERS (2022), <https://bit.ly/3vjDwAp>; see also Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 741–42. Abusive litigation arises if the court finds that Federal Rule of Civil Procedure 11(b) has been violated by any party or its counsel. See *id.* PSLRA also sets out that for each alleged misleading statement or omission, the complaint must specify the alleged misleading statement and give reasons for why it is misleading. See *id.* at 747. Further, the complaint must state, with particularity, the facts that give rise to a strong inference that the defendant acted with the required state of mind relating to each alleged misstatement or omission. See *id.* The burden rests with the plaintiff to prove that the act or omission caused the loss for which they seek to recover damages. See *id.*

176. See Practical Law Securities Litigation & White Collar Crime, *Exchange Act: Section 10(b) Elements and Defenses*, THOMSON REUTERS (2022), <https://bit.ly/3vjDwAp>.

plaintiffs from pleading their claims as violations of state law—instead of federal law—as a manner of circumventing the PSLRA’s stringent pleading requirements.<sup>177</sup> Many such state-law cases are successfully removed to federal court, where the federal court may determine whether they should be dismissed as preempted by SLUSA.<sup>178</sup>

In addition to federal securities fraud laws and regulations, states may also pass their own “Blue Sky” laws to protect investors from securities fraud at the state level.<sup>179</sup> Together, these federal and state anti-fraud securities laws provide prospective plaintiffs with one avenue for pursuing accountability from Carbon Majors for their role in climate change.

### C. *Exploring the Intersection Between Climate Change Litigation and Securities Law*

The United States federal government has yet to implement an effective and lasting solution managing the risks posed by climate change.<sup>180</sup> Climate change litigation and securities law have thus converged as one strategy for holding Carbon Majors accountable for their role in anthropogenic climate change and its attendant risks to the global population.<sup>181</sup> Climate change securities fraud litigation commonly centers on misleading statements or omissions allegedly made by one or many Carbon Majors under federal or state anti-fraud provisions.<sup>182</sup>

In analyzing the merits and missteps of climate change securities fraud litigation, a brief study of one past case, *People v. Exxon*,<sup>183</sup> and one ongoing case, *Commonwealth v. Exxon*,<sup>184</sup> is illustrative.

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177. *See id.*; *see also* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, 3227. SLUSA was promulgated in response to a post-PSLRA trend of private securities fraud class actions being filed in state courts pursuant to state securities laws, thereby circumventing the heightened pleading standards set forth in PSLRA for cases filed in federal court and frustrating PSLRA’s purpose of reducing the economic impact of frivolous litigation. *See id.*

178. *See* David M.J. Rein et al., *Navigating the Securities Litigation Uniform Standards Act of 1998 (SLUSA)*, THOMSON REUTERS (2021), <https://bit.ly/3tpdaeA>.

179. *Blue Sky Laws*, INVESTOR.GOV, <https://bit.ly/343ymxd>. These laws commonly mandate licensing requirements for brokers and investment advisors and assign liability to securities issuers for failures to disclose material information or fraudulent statements. *See id.*

180. *See* discussion *supra* Section II.A.1.

181. Joana Setzer, *Climate Litigation Against “Carbon Majors”: Economic Impacts*, OPENGLOBALRIGHTS (July 16, 2020), <https://bit.ly/3sII6Qt>.

182. *See, e.g.*, Complaint at 7, *People v. ExxonMobil Corp.*, No. 452044 (N.Y. Sup. Ct. Oct. 24, 2018); Complaint at 1, *Commonwealth v. Exxon Mobil Corp.*, No. 19-3333 (Mass. Super. Ct. Oct. 24, 2019).

183. *See* Decision at 1, *People v. ExxonMobil Corp.*, No. 452044 (N.Y. Sup. Ct. Dec. 10, 2019).

### 1. *People v. Exxon*

In *People v. Exxon*, the Attorney General of New York (NYAG) alleged that Exxon deceived investors regarding how the company was managing business risks posed by climate change regulation.<sup>185</sup> This securities fraud claim was filed pursuant to a New York Blue Sky law, the Martin Act.<sup>186</sup> Following a 12-day trial, the New York trial court denied the NYAG's claims and dismissed the case with prejudice.<sup>187</sup> In finding that the NYAG had failed to sufficiently establish Exxon's violation of the Martin Act, the court reasoned that "no reasonable investor" would rely on the challenged climate change disclosures, which took into account costs that would not be incurred for 20 to 30 years.<sup>188</sup>

Importantly, the court noted that the decision was not to be construed as "absolv[ing] Exxon from responsibility for contributing to climate change through the emission of [GHGs] in the production of its fossil fuel products."<sup>189</sup> Instead, the court was careful to stipulate that the case was "a securities fraud case, not a climate change case," and the NYAG had not met his burden in proving a violation of the Martin Act.<sup>190</sup>

While securities fraud cases are highly fact-specific, this decision provides one perspective regarding how courts may approach future climate change cases premised on securities fraud claims.<sup>191</sup> Here, the court's focus on the "reasonable investor" standard is important because this standard may well change over time.<sup>192</sup> While Exxon's data, cited as misleading by the NYAG, was not considered material to a "reasonable investor" in 2019, such disclosures may be considered material to reasonable investors in the future as their interest in climate change risks increase.<sup>193</sup>

Furthermore, the NYAG focused its claim in *People v. Exxon* specifically on the alleged fraud related to the company's climate disclosures, rather than on fraud related to the risk of physical impacts of

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184. See Decision at 1, *Commonwealth v. Exxon Mobil Corp.*, No. 19-3333 (Mass. Super. Ct. May 24, 2022).

185. See Complaint at 7, *People v. ExxonMobil Corp.*, No. 452044 (N.Y. Sup. Ct. Oct. 24, 2018).

186. See *id.* at 7; see also N.Y. Gen. Bus. Law §§ 352–359 (McKinney 2022).

187. See Decision at 55, *People v. ExxonMobil Corp.*, No. 452044 (N.Y. Sup. Ct. Dec. 10, 2019).

188. *Id.* at 34.

189. *Id.* at 3.

190. *Id.*

191. See Hana Vizcarra, *Understanding the New York v. Exxon Decision*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Dec. 12, 2019), <https://bit.ly/3Gri6Dv>.

192. *Id.*

193. *Id.*

climate change.<sup>194</sup> At the time of this writing, federal and state rules mandating climate risk disclosures are still widely unsettled, making claims like this one particularly onerous to succeed on at present.<sup>195</sup>

## 2. *Commonwealth v. Exxon*

In 2019, *Commonwealth v. Exxon* was filed in Massachusetts state court.<sup>196</sup> *Commonwealth v. Exxon* similarly alleges Exxon's violation of a state securities-fraud law.<sup>197</sup> The Massachusetts Attorney General's ("MAG") complaint alleges that Exxon violated the Massachusetts Consumer Protection Act, and several state regulations promulgated thereunder, by engaging in "deceptive practices against Massachusetts investors and consumers."<sup>198</sup>

The MAG's 205-page complaint meticulously details Exxon's "history of climate deception."<sup>199</sup> According to the MAG's complaint, Exxon has capitalized on the inherent uncertainties in climate science to foster confusion among the public and the company's own investors regarding the negative role Exxon products play in the climate change crisis.<sup>200</sup> Furthermore, the complaint alleges that Exxon has deceived its investors by misrepresenting the risks posed by climate change to its business, by engaging in greenwashing campaigns regarding its products, and by failing to disclose the detrimental impacts its fossil fuel products have on the global climate.<sup>201</sup>

At the time of this writing, the case is pending and largely intact in Massachusetts state court.<sup>202</sup> Exxon removed the case to federal court in 2019, but the federal court subsequently granted Massachusetts's motion to remand to state court.<sup>203</sup> The Massachusetts federal judge who granted the motion to remand reasoned that the case relied solely on state-law claims which were neither completely preempted by federal law nor

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194. Decision at 34, *People v. ExxonMobil Corp.*, No. 452044 (N.Y. Sup. Ct. Dec. 10, 2019).

195. See Jean Eaglesham & Paul Kiernan, *Climate Disclosure Poses Thorny Questions for SEC as Rules Weighed*, WALL ST. J. (Feb. 18, 2022, 5:30 AM), <https://on.wsj.com/3hExdQ1>.

196. See Complaint at 1, *Commonwealth v. Exxon Mobil Corp.*, No. 19-3333 (Mass. Super. Ct. Oct. 24, 2019).

197. See *id.*

198. *Id.* at 204.

199. *Id.* at 16.

200. See *id.*

201. See *id.* at 193–204.

202. The MAG's original complaint was amended on June 5th, 2020, to include three causes of action instead of the original four causes of action. See *Commonwealth v. Exxon Mobil Corp.*, SABIN CTR. FOR CLIMATE CHANGE L. COLUM. L. SCH., <https://bit.ly/3azKby8> (last visited June 25, 2022).

203. *Commonwealth v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 34 (D. Mass. 2020).

singularly premised on a federal question, contrary to Exxon's stipulation.<sup>204</sup> This sentiment should be encouraging, pending the final disposition of the case, considering the historical challenge federal preemption has posed to common-law climate change claims.<sup>205</sup>

Additionally, the MAG's case more recently survived two motions to dismiss filed by Exxon.<sup>206</sup> Exxon first moved to dismiss the case pursuant to a Massachusetts Anti-SLAPP ("Strategic Litigation Against Public Participation") statute and second for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted.<sup>207</sup> The Massachusetts Superior Court denied both of the motions to dismiss, stating that Massachusetts sufficiently alleged each of its three counts against Exxon.<sup>208</sup> In May 2022, the Massachusetts Supreme Judicial Court affirmed the superior court's dismissal of Exxon's Anti-SLAPP motion to dismiss, holding that the Anti-SLAPP statute is not applicable to government enforcement actions brought by the state's Attorney General (AG).<sup>209</sup>

*Commonwealth v. Exxon* is a pertinent example of a carefully pleaded complaint, evidenced by its survival through a federal removal and two motions to dismiss.<sup>210</sup> But a sufficiently well-pleaded complaint

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204. *See id.* at 43 (noting that the state-law claims were "far afield of any 'uniquely federal interests'").

205. *See* discussion *supra* Section II.A.3.

206. *See* Memorandum of Decision and Order on Defendant's Motion to Dismiss the Amended Complaint at 2, *Commonwealth v. Exxon Mobil Corp.*, No. 1984CV03333-BLS1 (Mass. Super. Ct. Jun. 22, 2021) [hereinafter *Decision on Motion to Dismiss*]; *see also* Memorandum of Decision and Order on Defendant's Special Motion to Dismiss the Amended Complaint at 1, *Commonwealth v. Exxon Mobil Corp.*, No. 1984CV03333-BLS1 (Mass. Super. Ct. Jun. 22, 2021) [hereinafter *Decision on Special Motion to Dismiss*].

207. *See Decision on Motion to Dismiss* at 2; *see also Decision on Special Motion to Dismiss* at 1.

208. In first denying Exxon's special motion to dismiss pursuant to Massachusetts Anti-SLAPP statute, the court noted that it is the moving party's burden to show by a preponderance of the evidence that each of the claims it challenges are "solely based on [Exxon's] own petitioning activities." *Decision on Special Motion to Dismiss, supra* note 206, at 2–3 (quoting *Blanchard v. Steward Carney Hosp., Inc.*, 130 N.E.3d 1242, 1248 (Mass. 2019)). The court analyzed the nature of all three of the Commonwealth's claims and found that Exxon had failed to meet this burden on each claim because each of the Commonwealth's claims brought into question activity by Exxon that could not be solely considered as petitioning activity. *See id.* at 4–5. The court also denied Exxon's second motion to dismiss for lack of personal jurisdiction and for failure to state a claim. *See Decision on Motion to Dismiss, supra* note 206, at 2. The court determined that exercising personal jurisdiction over Exxon complied with Massachusetts's long-arm statute and conformed with the Fourteenth Amendment's due process clause. *See id.* at 15.

209. *Commonwealth v. Exxon Mobil Corp.*, No. 13211 (Mass. May 24, 2022).

210. *See supra* notes 206–08 and accompanying text.



is only one necessity for increasing the chances of success in climate change securities fraud litigation.<sup>211</sup>

### III. ANALYSIS

Considering the ongoing political gridlock surrounding climate change,<sup>212</sup> its uniquely global impacts,<sup>213</sup> and the sheer volume of GHG emissions attributable to Carbon Majors,<sup>214</sup> an overhauled strategy for mitigating climate risk is clearly in order. Climate change securities fraud litigation against Carbon Majors, by state AGs now and by individual investors in the future, presents one viable avenue for spurring climate action and accountability.<sup>215</sup>

As the United States federal government struggles to enact meaningful and lasting policies to manage the threats posed by climate change, a flurry of subnational actors have joined the charge.<sup>216</sup> Recent and ongoing climate change securities fraud lawsuits filed by state AGs offer both heightened public awareness as to the allegedly fraudulent activity of Carbon Majors, as well as a useful roadmap for future climate change securities fraud lawsuits.<sup>217</sup> Such lawsuits may continue to be filed by state AGs, but they may also usefully be filed by individual Carbon Major shareholders who are concerned by a Carbon Major's financial performance or fraudulent conduct in conjunction with its role in anthropogenic climate change.<sup>218</sup> Such climate change securities fraud lawsuits, filed by non-political, non-state actors, may finally help compel enduring climate action.<sup>219</sup>

Despite their public statements announcing plans for GHG emission reductions, Carbon Majors like Exxon, Shell, and BP continue producing a staggering quantity of GHG-emitting energy resources.<sup>220</sup> Pursuing climate change securities fraud lawsuits against these Carbon Majors has

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211. *See infra* Section III.C.2.

212. *See supra* Section II.A.1.

213. *See supra* Part I.

214. *See supra* Section II.A.2.

215. *See* Thomas Englerth et al., *Climate Change Litigation: The Case for Better Disclosure and Targets*, S&P GLOBAL (Oct. 6, 2021, 12:01 AM), <https://bit.ly/3raVse3>.

216. *See supra* Section II.A.2.

217. *See supra* Section II.C.

218. *See infra* Sections III.A, III.B.

219. *See infra* Sections III.A, III.B.

220. *See ExxonMobil Announces Emission Reduction Plans; Expects to Meet 2020 Goals*, EXXONMOBIL (Dec. 14, 2020), <https://exxonmobil.co/3364DTH>. Importantly, this Press Release issued by ExxonMobil lays out measures ExxonMobil plans to take to decrease its own operational carbon intensity, while noting that “meaningful decreases in global greenhouse gas emissions will require changes in society’s energy choices coupled with the development and deployment of affordable lower-emission technologies.” *Id.* *See also Our Climate Target*, SHELL, <https://go.shell.com/3RwfE5a> (last visited July 13, 2022); *Getting to Net Zero*, BP, <https://on.bp.com/3Pu4L1N> (last visited July 13, 2022).

the potential to build a foundation of accountability amongst Carbon Majors who have misled investors about the climate risks they face and perpetuate.<sup>221</sup>

Beyond establishing a basis of accountability, climate change securities fraud litigation also has the potential to economically incentivize Carbon Majors and other private parties to decisively shift away from fossil fuels and toward renewable resources, thereby slowing climate change at the source.<sup>222</sup>

A. *State Attorney General and Shareholder Activism: Valuable and Necessary Assistance from Non-State, Non-Political Actors*

While state AGs continue their pursuit of climate change securities fraud lawsuits against Carbon Majors, similar litigation raised by shareholders against publicly-traded Carbon Majors unlocks the possibility of forging important climate action independent of state actors and politicians. History has all but proven that meaningful climate action is a cause too politically charged to be resolved by elected officials alone.<sup>223</sup> As a result, both everyday “main street” and established institutional investors may prove to be the ideal candidates to motivate lasting climate action looking into the future.<sup>224</sup>

Presently, in the United States, climate change, climate activism, and climate action are each viewed as inextricably tied to politics.<sup>225</sup> This understanding, however, is damaging to meaningful progress in protecting both environmental and human health.<sup>226</sup> Leveraging climate change securities fraud litigation has the potential to depoliticize the concept of, and solutions to, climate change. Further, this strategy may drive climate and energy policies which delicately balance the health of the environment, the human race, and the global economy.

Rather than understanding climate change as an inherently one-sided political issue, climate change has potential, through climate change securities fraud litigation, to become publicly understood as a human cause with human impacts requiring human solutions. Climate change securities fraud litigation can help to realize this transformation

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221. See *infra* Sections III.A, III.B.

222. See Englerth et al., *supra* note 215.

223. See discussion *supra* Section II.A.

224. See Caroline Flammer et al., *Shareholders Are Pressing for Climate Risk Disclosures. That's Good for Everyone.*, HARV. BUS. REV. (Apr. 22, 2021), <https://bit.ly/3GauUi0>. New research set forth in this article shows that publicly traded companies responded favorably to shareholder activism encouraging such companies to voluntarily disclose the climate risks they face. *Id.*

225. See discussion *supra* Section II.A.1.

226. See Elaine Kamarck, *The Challenging Politics of Climate Change*, BROOKINGS (Sept. 23, 2019), <https://brook.gs/3uaffw7>.

because those who bring suit need not identify with any single political group or ideology.

Instead, litigants need only be Carbon Major shareholders with concerns about potential negative impacts that misleading statements or omissions regarding climate change may have on their investments.<sup>227</sup> In bringing climate change securities fraud lawsuits, these shareholders may stir up public attention to climate change and bring to light the climate risks posed by Carbon Majors and the importance of a clean energy transition in coming years.<sup>228</sup>

### *B. Economic Incentives to Encourage the Renewable Energy Transition*

At the forefront of many current climate change mitigation strategies is a focus on reducing GHG emissions at their predominant source: Carbon Majors.<sup>229</sup> One of the main challenges of mitigating climate change involves economic considerations related to the fossil fuel industry and to those who rely on and politically support it.<sup>230</sup>

Fossil fuels are the source of about 80% of the world's energy,<sup>231</sup> which convincingly establishes their integral role in the lives of citizens across the globe. Additionally, in just the first nine months of 2021, Carbon Majors like Exxon, Chevron, BP, and Shell, posted combined profits of more than \$174 billion and collectively paid out more than \$36.5 billion to their shareholders.<sup>232</sup> Stated plainly, Carbon Majors hold great economic, societal, and political power, and the value of the infrastructure and energy they provide is enormous.<sup>233</sup> As a result, there is inherent tension in expecting necessary change from state actors who

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227. See *Investment Stewardship Vote Bulletin: ExxonMobil Corporation*, BLACKROCK 2 (May 26, 2021), <https://bit.ly/3gaSDmW>. BlackRock, an institutional investor, and the world's largest asset manager, stated that it "believe[s] more needs to be done in Exxon's long-term strategy and short-term actions in relation to the energy transition in order to mitigate the impact of climate risk on long-term shareholder value." *Id.*

228. Cf *The Master Settlement Agreement*, NAT'L. ASS'N ATT'YS GEN. (last visited July 17, 2022), <https://bit.ly/3B5sIbM> (summarizing the enduring impacts felt by the tobacco industry as a result of the Master Settlement Agreement reached between the members of the tobacco industry and state Attorneys General who sued them for damages relating to increased health care costs brought about by smoking tobacco).

229. See discussion *supra* Section II.A.

230. See discussion *supra* Section II.A.

231. See *Fossil Fuels*, ENV'TL AND ENERGY STUDY INST., <https://bit.ly/3btgnDR> (last visited June 25, 2022).

232. See Oliver Milman, *Exclusive: Oil Companies' Profits Soared to \$174bn This Year as US Gas Prices Rose*, THE GUARDIAN (Dec. 6, 2021, 5:00 AM), <https://bit.ly/33ndfri>.

233. See *id.*

are often politically accountable to oil and gas lobbyists and companies.<sup>234</sup>

Climate change securities fraud litigation may, at first glance, appear to be an unlikely avenue through which shareholders can resolve this catch-22, considering the lucrative nature of their current investments in fossil-fuel-generating companies.<sup>235</sup> However, shareholders of publicly traded corporations are unique in that some are merely average citizens, not directly accountable to political forces.<sup>236</sup> Instead, these shareholders are free to make investment decisions that align with their perspectives on the damaging impacts that the Carbon Majors in which they have invested may perpetuate.<sup>237</sup>

While Carbon Major shareholders may not have a strong incentive nor the requisite economic injury to bring a lawsuit against a Carbon Major while returns remain high, such an incentive may well materialize if the company's financial position deteriorates.<sup>238</sup> Such a downturn was observed in the fossil fuel industry amongst Carbon Majors during 2020; however, many Carbon Majors have since rebounded in 2021 and 2022 as gasoline prices have risen.<sup>239</sup>

Still, experts contend that Carbon Majors will face new and intensifying economic pressures that may well negatively impact their financial standing as both the global reckoning on climate change and the perceived need for a clean energy transition progress.<sup>240</sup> Furthermore, if climate change litigation continues to expand as it has in recent years,<sup>241</sup>

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234. See discussion *supra* Section II.A.1.

235. As of June 5, 2022, Exxon Mobil Corp.'s stock price is up 62.31% year over year. *Exxon Mobil Corp.*, GOOGLE FIN., <https://bit.ly/3x5zDhP> (last visited June 5, 2022). Chevron Corporation's stock price is up 64.83% year over year. *Chevron Corporation*, GOOGLE FIN., <https://bit.ly/3mjxMAO> (last visited June 5, 2022). BP's stock price is up 20.98% year over year. *BP P.L.C.*, GOOGLE FIN., <https://bit.ly/3MliOFb> (last visited June 5, 2022).

236. See *Exxon Mobil Corp.*, CNN BUS., <https://cnn.it/3te58UP> (last visited June 5, 2022). This webpage tracks ownership of Exxon shares, noting that as of June 5th, 2022, 0.80% of shares are owned by individual stakeholders as opposed to institutional investors. See *id.* While this 0.80% might appear small, it represents more than 32 million shares worth more than \$2.5 billion. See *id.* Additionally, individual shareholders may also own Exxon shares through accounts with institutional investors such as Vanguard, BlackRock, and Fidelity. See *id.*

237. See Alvin Powell, *Tracing Big Oil's PR War to Delay Action on Climate Change*, THE HARV. GAZETTE (Sept. 28, 2021), <https://bit.ly/3GdwhvF> (discussing Exxon's role in misleading the public about climate change over 40 years through selective linguistic and marketing schemes, despite being well-informed of its scientific mechanisms and impacts).

238. See discussion *supra* II.B.

239. See Milman, *supra* note 232.

240. See Tom Huddleston Jr., *Bill Gates Predicts Oil Companies 'will be worth very little' in 30 Years – Here's Why*, CNBC MAKE IT (Nov. 6, 2021, 9:30 AM), <https://cnb.cx/3f4tF8a>.

241. See discussion *supra* Section II.A.3.

the clean energy transition might indeed gain speed as further public awareness is brought to the myriad negative climate impacts posed by Carbon Majors.<sup>242</sup>

Climate change litigation, including cases proceeding on securities law claims, may serve as the impetus for additional climate change litigation and public attention to climate change policy. If the financial positions of Carbon Majors indeed face a downturn in coming years, investors may rightfully bring cases for material misrepresentations or omissions regarding climate risks the Carbon Majors faced or that their operations caused.<sup>243</sup>

### *C. Recommendation: Anatomy of a Climate Change Securities Fraud Lawsuit*

Climate change poses a global challenge which is uniquely difficult for individual governments to meaningfully resolve in a vacuum.<sup>244</sup> The challenge is not merely an environmental one; instead, it involves political and economic forces which add complexity to any potential solutions.<sup>245</sup> As such, the issue of climate change necessitates non-state, apolitical assistance which matches the urgency of current and impending climate change impacts.<sup>246</sup>

Investors—either institutional or “main street”—can act collectively as a non-state, non-political intervening force in climate change mitigation. By pursuing meritorious climate change securities-fraud claims against Carbon Majors, investors can help to mitigate climate change by catalyzing the clean-energy transition.<sup>247</sup> This transition can be accomplished in part by filing climate change securities fraud lawsuits against Carbon Majors.<sup>248</sup> Doing so may draw apolitical attention to the damage caused by, and the science supporting the phenomenon of, climate change.<sup>249</sup> The clean-energy transition can also be accomplished

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242. See discussion *supra* Section III.A.

243. See discussion *supra* Sections II.B., II.C.

244. ROBERT HENSON, *THE THINKING PERSON’S GUIDE TO CLIMATE CHANGE* 23 (American Meteorological Society Books, 2d ed. 2019) (“[G]iven the global nature of the climate problem, slashing emissions on the scale needed will almost certainly only be possible as part of an ambitious global accord, such as the Paris Agreement together with any potential successors.”).

245. See discussion *supra* Section II.A.1.

246. See Carlarne *supra* note 35, at 470–75.

247. See discussion *supra* Section III.B.

248. See discussion *supra* Section III.B.

249. See Christina Couch, *Taking Politics Out of Climate Change*, NOVA (May 17, 2017), <https://to.pbs.org/3RIJF1G> (discussing the current political divisiveness of climate change and setting forth the strategy of reframing climate action in terms more palatable to conservative voters by emphasizing cost or energy savings rather than climate change itself).

by economically incentivizing Carbon Majors to pivot their businesses away from fossil fuels in a meaningful and prompt manner.<sup>250</sup>

The history of climate change litigation, whether based on securities laws or not, provides to future litigants a blueprint for leveraging securities laws to pursue meaningful climate action.<sup>251</sup> This Section identifies three important aspects of a strong climate change securities fraud claim, highlighting merits and missteps along the way.<sup>252</sup>

### 1. Careful Forum & Law Selection

First, the potential success of a climate change securities fraud claim will vary drastically based upon the forum and the law a prospective plaintiff selects.<sup>253</sup> At present, filing securities fraud claims in state court premised on state securities laws is favorable over filing in federal court or pursuant to federal securities laws.<sup>254</sup> This preference exists because claims filed in state court and premised on state laws are not automatically subject to the PSLRA's heightened pleading standards, increasing the chance of survival past the pleading stage.<sup>255</sup>

One critical distinction of which plaintiffs should be aware, however, is that private securities fraud *class actions* filed in state court and based on state law are barred under SLUSA.<sup>256</sup> As a result, climate change securities fraud claims filed in state court, by state AGs, premised on state securities laws, are emerging as the potentially favorable formulation for succeeding on a climate change securities fraud cause of action.<sup>257</sup> Individual plaintiffs seeking to file a class action climate change securities fraud claim are best suited to file their claim in federal court based on federal securities laws.<sup>258</sup>

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250. See *How Do We Reduce Greenhouse Gases?*, UCAR FOR CENTER SCIENCE EDUCATION, <https://bit.ly/3Oae5a5> (last visited July 17, 2022).

251. See discussion *supra* Sections III.A., III.B.

252. See *infra* Section III.C.I.

253. See discussion *supra* Sections II.A.3.b., II.B.

254. See discussion *supra* Section II.B.

255. David M.J. Rein et al., *Securities Litigation Involving the Private Securities Litigation Reform Act (PSLRA)*, THOMAS RUETERS (2017), <https://bit.ly/39e9XYs>.

256. See *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1067 (2018). The Court stated that “taken all in all, §77p(b) [sic] [SLUSA] completely disallows (in both state and federal courts) sizable class actions that are founded on state law and allege dishonest practices respecting a nationally traded security’s purchase or sale.” *Id.* The Court understood “sizable” class action as a “covered class action” under SLUSA, which SLUSA defines as a class action seeking damages “on behalf of more than 50 persons.” *Id.* (quoting 15 U.S.C. § 77p (f)(2)(A)); see also *supra* notes 175, 177 and accompanying text.

257. See *supra* notes 175, 177 and accompanying text.

258. See *supra* notes 175, 177 and accompanying text.

## 2. Pleading with Sufficient Particularity

After a climate change securities fraud claimant has selected their forum and law, their potential for success is maximized by ensuring their complaint meets a host of potentially applicable pleading standards.<sup>259</sup> To begin, a complaint filed in state court will be subject to applicable state Blue Sky law pleading requirements with which a prospective plaintiff must become familiar.<sup>260</sup>

When filing a climate change securities fraud claim in federal court, the complaint must meet three sets of pleading standards. The complaint must meet the general pleading standards of Federal Rule of Civil Procedure (“FRCP”) 8(a)<sup>261</sup> as well as FRCP 9(b)’s<sup>262</sup> heightened pleading standards, which require the plaintiff to specify the statements alleged to be fraudulent, identify the speaker, state where and when the statements were made, and explain why the statements were fraudulent.<sup>263</sup> Then, the PSLRA imposes a third set of heightened pleading standards for federal securities fraud claims:

[1] Specify each statement alleged to have been misleading, and the reason or reasons why the statement is misleading[;] [2] State with particularity all facts supporting allegations made on information and belief[;] [and] [3] state allegations of scienter with particularity and support them with facts that establish a strong inference that the defendant acted with the requisite state of mind.<sup>264</sup>

The PSLRA applies to all private actions which assert violations of federal securities laws and are brought in federal court.<sup>265</sup> Thus, whether a plaintiff’s claim will be subject to PSLRA’s heightened pleading standards depends on the plaintiff’s choice of forum and law.<sup>266</sup>

## 3. Timing

Third, plaintiffs must also monitor the timeliness of their climate change securities fraud litigation claims.<sup>267</sup> When filing in federal court under § 10(b) of the Exchange Act, plaintiffs have two years after they

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259. See Practical Law Securities Litigation & White Collar Crime, *Exchange Act: Section 10(b) Elements and Defenses*, THOMSON REUTERS (2022), <https://bit.ly/3vjDwAp>.

260. See discussion *supra* Section II.B.

261. See FED. R. CIV. P. 8(a).

262. See FED. R. CIV. P. 9(b).

263. See *id.*

264. Practical Law Securities Litigation & White Collar Crime, *Exchange Act: Section 10(b) Elements and Defenses*, THOMSON REUTERS (2022), <https://bit.ly/3vjDwAp>.

265. See *id.*; see also discussion *supra* Section II.B.

266. See Practical Law Securities Litigation & White Collar Crime, *Exchange Act: Section 10(b) Elements and Defenses*, THOMSON REUTERS (2022), <https://bit.ly/3vjDwAp>.

267. See *id.*

discover, or should have discovered, the fact supporting their anti-fraud claim.<sup>268</sup> These limitations necessitate swift action by prospective climate change securities fraud claimants.<sup>269</sup>

While carefully selecting the forum and law, following pleading requirements, and managing the timeliness of a climate change securities fraud claim are not the only important considerations for prospective plaintiffs, they provide an initial framework for maximizing potential success.<sup>270</sup> In crafting a compelling, meritorious climate change securities fraud claim, both state AGs now, and individual investors in the future, have the opportunity to compel meaningful climate change action through economic incentives toward the clean energy transition.<sup>271</sup>

#### IV. CONCLUSION

In the face of dire, unmitigated climate risks, climate change securities fraud litigation offers citizens of the United States one viable avenue for relief.<sup>272</sup> However, considering the current framework of federal securities laws and the current financial success of Carbon Majors, climate change securities fraud lawsuits filed by state AGs in state courts are likely the best positioned for success today.<sup>273</sup>

Looking toward a future mired by increasingly damaging climate risks and the prospect of costly climate change regulations, individual Carbon Major shareholders may also file successful climate change securities fraud lawsuits against Carbon Majors in the future.<sup>274</sup>

Together, politically accountable state AGs and their non-political counterparts—Carbon Major shareholders—have the power to decisively hold Carbon Majors accountable for their role in anthropogenic climate change and forge a clear path toward the clean energy transition.<sup>275</sup>

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268. *See id.* A plaintiff may raise a relation-back defense to the two year statute of limitations under § 10(b) by amending their complaint if the plaintiff can show that the amendments arise from the same conduct or transaction described in the complaint, the plaintiff's delay was not the result of bad faith tactics, the amendments are not prejudicial to the defendant, and the amended or new claims do not necessitate extensive additional discovery. *See id.*

269. *See id.*

270. *See* discussion *supra* Section II.B.

271. *See* discussion *supra* Section III.A.

272. *See supra* Part III.

273. *See* discussion *supra* Sections III.A., III.B.

274. *See* discussion *supra* Section III.A.

275. *See supra* Part III.